Corrigé
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*CR 2022/18*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2022**

***Public sitting***

***held on Wednesday 21 September 2022, at 3 p.m., at the Peace Palace,***

***Vice-President Gevorgian, Acting President, presiding,***

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

**VERBATIM RECORD**

**ANNÉE 2022**

***Audience publique***

***tenue le mercredi 21 septembre 2022, à 15 heures, au Palais de la Paix,***

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

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

**COMPTE RENDU**

| | | |
|---|---|---|
| *Present:* | Vice-President | Gevorgian, Acting President |
| | Judges | Tomka |
| | | 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

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The VICE-PRESIDENT, Acting President: Please be seated. The sitting is open. The Court meets this afternoon to hear the remainder of the first round of oral arguments of the United States. I now give the floor to Ms Lisa Grosh.

Ms GROSH:

## IRAN HAS FAILED TO ESTABLISH A CLAIM UNDER ARTICLE IV (1) OF THE TREATY

### I. Introduction

1. Mr. President, Members of the Court, good afternoon. I will be addressing Iran's claims under Article IV, paragraph 1, of the Treaty of Amity. Mr. President, Members of the Court, the crux of Iran's claim under Articles III and IV is that the turnover of assets of its agencies and instrumentalities to satisfy US court judgments, in the very narrow circumstances of Iran's refusal to pay terrorism-related judgments against it, is a violation of the Treaty of Amity. You heard Mr. Daley describe why Iran's claim under Article III fails. Iran asserts an almost identical claim under Article IV (1), once again referring to the *Barcelona Traction* case and the *Bancec* decision on piercing the corporate veil[1]. Mr. Daley and I addressed those cases this morning and I will not refer to them further.

2. Article IV (1) does not say anything about juridical status, so in asserting a near-identical claim as under Article III, Iran urges the Court to wade into the murky and frankly contradictory decisions of investor-State tribunals interpreting the phrase "fair and equitable treatment" (FET). Iran itself admitted in its Memorial that the "seemingly open-ended nature of the terms 'fair' and 'equitable' [treatment has led] to difficulties when it has come to giving more specific content to such obligations"[2]. Iran nonetheless invites the Court to resolve those difficulties for the first time, despite the lack of agreement among States, scholars and arbitrators regarding the meaning of "fair and equitable treatment". The Court should decline its invitation.

3. The chart Iran provided at tab 13 of the judges' folder demonstrates why this Court should refrain from engaging on this issue. To be clear, the production of the chart at this hearing constitutes

[1] CR 2022/16, pp. 23-24, para. 44 (Wordsworth).

[2] RI, para. 5.22.

an unauthorized written legal submission[3]. Iran had ample time to brief these 172 cases during the course of the written submissions, which would have afforded the United States an opportunity to consider and respond to this lengthy and detailed document. The long quotes in Iran's "elements" column address numerous alleged facets of "fair and equitable treatment" that Iran did not even see fit to address in its oral argument. As such, the Court should not rely on this chart.

4. Nonetheless, a quick skim of the chart demonstrates the United States' point. Put bluntly, these decisions are all over the map. Some tribunals purport to rely on customary international law; others are interpreting a supposed autonomous standard. The elements that they assert are part of "fair and equitable treatment" vary from case to case, both in terms of what elements are included, and how those elements are described. Iran's counsel, pointing to a slide, told the Court that it is "well established" that FET includes a particular set of four standards[4]. And yet in Iran's chart of 172 cases, we could not find a single case that includes all four elements as they are described on its slide. Only ten of the 172 entries in Iran's chart include a reference to "idiosyncratic" conduct, for example, despite Iran's assertion that it is well established. And while Iran argues that "discriminatory" conduct is prohibited, many of the cases in Iran's chart refer more specifically to "sectional or racial prejudice", a variation of "discrimination" that Iran has not alleged in this case.

5. None of the cases included in the chart is interpreting the Treaty of Amity. Iran is not a party to any of the treaties listed in its chart. The few US bilateral investment agreements referenced in the chart contain different language than the Treaty of Amity, and they were all negotiated several decades after the Treaty of Amity. Indeed, Iran would have you believe that in negotiating the Treaty of Amity in 1955, Iran and the United States intended to incorporate standards of treatment developed under a separate treaty programme negotiated in the 1990s, as interpreted by arbitral tribunals in the 2000s. It is also notable that the treaty that features most prominently in Iran's chart — the Energy Charter Treaty, which entered into force in 1998 — includes neither the United States nor Iran as parties, and contains vastly different language in its relevant clause. Standards like "legitimate expectations" are not included expressly in any of these treaties; "legitimate expectations" was not found by any tribunal to be required under "fair and equitable

[3] Rules of Court, Arts. 45 and 49.

[4] CR 2022/16, pp. 17-18, para. 24 (Wordsworth).

treatment" until the *Tecmed* decision in 2003[5]. Imposing such standards on the 1955 Treaty of Amity, despite no indication in the Treaty text or negotiation history that the Parties intended to be so bound, is untenable.

6. Perhaps most importantly, many of these cases recognize both that the language in the various treaties is unclear, and that the standard for "fair and equitable treatment" remains in dispute. As the tribunal in *Hochtief AG* v. *Argentine Republic*, chaired by Professor Lowe, wrote, "[t]he Tribunal is mindful of the controversy concerning the precise definition and content of the FET standard. The Treaty does not define the FET standard, and the decision of other tribunals (to which both Parties referred) are not in themselves binding sources of international law."[6] This case is in Iran's chart at line 85. That the *Hochtief* tribunal went on to adopt the *Waste Management II* test for fair and equitable treatment does not mean that the standard is any less controversial, or that this decision is a binding source of international law.

7. Mr. President, Members of the Court, the Court should not head down this path. As a matter of judicial economy, the Court can dismiss Iran's Article IV (1) claims without engaging in this complicated and controversial interpretation of "fair and equitable treatment". First, as Mr. Bethlehem explained this morning, the Court can dismiss all of Iran's claims, including the Article IV (1) claim, due to Iran's unclean hands. It should further dismiss most of Iran's claims for a failure to exhaust local remedies; and, as Professor Boisson de Chazournes demonstrated, because Bank Markazi is not a "company" under the Treaty. Should any of Iran's claims remain, the Court need not definitively interpret "fair and equitable treatment" because Iran's claims fail under either the United States' or Iran's interpretations.

8. Mr. President, Members of the Court, I will cover three topics in the remainder of my discussion of Article IV (1). First, I will outline the proper legal interpretation of Article IV (1), which reflects the minimum standard of treatment owed to foreign investors and their property under customary international law, including the protection against the denial of justice. Second, I will demonstrate that none of the challenged US measures rise to the level of a denial of justice. And

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[5] *Técnicas Medioambientales Tecmed S.A.* v. *Mexico*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003).

[6] *Hochtief AG* v. *Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (29 Dec. 2014), para. 219.

finally, I will turn to Iran's flawed standard for Article IV (1) and show that, even under its proposed standard, Iran has not established that any of the US measures violate Article IV (1).

## II. Article IV (1) ensures the minimum standard of treatment for foreign investors under customary international law

9. Article IV (1) provides that:

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

10. The United States has fully briefed the proper interpretation of Article IV (1) in its Counter-Memorial and Rejoinder[7], and I do not intend to repeat those arguments in full. In short, it is clear that Articles IV (1) and IV (2) reflected the various components of the minimum standard of treatment, consistent with the Court's decision on preliminary objections in this case[8].

11. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. It is generally accepted that the minimum standard of treatment includes at least three facets, each of which is reflected in the Treaty. First, it includes a requirement that property not be expropriated without compensation. Second, it requires full protection and security. Both of these facets of the minimum standard are addressed in Article IV, paragraph 2, and will be discussed by my colleague Mr. Jedrey. Third, the minimum standard of treatment prohibits a denial of justice. This aspect of the minimum standard is what is captured in Article IV (1). The unreasonable and discriminatory and effective means clauses in Article IV (1) reflect particular aspects of the obligation not to deny justice, which is captured in the more general "fair and equitable treatment" clause[9]. Iran admits that the fair and equitable treatment, even under its broad interpretation, at least includes protections against denial of justice.

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[7] CMUSA, Chap. 14 (A-B); RUSA, Chap. 10.

[8] CMUSA, Chap. 14 (A); RUSA, Chap. 10 (A).

[9] CMUSA, paras. 116-117.

12. There is no indication that either Party — or anyone else in 1955 — understood "fair and equitable treatment" as requiring anything beyond the minimum standard of treatment under customary international law. This is best illustrated by the OECD draft Convention on the Protection of Foreign Property and its commentary, drafted just a few years after this Treaty. The OECD wrote that the fair and equitable standard "conforms in effect to the minimum standard which forms part of customary international law"[10]. Iran's assertion that arbitral tribunals after the year 2000, interpreting treaties from the 1990s, have not relied on the OECD draft convention[11] does not render it uninformative to interpret a treaty from 1955. Professor Vandevelde's treatise on US FCN treaties, quoted by Iran in its presentation on Monday, also does not undermine this point. That Professor Vandevelde describes the FET provision as independent *from other provisions in the Treaty*[12] does not mean that it is independent from the minimum standard of treatment.

13. In short, Article IV (1) and (2) represent the minimum standard of treatment, and the three provisions of Article IV (1) represent the denial of justice aspect of the minimum standard. Nothing Iran has argued establishes otherwise. As the Court made clear in *Rights of Nationals of the United States in Morocco*, it is up to Iran, as the claimant, to demonstrate that the minimum standard of treatment under customary international law has evolved beyond denial of justice, expropriation and full protection and security[13]. Iran has made no showing here. Instead of establishing the content of customary international law through State practice and *opinio juris*, the well-accepted test that the Court reiterated in the *Jurisdictional Immunities* case[14], Iran relies on its 172 investor-State arbitral decisions[15]. This is plainly insufficient, as these cases do not represent State practice or *opinio juris*, nor for that matter, do they engage in any robust analysis of State practice or *opinio juris*[16].

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[10] OECD, 1967 Draft Convention on the Protection of Foreign Property, reprinted in *International Legal Materials*, Vol. 7, 1968, pp. 119-120 (RUSA, Ann. 374).

[11] CR 2022/16, p. 19, para. 26 *(c)* (Wordsworth).

[12] CR 2022/16, p. 19, para. 27 (Wordsworth).

[13] *Rights of Nationals of the United States of America in Morocco (France* v. *United States), Judgment, I.C.J. Reports 1952*, p. 200.

[14] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 120-122.

[15] MI, para. 5.29 *et seq.*; RI, para. 6.13 *et seq.*

[16] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries, Draft Conclusion 13, Comment 3, UN doc. A/73/10, 2018 (RUSA, Ann. 381).

## III. Iran has not established that any of the challenged measures amount to a denial of justice

14. Mr. President, Members of the Court, the United States laid out the standard for denial of justice in our Counter-Memorial[17]. Again, I will not review the details of our arguments, but will highlight two critical points. First, a denial of justice must involve some violation of rights in the administration of justice, most commonly judicial proceedings. And second, as Jan Paulsson notes, there is a high threshold for demonstrating a denial of justice, requiring a notoriously unjust or egregious violation in the administration of justice which offends a sense of judicial propriety[18].

