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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Wednesday 21 September 2022, at 10 a.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 mercredi 21 septembre 2022, à 10 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
		Abraham
		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
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte
Mme Charlesworth, juges
Mme Barkett
M. Momtaz, juges *ad hoc*

M. Gautier, greffier

The Government of the Islamic Republic of Iran is represented by:

Mr. Tavakol Habibzadeh, Head of the Center for International Legal Affairs of the Islamic Republic of Iran, Attorney at Law, Associate Professor of International Law at Imam Sadiq University,

as Agent, Counsel and Advocate;

Mr. Mohammad H. Zahedin Labbaf, Agent of the Islamic Republic of Iran to the Iran-United States Claims Tribunal, Legal Adviser to the Center for International Legal Affairs of the Islamic Republic of Iran, The Hague,

as Co-Agent and Counsel;

H.E. Mr. Alireza Kazemi Abadi, Ambassador of the Islamic Republic of Iran to the Kingdom of the Netherlands,

Mr. Mohammad Saleh Attar, Director of the Center for International Legal Affairs of the Islamic Republic of Iran, The Hague,

as Senior National Authorities and Legal Advisers;

Mr. Vaughan Lowe, KC, member of the Bar of England and Wales, Essex Court Chambers, Emeritus Professor of International Law, University of Oxford, member of the Institut de droit international,

Mr. Alain Pellet, Professor Emeritus of the University Paris Nanterre, former Chairman of the International Law Commission, President of the Institut de droit international,

Mr. Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary-General of the Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,

Mr. Samuel Wordsworth, KC, member of the Bar of England and Wales, member of the Paris Bar, Essex Court Chambers,

Mr. Sean Aughey, member of the Bar of England and Wales, Essex Court Chambers,

Mr. Hadi Azari, Legal Adviser to the Center for International Legal Affairs of the Islamic Republic of Iran, Associate Professor of Public International Law at Kharazmi University,

Mr. Luke Vidal, member of the Paris Bar, Sygna Partners,

as Counsel and Advocates;

Mr. Behzad Saberi Ansari, Director General for International Legal Affairs, Ministry of Foreign Affairs of the Islamic Republic of Iran,

Mr. Ali Nasimfar, Assistant Director General for International Legal Affairs, Ministry of Foreign Affairs of the Islamic Republic of Iran,

Mr. Yousef Nourikia, Counsellor, Embassy of the Islamic Republic of Iran in the Netherlands,

Le Gouvernement de la République islamique d'Iran est représenté par :

M. Tavakol Habibzadeh, président du centre des affaires juridiques internationales de la République islamique d'Iran, avocat, professeur associé de droit international à l'Université Imam Sadiq,

comme agent, conseil et avocat ;

M. Mohammad H. Zahedin Labbaf, agent de la République islamique d'Iran auprès du Tribunal des réclamations irano-américaines, conseiller juridique auprès du centre des affaires juridiques internationales de la République islamique d'Iran, La Haye,

comme coagent et conseil ;

S. Exc. M. Alizera Kazemi Abadi, ambassadeur de la République islamique d'Iran auprès du Royaume des Pays-Bas,

M. Mohammad Saleh Attar, directeur du centre des affaires juridiques internationales de la République islamique d'Iran, La Haye,

comme hauts représentants de l'Etat et conseillers juridiques ;

M. Vaughan Lowe, KC, membre du barreau d'Angleterre et du pays de Galles, Essex Court Chambers, professeur émérite de droit international à l'Université d'Oxford, membre de l'Institut de droit international,

M. Alain Pellet, professeur émérite à l'Université Paris Nanterre, ancien président de la Commission du droit international, président de l'Institut de droit international,

M. Jean-Marc Thouvenin, professeur à l'Université Paris Nanterre, secrétaire général de l'Académie de droit international de La Haye, membre associé de l'Institut de droit international, membre du barreau de Paris, Sygna Partners,

M. Samuel Wordsworth, KC, membre du barreau d'Angleterre et du pays de Galles et du barreau de Paris, Essex Court Chambers,

M. Sean Aughey, membre du barreau d'Angleterre et du pays de Galles, Essex Court Chambers,

M. Hadi Azari, conseiller juridique auprès du centre des affaires juridiques internationales de la République islamique d'Iran, professeur associé de droit international public à l'Université Kharazmi,

M. Luke Vidal, membre du barreau de Paris, Sygna Partners,

comme conseils et avocats ;

M. Behzad Saberi Ansari, directeur général chargé des affaires juridiques internationales, ministère des affaires étrangères de la République islamique d'Iran,

M. Ali Nasimfar, directeur adjoint chargé des affaires juridiques internationales, ministère des affaires étrangères de la République islamique d'Iran,

M. Yousef Nourikia, conseiller à l'ambassade de la République islamique d'Iran aux Pays-Bas,

Mr. Mahdad Fallah-Assadi, Legal Expert, Department of International Legal Affairs, Ministry of Foreign Affairs of the Islamic Republic of Iran,

as Senior Legal Advisers;

Ms Tessa Barsac, Consultant in International Law, Master (University Paris Nanterre), LLM (Leiden University),

Ms Lefa Mondon, Master (University of Strasbourg), Sygna Partners,

as Counsel;

Mr. Ali Mokhberolsafa, Legal Adviser to the Center for International Legal Affairs of the Islamic Republic of Iran, The Hague,

Mr. S. Mohammad Asbaghi Namini, Legal Adviser to the Center for International Legal Affairs of the Islamic Republic of Iran,

Mr. Ahmad Reza Tohidi, Legal Adviser to the Center for International Legal Affairs of the Islamic Republic of Iran, Associate Professor of International Law at the University of Qom,

Mr. Sajad Askari, Legal Adviser to the Center for International Legal Affairs of the Islamic Republic of Iran, Assistant Professor at Shahid Bahonar University of Kerman,

Mr. Vahid Bazzar, Legal Adviser to the Center for International Legal Affairs of the Islamic Republic of Iran,

Mr. Alireza Ranjbar, Legal Adviser to the Center for International Legal Affairs of the Islamic Republic of Iran,

as Legal Advisers.

The Government of the United States of America is represented by:

Mr. Richard C. Visek, Acting Legal Adviser, United States Department of State,

as Agent, Counsel and Advocate;

Mr. Steven F. Fabry, Deputy Legal Adviser, United States Department of State,

as Co-Agent, Counsel and Advocate;

Ms Emily J. Kimball, Legal Counselor, United States Embassy in the Netherlands,

Ms Jennifer E. Marcovitz, Deputy Legal Counselor, United States Embassy in the Netherlands,

as Deputy Agents and Counsel;

Sir Daniel Bethlehem, KC, member of the Bar of England and Wales, Twenty Essex Chambers, London,

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization, University of Geneva, member of the Institut de droit international,

M. Mahdad Fallah-Assadi, expert juridique au département des affaires juridiques internationales, ministère des affaires étrangères de la République islamique d'Iran,

comme conseillers juridiques principaux ;

Mme Tessa Barsac, consultante en droit international, master (Université Paris Nanterre), LLM (Université de Leyde),

Mme Lefa Mondon, master (Université de Strasbourg), Sygna Partners,

comme conseils ;

M. Ali Mokhberolsafa, conseiller juridique auprès du centre des affaires juridiques internationales de la République islamique d'Iran, La Haye,

M. S. Mohammad Asbaghi Namini, conseiller juridique auprès du centre des affaires juridiques internationales de la République islamique d'Iran,

M. Ahmad Reza Tohidi, conseiller juridique auprès du centre des affaires juridiques internationales de la République islamique d'Iran, professeur associé de droit international à l'Université de Qom,

M. Sajad Askari, conseiller juridique auprès du centre des affaires juridiques internationales de la République islamique d'Iran, professeur adjoint à l'Université Shahid Bahonar de Kerman,

M. Vahid Bazzar, conseiller juridique auprès du centre des affaires juridiques internationales de la République islamique d'Iran,

M. Alireza Ranjbar, conseiller juridique auprès du centre des affaires juridiques internationales de la République islamique d'Iran,

comme conseillers juridiques.

Le Gouvernement des Etats-Unis d'Amérique est représenté par :

M. Richard C. Visek, conseiller juridique par intérim, département d'Etat des Etats-Unis d'Amérique,

comme agent, conseil et avocat ;

M. Steven F. Fabry, conseiller juridique adjoint, département d'Etat des Etats-Unis d'Amérique,

comme coagent, conseil et avocat ;

Mme Emily J. Kimball, conseillère juridique, ambassade des Etats-Unis d'Amérique aux Pays-Bas,

Mme Jennifer E. Marcovitz, conseillère juridique adjointe, ambassade des Etats-Unis d'Amérique aux Pays-Bas,

comme agentes adjointes et conseils ;

Sir Daniel Bethlehem, KC, membre du barreau d'Angleterre et du pays de Galles, cabinet Twenty Essex, Londres,

Mme Laurence Boisson de Chazournes, professeure à l'Université de Genève (droit international et organisation internationale), membre de l'Institut de droit international,

Ms Lisa J. Grosh, Assistant Legal Adviser, United States Department of State,

Mr. John D. Daley, Deputy Assistant Legal Adviser, United States Department of State,

Mr. Nathaniel E. Jedrey, Attorney Adviser, United States Department of State,

as Counsel and Advocates;

Ms Kristina E. Beard, Attorney Adviser, United States Department of State,

Mr. David M. Bigge, Attorney Adviser, United States Department of State,

Ms Julia H. Brower, Attorney Adviser, United States Department of State,

Mr. Peter A. Gutherie, Attorney Adviser, United States Department of State,

Mr. Matthew S. Hackell, Attorney Adviser, United States Department of State,

Ms Melinda E. Kuritzky, Attorney Adviser, United States Department of State,

Ms Mary T. Muino, Attorney Adviser, United States Department of State,

Mr. Robert L. Nightingale, Attorney Adviser, United States Department of State,

Mr. Alvaro J. Peralta, Attorney Adviser, United States Department of State,

Mr. David J. Stute, Attorney Adviser, United States Department of State,

Mr. Isaac D. Webb, Attorney Adviser, United States Department of State,

as Counsel;

Mr. Guillaume Guez, PhD candidate at the University of Geneva and the University of Paris 1 Panthéon-Sorbonne, Research and Teaching Assistant, Faculty of Law, University of Geneva,

Ms Anjail Al-Uqdah, Paralegal, United States Department of State,

Ms Mariama N. Yilla, Paralegal, United States Department of State,

Ms Kelly A. Molloy, Administrative Assistant, United States Department of State,

as Assistants.

Mme Lisa J. Grosh, conseillère juridique adjointe, département d'Etat des Etats-Unis d'Amérique,

M. John D. Daley, conseiller juridique adjoint de deuxième classe, département d'Etat des Etats-Unis d'Amérique,

M. Nathaniel E. Jedrey, avocat conseil, département d'Etat des Etats-Unis d'Amérique,

comme conseils et avocats ;

Mme Kristina E. Beard, avocate conseil, département d'Etat des Etats-Unis d'Amérique,

M. David M. Bigge, avocat conseil, département d'Etat des Etats-Unis d'Amérique,

Mme Julia H. Brower, avocate conseil, département d'Etat des Etats-Unis d'Amérique,

M. Peter A. Gutherie, avocat conseil, département d'Etat des Etats-Unis d'Amérique,

M. Matthew S. Hackell, avocat conseil, département d'Etat des Etats-Unis d'Amérique,

Mme Melinda E. Kuritzky, avocate conseil, département d'Etat des Etats-Unis d'Amérique,

Mme Mary T. Muino, avocate conseil, département d'Etat des Etats-Unis d'Amérique,

M. Robert L. Nightingale, avocat conseil, département d'Etat des Etats-Unis d'Amérique,

M. Alvaro J. Peralta, avocat conseil, département d'Etat des Etats-Unis d'Amérique,

M. David J. Stute, avocat conseil, département d'Etat des Etats-Unis d'Amérique,

M. Isaac D. Webb, avocat conseil, département d'Etat des Etats-Unis d'Amérique,

comme conseils ;

M. Guillaume Guez, doctorant à l'Université de Genève et à l'Université Paris 1 Panthéon-Sorbonne, attaché d'enseignement et de recherches à la faculté de droit de l'Université de Genève,

Mme Anjail Al-Uqdah, assistante juridique, département d'Etat des Etats-Unis d'Amérique,

Mme Mariama N. Yilla, assistante juridique, département d'Etat des Etats-Unis d'Amérique,

Mme Kelly A. Molloy, assistante administrative, département d'Etat des Etats-Unis d'Amérique,

comme assistants.

The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets today to hear the first round of oral argument of the United States in the case of *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*.

I now give the floor to Mr. Richard Visek, Agent of the United States. You have the floor, Sir.

Mr. VISEK:

AGENT'S INTRODUCTORY REMARKS

Introduction

1. Mr. President, Members of the Court, I am honoured to appear today in these proceedings as Agent of the United States of America. I am joined by my four colleagues from the US Department of State — Steve Fabry, Lisa Grosh, John Daley and Nat Jedrey — who will present portions of our argument, together with Sir Daniel Bethlehem, KC, and Professor Laurence Boisson de Chazournes.

2. At the outset, I wish to express again the condolences of the United States Government on the passing of Judge Cançado Trindade. I also want to express our appreciation for the Court's important work as the principal judicial organ of the United Nations and its contributions to the realization of the purposes and principles of the United Nations.

3. Mr. President and Members of the Court, we listened closely to Iran's submissions on Monday, and they reaffirmed that this case is an attempt by Iran to invoke the now-terminated Treaty of Amity to avoid accountability for its role in acts of terrorism perpetrated against US citizens. US courts have found that Iran has sponsored and provided support for terrorist attacks against US nationals and interests, including the 1983 bombing of the barracks of the US Marines who were serving as peacekeepers in Beirut.

4. The question for this Court is not whether Iran has sponsored or had a hand in the terrorist attacks that gave rise to the judgments in question. The evidence of this is compelling, and not seriously rebutted by Iran. Rather, the question for the Court is whether US measures that enable victims of terrorism to seek redress for their losses and judicial decisions with respect to these attacks constitute breaches of the Treaty of Amity. For all the reasons that my colleagues and I will set out over the course of today, the answer is "No" and Iran's claims should be denied.

5. My introductory submissions today will proceed in four parts. *First*, I will situate the case, as it now stands after the Court's preliminary objections Judgment, in its proper historical and procedural context. *Second*, I will preview some of the dispositive defects in Iran's remaining claims under the Treaty of Amity. *Third*, I will discuss the potentially far-reaching consequences of the Court's forthcoming judgment in this case. I will then close by setting out the structure of the remainder of the United States' first round submissions.

6. Before turning to my first topic, I should say that the United States stands fully behind its written submissions in these proceedings. We adopt and maintain all of the arguments that were advanced therein. If there is a point that is not reflected in our oral submissions, or that is referenced only in passing, that is simply a consequence of the time that is available.

I. Iran's case as it now stands

7. Mr. President, Members of the Court, this case concerns measures taken by the United States progressively over a period of years to enable victims of terrorism to hold Iran and other State sponsors of terrorism accountable through litigation for acts of terrorism directed at or affecting US persons. The US measures challenged by Iran under the Treaty are inextricably linked to choices made by Iran.

8. For its part, the Treaty of Amity does not address sponsorship of terrorism. The Treaty was predicated on peaceful relations between the two Parties.

9. The friendly bilateral relationship between Iran and the United States, anticipated by the 1955 Treaty of Amity, was fundamentally ruptured on 4 November 1979, by the seizure of the US Embassy and hostages in Tehran[1]. In the period since then, the Treaty relationship between the United States and Iran could not be salvaged — in large part because Iran's campaign sponsoring violent and destabilizing acts targeting the United States, US nationals and US interests continued to deeply strain bilateral relations.

