INTERNATIONAL COURT OF JUSTICE
Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands
Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928
Website Twitter Account YouTube LinkedIn

Summary
Unofficial

Summary 2023/3
30 March 2023

Certain Iranian Assets (Islamic Republic of Iran v. *United States of America)*

Summary of the Judgment of 30 March 2023

I. FACTUAL BACKGROUND (PARAS. 21-32)

The Court begins by setting out the factual background to the case, which was instituted on 14 June 2016 by the Islamic Republic of Iran (hereinafter "Iran" or the "Applicant") against the United States of America (hereinafter the "United States" or the "Respondent") with regard to a dispute concerning alleged violations by the United States of the Treaty of Amity, Economic Relations, and Consular Rights, which was signed by the two States in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter the "Treaty of Amity" or "Treaty", which was denounced by the United States on 3 October 2018).

The Court recalls that, in 1984, in accordance with its domestic law, the United States designated Iran as a "State sponsor of terrorism", a designation which it has maintained ever since. The United States then adopted a set of legislative, executive and judicial measures which Iran claims are in breach of the Treaty of Amity and are causing Iran and Iranian entities serious and ongoing harm.

As regards the measures at issue, the Court recalls that, in 1996, the United States amended its Foreign Sovereign Immunities Act (hereinafter the "FSIA") so as to remove the immunity from suit before its courts of States designated as "State sponsors of terrorism" in certain cases. Plaintiffs then began to bring actions against Iran before United States courts for damages arising from deaths and injuries caused by acts allegedly supported, including financially, by Iran. In 2002, the United States enacted the Terrorism Risk Insurance Act (hereinafter "TRIA"), which permitted certain enforcement measures for judgments entered pursuant to the 1996 amendment to the FSIA. The United States then further amended the FSIA and, in 2012, the President of the United States issued Executive Order 13599, which blocked all assets of the Government of Iran, including those of Bank Markazi (the Central Bank of Iran) and of other Iranian financial institutions, where such assets are within United States territory or "within the possession or control of any United States person, including any foreign branch".

The Court further recalls that, following the legislative and executive measures taken by the United States, many default judgments and substantial damages judgments have been entered by United States courts against the State of Iran and, in some cases, against Iranian State-owned entities. Further, the assets of Iran and certain Iranian entities, including Bank Markazi, are now subject to enforcement proceedings in various cases in the United States or abroad, or have already been distributed to judgment creditors.

II. QUESTIONS OF JURISDICTION AND ADMISSIBILITY (PARAS. 33-73)

The Court next recalls that, in the Judgment it rendered in 2019 (see Summary 2019/1), it ruled on several objections to jurisdiction and admissibility which the United States had raised as a preliminary matter. It observes that, at the present stage of the proceedings, the Court has still to examine two objections.

A. Objection to the Court's jurisdiction *ratione materiae*: question whether Bank Markazi is a "company" within the meaning of the Treaty of Amity (paras. 34-54)

The first objection concerns the question whether Bank Markazi is a "company" within the meaning of the Treaty of Amity. Indeed, the rights and protections guaranteed by Articles III, IV and V of that instrument are for the benefit of "nationals" (a term used in the Treaty to describe natural persons) and "companies".

The Court notes in this regard that the only activities on which Iran relies to found the characterization of Bank Markazi as a "company" consist in the purchase, between 2002 and 2007, of 22 security entitlements in dematerialized bonds issued on the United States financial market and in the management of proceeds deriving from those entitlements. In the opinion of the Court, these operations are not sufficient to establish that Bank Markazi was engaged, at the relevant time, in activities of a commercial character. Indeed, the operations in question were carried out within the framework and for the purposes of Bank Markazi's principal activity, from which they are inseparable. They are merely a way of exercising its sovereign function as a central bank, and not commercial activities performed by Bank Markazi "alongside [its] sovereign functions".

The Court concludes from this that Bank Markazi cannot be characterized as a "company" within the meaning of the Treaty of Amity. Consequently, the objection to jurisdiction raised by the United States with regard to Iran's claims relating to alleged violations of Articles III, IV and V of the Treaty of Amity predicated on treatment accorded to Bank Markazi must be upheld, and the Court finds that it has no jurisdiction to consider those claims.

B. Objection to admissibility based on the failure to exhaust local remedies (paras. 55-73)

The Court then turns to the question whether, as the United States argues, Iran's claims must be rejected on the ground that the Applicant failed to exhaust local remedies before seising the Court.

The Court recalls that, under customary international law, when a State brings an international claim on behalf of one or more of its nationals on the basis of diplomatic protection, local remedies must be exhausted before the claim may be examined. It adds that this requirement is deemed to be satisfied when there are no available local remedies providing the injured persons with a reasonable possibility of obtaining redress.

The Court observes that, in this case, each time an Iranian entity sought to have a federal legislative provision set aside by a court on the ground that it ran counter to the rights enjoyed by that entity under the Treaty of Amity, the court, after finding that the provision at issue was not contrary to the Treaty, referred to the jurisprudence whereby courts are, in any event, obliged to apply the federal statute when it was enacted after the treaty (which is the case for the provisions at issue in these proceedings). Given the combination of the legislative character of the contested measures and the primacy accorded to a more recent federal statute over the treaty in the jurisprudence of the United States, it appears to the Court that, in the circumstances of the present case, the companies in question had no reasonable possibility of successfully asserting their rights in United States court proceedings.

The Court thus concludes that the objection to admissibility based on the failure to exhaust local remedies cannot be upheld.

III. DEFENCES ON THE MERITS PUT FORWARD BY THE UNITED STATES (PARAS. 74-109)

Before considering the alleged violations of the Treaty of Amity claimed by Iran, the Court considers it appropriate to deal, first, with the three defences on the merits put forward by the United States.

A. Defence based on the "clean hands" doctrine (paras. 76-84)

As its first defence, the United States contends that Iran's Application is inadmissible because Iran has come to the Court with "unclean hands".

The Court notes that, though often invoked in international disputes, the argument based on the "clean hands" doctrine has only rarely been upheld by the bodies before which it has been raised. The Court itself has never held that the doctrine in question was part of customary international law or constituted a general principle of law.

In any event, the Court notes that, in the view of the Respondent itself, at least several conditions must be met for the "clean hands" doctrine to be applicable in a given case. Two of those conditions are that a wrong or misconduct has been committed by the applicant or on its behalf, and that there is "a nexus between the wrong or misconduct and the claims being made by the applicant State". In the view of the Court, there is not, in any case, a sufficient connection between the wrongful conduct imputed to Iran by the United States and the claims of Iran, which are based on the alleged violation of the "Treaty of Amity, Economic Relations, and Consular Rights".