15. There is nothing unreasonable, let alone unjust or egregious, about the measures in question. None of the measures denied Iranian entities the ability to participate fully in the litigation against them, and Iran does not complain that any of the judgments in question misapplied the relevant law, let alone in an egregious manner[19].

16. Iran instead complains that the measures denied its entities the ability to assert that they were separate juridical entities from Iran. But these arguments are unavailing as assertions of denial of justice. Three US measures — the 1984 designation of Iran as a State sponsor of terrorism, Executive Order 13599 and Section 1226 of the NDAA for 2020 — are easily dispensed with, as illustrated on the slide. The first, the 1984 designation, applies only to the Iranian State, and the Executive Order 13599 blocked assets only of Iran and Bank Markazi, in the context of the cases that are at issue here. Because Article IV (1) only applies to Iranian nationals or companies, and Bank Markazi does not qualify as a "company" for purposes of the Treaty, the second measure cannot give rise to Iran's claims under Article IV (1). More fundamentally, the 1984 designation and the blocking of assets as authorized by Executive Order 13599 do not engage the administration of justice in any fashion whatsoever, let alone in a notoriously unjust or egregious manner. Finally, the third measure, Section 1226, cannot constitute a breach of any provision of the Treaty of Amity because it was not enacted until after the United States terminated the Treaty.

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[17] CMUSA, paras. 14.33-14.37.

[18] Jan Paulsson, *Denial of Justice in International Law* (2005), p. 60 (CMUSA, Ann. 173).

[19] CMUSA, paras. 14.40-14.41; RUSA, paras. 10.28-10.30.

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

17. I will next address Section 201 *(a)* of TRIA and Section 1610 *(g)* of the FSIA together, since both allow plaintiffs who have obtained a judgment against a State sponsor of terrorism to enforce that judgment against the State's assets as well as the assets of its agencies and instrumentalities[20]. Contrary to the constant refrain we hear from Iran, neither of these measures is or ever was targeted at Iran. Section 1610 *(g)* permits attachment and execution against any State judgment debtor and its agencies and instrumentalities, while Section 201 *(a)* of TRIA applies to all State sponsors of terrorism as well as individual terrorists and terrorist organizations. And also contrary to Iran's repeated, unfounded assertions, neither measure is retroactive, as I explained earlier today[21]. So, Iran's only complaint with regard to these measures is that they allow attachment and execution against the assets of a State's agencies and instrumentalities to satisfy a terrorism-related judgment against that State.

18. Let us be clear, Iran has pointed to no authority, and to the best of our knowledge there is none, to suggest that the denial of justice standard requires the preservation of separate corporate status in all circumstances. Virtually all States, including both common law and civil law, permit the broader practice of piercing the corporate veil. The reasons for doing so vary by jurisdiction. The practice of piercing the corporate veil is so widespread that one treatise characterized it as a general principle of international law as that term is used by Article 38 (1) *(c)* of the Court's statute[22]. Iran has provided no authority and no reason why the type of attachment at issue in this case would constitute a denial of justice.

**Section 8772 of Title 22 of the United States Code**

19. This brings me to the last measure challenged by Iran, Section 8772. As I explained earlier, Section 8772 facilitated the attachment of some assets Bank Markazi was holding, through intermediaries to satisfy certain terrorism-related judgments. Again, the Court should not even consider this measure in the context of Article IV (1) because it applies only to Bank Markazi, which is not a "company" within the meaning of the Treaty.

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[20] CMUSA, paras. 6.11-6.15.

[21] RUSA, paras. 10.34-10.35.

[22] Albert Badia, *Piercing the Veil of State Enterprises in International Arbitration* (2014), pp. 48-49 (CMUSA, Ann. 186).

20. In any event, Section 8772 did not deny justice to any Iranian entity. The points I made with respect to piercing the corporate veil apply equally here. Iran's vague retroactivity arguments about Section 8772 also do not give rise to valid claims for denial of justice. Iran argues that Section 8772 prevented Iranian entities from raising the defences of *res judicata*, limitations of actions and collateral estoppel in ongoing proceedings. Yet Iran has not shown that these arguments were otherwise available. More importantly, Iran has provided no authority for the proposition that the United States was required to guarantee any particular defences or that eliminating any such defences in the context of enforcement proceedings against assets rises to the level of a denial of justice.

The VICE-PRESIDENT, Acting President: I am sorry to interrupt, but can you please speak a bit more slowly? The interpreters are having difficulties.

Ms GROSH: Yes. Thank you, Mr. President.

The VICE-PRESIDENT, Acting President: I thank you. Please continue.

Ms GROSH:

21. In contrast, the United States has cited authority, including in the European Court of Human Rights' decision in *National & Provincial Building Society* (hereinafter *NPBS*), holding that States are not prevented under international law from changing the governing law once a case is active[23]. Mr. Daley explained why that case is irrelevant to Article III, but it still remains relevant to Iran's Article IV arguments on retroactivity. As in this case, the measure in *NPBS* changed the substantive law in an ongoing case, and the court held there that such a change did not violate certain judicial access rights. Iran argued on Monday that *NPBS* is distinguishable because it involved fixing a technical tax loophole, which is in the public interest[24]. But if the public interest is relevant to the question of retroactivity, then certainly establishing a means to enforce unpaid terrorism-related judgments is an even more compelling public interest, as demonstrated by the level of debate that it received for years in the United States Congress and Executive Branch.

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[23] CMUSA, paras. 14.48-14.49; RUSA, paras. 10.47-10.49.

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

22. Further, Iran challenged the constitutionality of the retroactivity aspect of Section 8772 in the US courts, including in the US Supreme Court, and had a full hearing of its arguments. Thus, far from a denial of justice, Iran was fully heard on this issue at all levels of the US judicial system and its arguments were given their due.

23. Mr. President, Members of the Court, before turning to Iran's expansive description of Article IV (1), I would like briefly to discuss denial of justice in the context of the *Weinstein* case. If the Court accepts that Bank Markazi is not a "company" under the Treaty, and that Iran's claims with regard to several other cases should be disregarded due to Iran's failure to exhaust its claims, then the only two cases of the seven that Mr. Bethlehem outlined this morning that would remain are *Weinstein* and *Bennett*. *Bennett* is out of the case because there was no turnover of assets before the termination of the Treaty. So, in the *Weinstein* case, the plaintiffs brought suit against Iran for its support of a terrorist attack that killed a US citizen. Iran chose not to appear, and the court rendered a default judgment against Iran. Five years later, after Iran failed to pay the judgment, the plaintiffs sought an attachment under TRIA Section 201 *(a)*, and the district court attached the assets of Bank Melli. There can be no doubt that Bank Melli is an instrumentality of Iran; in fact, it is owned 100 per cent by the State of Iran. Bank Melli opted to participate in this phase of the proceedings, presenting detailed arguments about why it believed the attachment was improper. The district court and appellate court gave Iran a full hearing, but ultimately disagreed with Iran's arguments, setting out their reasons in detailed opinions, and it then ordered the sale of Bank Melli's property to pay the judgment against Iran. There was nothing in this process, in which Bank Melli participated fully, that could constitute a denial of justice.

## IV. Even under Iran's deeply flawed proposed legal standard, the United States did not breach Article IV (1)

24. Now let me turn finally to Iran's proposed legal standard for Article IV (1) and its claims under that proposed — but incorrect — standard. In its written submissions, Iran argues that Article IV (1) comprises eight separate obligations, untethered to the minimum standard of treatment.

We responded to this eight-prong test in our written submissions, and I will not repeat those arguments here[25].

25. At the hearing on Monday, Iran focused its argument on a smaller set of standards. First, Iran addressed the Treaty terms regarding unreasonable and discriminatory measures[26]. This is part and parcel of the denial of justice standard, but to the extent that it is an independent standard, Iran has nonetheless failed to establish a breach.

26. First, there was nothing unreasonable about the measures in question. In its Reply, Iran argues that the test to determine whether a measure is "reasonable" contains two parts: (i) whether there was a rational policy, and (ii) whether the US measures were reasonably connected to that policy[27]. The United States easily meets this test.

27. As I described earlier today in my discussion of the legislative history and lengthy debates regarding compensation for US victims of terrorism, the challenged US measures are part of a rational policy to respond to the sustained support of terrorist acts directed at US nationals and US interests by State sponsors of terrorism[28]. Several of the measures are aimed at satisfying valid judgments against Iran and other State sponsors, which have gone unpaid. Moreover, the designation of Iran as a State sponsor of terrorism, which allowed these suits to go forward in the first instance, was based on objective statutory criteria, just as it is for other States. The determination that Iran is a State sponsor of terrorism was made following the 1983 Marine barracks bombing[29].

28. The challenged US measures were reasonably related to this policy[30]. The measures in question authorized attachment only of assets of Iranian entities that are agencies and instrumentalities of the Iranian State, not private Iranian companies. In most cases, these enterprises are wholly owned by Iran. In other cases, the annexes Iran provides with its evidence show that these entities were at least majority-owned by Iranian government agencies.

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[25] CMUSA, paras. 14.51 *et seq.*; RUSA, paras. 10.52 *et seq.*

[26] CR 2022/16, p. 20, para. 31; p. 22, para. 39 *(b)* (Wordsworth).

[27] MI, para. 5.38 *(a)*.

[28] RUSA, para. 10.62.

[29] CMUSA, paras. 6.3-6.6.

[30] RUSA, para. 10.62.

29. Perhaps recognizing that its "reasonableness" claim fails, Iran sought on Monday to add a new component to reasonableness, "proportionality"[31]. "Proportionality" is mentioned nowhere in Article IV (1). Nonetheless, there can be no question about the proportionality of the US measures[32]. Iranian assets were subject to attachment and execution pursuant to valid US court judgments. As I discussed earlier, the US court judgments were based on a systematic and careful review of the evidence of Iranian support, even though Iran did not appear in the proceedings. The judgments made findings of fact and law and awarded damages for horrific violence that resulted in the killing and maiming of hundreds of individuals. TRIA, under which all of these cases were brought, permits attachment only with regard to the compensatory portion of the judgments — in other words, those damages that were aimed at redressing the grave injuries and suffering caused by Iran's conduct[33]. The measures were therefore clearly proportional to the concern being addressed.

30. As an aside, Iran takes issue with the characterization of the judgments as valid, based on Iran's alleged right not to appear because of sovereign immunity. But this is nothing more than an attempt to impermissibly reintroduce the issue of sovereign immunity back into this case, where the Court was absolutely clear in its preliminary objections decision that there is no sovereign immunity obligation in the Treaty.

31. Iran also alleges discrimination in its written pleadings, specifically regarding Section 8772, although it did not emphasize this point on Monday. Iran focuses on the fact that there is no analogous provision applicable to central banks of other States sponsors of terrorism[34]. In its Memorial, however, Iran conceded that differential treatment is not the same as discrimination[35]. Here, the differences in treatment between Iran and other State sponsors of terrorism justify the differential treatment. These differences, including Iran's deliberate and convoluted structuring of its central bank investments through multiple layers in an effort to evade its judgment creditors, are set

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[31] CR 2016/22 p. 21, para. 35 (Wordsworth).

[32] RUSA, para. 10.63.

[33] CMUSA, paras. 6.11-6.12, citing U.S. Terrorism Risk Insurance Act of 2002, Section 201 *(a)*, Pub. L. No. 107-297, 116 Stat. 2322 (2002) (MI, Ann. 13).