10. To name just two examples, on the morning of 23 October 1983, an Iranian member of Hezbollah crashed a truck loaded with 18,000 lbs of high explosives through the barriers at the US Marine barracks in Beirut, where US forces had been stationed as part of a multinational

[1] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 12, para. 17.

peacekeeping force at the request of the Lebanese Government[2]. The terrorist act, procured and sponsored by Iran, killed 241 US peacekeepers and gravely wounded many more[3]. Shortly afterward, a similar attack on the French barracks killed 58 peacekeepers and five Lebanese civilians[4]. Then speaker of Iran's parliament, the Majlis and later President of Iran, Akbar Hashemi Rafsanjani, touted in 1986 that

> "[t]he Americans put the blame for the blow that was delivered to the United States in Lebanon and the disgrace the Americans suffered there on us; and, in fact, they should blame us for it. If the U.S. Marines had to flee Lebanon and if a group of them also went to their graves under those circumstances, all this was part of the influence of the Islamic Revolution."[5]

11. In 1987, the Minister of the Iranian Revolutionary Guard Corps, Mohsen Rafiqdoust, boasted that

> "[w]ith the victory of the Iranian Revolution, America deeply felt the effect of our hard blow to its corrupt body in Lebanon and other parts of the world. It knows that both the TNT and the ideology which in one blast sent to hell 400 officers[,] NCOs and soldiers of the Marine Headquarters have been provided by Iran."[6]

12. Mr. President, Members of the Court, these are remarkable and deeply disturbing statements — rife with contempt for the victims of this attack. There was a vast array of other evidence linking Iran directly to the 1983 Marine barracks bombing, which was the deadliest terrorist attack against American citizens prior to September 11, 2001[7].

13. In another instance of Iran's campaign, in 1996, Iran sponsored a terrorist attack on a housing complex in Saudi Arabia known as the Khobar Towers, where US military forces were housed as part of the coalition forces monitoring a no-fly zone over southern Iraq to support implementation of a United Nations Security Council resolution[8]. Here, again, a truck bomb was detonated by Iran's proxy, Hezbollah, destroying much of the eight-storey housing complex and

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[2] See CMUSA, para. 5.21 and accompanying footnotes.

[3] See *ibid*.

[4] See *ibid.*

[5] "Hashemi-Rafsanjani on Alleged McFarlane Visit", Tehran Radio Domestic Service, in VII Foreign Broadcast Information Service Daily Rep. 11 (5 Nov. 1986), POUS, Ann. 26.

[6] "Speech of Our Brother Rafiqdoust at One of the Country's Factories for Defense", Ressalat (20 July 1987), POUS, Ann. 27.

[7] *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46, 47-48 (D.D.C. 2003), CMUSA, Ann. 36.

[8] CMUSA, para. 5.34.

killing 19 US service members[9]. As detailed in the US Counter-Memorial at paragraphs 5.35 to 5.43, a US court found that the Khobar Towers attack was approved by the Supreme Leader Khamenei himself, supported by the Iranian Minister of Intelligence and Security, Ali Fallahian, and carried out by individuals recruited by a senior official of the Islamic Revolutionary Guard, Brigadier General Ahmed Sharifi, who operated out of the Iranian Embassy in Damascus, Syria.

14. To this day, Iran has failed to respond in a meaningful way to these and other incidents that gave rise to US court proceedings brought by the victims of those and other terrorist acts. The only evidence Iran has offered in support of its attempt to deny responsibility remains a single news article from 1998 regarding the Khobar Towers bombing — an article written *before*, and contradicted by, the subsequent developments and statements in the investigation into the bombing and in the subsequent US court proceedings. All Iran added on Monday was an oblique reference to — and this is our translation — the "various events that occurred outside of the United States . . . having nothing to do with Iran"[10], along with yet another blanket denial — this time referring to "irrelevant and unproven allegations of terrorism"[11].

15. Besides generic claims of irrelevance, Iran appears to be wagering that its unsubstantiated denial of support for these and other incidents will deflect the Court's attention away from this history. But the evidence of Iran's involvement in the incidents at the heart of Iran's claim was and remains clear and convincing. There is an irrefutable nexus between Iran's sponsorship of the terrorist incidents that were the subject of the US court proceedings from which Iran now seeks relief, and the Treaty of Amity claims that it pursues here. The Court cannot close its eyes to this.

16. Turning now to the particulars of Iran's claims, let us recall that Iran's case initially had two principal branches: *first*, alleged violations of the Treaty of Amity stemming from the denial of sovereign immunity in connection with litigation brought by victims of terrorism seeking redress for their grave losses, and *second*, the alleged violation of a supposed right of corporate separateness under the Treaty of Amity through US legislation allowing judgments obtained against Iran to be executed on the property of both Iran and Iran's agencies and instrumentalities.

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[9] CMUSA, para. 5.34.

[10] CR 2022/15, p. 16, para. 11 (Habibzadeh).

[11] CR 2022/15, p. 25, para. 24 (Lowe).

17. In its preliminary objections Judgment of 13 February 2019, the Court, after carefully reviewing all of Iran's claims, concluded that the Treaty does not provide a vehicle for asserting sovereign immunity, and that the Court thus lacked jurisdiction over all of Iran's claims grounded in sovereign immunity[12]. The Court excluded Iran's claims that were predicated on a denial of sovereign immunity — whether by Iran, by its Central Bank, Bank Markazi, or by other Iranian State entities. And Iran on Monday acknowledged that sovereign immunity is no longer part of any claim within the Court's jurisdiction[13]. But having said that, Iran, nevertheless, on Monday, tried to reinsert sovereign immunity into these proceedings, arguing that it did not defend itself against terrorism-related claims in US courts because of its desire to preserve sovereign immunity. Such backdoor efforts should not be countenanced and should be seen for what they are — Iran's attempt to use this case to avoid accountability for its actions.

18. In any event, following the Court's preliminary objections Judgment, what remains before you is Iran's overarching claim that the Treaty of Amity prohibits the United States from allowing judgments entered against Iran to be enforced against assets of Iran's Central Bank and other Iranian State entities.

II. Iran's remaining claims are defective

19. Mr. President, Members of the Court, one of the fundamental defects in Iran's case is its effort to advance claims on behalf of its Central Bank, Bank Markazi, under commercial treaty provisions that provide rights only to nationals and companies of the Parties. Faced with the Court's dismissal of Iran's sovereign immunity-based claims, Iran is now seeking to recast Bank Markazi as a company carrying out ordinary commercial activities in an effort to preserve Iran's core claims as to the turnover of Bank Markazi assets in the *Peterson* litigation. But, as Professor Boisson de Chazournes will explain in greater detail, those claims do not fall under the Treaty of Amity because Bank Markazi is the Central Bank of Iran and cannot be characterized as a "company", as that term is used in the Treaty. Notably, the assets at issue in the *Peterson* case were, according to Bank Markazi's own submission in US court, being "used for the classic central banking purpose of

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[12] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, pp. 34-35, para. 80.

[13] CR 2022/15, p. 16, para. 9 (Habibzadeh).

investing Bank Markazi's currency reserves"[14]. The notion that the United States breached its Treaty of Amity obligations by allowing what are plainly assets of the Iranian State to be turned over to victims of Iran-sponsored terrorism in satisfaction of the victims' lawful judgments against Iran is untenable.

20. As to Iran's other claims under the Treaty, most of the Iranian entities concerned failed to exhaust local remedies — a prerequisite to bringing any such claims to this Court. Iranian entities have by and large failed to appear in US courts to try to rebut the allegations or oppose attachment of Iranian assets.

21. As Mr. Bethlehem will address, Iranian companies have exhausted local remedies in only two cases. In none of the other cases have Iranian companies made any effort to defend their interests in US court, let alone exhaust local remedies. And there is no reason for not having done so. Iran and Iranian entities have had and continue to have full access to US courts.

22. The United States will show that, beyond Iran's failure to exhaust local remedies, Iran has not sufficiently set out a case that demonstrates how any of the US measures, as they relate to specific US court cases, result in a breach of the specific articles of the Treaty of Amity that Iran has invoked. Even after Iran's more recent narrowing of its claims on Monday around the cases in its tab 2 chart, many of Iran's arguments attempting to invoke obligations under the Treaty of Amity remain comprised of conclusory assertions and imprecise statements. On Monday, for example, Iran repeatedly came back to a news article as evidence of a US "litigation industry"[15] that, in Iran's view, led to a legal system that was not — and this is our translation — "open to Iranian companies"[16]. Not only is this no way to establish Treaty breaches but we disagree with Iran's characterization. It is nothing more than an effort to mask Iran's real complaint, which is that, absent immunity, Iran could not avoid accountability for its actions. But, as Iran has conceded, that complaint is no longer properly before the Court.

23. We will show in our submissions that Iran's broad-brush attacks fail to substantiate its remaining claims. Iran has been slow throughout these proceedings to specify property or assets

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

[15] CR 2022/15, p. 5, para. 6 (Habibzadeh); see also CR 2022/15, p. 17, para. 14 (Habibzadeh).

[16] CR 2022/15, p. 34, para. 10 (Azari).

alleged to have been subject to a Treaty of Amity violation. In its Reply, Iran provided Attachment 2, which contained an "updated" list of 90 enforcement "[a]ctions filed", but only a handful of those proceedings could be said to have been particularized in any meaningful way. So, at long last on Monday, we were pleased to see Iran narrow its claims to thirteen asset turnovers listed on its tab 2 chart, which, with some differences, aligns with Appendix 1 to the United States' Rejoinder. As Mr. Bethlehem and others will explain, the information in Iran's new chart actually is covered by the seven turnover cases referenced in our Appendix 1, save for two additional cases that we will also address. Whether thirteen or seven, the number quickly boils down to zero because Iran's arguments are beset by flaws and do not give rise to breaches of the Treaty.

24. Mr. President, Members of the Court, in discussing some of the defects in Iran's case, I would be remiss not to mention the most obvious, and potentially consequential, of all of them. Iran's case should be dismissed in its entirety based on the principle of unclean hands, as Mr. Bethlehem will explain in greater detail. The essence of this threshold defence is that Iran's own egregious conduct, its sponsorship of terrorist acts directed against the United States and US nationals, lies at the very core of its claims. The United States submits that if there was ever a case for application of the principle of unclean hands — one that we recognize should be considered only in narrow circumstances — it is this case.

III. The Court's judgment could have consequences beyond this case

25. Mr. President and Members of the Court, before turning to an overview of our submissions, I would like to leave the Court with one additional point for consideration: this case involves important issues of international law, and, therefore, the Court's decision could reverberate far beyond its four corners.

26. Doctrinally, Iran, in its assertion of fair and equitable treatment, full protection and security, and expropriation claims, has made no effort to comport with the Court's two-element approach — that is, to provide evidence of State practice and *opinio juris* to support its positions on

how customary international law has evolved[17]. To disregard that fundamental shortcoming in Iran's case would be a blow to the approach long endorsed by this Court as "axiomatic"[18].

27. Relatedly, it is important to recognize that several of the standards of treatment at issue are ubiquitous in bilateral and other investment treaties, and thus play a prominent role in investment disputes. Accepting Iran's broad reading of fair and equitable treatment, full protection and security, or expropriation would have notable but possibly unintended effects on pending and future investment arbitrations. It could well constrain State action and tilt the playing field in a broad range of situations — from legitimate exercises of police powers to environmental regulation, to other State measures commonly challenged by claimants.

IV. Overview of the United States' submissions

28. Mr. President, Members of the Court, having provided a general framework for the United States' first round submissions, I now turn to an outline of the remainder of our submissions today. These submissions are divided into four main sections.

29. Following this opening in which I introduced the United States' principal themes, Mr. Bethlehem will put Iran's claims in a wider context and will set out the US unclean hands submissions and those on exhaustion of remedies.

30. Next, in the second section, Ms Grosh will address two topics. She will discuss the US measures that Iran challenges, setting them in the broader legal and historical context in which they must be considered. Further, Ms Grosh will make some brief remarks regarding the Treaty of Amity, including the consequences of the Treaty's termination.

31. In the third section, concerning the United States' remaining threshold defences, Professor Boisson de Chazournes will explain why Bank Markazi, the Central Bank of Iran, cannot properly be characterized as a "company" within the meaning of the Treaty of Amity and as discussed in the Court's preliminary objections Judgment.

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[17] See *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I),* p. 122, (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77).

[18] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27.

32. Thereafter, in the fourth section, my colleagues will address Iran's substantive claims under the Treaty of Amity. Mr. Daley will address why Article III, paragraphs 1 and 2, are limited in scope, guaranteeing only that "companies" are recognized as legal entities and that nationals and companies are allowed to appear in court to assert their rights, and that neither of those provisions was violated in this case. Ms Grosh will then return to demonstrate that the agencies and instrumentalities of Iran that have been subject to attachment and enforcement proceedings have not suffered a denial of justice in US courts pursuant to the minimum standard of treatment protected by Article IV, paragraph 1. Here, I must bring to the Court's attention that Iran's provision on Monday of tab 13 of its judges' folder, consisting of a chart listing 172 investment arbitration cases, amounts to an unauthorized legal submission[19]. Ms Grosh will further expound on why the presentation of these cases at this stage is not only prejudicial but also inapposite on the substance at issue here — Article IV, paragraph 1.

33. Mr. Jedrey will then take the floor to show why Iran misinterprets Article IV, paragraph 2, by reading in a requirement that a party cannot make changes to its legal system affecting property rights, and, further, by deeming non-discriminatory regulatory measures and judicial decisions expropriatory. Professor Boisson de Chazournes will then present on Article V, paragraph 1, Article VII, paragraph 1, and Article X, paragraph 1. At the end of the fourth section, Mr. Daley will set out why Article XX, paragraph 1, categorically bars Iran's claims as to Executive Order 13599.

34. Finally, Mr. Fabry will map out a path for the Court's decision — guiding the Court through the effects of possible rulings on each threshold defence as well as the substantive claims advanced by Iran.

V. Conclusion

35. Mr. President and Members of the Court, that concludes my opening remarks. My colleagues will proceed with the United States' presentation from here. I ask that you now please call on Sir Daniel Bethlehem.

[19] Rules of Court, Arts. 45, 49.

The VICE-PRESIDENT, Acting President: I thank the Agent of the United States. I now give the floor to Sir Daniel Bethlehem. You have the floor.

Sir BETHLEHEM:

FRAMING THE UNITED STATES' CASE AND THE SUBJECT-MATTER OF THE DISPUTE

1. Mr. President, Members of the Court, it is an honour to appear before you today representing the United States. May I associate myself with the sentiments expressed about the sad passing of Judge Cançado Trindade, a scholar and judge of considerable note, and someone whose humanity and humour were ever visible.

2. Mr. President, Members of the Court, just as a housekeeping matter, I will take you to the judges' folders, which you have. I hope you have them available. Just for ease of reference, you will see that in the top right-hand corner they are numbered sequentially. The pages are numbered sequentially, so I hope it will be relatively easy to navigate around the bundle.

Mr. President, Members of the Court, following Mr. Visek, my task this morning is to address three issues: *first*, to say a little more about the factual and legal context of this case and to develop some of the themes that Mr. Visek laid out; *second*, to set out the ***U.S.*** defence on unclean hands; and *third*, to address the issue of exhaustion of local remedies.

3. Before I turn to my topics, may I ~~***just***~~ recall what the US Agent said in opening, namely, that the United States stands on its written submissions. Proceeding on this basis, I will not repeat or summarize what we have said in writing. I propose, rather, to step back a little and endeavour to place the case in its proper context. I rely on our written submissions to fill in the gaps.

The factual and legal context of Iran's case

4. With that I turn to the first topic, the factual and legal context of the case.

5. Mr. President, Members of the Court, Iran has come to the Court with a dispute that it has with the United States. It has cast that dispute in terms that are convenient to it. The Court will, of course, have regard to the case as framed by the Applicant. Iran cannot, however, so artificially frame its dispute as to exclude the United States from properly contextualizing the case, from framing its

defence, to enable the Court to address the dispute with which it is seised, within its jurisdictional limits, in all of its aspects.

6. Taking aim at the US arguments addressing Iran's sponsorship of terrorism, Iran has accused the United States of attempting to redefine the scope of its case[20]. It says that the conduct of Iran that the United States impugns is irrelevant to these proceedings; that the United States is attempting "to change a case concerning rights and protections in economic and commercial relations into a case about terrorism"[21]. These proceedings, Iran says, are simply about Iran's allegations that the United States breached the Treaty of Amity by allowing plaintiffs to bring enforcement actions against Iranian companies before US courts.

7. Iran continued with this theme on Monday. We heard ~~***what was***~~ a sanitized case that hewed to a narrow vision of what this dispute is all about. Iran's Agent referred in opening to the *Peterson* case but did not once reference its facts, stating only that "various events . . . ha[d] nothing to do with Iran"[22]. Iran cannot even bring itself to say what the incident entailed. It has placed — Iran has placed — the *Peterson* proceedings at the very heart of its case but it wants only to talk about the monetary value of the judgments against Iran and Bank Markazi. It shuts its eyes to, and would have the Court look away from, the 241 lives of US peacekeepers in Beirut that were cut short on an October morning in 1983, and from the families and loved ones who have been the plaintiffs in the proceedings against Iran.

