DISSENTING OPINION OF JUDGE SEBUTINDE

I agree with subparagraphs (1) and (9) of the operative paragraph 236 but disagree with the remaining subparagraphs of that paragraph — As a jurisdictional matter, the Court should have determined which of the USA's impugned measures and judicial proceedings are relevant to its analysis of the case — 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 — The obligations under Articles III and IV of the 1955 Treaty are distinct and should not be conflated — 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 actually prevented Iranian companies from disposing 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 qualifies as a measure that is necessary to protect the security interests of the USA within the meaning of Article XX (1) (d) *and should be exempted from the scope of the 1955 Treaty — The USA is under no obligation to compensate Iran.*

INTRODUCTION

1. I have voted in favour of operative paragraphs (1) and (9) of paragraph 236 of the Judgment because I agree with the reasoning and conclusion of the Court in relation thereto. However, I have voted against operative paragraphs (2), (3), (4), (5), (6), (7) and (8) thereof because I disagree with the reasoning and conclusions of the Court in relation thereto. In this dissenting opinion, I give my reasons for not voting with the majority. Where certain abbreviations, acronyms and short forms have been used in the Judgment, I have adopted the same in this opinion, unless otherwise specified.

I. SCOPE OF THE DISPUTE FOLLOWING THE 2019 JUDGMENT

2. I begin with a few preliminary issues that were not dealt with in the Judgment. Iran's claims for the alleged breach of Articles VII and X of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed at Tehran on 15 August 1955 ("1955 Treaty"), are made in Iran's own right as a State. However, Iran's claims for the alleged breach of Articles III, IV and V of the 1955 Treaty are diplomatic protection claims brought on behalf of its "nationals" under a bilateral commercial treaty. Those claims concern the alleged violation of the rights of Iranian State-owned companies, as well as the consequences that these violations have had on Iran's ability to trade with the United States of America ("United States") as envisaged under the 1955 Treaty. Iran claims that the legislative and executive measures adopted by the Respondent since 2002 have "severely impeded" Iranian trade with or through foreign branches of the Respondent's companies, *inter alia*, because Iran cannot use the United States banking system for international payments; and neither Iran nor Iranian financial institutions are able to use or dispose of Iranian properties in the United States[1].

[1] Memorial of the Islamic Republic of Iran ("MI"), para. 1.19.

3. In my view, the Court should, as a preliminary matter, have determined which of the Respondent's executive and legislative measures as well as judicial proceedings are relevant to the determination of Iran's claims on the merits, following the Court's 2019 Judgment on preliminary objections[2] ("2019 Judgment"). *First*, the provisions of the *FSIA of 1996*[3], including the amendments thereto introduced in 2002 and 2008 which, according to Iran, violate its sovereign immunity or that of its entities, relate solely to the removal of immunity from Iran and its agencies and instrumentalities from legal and enforcement proceedings before United States courts[4]. Iran's claims challenging these provisions were, in the 2019 Judgment, adjudged to fall outside the Court's jurisdiction *ratione materiae*[5].

4. Notwithstanding its previous ruling on jurisdiction regarding the FSIA, the Court makes a blanket statement in the present Judgment that,

> "[g]iven 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, . . . in the circumstances of the present case, the companies in question had no reasonable possibility of successfully asserting their rights in the United States court proceedings"[6] (emphasis added).

In my respectful view, the Court should have made it clear this finding did not apply to Iran's sovereign immunity claims arising out of the impugned FSIA provisions, having previously ruled that it lacked jurisdiction to do so.

5. *Similarly*, the Court should have expressly excluded from its jurisdiction Iran's claims against the Respondent arising from the provisions of the National Defence Authorization Act for Fiscal Year 2020 ("NDAA of 2020"), as that law was enacted in December 2019 after the termination of the 1955 Treaty. In sum, there are only three legislative and executive measures directly relevant to the Court's analysis, namely the *2002 TRIA*; the *2012 ITRSHRA*; and the *2012 Executive Order 13599*.

6. Furthermore, given the Court's rejection of Iran's sovereign immunity claims in its 2019 Judgment[7], it is necessary to determine which of the Respondent's judicial proceedings complained of by Iran are relevant to the Court's analysis. In this regard, the cases listed in *Attachments 1*[8] *and 4*[9] are irrelevant as they relate to Iran's claims of sovereign immunity. Likewise, the cases listed in *Attachment 3*[10] are not relevant as they were filed outside the United States.

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[2] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 7 (as in the main text, hereinafter the "2019 Judgment").

[3] Foreign Sovereign Immunities Act, Sections 1605 *(a)* (7) and 1610 *(b)* (2).

[4] Paragraph 25 of the present Judgment recalls that after the United States removed the immunity from suit before its courts of States designated as "State sponsors of terrorism", Iran declined to appear before United States domestic courts in the ensuing lawsuits against it, including in the *Peterson* case, on the grounds that the provisions of the FSIA were in violation of the international law on State immunities.

[5] 2019 Judgment, pp. 34-35, para. 80.

[6] Judgment, para. 72.

[7] 2019 Judgment, pp. 34-35, para. 80.

[8] Reply of the Islamic Republic of Iran ("RI"), Att. 1, US courts judgments against Iran and Iranian State entities as of 31 December 2019.

[9] RI, Att. 4, Claims pending before US courts against Iran and Iranian State entities as of 31 December 2019.

[10] RI, Att. 3, Actions filed in other jurisdictions for recognition and enforcement of US judgments against assets of Iran and Iranian State entities as of 31 December 2019.

However, the enforcement cases listed in *Attachment 2*[11], as well as the *nine cases*[12] listed in the new document submitted by Iran during the oral proceedings, are relevant to the Court's analysis as they were filed within the United States and involve actions for the enforcement of judgments. Nonetheless, the Court need not decide during this phase of the present case which enforcement actions have given rise to injuries suffered by Iran or Iranian State-owned companies. Such matters can be determined at a subsequent reparations phase, if necessary.