[34] RUSA, paras. 10.41-10.45.

[35] MI, para. 5.31.

out in our Rejoinder[36]. As such, there is no basis to conclude that Iranian entities were impermissibly singled out.

32. Iran also emphasized "effective means" on Monday[37]. The "effective means" clause of the Treaty of Amity is limited to means for enforcing contractual rights. Nothing about the measures or their application interfered with the contractual rights of Iranian entities in question. They still have those contractual rights to the extent that the contracts are still in effect on their own terms, and US courts are open to those entities to enforce their contractual rights. All the US measures did was authorize attachment and execution on *proceeds* from those contracts. That does not mean that the contract rights themselves are not enforceable — it just means that the proceeds from those contracts can be attached to pay the judgment debts. If the Iranian entities' contractual rights were not enforceable as against the other parties to the contract, there would be nothing to attach. Furthermore, if Iran is correct, then no contractual proceeds directed to Iranian companies in the United States could ever be subject to attachment, even if the Iranian entity directly owed the debt. This is not how the "effective means" clause operates — it is not a means for Iran or its entities to avoid paying their judgments and any other debts.

33. Iran also tries to assert that "arbitrariness" is part of this Treaty. That standard appears nowhere in the Treaty of Amity — this is Iran's gloss on fair and equitable treatment, or on the "unreasonable or discriminatory" language, to try to shoehorn the *ELSI* pleadings into its case[38]. Its reliance on the *ELSI* case on Monday makes clear that Iran's "arbitrariness" claim is fully redundant of its "unreasonable or discriminatory" claim, or its denial of justice claim. As I have already addressed those issues, no more needs to be said about *ELSI* and Iran's "arbitrariness" argument beyond what we have included in our written submissions[39].

34. Mr. President, Members of the Court, before I conclude, I want to quickly return to the *Weinstein* case as an example for how this might all be applied in the context of the cases Mr. Bethlehem addressed this morning. As we have already seen, the plaintiffs in *Weinstein* had

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[36] RUSA, paras. 10.44-10.45, 12.25 and 12.29.

[37] CR 2016/22, p. 25, para. 46 (Wordsworth).

[38] CR 2016/22, p. 20, para. 33 (Wordsworth).

[39] RUSA, para. 10.13.

obtained a default judgment against Iran for its role in supporting the terrorist act that resulted in the death of a US national, and five years later the plaintiffs relied on TRIA Section 201 *(a)* to execute against the assets of Bank Melli. I will guide you through the application of Iran's articulated standard under Article IV (1) beyond denial of justice in the context of this case:

— So, first: was the execution against Bank Melli's assets arbitrary or unreasonable? No. It was a reasonable action based solely on Iran's support of terrorism, its refusal to participate in the underlying case, and its refusal to pay the judgment. The plaintiffs therefore pursued execution against Iran's agencies or instrumentalities, which was permitted under TRIA Section 201 *(a)* for all State sponsors of terrorism. There is nothing arbitrary or unreasonable about the enforcement of lawfully obtained judgments, including through veil piercing.

— Was it discriminatory? No: TRIA Section 201 *(a)* applied to all State sponsors of terrorism, not just Iran. That the *Weinstein* plaintiffs invoked the statute in connection with its action against Iran does not mean it was discriminatory.

— And finally, there are no contracts at issue in the *Weinstein* case, so the effective means claim does not come into play.

## V. Conclusion

35. Mr. President, Members of the Court, that brings me to the end of my submissions. As I have explained, this Court can dismiss all of Iran's Article IV (1) claims without delving into complicated interpretation questions. Article IV (1) reflects the minimum standard of treatment owed to foreign investors under customary international law, including the protection against denial of justice. As I have outlined, none of the US measures denied justice to any Iranian entities, alone or in combination with each other. And even under Iran's flawed interpretation of Article IV (1), Iran's claims still fail. This Court should therefore dismiss all of Iran's claims under Article IV (1).

36. Mr. President, may I now ask that you call on Mr. Jedrey, who will present arguments concerning paragraph 2 of Article IV.

The VICE-PRESIDENT, Acting President: I thank Ms Grosh. I now give the floor to Mr. Jedrey. You have the floor.

Mr. JEDREY:

## IRAN HAS FAILED TO ESTABLISH A BREACH UNDER ARTICLE IV (2)

### I. Introduction

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

2. I will be addressing Iran's claims under Article IV, paragraph 2, of the Treaty of Amity. As the Court is aware, Article IV, paragraph 2, has two limbs, the first guaranteeing the property of nationals and companies of one Party "the most constant protection and security within the territories of the other . . . Party, in no case less than that required by international law". The second limb provides that "[s]uch property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment . . .".

The VICE-PRESIDENT, Acting President: Mr. Jedr*e*y, I am sorry to interrupt. Could you please speak more slowly to facilitate the work of the interpreters?

Mr. JEDREY: Yes. Apologies, Mr. President.

The VICE-PRESIDENT, Acting President: Thank you.

Mr. JEDREY: "nor shall it be taken without the prompt payment of just compensation".

### II. Most constant protection and security

3. The Parties remain far apart on the interpretation of the first limb of Article IV, paragraph 2. Iran's interpretation of "most constant protection and security" is significantly broader than the traditional understanding of this standard, which is limited to the protection of property from physical harm. In Iran's view, the obligation extends also to some form of "legal security". Iran is wrong, as the United States has shown in its written submissions[40]. And because Iran is wrong, its claims must fail because it has neither alleged nor established any failure by the United States to protect the property of Iranian nationals and companies from physical harm. But, in any event, even accepting

[40] RUSA, Chap. 11, Section A (i); CMUSA, Chap. 14, Sect. C (i).

for the sake of argument that the first limb of Article IV, paragraph 2, extended to legal security, Iran has not established a breach of such a hypothetical obligation[41].

4. On Monday, Iran's counsel chose not to address the first limb of Article IV, paragraph 2, orally but instead rested on Iran's written pleadings[42]. But Iran has not responded in writing to the points in the United States' Rejoinder on the proper interpretation of the "most constant protection and security" obligation. Accordingly, in foregoing its opportunity to address them orally, Iran has left them unrebutted. That is all I will say about the first limb of Article IV, paragraph 2.

## III. Expropriation

5. Turning to the second limb of Article IV, paragraph 2, the interpretive dispute between the Parties is narrower, focusing on two key issues. The first issue relates to the proper test for the application of the police powers doctrine. The second issue relates to Iran's contention that US courts have expropriated the property of Iranian companies and nationals. In the view of the United States, decisions of domestic courts acting in the role of neutral and independent arbiters of legal rights do not give rise to a claim for expropriation. Iran contests this point and has identified a small number of arbitral awards that have sustained judicial expropriation claims. The United States does not accept that these awards are evidence of the state of international law on expropriation, but they do not in any event support Iran's position in this case, as I will come to.

6. Beyond these doctrinal issues that separate the Parties, they also disagree about whether US laws and court decisions constitute expropriations in breach of the second limb of Article IV, paragraph 2.

### A. Police powers doctrine

7. I will begin with the police powers doctrine. The doctrine holds that State regulation in the public interest will not ordinarily be deemed expropriatory[43]. The Parties agree that, for a measure to fall within the doctrine's scope, it must be non-discriminatory and must have a legitimate policy

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[41] RUSA, Chap. 11, Section A (ii).

[42] CR 2022/16, p. 31, para. 20 (Aughey).

[43] CMUSA, paras. 14.78-14.79; RUSA, para. 11.29.

aim[44]. Iran has argued that the Court must also consider whether the measure is "proportionate"[45], but it has failed to provide support for the inclusion of this element in the test. Moreover, Iran advocates a strict conception of proportionality that is not found in the authorities it has referenced.

8. *First*, Iran's only support for the purported proportionality requirement comes from a selection of investment arbitration awards that — as the United States explained in its Rejoinder — all trace back to the *Tecmed* v. *Mexico* award[46]. On Monday, Iran referenced a few additional awards not mentioned in its Reply, but their provenance is the same[47]. The issue for Iran is that these awards themselves do not constitute evidence of State practice and *opinio juris*, nor do they provide as part of their analysis evidence of widespread and consistent State practice. Accordingly, they are little help to the Court in assessing the content of international law on expropriation. Moreover, undercutting any notion that widespread and consistent practice might exist for Iran's position, the United States has supplied evidence that States have endorsed versions of the police powers doctrine that do *not* incorporate a proportionality element[48]. Iran chose not to engage with this material on Monday.

9. *Second*, even if the police powers doctrine required the Court to engage in a proportionality inquiry, Iran has provided no plausible account of what this might involve. Iran argued in its Reply and its counsel asserted again on Monday that a measure must be "necessary" in order to qualify as proportional[49]. Counsel also attempted to import concepts of arbitrariness and unreasonableness allegedly derived from obligations in paragraph 1 of Article IV[50]. But Iran has provided no support for its evolving multifactor test. In its Reply, Iran relied on inapposite case law from other contexts, as the United States explained in its Rejoinder[51], and Iran's counsel supplied no new support for its position on Monday.

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[44] RUSA, para. 11.29; RI, para. 7.14.

[45] CR 2022/16, p. 29, para. 13 (Aughey).

[46] RUSA, para. 11.29, and fn. 655.

[47] *Olympic Entertainment Group AS* v. *Republic of Ukraine*, PCA Case No. 2019-18, Award of 15 April 2021, para. 89; *Marfin Investment Group Holdings S.A. et al.* v. *Republic of Cyprus*, ICSID Case No. ARB/13/27, Award of 26 July 2018, para. 982.

[48] RUSA, para. 11.30.

[49] CR 2022/16, p. 30, para. 14 (Aughey).

[50] *Ibid.*

[51] RUSA, para. 11.32.

10. Looking to those authorities that Iran has identified, Iran's counsel quoted the *Philip Morris* award for the proposition that the police powers doctrine requires a showing of proportionality. But in that case, the tribunal found that the measures at issue were "proportionate to the objective they meant to achieve" — namely a reduction in smoking — because they "were directed to this end and were capable of contributing to its achievement"[52]. This holding implies a far more deferential approach than the probing inquiry that Iran has envisioned.

11. In sum, Iran has failed to establish that proportionality is an element of the police powers doctrine or that, if it is, the threshold for a finding of proportionality is as high as Iran would like to set it.

**B. Judicial expropriation**

12. Turning now to the second doctrinal issue separating the Parties, Iran takes issue with the US position that decisions by courts acting as neutral and independent arbiters of legal rights are not expropriatory. Iran contends that there should be no distinction made between the acts of a State's courts and the acts of any other part of the State in the expropriation context. But Iran's position ignores the fact that many court decisions have significant effects on the disputing parties' economic interests, including in areas such as contracts, torts and real property. Finding all such decisions to be expropriatory, and thus requiring compensation, would make it impossible for the judiciary to function[53].

13. And, indeed, Iran has only identified a handful of investment arbitration awards in which tribunals have concluded that State court decisions were expropriatory[54]. Even if these awards accurately reflected international law principles of expropriation, they do not support a finding of expropriation in this case. In addition to a taking of property without compensation, each award also identified an additional element of illegality in either the conduct of the court responsible for the

[52] *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 306.