8. Mr. President, Members of the Court, I do not intend here to make submissions that pull at the heart strings. The United States' case before you today is forensic, and it is focused on the facts and the law. But Iran cannot turn its back on the dispute that is at the very core of this case. This is not a dispute about dollars and cents. It is a dispute about a domestic legal process — rooted in the judicial examination of facts and evidence — that has as its purpose the holding to account of State sponsors of terrorism. The *Peterson* case, that Iran — that *Iran* — has placed at the centre of these proceedings, is about the loss of innocent lives and about the US legal process that has addressed Iran's accountability.

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[20] RI, paras. 1.12-1.14.

[21] RI, paras. 1.4, 1.5, 1.12.

[22] CR 2022/15, p. 16, para. 11 (Habibzadeh).

9. Mr. President, Members of the Court, there is an important point that follows from this. The United States does not come before you in these proceedings saying simply that Iran is a bad actor and should accordingly be denied a remedy. On the contrary, what the United States says in these proceedings is that the dispute that Iran has brought to the Court is — *at its very core* — a dispute that is inextricably linked to the United States' domestic response aimed at providing redress for US victims of terrorist acts. Iran has sought to characterize its case as a narrow Treaty of Amity claim, but that characterization cannot escape the fact that the very judicial decisions that Iran challenges, and the US measures on which those decisions rest, are directly and proximately and fundamentally linked to the conduct for which Iran was found liable by US courts.

10. Mr. President, Members of the Court, that brings me to another framing consideration.

11. Iran has asserted that the adoption by the United States of the measures of which Iran complains constitutes a breach of the Treaty of Amity. It is clear, however, that Iran's focus is on the enforcement proceedings resulting in the turnover of Iranian assets. Indeed, the only — *the only* — particularization of loss that Iran provides in its pleadings is in respect of the "enforcement proceedings against Iranian assets resulting in seizure of property". This is the table, that was introduced for the first time in the hearing on Monday, found at tab 2 of Iran's hearing bundle.

12. Mr. President, Members of the Court, as you will all recall, Iran appended four attachments to its Memorial and to its Reply purporting to identify a very large number of court proceedings with which it said the Court should be concerned. The United States took issue with this and identified eight cases — eight enforcement proceedings; *only eight* cases — in respect of which Iran had particularized its claims. In its written Reply, Iran sought to maintain the focus on its wider list of cases, saying that they provided "context" to Iran's claims.

13. On Monday, Iran moved away from that scattergun approach and, as you have heard from the US Agent, with its tab 2 table, has effectively agreed with the United States that this case is all about a small number of enforcement proceedings that have run their course before US courts.

14. And to make this point good, we have included two tabs in our judges' folder — tabs 28 and 29. Tab 28, which I am going to ask you to turn up briefly is at page 267 — that is the top-right-hand corner number — 267. I do not propose to take you through these tabs in detail but, if you could turn them up, I will briefly explain what they are.

15. You have seen the table at tab 28 before — that is at page 267: it is Appendix 1 to the US Rejoinder. It highlights the eight enforcement proceedings in bold type that are drawn from Attachment 2 to Iran's Memorial and Reply in respect of which Iran made particularized claims. You will see, for example, in respect of the item 2 entry, the case of *Heiser* v. *Iran*, which is set out in bold, that the right-hand column identifying the court-directed turnover of Iranian assets to the plaintiffs. And there are eight such cases.

16. If you then turn to the next tab, please, that is tab 29 which is at page 288. ~~***The***~~ Table A on that first page is taken from paragraph 2.6 of the US Rejoinder that identifies the eight cases in which there has been particularization. We have, however, for the hearing, added an additional column, on the right-hand side — that is the column in yellow —, which cross-references the United States' eight cases with the 13 entries that Iran included on its tab 2 table on Monday. Now, Mr. President, Members of the Court, significantly, although the case names are sometimes different, for reasons explained in the footnote to Table A, there is almost an exact correlation between the eight cases that the United States identified as being the only cases in respect of which Iran had particularized its claims and the 13 entries that Iran now puts at the heart of its case in its tab 2 table. If you flip over the page, Table B of tab 29 provides an explanation about why the cases at entries 4 and 11 on Iran's tab 2 table cannot properly be included as part of Iran's claims. And for further clarification, I note that the United States had included amongst the eight enforcement proceedings in which there had been particularization by Iran, the claims in the *Peterson II* case. The *Peterson II* proceedings, however, remains pending and for that reason ~~***were***~~ ***was*** not included, quite properly, on Iran's tab 2 table. There has been no attachment and turnover of assets in those proceedings[23].

17. Mr. President, Members of the Court, it is these seven enforcement cases — the US eight cases, less *Peterson II* which is still pending —, these seven enforcement cases, that are the fulcrum of Iran's case before you[24]. Nothing more.

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[23] RUSA, para. 8.31.

[24] RUSA, paras. 1.7, 2.5-2.10, 8.18-8.64.

***Peterson* and the other cases behind the enforcement proceedings**

18. I turn now to the *Peterson* case and the other cases behind the enforcement proceedings.

19. It is now beyond debate that the *Peterson* proceedings are at the very heart of this case. Iran's Agent said so in plain terms in his opening submissions on Monday. And the case was given prominent attention in the submissions that followed. As I noted in opening, however, what we heard was all about process and asset value, not about the facts behind the cases.

20. The enforcement proceedings in issue here arise out of around 10 terrorist incidents. The *Peterson* and related proceedings arise out of the Beirut Marine barracks bombing of October 1983. The *Heiser* and related proceedings arise out of the Khobar Towers bombing of June 1996. Other cases arise out of kidnappings and hostage-taking in Lebanon, out of assassinations, and bus and restaurant bombings, all leading to the death and injury of US citizens.

21. As Iran's tab 2 table and the notes to Table A at tab 29 in your judges' folder make clear, the *Peterson* case, in quantum terms, is the overwhelmingly significant case in terms of assets that have been turned over to plaintiffs. Over 98.4 per cent of the funds turned over to plaintiffs across all the cases to which Iran refers in these proceedings were turned over in a single case, in *Peterson I*. The enforcement proceedings in this case concerned assets held on behalf of Bank Markazi, Iran's central bank.

22. Mr. President, Members of the Court, the US Agent referred to the Beirut Marine barracks bombing and the Khobar Towers bombing — the facts that gave rise to the *Peterson* and *Heiser* cases — in his opening submissions just a moment ago. They are addressed in very significant detail in the United States' written pleadings[25]. And although the Court was in a different configuration at that point, I took the Court through the circumstances of these cases, and the US court judgments, at length in the preliminary objections phase of the case[26]. ~~***And M***~~***M***indful of the time today, I do not propose therefore to dwell on these cases further, but for some brief observations.

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[25] Counter-Memorial of the United States of America (CMUSA), Chap. 5; RUSA, Chap. 3. See also Memorandum Opinion, *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003) (CMUSA, Ann. 36); Judgment, *Peterson* v. *Islamic Republic of Iran*, Civil Action Nos. 01-2094, 01-2684 (D.D.C. Sep. 7, 2007) (CMUSA, Ann. 76); Memorandum Opinion, *Peterson v. Islamic Republic of Iran*, Civil Action Nos. 01-2094, 01-2684 (D.D.C. Sep. 7, 2007) (CMUSA, Ann. 77); *Blais* v. *Islamic Republic of Iran*, 459 F. Supp. 2d 40, 48 (D.D.C. 2006) (CMUSA, Ann. 40); *Heiser* v. *Islamic Republican of Iran*, 466 F. Supp. 2d 229, 265 (D.D.C. 2006) (CMUSA, Ann. 41); Transcript of Trial at 14:3-11, *Heiser* v. *Islamic Republic of Iran*, Nos. 00-2329, 01-2104 (D.D.C. Dec. 18, 2003) (CMUSA, Ann. 42).

[26] CR 2018/28, pp. 40-56, paras. 21-80 (Bethlehem).

23. Iran has failed to engage with the allegations of its terrorist conduct that the United States has put before the Court, conduct that goes to the heart of the dispute with which the Court is now seised. Iran's counsel asked on Monday — if the United States considers Iran to have been responsible for the Beirut Marine barracks bombing, or the Khobar Towers bombing, or other terrorist attacks — why it did not bring proceedings before this Court to establish that responsibility. That, of course, is rhetorical flourish on behalf of Iran's counsel. The reality is that the United States, through the measures that it enacted, and the court proceedings that followed, provided for a considered judicial process, rooted in evidence and findings of fact, to establish liability and, as appropriate, the attachment and turnover of assets to enforce damages awards.

24. Mr. President, Members of the Court, as I have just said, I do not propose to take you through the *Peterson* liability judgment today. It is at Annex 36 to the US Counter-Memorial. It is important reading. As it makes plain, these were no rubber-stamping proceedings. Iran was found liable on the basis of detailed and compelling factual and expert evidence. Unimpeachable telephone intercept evidence was before the court. Forensic evidence was before the court. Witness evidence from those with direct knowledge of Iran's involvement was heard. And, most tellingly of all, and driving an arrow through the statement by Iran's Agent on Monday, is that Iran's responsibility was acknowledged in what amount to statements against interest by senior Iranian political figures, a source of evidence that the Court described in the *Nicaragua* case as having particular weight[27]. Mr. Visek highlighted these political-level statements in his opening submissions. The plaintiffs in the *Peterson* proceedings before the US courts bore the burden of establishing the facts that underpinned their claims. And, in reaching its liability finding, the court concluded that the plaintiffs had shown "clear and convincing evidence" that established Iran's responsibility for the attack in question[28].

25. As Mr. Visek recalled, the Beirut Marine barracks bombing, targeting lightly armed peacekeepers who were in Beirut at the request and invitation of the Lebanese Government, killed 241 US Marines and injured another 128. A Lebanese civilian was also killed. A few moments after

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[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 43.

[28] Memorandum Opinion, *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46, D.D.C. 2003 (CMUSA, Ann. 36).

that bomb was detonated, another exploded a few miles away, killing 58 French paratroopers and injuring 15 more — also killing five Lebanese civilians (a young mother and her children) and injuring 20 more.

26. Mr. President, Members of the Court, this case before you is not about Iran's responsibility under international law for this or other terrorist incidents. It is about whether Iran can use its Treaty of Amity claims to avoid liability for those acts under US law, liability established by a court of law, by reference to the evidence. While, as my colleagues will show, the Treaty of Amity claims do not hold water, Iran's unclean hands in respect of the very subject-matter that Iran has brought to the Court require that the case be dismissed. It is to this second part of my submissions that I now turn.

Unclean hands

27. Mr. President, Members of the Court, as befits a defence in equity, the US unclean hands defence is advanced as a shield, not a sword. The United States says that Iran should not be permitted to proceed with its case because Iran comes to the Court in an attempt to evade liability for conduct that goes to the very heart of the dispute that it has brought to the Court.

28. As I have already emphasized, the United States is not saying in these proceedings simply that Iran is a bad actor and that its case should therefore be dismissed. What the United States is saying is that the facts and circumstances *engaged by this case* go to specific acts for which Iran has been found liable in a US court. However much counsel for Iran protests, there is a direct and a proximate and a fundamental nexus between the case that Iran brings to the Court and the Iranian conduct cited by the United States as part of its unclean hands defence.

29. The factual and the legal issues relevant to the US unclean hands argument have been addressed in detail in the US written pleadings[29]. I do not propose or need to summarize them here. There is nothing that we heard from Iran's counsel on Monday that warrants detailed response. Iran's arguments on Monday are all sufficiently addressed in the US written pleadings. I propose, therefore, to address the bigger picture.

30. The United States acknowledges that the unclean hands principle has not before been adopted by the Court, but nor has it been rejected. Significantly, there is, in the US contention, a

[29] CMUSA, Chap. 8; RUSA, Chap. 4.

more than sufficient basis — in wider jurisprudence, in State practice, in the literature — for the Court to root an unclean hands decision. I would refer you in particular to Chapter 8 (B) of the US Counter-Memorial for a discussion of the jurisprudence and practice supporting the principle, including Iran's own reliance upon it. Although counsel for Iran took a sideswipe at the footnotes, the footnotes bear scrutiny.

31. Iran, in its written pleadings and again on Monday, disputes the US unclean hands argument on the ground that there is insufficient nexus between the case it has brought to the Court and the Iranian conduct that the United States impugns. Iran says that the United States does not here allege that Iran has violated the Treaty of Amity. There is, though, nothing in the jurisprudence of this Court, or indeed in the jurisprudence of any other court or tribunal, that requires that an unclean hands argument should in effect amount to a counter-claim in everything but name. The United States is not here contending that Iran breached the Treaty of Amity by the Beirut Marine barracks bombing or any other act. But that is not the test. The United States is not required to allege and maintain a breach of the Treaty of Amity in order to sustain an unclean hands argument. The key consideration is that there should be a clear and direct nexus between the case brought by an applicant and the conduct on which the respondent relies to found its unclean hands argument.

32. Mr. President, Members of the Court, the United States does not rely on investment arbitration jurisprudence to make its case. To be sure, that has its place, but the Court will bring its own considerations to bear on the issues, and we have no difficulty with that. With this caveat, however, having regard to Iran's pleadings on Monday, I would like to draw to your attention extracts from two relatively recent arbitral awards that addressed the unclean hands principle. There are many others in those maligned footnotes in the US Counter-Memorial and Rejoinder, but I would like to draw your attention to two awards. You will find these at tab 30 of our judges' folder. That is at page 292. They are very short extracts. Once again, I do not propose to take you to them in detail, but if you could turn them up, I would direct your attention to one or two points.

33. The extracts are from two cases, the first being *Al-Warraq* v. *Indonesia* and the second being *Bank Melli and Bank Saderat* v. *Bahrain*[30].

[30] *Hesham Talaat M. Al-Warraq* v. *Republic of Indonesia*, UNCITRAL, Final Award, 15 Dec. 2014 (CMUSA, Ann. 91); *Bank Melli Iran and Bank Saderat Iran* v. *Kingdom of Bahrain*, PCA Case No. 2017-25, Award, 9 Nov. 2021.

34. To begin with, I note the identity of the arbitrators, not so much their names but that they are drawn from civil law and common law traditions and from widely divergent national backgrounds. So you have six arbitrators across these two cases that represent the legal traditions across the globe. They are, of course, names that you will know well.

35. Turning very briefly to *Al-Warraq*, where we have extracted three paragraphs, you will see that the tribunal upheld Indonesia's unclean hands argument. I do not need to say any more about the tribunal's decision at this stage — the extract speaks for itself.

36. With regard to the *Bank Melli* award, the points to which I would like to direct your attention are the tribunal's framing discussion of the unclean hands principle in paragraphs 373, 374 and 375 of the extract, and also — more relevant for present purposes — I direct your attention to the tribunal's statement of the two cumulative requirements that must be satisfied in order to sustain an unclean hands contention. This is addressed at paragraph 376. I make no submission on the framing discussion because none is needed. On the two requirements that must be satisfied for an unclean hands argument to be sustained, I note simply that the nexus requirement — that the circumstances invoked by the unclean hands contention must, in the words of the tribunal, "bear a close relationship to the claims" — is consummately reasonable. There must be a connection. Indeed, the United States accepts that that connection must go directly and fundamentally to the claims before the court that is hearing the matter. The second requirement, that the unclean hands conduct must be serious and widespread, is also eminently sensible. A claimant cannot lightly be deprived of due consideration of its claim. But, if the condition is satisfied, equitable considerations of good faith may well dictate an unclean hands finding.

37. Mr. President, Members of the Court, I add that the United States accepts without hesitation that the unclean hands doctrine can only operate in exceptional cases. The Court held as much in the *Jadhav* case[31], a point underscored in the declaration of Judge Iwasawa in that case[32]. The adjudicatory function of the Court cannot be declined simply on the grounds that the applicant is alleged to be a bad actor.

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[31] *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II),* p. 435, para. 61.

[32] *Ibid.*, declaration of Judge Iwasawa, pp. 520-522, paras. 2-3.

38. Mr. President, Members of the Court, the unclean hands principle is rooted in good faith, in equity *infra legem*. It is a shield, not a sword — it cannot be used to deny a defence; only a claim. Rooted in equity, reliance on the unclean hands principle is a matter for the discretion of the Court. If, as the Court has held in this case, unclean hands cannot operate at the point of jurisdiction, because the Court must be in a position to assess the claim of rights pursued by the applicant, and if it cannot, for the same reason, operate as a bar to admissibility, its application as a defence on the merits must rest on the Court's assessment that, in the circumstances before it, having examined the merits, it would be inequitable to permit the applicant to proceed.

