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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Friday 23 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 vendredi 23 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 now open. The Court meets today to hear the second round of oral arguments of the United States. I now call on Sir Daniel Bethlehem to take the floor.

Mr. BETHLEHEM:

FRAMING THE UNITED STATES' REPLY, UNCLEAN HANDS AND EXHAUSTION OF LOCAL REMEDIES

1. Mr. President, Members of the Court, it falls to me to open the United States' reply this afternoon. The order of our submissions will follow the decision scheme proposed by Mr. Fabry in his closing submissions on Wednesday. To begin with, I have some brief framing observations in response to what we heard from Iran yesterday, followed by some equally brief remarks on unclean hands and the exhaustion of local remedies. I will be followed by Professor Boisson de Chazournes, who will address the Bank Markazi status issue. She will be followed by Mr. Daley, who will address Article XX and Article III, paragraphs (1) and (2). Ms Grosh will follow him with submissions on the US measures and court decisions and also on Article IV (1). Mr. Jedrey will then address Articles IV (2), V (1), VII (1) and X (1). Finally, the US Agent, Mr. Visek, will make some closing remarks and will read the US final submissions.

General observations

2. Mr. President, Members of the Court, I turn, first, to some general observations on what we heard from Iran yesterday. There was a thread that ran through the Iranian submissions. It was that of US unilateralism, US exceptionalism — a handy trope, easily employed, with ready sarcasm and indignation, a fig leaf hiding the absence of reasoned argument. "[T]he United States really does not get it. The world does not work like this", said Iran's counsel. "It is not for the United States to put in place an alternative system", he continued, "of which the United States is the sole judge, and to expect that other States will give up their rights under international law, abandon the international rule of law, and submit to US procedures[1]". **"**Sponsorship**"**, he said, sponsorship of terrorism is not the language of State responsibility. US courts, Iran says, are merely a mechanism for registering

[1] CR 2022/19, p. 11, para. 9 (Lowe).

plaintiffs' claims[2]. Taking the United States to task about its invocation of equity, Iran says that this "speaks volumes about the United States' approach to its legal obligations"[3].

3. Mr. President, Members of the Court, it is, of course, *not just US* courts that have had the task of addressing and assessing and reaching judgments on Iran's actions of the kind here in issue. As is addressed in detail in the written submissions of the United States[4], and as was addressed at length in the US oral submissions at the preliminary objections phase[5], the same task has been required of prosecutors and judges from Argentina[6] to Azerbaijan[7]; from Bahrain[8] to Belgium[9]; from France[10] to Germany[11] to Kenya[12]; and more. Interpol Red Notices have been issued for the arrest of senior Iranian personnel[13]. The United Kingdom Parliamentary Human Rights Group issued a detailed report documenting Iranian terrorist conduct[14]. European law enforcement agencies have foiled bomb plots aimed at causing mass casualties. The Financial Action Task Force has assessed Iran to be a "high risk jurisdiction", given its involvement in terrorist financing[15]. The list goes on. So, it is not just US courts that have reached judgments on Iranian terrorist conduct. And the

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[2] CR 2022/19, p. 16, para. 7 (Vidal).

[3] CR 2022/19, p. 10, para. 4 (Lowe).

[4] See POUSA, Chap. 3; CMUSA, Chap. 5; RUSA, Chap. 3.

[5] See e.g. CR 2018/28, p. 38, para. 17; pp. 44-49, paras. 37-55; p. 53, para. 68 (Bethlehem).

[6] Investigations Unit of the Office of the Attorney General, *Report; Request for Arrests* (25 Oct. 2006), CMUSA, Ann 23.

[7] Supreme Court of Azerbaijan Judgment, Case No. 63, p. 2 (14 Apr. 1997), POUS, Ann. 69.

[8] *Official Records of the United Nations General Assembly (UNGAOR)*, 70th Sess., Agenda items 85 and 108, Letter from the Permanent Mission of Bahrain to the UN addressed to the Secretary General, UN doc. A/70/445 (26 Oct. 2015), POUS, Ann. 42.

[9] Corr. [Court of First Instance] Antwerp, Ct. AC8, 4 Feb. 2021, 20A003763, p. 32 (English translation), RUSA, Ann. 258.

[10] Court of Cassation, Criminal Div. [Cour de Cassation], Judgment of 9 July 1998, No. 9783.612 (denying appeal), CMUSA, Ann. 47.

[11] Summary of Judgment of the Superior Court of Justice, Berlin, in the *Mykonos* trial, p. 4, POUS, Ann. 33; see also Judgment of the Superior Court of Justice, Berlin, in the *Mykonos* trial [Kammergericht: Urteil im "Mykonos-Prozess"], p. 23 (10 Apr. 1997), CMUSA, Ann. 5.

[12] "In Kenya, two Iranians get life in prison for plotting attacks", *L.A. Times* (6 May 2013), POUS, Ann. 43; Cyrus Ombati, "Iranians' 30-bomb plot in Kenya", The Standard (4 July 2012), POUS, Ann. 44; "Iranians planned to assassinate Israeli ambassador", Ynet (17 Aug. 2012), CMUSA, Ann. 48.

[13] Interpol Media Release, "INTERPOL General Assembly upholds Executive Committee decision on AMIA Red Notice dispute" (7 Nov. 2007), CMUSA, Ann. 32.

[14] Parliamentary Human Rights Group, *Iran: State of Terror, An account of terrorist assassinations by Iranian agents* (1996), CMUSA, Ann. 47.

[15] Financial Action Task Force, *High-Risk Jurisdictions Subject to a Call for Action — 23 October 2020* (23 Oct. 2020), RUSA, Ann. 271.

judgments of the US courts regarding Iran's liability for acts of terrorism accord closely with the judgments reached by judges and law enforcement authorities in other States.

4. Counsel for Iran again queried why the United States had not sought to address Iran's claimed responsibility by bringing legal proceedings before this Court. On what basis of jurisdiction, we ask? Is Iran — are our colleagues on the other side of the aisle, here, today — ready to submit to the Court's jurisdiction to address the case against it? Hyperbole will not avail Iran on this issue.

5. Mr. President, Members of the Court, Iran's Agent, in his closing submissions, said that Iran categorically denied the US terrorism allegations[16]. There was, however, no engagement with the statements made by senior Iranian political leaders affirming Iran's responsibility for the Beirut Marine barracks bombing to which Mr. Visek drew attention on Wednesday; there was no explanation; there was no retraction; there was no denunciation — just a reiteration of a categorical denial. Not so credible.

6. On the issue of Iran's "sponsorship" of terrorism, a term with which Iran's counsel took issue. It bears observation that in the *Peterson*[17] and *Heiser*[18] cases — the two cases about which we heard most from Iran — the evidence was not simply of an indirect link between Iran and the atrocities in question; rather, that those attacks had been directly procured by Iran, with the knowledge and involvement of its most senior leadership. I referred you to the liability judgment in *Peterson* on Wednesday. Counsel for Iran said yesterday that we had said little about *Heiser* in our submissions[19]. We were simply following Iran's lead in focusing on *Peterson*, but, Mr. President, Members of the Court, we readily urge you to have a careful regard also to *Heiser*, the liability judgment of which is at Annex 41 to the US Counter-Memorial. The evidence of Iran's direct involvement in the atrocity underlying that case is also compelling.

7. And then we come to equity, and Iran's objection to the United States' invocation of the exercise of the Court's discretionary competence on this basis. The United States' reference to equity was, of course, and is, a reference to equity *infra legem*, equity that is a cornerstone of the law, a

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[16] CR 2022/19, p. 66, para. 9 (Habibzadeh).

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

[18] *Heiser* v. *Islamic Republican of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006), CMUSA, Ann. 41.

[19] CR 2022/19, p. 54, para. 20 (Aughey).

source of law, a general principle of law, not to equity *contra legem*. Although not addressing equity in terms, the Court has long ago made it clear that it "has ex officio the power to put an end to a case whenever it sees that this is necessary from the viewpoint of the proper administration of justice"[20]. This is the competence that the United States is asking the Court to exercise in this case, and the proper administration of justice comports readily with the principle of unclean hands.

8. Before turning to unclean hands, I note that, while there was passing comment from Iran yesterday that sought to re-root Iran's case in its longer list of cases set out at Attachment 2 to its Memorial and Reply, there was also an acknowledgment that Iran's case hinged on the enforcement proceedings that resulted in the turnover to plaintiffs of Iranian assets[21].

Unclean hands

9. Mr. President, Members of the Court, this brings me to the unclean hands argument. What was most striking about Iran's pleadings on this issue yesterday was what was *not* addressed. There was no engagement with the *Al-Warraq* and *Bank Melli* awards. Nothing was said on the issue of the direct and inextricable nexus between the case that Iran has brought to the Court and the conduct on which the United States relies to advance its unclean hands defence. There was no comment on the second limb of the *Bank Melli* unclean hands test, namely, the egregious conduct the showing of which underpins the principle. There was a deafening silence on the Iranian statements against interest asserting responsibility for the Beirut Marine barracks bombing. There was no engagement with the equitable provenance of the unclean hands principle. Iran simply cannot muster an argument in response to the US case on these points.

10. Iran chose to rest its case on unclean hands solely, only, exclusively, on its plea of US exceptionalism and its aspersions on the US judicial system. I have three points in response. *First*, as I have already observed, the US courts are neither alone nor outliers in addressing and assessing Iran's terrorist conduct. While the measures in issue are particular to the United States, evidence of Iran's engagement in terrorist conduct is incontrovertible, and by no means confined to US liability judgments.

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[20] *Legality of Use of Force (Serbia and Montenegro* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2004 (II)*, p. 734, para. 31.

[21] See e.g. CR 2022/19, p. 65, para. 3 (Habibzadeh).

11. *Second*, the US courts are assiduous in safeguarding a litigant's due process rights, if the litigant choses to exercise them, and the courts do not shirk from holding other branches of government to account and of scrutinizing their conduct. One example will suffice, a case called *Roeder* v. *Iran*, a 2002 judgment of Judge Sullivan of the DC District Court[22], which was upheld by the DC Court of Appeals[23]. In that case, Judge Sullivan, on a contested application by the US Government, vacated a default judgment on liability that had been given against Iran to US plaintiffs who had been held hostage in Iran and tortured when the US Embassy in Iran was seized in November 1979. The basis of the order vacating the liability judgment was the US obligations under the Algiers Accords that had brought the hostage crisis to an end. In his opinion, Judge Sullivan was sharply critical both of the plaintiffs' lawyers and of Congress. A review of the judgment will demonstrate beyond doubt the rigour, the due process, the fairness of the US judicial system.

12. *Third*, and of particular importance, the US case on unclean hands does not rest solely on the findings of liability by the US courts. The court judgments, notably those in the *Peterson* litigation, are the principal focus of Iran's challenge in these proceedings. But, for purposes of an unclean hands assessment, the Court can properly take judicial notice of the statements against interest by the Iranian political leadership acknowledging responsibility for the Beirut Marine barracks bombing. The Court can also, we submit, against the backdrop of this statement against interest evidence, properly form its own view of the reliability of the *Peterson* liability judgment[24]. As I noted a moment ago, we would also urge you to look at the *Heiser* liability judgment[25] and make your own assessment of that as well. These are not kangaroo court proceedings.

13. Mr. President, Members of the Court, Iran hopes to take refuge in the trope of US exceptionalism because it thinks that this will appeal to a sentiment that is more viscerally adverse to the United States. But such sentiment has no place in these proceedings. The US measures are an entirely appropriate response to Iran's terrorist conduct. And the US judicial system is both fully

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[22] *David M. Roeder et al.* v. *The Islamic Republic of Iran and the Ministry of Foreign Affairs*, 195 F.Supp.2d 140 (D.D.C. 2002), available at https://casetext.com/case/roeder-v-the-islamic-republic-of-iran.

[23] *David M. Roeder et al.* v. *The Islamic Republic of Iran et al.*, 333 F.3d 228 (D.C. Cir. 2003), available at https://casetext.com/case/roeder-v-islamic-republic-of-iran-2/.

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

[25] *Heiser* v. *Islamic Republican of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006), CMUSA, Ann. 41.

accessible and provides due process to Iran, to Iranian State entities, to Iranian companies and to third parties whose rights and interests may be caught up with them. This point will be reinforced by what I have to say on exhaustion in just a moment.

14. Mr. President, Members of the Court, there is one last aspect about the United States' unclean hands defence that warrants comment. It is a point, candidly, that we had been expecting Iran to make on Monday or yesterday, but it did not, and it is a point to which we expect and indeed we urge the Court to be sensitive.

15. The United States considers that there is a compelling case for the Court to rule against Iran in these proceedings on the basis of unclean hands. But, no doubt, as you come to your deliberations on this issue, a question that will loom large around your table will be a concern about whether, were you to do so — whether you were to find against Iran on this basis — this would open the floodgates to a proliferation of such claims in cases to come. This is a legitimate concern. But it is also, the United States believes, a concern that can be readily addressed through a judgment that sets clear parameters for resort to and reliance on the unclean hands principle.