[53] RUSA, paras. 11.35-11.38.

[54] RI, para. 7.17.

allegedly expropriatory decision or in the chain of events leading to the decision[55]. Other arbitral awards and treatises that have endorsed the concept of judicial expropriation are in accord[56].

14. The Court should therefore reject Iran's broad view of judicial expropriation.

**C. The challenged measures were not expropriatory**

15. Turning finally to the application of the principles that I have discussed, Iran's primary expropriation claim pertains to assets of Iranian companies that have been turned over to plaintiffs with judgments against Iran in proceedings before US courts. Iran has not identified alleged takings of property that are attributable solely to the enactment of the challenged legislative measures and, on Monday, Iran's counsel only addressed Executive Order 13599 in passing. The United States' written submissions address Iran's expropriation claims with respect to these categories of measures, but, in the interest of time, I will not deal with them in detail now[57].

16. With respect to the judicial decisions, Iran's claims fail because these decisions were not expropriatory. *First*, these decisions gave effect to legislation enacted as an exercise of US police powers. This legislation facilitates the enforcement of judgments obtained against State sponsors of terrorism, such as Iran. The legislation provides an avenue for the victims of State-sponsored terrorism to obtain compensation from the State's agencies and instrumentalities for the harm they have suffered[58]. This is a legitimate policy aim and, for the reasons explained in my colleague Ms Grosh's earlier presentation on Article IV, paragraph 1, neither the legislation nor the court decisions were discriminatory.

17. Moreover, even if proportionality were necessary to invoke the police powers doctrine, as Iran argues, that showing is easily made here. The court decisions allowed plaintiffs to enforce their lawfully obtained judgments against assets held by Iran's agencies and instrumentalities and plaintiffs were limited to obtaining compensation equal to the value of their judgments. Applying *arguendo* the test in the *Philips* award, these were measures directed towards a legitimate end —

[55] RUSA, para. 11.36, and fn. 667.

[56] RUSA, para. 11.36, and fns. 668 and 669.

[57] RUSA, paras. 11.40-11.44; CMUSA, paras. 14.86-14.93.

[58] RUSA, paras. 11.43-11.44.

namely, compensating the victims of terrorism — and were "capable of contributing to its achievement"[59].

18. Iran's arguments on Monday against applying the police powers doctrine focused on the purported "unreasonableness" of the US measures, but this was no more than a rehash of points that it made in connection with Article IV, paragraph 1, which have already been addressed by Ms Grosh.

19. In any event, even if the police powers doctrine did not apply, the US courts were acting as neutral arbiters of legal rights and their decisions cannot, therefore, be deemed expropriatory. And even accepting the approach set out in Iran's few authorities on judicial expropriation, Iran has failed to show the type of illegality that those decisions require[60]. For this independent reason, Iran's expropriation claims must fail.

### IV. Conclusion

20. Mr. President, Members of the Court, that brings to an end my submissions. As I have explained, Iran has failed to establish that the challenged measures constitute a breach of either limb of Article IV, paragraph 2.

21. Mr. President, may I ask that you now call on Professor Boisson de Chazournes, who will address Iran's claims under Articles V, VII and X.

The VICE-PRESIDENT, Acting President: I thank Mr. Jedrey. Now I give the floor to Professor Boisson de Chazournes. Vous avez la parole, madame.

Mme BOISSON DE CHAZOURNES :

## LES REVENDICATIONS DE L'IRAN AU TITRE DES PARAGRAPHES PREMIERS DES ARTICLES V, VII ET X DU TRAITÉ SONT DÉNUÉES DE FONDEMENT

### I. Introduction

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un honneur de me présenter à nouveau devant vous au nom des Etats-Unis.

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[59] *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 306.

[60] RUSA, paras. 11.46-11.47.

2. Au cours des prochaines minutes, je traiterai des allégations de l'Iran au titre des paragraphes premiers des articles V, VII et X du traité d'amitié. Dans le but de faire entrer ses allégations dans un cadre juridique qui ne leur correspond pas, l'Iran donne à ces dispositions des interprétations tellement larges que celles-ci sont pratiquement sans limites. Non seulement l'Iran n'a pas réussi à justifier ses interprétations abusives, mais il n'a pas non plus fourni d'éléments factuels à l'appui de ses allégations.

## II. Article X, paragraphe 1

3. Monsieur le président, je commencerai par le paragraphe 1 de l'article X. Celui-ci dispose qu'«[i]l y aura liberté de commerce et de navigation entre les territoires des deux Hautes Parties contractantes»[61]. Les prétentions de l'Iran en vertu de cette disposition doivent être rejetées pour trois raisons que je vais présenter tour à tour.

### A. Le «commerce» visé par l'article X, paragraphe 1, ne s'applique qu'au commerce lié à la navigation ou, à tout le moins, doit être sous-tendu par une forme ou une autre d'échange de marchandises

4. Les Etats-Unis reconnaissent que, dans l'affaire des *Plates-formes pétrolières,* la cour de céans a considéré que la référence au «commerce» contenue dans le paragraphe 1 de l'article X n'était pas limitée au commerce maritime. Mais pour les raisons présentées dans leurs écritures, les Etats-Unis considèrent que cette conclusion ne devrait pas être déterminante dans les circonstances de la présente affaire[62]. Comme les Etats-Unis l'ont expliqué en détail, le terme «commerce», tel qu'il est utilisé à l'article X, paragraphe 1, renvoie sans nul doute au commerce lié à la navigation, interprétation qui est amplement étayée par le texte, le contexte, les travaux préparatoires et de nombreuses autres sources historiques[63].

5. Cela dit, même si le «commerce» visé au paragraphe 1 de l'article X n'était pas circonscrit au commerce maritime, le terme doit toujours être compris comme se rapportant au commerce de marchandises. C'est ce que confirment le texte et le contexte de la disposition[64]. Dans ses écritures,

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[61] Traité d'amitié, art. X, par. 1.

[62] DEU, par. 12.10 ; CMEU, par. 17.9.

[63] DEU, par. 12.6-12.9 ; CMEU, par. 17.4-17.8.

[64] DEU, par. 12.5, 12.11-12.14 ; CMEU, par. 17.10-17.13.

l'Iran fait valoir que la Cour, dans l'affaire des *Plates-formes pétrolières*, a interprété le terme «commerce» de manière large, en y incluant les «produits du commerce» et les transactions financières[65]. Et, lundi dernier, nos contradicteurs n'ont cité, de manière sélective, que certains passages de la décision de la Cour sur les exceptions préliminaires dans l'affaire des *Plates-formes pétrolières*[66]. Cette sélectivité doit être corrigée. En effet, l'Iran ne cite pas la décision même de la Cour mais l'une des trois définitions de dictionnaire des termes «commerce» et «commerce international» que votre juridiction a prise en considération pour parvenir à sa décision[67]. La conclusion de la Cour n'était pas que le terme «commerce», ainsi que visé à l'article X, paragraphe premier du traité d'amitié, inclut les «opérations financières entre nations» mais plutôt que «commerce», dans cet article, inclut «non seulement les activités mêmes d'*achat et de vente*, mais également les activités accessoires qui sont intrinsèquement liées au commerce»[68]. Cela comprend des activités telles que la production, le transport et le stockage de marchandises «en vue de l'exportation»[69]. Il ressort ainsi clairement de l'affaire des *Plates-formes pétrolières* qu'il doit y avoir un lien entre un échange de marchandises pour que le terme «commerce» de l'article X, paragraphe 1, trouve application. Et l'Iran ne démontre pas qu'une des mesures en cause dans cette affaire a quelque chose à voir avec, ou a eu un impact sur, un quelconque commerce sous-tendu par une forme ou une autre d'échange de marchandises, et moins encore sur un quelconque commerce maritime entre les Parties.

**B. L'Iran ne satisfait pas à la limitation territoriale**

6. J'en viens à la deuxième raison pour laquelle les prétentions de l'Iran au titre de cet article doivent échouer. Le paragraphe 1 de l'article X protège la «liberté de commerce» uniquement «entre les territoires» de l'Iran et des Etats-Unis[70].

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[65] RI, par. 8.13, 8.27.

[66] CR 2022/16, p. 33, par. 31 (Aughey).

[67] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 818, par. 45 (ci-après «*Plates-formes pétrolières (exception préliminaire)*») ; CR 2022/16, p. 33, par. 31 (Aughey).

[68] *Plates-formes pétrolières (exception préliminaire)*, p. 819, par. 49 (les italiques sont de nous).

[69] *Ibid.*, par. 50 ; voir également *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2003*, p. 199, par. 80, p. 201, par. 83, et p. 202, par. 86 (ci-après «*Plates-formes pétrolières (fond)*»).

[70] Traité d'amitié, art. X, par. 1.

7. Pour satisfaire à la limitation territoriale de l'article X, paragraphe 1, la Partie demanderesse doit, en vertu de l'arrêt de la Cour de céans dans l'affaire des *Plates-formes pétrolières*, démontrer deux choses essentielles. Premièrement, qu'une mesure a entravé le commerce *réel* entre les territoires des Parties, et pas seulement le commerce potentiel[71]. Deuxièmement, que ce commerce effectif a eu lieu *directement* entre les territoires des Etats-Unis et de l'Iran. Un commerce impliquant une série de transactions avec des intermédiaires dans d'autres pays n'est pas un commerce «entre les territoires» des Parties et ne relève pas du paragraphe 1 de l'article X[72]. C'est précisément sur cette base que la Cour a, dans l'affaire des *Plates-formes pétrolières*, conclu qu'il n'y avait pas de commerce direct entre l'Iran et les Etats-Unis, qui aurait pu être entravé par les actes contestés.

8. Dans ses écritures et lundi dernier, l'Iran a allégué que, en entraînant le blocage et/ou la saisie des actifs de sociétés iraniennes, les mesures ont rendu le commerce entre les Parties «impossible»[73]. L'Iran prétend qu'il n'y a pas besoin de démontrer l'existence d'un impact sur le commerce réel car, affirme-t-il, «Article X(1) protects «freedom of commerce», not commerce per se»[74]. Cette tentative s'apparente à l'argument générique que les Etats-Unis ont soulevé dans l'affaire des *Plates-formes pétrolières*, à savoir que les attaques répétées de l'Iran contre la navigation ont rendu le golfe Persique dangereux[75]. La Cour a rejeté cet argument, déclarant qu'une telle allégation générique «ne peut être examinée sans tenir compte des incidents précis»[76]. De la même manière, l'Iran doit démontrer de manière spécifique en quoi une mesure a entravé le commerce existant.

9. L'Iran n'a déployé que très peu d'efforts pour démontrer de manière concrète que le commerce bilatéral entre l'Iran et les Etats-Unis avait été entravé par les mesures américaines. Son unique tentative à propos de certains actifs de la banque Markazi faisant l'objet de la procédure d'exécution du jugement *Peterson* prouve exactement le contraire. Les transactions autour de ces actifs financiers reflètent précisément le type de «série de transactions commerciales»[77] impliquant

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[71] *Plates-formes pétrolières (fond)*, p. 214, par. 119, et p. 217, par. 122-23.

[72] *Ibid.*, p. 207, par. 97.

[73] RI, par. 8.34.

[74] CR 2022/16, p. 34, par. 36 (Aughey).