39. Mr. President, Members of the Court, this is the case here. If not now, when? If not in this case, in which case? Iran's conduct, highlighted in the court judgments of which Iran complains, is egregious. There is a direct and unassailable subject-matter nexus between Iran's case before the Court and Iran's conduct which is the subject-matter of the judgments which Iran assails. They are two sides of the same coin. Iran is seeking to deploy the Treaty of Amity to avoid liability for its own conduct. The Court should exercise its judgment, rooted in equity, and reject Iran's case on the merits.

40. Mr. President, Members of the Court, in these proceedings, the Court has had an opportunity to examine Iran's case and assess the subject-matter nexus with the US measures and the court judgments that Iran assails. This Court has now had an opportunity to assess the exceptional nature of the circumstances that would warrant an unclean hands finding. The Court is at this point in a position to form a judgment on whether equity warrants rejection of Iran's merits case. The United States contends that it does and urges the Court to adopt this course.

41. Mr. President, Members of the Court, before I leave this topic, I note that, distinct from the defence of unclean hands, the United States is also advancing an abuse of rights defence, namely, that if the Court considers that Iran's claims under the individual articles of the Treaty of Amity are substantiated, it should nonetheless reject those arguments. We heard a good deal on this from Iran on Monday. The abuse of rights defence is addressed in the US Counter-Memorial, at Chapter 18 and the US Rejoinder, at Chapter 13. The United States maintains the submissions that are set out there. Given the constraints of time, there is no need to address this issue further in any detail. I add only one point, and that is that the abuse of rights defence is distinct from the unclean hands defence. Abuse of rights would apply in circumstances in which the Court was persuaded of the merits of

Iran's case but nonetheless considered that, taken holistically, to so find would take the Treaty of Amity beyond its intended scope or would amount to an abuse of the Treaty. In contrast, the unclean hands defence requires the Court to reach a judgment on whether, having regard to Iran's conduct, inextricably linked to the subject-matter of the claim, Iran should be precluded from pursuing its claim on the merits. That is a threshold assessment that goes to Iran's good faith in pursuing its claim as a matter of equity.

Exhaustion of local remedies

42. Mr. President, Members of the Court, I turn finally to the issue of exhaustion of local remedies. I have already laid the groundwork for this submission and can be brief. As with my earlier submissions, I adopt but do not repeat the arguments set out in Chapter 10 of the US Counter-Memorial and Chapter 6 of the US Rejoinder.

43. Iran's case on exhaustion — which we heard on Monday — rests on three limbs: *first*, that Iran is in fact advancing its own claims, independent of the claims of Iranian companies; *second*, and here Iran invokes the case law of the Court, that, where there are both direct and indirect claims that are interdependent, the State can advance the indirect claims alongside its own claims. In support of this contention, Iran invokes the Court's Judgments in *Avena*, in *LaGrand*, in *Ukraine* v. *Russia* and in the *Arrest Warrant* case. And the *third* limb, Iran says that in any event, exhaustion is futile as there are no meaningful remedies to exhaust. In support of this last contention, Iran, in its article-by-article submissions, contends that particular US measures had the effect of denying meaningful process and remedies for Iranian companies.

44. Those following me will address the US measures and Iran's article-by-article claims. I am simply going to confine my remarks to the broader arguments.

45. As a preliminary matter, I note that, although Iran asserts, by bare proposition, a direct claim on its own behalf, it does not particularize any such claim. And with the loss of the sovereign immunity limb of its case, this absence of particularization is stark. The only claims that Iran does particularize — those on its tab 2 table — with the exception of the *Peterson* v. *Bank Markazi* case, are in fact company claims. The *Peterson* v. *Bank Markazi* case, we say, is not a company case, as Bank Markazi is Iran's central bank and was engaged in sovereign activities. But Iran is trying to

have it both ways: saying that Bank Markazi is a company for purposes of its Treaty of Amity claims but that it is Iran's central bank for purposes of Iran's State claims. That cannot work.

46. Iran's failure to particularize any direct claims shines a light on the company claims before the US courts. And what this shows is that, in only two cases — apart from *Bank Markazi* v. *Peterson* — *in only two cases* did Iranian companies actually engage in the US court proceedings and exhaust available remedies. Those are the *Bennett* and *Weinstein* cases, with respect to which the United States accepts that local remedies were in fact exhausted. But there was no exhaustion in any other case. This is evident from the Appendix 1 information to the US Rejoinder.

47. So, there is nothing of substance in the point that Iran is advancing its own claims.

The VICE-PRESIDENT, Acting President: Go more slowly, Sir Daniel, to aid the work of the interpreters. I thank you.

Sir BETHLEHEM: Yes, Mr. President, indeed. My apologies to the interpreters.

47. There is nothing of substance in the point that Iran is advancing its own claims. This conclusion goes also to Iran's second assertion, that the interdependence of the direct and indirect claims allows Iran to assert both sets of claims, bypassing the local remedies rule. The lack of particularization of Iran's direct claims is fatal to this proposition. But even assuming that Iran can overcome the particularization hurdle, its reliance on the Court's case law to support the proposition is misplaced.

48. The requirement to exhaust local remedies is a cardinal rule of international law, subject to only limited exception. Where, as in this case, the "preponderant" — I am using the word "preponderant" because that is in the International Law Commissions draft Articles[33] — where, as in this case, the "preponderant" claims that are asserted are claims in respect of the alleged loss and damage to Iranian companies, the principle of exhaustion of local remedies cannot be ousted by the device of simply tagging on to the claim a bare, unparticularized assertion of loss by the State itself. Such an approach would make a mockery of the local remedies rule. Any State would be able to get

[33] International Law Commission (ILC), draft Articles on Diplomatic Protection, with commentaries, Art. 14, Commentary 11, UN doc. A/CN.4/SER.A/2006/Add.1, Part Two, 2006 (CMUSA, Ann. 125); RUSA, fn. 179.

around the rule in any case simply by asserting that the alleged loss or damage to its company had economic consequences for the State itself.

49. Turing to the Court's case law, and starting with Iran's invocation of *Ukraine* v. *Russia*, in that case, the Court found explicitly that Ukraine did not adopt the cause of its nationals, but instead framed its case in inter-State terms.[34] Iran now says, for the first time on Monday, that, with the exception of its Bank Markazi claims, the indirect claims that it is pursuing in these proceedings on behalf of Iranian companies are simply representative of how the United States' "systematic policy" of acting against Iran has violated the Treaty.[35] But once again, with the greatest of respect to our colleagues opposite, this is smoke and mirrors. Iran cannot advance the claims of its nationals for purposes of its article-by-article claims but then deny that it is doing so for purposes of exhaustion.

50. Turning to *Avena* and *LaGrand*, Iran draws on these to argue that the rights of its companies are intertwined with those of the State. But, again, Iran's reliance on these cases is misplaced. In both of these cases, the Court held that the various subparts of Article 36 (1) of the Vienna Convention on Consular Relations (VCCR) were interrelated, with the result, in the *Avena* case — where it is articulated most clearly — that the US breach of its obligations to individuals under Article 36 of the VCCR prevented Mexico from exercising *its own rights* under the Convention[36]. There is no analogy there with the present case. The rights of Iranian companies are *not* intertwined with or interdependent on those of the Iranian State under the Treaty of Amity. On the contrary, Articles III, IV and V of the Treaty, confer *no* protections on the Iranian State. Nor do Articles VII and X confer rights on the State parties that any alleged violations against Iranian companies could abrogate.

51. Turning to the *Arrest Warrant* case, on which Iran also relies to bypass the local remedies rule, the short response to that is that the DRC, the applicant in that case, was clear that it was "not acting in the context of the protection of one of its nationals"[37]. It was acting in its own name,

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[34] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 606, para. 130.

[35] CR 2022/15, p. 33, para. 7 (Azari).

[36] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 52, para. 99, citing *LaGrand (Germany* v. *United States of America), Judgment. I.C.J. Reports 2001*, p. 492, para. 74.

[37] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, ICJ Reports 2002*, p. 17, para. 40.

asserting its own immunity, in respect of its foreign minister. The Court accepted this. The case is completely inapposite in the proceedings now before you.

52. I turn, finally, to Iran's argument that exhaustion is futile as there are no meaningful remedies to exhaust. Iran says that there is no reasonable possibility of Iranian companies obtaining redress in US courts. It says that the US measures are a "discriminatory and comprehensive regime"[38] that is in practice not reviewable in US courts.

53. Contrary to Iran's assertions, the US legal process is not a foregone conclusion. The reality is that Iran, and other States in a similar position, when they have engaged in the court proceedings, have prevailed on occasion in enforcement cases. The *Rubin* case against Iran, concerning the Persepolis artefacts, is one such example. In that case, three tiers of US courts, all the way up to and including the US Supreme Court, rejected the plaintiffs' attempt to attach the artefacts[39].

54. There are other cases in which writs of attachment issued against properties belonging to Iran have been quashed. In one of the *Bennett* proceedings[40], for example, following a liability judgment, the plaintiffs obtained writs of attachment in respect of a number of properties belonging to Iran, including former Iranian diplomatic premises in Washington, DC. Iran had failed to appear in the liability proceedings, and it did not contest the enforcement proceedings. Given the character of the property as diplomatic premises, the US Government stepped into the proceedings and moved to quash the writs of attachment, a motion that was granted by the court. And it follows as night follows day, that had Iran appeared in the proceedings and challenged the attachment on the same grounds, it would no doubt also have prevailed.

55. In another case, *Hegna*, which appears on Iran's Attachment 2, the plaintiffs sought to attach property in Texas that had previously been owned by Iran. In that case, too, the US Government filed a motion to void the writ of attachment, a motion that was upheld by the courts.

56. Mr. President, Members of the Court, there are no doubt other arguments that might have been available to Iran, to Iranian companies and indeed to third parties, to reopen and challenge

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[38] RI, para. 9.13.

[39] See *Rubin* v. *Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014) (CMUSA, Ann. 184); *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016) (CMUSA, Ann. 185); *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816; 583 U.S. (2018) (CMUSA, Ann. 75).

[40] *Bennett* v. *Islamic Republic of Iran*, 604 F. Supp. 2d 152, 154 (D.D.C. 2009) (RUSA, Ann. 310).

liability judgments or to contest enforcement proceedings. It is not for the United States out of the mouth of counsel before you to speculate what such arguments might have been in individual cases. The US Rejoinder has given other examples of cases in which default judgments and enforcement proceedings have been successfully challenged[41].

57. Mr. President, Members of the Court, as I have already noted, the table at Appendix 1 to the US Rejoinder, now at tab 28 of your judges' folder, records that Iran or Iranian entities appeared in only four cases, and exhausted local remedies in only three of those cases: *Peterson (I)*, that is case 38, *Bennett*, case 54, and *Weinstein*, in case 63, with the *Peterson II* case still pending. *Peterson (I)* is not a company case. This leaves only *Bennett* and *Weinstein* in which the Iranian companies engaged in the proceedings and exhausted local remedies. The *Rubin* judgment and other judgments show that the US legal process is open and accessible to Iran and Iranian companies and, in the words of the International Law Commission, is reasonably capable of providing effective relief to Iran and Iranian defendants. Iranian companies were required to exhaust local remedies. They did not. Iran is precluded from pursuing such claims in these proceedings.

58. Mr. President, Members of the Court, that concludes my submissions today. I thank you for your attention. Mr. President, we are in your hands as to whether you wish to take the short break now or whether you would like to press ahead. If you would like to press ahead now, may I invite you to, or ask you to, invite Ms Grosh to continue the United States' submissions.

The VICE-PRESIDENT, Acting President: I thank you, Sir Daniel. Before I invite the next speaker to take the floor, the Court will observe a coffee break of 15 minutes. The sitting is suspended.

The Court adjourned from 11.15 a.m. to 11.35 a.m.

The VICE-PRESIDENT, Acting President: Please be seated. The sitting is resumed. I will now give the floor to Ms Lisa Grosh. You have the floor.

[41] RUSA, paras. 6.23-6.25.

Ms GROSH: Thank you, Mr. President.

THE US MEASURES AND THE TREATY OF AMITY

I. Introduction

1. Mr. President, Members of the Court, it is an honour to appear again before you on behalf of the United States.

2. My presentation has two primary parts. First, I will address the US measures that Iran has challenged in this case. I will begin with the legislative and executive measures, before turning to the judgment enforcement proceedings that Mr. Bethlehem has explained are the true core of the case. My discussion of the legislative and executive measures is intended to assist the Court in understanding the legal framework underlying the enforcement proceedings. You heard a rather skewed presentation regarding these measures by Iran. My task will be to discuss them in their proper context and to correct the numerous mischaracterizations made by Iran.

3. In the second part of my presentation, I will offer introductory comments on the Treaty of Amity before my colleagues and I discuss Iran's claims under the Treaty's specific articles. This second part of my presentation will be relatively brief.

II. The challenged US measures

A. The legislative and executive measures

4. Iran has challenged four legislative provisions enacted by the United States and an executive order issued by President Obama. I will begin my presentation with the legislative provisions before turning to Executive Order 13599.

1. Legislative measures

5. The four legislative provisions that Iran has challenged all have the same purpose. They are intended to allow victims of State-sponsored terrorism and their families to hold State sponsors of terrorism accountable and obtain compensation for the injuries and grave losses the victims and their families have suffered.

6. One of the ways that they do this is by allowing plaintiffs who have obtained judgments against a designated State sponsor of terrorism to enforce those judgments both upon the State's

property and — where certain conditions are met — upon the property of the State's agencies and instrumentalities. As you heard on Monday, Iran's claims are focused on the latter aspect of the US legal framework. Specifically, Iran takes issue with the assets of its agencies and instrumentalities being used to satisfy its debts in these cases.

7. As I will explain, the legislative provisions at issue are a reasonable and measured response to the refusal of State sponsors of terrorism to reckon with the immense harm that they have caused. These provisions have a narrow scope and are carefully applied by US courts to ensure that parties with an interest in the assets upon which plaintiffs seek to enforce their judgments are given an opportunity to appear and, when they choose to do so, a fair hearing of their arguments before US courts.

8. Mr. President, Members of the Court, Iran would have you believe that this entire legislative framework was aimed entirely at Iran. You heard this from several members of Iran's team on Monday[42]. But nothing could be farther from the truth. Soon after the 1996 amendments to the Foreign Sovereign Immunities Act, or I will refer to it sometimes as the FSIA, allowing US victims of terrorism to sue State sponsors of terrorism for their harms were passed, suits began to be filed and judgments were issued. The earliest judgments were against Iran and Cuba[43]. But suits were soon filed against Iraq for Saddam Hussein's holding of hundreds of US persons as human shields and the mistreatment of POWs[44]; against Libya for the Pan Am 103 bombing and other terrorist activity[45]; and against Sudan for its support of the terrorist bombings of the US Embassies in Kenya and Tanzania and the USS *Cole*[46], and judgments then were entered in these cases.

9. As litigation was ongoing and judgments mounted, attention focused on victims' efforts to satisfy their judgments. With few successful attachments of assets, vigorous debate ensued within the Congress, and between the Congress, the Executive branch and the plaintiffs' bar. As a result, over the years various legislative proposals were introduced and debated, hearings were occasionally

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[42] See e.g. CR 2022/15, p. 39, para. 6 (Vidal).

[43] See *Alejandre* v. *Republic of Cuba*, 996 F. Supp. 1239, S.D. Fla. 1997.

[44] See *Hill* v. *Republic of Iraq*, 175 F. Supp. 2d 36, D.D.C. 2001, rev'd in part 328 F.3d 680, D.C. Cir. 2003; *Acree* v. *Republic of Iraq*, 271 F. Supp. 2d 179, D.D.C. 2003, rev'd 370 F.3d 41, D.C. Cir. 2004.

[45] *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, D.D.C. 2005.

[46] See *Owens* v. *Republic of Sudan*, 826 F. Supp. 2d 128, D.D.C. 2011; *Harrison* v. *Republic of Sudan*, 882 F.Supp. 2d 22, D.D.C. 2012.

held, while some proposals failed to gain passage and others became law. One of the earliest laws was Section 1610 *(f)* of the FSIA, enacted in 1998. This provision of law, which can be found at tab 3 of the judges' folder, authorized execution of certain blocked property of a State sponsor of terrorism, including the property of any agency or instrumentality of such a State, to satisfy certain terrorism-related judgments against a State.