II. ISSUES OF JURISDICTION AND ADMISSIBILITY

A. Defences of the United States based on Iran's alleged "unclean hands" and alleged abuse of rights

7. Regarding the defence based on the "doctrine of unclean hands"[13], I agree with the Court that the United States has not shown a sufficiently close link or nexus between Iran's claims under the 1955 Treaty and the Applicant's alleged wrongful conduct. The United States' claims of wrongful conduct of Iran, including its alleged sponsorship and support of international terrorism, and its presumed actions in respect of nuclear non-proliferation, are not reciprocal to the obligations under the 1955 Treaty that Iran seeks to enforce. Indeed, the Court explained as much in its 2019 Judgment[14], where it rejected — on similar grounds — the largely identical argument raised by the United States as a preliminary objection to admissibility. I therefore agree with the conclusion of the Court in paragraphs 82-84 of the present Judgment.

8. Similarly, I agree that the Court should reject the United States' defence based on Iran's alleged abuse of rights. The abuse of rights doctrine applies in circumstances where a right is exercised by a State for a purpose other than that for which the right was created[15]. Assuming *arguendo* that the United States' terrorism allegations against Iran have any bearing on the issue, that conduct does not, in my view, appear sufficient to dismiss Iran's claim based on a valid title of jurisdiction. I agree with the Court's conclusion in paragraph 93 that the United States has not met the high threshold required to establish Iran's alleged abuse of rights.

B. Objections of the United States to the admissibility of Iran's claims based on the alleged failure by Iranian companies to exhaust local remedies

9. The United States does not dispute that Iran's claims pursuant to Articles VII and X of the 1955 Treaty are made in Iran's own right as a State and therefore do not require the exhaustion of

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[11] RI, Att. 2, Actions filed with US courts to enforce judgments against assets of I.R. Iran and Iranian State entities as of 31 December 2019.

[12] According to the Reply of Islamic Republic of Iran, paras. 2.63-2.120, the nine cases are: (1) *Weinstein* v. *Islamic Republic of Iran*, U.S. District Court for the Eastern District of New York, Case No. 02-mc-00237; (2) *Bennet* v. *Islamic Republic of Iran*, U.S. District Court for the Northern District of California, Case No. 11-cv-05807; (3) *Levin* v. *Bank of New York*, U.S. District Court for the Southern District of New York, Case No. 09-cv-5900; (4) *Peterson* v. *Islamic Republic of Iran*, U.S. District Court for the Southern District of New York, Case No. 10-cv-4518; (5) *Heiser* v. *Islamic Republic of Iran*, U.S. District Court for the District of Columbia, Case No. 00-cv-2329; (6) *Heiser* v. *Bank of Baroda, New York Branch*, U.S. District Court for Southern District of New York, Case No. 11-cv-1602; (7) *Heiser* v. *The Bank of Tokyo-Mitsubishi UFJ, Ltd.*, U.S. District Court for the Southern District of New York, Case No. 11-cv-1601; (8) *Heiser* v. *Mashreqbank PSC*, U.S. District Court for the Southern District of New York, Case No. 1:11-cv-01609 and (9) *Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran* v. *Cubic Defense Systems*, U.S. District Court for the Southern District of California, Case No. 3:98-cv-01165.

[13] 2019 Judgment, p. 44, paras. 122-123.

[14] *Ibid.*, p. 44, para. 122.

[15] A. Kiss, "Abuse of Rights", in *Max Planck Encyclopaedias of International Law*.

local remedies before the seisin of the Court[16]. However, it argues that the exhaustion of local remedies requirement is applicable to Iran's claims pursuant to Articles III, IV and V of the 1955 Treaty, an argument disputed by Iran. In relation to the requirement for the exhaustion of local remedies, I disagree with the conclusion of the Court that the Iranian companies in question did not have any effective means of redress that they failed to pursue, in the legal system of the United States (Judgment, paras. 67, 73 and 236 (2)), along with the reasons underlying that conclusion. In line with the test laid down in *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy)*[17], the first issue for determination is whether Iran's claims for diplomatic protection are *interdependent* with its own rights under the 1955 Treaty and thus do not require those companies to exhaust local remedies, or whether they are in fact claims that are *not interdependent* with the rights of Iran, in which case they would require the prior exhaustion of local remedies.

10. Articles III, IV and V of the 1955 Treaty, by their terms, protect only the rights of the companies of the High Contracting Parties and do not provide direct rights to those States. In its pleadings and arguments, Iran more than merely asserts a general claim that the 1955 Treaty has been violated: it claims that specific Iranian companies have had their rights violated and that the United States must provide reparation for the specific assets of those companies seized pursuant to the allegedly wrongful conduct of Iran. It does not discuss harm caused to the Iranian State as such. Thus, while the Court declined to expressly apply the test laid down in *Elettronica Sicula S.p.A. (ELSI)*[18], I am of the view that Iran's claims made under Articles III, IV and V of the 1955 Treaty were brought on behalf of Iranian State-owned companies solely for the diplomatic protection of their rights and are *not interdependent* with the rights of Iran under the Treaty. Consequently, the Iranian State-owned entities in respect of which Iran has brought these claims are required, under customary international law, to have exhausted local remedies in the United States before the seisin of the Court, unless it can be shown that the "futility" or "ineffectiveness" exception[19] to the local remedies rule applies.

11. Article 14 (1) of the *International Law Commission's 2006 Articles on Diplomatic Protection* ("ILC Articles") states that "[a] State may not present an international claim in respect to an injury to a national . . . before the injured person has, subject to draft article 15, exhausted all local remedies"[20]. Furthermore, Article 15 *(a)* of the ILC Articles provides that local remedies need not be exhausted where "the local remedies provide no reasonable possibility of . . . redress"[21] (for example, where the local court has no jurisdiction over the dispute in question; or where local courts are notoriously lacking in independence; or where there is a consistent and well-established line of precedents adverse to the claimant). However, as the ILC recognized in its commentary to this Article, for the exception to apply,

> "[i]t is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful

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[16] The United States' claim that Iran has failed to exhaust local remedies is limited to claims made under Articles III, IV and V of the Treaty. CR 2022/20, pp. 59-60, para. 14 (Visek).

[17] *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 42, para. 51.

[18] See para. 67 of the present Judgment.

[19] See Articles 14 and 15 *(a)* of the International Law Commission's Articles on Diplomatic Protection. *Report of the International Law Commission on the Work at its Fifty-Eighth Session,* Chapter IV, "Draft Articles on Diplomatic Protection", UN doc. A/61/10, 2006 ("ILC Articles").