[75] *Plates-formes pétrolières (fond)*, p. 217, par. 122-23.

[76] *Ibid.*, par. 123.

[77] *Ibid.*, p. 207, par. 97.

des intermédiaires en dehors de l'Iran et des Etats-Unis, que votre juridiction a considérée comme n'étant pas constitutive de commerce entre les Parties[78]. Ces actifs représentaient le produit en numéraire d'obligations échues détenues dans un compte ouvert auprès d'une banque établie à New York, Citibank, et appartenant à Clearstream, un intermédiaire luxembourgeois[79]. Comme l'illustre la diapositive, la banque Markazi avait un compte auprès de la banque italienne Banca UBAE, et Banca UBAE avait à son tour un compte auprès de Clearstream au Luxembourg. Jusqu'à l'échéance de ces obligations en 2012, Clearstream portait au crédit du compte de Banca UBAE les sommes correspondant aux intérêts produits par lesdites obligations ; et Banca UBAE virait ces sommes à la banque Markazi[80]. Ainsi que cela ressort, la banque Markazi n'a pas interagi avec Citibank, n'a pas pris possession des obligations et n'a reçu aucun paiement d'une entité basée aux Etats-Unis.

10. L'Iran espère distinguer cette série de transactions de celle en cause dans l'affaire des *Plates-formes pétrolières*, en faisant valoir que la banque Markazi avait eu l'intention d'investir sur les marchés de titres américains en utilisant Clearstream comme agent[81]. Mais l'«intention» de la banque Markazi n'est pas pertinente. Dans l'affaire des *Plates-formes pétrolières*, le facteur déterminant était la nature des transactions commerciales successives en question, et non les intentions d'investissement d'une partie[82]. En outre, la banque Markazi a eu recours à cette méthode complexe précisément pour éviter d'effectuer des transactions sur des titres émis par les Etats-Unis, ce qui était interdit par une réglementation américaine qui n'est pas en cause en cette affaire[83]. Dans ces circonstances, la suggestion de l'Iran d'ignorer cette série d'intermédiaires n'est pas soutenable. De plus, l'intention invoquée par l'Iran ne s'est pas matérialisée. Les titres dans lesquels la banque Markazi a investi étaient ceux de gouvernements européens, d'institutions financières internationales

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[78] *Plates-formes pétrolières (fond)*, p. 206, par. 96, et p. 207, par. 97.

[79] DEU, par. 12.24-12.25 et les citations qui y figurent.

[80] Petition for a Writ of Certiorari 7-8, *Bank Markazi* v. *Peterson*, n° 14-770 (29 déc. 2014) (CMEU, annexe 117) ; voir *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1321 & n. 11 (2016) (CMEU, annexe 109) ; *Peterson* v. *Islamic Republic of Iran*, Case No. 15-0690, slip op., at 8-9 (2d Cir. Nov. 21, 2017) (RI, annexe 58).

[81] RI, par. 8.36.

[82] *Plates-formes pétrolières (fond)*, p. 206, par. 96, et p. 207, par. 97.

[83] DEU, par. 12.29-12.31.

et de banques publiques européennes[84]. Aucun des titres concernés n'a été émis par des émetteurs américains.

11. L'Iran mentionne brièvement d'autres exemples d'avoirs qui, selon lui, ont été bloqués ou saisis, et qui comprendraient des «produits du commerce».[85] Il s'agit des dettes dues par des sociétés américaines à diverses entités iraniennes, notamment TIC, pour des dettes dues par Sprint ; banque Melli et banque Saderat, pour des dettes dues par Mastercard ; banque Melli, pour des dettes dues par deux sociétés américaines de cartes de crédit ; le ministère de la défense nationale pour une sentence arbitrale contre Cubic ; ainsi que des fonds appartenant à la marine iranienne détenus par Wells Fargo comme garantie d'une lettre de crédit. Mais, même en supposant que ces actifs soient des «produits du commerce» (ce que les Etats-Unis ne reconnaissent pas), l'Iran n'a fait aucun effort pour démontrer comment le blocage ou la saisie de ces actifs a entravé le commerce réel en cours entre les territoires des Parties. Au lieu de cela, il se contente d'affirmer que «seizure and turnover … of the funds … has interfered with the freedom of commerce»[86], laissant à la Cour le soin de formuler des hypothèses sur la nature de cette atteinte. Mais comme la Cour l'a expliqué dans l'affaire des *Plates-formes pétrolières*, cela est manifestement insuffisant pour satisfaire à la charge qui incombe à l'Iran de démontrer qu'une mesure a eu un impact réel sur le commerce entre les territoires des Parties.

12. L'Iran n'a donc pas identifié de cas spécifiques de commerce se produisant directement entre les territoires des Parties qui ont été entravés par les mesures.

### C. L'article X, paragraphe 1, ne peut être interprété comme s'appliquant à des «entraves d'ordre juridique» telles que les mesures

13. L'incapacité de l'Iran à rattacher l'une quelconque des mesures au «commerce», et plus particulièrement au commerce «entre les territoires des Parties», démontre combien il est inepte d'appliquer le paragraphe 1 de l'article X aux règles et procédures juridiques qui régissent les litiges internes devant les tribunaux américains en matière de terrorisme. L'Iran ne cite aucun cas dans

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[84] RI, par. 3.25 ; voir également Extracts from Bloomberg regarding Bank Markazi Security Entitlement (DEU, annexe 419, captures d'écran des entrées du terminal Bloomberg pour chaque titre identifié par ISIN au paragraphe 3.25 de la réplique de l'Iran, avec un tableau récapitulatif).

[85] RI, par. 8.34.

[86] CR 2022/16, p. 35, par. 37 (Aughey).

lequel une juridiction aurait interprété le paragraphe 1 de l'article X, ou une disposition similaire d'un autre traité d'amitié, de commerce et de navigation, comme s'appliquant à de telles «entraves juridiques» indirectes au commerce.

14. En pratique, l'interprétation de l'Iran conduit à considérer toute «entrave» au commerce comme une violation du paragraphe 1 de l'article X. Selon sa théorie, toute tentative d'exécution d'un jugement contre une entité iranienne, même pour une simple rupture de contrat, violerait le paragraphe 1 de l'article X. Cela reviendrait à considérer que le paragraphe 1 de l'article X accorde aux sociétés iraniennes une immunité contre l'exécution de tout jugement. Un tel résultat invraisemblable démontre à quel point l'interprétation de l'Iran est erronée.

15. De la même manière, l'interprétation de la «liberté de commerce» par l'Iran signifierait que d'autres règles juridiques, au-delà de celles en cause dans cette affaire, seraient *également* illégales, et cela même si elles sont explicitement autorisées par d'autres dispositions du traité. Les mesures envisagées par l'article VII concernant les restrictions de change, par l'article VIII concernant les restrictions à l'importation et par l'article IX concernant les réglementations douanières ont toutes le potentiel de restreindre la liberté de commerce dans certaines circonstances. Autrement dit, la seule phrase du paragraphe 1 de l'article X supplanterait toutes les dispositions détaillées du traité. Cette interprétation n'est pas conforme au contexte du traité et ne reflète pas l'intention des Parties.

## III. Article V, paragraphe 1

16. Monsieur le président, j'en viens maintenant au paragraphe 1 de l'article V que vous allez voir à l'écran. Les revendications de l'Iran se limitent à la clause *c)* de ce paragraphe, à savoir l'aliénation des biens[87].

17. Mesdames et Messieurs les juges, aucune des mesures faisant l'objet de la demande iranienne, soit les règles et procédures permettant aux plaignants qui ont obtenu des jugements valides de tribunaux américains de les exécuter, n'accorde un traitement moins favorable aux ressortissants et sociétés iraniens en ce qui concerne l'aliénation des biens. En fait, l'article V ne s'applique tout simplement pas à ces mesures.

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[87] MI, par. 5.75.

18. Dans son effort pour concilier l'inconciliable, l'Iran affirme que la première phrase du paragraphe 1 de l'article V doit être lue isolément, en tant qu'obligation autonome de «permettre» aux sociétés iraniennes «d'aliéner [leurs] biens»[88], sans tenir compte du critère de la nation la plus favorisée énoncé dans la phrase suivante. En d'autres termes, l'Iran soutient que les Etats-Unis ont une obligation inconditionnelle de permettre à une société iranienne d'aliéner ses biens à sa guise, quelles que soient les circonstances. Selon l'Iran, la saisie de biens pour exécuter un jugement valable «priv[e] [le débiteur du jugement] du droit d'aliéner» ses biens, et viole donc cette obligation autonome[89].

19. Une telle interprétation est contraire aux principes fondamentaux d'interprétation des traités[90]. La deuxième phrase du paragraphe 1 de l'article V commence ainsi : «[l]e traitement dont ils bénéficient *en ces matières* ne sera…»[91]. «[E]n ces matières» indique sans ambages que les deux phrases du paragraphe 1 sont liées entre elles. La deuxième phrase éclaire la première, en définissant la norme qui s'applique au traitement par une partie d'un ressortissant ou d'une société de l'autre partie en ce qui concerne l'aliénation des biens, à savoir la clause de la nation la plus favorisée. Ainsi, pris dans son ensemble, le paragraphe 1 de l'article V ne peut être compris que comme une obligation de permettre aux ressortissants et sociétés iraniens d'aliéner leurs biens à des conditions non moins favorables que les ressortissants et sociétés d'autres pays. La description de l'article V faite par la Cour dans son arrêt sur les exceptions préliminaires va dans le même sens[92].

20. L'affirmation de l'Iran défie donc le bon sens. Une lecture isolée de la première phrase de ce paragraphe, comme le préconise l'Iran, obligerait chaque partie à autoriser les ressortissants et les sociétés de l'autre partie à ignorer ses lois et règlements relatifs à l'acquisition, la location ou la cession de biens. Cela ne peut pas être le cas, et ce pour deux raisons. *Premièrement*, sur le plan de l'interprétation du traité, introduire une telle obligation inconditionnelle de permettre l'aliénation des biens rendrait superflue la deuxième phrase, avec son critère plus étroit de la nation la plus favorisée. *En second lieu*, une telle lecture nierait le pouvoir bien établi des Etats de fixer et d'appliquer des

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[88] RI, par. 7.26-7.27.

[89] MI, par. 5.75.

[90] Convention de Vienne sur le droit des traités, art. 3, par. 1.

[91] Traité d'amitié, art. V, par. 1 (les italiques sont de nous).

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

règles régissant les transactions commerciales ou le transfert de propriété, ainsi que d'interdire certains types de transactions immobilières impliquant un comportement illicite.

21. Mesdames et Messieurs les juges, la lecture erronée de la première phrase de l'article V par l'Iran ne peut donc pas être acceptée. Les deux phrases du paragraphe 1 de l'article V doivent être lues conjointement ; et seule une mesure qui accorde aux ressortissants et sociétés iraniens un traitement moins favorable que celui des pays tiers peut justifier une violation de ce paragraphe.

22. Pour ce faire, le demandeur doit non seulement montrer qu'une société iranienne a été empêchée d'aliéner ses biens[93], mais *aussi*, comme les Etats-Unis l'ont expliqué dans leurs écritures[94], identifier une autre entité, dite «élément de comparaison», qui, dans une situation similaire, n'a pas été empêchée de le faire. L'Iran ne s'est pas acquitté de cette obligation.