The Court therefore considers that the defence on the merits based on the "clean hands" doctrine cannot be upheld.

B. Defence based on abuse of rights (paras. 85-93)

The Court next addresses the second argument put forward by the United States that Iran is committing an abuse of rights by seeking to apply the Treaty of Amity to measures that, in its view, are unrelated to commerce, and that it is seeking to do so solely to circumvent its obligation to make reparation to the victims of its acts.

The Court considers that it could only accept the abuse of rights defence if it were demonstrated by the Respondent, on the basis of compelling evidence, that the Applicant seeks to exercise rights conferred on it by the Treaty of Amity for purposes other than those for which the rights at issue were established, and that it was doing so to the detriment of the Respondent.

The Court is of the view, however, that the United States has failed to make such a demonstration. Consequently, it finds that it cannot uphold that defence.

C. Article XX, paragraph 1 *(c)* and *(d)*, of the Treaty of Amity (paras. 94-109)

Finally, the Court turns to the third defence on the merits. The United States invokes Article XX, paragraph 1 *(c)* and *(d)*, of the Treaty of Amity (which provisions are reproduced in paragraph 96 of the Judgment) to request that the Court dismiss as outside its jurisdiction all claims

of Iran that the measures adopted by the United States under Executive Order 13599 violate the Treaty of Amity.

1. Article XX, paragraph 1 *(c)* (paras. 99-103)

As regards paragraph 1 *(c)*, the Court recalls that Executive Order 13599 was issued with a view to blocking all assets of the Government of Iran and those of Iranian financial institutions, where such assets are within United States territory or "within the possession or control of any United States person, including any foreign branch".

The Court considers that the terms of Article XX, paragraph 1 *(c)*, of the Treaty of Amity, in their ordinary meaning and in light of the object and purpose of the Treaty, cannot bring within its scope any measures other than those that are intended, by a party to the Treaty, to regulate its own production of or its own traffic in arms, or to regulate the export of arms to the other party or the import of arms from the other party. In the view of the Court, this provision cannot be relied upon to justify measures taken by a party which might impair the rights afforded by the Treaty and which are solely intended to have an indirect effect on the production of and the traffic in arms by the other party or on the territory of the other party. Consequently, the Court finds that the United States' defence cannot be upheld.

2. Article XX, paragraph 1 *(d)* (paras. 104-109)

As regards paragraph 1 *(d)*, the Court is of the view that it was for the United States to show that Executive Order 13599 was a measure necessary to protect its essential security interests, and that it has not convincingly demonstrated that this was so. Even accepting that the Respondent enjoys a certain margin of discretion, the Court cannot content itself with the latter's assertions. The Court therefore concludes that the defence cannot be upheld.

IV. ALLEGED VIOLATIONS OF THE TREATY OF AMITY (PARAS. 110-223)

The Court then examines the alleged violations by the United States of its obligations under the Treaty of Amity.

A. Alleged violations of Article III, paragraph 1, and Article IV, paragraph 1 (paras. 123-159)

The Court begins by examining the scope of the obligation established by the first sentence of Article III, paragraph 1, of the Treaty, which provides that "[c]ompanies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party". It notes that the Parties' disagreement revolves around the meaning of the phrase "shall have their juridical status recognized".

The Court recalls that, in its 2019 Judgment, it examined the definition of the term "company". On the basis of that jurisprudence, the Court considers that the expression "juridical status" refers to the companies' own legal personality and that the recognition of a company's own legal personality entails the legal existence of the company as an entity that is distinct from other natural or legal persons, including States. However, in the view of the Court, it does not follow that the legal situation of such an entity will always be the same as in the State in which it was constituted.

In the present case, it is not disputed that the companies allegedly affected by the measures of the United States were constituted under Iranian law as separate legal entities with their own legal

personality. The Parties disagree on whether the United States disregarded the legal personality of the companies through its legislative, executive and judicial measures and whether this was justified.

In the Court's view, the obligation under Article III, paragraph 1, is not necessarily satisfied by the fact of their appearance at and participation in domestic judicial proceedings. It therefore decides to examine all the relevant measures in order to determine whether the United States disregarded the legal personality of the Iranian companies and, if so, whether this was justified.

The Court addresses these questions in the context of its examination of Iran's claims under Article IV, paragraph 1, of the Treaty of Amity, which is "aimed at the way in which the natural persons and legal entities in question are, in the exercise of their private or professional activities, to be treated by the State concerned". It considers that, interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context, it is clear that Article IV, paragraph 1, comprises three distinct obligations.

As regards the first clause of that paragraph, which provides that "[e]ach High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises", the Court first notes that the Parties agree that this obligation includes protection against a denial of justice. It considers that, in the present case, the rights of Iranian companies to appear before the courts in the United States, to make legal submissions and to lodge appeals, have not been curtailed. The enactment of legislative provisions removing legal defences based on separate legal personality, and their application by the courts, do not in themselves constitute a serious failure in the administration of justice amounting to a denial of justice.

As regards the second clause, which provides that "[e]ach High Contracting Party . . . shall refrain from applying unreasonable or discriminatory measures that would impair [the] legally acquired rights and interests [of nationals and companies of the other High Contracting Party]", the Court notes that there is an overlap between protection against "unreasonable or discriminatory measures" and the broader standard of "fair and equitable treatment" set out earlier. Referring to its jurisprudence, the Court considers that the terms "unreasonable" or "discriminatory" reflect two different standards against which the conduct of a State may be separately assessed.