10. Reflecting a balance on whether regulated assets would be subject to attachment, Section 1610 *(f)* also allowed the President of the United States to waive the provision, which President Clinton did the day he signed the provision into law in 1999. And debate on additional legislative measures and victims' compensation issues generally continued. Hearings were held in the Senate Judiciary Committee in 1999, and, as you can see at tab 31 of your judges' folder, Mr. Flatow — the father of a victim of Iran-sponsored terrorism who Iran referenced on Monday — testified at that hearing. In addition to Mr. Flatow, there were five other witnesses, including the widow of a victim of the Cuban shootdown and her counsel, and the lawyer representing Pan Am 103 victims against Libya[47]. Another hearing was held in the House of Representatives, which included many of the same witnesses[48]. And shortly thereafter, Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 was passed. And this Act directed the Secretary of the Treasury to pay portions of certain terrorism-related judgments against Cuba and Iran[49]. The Cuba judgments were paid from blocked assets of a Cuban agency and instrumentality, and the Iran judgments were paid from funds appropriated by Congress with the United States subrogated to their claims against Iran. And then additional legislation was passed, making additional Iran judgment holders eligible for those appropriated payments[50].

11. But this only addressed certain judgments against Iran and Cuba. Other accruing judgments against Iran, Cuba, Sudan and Libya continued to have difficulty being satisfied, resulting in additional discussions concerning appropriate measures to compensate victims of terrorism,

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[47] Terrorism: Victims' Access to Terrorist Assets, Hearing before the Senate Judiciary Committee, S. Hrg. 106-941, 27 Oct. 1999, available at https://purl.fdlp.gov/GPO/LPS12101.

[48] Justice for Victims of Terrorism, Hearing before the House Subcommittee on Immigration and Claims of the Committee of the Judiciary, Serial No. 129, 13 Apr. 2000, available at https://purl.fdlp.gov/GPO/LPS9090.

[49] Public Law 106-386, Section 2002, 28 Oct. 2000, available at https://www.govinfo.gov/link/plaw/106/public/386.

[50] Public Law 107-228, Section 686, 30 Sept. 2002, available at https://www.govinfo.gov/content/pkg/STATUTE-116/pdf/STATUTE-116-Pg1350.pdf.

including Congress requesting a legislative proposal from the President to establish a comprehensive compensation programme[51]. Mr. President, Members of the Court, it is against this backdrop, and consideration of alternative proposals, that both Section 201 of the Terrorism Risk Insurance Act of 2002, or TRIA, and Section 1610 *(g)* of the Foreign Sovereign Immunities Act, were enacted. Iran is simply incorrect in asserting that the legislative framework was aimed at Iran.

12. Iran, on Monday, also repeatedly referred to a statement made by the Executive Branch in connection with proposed legislation allowing agency and instrumentality property to be attached. Such a statement does not change the conclusion that Iran has not demonstrated that these measures, or the resulting attachments and turnover of assets, amounted to a violation of the Treaty of Amity. Rather, the statement was part of a healthy and normal debate that occurred among two separate branches of government and other stakeholders as part of the legislative process. The statement demonstrates that multiple viewpoints and factors were considered in the overall legislative process.

13. Mr. President, Members of the Court, with that background, I now turn to Section 201 *(a)* of TRIA, and Section 1610 *(g)* of the FSIA, which are the two legislative measures Iran has addressed.

(a) *Section 201* (a) *of TRIA and Section 1610* (g) *of the FSIA*

14. As we have discussed in our written submissions, Section 201 *(a)* of TRIA and Section 1610 *(g)* of the FSIA are similar in that both allow plaintiffs that have obtained a judgment against a State sponsor of terrorism to enforce that judgment against a State's assets and the assets of its agencies and instrumentalities. My first point, as I just previewed, is that these provisions apply equally to all designated State sponsors of terrorism, not solely to Iran.

15. My second point is that TRIA, which was enacted in 2002, and Section 1610 *(g)* of the FSIA, which was enacted in 2008[52], were both in place prior to the initiation of the judgment enforcement proceedings that are at issue in this case. In other words, there is no plausible argument that these provisions had retroactive effect.

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[51] Public Law 107-77, Section 626, 13 Sept. 2001, available at https://www.govinfo.gov/content/pkg/PLAW-107publ77/html/PLAW-107publ77.htm.

[52] See US Terrorism Risk Insurance Act of 2002, Pub. L. 107–297, 116 Stat. 2322 (MI, Ann. 13); FSIA Section 1610 *(g)* was enacted as Section 1083 of the US National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (MI, Ann. 15).

16. My third point regarding these provisions is that they are only available where victims have already obtained a liability judgment from a US court against a State sponsor of terrorism. Contrary to the picture that Iran has painted, obtaining a judgment against a State is no simple matter. US courts have protections in place to ensure that States are given proper notice of the claims against them and an opportunity to present their defences[53]. Even where States choose not to appear, US courts ensure that the evidence presented against the State is weighed in accordance with the same standard that is applicable to the United States itself, should the United States fail to appear in proceedings against it[54]. Further, Iran has not attempted to set aside any of the default judgments against it, as other States, such as Sudan, have successfully done[55]. We addressed US court rules and practice regarding set aside in our Rejoinder[56]. As the Second Circuit Court of Appeals has noted, "[c]ourts go to great lengths to avoid default judgments against foreign sovereigns or to permit those judgments to be set aside"[57].

17. My fourth point is that, due in part to the need to ensure that all parties with a potential interest in the property are given notice and an opportunity to appear, the process of executing a judgment can take and — in several of the cases at issue in these proceedings — has taken years to resolve[58]. As this suggests, the multi-step execution process is no mere rubber stamp. US courts are careful to ensure that any party with an interest in the assets is able to be heard[59]. Moreover, multiple levels of appeal are available to parties disappointed with the result before the trial-level court. Indeed, Bank Markazi appealed the *Peterson I* case to the US Supreme Court, but the Court ultimately rejected its arguments.

18. And while Iran contends that the US courts disregarded defences asserted by Iranian entities based on the Treaty of Amity, holding that a later enacted statute would prevail over an earlier treaty, Iran failed to tell you that the courts first addressed the Treaty arguments and found them

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[53] RUSA, paras. 8.69-8.70.

[54] RUSA, para. 8.74.

[55] See e.g. RUSA, paras. 6.24, 8.71.

[56] RUSA, para. 8.78.

[57] *First Fidelity Bank, N.A.* v. *Government of Antigua & Barbuda–Permanent Mission*, 877 F.2d 189, 196 (2nd Cir. 1989) (RUSA, Ann. 372).

[58] RUSA, para. 6.27, fn. 234.

[59] RUSA, paras. 8.52-8.55.

meritless. For example, in the *Weinstein* case, the Second Circuit Court of Appeals concluded that "[t]here is . . . no conflict between the TRIA [that is the US Statute] and the Treaty"[60]. The Ninth Circuit Court of Appeals reached the same conclusion with respect to Section 1610 *(g)* of the FSIA[61].

19. My final point on Section 201 *(a)* of TRIA and Section 1610 *(g)* of the FSIA goes to Iran's argument on Monday that these provisions "completely overturned the paradigm" established by the Supreme Court's 1983 decision in the *Bancec* case[62]. Iran contends that the *Bancec* decision established strict principles and factors to determine when it would be appropriate to allow the assets of a State's instrumentalities to be treated as the property of the State[63]. But Iran is wrong about the *Bancec* case. The Supreme Court expressly declined in *Bancec* to take such a prescriptive approach. This is what the Court said: "Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded."[64] The five so-called *"Bancec"* factors were subsequently developed by the lower courts and, in the view of some members of Congress, were misapplied[65]. Moreover, nothing in *Bancec* precluded the US Congress from enacting laws identifying specific circumstances in which the assets of a State's agencies and instrumentalities could be treated as assets of the State. To the contrary, the Supreme Court's decision in *Bancec* was "guided by the policies articulated by Congress in enacting the FSIA" and the decision also recognized that "the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies"[66].

(b) ***Section 8772***

20. Mr. President, Members of the Court, that then takes me to Section 502 of the Iran Threat Reduction and Syria Human Rights Act, which was codified as Section 8772 of Title 22 of the US Code. For purposes of my presentation, I will refer to this provision as Section 8772 and my colleagues will likewise follow this convention. I just note that our colleagues across the side have

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[60] *Weinstein* v. *Islamic Republic of Iran*, 609 F.3d 43, 53, (2nd Cir. 2010) (RUSA, Ann. 308).

[61] *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949, 962, slip op. 23-24, (9th Cir. 2016) (MI, Ann. 64).

[62] CR 2022/15, p. 41, para. 11 (Vidal).

[63] CR 2022/15, p. 44, para. 16 (Vidal).

[64] *Bancec*, 462 U.S. at 633 (CMUSA, Ann. 141).

[65] 154 Cong. Rec. S55, 22 Jan. 2008, Statement of Sen. Lautenberg (CMUSA, Ann. 72).

[66] *Bancec*, 462 U.S. at 621, 629 (CMUSA, Ann. 141).

been referring to this as Section 502, so hopefully that will help clarify any confusion. Iran contends that this provision breaches the Treaty of Amity because, in addition to allegedly violating the separateness of Iranian companies, it applied solely to the assets of Bank Markazi at issue in a single case, namely the *Peterson I* case, and that it was enacted while that case was pending. I will offer some initial responses on this provision, but you will hear in later presentations why this provision does not breach the individual articles of the Treaty.

21. Mr. President, Members of the Court, I want to begin with Chief Justice Roberts' dissenting opinion from the decision of the majority of the US Supreme Court to uphold Section 8772. A number of Iran's counsel mentioned this dissent on Monday, and specifically Judge Roberts' claim that Section 8772 "chang[ed] the law . . . simply to guarantee that respondents win"[67]. I have three points to make about Justice Roberts' dissent.

22. *First*, it is clear evidence of the fair hearing that Bank Markazi received before US courts. The justices listened attentively to Bank Markazi's submissions, and two justices were convinced that Bank Markazi had the better of the argument, leading to the publication of a detailed dissenting opinion. In a system "fixed" against Iran, none of this would have happened.

23. My *second* point is that Justice Roberts' dissent is just that. Justice Roberts and Justice Sotomayor, who joined his dissent, were in the minority. Six other justices of the Supreme Court joined Justice Ginsburg's majority opinion upholding Section 8772 against Bank Markazi's challenge. And those justices in the majority rejected Justice Roberts' argument that Congress, by enacting Section 8772, had effectively legislated a win for plaintiffs[68].

24. My *third* point is that Justice Roberts' claim jars with the fact that the District Court ruled in *Peterson I* that the assets at issue would have been available for execution under Section 201 *(a)* of TRIA, which was enacted years before the *Peterson* enforcement action began, as well as before Section 8772 was enacted[69]. This aspect of the District Court's ruling was not ultimately pursued on appeal, where the arguments focused on Section 8772. But the fact remains that, according to the

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[67] *Bank Markazi* v. *Peterson*, 578 U.S. 212, 242 (2016) (CMUSA, Ann. 109).

[68] *Bank Markazi* v. *Peterson*, 578 U.S. 212, 230-31, 2016 (CMUSA, Ann. 109).

[69] RUSA, para. 8.30. See also *Peterson* v. *Islamic Republic of Iran*, 2013 WL 1155576, paras. 23-26, S.D.N.Y., 13 Mar. 2013 (CMUSA, Annex 108); *Peterson* v. *Islamic Republic of Iran*, 758 F.3d 185, 189, 2d Cir. 2014 (CMUSA, Ann. 233).

District Court, plaintiffs would have prevailed regardless of whether Section 8772 had been enacted. Iran may disagree with this ruling, but it has not and cannot establish that Section 8772 ensured a victory for plaintiffs that they would not have obtained in its absence.

25. Iran emphasized during its presentation on Monday that, prior to the enactment of Section 8772, it could be argued that the assets at issue in *Peterson I* were not susceptible to execution under TRIA because they were not assets "of" Bank Markazi, as required by the statute, but were instead assets of Clearstream[70]. But, again, the District Court rejected this argument on the basis that Bank Markazi repeatedly asserted that the assets belonged to it and no other party[71]. For example, the District Court noted that "two officers of Bank Markazi have sworn under penalty of perjury that the Blocked Assets are the 'sole property of Bank Markazi and held for its own account'"[72]. And Iran has reiterated this characterization in its pleadings before this Court, describing the assets in *Peterson I* as "Bank Markazi's assets in issue", "the Bank's investments in the United States" and "the assets and interests of Bank Markazi"[73].

26. As a final point on Section 8772, the bond proceedings at issue in *Peterson* had been blocked and made available for execution as a result of Bank Markazi's own deceptive financial practices in facilitating transactions with sanctioned parties[74]. You will hear more about this in later presentations, but it is important to recognize that Bank Markazi's own conduct played a significant role in the turnover of these assets.

27. It also cannot be overlooked that Bank Markazi engaged in an apparent deception with respect to the specific assets at issue. In 2008, Bank Markazi interposed another bank — Banca UBAE — between itself and Clearstream, the financial institution that held the assets for Bank Markazi. Iran asserts in its Reply that Bank Markazi did this because Clearstream had decided in 2007 to close all accounts that it maintained for Iranian customers in response to pressure from US regulators[75]. In particular, the United States had decided to close a loophole that had previously

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[70] CR 2022/15, p. 47, para. 23 (Vidal).

[71] *Peterson*, 2013 WL 1155576, para. 23 and fn. 10 (CMUSA, Ann. 108).

[72] *Ibid*.

[73] RI, paras. 2.84, 2.86. See also *ibid*. para. 3.29.

[74] RUSA, Chap. 7, Sect. B (iii).

[75] RI, paras. 2.94-2.95.

allowed non-US banks to provide financial institutions with access to the US financial system through so-called "U-turn" transactions[76]. But rather than liquidate its holdings and allow its accounts to be closed, Bank Markazi inserted an intermediary between itself and Clearstream. Iran contends that this manoeuvre only altered the appearance of the ownership structure, not its substance, asserting that Bank Markazi "remained the ultimate beneficial owner of the bonds"[77]. If that is the case, the only conceivable reason for making the change could have been the desire to conceal Bank Markazi's ownership of the assets, whether from Clearstream, US regulators, plaintiffs with unsatisfied judgments against Iran, or all three.

(c) ***Section 1226 of the NDAA 2020***

28. Mr. President, Members of the Court, that takes me finally to Section 1226 of the National Defense Authorization Act for Fiscal Year 2020, which Iran mentioned only briefly on Monday, and so will I. I note simply that this provision has no place in the present case for two reasons. First, no assets have been turned over to plaintiffs in reliance on this provision. Second, this provision was enacted after the termination of the Treaty and, as a result, cannot constitute a breach of the Treaty.

(d) ***Concluding observations***

29. In sum, the legislative measures that Iran has challenged are a reasonable and measured response to a problem that Iran and its fellow State sponsors of terrorism have brought on themselves. The measures allow for victims of State-sponsored terrorism to hold the State sponsor accountable and obtain compensation from the State's agencies and instrumentalities that they cannot get from the State itself.

30. Iran argues that the United States has breached the Treaty of Amity by treating the assets of its agencies and instrumentalities as assets of the Iranian State. The Treaty of Amity, however, says nothing about the purported inviolability of the corporate form, as we will discuss in subsequent presentations regarding Iran's claims under the specific Treaty articles. Accordingly, nothing in the

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[76] Defendant Bank Markazi's Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction 34-35, *Peterson* v. *Islamic Republic of Iran*, Case No. 10-4518, S.D.N.Y., 11 May 2011 (POUS, Ann. A01).

[77] RI, para. 2.95.

Treaty of Amity bars the United States from allowing plaintiffs to enforce their judgments upon the assets of Iran's agencies and instrumentalities in the very narrow circumstances at issue here.

2. Executive Order 13599

31. I will now briefly discuss the Executive Order, that is Executive Order 13599, which is the sole executive branch action that Iran has challenged.

32. President Obama issued Executive Order 13599 in February 2012 to block all property and interests in property of (i) the Government of Iran, including Bank Markazi, and (ii) Iranian financial institutions[78]. Iran noted in its Reply that "[o]nly a small part of its complaints is linked to [Executive Order] 13599"[79] and the United States agrees.

33. As stated in the Order itself, President Obama acted

> "in light of the 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"[80].

34. Executive Order 13599 was plainly well justified, and you will hear more about the reasons for the Order in our presentation on Article XX of the Treaty.

35. The only other point I want to make regarding the Order is a clarification about its role in the judicial proceedings. Section 201 *(a)* of TRIA makes blocked assets of Iran and its agencies and instrumentalities available to plaintiffs holding judgments against Iran in the circumstances that I described earlier. Thus, the assets of Iran and its agencies and instrumentalities blocked pursuant to Executive Order 13599 would be subject to attachment under Section 201 *(a)* of TRIA.