## IV. Article VII, paragraphe 1

23. Cela m'amène à la dernière partie de mon exposé, qui concerne le paragraphe 1 de l'article VII. Monsieur le président, les affirmations de l'Iran concernant cet article sont tout autant erronées. Comme cela a été amplement démontré dans le contre-mémoire et la duplique des Etats-Unis, l'article VII est une disposition régissant les restrictions sur les devises étrangères, et l'interdiction énoncée dans son paragraphe 1 ne s'applique qu'à de telles restrictions de change.

24. L'Iran ne prétend pas qu'une quelconque mesure en cause dans cette affaire constitue une restriction ou un contrôle des changes. Au lieu de cela, tout comme il a essayé de réécrire l'article V en une interdiction de toute mesure restreignant l'aliénation de biens, l'Iran cherche à redéfinir le paragraphe 1 de l'article VII comme «une interdiction générale de restrictions en matière de … transferts de fonds»[95]. Il soutient ensuite que, parce que l'effet allégué de certaines mesures américaines peut être d'empêcher certaines entités iraniennes de transférer des fonds à l'étranger, ces mesures violent l'article VII, paragraphe 1, en ce qui concerne ces entités.

25. Mesdames et Messieurs les juges, l'Iran se trompe sur l'objet et l'effet de l'article VII. Etant donné le temps qui m'est imparti, je ne discuterai pas des nombreuses preuves détaillées qui conduisent à la conclusion inéluctable que l'interdiction de l'article VII est limitée aux restrictions

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[93] DEU, par. 12.41.

[94] CMEU, par. 15.9 ; DEU, par. 12.45-12.50.

[95] MI, par. 6.3.

sur le contrôle des changes. Vous trouverez le détail de cette analyse dans le contre-mémoire[96]. Pour les besoins de cette présentation, je soulignerai brièvement quatre points essentiels :

26. *Tout d'abord*, le contexte immédiat de l'interdiction énoncée au paragraphe 1 de l'article VII est constitué de deux exceptions à cette interdiction générale. Ces deux exceptions, qui suivent immédiatement le texte de l'interdiction générale, permettent aux Parties d'imposer des restrictions autrement interdites, *d'une part*, lorsque cela est nécessaire pour assurer la disponibilité de devises étrangères pour la santé et le bien-être de leurs populations, et, *d'autre part*, lorsque le FMI approuve spécifiquement la restriction. Ces exceptions permettent ainsi des restrictions de change. Il devient clair que la catégorie de «restrictions» interdite par le paragraphe 1 de l'article VII a trait aux restrictions de change.

27. *Ensuite*, les paragraphes 2 et 3 du présent article, qui énoncent les obligations d'une partie lorsqu'elle impose des restrictions en vertu de l'une des exceptions prévues au paragraphe 1, confirment cette interprétation. Les deux paragraphes font expressément référence aux restrictions de change et renvoient au paragraphe 1. Lu dans son ensemble — ce qu'il convient de faire —, il est clair que l'article VII traite des restrictions de change. La tentative iranienne de sortir la première moitié de phrase du paragraphe 1 de son contexte dénature la disposition.

28. *Enfin*, l'historique des négociations du traité confirme que l'article VII porte, exclusivement et dans son intégralité, sur le contrôle des changes. Les éléments de preuve développés dans le contre-mémoire des Etats-Unis établissent sans conteste que l'article VII a toujours été décrit comme une disposition relative au contrôle des changes dans les projets de traité[97]. Ainsi, la correspondance entre les Parties, les communications internes et les discussions substantielles sur cet article ont toutes trait à des questions de change[98].

29. L'Iran n'a rien à répondre à ces preuves. Il ne parvient absolument pas à fournir une explication plausible de la rédaction et de la négociation de l'article VII qui inclut l'interdiction étendue qu'il avance.

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[96] CMEU, par. 16.4-16.16 ; DEU, par. 12.58-12.61.

[97] CMEU, par. 16.7-16.8 et 16.13.

[98] CMEU, par. 16.9-16.12.

30. Ce que l'Iran omet de porter à l'attention de la Cour, c'est que, dans ses écritures, dans l'affaire des *Plates-formes pétrolières*, l'Iran a lui-même reconnu le contraire de ce qu'il affirme aujourd'hui. Ainsi, dans son mémoire, l'Iran a expliqué que l'article VII, «établit un régime précis … en ce qui concerne les mesures dans le domaine des restrictions de change»[99]. Je répète, «[r]estrictions de change». Cette déclaration correcte contraste fortement avec les revendications dans la présente affaire.

31. Mon *quatrième* et dernier point a trait à la nature démesurée de l'interprétation proposée par l'Iran. Comme pour ses interprétations des articles V et X, la position de l'Iran sur l'article VII se révèle excessive. Lundi dernier, l'Iran rejeta, car «largement dénué de portée dans la présente affaire»[100], l'argument américain selon lequel, en vertu de l'interprétation extensive de l'article VII, paragraphe 1, donnée par l'Iran, les réglementations bancaires visant à prévenir le blanchiment d'argent ou l'exécution de tout jugement d'un tribunal américain contre un ressortissant ou une société iranienne seraient également interdites en vertu de cette disposition. Pourtant, le traité d'amitié ne vise pas à établir une telle interdiction. L'Iran n'en disconvient pas, d'ailleurs. Contrairement à ce qu'il affirme, ce constat n'est pas sans importance. Il souligne plutôt la manière intéressée et excessivement large dont l'Iran interprète l'article VII.

## V. Conclusion

32. Comme le montrent les écritures des Etats-Unis et comme je l'ai évoqué ici, l'Iran ne peut pas établir que l'une quelconque des mesures constitue une violation des articles V, VII ou X. Monsieur le président, Mesdames et Messieurs les juges, ceci conclut ma plaidoirie. Je vous remercie de votre bienveillante attention et vous saurais gré, Monsieur le président, de bien vouloir donner la parole à M. Daley.

The VICE-PRESIDENT, Acting President: I thank Madame Boisson de Chazournes. I will now give the floor to Mr. John Daley. You have the floor, Sir.

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[99] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique)*, mémoire de la République islamique d'Iran, p. 86, par. 3.55.

[100] CR 2022/15, p. 70, par. 60 (Thouvenin).

Mr. DALEY:

## ARTICLE XX (1) BARS IRAN'S CLAIMS REGARDING EXECUTIVE ORDER 13599

### I. Introduction

1. Thank you, Mr. President. I will address the United States' invocation of Article XX, paragraphs 1 *(c)* and *(d)*, of the Treaty of Amity with respect to Executive Order 13599.

2. These provisions of the Treaty involve vital interests of the State, aimed at protecting the safety and lives of its people. Retaining the ability to act in these areas was of paramount importance to the United States, which is evident from the fact that similar exceptions have been built into every similar treaty that it has signed, regardless of the treaty partner.

3. I will address three points this afternoon. First, I will provide background on the history and purpose of the Executive Order. Second, I will explain why the Executive Order falls within the arms trafficking exception set out in subparagraph 1 *(c)*. And third, I will explain why the Executive Order also falls within the essential security exception set out in subparagraph 1 *(d)*.

### II. Background on Executive Order 13599

4. Mr. President and Members of the Court, on Monday Iran described the Executive Order as "purely financial" and unrelated to security interests[101].

5. This evades the point entirely.

6. The Executive Order is a critical part of a broader regulatory and sanctions régime that was incrementally and carefully constructed over many years to target specific activity by Iran to supply terrorists with arms, and to prevent the development and proliferation of weapons of mass destruction and ballistic missiles. As holes in that régime were identified, the United States made enhancements and additions, with a view to filling the cracks in the wall, if I may use that analogy to describe it.

7. Like many other governments, the United States maintained restrictions on the export of weapons and dual-use items, as well as the re-export and trafficking in those items once they leave the United States. This was the original layer of protection.

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[101] CR 2022/16, p. 41, para. 12 (Pellet).

8. Building on top of those restrictions, the United States enacted blocking and other sanctions measures that targeted specific persons and entities engaged in arms trafficking, support for terrorism and the proliferation of weapons of mass destruction and ballistic missile technology. For example:

9. In 1995, the United States issued Executive Order 12957, declaring a national emergency and issuing certain restrictions as a result of Iran's support for international terrorism and acquisition of weapons of mass destruction or their means of delivery[102].

10. In 2001, the United States issued Executive Order 13224, which blocked the property of and prohibited transactions with persons who commit, threaten to commit or support terrorism[103].

11. In 2005, the United States issued Executive Order 13382, which blocked the property of those who engage in or support proliferation of weapons of mass destruction or their means of delivery[104].

12. Pursuant to these Orders, over the course of several years the United States sanctioned a variety of Iranian entities and individuals in light of their support for terrorism and weapons proliferation activities. Examples of these designations from 2007 are on the slide[105].

13. Over time, it became apparent that Iranian entities, including banks, were attempting to circumvent those restrictions. The United Nations Security Council adopted a resolution in 2008 calling upon all nations to "exercise vigilance" over all transactions with Iranian-domiciled banks and their branches and subsidiaries abroad, "in order to avoid such activities contributing to the proliferation of sensitive nuclear activities, or to the development of nuclear weapons delivery systems"[106].

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[102] President William J. Clinton, Message to the Congress on Iran, 34 Weekly Comp. Pres. Docs. 446, 16 Mar. 1998 (POUS, Ann. 193).

[103] Executive Order 13224, 66 Fed. Reg. 186, 25 Sept. 2001 (POUS, Ann. 134).

[104] Executive Order 13382, 70 Fed. Reg. 38,567, 28 June 2005 (POUS, Ann. 197).

[105] See e.g. Additional Designation of Entities Pursuant to Executive Order 13382, 72 Fed. Reg. 62,520, 5 Nov. 2007 (RUSA, Ann. 314); US Dep't. of the Treasury, "Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism", 25 Oct. 2007 (POUS, Ann. 147).

[106] Security Council resolution 1803, para. 10, UN doc. S/RES/1803, 3 Mar. 2008 (POUS, Ann. 102).

14. In response, the United States continued to issue sanctions on banks that were found to be assisting entities in evading sanctions and regulations[107]. The holes are appearing in the wall and they are being plugged, one by one by one.

15. In 2010, the United States Congress enacted the Comprehensive Iran Sanctions, Accountability, and Divestment Act[108], which authorized a number of additional measures to counteract the evasion of existing restrictions. For example:

16. Section 303 of that Act focused on countries from which weapons and other restricted materials were being illegally re-exported to Iran. To stop that practice, the law required licences for the export or re-export of any items to customers in those jurisdictions, until the problem of illegal re-exports had been addressed by the local authorities.

17. Section 104 of that same Act focused on the threat of terrorist and weapons financing. It imposed restrictions on the maintenance of accounts in the United States for any financial institution that carried out transactions with Iranian entities engaged in weapons proliferation, support for terrorist organizations, or evasion of United Nations sanctions[109].

18. In October 2011, the multilateral Financial Action Task Force (FATF) issued a report expressing with "renewed urgency" its concern over "Iran's failure to address the risk of terrorist financing"[110]. It noted that "[d]ue to the continuing terrorist financing threat emanating from Iran, jurisdictions should consider the steps already taken and possible additional safeguards or strengthen existing ones"[111]. So the lights are blinking orange. More holes are appearing in the wall.