[20] *Ibid.*, p. 70.

[21] *Ibid.*, p. 76.

outcome is likely or possible, but whether the *municipal system* of the respondent State *is reasonably capable of providing effective relief*."[22]

12. In the present case, Iran has not produced any evidence impugning the competence or independence of the United States court system as such or establishing a consistent and well-established line of precedents adverse to the claimants[23]. Moreover, the fact that some entities whose assets were attached on grounds of terrorism successfully challenged the attachment in those courts (a fact acknowledged by the Court[24]) is, in my view, sufficient to preclude a conclusion that the negative outcomes in the *Peterson*, *Bennett* and *Weinstein* cases necessarily meant that Iranian State-owned companies had "no reasonable prospect of redress" *in other cases*. In my view, what is relevant is not whether a successful or favourable outcome for the Iranian companies was likely or possible, but whether the municipal system of the United States is *reasonably capable of providing effective relief*. I disagree with the conclusion of the Court that "the companies in question did not have any effective means of redress, in the legal system of the United States, that they failed to pursue"[25]. The exception of futility or ineffectiveness does not apply. Consequently, any Iranian State-owned company that chose not to participate in the United States proceedings in which its assets were the subject of attachment failed to exhaust local remedies, and Iran's claims in relation thereto are, in my view, inadmissible[26]. Accordingly, the United States' objection to the admissibility of Iran's claims based on the failure of Iranian State-owned companies to exhaust local remedies should have been upheld.

III. ALLEGED VIOLATIONS OF THE 1955 TREATY

A. Alleged violation of Article III

1. Alleged violation of Article III, paragraph 1

13. I voted against the finding of the Court in paragraph 236 (3) because I am not convinced that the United States has violated its obligations under Article III, paragraph 1, of the 1955 Treaty. The obligation imposed by Article III, paragraph 1, upon each contracting party to recognize in its territory the distinct corporate or legal personality of a company incorporated in the territory of the other party, is distinct from the obligations of reasonableness and non-discrimination imposed by Article IV, paragraph 1. In my respectful view, the Court should not have conflated the distinct obligations arising under the two provisions as it appears to have done in the Judgment[27].

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[22] ILC Articles, UN doc. A/61/10, 2006, p. 48.

[23] In this regard, I disagree with the majority's reading and interpretation — as found in paragraphs 70-72 of the Judgment — of the *Weinstein* and *Bennett* decisions by the Respondent's domestic courts. Those courts clearly found that there was no conflict between the 1955 Treaty and the applicable subsequent legislation, and accordingly did not have to use the legislation to override the said Treaty.

[24] CR 2022/17, p. 32, paras. 52-55 (Bethlehem); CR 2022/20, pp. 16-17, paras. 22-23 (Bethlehem). See also Judgment, para. 71.

[25] Judgment, para. 67.

[26] It is not clear from Iran's pleadings which of the Iranian State-owned companies have or have not exhausted local remedies. Iran merely lists in Attachment 2 a list of enforcement actions, without indicating the parties to those proceedings or the procedural status of the actions. Similarly, the new list provided during the oral proceedings lacks the requisite clarity. Be that as it may, the onus remains on Iran to demonstrate, in respect of each company, that it exhausted local remedies, before its claims can be entertained.

[27] See paragraph 159 of the Judgment where without much prior analysis of the alleged violation of Article III (1), the Court simply concludes: "In light of all of the foregoing, 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."

14. So what is the nature and extent of the obligation created or envisaged under Article III, paragraph 1, of the 1955 Treaty? The provision, read in its context and in light of the object and purpose of the Treaty[28], ordinarily means that the United States and Iran each has a duty to recognize in its territory the juridical status (distinct corporate or legal personality) of a company incorporated in the territory of the other party. However, the obligation is not absolute and, as stipulated in the second sentence of that Article, the recognition of a company's juridical status "does not of itself confer rights upon companies to engage in the activities for which they are organized". Thus, the United States, in recognizing the corporate or juridical status of Iranian companies in its territory, is not obliged to grant to those companies the full range of rights to which they may be entitled under Iranian law, and vice versa.

15. This narrow reading of Article III (1) is confirmed by the 1955 Treaty's *travaux préparatoires*[29]. Specifically, an internal United States State Department cable explained that Article III (1) "merely provides [for the] recognition [of corporations] as corporate entities principally in order they may prosecute or defend their rights as corporate entities"[30]. This statement was subsequently conveyed by representatives from the United States Government to the Iranian Foreign Secretary[31]. The *travaux* support the understanding that Article III (1) was intended to enable the companies of each party to access the courts of law, and to perform such functions as enforcing contracts, holding property and collecting debts, in the territory of the other. In the present case, the United States indisputably recognized the legal status of Iranian companies as distinct legal entities for purposes of litigation in domestic courts. As the Court itself noted in the Judgment[32], the rights of Iranian companies to appear before United States courts, make legal submissions and lodge appeals were not curtailed. Indeed, the very existence of the attachment proceedings challenged by Iran — which involved lawsuits initiated by plaintiffs against Iranian companies as separate legal entities — demonstrate the compliance of the United States with Article III (1).

16. However, while it is a well-established principle in company law to distinguish the juridical status of a company from that of its individual shareholders, there is also a well-established exception in both common law and civil law domestic jurisdictions known as the "piercing or lifting of the corporate veil", whereby courts go behind the legal personality of the company and proceed against the assets of individual shareholders "in the interests of justice". This practice has also been applied in international law in *Barcelona Traction* where the Court stated as follows:

> "Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already

[28] The provision is interpreted according to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), which reflect the applicable customary international law.

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

[30] Telegram No. 936 from US Department of State to United States Embassy in Tehran, 9 November 1954; Counter-Memorial of the United States of America ("CMUSA"), para. 13.8 and Ann. 135.

[31] Aide-memoire of the US Embassy in Tehran dated 20 November 1954, p. 2 (MI, Ann. 3).

[32] Judgment, para. 143.

> accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of 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.
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> . . . . . .
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> In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law . . ., is equally admissible to play a similar role in international law."[33]

In my view, the domestic courts of the United States were entitled to lift the corporate veil of Iranian State-owned companies in the interests of justice (namely, for the purposes of enforcing various judgments obtained against the Iranian State), in order to access the assets of the Iranian State as a shareholder in those companies. In the circumstances, Iran has failed to establish that the United States violated its obligation owed to Iran under Article III (1).