16. The unclean hands principle is rooted in good faith as a principle of equity *infra legem*. As such, it can only be a shield, not a sword. In other words, it can only operate to deny a claim, and not to preclude a defence. As a principle of equity, rooted in the proper administration of justice, it is a matter for the discretion of the Court. It does not go to the jurisdiction of the Court. Unclean hands operates as an affirmative defence. In other words, the burden is on the respondent to advance and sustain a claim of unclean hands.

17. As to the requirements that must be met to sustain a plea of unclean hands, the following emerge from a review of the case law and commentary. *First*, there must be a direct nexus between the claim that the applicant brings to the Court and the conduct on which the unclean hands defence rests. *Second*, the conduct complained of must be egregious and it must be demonstrable by evidence. *Third*, the circumstances warranting reliance on unclean hands must be exceptional — an applicant cannot be lightly deprived of its right to judicial process. *Fourth*, the outcome, namely a dismissal by the Court on the basis of a finding of unclean hands, must be proportionate, having regard to all the circumstances of the case.

18. Mr. President, Members of the Court, the adoption by the Court of a principle of unclean hands that rests on such a framework and on these requirements would not open the floodgates. It would give content, and appropriate limitation, to a principle that has been applied by international tribunals for a century.

19. Mr. President, Members of the Court, this case meets every requirement for the proper resort to the unclean hands principle. If not this case, which case? Iran comes to the Court with unclean hands. We urge you to so find.

Exhaustion of local remedies

20. Mr. President, Members of the Court, I come lastly to the issue of exhaustion of local remedies. As you will recall, we heard virtually nothing from Iran on this yesterday. There was no response to the US submissions on *Avena*, on *LaGrand*, on *Ukraine* v. *Russia*, on *Arrest Warrant* — submissions that had been advanced with such apparent conviction on Monday. Nothing was said about the International Law Commission's approach to preponderant claims. The only thing that was said about what Iran says are its own direct claims is that Iran reserves its right to define and address them in a damages phase. But, Mr. President, Members of the Court, that cannot be sufficient. As I observed on Wednesday, such an approach would effectively eviscerate the local remedies rule as all that would be required to get around it would be for a State to assert an unparticularized claim of economic loss of its own.

21. Mr. President, Members of the Court, a review of Iran's final submissions yesterday also makes it abundantly clear that Iran is advancing claims on behalf of Iranian companies, not a claim of its own. The only possible direct claim that, on Iran's initial theory of the case, would have engaged the interests of the State of Iran, was the claim of sovereign immunity. That, though, is not before the Court.

22. Iran's case on exhaustion of local remedies is essentially that there are no local remedies to exhaust, that the US legal process is constitutionally incapable of availing Iran or Iranian entities or Iranian companies of due process and an opportunity to be heard. The reality, however, is different.

23. Counsel for Iran — to give them their due — acknowledged that Iran had prevailed in the *Rubin* case concerning the Persepolis artefacts, but he said that this was irrelevant to the present case,

which concerns the availability of effective remedies for Iranian companies. Iran's counsel similarly dismissed the *Bennett* case, to which I drew your attention on Wednesday[26], on the ground that this concerned diplomatic property. Iran did not, however, address the example of the *Weinstein* case [27], in which — as Ms Grosh had pointed out — the court had given active consideration to the asserted inconsistency of the US measures with the Treaty of Amity and had concluded, on the issues engaged by that case, that there was no such inconsistency. The conclusion to be drawn from this is that it would have been entirely open to an Iranian defendant to have raised Treaty of Amity points, were any such issues to have been apparent in the circumstances of the given case.

24. Mr. President, Members of the Court, there is an even more fundamental point. It is that, save in very, very few cases, Iran, Iranian State entities and Iranian companies did not appear in either the liability or the enforcement proceedings. Iran, in response, complains of the default judgments on liability and says that sovereign immunity entitled it not to engage in those proceedings. However, Mr. President, Members of the Court, States, as a matter of routine, are impleaded in foreign courts and have a choice of whether or not to appear. In a growing number of circumstances, there will be no entitlement to immunity as a matter of settled law. In other cases, the availability of immunity will be heavily contested, with the boundaries of immunity acknowledged by national law evolving through legislative enactment and judicial decision. And it only requires the most cursory of review of national judicial decisions to see this in action. States, State entities and State-owned companies make a choice when they decide not to appear. Non-appearance, however, and the fact of a default judgment on liability or enforcement, does not oust the local remedies rule.

25. As Ms Grosh observed on Wednesday, foreign States are afforded a very considerable latitude in US civil procedure rules. Default liability judgments can be challenged and they can be set aside. Indeed, it is readily envisaged that States may choose not to engage in legal proceedings when initially served, with the possibility of doing so at some later stage, in the event that a default judgment is issued. This point was expressly addressed by the DC Court of Appeals in a 2015

[26] CR 2022/17, p. 32, para. 54 (Bethlehem); *Bennett* v. *Islamic Republic of Iran*, 604 F. Supp. 2d 152, 154 (D.D.C. 2009), RUSA, Ann. 310.

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

judgment in the case of *Jerez* v. *Cuba* in the following terms — and I quote two brief paragraphs from the judgment of that court:

> "A defendant who knows of an action but believes the court lacks jurisdiction over his person or over the subject matter generally has an election. He may appear, raise the jurisdictional objection, and ultimately pursue it on direct appeal. If he so elects, he may not renew the jurisdictional objection in a collateral attack . . ."

And the court goes on:

> "Alternatively, the defendant may refrain from appearing, thereby exposing himself to the risk of a default judgment. When enforcement of the default judgment is attempted, however, he may assert his jurisdictional objection. If he prevails on the objection, the default judgment will be vacated."[28]

26. So the US courts expressly contemplate the circumstances that Iran was faced with. Significantly, for present purposes, this case — the extract of which I have just quoted — this was a case in which the plaintiff, who had obtained a default liability judgment for US$200 million against Cuba under the Torture Victim Protection Act, sought to enforce that judgment against alleged agencies and instrumentalities of Cuba. The alleged agencies and instrumentalities of Cuba, however — and the word "alleged" is important here, in the judgment of the court — the alleged agencies and instrumentalities, however, *not Cuba itself*, moved to vacate the writ of attachment and challenge the jurisdiction of the court with regard to the default judgment. They were successful in doing so.

27. Mr. President, Members of the Court, what this demonstrates is that, not only would it have been open to Iran to contest default liability judgments, but that, in given circumstances, it may well have been open to Iranian State entities, to Iranian companies and, indeed, to third parties caught up in enforcement proceedings, to have challenged the underlying default liability judgments. Apart from three of the enforcement cases in these proceedings, however — *Peterson*, *Weinstein* and *Bennett* — Iranian State entities and Iranian companies chose not to engage in the domestic legal processes. It was open to them to do so. They did not. Iran is not now entitled to bring claims in respect of such cases in these proceedings.

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[28] *Nilo Jerez* v. *Republic of Cuba, et al.*, 775 F.3d 419, 422 (D.C. Cir. 2015) available at https://casetext.com/case/jerez-v-republic-cuba-2.

28. Mr. President, Members of the Court, that concludes my submissions. I thank you for your kind attention. Mr. President, may I ask you to call Professor Boisson de Chazournes to continue the US submissions.

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

Mme BOISSON DE CHAZOURNES :

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

I. Introduction

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un honneur de me présenter à nouveau devant vous aujourd'hui au nom des Etats-Unis. Comme vous l'avez entendu lundi et à nouveau hier, au cœur de l'affaire se trouvent les réclamations de l'Iran découlant du transfert des actifs de la banque Markazi dans le cadre du litige *Peterson*. L'Iran persiste à avancer sa théorie intenable selon laquelle sa banque centrale peut être qualifiée de «société» au sens du traité d'amitié. Le second tour de plaidoiries permettra de clore cette controverse. En investissant ses réserves en devises étrangères, activité en cause dans l'affaire *Peterson*, la banque centrale de l'Iran était engagée dans des activités fondamentalement souveraines. Par conséquent, les tentatives peu convaincantes de l'Iran de qualifier la banque Markazi de «société» au sens du traité doivent être rejetées.

II. Ce que les Etats-Unis ont démontré

2. Dans leurs présentations de mercredi, les Etats-Unis ont établi trois points que l'Iran n'est pas parvenu à réfuter hier. Ceux-ci sont donc toujours valables.

1) *Tout d'abord*, nous avons rappelé que la banque Markazi est la banque centrale de l'Iran et exerce, à ce titre, des activités souveraines pour l'Etat iranien[29].
2) *Ensuite*, nous avons souligné que l'Iran n'a pas réussi à établir que sa banque centrale mène des activités *autres que* souveraines, et ce, à aucun moment, ni dans aucune juridiction.

[29] CR 2022/17, p. 52-53, par. 15-17 (Boisson de Chazournes).

3) *Enfin*, même si l'Iran avait réussi à prouver que sa banque centrale pouvait, en théorie, mener des activités non souveraines, il n'a pas réussi à démontrer que les activités pertinentes en cause dans la présente affaire étaient de nature «commerciale». En fait, l'investissement par la banque Markazi de ses réserves de change participe de la gestion de sa politique monétaire, une activité souveraine par excellence. Si un doute devait subsister pour la Cour à ce sujet, la description répétée et sans équivoque de ces activités par la banque Markazi devant d'autres juridictions comme étant souveraines et non commerciales devrait le dissiper.

3. Monsieur le président, Mesdames et Messieurs les juges, je ne répéterai pas les arguments déjà avancés par les Etats-Unis dans leurs écritures et au cours de leurs présentations orales de mercredi. J'aborderai plutôt la principale pomme de discorde qui oppose les Etats-Unis à l'Iran, à savoir la nature souveraine ou commerciale des activités à l'origine de ce différend. La conclusion reste inéluctablement la même ; ces transactions étaient et ne pouvaient être autre chose que des activités de nature souveraine.

III. Pour la quatrième fois, l'Iran n'a pas réussi à démontrer que les activités de la banque Markazi à l'origine de ce litige étaient de nature commerciale

4. Dans son arrêt sur les exceptions préliminaires, votre juridiction a offert à l'Iran la possibilité de démontrer que la banque Markazi exerçait une activité commerciale lorsqu'elle réalisait les activités à l'origine du présent différend et qu'elle devait alors être considérée comme une «société» au sens du traité. Autrement dit, au cours de la procédure, l'Iran disposa de quatre occasions pour démontrer que la banque Markazi devait être soumise aux articles III à V du traité en tant que «société». Dans son mémoire, dans sa réplique, lors du premier tour de plaidoiries de lundi et lors du second tour hier. Et pas une fois il n'y est parvenu. Au cours de ces quatre occasions, tout ce qu'a fait l'Iran a été de tenter de transformer des activités connues de la Cour lors des exceptions préliminaires, à savoir des investissements de réserves de change, en des activités «commerciales». Dans ses tentatives, l'Iran a fait un certain nombre d'allégations qu'il me revient maintenant d'écarter. Il y en a six.

1) L'Iran avance que les Etats-Unis auraient mis l'accent sur les «fonctions» ou les «objectifs» des activités de la banque Markazi plutôt que sur la nature de celles-ci. Ce n'est certainement pas le

cas. Je vous renvoie simplement aux écritures des Etats-Unis et, plus particulièrement, aux paragraphes 5.3 à 5.6 de la duplique. Je vous renvoie également aux paragraphes 8 à 12 de ma présentation orale de mercredi dernier. En revanche, ce qui est certain, c'est que l'Iran interprète de manière inexacte votre arrêt sur les exceptions préliminaires. Souhaitant faire oublier que l'activité en cause *est* la gestion par la banque centrale des réserves de change de l'Iran, ce dernier redéfinit l'«activité commerciale» au sens du traité en voulant en avoir une interprétation microscopique. Suivant une telle logique, toutes les activités de la banque Markazi aux Etats-Unis seraient commerciales. Un tel résultat est inconciliable avec la décision de la Cour de céans de joindre l'examen de la question au fond, précisément pour que l'Iran puisse démontrer en quoi les activités de la banque Markazi constituaient autre chose que les «fonctions souveraines qu'il admet»[30].

2) La loi bancaire de 1972 serait censée démontrer que la banque Markazi est autorisée à exercer une activité commerciale. Mais de manière assez curieuse, malgré les nombreuses activités de nature commerciale que la banque est prétendument autorisée à exercer telles que l'achat et la vente des réserves d'or, la détention de comptes bancaires, la réalisation de transactions financières, l'Iran est bien incapable de fournir *un seul exemple concret* d'activité commerciale autre que celle en cause dans la présente affaire.
3) L'Iran prétend que les activités de la banque Markazi aux Etats-Unis allaient au-delà des 22 placements dans des obligations américaines. Je me contenterai seulement de vous renvoyer à la présentation orale de l'Iran de lundi dernier, lors de laquelle le conseil pour l'Iran a défini les «activités concernées» comme les «22 obligations américaines» achetées par Clearstream[31].
4) L'Iran fait valoir que les déclarations de la banque Markazi devant les juridictions américaines n'ont aucun poids. N'en déplaise à nos contradicteurs, c'est tout le contraire.