The Court therefore begins by examining whether the measures taken by the United States and challenged by Iran are "unreasonable". In the Court's view, a measure is unreasonable within the meaning of the Treaty of Amity if it does not meet certain conditions. First, a measure is unreasonable if it does not pursue a legitimate public purpose. In the present case, the United States contends that the legislative provisions challenged by Iran, as well as the judicial decisions that applied those provisions, had the purpose of providing compensation to victims of "terrorist acts" for which Iran has been found liable by United States courts. As a general rule, providing effective remedies to plaintiffs who have been awarded damages can constitute a legitimate public purpose. In addition, a measure is unreasonable if there is no appropriate relationship between the purpose pursued and the measure adopted. The attachment and execution of assets of a defendant that has been found liable by domestic courts can generally be considered as having an appropriate relationship with the purpose of providing compensation to plaintiffs. Furthermore, a measure is unreasonable if its adverse impact is manifestly excessive in relation to the purpose pursued. The Court notes that, in the present case, the legislative measures at issue (namely Section 201 *(a)* of TRIA and Section 1610 *(g)* (1) of the FSIA), by design, plainly disregarded the Iranian companies' own legal personality, and that those same provisions were applied by United States courts in several enforcement proceedings involving Iranian companies. The Court recalls that the process of "lifting the corporate veil" or "disregarding the legal entity" may be justified and equitable in certain circumstances or for certain purposes. However, in the circumstances of the present case, the Iranian companies' own legal personality has been set aside, under the conditions described above, in relation to liability judgments rendered in cases in which those companies could not participate and in relation to facts in which those companies do not appear to have been involved. The Court

considers that disregarding the legal entity in such circumstances is not justified. The Court therefore concludes that the legislative and judicial measures were unreasonable, in violation of the obligation under Article IV, paragraph 1, of the Treaty of Amity. With respect to Executive Order 13599, the Court notes that it is apparent that it was not adopted for the purpose of providing compensation to plaintiffs who had been successful in their liability claims against Iran. Because Executive Order 13599 encompasses "[a]ll property and interests in property of any Iranian financial institution", it is manifestly excessive in relation to the purpose pursued. Accordingly, the Court concludes that this, too, is an unreasonable measure, in violation of the obligation under Article IV, paragraph 1.

Since the second clause of Article IV, paragraph 1, of the Treaty of Amity uses the disjunctive "or" in providing for protection against "unreasonable" or "discriminatory" measures, a measure will be in violation of the obligation provided for when it is not in conformity with either standard. Since the Court has concluded that the measures adopted by the United States are "unreasonable", it is not necessary to examine separately whether they are "discriminatory".

Having thus determined that the measures of the United States disregarded the Iranian companies' own legal personality, and that this was not justified, the Court also concludes that the United States has violated its obligation to recognize the juridical status of Iranian companies under Article III, paragraph 1.

B. Alleged violations of Article III, paragraph 2 (paras. 160-168)

The Court turns next to the alleged violations of Article III, paragraph 2, of the Treaty of Amity, which provides, *inter alia*, that

> "[n]ationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done".

The Court considers that there is a clear distinction between freedom of access to the courts with a view to the assertion of rights and the content of the substantive or procedural rights that may be invoked before the courts. In its view, the phrase "to the end that prompt and impartial justice be done" reflects the purpose for which the Contracting Parties of the Treaty recognized the freedom of access to the courts of justice and administrative agencies for their respective nationals and companies. It does not itself guarantee any procedural or substantive right, nor does it in any way enlarge the "freedom of access" established in Article III, paragraph 2.

The Court has already noted that, in the circumstances of the present case, the rights of Iranian companies to appear before United States courts, make legal submissions and lodge appeals were not curtailed. It observes that the application by United States courts of legislation that was unfavourable to the Iranian companies and the fact that the companies' arguments on the basis of the Treaty of Amity were unsuccessful are matters related to the companies' substantive rights, and that these matters do not call into question the "freedom of access" enjoyed by the companies or the aim of "prompt and impartial justice" within the meaning of Article III, paragraph 2, of the Treaty of Amity. The Court thus concludes that Iran has not established a violation by the United States of its obligations under Article III, paragraph 2, of the Treaty of Amity.

C. Alleged violations of Article IV, paragraph 2 (paras. 169-192)

The Court next considers the alleged violations of Article IV, paragraph 2, of the Treaty of Amity. It notes that the Parties agree that this provision contains two distinct rules. The first sets out

the obligation of each Contracting Party to afford the most constant protection and security to the property and interests in property of the nationals and companies of the other Contracting Party. The second concerns taking or expropriation.

Addressing this second rule, the Court notes that it is not disputed by the Parties that United States courts, in application of Section 201 *(a)* of TRIA or Section 1610 *(g)* (1) of the FSIA, subjected to attachment and execution the property and interests in property of Iranian companies. It is also uncontroversial that the assets were turned over or distributed to plaintiffs who had succeeded in cases before United States courts in which Iran was found liable. Nor is it disputed that the Iranian companies concerned did not receive any payment. The Court considers, however, that a judicial decision ordering the attachment and execution of property or interests in property does not per se constitute a taking or expropriation of that property. A specific element of illegality related to that decision is required to turn it into a compensable expropriation.

The Court notes that the Parties disagree as to whether the "police powers" doctrine has any bearing on Article IV, paragraph 2. The Court considers that the Contracting Parties' right to regulate is not undermined by the prohibition of takings provided for in that paragraph. It has long been recognized in international law that the bona fide non-discriminatory exercise of certain regulatory powers by the government aimed at the protection of legitimate public welfare is not deemed expropriatory or compensable. Governmental powers in this respect, however, are not unlimited.

The Court has already concluded that, in the circumstances of the present case, Section 201 *(a)* of TRIA and Section 1610 *(g)* (1) of the FSIA, as well as their application by United States courts, were unreasonable measures in violation of the obligation under Article IV, paragraph 1, of the Treaty of Amity (see above). Reasonableness is one of the considerations that limit the exercise of the governmental powers in this respect. It follows from this element of unreasonableness, which is found in the legislative provisions and which extends to their judicial enforcement, that the measures adopted by the United States did not constitute a lawful exercise of regulatory powers and amounted to compensable expropriation.

For these reasons, the Court concludes that the application of Section 201 *(a)* of TRIA and Section 1610 *(g)* (1) of the FSIA by United States courts amounted to takings without compensation of the property and interests in property of the Iranian companies identified earlier, in violation of the obligations under Article IV, paragraph 2, of the Treaty.

The situation with respect to Executive Order 13599 is different. Iran has failed to identify the property or interests in property of Iranian companies that were specifically affected by Executive Order 13599. The Court considers that, in respect of that Executive Order, Iran has not substantiated its allegations in relation to takings under Article IV, paragraph 2, of the Treaty.