2. Alleged violation of Article III, paragraph 2

17. I agree with the reasoning of the majority in relation to Article III, paragraph 2, of the 1955 Treaty and with its conclusion, in paragraph 168 of the Judgment, that Iran has not established a violation by the United States of its obligations under that provision. I can only add that the cases cited by Iran in support of its interpretation of the provision[34] are, in my view, distinguishable in that they interpret legal provisions that are broader in scope than Article III (2). They are therefore not applicable to the present circumstances. The record makes clear that those Iranian State-owned entities that chose to appear before the United States courts were afforded significant opportunities to make their case within the United States legal system. Those companies were represented by experienced counsel and had the opportunity to present evidence, call witnesses, make full and detailed submissions and appeal judgments rendered against them, including in one case to the United States Supreme Court[35]. The fact that many of these companies opted not to appear before the United States courts or to challenge the outcome does not negate their ability to access the judicial system.

B. Alleged violation of Article IV

18. I respectfully disagree with the findings of the Court in paragraphs 159, 187, 192 and 236 (4) and (5) of the Judgment, relating to the alleged violation by the United States of its obligations under Article IV of the 1955 Treaty. Article IV guarantees traditional investment law protections, including those of fair and equitable treatment, most constant protection and security, and protection from unlawful expropriation. It appears that the parties understood these to be terms of art when drafting the Treaty. There is also limited jurisprudence applying similar standards present in other bilateral commercial treaties concluded by the United States with other States around the same period.

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[33] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, pp. 38-39, paras. 56-58.

[34] RI, paras. 5.18-5.25 (citing ECtHR, *National & Provincial Building Society et al.* v. *United Kingdom*, *Judgment*, 23 October 1997; ECtHR, *Stran Greek Refineries and Stratis Andreadis* v. *Greece, Judgment*, 9 December 1994). See also *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, 6 March 1956, *Reports of International Arbitral Awards (RIAA)*, Vol XII, p. 111.

[35] RI, Att. 2; Rejoinder of the United States of America ("RUSA"), para. 13.29, App. 1.

1. Alleged violation of Article IV, paragraph 1

19. In its ordinary meaning read in the context of the rest of the 1955 Treaty, Article IV, paragraph 1, consists of three separate clauses, each separated with a semicolon and beginning with the word "shall". This suggests an intention to incorporate *three distinct obligations*. This interpretation is also supported by the Treaty's negotiating history[36]. The *first strand* of Article IV, paragraph 1, sets out a free-standing "fair and equitable treatment" standard ("FET standard") that contains no express reference to customary international law. Accordingly, the Court should interpret this first strand as prescribing an autonomous FET standard that need not correspond precisely with the minimum standard of treatment under customary international law. The Parties agree that the FET standard prohibits denial of justice, by promoting respect for fair procedure and due process[37].

20. The second strand of Article IV, paragraph 1, sets out the prohibition against "discriminatory or unreasonable treatment". For treatment to be deemed "discriminatory", the claimant must demonstrate that similarly situated companies were subject to differential treatment without reasonable or justifiable cause[38]. The standard of "unreasonableness" is largely equivalent to that of "arbitrariness"[39]. Evaluating whether a given measure is unreasonable or arbitrary requires reviewing the measure's stated purpose, determining the legitimacy of that purpose and assessing whether the measure bears a reasonable relationship with that purpose[40].

21. Regarding the obligation encapsulated in the third strand of Article IV, paragraph 1, investment tribunals have generally interpreted the "effective means" provisions as being similar to the obligations to provide due process and to refrain from denial of justice[41]. Such a requirement could be breached, for example, by the failure to ensure the presence of legislation and secondary rules of procedure that facilitate the enforcement of contractual rights through the legal system[42] or

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[36] A document memorializing discussions between representatives of the United States and Iran notes that the United States rejected an Iranian proposal to replace the term "unreasonable and discriminatory" in Article IV (1) with the term "unlawful and discriminatory". Aide-memoire of the US Embassy in Tehran dated 20 November 1954, p. 3 (MI, Ann. 3). The United States explained that the clause was intended to express a "general requirement for careful regard . . . for legitimate interests of foreign investors without interference with the country's right of proper regulation". *Ibid.* This suggests that the United States understood at the time that the separate clauses of Article IV (1) imposed their own distinct standards of treatment.

[37] RUSA, para. 10.5; RI, para. 6.9.

[38] See *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 184: "With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds."

[39] See *National Grid p.l.c.* v. *Argentine Republic*, Award, 3 November 2008, para. 197: "It is the view of the Tribunal that the plain meaning of the terms 'unreasonable' and 'arbitrary' is substantially the same in the sense of something done capriciously, without reason." In *ELSI*, the Court explained that concept of arbitrariness is distinct from illegality under domestic law: "It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety". See *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 76, para. 128.

[40] See e.g. *Cairn Energy PLC and Cairn UK Holdings Limited* v. *The Republic of India,* PCA Case No. 2016-7, *Award*, 21 December 2020, para. 1787: "This entails not only a requirement that the State's policy be rational and non-arbitrary, but also that the measure in question bear a reasonable relationship with that policy"; *Mr. Joshua Dean Nelson* v. *The United Mexican States*, ICSID Case No. UNCT/17/1, Award, 5 June 2020, para. 325"[T]he arbitrariness analysis consists in reviewing the stated purposes of a certain measure and whether the measure effectively addresses the stated purposes."

[41] Rudolf Dolzer et al., *Principles of International Investment Law, Third Edition* (2022), Oxford, Oxford University Press, p. 289.

[42] See *Limited Liability Company AMTO* v. *Ukraine,* SCC Case No. 080/2005, Final Award, 26 March 2008, paras. 75 and 87.

by undue delays in local proceedings[43]. I will address the alleged violations of each of the three obligations or protections guaranteed by the provision, in turn.