— Tout d'abord, l'Iran souligne que la banque Markazi, en tant que plaideur, a avancé tous les arguments possibles et imaginables dans le but de prévaloir dans les procédures judiciaires américaines, suggérant ainsi que les déclarations émises dans ce contexte devaient être écartées[32].

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

[31] CR 2022/15, p. 61, par. 26-27 (Thouvenin).

[32] CR 2022/19, p. 28, par. 13 (Thouvenin).

Les Etats-Unis conviennent que les tribunaux américains permettent à la banque Markazi et à l'Iran de présenter une grande variété d'arguments juridiques pour défendre leurs positions. Pour autant, cela ne suffit pas pour écarter ces déclarations. En particulier, lorsque la banque Markazi décrit ses propres activités, ses déclarations ont, d'un point de vue factuel, un grand poids.

— A cet égard, dans le cadre de ces procédures, la banque Markazi a soumis des déclarations sous serment de ses employés sur la nature de ses activités, les qualifiant de souveraines et non de commerciales ou d'affaires. Comme vous pouvez le voir sur la diapositive qui vous est présentée, dans une déclaration sous serment soumise dans le cadre de la procédure judiciaire américaine *Peterson*, un employé de la banque Markazi a déclaré que les activités en question sont des

> «examples of the type of bonds in which Bank Markazi invests part of its reserves. Such investments are not linked to any specific project and simply form part of the total reserves used to instill market confidence, and promote [*sic*] central bank's primary objective of price stability.»[33]

Un autre employé a déclaré que la «Bank Markazi does not maintain a presence of any kind in the United States and does not conduct any business whatsoever in that country»[34].

— Quand bien même il conviendrait de ne pas tenir compte des arguments développés par les avocats de la banque Markazi, ceux-ci ayant présenté tous les arguments possibles pour défendre la banque centrale, le même constat ne peut pas être fait vis-à-vis des déclarations sous serment des représentants de la banque Markazi. Bien au contraire, ces déclarations sont hautement pertinentes pour la décision de la Cour. De surcroît, ces déclarations ne se limitent pas aux seules juridictions américaines. Des déclarations similaires concernant la nature des activités en cause dans la présente affaire ont été formulées devant les tribunaux d'autres pays[35].

— En second lieu, l'Iran soutient que les déclarations passées de la banque Markazi font référence à ses «fonctions» plutôt qu'à la «nature» de ses activités. A l'appui de cet argument, il reproduit la diapositive tirée de la présentation américaine de mercredi que vous voyez à l'écran. L'Iran se

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[33] Déclaration sous serment de M. Massoumi, *Peterson* v. *Islamic Republic of Iran*, no 10-4518 (district sud de l'Etat de New York, 17 octobre 2010) (EPEU, annexe A02), par. 11.

[34] Déclaration sous serment de Gholamhossein Arabieh, *Peterson* v. *Islamic Republic of Iran*, No. 10-4518 (district sud de l'Etat de New York, 17 octobre 2010) (EPEU, annexe A03), par. 6.

[35] Frédéric Dopagne, avis juridique sur l'immunité d'exécution de la banque centrale de la République islamique d'Iran (banque Markazi) en vertu du droit international dans le cadre de la procédure en validation de saisie-arrêt pendante devant le tribunal d'arrondissement de Luxembourg dans le rôle nº 177.393 (16 mars 2018), par. 60-64 (CMEU, annexe 120 ; dossier des juges, onglet nº 13).

trompe. Si, dans son mémoire soumis aux tribunaux américains, la banque Markazi décrit ses fonctions souveraines, elle ne s'arrête pas là. Elle a également précisé qu'elle considérait que les activités spécifiques entreprises à l'appui de ces fonctions souveraines étaient «non commerciales». Autrement dit, Mesdames et Messieurs les juges, la banque Markazi a fait état à la fois de l'objectif souverain de ses placements au titre des réserves de change et de la nature «non commerciale» des activités qu'elle a entreprises dans la poursuite de cet objectif.

— En dernier lieu, l'Iran cherche à écarter les déclarations de la banque Markazi sur le «but» de ses activités devant les juridictions américaines en prétendant qu'elle traitait de l'immunité souveraine, une question qui, selon l'Iran, est totalement déconnectée de celle de savoir si une entité peut prétendre au statut de «société» en vertu du traité. Cela est également incorrect.

— Dans l'affaire *Peterson*, la banque Markazi a soutenu que les plaignants ne pouvaient pas invoquer la renonciation de l'immunité contenue dans l'article XI, paragraphe 4, du traité d'amitié. Comme vous le voyez sur vos écrans, l'article XI, paragraphe 4, est une disposition qui vise à garantir que les sociétés d'Etat qui peuvent revendiquer des droits conventionnels ne soient pas injustement avantagées par rapport aux sociétés privées avec lesquelles elles sont en concurrence. En conséquence, la disposition interdit aux entreprises d'Etat de l'une ou l'autre des parties de revendiquer certaines immunités pour elles-mêmes ou pour leurs biens si ces entreprises «exerce[nt] dans les territoires de l'autre Haute Partie contractante une activité commerciale ou industrielle de quelque nature que ce soit, y compris le transport des marchandises». La banque Markazi a expressément fait valoir que cette disposition était inapplicable aux actifs en cause parce qu'elle ne se livrait pas à de telles activités commerciales ou d'affaires au sens du traité. La banque Markazi n'a pas discuté de l'immunité souveraine — pardon, excusez-moi. Donc, pour conclure sur ce point, je dirai que la position de l'Iran, telle qu'elle a été décrite hier, peut se résumer ainsi. Les placements au titre des réserves de change ne sont pas une activité commerciale au sens de l'article XI, paragraphe 4, du traité, si bien que la banque Markazi peut revendiquer l'immunité de ses actifs. En revanche, les placements au titre des réserves de change sont une activité commerciale aux fins de l'article III du traité, de sorte que la banque Markazi peut revendiquer tous les droits et protections d'une «société» en vertu de ce traité. Comme vous le voyez, c'est une lecture confuse et opportuniste du traité, qui

ne peut pas être correcte, en revendiquant l'application de deux dispositions à la fois. Mais surtout, l'approche … Pardon.

Le VICE-PRESIDENT, faisant fonction de président : Vous parlez très vite.

~~*Mme BOISSON DE CHAZOURNES : Je ne vous entends pas. Je ne vous ai pas entendu. Excusez-moi.*~~

~~*Le VICE-PRESIDENT, faisant fonction de président : Vous pouvez ralentir s'il vous plaît ? Vous parlez trop vite. Can you speak slower because you are …*~~

Mme BOISSON DE CHAZOURNES : ~~*Je n'arrive pas… Je suis désolée, il y a de la résonnance et je n'arrive pas à …*~~ Est-ce que vous me permettez de reprendre ~~*un*~~ ***le*** paragraphe ?

Le VICE-PRESIDENT, faisant fonction de président : Oui, s'il vous plaît.

Mme BOISSON DE CHAZOURNES : ~~*D'accord, vous me le permettez*~~. Je vous remercie de cette faveur.

— ~~***Donc,***~~ ***J***'en étais aux déclarations de la banque Markazi dans l'affaire *Peterson*, et ~~***donc***~~ je disais que la banque Markazi a expressément fait valoir que cette disposition était inapplicable aux actifs en cause parce qu'elle ne se livrait pas à de telles activités commerciales ou d'affaires au sens du traité. Dans l'affaire *Peterson*, la banque Markazi n'a pas discuté de l'immunité souveraine d'un point de vue ésotérique. Elle ne faisait pas non plus valoir uniquement ses objectifs souverains. Donc, pour conclure sur ce point, la position de l'Iran, telle qu'elle a été décrite hier, peut se résumer ainsi. Les placements au titre des réserves de change ne sont pas une activité commerciale au sens de l'article XI, paragraphe 4, du traité, si bien que la banque Markazi peut revendiquer l'immunité de ses actifs. En revanche, les placements au titre des réserves de change sont une activité commerciale aux fins de l'article III du traité, de sorte que la banque Markazi peut revendiquer tous les droits et protections d'une «société» en vertu dudit traité. C'est une lecture confuse et opportuniste du traité qui ne saurait être correcte. Surtout, l'approche de l'Iran va à l'encontre de l'objectif de l'article XI, paragraphe 4, dont la Cour a reconnu qu'il visait à garantir que les entités publiques opérant sur le même terrain que les

entreprises privées et revendiquant les droits en vertu du traité *ne bénéficient pas* de privilèges spéciaux tels que l'immunité souveraine[36].

5) Dans une autre tentative de dévier la Cour de la description faite par la banque Markazi de ses propres activités dans la procédure *Peterson*, l'Iran invoque une décision d'un tribunal américain qui, selon lui, n'a «jamais eu le moindre doute sur le fait que la banque Markazi [était] une» société au sens du traité[37]. En réalité, dans cette affaire mentionnée par l'Iran, la question de savoir si la banque Markazi est une société n'a pas été soulevée par les plaignants, de sorte que le silence de la cour sur cette question n'est ni surprenant ni révélateur.

6) Et ce sera là mon dernier point : l'Iran n'a pas abordé les décisions internationales et nationales qui soutiennent la nature souveraine des placements au titre des réserves de change[38]. Nos contradicteurs se sont bien gardés d'aborder ces décisions hier. Les Etats-Unis estiment qu'elles sont pourtant pertinentes pour l'examen de la Cour, et tout particulièrement, l'affaire *Paushok,* dans laquelle le tribunal a estimé que la gestion par la Mongolie de ses réserves de change était une activité souveraine. Cette affaire est particulièrement instructive étant donné que l'immunité souveraine n'était pas en cause, contrairement aux litiges devant les juridictions américaines, ce qui justifierait, selon l'Iran, d'écarter ces décisions.

IV. Conclusion

5. Pour toutes ces raisons, la banque Markazi ne constitue pas une «société» au sens du traité. Par conséquent, les demandes de l'Iran au titre des articles III, IV et V, dans la mesure où elles sont liées au traitement de la banque Markazi, doivent être rejetées.

6. Monsieur le président, je voudrais conclure ma plaidoirie avec un point plus général. Les banques centrales, comme la banque Markazi, ont longtemps occupé un statut particulier, plus proche d'un statut officiel que d'autres entités telles des entreprises publiques. Lorsqu'elles agissent à titre officiel, comme lorsqu'elles gèrent les réserves de change d'un Etat, les banques centrales sont présumées agir au nom de l'Etat.

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[36] Arrêt sur les exceptions préliminaires, *C.I.J. Recueil 2019 (I),* p. 37, par. 87.

[37] CR 2022/19, p. 31, par. 24 (Thouvenin).

[38] DEU, par. 5.17-5.22.

7. Des écritures et des plaidoiries des Etats-Unis, il ne fait aucun doute que la banque Markazi agissait en cette qualité lorsqu'elle a effectué des placements au titre des réserves de change de l'Iran en cause dans la présente affaire. Malgré toutes les preuves fournies, depuis l'arrêt de votre juridiction sur les exceptions préliminaires, l'Iran tente de redéfinir la façon dont sa banque centrale est régie par le traité, afin de tirer parti de dispositions qui ne sont pas censées s'appliquer à elle. Un changement aussi fondamental dans le traitement des banques centrales lorsqu'elles agissent en qualité de souverain serait incompatible avec l'objet et le but de ce traité et ceux de nombreux autres traités similaires. En négociant des traités de commerce et d'investissement, les Etats n'envisageaient pas que la gestion des réserves de change par une banque centrale soit considérée comme «commerciale», avec toutes les implications qui s'ensuivraient, pour ces traités notamment. Les conséquences de la qualification par la Cour d'une activité gouvernementale essentielle d'une banque centrale comme étant «commerciale» auraient des répercussions importantes bien au-delà du traité d'amitié.

8. Monsieur le président, Mesdames et Messieurs les juges, il me reste à vous remercier pour votre bienveillante attention — et je me permettrai de dire très bienveillante attention ***~~pour les problèmes que j'ai eus~~***. Je vous prierai, Monsieur le président, de bien vouloir donner la parole à mon collègue, M. John Daley.

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

Mr. DALEY:

ARTICLES XX AND III

Article XX

1. Mr. President, Members of the Court, it is an honour to appear before you to respond to Iran's arguments under Articles XX and III of the Treaty of Amity.

2. I will begin with Article XX.

3. In our opening submissions, we established that Executive Order 13599 falls well within the paragraph 1 *(c)* exception for measures "regulating the production of or traffic in arms" and

within the paragraph 1 *(d)* exception for measures "necessary" to protect the United States' essential security interests.

4. In response, counsel's main theme, as it was in the first round, is that the Executive Order "relates to purely financial questions"[39].

5. But Mr. President, Members of the Court, we have addressed this point at length. On Wednesday, I explained that the Executive Order was issued pursuant to the mandate in Section 1245 of the 2012 National Defense Authorization Act, which required the President to block the assets of Iranian financial institutions[40]. That Act was incorporated by reference directly into the Executive Order.