The Court then turns to Iran's claims in relation to the obligation to afford the most constant protection and security. The Court considers that the core of that obligation concerns the protection of property from physical harm. It notes in this regard that, in the present case, Iran does not assert that the United States has failed to protect the property of Iranian nationals and companies from physical harm, but that it has failed to ensure its legal protection. In the Court's view, the standard of the most constant protection and security and the standard of fair and equitable treatment would overlap significantly if the former were interpreted to include legal protection. Having concluded that the measures of the United States were in violation of its obligations under Article IV, paragraph 1, the Court considers that the provisions of Article IV, paragraph 2, as concerns the most constant protection and security, were not intended to apply to situations covered by the provisions of Article IV, paragraph 1. Accordingly, the Court concludes that Iran has not established a violation by the United States of its obligations under Article IV, paragraph 2, as concerns the most constant protection and security.

Based on its finding with respect to the measures of the United States, the Court concludes that the United States has violated its obligations under Article IV, paragraph 2, of the Treaty of Amity, as concerns the prohibition of takings except for a public purpose and with the prompt payment of just compensation.

D. Alleged violations of Article V, paragraph 1 (paras. 193-201)

The Court turns next to the alleged violations of Article V, paragraph 1, of the Treaty of Amity. It notes in this regard that Iran contends that the measures adopted by the United States have deprived Iranian companies of the right to dispose of their property, within the meaning of subparagraph 1 *(c)*.

The Court considers that the language of the first sentence of Article V, paragraph 1, establishes rights for the nationals and companies of the Contracting Parties to lease property for their residence or for the conduct of their commercial activities, to purchase or otherwise acquire personal property, and to dispose of property. These rights do not entail an absolute obligation for the Contracting Parties. The Contracting Parties can exercise their regulatory powers in respect of such acts of lease, acquisition or disposal of property.

The Court notes that Iran's allegations regarding the right of Iranian companies to dispose of property under Article V, paragraph 1, are predicated on the same set of facts as its claims in relation to Article IV, paragraph 2. The Court has already concluded that the measures of the United States amounted to takings without compensation. In the Court's view, measures that amount to takings without compensation are not the type of measures that fall within the scope of the Contracting Parties' obligation to permit the disposal of property, under Article V, paragraph 1. The obligation to permit the disposal of property presupposes that the national or company concerned actually owns property over which it can exercise ownership rights. The Court considers that Article V, paragraph 1, was not meant to apply to situations amounting to expropriation, which are addressed in Article IV, paragraph 2.

As concerns Executive Order 13599, the Court notes that the property and interests in property blocked by this Executive Order "may not be transferred, paid, exported, withdrawn, or otherwise dealt in". These terms reflect a general prohibition of the disposal of property. The Court recalls, however, that Iran has failed to identify the property or interests in property of Iranian companies that were specifically affected by the Executive Order, other than the assets of Bank Markazi. Indeed, all other property allegedly blocked by Executive Order 13599 that Iran has brought to the Court's attention was blocked by other executive measures which have not been challenged in these proceedings. Such property was therefore not affected by Executive Order 13599.

In light of the foregoing, the Court concludes that Iran has not established a violation by the United States of the right to dispose of property under Article V, paragraph 1, of the Treaty of Amity.

E. Alleged violations of Article VII, paragraph 1 (paras. 202-208)

The Court next addresses the alleged violations of Article VII, paragraph 1, of the Treaty of Amity. It notes that the Parties' disagreement concerns the scope of the first part of that provision (which refers to "restrictions on the making of payments, remittances, and other transfers of funds"), in particular that of the term "restrictions". In the Court's view, while this phrase appears fairly broad on its face, it should not be interpreted in isolation but in its context, which suggests that the term "restrictions" is limited to "exchange restrictions".

Since Iran's claims regarding Article VII, paragraph 1, are not related to exchange restrictions, they should be dismissed. The Court concludes that Iran has not established a violation by the United States of its obligations under Article VII, paragraph 1, of the Treaty of Amity.

F. Alleged violations of Article X, paragraph 1 (paras. 209-223)

Finally, the Court examines the alleged violations of Article X, paragraph 1, of the Treaty of Amity, which provides that "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation".

It notes that the Parties disagree on whether the Court's interpretation of "freedom of commerce" in its earlier jurisprudence requires that commerce and the ancillary activities related to it are limited to trade in goods. Referring to the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, the Court considers that financial transactions or operations constitute ancillary activities integrally related to commerce. In the Court's view, activities entirely conducted in the financial sector, such as trade in intangible assets, also constitute commerce protected under Article X, paragraph 1, of the Treaty.

It then recalls that, in order to enjoy its protection, the commerce concerned "is to be *between the territories* of the United States and Iran". The Court considers that it does not follow from its jurisprudence that any form of commerce conducted through intermediaries is not commerce for the purposes of Article X, paragraph 1. Indeed, it is in the nature of financial transactions that intermediaries located in various countries are often involved in the operations.

The Court adds that a party claiming a breach by the other party of Article X, paragraph 1, must show that "there was an *actual impediment* to commerce . . . *between* the territories of the two High Contracting Parties". It states in this regard that the impediment may be physical or legal. In its view, Executive Order 13599 constitutes an actual impediment to any financial transaction or operation to be conducted by Iran or Iranian financial institutions in the territory of the United States, and Section 1610 *(g)* (1) of the FSIA constitutes an actual impediment to the performance of commercial activities by those entities in the territory of the United States. It further notes that the judicial application of Section 1610 *(g)* (1) of the FSIA and Section 201 *(a)* of TRIA has caused concrete interference with commerce. The Court is also of the opinion that the effects of the enforcement proceedings with respect to contractual debts in the telecommunications industry and in the credit card services sector constitute clear examples of such concrete interference with commerce.

In light of the foregoing, the Court concludes that the United States has violated its obligations under Article X, paragraph 1, of the Treaty of Amity.

V. REMEDIES (PARAS. 224-235)

The Court concludes by addressing the question of remedies.

A. Cessation of internationally wrongful acts (paras. 225-229)

The Court first considers Iran's claim relating to the cessation of internationally wrongful acts. It recalls in this regard that the State responsible for the internationally wrongful act is under an obligation to cease that act, if it is continuing. Such an obligation exists only if the violated obligation is still in force. In the present case, this condition is not met, since the Treaty of Amity is no longer in force. The United States denounced the Treaty by giving notification of its denunciation to Iran on 3 October 2018, so that the Treaty ceased to have effect a year later in accordance with the provisions of Article XXIII, paragraph 3, thereof. It follows that Iran's request relating to the cessation of internationally wrongful acts must be rejected.