36. The assets at issue in *Peterson I* were blocked pursuant to Executive Order 13599. Iran has not shown that any other assets turned over to judgment holders against Iran were made available as a result of Executive Order 13599. For example — and this is reflected in Iran's tab 2 — the assets at issue in the *Weinstein* and *Bennett* cases — which belonged to Bank Melli — were blocked and made available for attachment *not* under Executive Order 13599 but under an earlier executive order, Executive Order 13382, which was issued in 2005 to address proliferation of weapons of mass

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[78] Executive Order 13599, 77 Fed. Reg. 6659, 5 Feb. 2012 (MI, Ann. 22).

[79] RI, para. 10.2.

[80] Executive Order 13599, 77 Fed. Reg. 6659, 5 Feb. 2012 (MI, Ann. 22).

destruction and their means of delivery[81]. Iran has not challenged Executive Order 13382 in these proceedings, nor has it challenged any of the various other executive orders that it mentioned during its presentations on Monday.

B. The judicial proceedings

37. Mr. President, Members of the Court, this now takes me to a discussion of the judicial proceedings. Mr. Bethlehem has already addressed the judgment enforcement proceedings that Iran has challenged and I have only two brief points to make about them.

38. *First*, none of the four legislative provisions at issue caused the turnover of assets themselves. Rather, as I have already described, these statutory provisions allow plaintiffs to seek enforcement of their judgments before a US court in certain circumstances. Prior to directing the turnover of property, the court must assess whether the applicable statutory criteria are met and must also give interested parties an opportunity to argue that those provisions are not met. Only once the court is satisfied that a plaintiff has met the statutory criteria will it order the turnover of the assets upon which enforcement is sought. And even then, the court's order is subject to appeal.

39. *Second*, as will become clear from our discussion of Iran's claims under individual articles, Iran has not alleged any procedural impropriety of the US courts in their treatment of Iranian companies, such as a failure to provide notice or an opportunity to be heard. There can be no serious question that the US courts acted as neutral and independent arbiters of the legal rights of the parties before them. As evidence of this, the United States has noted instances in which Iranian companies prevailed before US courts, as well as instances in which other parties prevailed by asserting defences that would have been available to Iranian companies, had they chosen to appear[82]. The United States Government also has submitted statements of interest in certain cases that were consistent with positions on the law taken by Iranian companies or by parties whose interests were aligned with those companies[83].

[81] RUSA, paras. 8.34, 8.41.

[82] RUSA, paras. 6.23, 8.33, 8.57-8.61.

[83] RUSA, paras. 8.33, 8.61.

C. Concluding observations

40. Mr. President, Members of the Court, that brings me to the close of my discussion of the challenged US measures. Stepping back, what Iran is trying to do in this case is make the United States — rather than Iran itself — responsible for compensating the victims of Iran-sponsored acts of terrorism. Moreover, Iran's case is not based on refuting its conduct that contributed to the attacks at issue — which it addresses only in two short deflecting appendices — or on proving that the US courts committed some procedural impropriety. Instead, Iran asks for billions of dollars in compensation because the assets turned over to plaintiffs were owned indirectly through its agencies and instrumentalities, rather than directly by the Iranian State. But, simply put, there is nothing in the Treaty of Amity that would mandate such a result.

III. The Treaty of Amity

41. Mr. President, Members of the Court, I now turn to the second part of my presentation, which concerns the Treaty of Amity. My colleagues and I will be addressing the individual articles Iran has invoked in subsequent presentations, so my task is to offer four introductory observations on the Treaty and its provisions to help guide the Court in its interpretation and application of the relevant text.

42. *First*, as the Court has previously observed, the Treaty of Amity

> "contains rules providing for freedom of trade and commerce between the United States and Iran, including specific rules prohibiting restrictions on the import and export of products originating from the two countries, as well as rules relating to the payment and transfer of funds between them"[84].

43. The measures that Iran has challenged are far outside the realm that the Treaty was intended to govern. They are not measures targeted at trade and transactions between the United States and Iran. Rather, they are measures that relate to the adjudication of claims and the satisfaction of US court judgments awarded to US victims of State-sponsored terrorism. Accordingly, these measures were designed to solve the specific problem of State sponsors of terrorism failing to compensate victims of terrorist attacks for which they have been found liable. And while Iran

[84] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, pp. 635-636, para. 43.

attempts to locate in the Treaty of Amity obligations that are purportedly inconsistent with the US measures, its efforts are strained and unconvincing.

44. My *second* observation is that Iran has invoked two categories of provisions of the Treaty of Amity. The first category is comprised of articles that establish certain obligations regarding each Party's treatment of the other Party's nationals and companies. And this category includes Article III (1) and III (2), Article IV (1) and IV (2), and Article V of the Treaty. The second category comprises articles that govern other aspects of trade and transactions between the Parties. They are Article VII (1) and Article X (1).

45. With respect to the first category of articles, Iran's argument is that they require insurmountable corporate separateness in all circumstances even where — as is the case here — each entity has been found to be an agency or instrumentality of the Iranian State and the judgments being enforced are due to heinous conduct carried out by Iran. But, as we will discuss in more detail, Articles III, IV and V do not so constrain the regulatory power of either Party in allowing victims to use the judicial process to hold State sponsors of terrorism to account and pay compensation for their injuries and other grave losses.

46. As to the second category of articles, the measures at issue relate to the enforcement of judgments against Iranian entities and any attempt to connect them to inter-State commerce is an aggressive overreach by Iran. There is nothing in the text of Articles VII (1) and X (1) to suggest that they were intended to govern the functioning of the Parties' judicial systems or that they have any application to the types of measures that are at issue here, or for that matter, any measures that allow lawsuits and enforcement of judgments to go forward against the other Party for harms it has caused.

47. My *third* point is a related one. Lacking a textual basis for its claims, Iran has relied on a number of generalities to plead its case, complaining that it has been blamed for acts that it did not commit, that the judgments have imposed excessive financial liability, and that these judgments expose the property of Iranian companies to attachment and execution around the world. But these generalized complaints are not sufficient to establish a breach. The Treaty of Amity imposed specific, carefully circumscribed obligations on the Parties, and it is Iran's burden to show that the impugned conduct actually breached one or more of these obligations. But, in several respects, Iran has not made the necessary link between the alleged US misconduct and a provision of the Treaty of Amity.

Iran complains, for example, about the propriety of the judgments against the Iranian State even though such complaints cannot form the basis for a breach of the Treaty provisions that — like Articles III, IV and V — only extend protections to Iranian companies and nationals. Likewise, Iran objects to efforts by plaintiffs to enforce US court judgments in foreign jurisdictions but completely skates over the question of how a decision by a foreign court to allow a judgment to be enforced outside the United States could possibly constitute a breach of the Treaty. The bottom line is that there can be no liability for the United States in this case unless Iran can establish a breach of a specific Treaty obligation.

48. My *fourth* and final point is that, whatever obligations the Treaty may have imposed when it was in force, the United States notified the termination of the Treaty on 3 October 2018, and that termination accordingly took effect no later than 3 October 2019[85]. As explained in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs"[86]. The United States ceased to be bound by the Treaty of Amity after its termination and, accordingly, there can be no breach of the Treaty's obligations based on acts occurring after its termination.

IV. Conclusion

49. Mr. President, Members of the Court, that brings to an end my introductory observations on the Treaty of Amity. As I noted, you will hear a more detailed discussion of the Treaty's provisions in subsequent presentations by me and my colleagues.

50. Mr. President, may I now ask that you call on Professor Boisson de Chazournes, who will show that Bank Markazi is not a "company" within the meaning of the Treaty.

The VICE-PRESIDENT, Acting President: I thank you, Ms Grosh. I now give the floor to Professor Laurence Boisson de Chazournes. Vous avez la parole, Madame.

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[85] RUSA, para. 2.2.

[86] ILC, draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Chap. I, Art. 13, UN doc. A/CN.4/SER.A/2001/Add.1, Part 2 (RUSA, Ann. 254).

Mme BOISSON DE CHAZOURNES :

LA BANQUE MARKAZI N'EST PAS UNE «SOCIÉTÉ» AU SENS DU TRAITÉ D'AMITIÉ

I. Introduction

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un honneur pour moi de me présenter à nouveau devant vous au nom des Etats-Unis d'Amérique. Ainsi que vous l'avez entendu lundi, au cœur de l'affaire de l'Iran se trouvent les revendications découlant du transfert des actifs de la banque Markazi dans le cadre du litige *Peterson*. Comme je le démontrerai au cours de ma présentation, ces revendications ne sont pas compatibles avec les dispositions du traité d'amitié qui gouvernent les revendications de l'Iran en la présente instance.

2. Commençons par les faits. Qu'est-ce que la banque Markazi ? Elle est la banque centrale de l'Iran. Elle n'est pas simplement une «entreprise publique» comme l'ont présentée nos contradicteurs[87]. Elle n'est pas non plus, contrairement au désir ardent de l'Iran, une «société» au sens des dispositions du traité d'amitié qui accordent «droits et protections»[88] aux personnes physiques et morales exerçant des activités commerciales ordinaires sur le territoire de l'autre partie.

3. Comme la banque Markazi elle-même l'a fait valoir à plusieurs reprises devant les tribunaux américains, elle était engagée dans des transactions d'une nature totalement différente, des transactions qui s'inscrivent dans le cadre classique des activités souveraines conduites par une banque centrale[89]. La tentative opportuniste de l'Iran de transformer la nature de ces transactions afin de se prévaloir des protections offertes par le traité aux «sociétés» doit être écartée. Ce faisant, la Cour doit rejeter toutes les demandes y afférentes au titre des articles III à V.

4. Mesdames et Messieurs les juges, je procéderai en deux étapes. Dans un premier temps, je reviendrai sur les conclusions pertinentes de l'arrêt de la Cour de céans sur les exceptions préliminaires que nos contradicteurs ont bien du mal à présenter. Je montrerai dans un deuxième temps que l'Iran n'a, une fois de plus, pas réussi à établir que la banque Markazi exerçait une activité

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[87] CR 2022/15, p. 21, par. 8 (Lowe).

[88] Arrêt sur les exceptions préliminaires, *C.I.J. Recueil 2019 (I)*, p. 36, par. 85.

[89] DEU, par. 5.11-5.17.

commerciale au sens du traité lorsqu'elle a effectué les transactions à l'origine de cette affaire. Il y a trois raisons à cela :

1) Comme je l'ai souligné, la banque Markazi est la banque centrale de l'Iran et exerce, à ce titre, des fonctions souveraines.
2) Toute prétendue habilitation à exercer certains types d'activités commerciales n'est pas pertinente pour déterminer si l'*activité spécifique à l'origine du présent litige* était effectivement commerciale.
3) L'activité de la banque Markazi en cause dans la présente affaire est incontestée. La banque investissait les réserves de devises étrangères de l'Iran, ce qui constitue l'une des principales activités d'une banque centrale. La banque Markazi a elle-même constamment argué de la nature souveraine de cette activité dans le cadre de procédures judiciaires aux Etats-Unis.

II. Les conclusions de la Cour dans l'arrêt sur les exceptions préliminaires

5. J'en viens à présent à la première partie de mon intervention. Je commencerai par un bref rappel du contenu du traité d'amitié, que votre juridiction a analysé et interprété dans son arrêt sur les exceptions préliminaires.

6. Les articles III, IV et V du traité accordent un certain nombre de droits et protections aux «ressortissants», à savoir les «personnes physiques et morales» des parties contractantes. Le traité définit les «sociétés» comme «des sociétés de capitaux ou de personnes, des compagnies et de toutes associations, qu'elles soient ou non à responsabilité limitée et à but lucratif»[90]. Il n'est pas contesté que ces dispositions ne portent pas sur le traitement que les parties sont tenues de s'accorder mutuellement. Elles ne portent pas non plus, comme la Cour l'a souligné dans sa décision sur les exceptions préliminaires, sur le traitement à accorder à d'autres entités exerçant des activités souveraines[91].

7. Lundi dernier, l'Iran a présenté une interprétation très trompeuse de l'arrêt de votre juridiction, en coupant et collant les passages qu'il jugeait utiles à sa cause et en omettant ceux, moins

[90] Traité d'amitié, art. 3(1) (onglet n° 1 du dossier des juges).

[91] Arrêt sur les exceptions préliminaires, *C.I.J. Recueil 2019 (I)*, p. 38, par. 91.

utiles pour lui, qui font pourtant partie de la décision de la Cour. Il me faut donc remédier à cette interprétation trompeuse.

8. Dans son arrêt sur les exceptions préliminaires, la Cour a souligné que l'interprétation du terme «société» devait tenir compte du contexte dans lequel il s'inscrit, ainsi que de l'objet et du but du traité d'amitié. En particulier, la Cour a souligné qu'une analyse appropriée des dispositions pertinentes du traité «oriente nettement vers la conclusion que le traité vise à garantir des droits et à accorder des protections aux personnes physiques et morales qui exercent des activités de nature commerciale, même si ce dernier terme doit être compris dans un sens large»[92]. La Cour rappela également l'objet et le but du traité, à savoir d'«encourager les échanges et les investissements mutuellement profitables et l'établissement de relations économiques plus étroites entre leurs peuples et [de] régler leurs relations consulaires»[93]. Au vu de ces points, la Cour en conclut que les dispositions du traité relatives aux sociétés n'ont pas pour objet de réglementer le traitement des entités engagées dans des activités souveraines. La Cour en tira la conséquence, fatale pour l'Iran, que la question des immunités souveraines ne rentrait pas dans leur champ d'application[94].

9. La Cour considéra qu'une entité étatique «qui exercerait exclusivement des activités de souveraineté … ne saurait se voir attribuer la qualification de «société» au sens du traité»[95] et ne peut donc bénéficier des protections y relatives au titre des articles III, IV et V. Pour la même raison, une entité publique qui exercerait à la fois des activités commerciales et souveraines ne pourra être qualifiée de «société» au sens du traité que «dans la mesure où elle exerce des activités de nature commerciale»[96]. Le test, selon la Cour, n'est pas de savoir si une entité étatique a, à un moment donné ou dans une juridiction donnée, mené une activité qui pourrait être qualifiée de commerciale, mais si *l'activité spécifique* à l'origine du différend est de nature souveraine ou commerciale[97].

10. Dans ses écritures et lors du premier tour de plaidoiries, l'Iran a tenté de déformer la position américaine et affirme que celle-ci se concentre *uniquement* sur les fonctions souveraines de

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[92] Arrêt sur les exceptions préliminaires, *C.I.J. Recueil 2019 (I)*, p. 38, par. 91.

[93] *Ibid.*, p. 28, par. 57.

[94] *Ibid.*, p. 34-35, par. 80.

[95] *Ibid.*, p. 38, par. 91.

[96] *Ibid.*, p. 39, par. 92.

[97] *Ibid.*, par. 93.

la banque Markazi[98]. Tel n'est pas le cas. Comme cela est expliqué dans la duplique des Etats-Unis[99], la question pertinente est de savoir si les transactions de la banque Markazi à l'origine de ce différend sont souveraines ou commerciales. Par sa réécriture de la position américaine, l'Iran espère sans doute détourner l'attention du fait inopportun que la banque Markazi est la banque centrale de l'Iran.

11. Monsieur le président, si l'on suit l'interprétation de l'Iran, pratiquement toute entité étatique ayant effectué une quelconque transaction peut être considérée comme exerçant une activité commerciale et donc revendiquer des droits en tant que «société» en vertu du traité. Dans la même logique, une banque centrale sera presque toujours considérée comme une «société» au sens du traité dans la mesure où elle se livre inévitablement à des activités impliquant des transactions et des investissements monétaires. Cela ne peut pas être le cas. Il n'aurait pas été nécessaire pour la Cour de joindre cette question au stade du fond.

12. Dans son arrêt, la Cour conclut plutôt qu'il était nécessaire de déterminer si les activités spécifiques de la banque Markazi aux Etats-Unis en cause dans l'affaire *Peterson*, c'est-à-dire les activités au cœur des violations du traité alléguées par l'Iran, étaient de nature commerciale[100]. Mais constatant que l'Iran «ne s'est guère employé à démontrer que la banque Markazi exerce, *à côté de* fonctions souveraines qu'il admet, des activités de nature commerciale»[101], la Cour en reporta l'examen au fond, donnant ainsi à l'Iran la possibilité de présenter des preuves supplémentaires[102].

III. Une nouvelle fois, l'Iran n'a pas prouvé que les transactions de la banque Markazi à l'origine de ce litige étaient de nature commerciale

13. Monsieur le président, je vais maintenant me pencher sur cette question. Dans ses observations orales, l'Iran tente de démontrer que la législation constitutive de la banque Markazi autorise des activités commerciales. Mais il ne fournit pas un seul exemple d'exercice d'une telle activité en dehors de sa qualification erronée des transactions à l'origine de la présente affaire. L'Iran n'a pas non plus fourni de preuve montrant que les Parties avaient compris, lors des négociations,

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[98] RI, par. 3.7 ; CR 2022/15, p. 56, par. 9 (Thouvenin).