6. As I explained in detail, that Act expressly stated findings that Iranian banks were engaged in evasion of sanctions, and that this posed a threat to the United States in light of Iran's pursuit of weapons of mass destruction and support for terrorism. Congress felt compelled to act because it found that the entire Iranian banking sector posed "terrorist financing" and "proliferation financing" risks[41].

7. And while it is true that the Treasury Department's conclusion that Iran should be designated a jurisdiction of primary money-laundering concern triggered certain limited actions under Section 311[42] of the 2001 Patriot Act, this point does not assist Iran. It is precisely because those measures would be *insufficient* to combat the threat that the United States Congress passed Section 1245. As I explained on Wednesday, the strategy of plugging holes one by one was not working.

8. Counsel for Iran has simply confused the financial *nature* of the Executive Order, which addressed the conduct in the Iranian financial sector, with the intended *aim* and *purpose* of deploying the Order. And on that there can be no serious question: the purpose of the Executive Order was not "purely financial" — it had one reason and one reason alone, to stop Iranian financial institutions

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[39] CR 2022/19, p. 61, paras. 6 and 8 (Pellet).

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

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

[42] CR 2022/19, pp. 61-62, para. 9 (Pellet).

from evading the carefully constructed regulatory régime the United States put into place to prevent terrorism, arms trafficking and the proliferation of weapons of mass destruction.

9. Yesterday Iran suggested that the Executive Order was not necessary because Iranian banks were "almost completely cut off from the American financial system"[43]. But the Treasury Department explained that this very pressure on existing banks was leading new banks to join in on the initiative to evade sanctions and carry out prohibited transactions. I took you precisely to this point on Wednesday[44]. It was exactly for this reason that the US Congress directed the President to block the assets of Iranian financial institutions.

10. Mr. President, counsel once again attempted to characterize the United States as advocating for a self-judging standard of review for the essential security exception in Article XX, paragraph 1 *(d)*. We addressed this in our written pleadings — we do not argue that the clause in this treaty is self-judging[45].

11. Yes, the United States believes that the question of what is an essential security interest should be viewed from the perspective of the invoking State, according careful and appropriate weight to the party's good faith perception of its circumstances. But that is inherent in the text of the treaty — paragraph 1 *(d)* applies to "its" essential security interests, not interests in the abstract.

12. Counsel made much of my statement that "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"[46]. He seemed to infer that we were eliminating a role for the Court by making this statement.

13. I must say we, on our side, found this argument rather puzzling, since Iran said in its Reply that "Iran does not argue that the generalised U.S. allegations concerning terrorism and alleged ballistic missile programs could not be related to its security"[47]. In the face of that statement, it should be uncontroversial to characterize this issue as unquestionable.

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[43] CR 2022/19, p. 60, para. 3 (Pellet).

[44] CR 2022/18, p. 42, para. 24 (Daley); 76 Fed. Reg. 72,756, 72,759 (18 Nov. 2011), POUS, Ann. 152.

[45] RUSA, para. 7.18.

[46] CR 2022/19, p. 62, para. 13 (Pellet).

[47] RI, para. 10.29.

14. One final point. Yesterday, counsel asserted to you that the Court in the *Military and Paramilitary Activities* case assessed the essential security question by applying the "criteria of necessity and proportionality"[48]. That is our translation. But counsel did not bring to your attention that, in the passage of the Judgment he was quoting, the Court was in fact applying the customary rules relating to the use of force in self-defence[49]. For this reason, the point does not assist Iran, or the Court, in applying paragraph 1 *(d)* in this case, which, quite obviously does not involve the use of force.

15. Mr. President, Members of the Court, if I may sum up. The United States has demonstrated that Executive Order 13599 was part of a broader regulatory and sanctions régime that was incrementally and carefully constructed over many years to prevent the development and proliferation of weapons of mass destruction and ballistic missiles, and to prevent the supply of arms and other support to terrorists. The Executive Order was issued only after more specific, targeted measures had failed to stop the flow of funds to illicit activities. Only then, after the United States (and the Financial Action Task Force) recognized the threat that Iran's financial sector posed, did the Executive Order come into force.

16. For these reasons, Executive Order 13599 can be considered a "regulation" within the meaning of Article XX, paragraph 1 *(c)*, and it was "necessary" to the United States' essential security interests within the meaning of paragraph 1 *(d)*.

Article III

I. Article III (1)

17. I will now turn to Article III, beginning with paragraph 1.

18. Iran spent the bulk of its time yesterday explaining that the reason it did not address matters relating to the text, context, object and purpose or negotiating history of the Treaty in its opening statement is because Iran had no points to raise in response to the United States' Rejoinder on those issues[50]. That is what we suspected and now it is confirmed.

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[48] CR 2022/19, p. 63, para. 16, final sentence (Pellet).

[49] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p 141, para. 237.

[50] CR 2022/19, p. 35, para. 34 (Thouvenin).

19. Counsel did complain[51] about my decision to highlight some points from our written pleading, which were included in an effort to emphasize them by way of winding up our arguments, as Practice Direction VI instructs, but he did not engage on any points except those relating to Iran's far too generous reading of paragraph 87 of the Court's preliminary objections Judgment[52].

20. On that point, counsel asked what was the point of recognizing a company without recognizing "its" juridical personality[53], a term Iran apparently uses to mean a rigid and immutable application of Iranian rules of corporate separateness, no matter the circumstances[54]. I will just pause here to note that there is nothing in the record of this case to demonstrate what the Iranian rules of corporate separateness might be. Iran chose not to bring any of those to your attention, at any stage of these proceedings.

21. But leaving that aside, the answer to counsel's question is found in the negotiating history that Iran continues to ignore. At the time of the Treaty's adoption, many countries would impose additional tests before recognizing a company's existence within its borders, such as the location of its seat, the nationality of its ownership, or the character of its aims. Article III, paragraph 1, however, recognized entities as legal beings without a need for such tests[55]. A purpose of Article III was to dispense with that practice and allow foreign companies to appear in court without having to satisfy such requirements[56].

22. For this reason, the United States' interpretation of Article III, paragraph 1, fits nicely in the historical context — context that is demonstrable because it can be found in the negotiating history of this and other contemporaneous treaties, as we have explained[57].

23. In contrast, Iran's interpretation of the Treaty does not sit so well against the historical context. Iran's interpretation of paragraph 1 leads to an immutable and inviolable separate juridical status in every circumstance, leaving no room for piercing the corporate veil at all[58]. And if that is

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[51] CR 2022/19, pp. 34-35, paras. 32-33 (Thouvenin).

[52] CR 2022/19, p. 35, para. 35 (Thouvenin).

[53] CR 2022/19, p. 35, para. 35 (Thouvenin).

[54] RI, paras. 4.7-4.8, 4.13.

[55] CMUSA, para. 13.12.

[56] CMUSA, paras. 13.8-13.12; RUSA, para. 9.7.

[57] CMUSA, paras. 13.8-13.12; RUSA, para. 9.7; CR 2022/17, p. 60, paras. 5-8 (Daley).

[58] RI, paras. 4.7-4.8 and 4.13.

the rule that the parties to this Treaty had wanted, it is surely something we would see mentioned in the negotiating history or the many commentaries discussing this and other contemporaneous friendship, commerce and navigation treaties. But we do not.

24. I made this point very clearly on Wednesday, and Iran avoided the point completely[59]. There was no effort to explain how its interpretation of Article III, paragraph 1, could be squared with — to use this Court's words — the "wealth of practice" demonstrating veil piercing[60]. The silence speaks volumes.

25. Rather than respond to that point, counsel said that the judgment enforcements at issue in this case were not justified, because they represented a "collective" piercing of the veil rather than a decision on a case-by-case basis[61]. Ms Grosh will come to that point shortly, as it is similar to an argument that Mr. Wordsworth also made. The point I will reiterate for now is that it is no answer to the key problem we have raised with Iran's interpretation of the Treaty.

II. Article III (2)

26. I turn now to Article III, paragraph 2.

27. On Wednesday, we explained that paragraph 2 only requires the host State to grant companies the right of access to courts to pursue whatever other rights they claim to have, but does not guarantee any substantive or procedural rights[62]. And that this interpretation of paragraph 2 was confirmed by the Court in its preliminary objections Judgment[63]. We explained that Iran's arguments to wave away the Court's ruling were inadequate, because all of them would apply equally to a putative defence of sovereign immunity, the removal of which the Court has already found could in no plausible way be a violation of paragraph 2 of Article III[64].

28. Yesterday, Mr. Wordsworth, in an effort to avoid the implications of paragraph 70 of the Court's Judgment, has recharacterized what Iran throughout this case has referred to as a putative

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[59] CR 2022/17, p. 63, para. 18 (Daley).

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

[61] CR 2022/19, p. 36, para. 36 (Thouvenin).

[62] CR 2022/17, p. 64, paras. 23-24 (Daley).

[63] CR 2022/17, p. 64, paras. 27-28 (Daley).

[64] CR 2022/17, p. 65, paras. 31-32 (Daley).

defence of separate juridical status or a right to separate juridical status[65]. In his submissions yesterday, he renamed the denial of that right as the act of "assimilating" a company with Iran[66]. And after that transformation, the putative defence mutated again — it was said that the United States was not recognizing the company at all[67]. Two points in response.

29. *First*, this is just a new label on the same clothes. Whether it is called a right to separate juridical status, a right not to be assimilated with Iran, or anything else, it is still the assertion of a right in litigation. One could just as easily recharacterize a sovereign immunity defence as a right "not to be transformed into a non-sovereign entity" or say that the host State was refusing to "recognize it as a sovereign". Either way, the Court has held that Article III, paragraph 2, only grants access to court for that putative right, or any right, to be asserted. It does not guarantee that the assertion of that putative right will be successful, or even available.

30. *Second*, contrary to Mr. Wordsworth's assertion, the company is not losing its status as a company. It is not being held responsible for all of the debts of its shareholders or affiliates. It is not being denied the ability to act as a legal person in all circumstances. It is just having one set of its assets executed against to satisfy a narrow and particularly critical debt that its primary or only shareholder is avoiding.

31. Mr. Wordsworth also renewed his contention that — in paragraph 70 of its preliminary objections Judgment — the Court considered the context of Article III, paragraph 2, in relation to sovereign immunity, whereas there is a different context as to juridical status, namely Article III, paragraph 1, as interpreted by Iran.

32. Not only does that depend entirely on the Court agreeing with Iran on the meaning of paragraph 1 — which of course we submit the Court should not do — but the two larger points are

(a) first, Iran is still trying to assert that paragraph 2 protects substantive rights, rather than access to the courts to pursue a claimed right; and

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[65] Application of the Islamic State of Iran, para. 33 *(e)*; MI, para. 5.5 *(b)*.

[66] CR 2022/19, p. 38, para. 5 *(a)* (Wordsworth).

[67] CR 2022/19, p. 39, para. 5 *(a)* (Wordsworth).

(b) second, whether that supposed substantive right is located within the Treaty or to be found elsewhere is completely irrelevant to the reasoning in paragraph 70 of the Judgment on preliminary objections.

33. And as for the ECHR's *National and Provincial Building Society* case: yes, it is true that the Court was assessing the right of access to court under Article 6, Section 1 of the Convention. That right has a specific meaning and provenance in ECHR jurisprudence[68]. This Court needs to apply the right that is set out in this treaty, the Treaty of Amity, which has a different text, context, object and purpose and negotiating history.

34. And in any event, even under the ECHR, the right of access to courts is not absolute and may be subject to limitations and to a margin of appreciation for the State[69].

Conclusion

35. Mr. President, Members of the Court, that concludes my submissions on Article III. Mr. President, we are not planning to use all of our time this afternoon and this may be a convenient time to break as we have just a couple of more submissions after. But we are in your hands.

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

The Court adjourned from 4.10 p.m. to 4.25 p.m.

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

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[68] See e.g. *Golder* v. *The United Kingdom*, App. No. 4451/70, Judgment of 21 February 1975, paras. 26-36.

[69] *National & Provincial Building Society* v. *The United Kingdom*, App. No. 21319/93, Judgment of 23 October, para. 105, available at http://hudoc.echr.coe.int/fre?i=001-58109.

Ms GROSH:

US MEASURES AND ARTICLE IV (1) OF THE TREATY

1. Mr. President, Members of the Court, good afternoon. My task is to address counsel's arguments yesterday concerning the US measures and Article IV, paragraph 1.

I. US measures

2. I will begin with Iran's discussion of the US measures. Let me note at the outset that it was good to hear Mr. Vidal step back from Iran's prior contention that the measures were all addressed and aimed at Iran. I also want to note that the United States stands by arguments made in our opening submissions about the measures on Wednesday. With that, I will now use my time to address four points raised by Iran yesterday that merit a response.

3. *First*, there were a number of comments made by counsel about the US court judgments that have given rise to the attachments and turnovers of assets about which Iran complains. The suggestion was that the Court should not give weight to the judgments and not consider them valid. The various reasons given were nothing more than generalities along the lines of what you heard about the legislative measures on Monday. The complaint was that many of the cases were before the same judge, based on the same expert evidence, etc.[70], but without providing specific details of the cases and evidence to shore up Iran's allegation of some impropriety.