B. Compensation for the injury suffered (paras. 230-231)

The Court then turns to the question of compensation for the injury suffered. It notes that Iran is entitled to compensation for the injury caused by violations by the United States that have been ascertained by the Court. It observes that the relevant injury and the amount of compensation may be assessed by the Court only in a subsequent phase of the proceedings. It therefore decides that, if the Parties are unable to agree on the amount of compensation due to Iran within 24 months of the date of the present Judgment, the Court will, at the request of either Party, determine the amount due on the basis of further written pleadings limited to this issue.

C. Satisfaction (paras. 232-233)

Finally, the Court considers the question of satisfaction. It recalls in this regard that the offering of a formal apology by the State having committed the wrongful act may, in appropriate circumstances, constitute a form of satisfaction that the injured State is entitled to claim further to a finding of wrongfulness. In the circumstances of this case, the Court considers that a finding, in the present Judgment, of wrongful acts committed by the United States is sufficient satisfaction for the Applicant.

OPERATIVE CLAUSE (PARA. 236)

THE COURT,

(1) By ten votes to five,

Upholds the objection to jurisdiction raised by the United States of America relating to the claims of the Islamic Republic of Iran under Articles III, IV and V of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, to the extent that they relate to treatment accorded to Bank Markazi and, accordingly, *finds* that it has no jurisdiction to consider those claims;

IN FAVOUR: *Vice-President* Gevorgian, *Acting President*; *Judges* Tomka, Abraham, Xue, Sebutinde, Bhandari, Iwasawa, Nolte, Charlesworth; *Judge* ad hoc Barkett;

AGAINST: *Judges* Bennouna, Yusuf, Robinson, Salam; *Judge* ad hoc Momtaz;

(2) By thirteen votes to two,

Rejects the objection to admissibility raised by the United States of America relating to the failure by Iranian companies to exhaust local remedies;

IN FAVOUR: *Vice-President* Gevorgian, *Acting President*; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judge* ad hoc Momtaz;

AGAINST: *Judge* Sebutinde; *Judge* ad hoc Barkett;

(3) By eight votes to seven,

Finds that the United States of America has violated its obligation under Article III, paragraph 1, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights;

IN FAVOUR: *Vice-President* Gevorgian, *Acting President*; *Judges* Bennouna, Yusuf, Xue, Robinson, Salam, Charlesworth; *Judge* ad hoc Momtaz;

AGAINST: *Judges* Tomka, Abraham, Sebutinde, Bhandari, Iwasawa, Nolte; *Judge* ad hoc Barkett;

(4) By twelve votes to three,

Finds that the United States of America has violated its obligations under Article IV, paragraph 1, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights;

IN FAVOUR: *Vice-President* Gevorgian, *Acting President*; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judge* ad hoc Momtaz;

AGAINST: *Judges* Sebutinde, Bhandari; *Judge* ad hoc Barkett;

(5) By eleven votes to four,

Finds that the United States of America has violated its obligation under Article IV, paragraph 2, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, namely that the property of nationals and companies of the Contracting Parties "shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation";

IN FAVOUR: *Vice-President* Gevorgian, *Acting President*; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Momtaz;

AGAINST: *Judges* Sebutinde, Bhandari, Charlesworth; *Judge* ad hoc Barkett;

(6) By ten votes to five,

Finds that the United States of America has violated its obligations under Article X, paragraph 1, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights;

IN FAVOUR: *Vice-President* Gevorgian, *Acting President*; *Judges* Abraham, Bennouna, Yusuf, Xue, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Momtaz;

AGAINST: *Judges* Tomka, Sebutinde, Bhandari, Charlesworth; *Judge* ad hoc Barkett;

(7) By thirteen votes to two,

Finds that the United States of America is under obligation to compensate the Islamic Republic of Iran for the injurious consequences of the violations of international obligations referred to in subparagraphs (3) to (6) above;

IN FAVOUR: *Vice-President* Gevorgian, *Acting President*; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judge* ad hoc Momtaz;

AGAINST: *Judge* Sebutinde; *Judge* ad hoc Barkett;

(8) By fourteen votes to one,

Decides that, failing agreement between the Parties on the question of compensation due to the Islamic Republic of Iran within 24 months from the date of the present Judgment, this matter will, at the request of either Party, be settled by the Court, and *reserves* for this purpose the subsequent procedure in the case;

IN FAVOUR: *Vice-President* Gevorgian, *Acting President*; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judges* ad hoc Barkett, Momtaz;

AGAINST: *Judge* Sebutinde;

(9) Unanimously,

Rejects all other submissions made by the Parties.

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Judge TOMKA appends a separate opinion to the Judgment of the Court; Judge ABRAHAM appends a declaration to the Judgment of the Court; Judges BENNOUNA and YUSUF append separate opinions to the Judgment of the Court; Judge SEBUTINDE appends a dissenting opinion to the Judgment of the Court; Judge BHANDARI appends a declaration to the Judgment of the Court; Judge ROBINSON appends a separate opinion, partly concurring and partly dissenting, to the Judgment of the Court; Judge SALAM appends a declaration to the Judgment of the Court; Judges IWASAWA, NOLTE and CHARLESWORTH append separate opinions to the Judgment of the Court; Judge *ad hoc* BARKETT appends a separate opinion, partly concurring and partly dissenting, to the Judgment of the Court; Judge *ad hoc* MOMTAZ appends a separate opinion to the Judgment of the Court.

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Separate opinion of Judge Tomka

In his separate opinion, Judge Tomka disagrees with the decision of the majority in relation to Article III, paragraph 1, and Article X, paragraph 1, of the 1955 Treaty of Amity. He opines that the United States has not violated its obligations owed to Iran under either of these provisions.

Concerning Article III, paragraph 1, Judge Tomka considers that the obligation to recognize the "juridical status" of companies requires the United States to recognize the legal personality and legal capacity of Iranian companies. However, it does not oblige the United States to also recognize the "separate juridical status" (or "corporate form") of these companies. In his view, this interpretation of "juridical status" is supported by, amongst other things, the historical context and economic background of the Treaty, the structure of Article III, paragraph 1, the ordinary meaning of its terms, and the object and purpose of the Treaty. The very fact that Iranian companies have appeared and participated in domestic judicial proceedings in the United States demonstrates that the United States has recognized the juridical status of Iranian companies in the way that Article III, paragraph 1, requires.