19. Heeding FATF's call, in November 2011 the US Treasury Department exercised the called-for vigilance concerning Iranian banks. It issued a finding that Iran should be treated as a jurisdiction of "primary money laundering concern"[112] in light of "illicit and deceptive conduct

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[107] Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72,756, 72,760, 18 Nov. 2011 (POUS, Ann. 152).

[108] Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, P.L. 111-195 (POUS, Ann. 198).

[109] *Ibid.*

[110] Financial Action Task Force, Public Statement, 28 Oct. 2011 (POUS, Ann. 222).

[111] *Ibid.*

[112] 76 Fed. Reg. 72,756, 72,763, 21 Nov. 2011 (POUS, Ann. 152).

designed to facilitate the Iranian government's support for terrorism and its pursuit of nuclear and ballistic missile capabilities"[113].

20. The evidence reported in support of the Treasury finding removes any doubt. Iran, including through its entire banking system, was circumventing United States regulations and sanctions on arms production and trafficking, support for terrorism and terrorism financing, and the pursuit of ballistic missile and nuclear weapons capabilities.

21. We have put that finding at tab 26 of your judges' folder and would encourage you to review it in full. It highlights efforts by Iranian banks and their affiliates over time to circumvent not just US sanctions, but international sanctions as well. For example:

22. The finding reported that Bank Mellat, an Iranian State-owned bank, had "financially facilitate[ed] Iran's nuclear and proliferation activities" by engaging in transactions with sanctioned entities[114].

23. And Bank Melli actively hid Bank Sepah's involvement in transactions, following Bank Sepah's designation under Security Council resolution 1747 as an entity involved in nuclear or ballistic missile activities[115].

24. Those banks were already the subject of restrictions, and the Treasury investigation concluded that as specific banks were made subject to sanctions, "other banks have begun to play a larger role in Iran's illicit activities and efforts to circumvent sanctions"[116]. It explained that Iran's use of deceptive practices to hide unauthorized transactions put any financial institution involved with Iranian entities at risk of facilitating transactions related to terrorism or weapons proliferation.

25. So by late 2011, Mr. President and Members of the Court, the lights are flashing red. The ability to stop terrorist and weapons financing is at risk. In response, the United States Congress directed the President to take specific action to counter the threat posed by Iran's banking sector.

26. Section 1245 of the 2012 National Defense Authorization Act required the President to block the assets of Iranian financial institutions because the "entire Iranian banking sector . . . pos[ed]

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[113] 76 Fed. Reg. 72756, 18 Nov. 2011 (POUS, Ann. 152).

[114] 76 Fed. Reg. 72756, 72759, 18 Nov. 2011 (POUS, Ann. 152).

[115] Security Council resolution 1747, Ann. 1, UN doc. S/RES/1747, 24 Mar. 2007 (POUS, Ann. 101); 76 Fed. Reg. 72,756, 72,759, 18 Nov. 2011 (POUS, Ann. 152).

[116] 76 Fed. Reg. 72,756, 72,759, 18 Nov. 2011 (POUS, Ann. 152).

terrorist financing, proliferation financing, and money laundering risks for the global financial system"[117]. If I may use the analogy again, plugging the holes in the wall, one by one, was not working. A new wall was needed.

27. As directed by the Congress, President Obama issued Executive Order 13599, blocking the property and interests in property of Iranian financial institutions[118]. The Executive Order clearly characterizes its measures as an "additional step[]"[119] to prevent the continued evasion of previously enacted measures, and makes specific reference to the National Defense Authorization Act as the basis for the President's action.

## III. Article XX (1) *(c)* applies because Executive Order 13599 regulates Iranian arms production and trafficking

28. With that background in mind, I will now turn to my second point: the applicability of Article XX, paragraph (1) *(c)*. Executive Order 13599, given its history, purpose and effect, falls well within this exception for measures "regulating the production of or traffic in arms"[120].

29. The purpose and effect of the Executive Order was clear on its face: to take, "additional steps"[121] to prevent the continued evasion of previously enacted regulations. I have just taken you through the careful escalation of measures. It began with the initial restrictions on arms trafficking and weapons proliferation. Followed by specific sanctions on entities found to be violating or circumventing those restrictions. And finally, a restriction on the entire banking sector.

30. For these reasons, we say that the Executive Order qualifies as a measure "regulating" the production and trafficking of arms and is therefore covered by paragraph 1 *(c)* of Article XX. The fact that it was enacted at the end of the process, after the other measures proved insufficient, does not change its fundamental character as part of the regulatory régime.

31. On Monday, Iran argued that the Executive Order does not regulate arms production and trafficking because its text does not use the words "arms" or "security"[122].

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[117] NDAA 2012, Sec. 1245 *(a)*, Pub. L. No. 112-239, 126 Stat. 2006 (MI, Ann. 17).

[118] *Ibid.*

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

[120] Treaty of Amity, Art. XX (1) *(c)*.

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

[122] CR 2022/16, p.41, para. 12 (Pellet); RI, paras. 10.8-10.9.

32. But as I have just explained, the Executive Order expressly referenced and implemented the sanctions required by Section 1245 *(c)* of the National Defense Authorization Act. That law was explicit in its purpose: combatting Iran's evasion of US and international sanctions targeting weapons proliferation, among other activities. Given this reference, there can be little doubt that a purpose of the Executive Order was to regulate trafficking in arms.

33. And for this reason, we say that Iran's claims with respect to the Executive Order can be rejected on the basis of Article XX, paragraph (1) *(c)* alone.

## IV. Article XX (1) *(d)* applies because Executive Order 13599 was necessary to protect US essential security interests

34. I will now turn to the essential security provision[123].

35. The United States has set out its interpretation of Article XX, paragraph 1 *(d)*, at length in our written submissions. In short, it leaves each Party, acting in good faith, a wide discretion to determine the measures necessary to protect its security interests. Whether a situation implicates "its . . . security interests" and whether the interests at stake are "essential" to that Party are not questions in the abstract. They must be viewed from the perspective of the Party invoking the exception — requiring the Court to accord careful regard and appropriate weight to the Party's good faith perception of its circumstances.

36. The dispute between the Parties amounts to the question whether an incremental step by one Party to address a threat to its essential security interests can be "necessary" within the meaning of paragraph 1 *(d)*. And, more importantly, whether the Executive Order was such a measure. The answer to those questions is yes.

37. Mr. President and Members of the Court, the United States has unquestionable essential security interests in preventing activities that threaten its nationals, including terrorism and attacks from ballistic missiles or nuclear weapons. Through a series of measures, the United States constructed a regulatory régime to protect itself from those threats.

[123] Treaty of Amity, Article XX (1) *(d)*.

38. When Iranian financial institutions continued to circumvent existing prohibitions[124], it became apparent that broader action was needed.

39. It is for these reasons that Executive Order 13599 was issued, and why it was necessary within the meaning of Article XX, paragraph 1 *(d)*. The developments leading up to the Executive Order highlight that it did more than "tend to protect"[125] the US security interests, or be "merely useful" to protecting them, to use the words of the Court in the *Military and Paramilitary Activities* case[126].

40. On Monday we heard a scattershot of points calling this conclusion into question.

41. As to the standard the Court should apply in considering whether the Executive Order was necessary within the meaning of paragraph 1 *(d)*, Iran made much of the *Questions of Mutual Assistance* case. But the criticism misses the mark entirely.

42. The United States referred to that case for one reason: because the Court's 2008 Judgment in that case characterized the essential security clause of the Iran-United States Treaty of Amity as a provision giving "wide discretion"[127] to the invoking State. That the case involved a differently worded clause is beside the point.

43. Iran made repeated reference to proportionality on Monday. And suggested that you should adopt an investor-State tribunal's test — applying a different treaty — of whether a measure is necessary[128]. Under that test, the Court must put itself in the place of a national security official to opine on whether there might have been alternatives to the threat that were more compliant with the

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[124] See e.g. CMUSA, para. 11.15; Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, P.L. 111-195 (POUS, Ann. 198); Executive Order 13224, 66 Fed. Reg. 186, 25 Sept. 2001 (POUS, Ann. 134); Executive Order 13382, 70 Fed. Reg. 38567, 28 June 2005 (POUS, Ann. 197).

[125] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 141, para. 282; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 183, para. 43.

[126] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 117, para. 224.

[127] CMUSA, para. 11.22; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145.

[128] RI, para. 10.24, 10.32, citing *Deutsche Telekom* v. *India*, PCA Case No. 2014-10, Interim Award, para. 239, 13 Dec. 2017.

treaty[129]. This approach finds no support in the Court's jurisprudence. And as we have explained in our written pleadings, the Tribunal in that case did not fully apply the test it articulated[130].

44. You were also directed to WTO disputes applying a proportionality standard. But none of the cases relied upon by Iran involve essential security provisions[131].

45. It was also suggested that you should adopt an approach discussed in Judge Higgins' separate opinion in the *Oil Platforms* case. But that was an opinion that described what the Court might have done, but did *not* do, in assessing the essential security issue[132].

46. Finally, it was said that Article XX should be interpreted in light of rules and principles relating to the protection of "fundamental rights" of Iranian economic actors[133]. But the nature and source of such rights was not identified. With respect, this does not assist the interpretive exercise in the slightest bit.

47. Mr. President, Members of the Court, the United States does not believe that the Court should attempt to assess, as Iran claims, whether there were "reasonable alternatives [that were] less in conflict or more compliant" with the Treaty[134]. But in fact, the United States had already taken several reasonable alternative measures to protect its essential security interest prior to enacting Executive Order 13599. It was only when those measures proved insufficient that the Executive Order became necessary.

48. To decide this case, we do not believe that you need to construct a complex or comprehensive test for determining when and whether an essential security exception applies. The facts of this case are strong enough to satisfy any reasonable standard.

49. As for the application of the standard to the facts, Iran made several points.

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[129] RI, para. 10.32.

[130] RUSA, paras. 7.19-7.22.

[131] CR 2022/16, p. 40, para. 10 (Pellet).

[132] CR 2022/16, p. 46, para. 29 (Pellet).

[133] CR 2022/16, p. 39, para. 8 (Pellet).

[134] CR 2022/16, p. 40, para. 10 (Pellet).

50. Drawing an analogy to the *Military and Paramilitary Activities* case, Iran said that the Executive Order was not necessary because the United States had been complaining of Iran's conduct for years[135]. But Iran's argument elides a critical distinction.

51. In those years, the United States did not fail to act, but instead implemented incremental measures to address Iran's conduct. Each such action was taken in the hopes that it would curb Iran's threat. On a number of occasions, when the previous mix of measures proved to have failed, the United States took further, measured steps.

52. There can be no credible suggestion that this situation resembles that in *Military and Paramilitary Activities*.

53. Iran also suggested that the Executive Order does not protect essential security because the assets at issue in this case had already been blocked, restrained or seized[136]. But the scope of the Executive Order was more general than the assets in this case. It applied to all Iranian financial institutions, and the purpose was to prevent transactions from moving forward in the future. The fact that some assets encompassed by the Executive Order had already been restrained is beside the point.