4. In the preliminary objections hearing, Mr. Bethlehem took you to the evidence of some sample cases, including *Heiser* and *Peterson*, and he walked you through the evidence upon which the US courts relied to reach their decisions[71]. But there has been only silence from the other side. No response to the specific evidence and findings by the courts. One can imagine that neither Iran's representatives nor counsel can bring themselves to come face to face with the record in those cases that Mr. Bethlehem reviewed, a record that described the horrific acts and the aftermath that resulted in countless deaths and lives changed forever, and evidencing Iran's support and complicity therein. As Mr. Bethlehem noted, there was also no response to the explicit statements by Iranian leaders taking responsibility and even boasting for their hand in the Marine barracks bombing. Here we are

[70] CR 2022/19, p. 16, para. 8 (Vidal).

[71] CR 2018/32, pp. 18-19, paras. 22-24 (Bethlehem).

at the end of the hearing, after extensive written and oral submissions, and all we hear are generalities about why the US court judgments should not be considered valid for purposes of the enforcement actions.

5. Mr. Wordsworth also took strong objection to our suggestion that, in challenging the US court decisions for sovereign immunity reasons, Iran was simply trying to reintroduce its claims for sovereign immunity into the case[72]. Contrary to Mr. Wordsworth's contention, the United States is not referring to the judgments as valid as a defence to the case. We are simply saying that Iran has not demonstrated why these judgments should not be considered to be like any other judgments that merit enforcement. In its preliminary objections decision, the Court determined that there was no obligation of sovereign immunity in the Treaty of Amity and that it had no jurisdiction to hear Iran's other claims of sovereign immunity. Iran clarified yesterday that it is not asserting sovereign immunity and, again, the validity of these judgments is not a defence for the United States[73]. So, Mr. President, Members of the Court, that should be the end of the matter on sovereign immunity.

6. Further, for all of Iran's complaints that it should not have to appear in the cases, as Mr. Bethlehem also has observed, the reality is that States often appear in US and other foreign courts to assert their immunity. Libya appeared in US courts to represent its interests and defend its immunity in multiple terrorism-related cases, including those arising out of the bombing of Pan Am 103 and the kidnapping and torture of a US citizen. Sudan appeared in US courts to do the same and was successful in having a decision against it vacated. And Iran appeared in 2011 in the *Bell Helicopter Textron* case, admittedly not a terrorism case, but relevant nonetheless. Iran appeared in that case to assert its immunity under the Foreign Sovereign Immunities Act and to seek *vacatur* of the default judgment rendered against it when it previously had failed to appear. The district court granted Iran's request and vacated the judgment in 2012, finding that Bell Helicopter had not demonstrated that the exception to immunity applied in that case. The decision was upheld on appeal in 2013[74]. So Iran cannot attempt to wave away the judgments at issue in this case as not valid and

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[72] CR 2022/19, p. 47, para. 31 (Wordsworth).

[73] *Ibid.*

[74] *Bell Helicopter Textron, Inc.* v. *Islamic Republic of Iran*, 734 F.3d 1175 (D.C. Cir. 2013).

not meriting enforcement simply by invoking sovereign immunity and the kinds of generalities it raised yesterday.

7. Mr. President, Members of the Court, this brings me to my *second* point, which involves Iran's complaints that Section 201 *(a)* of TRIA and Section 1610 *(g)* of the FSIA permit the attachment of assets of Iranian State agencies and instrumentalities to satisfy terrorism-related judgments against the State of Iran. In their submissions yesterday, both Professor Thouvenin and Mr. Wordsworth tried once again to criticize the United States for pointing to what this Court in *Barcelona Traction* described as "'lifting the corporate veil' or 'disregarding the [corporate] entity'"[75].

8. Mr. Wordsworth would have you think that the United States is arguing that "lifting the veil is absolutely standard"[76]. Not at all.

9. The United States is instead making a point that this Court recognized in 1970: that is, in municipal law, which inevitably will vary from State to State, there is a recognition that the privilege of the corporate form cannot be treated as an absolute and must be accompanied by the possibility of being disregarded in extraordinary cases. As you will recall, the Court in *Barcelona Traction* gave the following examples: "to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations"[77]. The US decision to permit enforcement against Iran's State-owned agencies and instrumentalities of the judgments at issue here falls squarely within that series.

10. Mr. Wordsworth also argued that the United States had failed to identify instances of corporate manipulation on the part of Iran's agencies and instrumentalities[78]. With this, it will also be convenient to take Professor Thouvenin's assertion that "[e]n l'espèce, le 'percement' n'est pas

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[75] CR 2022/19, p. 36, para. 36 (Thouvenin); pp. 39-40, paras. 8-10 (Wordsworth).

[76] CR 2022/19, p. 39, para. 7 (Wordsworth).

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

[78] CR 2022/19, p. 41, para. 13 (Wordsworth).

individualisé, n'est pas motivé par quoi que ce soit que ces 'companies' aient fait ou n'aient pas fait; c'est une mesure collective qui n'a rien à voir avec un 'percement' de voile social"[79].

11. Iran's counsel have rather missed the point. The US measures are not a response to something that Bank Markazi and Iran's companies have done or not done, but rather they are a response to something that *Iran* has definitely not done: and that is provide compensation to the victims of terrorism it has sponsored. That is why the United States had to act to "protect . . . creditor[s]" and "prevent the evasion of legal requirements or of obligations", to return again to this Court's words in *Barcelona Traction*.

12. And of course it bears remembering that for those financial institutions subject to Executive Order 13599, the United States Government had found building on work done by the United Nations Security Council and the multilateral Financial Action Task Force — and I quote from the Executive Order:

> "Iran has used deceptive financial practices to disguise both the nature of transactions and its involvement in them in an effort to circumvent sanctions. This conduct puts any financial institution involved with Iranian entities at risk of unwittingly facilitating transactions related to terrorism, proliferation, or the evasion of U.S. and multilateral sanctions. Iranian financial institutions, including the Central Bank of Iran ('CBI'), and other state-controlled entities, willingly engaged in deceptive practices to disguise illicit conduct, evade international sanctions, and undermine the efforts of responsible regulatory agencies around the world."[80]

In other words, on the one hand Iran now wants Bank Markazi and Iranian companies to benefit from the corporate form and to be shielded from the consequences of Iran's conduct, while on the other hand its State-owned banks have been found to be acting to advance Iran's interests, including with respect to terrorism. That, Mr. President, Members of the Court, is hardly a use of the corporate form that the basic principles of corporate law were intended to protect.

13. Mr. President, Members of the Court, my *third* point relates to the further deceptive conduct Bank Markazi was engaged in as part of the structuring of its investments at issue in the *Peterson* case. Professor Thouvenin took the Court to a settlement between the US Treasury's Office of Foreign Assets Control (OFAC) and Clearstream in an effort to show that Bank Markazi had not,

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[79] CR 2022/19, p. 36, para. 36 (Thouvenin).

[80] "Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern", 76 Fed. Reg. 72,756, 72,757-72,758, 18 Nov. 2011 (POUS, Ann. 152).

in fact, engaged in deceptive conduct with respect to those assets[81]. But the settlement shows the opposite.

14. The facts are straightforward. According to the settlement, in October 2007, Clearstream's Executive Board "made the decision . . . to close all accounts that it maintained for Iranian customers"[82]. In early 2008, "OFAC and Clearstream discussed the manner in which Clearstream would wind down its Iranian business to achieve the institution's stated objective of terminating its Iranian business"[83]. In February 2008, Clearstream transferred bonds from Bank Markazi's account "to a recently-opened custody account for a European commercial bank at Clearstream"[84]. These are direct quotes from the settlement.

15. To summarize, then, Clearstream decided to close all of its Iranian accounts and agreed with US regulators on a plan to carry out this decision. Bank Markazi then purported to comply with Clearstream's decision by transferring the assets held in Clearstream to a new owner. But the reality was that Bank Markazi had not, in fact, given up its interest in the assets. Rather, as it turned out, the European commercial bank to which Bank Markazi's assets were transferred was acting as custodian for Bank Markazi. Bank Markazi had, in effect, transferred the assets to itself.

16. As the settlement explains, "the record of ownership on Clearstream's books changed, but the beneficial ownership did not, resulting in [Bank Markazi's] interest being buried one layer deeper in the custodian chain"[85]. And again, this is a quote from the settlement. Clearstream made a settlement payment of US$151.9 million to OFAC for its failure to detect that Bank Markazi continued to have an interest in the assets, which, and again I am quoting from the settlement, "undermined US national security, foreign policy, and other objectives of US sanctions programs"[86].

17. Mr. President, Members of the Court, to bring this back to our starting-point, how could the facts in the settlement agreement be interpreted as anything other than deception on Bank

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[81] CR 2022/19, pp. 33-34, paras. 29-30 (Thouvenin).

[82] Settlement Agreement Between OFAC and Clearstream, 22 Jan. 2014, para. 6; Iran's judges' folder, 22 Sept. 2022, tab 17.

[83] *Ibid.*

[84] *Ibid.*, para. 7.

[85] *Ibid.*, para. 8.

[86] *Ibid.*, para. 13.

Markazi's part? Again, Bank Markazi purported to divest itself of the bonds but, in reality, it continued to own them, using the intermediary bank to shroud its ongoing interest.

18. I turn to my *fourth* point regarding the US measures, which relates to Section 8772, or Section 502 as Iran refers to it. Iran took issue with the fact that the district court's decision granting turnover was also based on Section 201 *(a)* of TRIA. On Wednesday, the United States noted that it cannot be established that Section 8772 ensured a victory for plaintiffs that they would not have obtained in its absence[87]. In response, Iran made three assertions. First, Iran noted that plaintiffs' counsel went to "such lengths" to get a law enacted[88]. We cannot know the exact motivations of plaintiffs' counsel in pursuing additional legislation. And whatever counsel's motivations, it does not establish that plaintiffs' enforcement efforts would have failed in the absence of Section 8772. Iran then incorrectly claims that the Court of Appeals refused to hear arguments of Bank Markazi on Section 201 *(a)* of TRIA. Bank Markazi did have the opportunity to submit its legal arguments on TRIA to the court, and while the court did not address the applicability of TRIA in its opinion as a matter of judicial efficiency, that does not mean that Bank Markazi's arguments were not fully aired before the court[89]. Finally, Iran indicates that any uncertainty under TRIA should have been resolved in favour of Bank Markazi and the Bank's immunity. But there was no uncertainty on Bank Markazi's part on the key legal question of ownership — Bank Markazi repeatedly asserted that the assets at issue in the case belonged to it[90].

II. Article IV (1)

19. Mr. President, Members of the Court, I will now turn to Iran's claims under Article IV, paragraph 1.

20. On Wednesday, I described reasons why the Court need not wade into the fraught interpretation of fair and equitable treatment[91]. It can rule on the United States' threshold defences,

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[87] CR 2022/19, pp. 19-20, paras. 14-15 (Vidal).

[88] CR 2022/19, p. 20, para. 15 (Vidal).

[89] *Peterson* v. *Islamic Republic of Iran*, 758 F.3d 185, 189 (2d Cir. 2014).

[90] *Peterson* v. *Islamic Republic of Iran*, 2013 WL 1155576, at ~~***para.***~~ 23 and fn. 10 (S.D.N.Y. March 13, 2013), CMUSA, Ann. 108.

[91] CR 2022/18, p. 10-12, paras. 2-7 (Grosh).

which should obviate the need to examine Iran's claims. It can also rule on Article IV directly without providing an interpretation, since under either the US or Iranian interpretation, Iran loses.

21. With the remainder of my presentation on Wednesday, I set out the better interpretation of Article IV (1), based on the text and structure of Article IV (1) and Article IV (2) considered together, and not requiring an expansive reading based on hundreds of disparate arbitral decisions rendered some 50 years following the Treaty's conclusion and interpreting vastly different investment agreements concluded decades later. I then also walked you through the application of both the US and Iranian interpretations of Article IV, and showed in detail — using the *Weinstein* case as an example — how Iran's claims fail under either the US or Iranian interpretation. Again, as both interpretations yield the same result, this Court can decide Iran's Article IV (1) claims without deciding which interpretation is correct.

22. Iran describes this approach as "handcuffing" the Court[92], a description to which we take exception. The use of judicial economy is a widely adopted approach to judgment and award writing and one quite familiar to the Court. If, in the end, it is necessary to define "fair and equitable treatment" to resolve this dispute, then the Court can and should do so based on the interpretive approach we have put forward, which is more faithful to the text and intent of the parties at the time the Treaty was concluded than Iran's interpretation based on its chart of 172 cases.

23. Turning to Iran's chart, I have two points to make, and I can be brief.

24. First, as demonstrated by the entries on the chart, there remain differences not only in what standards comprise fair and equitable treatment, but in how those standards are described. Iran cited the Vienna Convention Article 31 to us yesterday[93], but failed to account for the fact that Article 31 requires not only the ordinary meaning of treaty terms to be examined, but that they also be read in the context and in light of the treaty's object and purpose. It does not appear that Iran has undertaken an analysis of any of the language, object and purpose of the various investment agreements in its charts. It certainly has not compared the language, object and purpose of each of those treaties to the 1955 Treaty of Amity. Iran's assertion that these cases are "directly on point"[94] is therefore plainly

[92] CR 2022/19, p. 44, para. 23 (Wordsworth).