Judge Tomka then turns to the majority's finding that the United States has violated its obligation under Article X, paragraph 1, of the Treaty of Amity. He notes that the Court has already interpreted this provision, notably in *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, where the Court determined that Article X, paragraph 1, is not confined to maritime commerce but provides for freedom of commerce in general. He sees no compelling reason to revisit this interpretation in the present case. In his view, Iran has not provided sufficient evidence that the United States' measures interfered with actual commerce. The measures were not aimed at limiting, or interfering with, freedom of commerce. Rather, the measures concerned the enforcement of judgments rendered by the United States courts against Iran. As the purpose of Article X, paragraph 1, is not to provide protection against the enforcement of judgments, Judge Tomka considers that the United States has not violated its obligation under that provision.

Separate opinion of Judge Bennouna

Judge Bennouna voted against the decision of the Court whereby it upheld the objection to jurisdiction raised by the United States of America relating to the claims of the Islamic Republic of Iran under Articles III, IV and V of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, to the extent that they relate to treatment accorded to Bank Markazi and, accordingly, found that it had no jurisdiction to consider those claims.

Judge Bennouna points out that the Court has chosen to make a clear departure from the line of reasoning adopted in its 2019 Judgment. Indeed, in Judge Bennouna's view, the reference to the criterion of the commercial nature of the activity, for the purpose of characterizing a company, has therefore disappeared between the two successive Judgments of 2019 and 2023, without the Court justifying this on the basis of any new facts. According to Judge Bennouna, the Court decided that the bank's sovereign function is a necessary and sufficient criterion for its characterization as a "company", which is in contradiction with the 2019 Judgment.

Separate opinion of Judge Yusuf

Judge Yusuf agrees with all the findings of the Court except the one rejecting Iran's claims relating to Bank Markazi's assets due to lack of jurisdiction. His separate opinion focuses on this issue.

Judge Yusuf considers that the Court should have extended its findings regarding the United States' breach of Articles III (1) and IV (1) and (2) to Bank Markazi in view of the fact that the bank's activities in the United States at the relevant time qualified it as a "company" under the Treaty of Amity, Economic Relations, and Consular Rights (hereinafter the "Treaty").

According to Judge Yusuf, the criteria for determining whether Bank Markazi could qualify as a "company" under the Treaty in light of the activities it was carrying out in the United States at the relevant time were laid down by the Court in its 2019 Judgment. For him, a proper application of those criteria, which were centred on the nature of the activities in which Bank Markazi engaged in the United States, would establish that they were of a commercial nature and would consequently entitle it to the protections provided under the Treaty.

His disagreement is with what he considers to be a new test introduced by the Court in the present Judgment which, in his view, has moved the goalposts in the middle of the case by emphasizing Bank Markazi's function as a Central Bank and the link between that function and its activities in the United States. He observes that a sovereign function linked to commercial activities does not necessarily transform such activities into sovereign acts and that the Treaty does not exclude State-owned or State-controlled entities from its protections in view of their functions, especially when such entities conduct commercial activities in the host State's territory. Through financial intermediaries, Bank Markazi purchased and managed security entitlements in the United States for profit in an open and competitive market. These activities, being commercial in nature, should have led the Court to characterize Bank Markazi as a "company" under the Treaty for the purposes of its activities in the United States at the relevant time. In this context, Judge Yusuf points out that considering Bank Markazi as a "company" under the Treaty in view of its specific activities in the United States does not mean that it should be treated as a "company" in all circumstances.

In conclusion, Judge Yusuf expresses the view that the legislative and executive acts of the United States, given effect by its judiciary, deprived Bank Markazi of the protections to which it was entitled under the Treaty. Therefore, the Court should have upheld its jurisdiction and extended its findings regarding the breach by the United States of its obligations under Articles III (1), IV (1) and (2) to Bank Markazi.

Dissenting opinion of Judge Sebutinde

Judge Sebutinde voted in favour of subparagraphs (1) and (9) of the operative paragraph 236 of the Judgment but disagrees with the majority in relation to subparagraphs (2), (3), (4), (5), (6), (7) and (8) thereof, for the following reasons. Iran's claims pursuant to Articles III, IV and V of the 1955 Treaty are inadmissible in as far as they relate to Iranian companies that failed to exhaust local remedies in the USA. Articles III and IV of the 1955 Treaty create distinct obligations that should not be conflated. Notwithstanding the obligation under Article III (1) to recognize the juridical status of Iranian companies in the USA, United States courts are entitled, in the interests of justice, to lift the corporate veil of Iranian State-owned companies. Iran has not established that the USA denied Iranian companies fair and equitable treatment or subjected them to unreasonable or discriminatory measures or impeded the enforcement of their contractual rights. Iran has not established that Executive Order 13599 prevented Iranian companies from disposing of their real property in the USA within the meaning of Article IV (1). The attachment of Iranian assets by the USA does not amount to compensable "expropriation" within the meaning of Article IV (2). Article VII (1) relates solely to exchange restrictions and Iran has not established that the USA violated its obligation under that Article. Iran has not established that there was ongoing commerce between the territories of Iran and the USA that was impeded by the USA in violation of Article X (1). Executive Order 13599 should be exempted from the scope of the 1955 Treaty because it qualifies as a measure that is necessary to protect the security interests of the USA within the meaning of Article XX (1) *(d)*. The USA is under no obligation to compensate Iran in the present case.

Declaration of Judge Bhandari

In his declaration, Judge Bhandari addresses judicial expropriation. He states that, in his view, the Court should have offered more comprehensive reasoning and justification in the passages in the Judgment that address Iran's claim concerning judicial expropriation.

According to Judge Bhandari, the Court's statements concerning judicial expropriation are not supported by any precedent or adequate reasons. He adds that they are not necessarily in keeping with prevailing understandings of judicial expropriation, according to which an element of international unlawfulness must taint a domestic judicial decision itself before a claim for judicial expropriation can be established. According to the Court's own view, he says, that was not the case here.

Judge Bhandari then explores decisions of other international courts and tribunals. He concludes that, in any event, the Court should have adopted an analysis that was more fully reasoned and supported by authority.

Separate opinion, partly concurring and partly dissenting, of Judge Robinson

1. In his separate opinion, Judge Robinson first explains his disagreement with the finding of the majority, in paragraph 236 (1) of the Judgment, that the Court does not have jurisdiction to consider claims under Articles III, IV and V of the 1955 Treaty of Amity, Economic Relations, and Consular Rights ("Treaty of Amity") to the extent that they relate to the treatment accorded to Iran's Central Bank, Bank Markazi.