(a) ***Alleged lack of fair and equitable treatment of Iranian companies***

22. Iran claims that the United States, by enforcing adverse retrospective legislation, has deprived Iranian companies of their right to raise certain defences, resulting in a denial of justice and a violation of due process[44]. The obligation to afford due process, by its nature, encompasses predominantly procedural obligations. It generally does not concern itself with the merits (or lack thereof) of the substantive claims at issue, but with access to the courts, delays in court proceedings or manifestly unjust applications of the law. As already discussed above, Iran has, in my view, not provided any evidence of due process violations by United States domestic courts. Iranian State-owned companies were provided the opportunity to defend their rights in United States courts as part of the execution proceedings brought against them. Besides, Iran has not alleged that United States courts manifestly failed to properly apply the applicable law.

(b) ***Alleged discriminatory or unreasonable treatment***

23. The obligation to refrain from discriminatory and unreasonable measures provides Iran with the most plausible basis for its claim that the United States has violated Article IV, paragraph 1, of the 1955 Treaty. Each of the measures challenged by Iran will be examined in turn.

(a) Section 502 of the 2012 ITRSHRA: This provision specifically targeted the assets of Bank Markazi and rendered them subject to attachment and execution for the purpose of satisfying default judgments against Iran in the *Peterson* case[45]. Bank Markazi unsuccessfully challenged the validity of the provision before United States courts, as well as its constitutionality before the United States Supreme Court[46]. In view of the Court's findings that claims relating to the treatment accorded to Bank Markazi fall outside the jurisdiction of the Court, Iran's claim of alleged discriminatory or unreasonable treatment based on the ITRSHRA cannot succeed.

(b) The 2002 TRIA and 2008 Amendments to the FSIA: These provisions (whose effects are similar)[47] were not *discriminatory* in as far as they did not apply to Iranian companies only, but also to entities belonging to several other States that were also designated by the United States as "State sponsors of terrorism", including, at the time, North Korea, Cuba, Syria and Sudan. Regarding Iran's argument that the United States was *unreasonable or arbitrar*y in applying its policy of corporate veil piercing, as well as its enforcement of the TRIA and the FSIA to individual Iranian State-owned companies not responsible for Iran's impugned conduct, I refer to the quotation in *Barcelona Traction* referred to earlier in this opinion. In the present case, the veil was lifted, according to the Respondent, to prevent the misuse of the privileges of legal personality, to protect third persons that had obtained default judgments against the State of Iran (a shareholder in the companies), and to prevent Iran as well as other "State sponsors of terrorism" from evading

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[43] See *White Industries Australia Limited* v. *The Republic of India*, Final Award, 30 November 2011, para. 11.4.19.

[44] RI, para. 6.60.

[45] Subsection 502 *(b)* of the Act specifically defined the property subject to the Act as

"the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al.* v. *Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 . . . that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order."

[46] 2019 Judgment, p. 21, para. 26.

[47] *Ibid.*, p. 20, paras. 23-24.

compensating victims of terrorist attacks. The enforcement of the TRIA and the FSIA followed similar objectives as those underlying corporate veil piercing. In the premises, Iran's claim that the 2002 TRIA and 2008 Amendments to the FSIA were "unreasonable and arbitrary" and therefore violate Article IV, paragraph 1, cannot succeed.

(c) *Executive Order 13599*: This measure blocked or "froze" property in the United States belonging to the Government of Iran (including its agencies and instrumentalities) and Iranian financial institutions[48]. Iran argues that the Order was both *discriminatory* and *unreasonable*. With respect to discrimination, the Executive Order by its terms targeted only the Government of Iran. On its face, this is suggestive of discriminatory treatment. However, the Order cannot be examined in isolation. In this regard, other United States measures have, at various times, frozen the assets of nationals of other States[49]. Moreover, the United States has credibly argued that the money-laundering risks posed by the Iranian financial sector were not necessarily commensurate with the risks posed by banks of other States. Specifically, the Respondent points to 2011 findings by the Financial Actions Task Force ("FATF") — an intergovernmental anti-money-laundering body — that Iran posed a particularly severe terrorism-financing risk, noting that Iran is one of only two jurisdictions (along with North Korea) against which the FATF has specifically called for States to take action[50]. In the same vein, the United Nations Security Council stated in 2010 that there was a need to "exercise vigilance" regarding Iranian financial institutions[51]. In that context, it was rational for the United States to implement stricter measures against Iranian banks than against the financial sector of other States. Iran has provided no evidence of its own challenging the credibility of the Respondent's contention that the Iranian financial sector posed a cumulative money-laundering risk. Accordingly, it appears that Iran has not met its burden to show that the Executive Order was arbitrary or unreasonable under the circumstances. Accordingly, Iran's claim in this regard must also fail.

(c) ***Alleged lack of effective means of enforcement***

24. Iran contends that the United States measures have "rendered illusory" the contractual rights of two Iranian entities, Bank Melli and TIC, to receive moneys owed by United States companies because those funds were attached in execution proceedings. Iran's claim that this constituted a violation of Article IV, paragraph 1, is not very persuasive. As discussed above, "effective means" obligations are generally interpreted as primarily concerning themselves with rules of procedure, similar to the obligation regarding access to justice. The measures at issue did not directly affect the procedural rights of Iranian State-owned companies to seek enforcement of their contractual rights. Iranian companies retained access to the United States court system and the ability to bring contractual claims therein although many chose not to do so.

25. In my view, Iran has not established a violation by the United States of its obligation under Article IV, paragraph 1, of the 1955 Treaty, and Iran's claims in this regard should have been dismissed.

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[48] United States Executive Order 13599, 5 February 2012 (MI, Ann. 22).

[49] For example, a 2001 executive order broadly froze the assets of foreign persons that support or associate with foreign terrorists (Executive Order 13224, 23 September 2001).

[50] Financial Action Task Force, High-risk and other monitored jurisdictions (CMUSA, Ann. 134). There have been numerous US sanctions implemented against North Korea, including measures blocking the property of North Koreans operating in the financial services industry. See e.g. Executive Order 13810 of 20 September 2017.

[51] United Nations Security Council Resolution 1929, UN doc. S/RES/1929, 9 June 2010.

2. Alleged violation of Article IV, paragraph 2

26. Article IV, paragraph 2, contains two protections: the first relating to the obligation to provide "the most constant protection and security" and the second relating to the obligation not to take property "without the prompt payment of just compensation" "except for a public purpose". With respect to the first of these protections, Article IV, paragraph 2, does not define the phrase "most constant protection and security" ("MCPS"). Likewise, the *travaux préparatoires* of the 1955 Treaty shed little light on how that standard was understood by the Parties. However, the MCPS obligation and related obligations, such as the obligation to ensure "full protection and security" ("FPS")[52], are present in a wide range of bilateral and multilateral investment agreements. Such clauses have been traditionally understood as obligating the host State to ensure the *physical* protections of the property of nationals or companies of the investor State.