[93] CR 2022/19, p. 43, para. 22 (Wordsworth).

[94] CR 2022/19, p. 45, para. 26 (Wordsworth).

unsupported. We simply do not know, from the minimal analysis reflected in the chart, whether these treaties are sufficiently similar to the Treaty of Amity to transpose these interpretations of "fair and equitable" treatment onto the Treaty of Amity.

25. Second, the United States maintains its objection to this chart as a late-filed written submission. The "elements" column, selectively quoting from these cases to demonstrate what Iran thinks the standard for fair and equitable treatment should be, constitutes a legal argument. We do not have time to respond to this new argument, or even to check if all of the quoted language is accurate. It therefore should not be relied upon by the Court.

26. Mr. President, Members of the Court, the Parties have laid out their respective interpretations of Article IV (1) in their written submissions and opening oral submissions. The United States has demonstrated that Articles IV (1) and IV (2) represent several strands of the minimum standard of treatment under customary international law, which includes denial of justice, expropriation, and full protection and security, with Article IV (1) representing the elements of denial of justice. We rest on those submissions, with two additional points.

27. First, contrary to Iran's assertion, it was inaccurate for Iran to describe the US position as "freezing" the fair and equitable treatment concept as it was in 1955[95]. Far from it. The United States has made clear that the minimum standard of treatment can evolve, and has evolved, over time. But precisely because the minimum standard derives from customary international law, it is up to Iran, as the Applicant in this case, to prove precisely how customary international law has developed through State practice and *opinio juris*[96], and this Iran has not done, by invoking the *Waste Management II* decision or otherwise.

28. Along these lines, Iran argues that the United States must "show a rule of international law that applies in the circumstances of the current abrogation of separate juridical status, supported by the necessary State practice and *opinio juris* that the United States itself insists on, albeit inappropriately, in other contexts"[97]. That was a quote from Mr. Wordsworth's presentation

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[95] CR 2022/19, pp. 44-45, para. 25 (Wordsworth).

[96] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 200; *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 120-122.

[97] CR 2022/19, p. 47, para. 32 (Wordsworth).

yesterday. But this turns the burden of persuasion on its head. Iran is the Applicant and bears the burden of demonstrating that the United States has breached the Treaty. In any event, the United States has demonstrated that the practice of piercing the corporate veil is widespread, and as I showed just a moment ago, in line with that practice, Bank Markazi and Iran's companies should not benefit from the corporate form and be shielded from the consequences of Iran's conduct.

29. Second, Iran pointed on Monday and again yesterday to the supposed views of Robert Wilson, one of the US FCN negotiators[98]. Iran asserts that Mr. Wilson viewed the fair and equitable treatment as "distinguished from the minimum standard of treatment"[99]. In fact, Iran is relying on a 2017 treatise for that quote. But Iran did not take you directly to the source material, the article by Mr. Wilson published in 1956. On the slide, and in your judges' folder at tab 32, is Mr. Wilson's actual article. The relevant portion reads,

> "[w]hile most-favored-nation treatment and national treatment have figured most prominently in this type of treaty, other standards, such as reciprocity, the international law standard, 'equitable,' and even 'fair' and 'reasonable' treatment have found mention in them"[100].

As you can see, it is far from clear whether Mr. Wilson viewed fair and equitable treatment as "distinguished" from the minimum standard, or even whether the "international law standard" is the same as the "minimum standard of treatment". Rather, he appears to be simply listing several new phrases that have appeared in different post-war FCNs in a paragraph that introduces the substance of the article — and in the rest of the article he does not even return to all the terms in that list. Mr. Wilson did not address how these terms relate to each other, and hardly suggests that they should be given the meaning that Iran attributes to them now, over 70 years later.

30. The OECD draft convention, on the other hand, states directly that fair and equitable treatment is equivalent to the minimum standard of treatment. It was issued shortly after the Treaty of Amity was concluded, and the United States was a founding member of that organization. This therefore constitutes the nearly contemporaneous view of one of the Parties to this Treaty. Iran, for

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[98] CR 2022/19, p. 44, para. 22 (Wordsworth).

[99] *Ibid.*

[100] Robert R. Wilson, *A Decade of New Commercial Treaties*, 50 AJIL 927, 1956; judges' folder, tab 32.

its part, has not provided any contemporaneous evidence of its own views of the Treaty, and instead asks you to rely on its 172 cases.

31. Mr. President, Members of the Court, Iran raised several other points yesterday that I will not address here in the interest of time. Our responses would have merely reiterated points we made on Wednesday that are largely unrebutted, and we stand by those submissions. I close by reminding the Court that there has been no denial of justice here, because Iran was given every opportunity to defend itself in the underlying liability claims, and the Iranian agencies and instrumentalities were able — and sometimes did — present their own defences in US courts. Likewise, even under Iran's expansive and incorrect standard, there were no discriminatory, unreasonable, arbitrary or disproportionate measures taken here, particularly given the unique situation created by Iran's role in global terrorism and its failure to pay the judgments outstanding against it resulting from those acts.

32. Mr. President, Members of the Court, I thank you for your attention and I ask that you give the floor to Mr. Jedrey.

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

Mr. JEDREY:

ARTICLES IV (2), V (1), VII (1) AND X (1) OF THE TREATY

I. Introduction

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

2. I will be addressing Iran's claims under Article IV, paragraph 2, and under paragraph 1 of each of Articles V, VII and X. For the reasons set out in our written submissions and on Wednesday, Iran's claims under these Articles suffer from numerous flaws. I will make only a few additional points on each Article in light of Iran's arguments yesterday.

II. Article IV (2)

A. Most constant protection and security

3. I begin with the first limb of Article IV, paragraph 2, "most constant protection and security". Iran's counsel again chose not to engage with the US arguments on this provision. Counsel attempted to justify this on the basis that "no materially new points arise from the United States Rejoinder"[101]. This is not a credible characterization of the US Rejoinder, but the Court can, of course, make its own assessment, keeping in mind that Iran had a full opportunity to respond to the arguments in the Rejoinder and chose not to do so.

B. Expropriation

4. Turning to the second limb of Article IV, paragraph 2, I will address two key issues separating the Parties.

1. Police powers doctrine

5. I will begin with the police powers doctrine, and I have four points to make.

6. First, Iran took issue yesterday with the United States' characterization of the doctrine. The United States has been clear in each of its pleadings — and here I am quoting from the Counter-Memorial — that the doctrine applies to "*bona fide*, non-discriminatory regulation[s], enacted as an exercise of a State's police powers"[102]. The United States supported this formulation with extensive references in its Counter-Memorial[103].

7. Among other things, the United States referenced the precise quotation from the *Saluka* award that Iran's counsel mentioned yesterday[104], which is nearly identical to the US formulation:

> "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[105]

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[101] CR 2022/19, p. 52, para. 14 (Aughey).

[102] CMUSA, para. 14.78; RUSA, paras. 11.2, 11.29.

[103] CMUSA, paras. 14.78-14.79.

[104] CR 2022/19, p. 50, para. 7 (Aughey).

[105] *Saluka Investments B.V.* v. *Czech Republic*, Partial Award, para. 255, 17 Mar. 2006 (CMUSA, Ann. 196). See also CMUSA, para. 14.79, fn. 472.

Despite the suggestion otherwise made by Iran's counsel, there is no serious disagreement between the Parties about these elements of the standard.

8. This brings me to my second point, which relates to the additional element that Iran seeks to add to the police powers test. Iran contends that there is a proportionality element inherent in the test articulated by the United States and other authorities. But Iran ignores the fact that the investment arbitration awards on which it relies identify proportionality as an element separate from the other factors.

9. For example, the *Philip Morris* award stated that, for the police powers doctrine to apply, a measure "must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory *and* proportionate"[106]. Other awards that Iran has relied upon similarly refer to proportionality as a separate, additional factor[107]. And in the *Olympic Entertainment Group* award that Iran referenced on Monday, the tribunal did not simply infer proportionality from the other elements of the test, but rather considered whether to add it as another, cumulative element[108]. If proportionality were inherent in the concept of a bona fide, non-discriminatory regulation, as Iran argues, there would be no need for these awards to reference it separately or to debate its independent existence.

10. Accordingly, proportionality is not implicit in the other factors that comprise the test. Iran must establish the place of its proposed proportionality factor in the police powers doctrine with evidence of State practice and *opinio juris* and it has failed to do so.

11. And I pause here to correct a mischaracterization of the United States' own model bilateral investment treaties. Iran's counsel stated that, in the US Model BITs, proportionality is inherent because, among other things, "regulatory takings will be permissible in 'rare circumstances' only"[109].

12. The provision that counsel selectively quoted in his presentation actually says the opposite, and I have put it up on a slide, in full:

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[106] *Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Herman's S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 305; emphasis added.

[107] *Corn Products International, Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility of 15 January 2008, para. 87; *Fireman's Fund Insurance Co.* v. *United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award of17 July 2006, para. 176 *(j)*.

[108] *Olympic Entertainment Group AS* v. *Republic of Ukraine*, PCA Case No. 2019-18, Award of 15 April 2021, paras. 87-90.

[109] CR 2022/19, p. 51, para. 9 (Aughey).

> "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[110]

13. As this provision makes clear, and consistent with the US position before the Court, it is the exceptional case in which "non-discriminatory regulatory actions by a Party" will be deemed expropriatory, and not the other way around, as Iran's counsel asserted.

14. Moreover, there is nothing in the text of the US Model BITs about proportionality in the police powers context, and counsel did not explain his suggestion that it is somehow "inherent".

15. The United States supplied examples of treaty provisions that recognize proportionality as part of the police powers doctrine, but when they do so, they do so expressly. For example, the EU-Canada Comprehensive Economic and Trade Agreement provides in its expropriation annex:

> "For greater certainty, except in the rare circumstance *when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive*, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."[111]

16. Turning to my third point, counsel argued that, without a proportionality element, the police powers doctrine would be "essentially self-judging"[112]. But that would be to disregard the other elements of the test, namely whether the measure is a bona fide regulation and whether it is non-discriminatory.

17. My fourth point relates to the *Philip Morris* award. Iran's counsel argued that the tribunal in that case "considered whether the measures were necessary, and suitable to achieve the relevant objective and/or whether they were excessively burdensome" as part of its proportionality inquiry[113]. As an initial matter, the passages from the award that counsel referenced do not suggest that the tribunal required the measure to be "necessary" in order to qualify as proportional. And while the tribunal did mention the limited impact of the challenged measures on the claimant's business, it

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[110] 2004 US Model BIT, Ann. B, Expropriation, para. 4 *(b)* (RUSA, Ann. 409); 2012 US Model BIT, Ann. B, Expropriation, para. 4 *(b)* (RUSA, Ann. 410).

[111] EU-Canada Comprehensive Economic and Trade Agreement, Ann. 8-A, Expropriation, para. 3, 30 Oct. 2016, emphasis added (RUSA, Ann. 412). See also EU-Singapore Investment Protection Agreement, Chap. 4, Ann. 1, Expropriation, para. 2, 19 Oct. 2018 (RUSA, Ann. 413); Modernisation of the Trade part of the EU-Mexico Global Agreement, Annex on Expropriation, para. 3 (RUSA, Ann. 414).

[112] CR 2022/19, p. 51, para. 10 (Aughey).

[113] CR 2022/19, p. 51, para. 11 (Aughey).

made clear that this was an issue separate from the core of the proportionality inquiry, which related to whether the measures were "proportionate to the objective they meant to achieve"[114].

18. Finally, it is telling that, paragraph 410 of the award — which was one of only two passages that counsel referenced in an effort to support his characterization of the expansive nature of the police powers inquiry in *Philip Morris* — came not from the tribunal's evaluation of the claimant's expropriation claim, but rather from the section of the award on the fair and equitable treatment claim. Whatever the tribunal may have thought relevant in considering that claim cannot, of course, have any bearing on the proper articulation of the test for application of the police powers doctrine.

2. Judicial expropriation

19. I turn now to judicial expropriation. Like Iran's counsel, I will be brief.

20. Iran's counsel took issue with our characterization of the US courts as neutral and independent arbiters of legal rights[115]. But counsel offered no basis to doubt the US courts' neutrality or independence and there is none.

21. Instead, counsel asserted that it did not matter whether US courts were neutral and independent because they "were merely acting as the conduit for the implementation of the legislative and executive measures"[116]. But, of course, the job of the courts is to apply the law. There is nothing inherently wrongful in them doing so.

22. Iran suggested that the judgment enforcement actions at issue were different from the typical contract or tort case because "court judgments in disputes between private persons do not generally involve the State taking the defendant's property or distributing that property"[117]. But any successful judgment enforcement action, whether or not under the provisions at issue in this case, results in the State — through the courts — transferring assets from the judgment debtor to the

[114] *Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Herman's S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, para. 306, 8 July 2016.

[115] CR 2022/19, p. 49, para. 3 (Aughey).