2. Judge Robinson notes that the Court's finding that Bank Markazi is not entitled to the protection afforded to companies by the Treaty of Amity is based on a reasoning that is contradicted by the Court's Judgment of 13 February 2019 ("2019 Judgment"). In his view, a proper reading of the 2019 Judgment confirms that it is the nature of the activity that settles definitively the question whether an entity is a company within the meaning of the Treaty of Amity. However, in the present Judgment, the Court has moved away from its previous analysis and conclusions, introducing an element not to be found in the 2019 Judgment, i.e. links between the activity and a sovereign function or purpose.

3. Judge Robinson also explains his disagreement with the Court's finding in paragraph 143 of the Judgment that the United States' conduct does not constitute a serious failure in the administration of justice amounting to a denial of justice. Consistent with his position that Bank Markazi qualifies as a company under the Treaty of Amity, Judge Robinson maintains that the enactment of legislation during an ongoing proceeding amounts to a denial of justice and a breach of the bank's right to fair and equitable treatment.

4. Judge Robinson stresses that his views on the topic of unilateral economic sanctions are not to be in any way construed as a commentary on the merits of the present case, in which the applicable law is the Treaty of Amity and treaty law in general. Judge Robinson addresses the issue of sanctions under general international law, pointing to key developments from the past decades. He notes that unilaterally imposed sanctions are particularly objectionable when it is clear from the context in which they are imposed that the imposing State is performing a function that the United Nations Charter assigned to the Security Council.

5. Finally, Judge Robinson criticizes some of the language employed by the Court in the present Judgment, noting that the use of the verb "appear" in paragraph 72 of the Judgment suggests

that the Party bearing the burden of establishing its case discharges that burden by a relatively low standard. He further points to the unnecessary genuflection on the part of the Court, which suggests that the Court has adopted an apologetic stance towards the United States for concluding that Iranian companies had no reasonable possibility of successfully asserting their rights in United States court proceedings.

Declaration of Judge Salam

In his declaration, Judge Salam states that he disagrees with the majority on the question of whether Bank Markazi is a "company" within the meaning of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, Parties to the present case. In fact, he considers that the methodology and reasoning followed by the Court in this respect is not convincing. He regrets that the Court did not really follow the line of reasoning it adopted in the 2019 Judgment on preliminary objections calling for the focus to be on the "nature" of the activities of Bank Markazi, and chose to ignore the known solutions of international law regarding the distinction between the "commercial activities" and the "sovereign activities" of public entities.

In Judge Salam's view, the Court should have considered, for the qualification of Bank Markazi, only the nature of the activities which it carried out in the territory of the United States. This is what the Court had unambiguously stated in paragraph 93 of the 2019 Judgment. In this Judgment, the Court affirmed the possibility for a public enterprise to qualify as a "company" within the meaning of the Treaty if it engages in commercial or industrial activities within the territory of the other party, even if they do not constitute its principal activities. The investment and securities management activities of Bank Markazi being of a commercial nature, the bank should therefore qualify as a company for these activities. The different conclusion reached by the Court results, in Judge Salam's view, from the majority's questionable reading of the 2019 Judgment, and in particular of its aforementioned paragraph 93.

For Judge Salam, the fact that immunities were not the subject of the dispute before the Court should not have prevented the latter from drawing on State practice and solutions adopted in that field. It would be manifestly illogical, in his view, that a party should adopt the nature of the act criterion to deny immunities to foreign States and their organs but refuse to apply it when it comes to affording them the protection of an agreement such as the Treaty of Amity.

Finally, Judge Salam criticizes the Court's assertion that the statements made by Bank Markazi in the proceedings before the United States courts correctly reflected the bank's activities. He considers that, with such reasoning, the Court is doing exactly what it rightly ruled out earlier by attributing to Iran statements of which it is not the author. Furthermore, the Court is relying on the positions adopted by Bank Markazi before the United States courts while ignoring that the United States argued before those same courts that part of Bank Markazi's activities were no different from those of a private actor and therefore should be characterized as commercial. This approach of the Court, in Judge Salam's view, is neither consistent nor justifiable in the context of the present case.

Separate opinion of Judge Iwasawa

Judge Iwasawa discusses three topics in his separate opinion: the exhaustion of local remedies, security exceptions in treaties, and the most constant protection and security.

Judge Iwasawa describes the allocation of the burden of proof in the context of exhaustion of local remedies. He explains that an applicant exercising diplomatic protection must specify that the injured person has exhausted local remedies. While the respondent raising the objection that local remedies have not been exhausted must identify the remedies which have not been exhausted, it is

then for the applicant to demonstrate either that those remedies were exhausted or that they are ineffective. When the applicant makes a prima facie case that the remedies are ineffective, the respondent must prove that the remedies are in fact effective. In the present case, it is incumbent on the United States to demonstrate that the remedies are effective.

Iran complains of a succession of legislative and executive measures which have effectively removed the remedies available to Iranian companies, agencies and instrumentalities to challenge enforcement actions against their assets. United States courts are bound to apply these measures. The combination of the distinctive features of the measures adopted by the United States and the primacy accorded to a more recent statute over a treaty has led the Court to conclude that the relevant companies had no reasonable possibility of obtaining redress. Judge Iwasawa emphasizes that this reasoning does not automatically apply to other circumstances in States where a statute enacted after a treaty prevails over the treaty.

Judge Iwasawa then turns to security exceptions in treaties. In his view, the standard of review to be used by international courts for analysing claims made under security exceptions is of crucial importance. The respondent bears the burden of proving that the conditions set out in a security exception clause are met. Article XX (1) *(d)* of the Treaty of Amity gives the invoking State a fair measure of discretion. The tests of proportionality and least restrictive alternatives are too stringent for security exceptions.

Judge Iwasawa is of the view that, in assessing whether a measure is necessary to protect a State's essential security interests under a clause such as Article XX (1) *(d)* of the Treaty of Amity, an international court should determine whether the measure was rational in light of a consideration of the reasonably available alternatives known to that State at the time. In making this evaluation, it should take into account the importance of the security interests at stake, and appraise the contribution the measure was designed to make towards the protection of those interests and its effectiveness in this regard, as well as its impact on commerce between the parties. In addition, the court should ascertain whether the State followed proper procedures in exercising its discretion.

Judge Iwasawa agrees with the Court that, in the present case, the United States has not convincingly demonstrated that Executive Order 13599 was a measure necessary to protect its essential security interests.

Lastly, Judge Iwasawa discusses the standard of the most constant protection and security. He notes that the Court makes important statements in this respect, *inter alia*, that the standard is of particular relevance in the form of protection from physical harm by third parties; that the standard is not one of strict liability but of due diligence; and that the standard of full protection and security and the standard of fair and equitable treatment would overlap significantly if full protection and security were interpreted to include legal protection.