27. However, more recently, several investment tribunals have interpreted such clauses to also extend to *legal protections*, in particular the existence of a secure legal environment[53]. Arbitral tribunals that have interpreted MCPS and FPS obligations to apply to legal security claims have generally focused on the existence of a stable legal environment in the host State that provides the investor with legal protections for their investment[54].

28. The Parties agree that a "taking" of property under Article IV, paragraph 2, is equivalent to *expropriation*, as understood in international law[55]. This is also supported by the *travaux* of the 1955 Treaty[56]. Expropriation is defined as the governmental taking of property for which compensation is required[57]. Expropriation usually takes the form of administrative or executive action by the State. However, claims of expropriation based on conduct of a State's judiciary require an element of "illegality" or "arbitrariness" in the conduct of the State's court system, such as conduct amounting to denial of justice, for a judicial decision to qualify as an expropriation[58]. It is also a widely accepted norm of international law that a bona fide, non-discriminatory regulation, enacted as an exercise of a State's police powers, will not be deemed to be an expropriation[59]. I will address the alleged violations of each of the two obligations or protections guaranteed by Article IV, paragraph 2, in turn.

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[52] These different textual variations of the obligation have generally been interpreted similarly. See *Frontier Petroleum Services Ltd.* v. *The Czech Republic*, Final Award, 12 November 2010, para. 260.

[53] See e.g. *Global Telecom Holding S.A.E.* v. *Canada*, Award, 27 March 2020, paras. 664-665; *Anglo American plc* v. *Bolivarian Republic of Venezuela*, Award, 18 January 2019, para. 482; *Biwater* v. *Tanzania*, Award, 24 July 2008, para. 729; *Azurix Corp.* v. *The Argentine Republic*, Award, 14 July 2006, para. 408.

[54] See e.g. Christoph Schreuer, "Full Protection and Security", in *Journal of International Dispute Settlement*, Vol. 1 (2), 2010, p. 369: "Under this interpretation the host State is under an obligation to provide a legal framework that enables the investor to take effective steps to protect its investment." *Azurix Corp.* v. *The Argentine Republic*, Award, 14 July 2006, para. 406, referring to "the stability afforded by a secure investment environment".

[55] RI, para. 7.13; CMUSA, para. 14.84.

[56] One document prepared by the United States during negotiations notes that "[t]he provision on compensation in case of expropriation in paragraph 2 is basic in all US treaty proposals of this type" (Instructions from US Department of State to U.S. Embassy, Tehran (CMUSA, Ann. 227)).

[57] Campbell McLachlan et al., *International Investment Arbitration (2nd Edition): Substantive Principles* (2017), p. 360.

[58] See Vid Prislan, "Judicial Expropriation in International Investment Law", in *International & Comparative Law*, Vol. 70, 2021, p. 177; *Krederi Ltd.* v. *Ukraine*, Award, 2 July 2018, para. 713; *Saipem S.p.A.* v. *The People's Republic of Bangladesh*, Award, 30 June 2009, para. 134.

[59] James Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012), p. 621.

(a) ***Alleged violation of the "most constant protection and security" obligation***

29. As discussed previously in the context of Iranian claims regarding violations of Article III, paragraph 2, and Article IV, paragraph 1, the United States measures did not deprive Iranian State-owned companies of access to the courts or result in a denial of justice or of effective means to enforce their contractual rights. Those reasons are equally applicable to the alleged violation of the most constant protection and security obligation (legal security). Based on the above reasons, I am of the view that Iran has not proved that the impugned United States measures deprived Iranian companies of legal security. Iran's claim in this regard fails.

(b) ***Alleged expropriation of property belonging to Iranian State-owned companies***

30. Iran's claim is essentially one of direct and unlawful expropriation. It contends that the attachment of the assets of certain Iranian State-owned companies by United States courts and their transfer to victims of terrorist attacks resulted in a taking of property without compensation in violation of Article IV (2). As stated earlier, Iran's claims of expropriation, with regard to measures that solely affected Bank Markazi or Iran's sovereign immunity, fall outside the Court's jurisdiction. Secondly, the challenged legislative and executive measures, in my view, amount to a bona fide, non-discriminatory exercise of the United States police power aimed at achieving legitimate regulatory purposes. Through those measures, the Respondent intended to provide victims of terrorist attacks with the ability to obtain legal redress while, at the same time, addressing the national security threats posed by Iran's alleged arms trafficking and support for terrorism. Moreover, regarding the effect of the impugned judicial decisions on the Applicant's property, Iran has not provided any evidence of "illegality" or "arbitrariness" in the conduct of the United States' court system amounting to judicial expropriation. Accordingly, the attachment by the United States of Iranian assets, including those belonging to Iranian State-owned companies, does not amount to compensable "expropriation" within the meaning of Article IV, paragraph 2. Iran's claim in this regard also fails.

31. In my view, Iran has not established a violation by the United States of its obligation under Article IV, paragraph 2, of the 1955 Treaty.

C. Alleged violation of Article V, paragraph 1

32. I agree with the conclusion of the Court in paragraph 201 of the Judgment that Iran has not established a violation by the United States of the Applicant's right to dispose of property under Article V, paragraph 1, of the 1955 Treaty, albeit for different reasons. Article V, paragraph 1, contains three guarantees or protections. The provision obligates the Parties to permit each other's companies and nationals *(a)* to lease real property for residential or business purposes; *(b)* to purchase or otherwise acquire personal property; and *(c)* to dispose of property of all kinds by sale, testament or otherwise, all subject to the "most-favoured-nation" standard. In the present case, Iran's claim is limited to alleged breach of the obligations under clause *(c)* relating to the disposal of property.

33. I agree with the majority that the obligation incumbent upon a party under Article V, paragraph 1, is not absolute, and does not prevent a host State from exercising regulatory control over the lease, purchase, acquisition or disposal of property by the companies of the other State[60]. A

[60] Judgment, para. 197.

host State is thus not precluded, for example, from implementing rules and procedures that purport to regulate such activity.