[116] CR 2022/19, p. 49, para. 4 (Aughey).

[117] CR 2022/19, p. 50, para. 5 (Aughey).

judgment creditor. Yet the enforcement of judgments obviously cannot be deemed an expropriatory act. To rule otherwise would jeopardize the normal operation of the judicial system.

23. Thus, the mere fact that the US courts allowed execution of the judgments at issue cannot be sufficient to deem them expropriatory. If Iran could show that the courts were acting in some capacity other than as neutral and independent arbiters of legal rights, the outcome might be different. But, again, Iran has not and cannot do so.

24. As a final note, Iran's counsel referred in his presentation to "cases that the United States relies on as support for the proposition that Iran needs to demonstrate some form of illegality on the part of the US courts"[118]. To be clear, the United States does not rely on these cases. Rather, these cases are a handful of investment arbitration awards that Iran itself referenced in its Reply, in an effort to supply some support for its judicial expropriation claim[119]. Iran now seems to disavow these awards and the United States is certainly happy to have the Court disregard them.

III. Article V (1)

25. That concludes my submissions on Article IV, paragraph 2, and I turn now to Article V, paragraph 1. On Wednesday, the United States established that Article V, paragraph 1, requires only that Iranian nationals and companies be allowed to dispose of property on terms *no less favourable* than nationals and companies of third countries. It is not, as Iran would have it, an unconditional obligation to permit Iranian companies to dispose of property free of any applicable laws or regulations.

26. We also explained that to meet this standard, Iran must not only show that an Iranian company was actually prevented from disposing of its property by a challenged measure, but also identify a third-party company in like circumstances that was not so prevented. We noted that Iran had not even attempted to meet this burden. It still has not done so.

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[118] CR 2022/19, p. 49, para. 4 (Aughey).

[119] RI, para. 7.17 and fn. 645; RUSA, para. 11.36 and fn. 667.

27. Yesterday we heard no answer to our points that the Article's use of the phrase "in these respects" requires that the two sentences of the Article be read together[120], and that not doing so makes its second sentence superfluous[121].

28. Instead, we heard that the United States' reading supposedly deprives other words — "shall" and "in no event" — of meaning. Iran does not explain this assertion, which is, in any case, incorrect. "Shall", of course, renders the most-favoured-nation obligation in Article V, paragraph 1, mandatory. And the words "in no event" are simply another way of saying "not"; those words ensure that the sentence actually sets the most-favoured-nation standard as a bar below which the Parties may not fall, because without them, the sentence would mean the exact opposite.

29. That is all I have to say about Article V, paragraph 1, and I move now to Article VII, paragraph 1.

IV. Article VII (1)

30. On Wednesday, the United States showed that the text of Article VII, paragraph 1, read in context and confirmed by its negotiating history, establishes that Article VII, paragraph 1, is a provision applicable only to restrictions on foreign exchange transactions, and cannot be read, as Iran argues, as a broad prohibition on any restrictions on transfers of funds. We also established that Iran *shared* this understanding, both in 1955 when the Treaty was negotiated[122], and as recently as 1993, in its Memorial in the *Oil Platforms* case[123].

31. Yesterday we heard no argument about what the *travaux préparatoires* disclosed. There is apparently no dispute that the *travaux* support the United States' understanding of this Article. Instead, Iran chose to take issue with the United States for consulting them at all. According to Iran, "[e]veryone knows" that recourse to *travaux préparatoires* can only be had — and this is our translation — "if the interpretation according to the rules of Article 31 [of the Vienna Convention on

[120] CR 2022/18, p. 35, para. 19 (Boisson de Chazournes).

[121] CR 2022/18, p. 35, para. 20 (Boisson de Chazournes).

[122] CMUSA, paras. 16.9-16.12.

[123] CR 2022/18, p. 38, para. 30 (Boisson de Chazournes); *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Memorial of the Islamic Republic of Iran, 8 June 1993, para. 3.55.

the Law of Treaties] leads to a 'manifestly absurd or unreasonable' result"[124]. That is not, however, what the Vienna Convention says.

32. Rather, Article 32 of the Vienna Convention says that "[r]ecourse may be had to supplementary means of interpretation", such as *travaux préparatoires*: one, "to confirm the meaning resulting from the application of article 31", or two, "when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure", in addition to the third scenario that Iran's counsel described[125].

33. The United States submits that the *travaux* here confirm what is already evident from the text and the context: that Article VII, paragraph 1, is a provision that regulates exchange controls. But even if the Court found the paragraph ambiguous, recourse to the *travaux* would still be appropriate to resolve that ambiguity, and it indisputably reflects an intention to regulate exchange controls, and only exchange controls.

34. That concludes my discussion of Article VII and I turn finally to Article X, paragraph 1.

V. Article X (1)

35. On Wednesday, the United States established that Iran's reading of paragraph 1 of Article X was flawed and, if it were correct, would lead to results that simply do not make sense. My presentation on this provision will address three topics. First, the proper interpretation of the term "commerce". Second, Iran's failure to show that any of the measures impacted actual commerce between the Parties. And finally, Iran's failure to show an impact on commerce "between the territories" of the Parties.

A. Trade in goods

36. Moving to my first topic, Iran's counsel attempted yesterday to conflate maritime commerce and trade in goods. Specifically, counsel asserted that the Court determined in *Oil Platforms* that "commerce" as used in Article X, paragraph 1, was not limited to maritime commerce *or* limited to trade in goods[126]. The United States again acknowledges, as it did on

[124] CR 2022/19, p. 36, para. 39 (Thouvenin).

[125] Vienna Convention on the Law of Treaties, Art. 32.

[126] CR 2022/19, pp. 56-57, paras. 33-34 (Aughey).

Wednesday and in its written pleadings, that the Court in *Oil Platforms* considered that the word "commerce" in Article X, paragraph 1, is not "confined to maritime commerce"[127], but as previously explained, the United States does not believe that should be controlling here. Regardless, whether the term is limited to transactions involving some underlying trade in goods is a wholly distinct question.

37. To be clear, the United States is not arguing that only the actual transactions in goods themselves can qualify as "commerce" within the meaning of Article X; rather, it maintains that "commerce" consists of trade in goods and transactions associated with such trade in goods.

38. This position is supported by the language and outcome of *Oil Platforms*. Trade in goods was, of course, the context of the *Oil Platforms* case, in which the United States had argued that the term "commerce" referred solely to the actual sale or exchange of goods, while Iran argued that it also covered those activities "which, at a prior stage, enable the goods to be made ready for exchange"[128].

39. While the Court considered a wide variety of definitions of "commerce", it ultimately determined that "commerce" as used in Article X, paragraph 1, was "not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce"[129]. The Court went on to explain that in this sense, commerce could be impeded as a result of acts "entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export"[130]. Commerce — as used in Article X — is thus grounded in the trade in goods. In *Oil Platforms*, the Court neither considered nor decided that commerce could include purely financial transactions unrelated to any underlying trade in goods, such as trading in securities or other financial assets, as Iran would have it.

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[127] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 817, para. 43; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 34, para. 78.

[128] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 817, paras. 39-40.

[129] *Ibid.*, p. 819, para. 49.

[130] *Ibid.*, para. 50.

40. Yesterday, Iran's counsel referenced the Court's preliminary objections Judgment as purported support for its position[131], but there the Court was simply recounting its determination that "commerce" was not confined to maritime commerce but included commercial exchanges in general, referencing the above discussion in *Oil Platforms*[132]. Counsel also cited to the Court's Order on provisional measures in the *Alleged Violations* case, but failed to note that the "services" referred to there were associated with the provision of spare parts and equipment for civil aircraft, such as warranty, maintenance and repair services[133].

41. The Court should interpret the term "commerce" to give effect to the Parties' intention. Iran attempts to dismiss the Treaty text, context and *travaux* that the United States has put forward on this point[134], perhaps recognizing that all of those support the term "commerce" requiring a connection to some underlying trade in goods[135]. But, again, Article X, paragraph 1, appears at the head of an article concerning *only* the movement of *products* and *cargoes* by vessel between the Parties and other navigation matters. Article X as a whole appears in a grouping with Articles VIII and IX, which also concern trade in goods between the Parties. This context confirms that the Parties intended the term "commerce" to be limited to trade in goods and ancillary activities related thereto.

B. Actual commerce

42. Moving to my second topic, Iran has still failed to identify any actual commerce between the territories of Iran and the United States that was impacted by the challenged measures.

43. Yesterday, Iran's counsel asked the Court to "[r]ecall" the various contractual claims and debts of Iranian entities against which certain plaintiffs executed their judgments[136], and posited that these assets represent "the product of commerce"[137]. But even assuming that such assets, sitting untouched in a bank account or on a court docket, can be described as a "product" of historical

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[131] CR 2022/19, pp. 55-56, para. 30 (Aughey).

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

[133] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 645, para. 75.

[134] CR 2022/19, p. 57, para. 36 (Aughey).

[135] RUSA, paras. 12.5-12.9, 12.11-12.14; CMUSA, paras. 17.4-17.8, 17.10-17.13.

[136] CR 2022/19, p. 53, para. 20 (Aughey).

[137] CR 2022/19, p. 53, para. 21 (Aughey).

commerce between Iran and the United States, they do not establish that there was continuing commerce, at the time they were attached, that the challenged measures could have impeded.

44. Indeed, one asset — the arbitral award against Cubic Defense Systems — relates to two 1977 contracts between Cubic and the Iranian Ministry of Defence — that Cubic terminated in 1979[138]. Any "commerce" to which this asset pertained ended more than three decades before it was made the subject of enforcement proceedings. But the dormant contractual claims and inactive bank accounts established, at most, that there had been commerce between the territories of Iran and the United States in the past, which nobody disputes. To show that the United States' actions impeded freedom of commerce, Iran must show that there was continuing commerce at the time of those actions. And Iran has offered no evidence to support that assertion.

45. Yesterday, Iran sought to rely for that purpose on a supposed "concession" by Ms Grosh that certain of the contracts are still alive[139]. But Ms Grosh made no such concession, or indeed any factual assertion about the underlying contracts. Rather, she expressed the uncontroversial legal point that the attachment of an entity's contractual claims to satisfy a judgment does not terminate any other rights such entity may have under the contract.

46. Finally, Iran's counsel argued that its failure to show any continuing commerce between the territories of the Parties is of no consequence. Iran asks, "where . . . in the Court's case law does the United States find authority" for the proposition that a measure must impede actual, ongoing commerce in order to breach Article X, paragraph 1[140]? The answer, as explained in our Rejoinder[141], is *Oil Platforms*.

47. In that case, the Court rejected Iran's argument that the attacks could impede freedom of commerce where no commerce existed, writing: "Injury to potential for future commerce is however, in the Court's view, not necessarily to be identified with injury to freedom of commerce, within the meaning of Article X, paragraph 1[142]".

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[138] *Ministry of Defense of Iran* v. *Cubic et al.*, Case No. 98-cv-1165, Order to Close Interest Bearing Account and Disburse Funds (S.D. Cal. 29 Apr. 2016) (MI, Ann. 67).

[139] CR 2022/19, p. 54, para. 22. (Aughey).

[140] CR 2022/19, p. 58, para. 38 (Aughey).

[141] RUSA, para. 12.17.

[142] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 205, para. 92.

C. Commerce between the territories

48. Turning now to my final topic, Iran's counsel sought to contest the point that a breach of Article X, paragraph 1, requires not only that actual commerce be impeded, but that the commerce be "between the territories" of the parties. But this is an important limitation. Moreover, the Court determined in *Oil Platforms* that a series of commercial transactions involving third-country intermediaries is not commerce "between the territories" of the parties[143]. In light of this determination, there is no credible argument that the Bank Markazi assets at issue in *Peterson* represent commerce between the territories of the United States and Iran.

49. Iran seeks to distinguish Bank Markazi's series of transactions from those at issue in *Oil Platforms* by noting that a US District Court found Clearstream to be acting as Bank Markazi's "agent"[144]. It is not clear why this should matter. The question before the court was whether Bank Markazi was the beneficial owner of the securities held by Clearstream at Citibank, not whether Bank Markazi's beneficial ownership constituted commerce between the territories of Iran and the United States within the meaning of the Treaty of Amity. And it was stipulated that neither Clearstream nor Banca UBAE had a financial interest in those securities. In this context, the court's finding means only that Clearstream was not holding the securities for itself, and that they could be attached as assets "of" Bank Markazi[145]. It in no way suggests that Bank Markazi was engaging directly in "commerce" with the territory of the United States.

50. What is significant is that Bank Markazi chose to structure its investments through not one but two foreign intermediary banks. And it did so, as you heard from Ms Grosh, for the specific purpose of circumventing US regulations that prohibited Bank Markazi from engaging in commerce directly with a US bank or issuer. Having consciously structured its holdings through a series of third-country intermediaries precisely to avoid engaging in direct commerce with the United States, Iran cannot credibly claim now that "direct commerce" is what Bank Markazi was doing.

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

[144] CR 2022/19, p. 54, para. 25 (Aughey).