Judge Iwasawa is of the view that, in order to avoid an overlap between separate standards, full protection and security is better understood as providing for protection different from fair and equitable treatment. Unless the relevant treaty expressly provides otherwise, full protection and security should be interpreted as referring to protection from physical harm.

Separate opinion of Judge Nolte

1. Judge Nolte disagrees with the Court's finding that the United States of America violated Article III, paragraph 1, of the Treaty of Amity. In his view, Article III, paragraph 1, does not protect any legally distinct (separate) existence of companies.

2. Judge Nolte recognizes that the text of Article III, paragraph 1, leaves open the question whether Article III, paragraph 1, merely protects the legal existence of a company or whether it also protects the separate legal personality of companies which possess such a personality by virtue of the domestic law under which they were established. However, Judge Nolte is of the view that the context of the provision, its object and purpose as well as the *travaux préparatoires* indicate that the protection afforded by Article III, paragraph 1, is limited to the recognition of the legal existence of a company.

3. Judge Nolte emphasizes that such a restrictive interpretation of Article III, paragraph 1, does not leave unprotected the separate legal personality of companies which possess such a personality. In his view, such protection derives from Article IV, paragraph 1, which protects against an unreasonable disregard of any separate legal personality as well as the possibility for States parties to engage in regulation, including reasonable forms of lifting the corporate veil.

4. On this basis, Judge Nolte concludes that the disregard by the United States of the separate legal personality of certain Iranian companies has not violated Article III, paragraph 1, of the Treaty of Amity, but only Article IV, paragraph 1.

5. With respect to the jurisdictional objection concerning Bank Markazi, Judge Nolte is of the view that the Court has appropriately determined, in conformity with the 2019 Judgment, that the relevant activities of Bank Markazi are not commercial in nature and that, consequently, Bank Markazi is not a company within the meaning of the Treaty of Amity. He agrees in principle with the Court's reasoning in this regard. Judge Nolte explains that the scope of the Court's characterization of the activity undertaken by Bank Markazi is based on an interpretation of the treaty term "company" and of the term "commercial activity", which is itself derived from the treaty term "company".

6. While Judge Nolte agrees with the Court's affirmation that "it is not required to ascertain whether the entity in question could claim, with regard to those activities, immunity from jurisdiction or enforcement under customary international law" (Judgment, para. 48), he is of the view that this affirmation does not preclude the Court from taking the customary rules on sovereign immunities into account when interpreting a rule under the Treaty of Amity (see Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties, a provision which reflects customary international law).

7. Judge Nolte highlights that the Court's interpretation of the Treaty of Amity conforms with the practice which indicates that the holding and managing of currency reserves by central banks abroad is an activity which is generally recognized as a typical sovereign activity in which the central banks of most States regularly and reciprocally engage, and which is specifically protected by customary rules on State immunity. He points out that a different conclusion may be reached with respect to the activities of sovereign wealth funds.

Separate opinion of Judge Charlesworth

While agreeing with much of the Court's reasoning in the case, Judge Charlesworth addresses two questions on which she does not agree with the majority.

Judge Charlesworth endorses the criteria set out in the Court's analysis of the claim of unlawful expropriation. She does not support, however, the Court's reliance on a finding of breach of Article IV, paragraph 1, to find a breach of Article IV, paragraph 2. Judge Charlesworth adds that

international jurisprudence tends to recognize that the domestic regulator is vested with a measure of discretion in this connection. In her view, Iran has not demonstrated that the United States' measures crossed the line separating valid regulatory activity from expropriation.

Judge Charlesworth also disagrees with the Court's finding that the United States' measures violated its obligations under Article X, paragraph 1. She agrees with the Court's broad interpretation of the provision, but she draws attention to the limits on its scope identified in the Court's jurisprudence. On that basis, she thinks that it is up to Iran to establish that the United States' measures created an actual impediment to commerce between the Parties. Judge Charlesworth considers that Article X, paragraph 1, cannot be taken to preclude activities that are a regular feature of commercial life or measures that may have indirect or incidental effects on commerce. In her view, the measures identified by the Court did not violate Article X, paragraph 1, even though they violated other provisions of the Treaty of Amity.

Separate opinion, partly concurring and partly dissenting, of Judge *ad hoc* Barkett

Regarding the United States' defences and objections, Judge *ad hoc* Barkett states that Iran is seeking to exercise rights conferred on it by the Treaty for purposes other than those for which the rights at issue were established. She concludes that the United States' defence based on abuse of rights should therefore have been granted. She further states that local remedies in the United States were not futile, and that Iran's claims should have been declared inadmissible to the extent Iranian companies had not exhausted local remedies. Further, she notes that in her opinion the United States demonstrated that Executive Order 13599 was necessary to protect the United States' essential security interests, and that consequently the Court should have granted the United States' defence based on Article XX (1) *(d)* of the 1955 Treaty of Amity.

As to the merits of Iran's claims, Judge *ad hoc* Barkett observes that the Court conflates its analysis of Iran's claims under Articles III (1) and IV (1), noting that, in her view, unreasonableness cannot be equated to non-recognition of juridical status. She states that Article III (1) only requires that juridical status of companies be recognized, without implicating additional legal rights. She adds that United States courts recognized the juridical status of Iranian companies, and that Article III (1) does not require recognition of "separateness".

Regarding Iran's claim under Article IV (1), Judge *ad hoc* Barkett notes that the Court does not consider the purpose of compensating victims of terrorist acts or explain why measures were allegedly manifestly excessive. She notes that the term "unreasonable" creates a high threshold, but that the Court has, without explanation or support, chosen a lower threshold. In her opinion, the United States statutes apply to a specific subset of companies and are tailored precisely.

With respect to Iran's claim under Article IV (2), Judge *ad hoc* Barkett notes that attachment to obtain satisfaction of a lawfully obtained money judgment does not amount to expropriation. She notes that the Court's understanding of judicial expropriation is unsupported. Given that, as Judge *ad hoc* Barkett observes, there was no violation of due process in the domestic proceedings, the Court's only support for granting Iran's expropriation claim is its finding of unreasonableness under Article IV (1).

Finally, Judge *ad hoc* Barkett states, in relation to Iran's claim under Article X (1), that the United States measures have no connection, or too tenuous a connection, with commercial relations between the Parties.

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