54. Nor is it relevant that other States and international organizations did not enact the same measure as the United States[137]. It requires little explanation to understand that the United States perceived itself as a unique target of Iran's support for terrorism and other threats. Under paragraph 1 *(d)*, it is the United States' essential security interests that matters — not the interests of others. The provision says "its" essential security interest, not "an" interest.

55. Finally, for the first time, Iran suggested that the Executive Order should have been eliminated because some banks were removed from the Specially Designated Nationals list in connection with the JCPOA[138]. This, again, misses the point.

56. While the JCPOA was entered into with the hope that it would curtail the risk with respect to nuclear proliferation, it did not address other threats, such as terrorism, for example. And for this reason, Executive Order 13599 remained necessary.

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[135] CR 2022/16, pp. 46-47, paras. 31-34 (Pellet); see also RI, para. 10.29.

[136] CR 2022/16, p. 41, para. 14 (Pellet).

[137] CR 2022/16, p. 47, para. 35 (Pellet).

[138] CR 2022/16, p. 48, para. 36 (Pellet).

### V. Conclusion

57. Mr. President, Members of the Court, that brings me to the end of my submissions on Article XX.

58. I thank you for your attention and would ask that you now call on Mr. Fabry, who will continue the presentation of the United States.

The VICE-PRESIDENT, Acting President: I thank Mr. Daley. I now give the floor to Mr. Steven Fabry. You have the floor, Sir.

Mr. FABRY:

## CONCLUDING REMARKS

### I. Introduction

1. Mr. President, Members of the Court, it is an honour to appear on behalf of the United States in this case and to close our first round of oral argument. As my colleague Mr. Visek said in his introductory remarks, I am going to map out a path for the Court's decision, drawing from our submissions to the Court. The United States acknowledges that the various parts of the case, the various facets of each argument, and how they relate to one another, might appear complex. As I will explain, however, there are clear paths through that thicket.

### II. Threshold defences

2. Mr. President, Members of the Court, the United States has advanced threshold defences that would dispose of Iran's claims. I would like to set them out in the order that we respectfully suggest that the Court could pursue to reach its decision in this case.

3. The first defence is that advanced by Mr. Bethlehem, the unclean hands defence, which would dispose of the case completely. At the very heart of this case is Iran's sponsorship of the terrorist acts against US nationals that underlie the US court judgments at issue in Iran's claims, including in particular the bombing of the US Marine barracks in Beirut in 1983 and the bombing of the Khobar Towers in Saudi Arabia in 1996. After victims finally obtained judgments in US courts and began to enforce those judgments — indeed, just a few weeks after the victims prevailed in the

US Supreme Court in *Peterson*[139] — Iran brought this case predicated on the dubious claims that the legal framework underlying those judgments and the enforcement of those judgments are inconsistent with US obligations under the Treaty of Amity. Tellingly, as both Mr. Visek and Mr. Bethlehem described this morning, Iran has consistently and to this day failed to engage meaningfully with the allegations underlying those judgments — in other words, the conduct that is at the very core of the dispute before this Court. As Mr. Visek and Mr. Bethlehem explained, if there was ever a case for application of the principle of unclean hands, it is this case. The Court's analysis can and, we submit, *should* end here without reaching the merits of Iran's claims under the individual Treaty articles.

4. Separately from the unclean hands defence, I note that even if the Court did reach the merits and concluded that Iran has rights under the Treaty, the Court should nevertheless reject Iran's claims as an abuse of those rights — because Iran seeks to extend the Treaty to unintended circumstances and employ it for an improper purpose.

5. Mr. President and Members of the Court, if you are not with us on unclean hands, then the next issue we submit that you should come to, is the US preliminary objection that the Court joined to the merits, namely, whether Bank Markazi is a "company" for purposes of the Treaty. This issue is now ripe for decision. Now that we have read Iran's reply and listened to the arguments that Iran made on Monday, it is abundantly clear, for the reasons given by Professor Boisson de Chazournes, that Bank Markazi is not a "company" for purposes of the Treaty of Amity. It is instead the central bank of Iran. It was engaged in classically sovereign, and not commercial, activities when it conducted the transactions underlying this dispute. And while Iran says that its central bank is like private actors that also invest in sovereign bonds, that argument does not help Iran. Bank Markazi engages in such transactions as part of its management of foreign currency reserves, which is a distinctly sovereign function. Indeed, that was precisely the point that Bank Markazi made to the US courts, as you heard this morning. For all these reasons, Bank Markazi cannot avail itself of the rights and protections provided for in Articles III, IV and V of the Treaty. That in turn eliminates

[139] CR 2022/15, p. 22, para. 11 (Lowe).

Iran's claims under those Articles with respect to the *Peterson* case, which make up the vast majority of Iran's overall claim.

6. Even if the Court were not with the United States on unclean hands and Bank Markazi, two additional threshold defences would eliminate many of Iran's claims. I turn first to another preliminary matter that was left to the merits by this Court's Judgment on preliminary objections.

7. Mr. President, Members of the Court, Mr. Daley has just taken you through paragraphs 1 *(c)* and 1 *(d)* of Article XX of the Treaty. He explained that Iran's claims with respect to Executive Order 13599 — which, as the Court will recall, blocked the assets that were turned over in *Peterson* — fall within the scope of those provisions. The Order is both an additional component of the US regulatory régime with respect to Iran's production and trafficking of ballistic missiles and other arms, and an incremental increase in US efforts to protect its essential security interests — namely to protect its nationals from acts of terrorism, ballistic missiles, and nuclear weapons. The facts before you, Mr. President and Members of the Court, meet any reasonable standard under paragraph 1 *(d)* of Article XX. Those provisions therefore bar the claim that the United States' blocking of assets pursuant to Executive Order 13599 constitutes, in any manner, a breach of the Treaty of Amity.

8. Returning now to the US court proceedings at issue, our next threshold defence flows from the fact that, as you heard this morning, Iran has detailed its claims solely with respect to the enforcement proceedings in *Peterson*, *Weinstein*, *Bennett*, *Levin*, and the trio of *Heiser* cases. But not only are Iran's claims limited to those cases; as Mr. Bethlehem explained, Iran's failure to exhaust its remedies in the US courts eliminates all but three of those cases. If the Court is with us on Bank Markazi and also finds in favour of the United States on exhaustion, Iran's only remaining company claims are those relating to the *Bennett* and *Weinstein* cases. However, I note that in *Bennett*, assets were turned over pursuant to court order only after the conclusion of judicial proceedings in 2020 and thus after the United States terminated the Treaty.

9. In sum, a finding by the Court on the US threshold defences would eliminate all of Iran's claims if the Court accepts the US unclean hands defence, or if it does not, then nearly all of them.

## III. Article-specific contentions

10. Mr. President, Members of the Court, it is to our submissions on the specific provisions of the Treaty of Amity that I now turn. Regardless of the Court's acceptance of the US threshold defences, we respectfully submit that you can and should conclude that Iran's case fails on the substance of its Treaty of Amity claims because Iran has misinterpreted and misapplied the Treaty.

11. Specifically, with respect to Article III, paragraphs 1 and 2, Iran's claims rely on reading words into those provisions in order to create obligations that those provisions do not impose. For example, Article III, paragraph 1, does not recognize what Iran calls the "separate" juridical status of Iranian companies, and it most certainly does not require the Parties to treat that so-called "separateness" as inviolable. Indeed, as Mr. Daley explained, the doctrine of piercing the corporate veil has long been well established, and there is nothing in the Treaty's text or negotiating history to suggest that the Parties intended to eliminate veil piercing here.

12. Moving on to the next paragraph, although Article III, paragraph 2, protects a company's *access* to courts, it does *not*, in the words of this Court, "seek to guarantee the substantive or even procedural rights that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party"[140]. A guarantee of substantive and procedural rights, of course, is precisely what Iran seeks in attempting to insulate its agencies and instrumentalities from judgment enforcement actions. Iran's claims under Article III should be rejected.

13. As to Article IV, paragraph 1, Iran has failed to support its expansive, proposed reading. As Ms Grosh explained, it is limited to the minimum standard of treatment under customary international law and in particular to the obligation that each Party not deny justice to the other Party's companies and nationals. Iran has not established that the minimum standard of treatment has evolved to include any of the list of additional standards that Iran has proposed. Nor has Iran demonstrated that any of the US measures meets the high threshold for a denial of justice. But as Ms Grosh also explained, even under Iran's mistaken interpretation that the second and third subparagraphs form independent obligations of their own, Iran still would have failed to establish that any of the US measures breached such obligations. Ms Grosh took you in particular through the *Weinstein* case — the only one that we submit could possibly survive the Court's consideration of

[140] *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.

the US threshold defences — and she showed how nothing about the judicial process in that case came close to amounting to a denial of justice or to falling short of Iran's proposed additional standards.

14. I turn next to Article IV, paragraph 2. First, Iran's expropriation claim fails, including because the US measures are non-compensable exercises of the police power, and because Iran has not established that decisions issued by US courts acting as neutral and independent arbiters of legal rights, like the decisions at issue here, are expropriatory. Second, Iran has failed to justify expanding the obligation in that provision of "the most constant protection and security" beyond its traditional scope of protection from physical harm. Iran has not alleged any failure by the United States to provide such protection, and so its claim cannot succeed.

15. That leaves three additional provisions invoked but also misinterpreted by Iran: paragraphs 1 of each of Article V, Article VII and Article X.

16. To begin, Iran has not established any breach of Article V, paragraph 1. That paragraph, contrary to Iran's arguments, must be read as a unitary provision in order to make sense. However, Iran has not established any attempt by its companies to dispose of property, much less a measure that treated Iranian companies less favourably than a similarly situated comparator, as would be required for any claim under a most-favoured-nation obligation like the one in that paragraph.

17. Next, Article VII, paragraph 1, contrary to Iran's reading, does not prohibit any and all conceivable restrictions on payments and other sorts of fund transfers. That reading cannot be sustained under the rules of treaty interpretation.

18. Finally, Iran's interpretation of Article X, paragraph 1, is incorrect for three reasons. First, Iran has advocated an implausibly broad reading of the term "commerce". Second, Iran has failed to show that the US measures at issue here have in fact impeded commerce "[b]etween the territories" of the two Parties. Third, Iran's attempt to apply this paragraph to the enforcement of court judgments leads to absurd results and cannot be a correct interpretation of that provision. Iran's claims with respect to Article X must therefore also fail.

## IV. Conclusion

19. Mr. President, Members of the Court, in conclusion, the United States asks that the Court dismiss this case in its entirety because Iran comes to the Court with unclean hands in an attempt to evade the responsibility for sponsoring acts of terrorism directly tied to the court proceedings here. In the alternative, the United States asks that the Court dismiss almost all of Iran's claims on the basis of one or more of our other threshold defences, including that Bank Markazi is not a company for purposes of the Treaty. Should the Court nevertheless reach the merits, the United States submits that Iran has failed to make out a single viable claim of breach under any of the articles of the Treaty of Amity.

20. This concludes my submissions, and it also concludes the first-round oral argument of the United States. I thank you for your kind attention.

The VICE-PRESIDENT, Acting President: I thank Mr. Fabry, whose statement brings to an end the first round of oral argument of the United States. The Court will meet again tomorrow afternoon, at 3 p.m., to hear the second round of oral arguments of Iran. The sitting is adjourned.

*The Court rose at 4.55 p.m.*

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