[99] DEU, par. 5.5.

[100] Arrêt sur les exceptions préliminaires, *C.I.J. Recueil 2019 (I)*, p. 39, par. 93.

[101] *Ibid.*, p. 39, par. 94 (les italiques sont de nous).

[102] *Ibid.*, p. 40, par. 97 ; voir également p. 39, par. 94.

que les dispositions du traité régiraient les activités essentielles d'une banque centrale. L'Iran n'a pas non plus produit de pratique démontrant que des Etats avaient pris appui sur des dispositions relatives aux «ressortissants et aux sociétés» dans des circonstances analogues, impliquant les fonctions essentielles de leurs banques centrales.

14. Mais, même si la banque Markazi était autorisée à exercer certaines activités commerciales, toute autorisation alléguée est sans rapport avec la question de savoir si elle exerçait effectivement une activité commerciale dans le cadre des transactions à l'origine du présent différend. Je concentrerai le reste de mes remarques sur cette question, à savoir si l'activité pertinente était commerciale ou non. Je réfuterai également tous les arguments avancés par l'Iran pour tenter d'étayer sa demande.

IV. Le statut et les fonctions souveraines de la banque Markazi sont incontestés

15. Mesdames et Messieurs les juges, l'Iran ne conteste pas que la banque Markazi est, et a été constituée pour être, la banque centrale de l'Iran. Ce statut incontesté implique que la banque Markazi est investie de fonctions souveraines étendues[103]. Le chapitre 2 de la loi monétaire et bancaire iranienne de 1972 est sans équivoque quant aux fonctions et aux pouvoirs de la banque[104]. Par exemple, l'article 11 confère à la banque le «pouvoir de régulation du système monétaire et de crédit du pays», ce qui inclut un certain nombre d'activités telles que l'émission de billets de banque et de pièces, la supervision des institutions financières et de crédit et l'adoption de règlements relatifs aux opérations de change[105]. En particulier, en confiant à la banque Markazi l'autorité monétaire du pays, l'article 11 accorde spécifiquement à la banque centrale le «contrôle des opérations de change», le «contrôle des transactions sur l'or» et le «contrôle des exportations et importations de devises»[106]. L'article 14, quant à lui, confère à la banque la compétence de mettre en œuvre le système monétaire du pays en réglementant les banques du pays[107].

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[103] DEU, par. 5.8.

[104] Loi monétaire et bancaire iranienne de 1972, chap. 2.

[105] RI, par. 3.17.

[106] Loi monétaire et bancaire iranienne de 1972, art. 11(c)-(e).

[107] *Ibid.*, art. 14.

16. De ce statut et de ces fonctions, l'Iran, au début de la présente affaire, en a déduit une immunité souveraine. En effet, Mesdames et Messieurs les juges, l'Iran prétendait que le traité d'amitié incorporait les règles coutumières relatives aux immunités souveraines et que celui-ci et la banque Markazi, en tant qu'entités souveraines, étaient protégés contre les poursuites et les saisies américaines[108]. Le paragraphe d'ouverture de son mémoire affirme ainsi que les Etats-Unis «viole[nt] … l'immunité spécifique de la banque centrale de l'Iran … en ce qui concerne ses activités de banque souveraine aux Etats-Unis»[109]. L'Iran n'a eu de cesse de soutenir dans son mémoire que la banque Markazi est une entité souveraine ayant droit à l'immunité souveraine, en particulier dans le domaine de la politique monétaire et de sa mise en œuvre. On peut notamment y lire que «[l]e devoir essentiel d'une banque centrale est de protéger et de réguler le système monétaire et la devise de l'Etat, aussi bien à l'échelle nationale qu'internationale. Les banques centrales jouent donc un rôle clef dans l'exercice par l'Etat de sa souveraineté monétaire.»[110]

17. Face à la décision de la Cour de ne pas connaître des demandes de l'Iran fondées sur l'immunité souveraine, l'Iran cherche maintenant à minimiser le rôle de la banque Markazi en tant qu'entité souveraine. De banque centrale, la banque Markazi serait devenue une banque ordinaire exerçant une activité commerciale ordinaire. Cela n'est pas possible. Après avoir revendiqué l'application des règles coutumières relatives aux immunités souveraines au bénéfice de la banque Markazi, l'Iran ne peut pas maintenant soutenir que celle-ci peut se prévaloir des protections accordées aux entités engagées dans des activités commerciales en vertu du traité.

V. Les arguments confus de l'Iran selon lesquels la banque Markazi est autorisée à exercer certaines activités commerciales ne sont pas pertinents si la banque n'*exerçait* pas *réellement* une telle activité dans le contexte des violations alléguées

18. Au soutien de son argument, et au lieu d'établir que la banque Markazi n'exerçait pas d'activités souveraines, ce qu'il ne peut pas faire, l'Iran tente de faire valoir que la banque est autorisée par ses lois constitutives à exercer *certaines* activités commerciales. Dans ses écritures et dans ses observations orales, l'Iran cite diverses dispositions de sa loi monétaire et bancaire de 1972

[108] MI, par. 1.7.

[109] MI, par. 1.1.

[110] MI, par. 3.24.

pour tenter de convaincre votre juridiction que la banque est autorisée à se livrer à des actes commerciaux[111]. Mais même à supposer que la loi de 1972 autorise certains types de transactions financières ou commerciales, les mots de la banque Markazi à leur égard sont éclairants : «[t]hat Bank Markazi «conducts financial transactions on behalf of Iran» … is utterly unremarkable, and the same could be said of *virtually any central bank in the world*»[112].

19. Monsieur le président, privilégiant l'abstraction, l'Iran ne fournit pas un seul exemple d'exercice d'une activité commerciale en dehors de celui — erroné — des transactions à l'origine de la présente affaire, que cela soit dans ses écritures ou lors des audiences de lundi. Mais de toute façon, quand bien même la banque Markazi serait habilitée à exercer certaines activités commerciales, ces prétendues habilitations sont sans rapport avec la question soulevée par votre juridiction dans son arrêt sur les exceptions préliminaires.

20. Pour rappel, il s'agit de déterminer si, «à côté de fonctions souveraines qu'il admet»[113], la banque Markazi «exerçait, à l'époque pertinente, des activités de la nature de celles qui permettent de caractériser une «société» au sens du traité d'amitié»[114]. En d'autres termes, même à supposer que la banque Markazi était autorisée à exercer une activité commerciale, la Cour doit déterminer si les activités spécifiques de la banque Markazi à l'origine de ce litige et conduites aux Etats-Unis étaient commerciales. Ces activités ne l'étaient pas, comme je m'apprête à l'expliquer.

Les activités de la banque Markazi à l'origine de ce litige étaient de nature souveraine et non commerciale

21. Mesdames et Messieurs les juges, la seule activité alléguée par l'Iran est l'achat par la banque Markazi de 22 titres de créance sur des obligations dématérialisées émises par un certain nombre de gouvernements étrangers et d'organisations intergouvernementales[115]. Dans le cadre de la procédure *Peterson*, la banque Markazi a affirmé au sujet de la nature de ces transactions qu'elles

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[111] CR 2022/15, p. 59-61, par. 19-24 (Thouvenin) ; RI, par. 3.17-3.22.

[112] Defendant Bank Markazi's Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction, *Peterson, et al.* v. *Islamic Republic of Iran*, No. 10-4518 (tribunal fédéral du district sud de l'Etat de New York, 11 mai 2011), p. 31 (les italiques sont de nous) (annexe A01 des documents de procédure de l'affaire *Peterson* déposée à la CIJ par les Etats-Unis le 19 septembre 2017 — dossier des juges, onglet n° 9).

[113] Arrêt sur les exceptions préliminaires, *C.I.J. Recueil 2019 (I)*, p. 39, par. 94.

[114] *Ibid.*, p. 40, par. 97.

[115] RI, par. 3.25.

«plainly serve[] an «important governmental purpose» and thus do[] not constitute «commercial» activity under the Treaty»[116].

22. Comme votre Cour l'a noté dans sa décision sur les exceptions préliminaires, le traité envisage expressément les situations d'entreprises publiques exerçant des activités commerciales ou industrielles à l'article XI, paragraphe 4, privant ces entités de l'immunité pour éviter de les placer dans une position avantageuse par rapport aux entités privées. Dans ce contexte, devant les tribunaux américains, la banque Markazi a vigoureusement fait valoir qu'elle ne se livrait pas à de telles «activités commerciales, industrielles, de transport maritime ou autres» au sens du traité. Elle indiqua que,

> «[p]lainly, central banking activities such as investing currency reserves are not remotely comparable to the «commercial, industrial, shipping or other business activities» that Article XI, Section 4 is concerned with. Rather, central banking activities serve an important governmental purpose.»[117]

23. Nous devrions nous en tenir aux affirmations de la banque Markazi. Dans les procédures judiciaires américaines qui sous-tendent cette affaire, l'invocation de l'immunité souveraine par la banque Markazi reposait *uniquement* sur le fait que les achats en question faisaient partie de la gestion des réserves monétaires de l'Iran, une fonction souveraine qui n'a pas d'équivalent commercial. La banque Markazi a fait valoir que ces investissements avaient été réalisés «for the classic central bank purpose of investing Bank Markazi's currency reserves»[118], réserves qu'elle utilise pour mettre en œuvre des politiques monétaires telles que le maintien de la stabilité des prix[119]. La banque Markazi a donc déclaré sans équivoque que les transactions précisément en cause dans la présente instance étaient des activités dans lesquelles la banque agissait «à titre souverain»[120].

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[116] Defendant Bank Markazi's Reply Memorandum of Law in Further Support of its Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction, *Peterson* v. *Islamic Republic of Iran*, No. 10-4518 (tribunal fédéral du district sud de l'Etat de New York, 22 juin 2012), p. 29 (annexe A15 des documents de procédure de l'affaire *Peterson* déposée à la CIJ par les Etats-Unis le 19 septembre 2017 — dossier des juges, onglet n° 10).

[117] Defendant Bank Markazi's Reply Memorandum of Law in Further Support of its Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction 27, *Peterson* v. *Islamic Republic of Iran*, No. 10-4518 (tribunal fédéral du district sud de l'Etat de New York, 22 juin 2012), p. 27 (annexe A15 des documents de procédure de l'affaire *Peterson* déposée à la CIJ par les Etats-Unis le 19 septembre 2017 — dossier des juges, onglet n° 10).

[118] Brief and Special Appendix for Defendant-Appellant Bank Markazi, Cent. Bank of Iran, *Peterson* v. *Islamic Republic of Iran*, No. 13-2952 (2d Cir. 19 novembre 2013), p. 35-36 (EPEU, annexe 233 — dossier des juges, onglet n° 11).

[119] Petition for a Writ of Certiorari, *Bank Markazi* v. *Peterson*, No. 14-770 (29 décembre 2014), p. 7-8 (CMEU, annexe 117 — dossier des juges, onglet n° 12).

[120] Brief for Defendant-Appellee Bank Markazi aka Central Bank of Iran, *Peterson* v. *Bank Markazi* (2d Cir. 31 août 2015), (Bank Markazi describing itself as an "instrumentalit[y] acting in a sovereign capacity"), No. 15-690, p. 38 (EPEU, annexe 235).

24. Comme vous pouvez le voir sur la diapositive qui vous est présentée, dans sa demande d'ordonnance de *certiorari* auprès de la Cour suprême des Etats-Unis dans l'affaire *Peterson*, la banque Markazi a précisé comment les transactions en question s'inscrivaient dans le cadre de la surveillance de la politique monétaire qu'elle conduit. Je ne vais pas vous lire tout le passage, mais vous pouvez voir que la banque Markazi déclare qu'elle «maintains reserves in bonds issued by foreign sovereigns or «supranationals» in carrying out its monetary policies [and that] [a]s part of its foreign currency reserves», elle détient les titres de créance, titres également en cause dans la présente instance[121].

25. Dans sa description d'actifs du même type, à savoir des obligations étrangères dont la banque Markazi est bénéficiaire, et qui ont fait l'objet d'une procédure en dehors des Etats-Unis, l'expert de la banque Markazi a déclaré que «les avoirs saisis paraissent même être affectés en réalité à des fins monétaires ou autres fins souveraines … . Ils ne sont *certainement pas affectés en tout cas à des fins économiques ou commerciales de droit privé*.»[122]

26. Il ressort de ce qui précède que la banque Markazi a clairement indiqué que les activités en cause dans la présente instance étaient liées à la gestion de ses réserves en devises étrangères. Cette gestion des réserves de devises étrangères est incontestablement une activité souveraine. Elle est donc bien loin des transactions commerciales ordinaires comme l'achat de cartouches d'encre. La Cour notera d'ailleurs, tout comme les Etats-Unis, que l'Iran ne se prononce pas sur les déclarations faites devant les tribunaux américains qui soulignaient bien la nature souveraine de ces activités. L'Iran cherche simplement à faire comme si de telles déclarations n'avaient jamais été faites.

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[121] Brief for Defendant-Appellee Bank Markazi aka Central Bank of Iran, *Peterson* v. *Bank Markazi* (2d Cir. 31 août 2015), (Bank Markazi describing itself as an "instrumentalit[y] acting in a sovereign capacity"), No. 15-690, p. 38 (EPEU, annexe 235).

[122] Frédéric Dopagne, avis juridique sur l'immunité d'exécution de la banque centrale de la République islamique d'Iran (banque Markazi) en vertu du droit international dans le cadre de la procédure en validation de saisie-arrêt pendante devant le tribunal d'arrondissement de Luxembourg sous le rôle nº 177.393 (16 mars 2018), par. 63-64 (annexe 120, CMEU — dossier des juges, onglet nº 13).

VI. Le simple fait qu'une entité privée puisse effectuer des opérations similaires ne fait pas de la banque Markazi une «société» au sens du traité

27. Malgré les nombreuses déclarations de la banque Markazi devant les juridictions américaines, l'Iran cherche à prétendre que ces transactions peuvent être considérées comme étant de nature commerciale[123] au motif que les placements en obligations souveraines étrangères sont «une pratique courante dans l'économie actuelle»[124]. Il n'en demeure pas moins, ce que l'Iran ne conteste pas, que la banque Markazi effectue de telles transactions dans le cadre de son activité d'investissement et de gestion des réserves de devises étrangères. L'Iran ne conteste pas non plus que la gestion des réserves de devises étrangères est une fonction souveraine spécifique. Le fait que la banque Markazi s'acquitte de ces fonctions souveraines en recourant à une pratique commerciale répandue ne transforme pas son activité d'une activité souveraine en une activité commerciale.

28. Que la banque Markazi puisse réaliser un profit sur son investissement des réserves de devises étrangères, ou payer des impôts sur ce profit, ne fait pas non plus passer son activité de souveraine à commerciale. Il n'est pas étonnant que l'investissement par une banque centrale de ses réserves en devises puisse donner lieu à des profits. Il n'est pas non plus inhabituel que les bénéfices générés par une banque centrale soient reversés à l'Etat ; l'Iran n'est pas un cas isolé à cet égard. Le fait que le législateur iranien ait créé la banque Markazi de telle sorte qu'elle paie à l'Etat des impôts sur les bénéfices n'est pas pertinent pour l'analyse menée ici et ne change rien à la nature de l'activité sous-jacente. La gestion et l'investissement des réserves étrangères d'un Etat restent une activité souveraine, que l'Etat choisisse ou non d'imposer les bénéfices résultant de ces investissements.

29. En outre, l'unique décision rendue par un tribunal d'investissement invoquée par l'Iran à son soutien ne lui est pas utile. En effet, dans l'affaire *CSOB c. République slovaque,* la banque en cause était explicitement une «banque commerciale», ce qui est précisé au premier paragraphe de la sentence. Cela la distingue déjà de la banque Markazi, qui n'est pas une banque commerciale. Ensuite, le tribunal devait interpréter l'article 25, paragraphe premier, de la convention CIRDI afin de déterminer si cette banque commerciale appartenant à un gouvernement pouvait être considérée comme un «ressortissant d'un autre Etat contractant». Le tribunal a conclu qu'elle pouvait l'être, à

[123] RI, par. 3.27-3.36.

[124] RI, par. 3.28.

moins qu'elle n'agisse en tant que «agent for the government or is discharging an essentially governmental function»[125].