34. I also agree that on its face, Executive Order 13599 does appear to entirely prohibit the disposition of certain Iranian property that has been "blocked" pursuant to that Order[61]. However, as referred to earlier, the Executive Order was deemed necessary after less stringent measures had failed to curb money-laundering activities of particular financial institutions. In fact, the Order seems to have been targeted at freezing financial assets rather than real property.

35. Furthermore, in order to demonstrate a breach by the United States of its obligations, Iran must show more than a mere hypothetical interference with the right of its companies to dispose of their real property. In the *Oil Platforms* case, which dealt with the interpretation and application of Article X (1) of the 1955 Treaty, the Court explained that for that provision to have been breached, there must have been an *actual* impediment to freedom of commerce[62]. The same is true regarding the interpretation and application of Article V, paragraph 1. To establish a breach of this obligation, Iran must demonstrate that an Iranian State-owned company that has been in possession of certain real property was *actually prevented* from disposing of that property within the United States, as a result of Executive Order 13599. Except with respect to assets of Bank Markazi which fall outside the Court's jurisdiction, Iran has not established its claim that the impugned Executive Order has deprived Iranian companies of their right to dispose of their property, within the meaning of subparagraph 1 *(c)*. Its claim is based entirely upon a hypothetical argument. It is for the above reasons that I would join the majority in rejecting Iran's unsubstantiated claim regarding the United States' alleged violation of Article V, paragraph 1, of the 1955 Treaty.

D. Alleged violations of Article VII

36. I agree with the Court's conclusion in paragraph 208 of the Judgment rejecting Iran's claim relating to the alleged violation by the United States of Article VII, paragraph 1, of the 1955 Treaty. I also agree with the Court's interpretation of Article VII, paragraph 1, and would only add that the negotiating history of the said provision confirms that interpretation. Iran does not refer to a single instance in the provision's negotiating history supporting its interpretation of Article VII (1).

E. Alleged violations of Article X, paragraph 1

37. I respectfully disagree with the conclusion of the Court in paragraph 223 and its findings in paragraph 236 (6) of the Judgment. Regarding the scope of this provision, the Court's previous interpretations of the scope of Article X, paragraph 1, in the *Oil Platforms* case and in the 2019 Judgment are highly relevant. In the *Oil Platforms* preliminary objection Judgment, the Court stated:

> "The Court must indeed give due weight to the fact that, after Article X, paragraph 1, in which the word 'commerce' appears, the rest of the Article clearly deals with maritime commerce. Yet this factor is not, in the view of the Court sufficient to restrict the scope of the word to maritime commerce, having regard to other indications in the Treaty of an intention of the parties to deal with trade and commerce in general. The Court also takes note in this connection of the recital in Article XXII of the Treaty which states that the Treaty was to replace, *inter alia*, a provisional agreement relating

[61] Judgment, para. 200, referring to Executive Order 13599, Sec. 1.

[62] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Merits, Judgment, I.C.J. Reports 2003*, pp. 204-205, para. 92.

to commercial and other relations, concluded at Tehran on 14 May 1928. The Treaty of 1955 is thus a Treaty relating to trade and commerce in general, and not one restricted purely to maritime commerce.

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In these circumstances, the view that the word 'commerce' in Article X, paragraph 1, is confined to maritime commerce does not commend itself to the Court.

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The Court must now consider the interpretation according to which the word 'commerce' in Article X, paragraph 1, is restricted to acts of purchase and sale. According to this interpretation, the protection afforded by this provision does not cover the antecedent activities which are essential to maintain commerce as, for example, the procurement of goods with a view to using them for commerce.

In the view of the Court, there is nothing to indicate that the parties to the Treaty intended to use the word 'commerce' in any sense different from that which it generally bears. The word 'commerce' is not restricted in ordinary usage to the mere act of purchase and sale; it has connotations that extend beyond mere purchase and sale to include 'the whole of the transactions, arrangements, etc., therein involved' (*Oxford English Dictionary*, 1989, Vol. 3, p. 552).

In legal language, likewise, this term is not restricted to mere purchase and sale because it can refer to

> 'not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and transportation of persons as well as of goods, both by land and sea' (*Black's Law Dictionary*, 1990, p. 269).

Similarly, the expression 'international commerce' designates, in its true sense, 'all transactions of import and export, relationships of exchange, purchase, sale, transport, and financial operations between nations' and sometimes even 'all economic, political, intellectual relations between States and between their nationals' (*Dictionnaire de la terminologie du droit international* (produced under the authority of President Basdevant), 1960, p. 126 *[translation by the Registry]*).

Thus, whether the word 'commerce' is taken in its ordinary sense or in its legal meaning, at the domestic or international level, it has a broader meaning than the mere reference to purchase and sale.

. . . . . .

The Court concludes from all of the foregoing that it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce."[63]

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[63] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 817-819, paras. 41, 43, 45, 49.

38. According to the Court's jurisprudence in *Oil Platforms*, the word "commerce" as used in Article X (1) covers all forms of commercial transactions, including trade in services, as well as financial transactions, and not merely the immediate act of purchase and sale.

39. Moreover, in its 2019 Judgment the Court made clear that it saw "no reason to depart now from the interpretation of 'freedom of commerce' that it adopted in the *[Oil Platforms]* case"[64]. Recognizing that, in order to establish a breach of obligation under Article X (1), there must be a sufficiently close relationship between the impugned conduct and the acts of commerce, the Court stated that "freedom of commerce cannot cover matters that have no connection, or too tenuous a connection, with the commercial relations between the States Parties to the Treaty"[65]. The Court has also observed that it must be established that there is actual and ongoing commerce that was impeded by the impugned activities; and that Article X, paragraph 1, "is in terms limited to the protection of freedom of commerce '*between* the territories of the two High Contracting Parties'"[66]. Such commerce must be sufficiently direct[67]. *Lastly*, the Court has stated that in order to demonstrate a violation of Article X (1), a party must do more than plead a "generic" claim of breach and must identify specific conduct that impeded commerce[68].