[145] *Peterson* v. *Islamic Republic of Iran*, No. 10 Civ. 4518 (KBF), Opinion and Order (S.D.N.Y. 13 March 2013), p. 17, CMUSA, Ann. 108.

51. In the US Rejoinder, the United States noted that even the suggestion that Bank Markazi had intended to invest in US securities is baseless[146]. In fact, Bank Markazi was invested in the securities of European governments, European State-owned banks and international financial institutions — with not one US issuer among them. Bank Markazi's indirect investments in these non-US securities, the proceeds of which it received via two separate intermediary banks in Luxembourg and Italy, respectively, is not commerce between the territories of Iran and the United States.

VI. Conclusion

52. Mr. President, Members of the Court, that brings my submissions to an end. I thank you for your kind attention and may I ask that you now call on the Agent of the United States, Mr. Richard Visek, to conclude the United States' presentation.

53. The VICE-PRESIDENT, Acting President: I thank Mr. Jedrey. I now give the floor to Mr. Richard Visek, Agent of the United States.

Mr. VISEK:

CLOSING OBSERVATIONS AND FINAL SUBMISSIONS

I. Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you again on behalf of the United States of America. I will offer some closing observations and then will present the United States' final submissions.

II. Closing observations

2. You have heard our oral presentations this week, and you have before you our written submissions. We have explained why Iran's case invoking the Treaty of Amity fails and my colleague, Mr. Fabry, provided a framework on Wednesday for working through Iran's various claims. I will not restate all of the oral submissions we have made this week. Permit me instead to make five succinct closing observations.

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[146] RUSA, paras. 12.26-12.27.

3. Mr. President, Members of the Court, my first observation is that, yesterday, Iran's counsel and Agent lectured us on the United States' ignorance of and even failure to "get" international law[147]. It is truly a tired trope. The United States takes seriously its obligations under international law, including under the Charter of the United Nations and the numerous other bilateral and multilateral treaties to which we are party. But we are not here to debate our commitment to international law or, for that matter, our broader relations with Iran. We have kept the focus on the case at hand, including what is at the root of Iran's claims — a desire to use the Treaty of Amity as a vehicle to avoid accountability for its support for international terrorism.

4. Notwithstanding Iran's effort to distort the Treaty of Amity, the United States — spanning three presidential administrations — has come before the Court and defended against Iran's claims. You have read our written and heard our oral submissions — both at the preliminary objections and merits phases. We have set forth our positions on the facts and the law, and we submit that we have the compelling case under both.

5. Mr. President, Members of the Court, my second observation is to underscore what we have set out in detail: Iran comes to the Court with unclean hands as a supporter of repeated, horrific terrorist attacks against the United States and its nationals. Aside from generalized denials of all allegations[148], Iran has conspicuously avoided engaging before the Court on the actions that led to the US cases about which Iran complains. The *Peterson* litigation, for example, centres on Iran's support for the terrorist attack in Beirut that killed 241 peacekeepers and injured many more. Given that Iran's senior leaders claimed responsibility for Iran's role in this heinous attack, it is perhaps not surprising that Iran did not even try to rebut the detailed evidence presented by the United States in these proceedings. Nor has Iran attempted to rebut the findings of the courts and other bodies — both within and outside the United States — that have chronicled Iran's support for terrorist attacks. Perhaps it is Iran's calculus that any substantive response would only harm its case. Mr. President, Members of the Court, we will let Iran's silence speak for itself.

6. As Mr. Fabry explained on Wednesday, if the Court reaches the conclusion that Iran has come to the Court with unclean hands, that addresses Iran's case in its entirety.

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[147] CR 2022/19, p. 11, para. 9 (Lowe).

[148] CR 2022/15, p. 16, para. 11 (Habibzadeh); CR 2022/15, p. 28, para. 40 (Lowe).

7. My third observation is that — even assuming *arguendo* that the Court does not find Iran has come before it with unclean hands — Iran's case suffers from other consequential defects. Chief among them is Iran's 180 degree turn on Bank Markazi. Professor Thouvenin asserted yesterday that, and this is our translation, "our opponents stubbornly refuse to tell you about the nature of the investment activities" — activities that he also described as "commercial par excellence"[149]. But that contention is simply incorrect. Bank Markazi is indisputably Iran's central bank. Its purchase and sale of securities through proxies to manage the currency of the Iranian State is a quintessential central bank activity and cannot be characterized as commercial, simply because Iran wishes to avail itself of the protections provided in Articles III to V of the Treaty. Moreover, Iran cannot escape from Bank Markazi's statements on the record in the *Peterson* litigation that the assets at issue "plainly serve[] an 'important governmental purpose' and thus do[] not constitute 'commercial' activity"[150]. Even as it tries to distance itself from "Bank Markazi's lawyers", Iran cannot ignore the fact that Bank Markazi officials themselves signed sworn statements declaring that Bank Markazi "does not conduct any business whatsoever"[151] in the United States and that the exact transactions at issue in this case "are not linked to any specific project and simply form part of the total reserves used to instill market confidence, and promote [*sic*] central bank's objective of price stability"[152].

8. Iran's opportunistic recasting of Bank Markazi into a commercial entity is not supported by the facts of this case, including by what Bank Markazi has said about itself. And, as Professor Boisson de Chazournes demonstrated, if such opportunism is upheld, it would have far-reaching consequences for central banks around the world.

9. Mr. President, Members of the Court, I now turn to my fourth observation. Woven into Iran's submissions this week was the repeated allegation that the US legal system is closed to Iran. But that is nothing more than a convenient excuse on Iran's part — one that is untethered from the facts. The US legal régime applicable to designated State sponsors of terrorism is not unique to or

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[149] CR 2022/19, p. 26, para. 5 (Thouvenin); CR 2022/19, p. 30, para. 18 (Thouvenin).

[150] Defendant Bank Markazi's Reply Memorandum of Law in Further Support of its Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction 29, *Peterson* v. *Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. June 22, 2012), POUS, Ann. A15.

[151] Affidavit of Gholamhossein Arabeieh, para. 6, *Peterson* v. *Islamic Republic of Iran*, No. 10-4518 (S.D.N.Y. Oct. 17, 2010), POUS, Ann. A03.

[152] Affidavit of Ali Asghar Massoumi, para. 11, *Peterson* v. *Islamic Republic of Iran*, Doc. 815, No. 1:10-Civ.-4518-KBF (S.D.N.Y. Aug. 31, 2017), POUS, Ann. A02.

targeted at any one country. In that vein, Iran clarified yesterday, and again, this is our translation, to have "never claimed to be the only State targeted"[153]. It is also not surprising that Iran is included on this list, given the ample record of its support for terrorist acts.

10. Not only do the courthouse doors in the United States remain open to Iran and Iranian entities in US enforcement proceedings but, as both Mr. Bethlehem and Ms Grosh have shown, Iran and Iranian entities have ample opportunities to make their case — from courts of first instance, to appellate courts, to the United States Supreme Court. Before walking through those doors, however, Iran and its entities seem to want a guarantee that they will always prevail. That is not a reasonable request of any legal system.

11. Mr. President, Members of the Court, my fifth observation is that to advance its myriad claims, Iran has stretched and reinterpreted the Treaty of Amity in ways that are unsupported by the text, the negotiating history and customary international law. Over the course of the merits proceedings, the United States has diligently analysed and addressed Iran's claims under the Treaty's articles and shown them to be wanting. As Ms Grosh has illustrated, Iran cannot wish away the well-established concept of piercing the corporate veil to protect creditors and prevent evasion or other abuse. Nor, as Ms Grosh also explained, can Iran expand the scope of protections beyond what is contemplated in the text of the Treaty in light of its context and as confirmed by its negotiating history. Further, notwithstanding Mr. Wordsworth's invitation to the Court to find new protections by going out on a limb constructed from a grab bag of arbitration decisions[154], we submit that the Court must stay grounded in its well-established requirements of basing any development in the minimum standard of treatment under customary international law on a rigorous analysis of State practice and *opinio juris* — which is something that Iran has not offered but has, at least, concurred with in principle[155].

12. Mr. President, Members of the Court, Iran is hoping that you will decline to engage on what is at the core of its claims and not scrutinize them in light of the specific articles of the Treaty. We are confident that you will engage, and that you will find — as we submit we have shown — that

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[153] CR 2022/19, p. 15, para. 3 (Vidal).

[154] CR 2022/19, p. 45, para. 26 (Wordsworth).

[155] CR 2022/19, p. 13, para. 13 (Lowe).

all of Iran's claims merit rejection. Either because they are constructed with unclean hands or falter because: Iranian entities have not exhausted local remedies; Bank Markazi is not a "company" under the Treaty of Amity; Iran has not established breaches of any Treaty provisions; and the Treaty does not preclude the application of Executive Order 13599 because the Order falls within the scope of Article XX of the Treaty.

13. Before I set out the United States' final submissions, and in light of the Iranian Agent's final submissions, I should also reiterate what the United States addressed in Chapter 19 of its Counter-Memorial and Chapter 15 of its Rejoinder: because the Treaty of Amity is now terminated, there is no basis for the Court to order the United States to withdraw the challenged measures or to refrain from reimposing measures in the future, irrespective of how the Court rules on the merits of Iran's claims.

III. Final submissions and conclusion

14. Mr. President, distinguished Members of the Court, in conclusion I present to you the final submissions of the United States of America:

> "For the reasons explained during these hearings and in its written submissions and any other reasons the Court might deem appropriate, the United States of America requests that the Court:
>
> 1. Dismiss all claims brought under the Treaty of Amity on the basis that Iran comes to the Court with unclean hands.
>
> 2. Dismiss as outside the Court's jurisdiction all claims brought under Articles III, IV, and V of the Treaty of Amity that are predicated on treatment accorded to Bank Markazi.
>
> 3. Dismiss as outside the Court's jurisdiction all claims brought under Articles III, IV, and V of the Treaty of Amity that are predicated on treatment accorded to companies that have failed to exhaust local remedies.
>
> 4. Dismiss on the basis of Article XX (1) (c) and (d) of the Treaty of Amity all claims that U.S. measures that block or freeze assets of the Iranian government or Iranian financial institutions (as defined in Executive Order 13599) violate any provision of the Treaty.
>
> 5. Dismiss all claims brought under Articles III, IV, V, VII, and X of the Treaty of Amity on the basis that the United States did not breach its obligations to Iran under any of those Articles.
>
> 6. To the extent the Court concludes that Iran, notwithstanding the foregoing submissions, has established one or more of its claims brought under the Treaty of

> Amity, reject such claims on the basis that Iran's invocation of its purported rights under the Treaty constitutes an abuse of right."

15. Mr. President, distinguished Members of the Court, in closing, I would like to thank the Court for its consideration of the United States' submissions in these proceedings, and I would also like to express our appreciation to the Court and the delegation across the aisle for listening to our presentations this week. In addition, on behalf of the US delegation, I would like to thank the Registrar and the interpreters for their tireless efforts, as well as all of the Court personnel who have been so welcoming to the Parties this week. Mr. President, distinguished Members of the Court, this concludes the oral argument of the United States of America. Thank you.

The VICE-PRESIDENT, Acting President: I thank the Agent of the United States of America. The Court takes note of the final submissions which you have just read out on behalf of your Government. I shall now give the floor to Judge Bhandari who has a question for Iran. Judge Bhandari, you have the floor.

Judge BHANDARI: Thank you, Mr. President. A question for Iran.

In its Memorial and Reply, Iran submitted, in unqualified terms, that 22 US Code Section 8772 removed legal defences that might otherwise have been available to Bank Markazi in United States courts. In its Reply, for example, Iran states: "In the *Peterson* case, U.S. legislation targeted the specific proceedings, retroactively removing *all* defences that would usually have been available to Bank Markazi." (Reply, para. 1.6, emphasis added.) [See also e.g. Memorial, paras. 5.44 *(c)*, 5.45; Reply, paras. 6.60 *(c)*, 9.6, 9.15.]

In its oral submissions on Monday, by comparison, counsel for Iran stated that Section 8772 removed what it called a "key defence" or "key defences" on the part of Bank Markazi. [CR 2022/16, p. 11, para. 4; p. 14, para. 13; p. 15, para. 15; p. 22, para. 39 *(a)* (Wordsworth).]

Is it Iran's case that Section 8772 removed *all* defences, or that it removed a more limited *"key"* defence or *"key"* defences? If the latter, which defence or defences did Section 8772 remove and which remained after the passing of Section 8772? Thank you.

The VICE-PRESIDENT, Acting President: I thank Judge Bhandari. The written text of his question will be communicated to both Parties. Iran is invited to provide its written reply to the

question no later than Friday 30 September 2022, at 6 p.m. I would add that any comment the United States may wish to make, in accordance with Article 72 of the Rules of Court, on the reply by Iran must be submitted no later than Friday 7 October 2022, at 6 p.m. This brings us to the end of the hearings in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*. I thank the representatives of the two Parties for the assistance they have given to the Court by their presentations in the course of these hearings. In accordance with practice, I shall request the Agents of the Parties to remain at the Court's disposal to provide any additional information it may require.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment. As the Court has no other business before it today, the sitting is now closed.

The Court rose at 5.40 p.m.

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