30. Le tribunal examina alors deux séries d'activités de la demanderesse, à savoir 1) des activités de prêt pour des opérations commerciales que l'Etat voulait soutenir et 2) l'adoption de mesures visant à attirer des capitaux privés pour son activité bancaire restructurée. Il détermina que la première série d'activités était à juste titre considérée comme commerciale parce que les «lending activities to private parties do not become sovereign in nature simply because they are directed by a State in a non-market economy»[126]. Ces activités sont toutefois très différentes de la définition de la politique monétaire et de la gestion des réserves monétaires d'un Etat, qui, elles, sont des activités relevant exclusivement de la compétence d'une entité souveraine. Le tribunal aborda ensuite la deuxième série d'activités de la banque en cause dans l'affaire pendante devant lui, et il estima que les mesures prises spécifiquement pour lui permettre de fonctionner comme une «banque commerciale indépendante»[127] ne différaient pas dans leur nature des mesures qu'une banque privée pouvait prendre, même si l'Etat en cause avait un intérêt dans la CSOB et dans sa survie au sein d'une économie de marché[128]. En la présente instance, l'Iran n'a pas essayé de démontrer en quoi la banque Markazi pouvait prétendre s'identifier à une «banque commerciale indépendante» ou exercer des activités caractéristiques d'une telle entité. Au contraire, la banque Markazi a toujours été cohérente dans sa qualification en tant qu'entité souveraine menant des activités souveraines.

31. Dans une affaire plus pertinente, l'affaire *Paushok c. Mongolie*, sur laquelle nos contradicteurs sont très vite passés, un tribunal d'investissement avait été chargé, comme dans notre cas, de déterminer non pas le statut de la banque centrale elle-même, mais celui des activités contestées. Il devait déterminer, en particulier, si ces activités constituaient des actes *de jure imperii*, autrement dit, des actes régaliens de l'Etat. Le tribunal jugea que la détention et la gestion des réserves de devises étrangères d'un Etat constituaient une activité effectuée dans le cadre de

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[125] *Ceskoslovenska Obchodni Banka, A.S.* v. *The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, par. 17 (24 mai 1999) (DEU, annexe 290) (citant Aron Broches, «The Convention on the Settlement of Investment Disputes between States and Nationals of Other States», in Académie de droit international, *Recueil des Cours*, vol. 136 (1972), p. 331 et 354-355).

[126] DEU, par. 5.19.

[127] *Ceskoslovenska Obchodni Banka, A.S.* v. *The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, par. 21 (24 mai 1999).

[128] DEU, par. 5.19-5.20.

l'exercice des pouvoirs souverains spécifiques de la banque, même si l'activité elle-même, à savoir le transfert de dépôts en or, était une activité que des acteurs commerciaux pouvaient également exercer[129]. Le tribunal eut alors

> «no hesitation in concluding that MongolBank acted *de jure imperii* … when it exported … gold for refining and deposited it or its value in an unallocated account in England «with the purposes of increasing the country's reserves». Those actions were *de jure imperii* and went beyond a mere contractual relationship.»[130]

VII. Conclusion

32. Monsieur le président, Mesdames et Messieurs les juges, la banque Markazi, la banque centrale de l'Iran, est une entité souveraine qui exerçait des activités souveraines et non des activités de nature commerciale. La banque Markazi n'est donc pas une «société» au sens du traité d'amitié et les demandes de l'Iran au titre des articles III, IV et V, dans la mesure où elles sont liées au traitement de la banque Markazi, doivent être rejetées. Ceci conclut ma plaidoirie. Je vous demanderai, Monsieur le président, de bien vouloir donner la parole à mon collègue, M. John Daley.

Le VICE-PRESIDENT, faisant fonction de président : Je remercie Mme Boisson de Chazournes. I give the floor to Mr. John Daley. You have the floor, Sir.

Mr. DALEY:

IRAN HAS FAILED TO ESTABLISH A CLAIM UNDER ARTICLE III (1) AND (2) OF THE TREATY

I. Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you again on behalf of the United States of America.

2. I will be addressing Iran's claims under Article III, paragraphs 1 and 2, of the Treaty of Amity.

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[129] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company* v. *The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, par. 592 (28 avril 2011) (DEU, annexe 291 — dossier des juges, onglet n° 14).

[130] *Ibid.*

II. Article III (1)

3. I will begin with paragraph 1. The operative phrase in the text of Article III, paragraph 1, is "shall have their juridical status recognized"[131]. The Treaty does not contain a definition of these terms. But the ordinary meaning is limited: to recognize a company's "juridical status" means recognizing the company's existence as a legal entity. It does not confer any other rights upon a company.

4. The second sentence of the paragraph makes this clear. It sets forth the understanding of the Parties that "recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized"[132]. Taken as a whole, Article III, paragraph 1, provides for the acknowledgment of the existence of companies but does not grant such companies any other legal rights.

5. This narrow meaning is confirmed by the negotiating history of the Treaty. During negotiations, the United States explained to Iran that "recognition" of a company's "juridical status" means recognizing the company as a legal entity, primarily for purposes of asserting or defending claims in a judicial proceeding. Instructions from the US State Department to negotiators described Article III, paragraph 1, as follows: "It merely provides their recognition as corporate entities principally in order [that] they may prosecute or defend their rights in court as corporate entities. In this sense paragraph one [is] related [to] paragraph two", which is the paragraph relating to access to courts[133]. The instructions go on to say: "[c]orporate status should be recognized [to] assure [the] right [of] foreign corporate entities . . . [to] free access [to] courts [to] collect debts, protect patent rights, enforce contracts, etc."[134].

6. A subsequent cable from the US Embassy confirmed that Iran understood the United States' explanation of this narrow scope[135]. The negotiation history does not indicate that Iran ever took a different view of the interpretation of this provision.

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[131] Treaty of Amity, Article III (1).

[132] *Ibid.*

[133] Telegram from US Department of State, No. 936, to US Embassy in Tehran, 9 Nov. 1954 (CMUSA, Ann. 135).

[134] *Ibid.*

[135] Telegram from US Embassy in Tehran, No. 1176, to US Department of State, 29 Nov. 1954, p. 1 (MI, Ann 4).

7. Evidence from the negotiations of other US treaties with similar language also confirms the meaning of paragraph 1. For instance, during the negotiation of a substantially similar treaty concluded by the United States with Belgium, the US State Department explained that the language only required that each country "acknowledge that a corporation is actually existent and endowed with legal being when the law of the other country has created it and given it existence"[136]. The Court will no doubt recall that in the *Oil Platforms* case, it considered the negotiating history of other, contemporaneous US friendship, commerce and navigation treaties as relevant to the interpretation of the Treaty of Amity[137].

8. These sources confirm what is clear from a plain reading of Article III, paragraph 1. This provision was only intended to ensure that legal persons could, on the basis of being incorporated in one of the Parties, have "legal being" in the territory of the other Party.

9. As you heard on Monday, Iran takes a very different view. According to Iran, the reference to "juridical status" in Article III, paragraph 1, requires the Parties to recognize an apparently *inviolable* "*separate* juridical status" of companies with reference solely to the law of the State of incorporation[138]. Iran's interpretation of this provision is unsupported by the terms of the Treaty, read in context, and it is also directly contradicted by its negotiating history.

10. In support of its argument on Monday, Iran did not analyse the text of the Treaty, its context or object and purpose, much less examine the negotiating history. Iran instead relied on paragraph 87 of the preliminary objections Judgment, claiming that the Court has already decided that Article III, paragraph 1, requires recognition of separate juridical status[139]. This is a new argument, which seems to betray a certain lack of conviction in Iran's pleaded case.

11. In any event, Iran reads far too much into paragraph 87. In the preliminary objections phase, the Court was not tasked with determining the meaning of "recognize" or even "juridical status". Rather, the question before the Court was whether Bank Markazi qualified as a

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[136] Instruction from the US Department of State to US Embassy in Brussels, 25 Mar. 1957, p. 4 (CMUSA, Ann. 137).

[137] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 814-815, para. 29.

[138] CR 2022/15, p. 65, para. 40 (Thouvenin); see also RI, para. 4.7.

[139] CR 2022/15, pp. 64-65, para. 36. (Thouvenin).

"company"[140]. The Court noted the threshold requirement that an entity cannot be characterized as a "company" under the Treaty unless it has its own legal personality, conferred on it by the law of the State where it was created[141]. That is, its own legal existence.

12. So for this reason, Iran's attempt to draw key concepts from paragraph 87 of the Court's preliminary objections Judgment is misplaced. The Court was simply not faced with examining the meaning of juridical status or recognition. Only "company". And all the Court concluded in paragraph 87 was that the necessary, but not sufficient, first step to determining whether an entity is a company is examining whether it has its own legal personality under the law of incorporation.

13. As you heard on Monday, in an attempt to give its preferred content to the terms "recognize" and "juridical status", Iran relies on this Court's decisions in *Barcelona Traction* and in *Diallo*[142]. But these decisions do not assist Iran.

14. Neither case concerned the issue of recognition of companies' juridical status or the analysis of a provision similar to Article III, paragraph 1. Rather, the primary issue addressed by the Court was whether the right being invoked was the right of a national or corporation, and thus, whether the claimant State could, under customary international law, exercise diplomatic protection on behalf of the national[143].

15. To be sure, the cases did discuss the distinct rights of shareholders and corporations. But the Court nowhere set forth a universal definition of "recognition of juridical status". Moreover, the Court stated in *Barcelona Traction* that "the law has recognized that the independent existence of the legal entity cannot be treated as an absolute"[144].

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[140] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 36, para. 84.

[141] *Ibid.*, p. 37, para. 87.

[142] CR 2022/15, p. 65, para. 39 (Thouvenin); see also MI, paras. 3.42, 3.44-3.46; RI, paras. 4.6 *(a)* (i), 4.9, 4.13, fn. 368.

[143] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 39, paras. 54-55; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 606, para. 64.

[144] *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.

16. And this is where Iran's theory breaks down. Because, according to Iran's interpretation of Article III, paragraph 1, of the Treaty, any form of veil-piercing would violate the Treaty. Under Iran's view, corporate separateness is inviolable and immutable in every circumstance[145].

17. Yet this is squarely at odds with the Court's Judgment in *Barcelona Traction*, on which Iran puts so much weight. There, the Court characterized the "wealth of practice" of veil-piercing. And contrary to Iran's characterization, the Court did not provide an exhaustive list of circumstances in which lifting the corporate veil might be appropriate. Rather, it indicated that

> "the veil is lifted, *for instance*, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations"[146].

18. Mr. President, Members of the Court, given the wealth of practice on piercing the corporate veil, had the Parties intended to prohibit it when they agreed to Article III, paragraph 1, of the Treaty, there would have surely been some indication of this in the negotiating history.

19. But that is not what we see. On the contrary, what we see is a distinct and limited meaning of what it means to recognize juridical status.

20. Nor has Iran pointed to any practice in which similar treaty text has been interpreted by States to confer companies with corporate inviolability. Iran's broad, unequivocal reading of paragraph 1 is incorrect.

21. Mr. President and Members of the Court, Iran does not allege that the US measures denied Iranian companies' legal existence. Or disallowed them from acting as "companies" in US courts or otherwise. To the contrary, the very fact of the cases in which Iranian companies have appeared and participated demonstrates that the companies' juridical status has been recognized. And for this reason, there has been no violation of Article III, paragraph 1.

Mr. President, I note the time. I am about halfway through my submissions. If you wish to break now, this would be a convenient spot, or I am content to go on.

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[145] CR 2022/15, p.68, para. 48 (Thouvenin).

[146] *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 (emphasis added).

III. Article III (2)

22. I turn now to Article III, paragraph 2. Here again, Iran is trying to rewrite the text of paragraph 2 to add guarantees that are not in the Treaty.

23. The first sentence of paragraph 2 provides that companies of a Party to the Treaty "shall have freedom of access to the courts of justice and administrative agencies" of the other Party.

24. This provision simply grants a company the right of access to the courts to pursue whatever other rights the company claims to have. It does not do anything more.

25. The sentence goes on to reference "all degrees of jurisdiction" — which means access to courts of first instance and appeal — "both in defense and pursuit of their rights" — meaning as a plaintiff or a defendant — and finally, "to the end that prompt and impartial justice be done". This latter phrase is the inspiration for Iran's arguments, and I will come back to that in a moment.

26. Mr. President, Members of the Court, in the preliminary objections phase of this case, the United States made clear its view that Article III, paragraph 2, only provided for access, and did not guarantee that substantive or procedural rights would prevail or be available[147]. Iran made its contrary argument — in very similar terms to what you heard on Monday[148] — that the Article provided for unqualified assertion of rights, whether under domestic or international law[149].

27. And then the Court ruled. And had this to say in paragraph 70 of its preliminary objections Judgment. Paragraph 2

> "does not seek to guarantee the substantive or even the procedural rights that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party, but only to protect the possibility for such a company to have access to those courts or authorities with a view to pursuing the (substantive or procedural) rights it claims to have"[150].

28. In light of the undisputed fact that the Iranian companies were at all times permitted to appear and present all their arguments in US courts, Article III, paragraph 2, has been complied with and Iran's claims should be rejected.

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[147] CR 2018/29, p. 34, para. 30 (Boisson de Chazournes).

[148] Compare CR 2022/16, p. 10, para. 2 (Wordsworth) with CR 2018/31, p. 12, para. 6 (Wordsworth).

[149] CR 2018/31, p. 12, paras. 7-9 (Wordsworth).

[150] *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.

29. On Monday, Iran tried to reopen and wave away the Court's ruling, but the points made do not assist its case.

30. For example, Iran said that the Court's decision was focused on whether Article III, paragraph 2, established "any rights with respect to assertion and grant of sovereign immunities"[151]. But this is a distinction without a difference. The reasoning and holding of the Court provide the same answer whether the question is assertion and grant of a purported sovereign immunity right under the Treaty, or assertion and grant of a purported right to separate juridical status under the Treaty. Article III, paragraph 2, does not guarantee any rights, procedural or substantive, merely the access to the Court to establish or assert whatever rights a party thinks it has.

31. Iran clings to the Court's use of the term "possibility" in paragraph 70[152], and also asserts that Article III, paragraph 2, requires that its ability to assert its defences be "meaningful" or "not illusory", citing to the phrase "to the end that prompt and impartial justice be done"[153]. The thrust of the points seemed to be that, because a putative separate juridical entity defence has been removed by legislation, there is no possibility of success on the defence, and therefore no freedom of access[154].

32. Again, the difficulty for Iran with this argument is that the very same thing could be said for the defence of sovereign immunities and the effect that the challenged legislation had on that defence. Yet the Court's decision did not find any room for a possible violation of Article III, paragraph 2, in such a circumstance. The provision provides for access and is not addressed to procedural or substantive rights. The same result must apply here.

33. One final point. On Monday, Iran's arguments hinged on what it characterized as the retroactive character of the challenged US measures[155]. Ms Grosh has already addressed why Iran's characterization of the various measures as retroactive is simply inaccurate.

34. And while we take note of the language counsel quoted[156] from the European Court of Human Rights' *National & Provincial Building Society* decision, the point we have made — and will

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[151] CR 2022/16, p. 12, para. 8 *(a)* (Wordsworth).

[152] CR 2022/16, p. 12, para. 8 *(c)* (Wordsworth).

[153] CR 2022/16, p. 11, paras. 5-6 (Wordsworth).

[154] CR 2022/16, p. 12, para. 8 (Wordsworth).

[155] See e.g. CR 2022/16, p. 13, para. 8 *(c)* (ii) (Wordsworth).

[156] CR 2022/16, p. 15, para. 14 (Wordsworth).

make again — is that the treaty provision at issue in that case is broader and very different from Article III, paragraph 2[157], and of course neither the United States nor Iran are parties to that treaty.

35. In summary, Mr. President and Members of the Court, Article III, paragraph 2, has a limited role: to require the host State to grant foreign companies the right of access to the courts to pursue whatever other rights the company claims to have. It does not do anything more. Because the Iranian entities at issue in this case were afforded the ability to appear in court to assert their rights, there has been no violation of Article III, paragraph 2, and Iran's claims should be rejected.

IV. Conclusion

36. Mr. President, Members of the Court, that concludes my submissions on Article III. I thank you for your attention, and after the lunch break I would ask you to call upon Ms Grosh to continue our submissions.

The VICE-PRESIDENT, Acting President: I thank Mr. Daley, whose statement brings to an end this morning's session. The Court will meet again this afternoon, at 3 p.m., to hear the remainder of the first round of oral arguments of the United States. The sitting is adjourned.

The Court rose at 1.05 p.m.

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[157] RUSA, para. 9.25.