40. Iran argues that the United States' measures resulting in the freezing or seizure of the assets belonging to Iranian financial institutions and State-owned entities have "rendered impossible" commerce between the United States and Iran with respect to those entities[69]. Iran specifically refers to the attachment proceedings in relation to contractual debts owed by United States companies to TIC, Bank Melli and the Iranian Ministry of Defence[70]. For Iran's claim to succeed, it must demonstrate that a sufficiently direct nexus exists between the impugned United States measures and freedom of commerce. In my view, however, many of the measures challenged by Iran — particularly those legislative measures that merely authorize the attachment of the assets of Iranian State-owned entities to enforce judgments rendered against Iran — do not directly affect trade or commerce between the two States. *Firstly*, while the Court has made clear that Article X (1) does not only cover purchase and sale, but also applies to "ancillary activities integrally related to commerce"[71], the impugned measures are not analogous to the conduct in *Oil Platforms*. That case concerned conduct amounting to interference with the antecedent activities to a commercial transaction; specifically, the production of oil that would later be traded on the international market. By contrast, the attachment of assets of Iranian companies does not target an element in the commercial process. Such measures, in Iran's own words, merely affect "the products of commerce"[72].

41. *Secondly*, to the extent that one or more of the impugned measures are capable of directly affecting commerce, Iran has not demonstrated that there has been *actual* interference with then-existing and ongoing commerce. Taken in isolation, Executive Order 13599 has the potential to

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[64] 2019 Judgment, p. 34, para. 79.

[65] *Ibid.*

[66] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 200, para. 82 (emphasis added).

[67] *Ibid.*, p. 207, para. 97.

[68] *Ibid.*, p. 217, para. 123.

[69] RI, para. 8.34.

[70] *Ibid.*

[71] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 49.

[72] RI, para. 8.34.

interfere with commerce by "blocking" all assets belonging to the Iranian Government and Iranian financial institutions located in the United States. However, by 2012 when the Order was issued, there were already a range of existing sanctions and other measures (not challenged by Iran in these proceedings) that made commerce between Iran and the United States extremely difficult. For example, Iran complains about the treatment of certain assets of Bank Melli. But those assets were blocked in 2007 and were therefore unaffected by Executive Order 13599[73]. Similarly, financial transactions between Iran and the United States were severely restricted in 2008 by a regulation that prohibited so-called "U-turn" transfers that had previously been used by United States banks[74]. There is therefore reason to believe that there was little, if any, commerce left between Iran and the United States in 2012 that could have been impeded by the Executive Order[75]. Iran refers generally to the fact that United States census data demonstrates that a small amount of trade existed between the United States and Iran in 2016, the year Iran initiated these proceedings[76]. However, it provides no specific evidence as to how this ongoing trade was affected by the Executive Order or other measures at issue.

42. *Thirdly*, some of the examples of "commerce" cited by Iran are not in fact commercial in nature. In view of the Court's finding that Bank Markazi is not a company for purposes of Articles III, IV and V of the Treaty, it follows that the Bank's investments in the United States do not qualify as "commercial" for purposes of Article X, paragraph 1. *Lastly*, regarding the requirement for commerce "*between* the territories of the two High Contracting Parties" to be sufficiently direct, there is evidence on record that, from as early as 1995, there were no direct transactions between United States and Iranian banks and that the investments made by Bank Markazi took place through various intermediaries located outside the territories of the Parties, a fact not challenged by Iran[77]. In my view, Iran has not established that there was commerce between the Parties on their territories as required by Article X, paragraph 1, let alone that it was impeded by Executive Order 13599.

43. For the above reasons, Iran has, in my view, not demonstrated that the United States has violated its obligations under Article X (1) of the 1955 Treaty of Amity.

IV. DEFENCES UNDER ARTICLE XX, PARAGRAPH 1

Application of Article XX, paragraph 1 *(c)* and *(d)*, of the 1955 Treaty

44. Whilst I agree with the Court's conclusion in paragraph 103 regarding the non-applicability of Article XX, paragraph 1 *(c)* to the present case, I disagree with its conclusion in paragraph 109 regarding Article XX, paragraph 1 *(d)*.

45. Article XX, paragraph 1 *(d)* exempts from the scope of the 1955 Treaty measures that are "necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests". The Court has previously interpreted the scope of both Article XX, paragraph 1 *(d)* and an identically worded

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[73] RUSA, para. 8.34.

[74] CMUSA, Ann. 232.

[75] Iran also references in its Reply debts owed by Sprint to TIC. However, these funds were money owed by Sprint not subject to Executive Order 13599, as the payments in question were made under a US licence permitting telecommunications payments as an exception to the Executive Order. *Heiser* v. *Iran*, 807 F. supp. 2d 9, p. 18 fn. 6, (RUSA, Ann. 338).

[76] CR 2022/16, pp. 34-35, para. 36 (Aughey).

[77] CMUSA, paras. 17.14-17.20.

provision in the *Military and Paramilitary Activities* and *Oil Platforms* cases. In both cases, the Court made clear that the exception is not self-judging, explaining that it is for the Court to determine whether there existed essential security interests at the time of the challenged measures and whether such conduct measures were "necessary" to protect such interests[78].

46. The United States asserts that the "essential security interests" at issue here are its interests in preventing terrorist attacks against the United States and its nationals, preventing terrorist financing and the supply of arms to terrorist groups, and combating Iran's development of a ballistic missile programme. In *Military and Paramilitary Activities*, the Court stated that "the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past"[79]. Even interpreted relatively narrowly, it is likely that the interests alleged by the United States in this case, which relate to counterterrorism, prevention of arms trafficking and arms production, safely fall within the category of "essential security interests" to which the exception in Article XX, paragraph 1 *(d)* applies. Accordingly, Executive Order 13599 is, in my view, a measure falling within Article XX, paragraph 1 *(d)* of the Treaty and is therefore not subject to the terms of the said Treaty.

V. REMEDIES

47. I disagree with the conclusions of the Court in paragraph 231 as well as its findings in paragraph 236 (7) and (8) of the Judgment. In view of my opinion above that Iran has failed to substantiate any of its claims or to establish that the United States has violated the provisions of the 1955 Treaty, I am of the view that the Respondent is under no obligation to compensate Iran.

(Signed) Julia SEBUTINDE.

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[78] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 141, para. 282 ("But by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized . . . purely a question for the subjective judgment of the party"); *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 183, para. 43.

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