DECLARATION OF JUDGE BHANDARI

Judicial expropriation — Criteria for establishing expropriation involving conduct of domestic court —Decisions of other international courts and tribunals —Court should have offered more comprehensive reasoning and justification.

1. I make this declaration to indicate what are, in my view, shortcomings in the Court's reasoning on Iran's expropriation claim under Article IV (2) of the Treaty of Amity. The passages in the Judgment concerning judicial expropriation in my view require greater depth of analysis.

2. Paragraph 184 of the Judgment states as follows:

> "The Court considers 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*. Such an element of illegality is present, in certain situations, when a deprivation of property results from a denial of justice, or *when a judicial organ applies legislative or executive measures that infringe international law and thereby causes a deprivation of property*. Therefore, in order to determine whether there exists a specific element of illegality, it is necessary to examine the legislative, executive and judicial acts adopted by the United States as a whole." (Emphasis added.)

3. This paragraph addresses an important aspect of international economic relations, and it states a purported rule of international law. That statement, however, is not supported by any precedent or adequate reasons. In my opinion, the Court should be extremely cautious when making such broad statements of law. When it does so, the Court should, at a minimum, ensure that its statements can withstand scrutiny by backing them up with the necessary analysis and support. That has not occurred here, notwithstanding the fact that other international tribunals have explored this aspect of the international law of expropriation.

4. Perhaps the reason why this paragraph stands unsupported, though, is because it is not necessarily in keeping with prevailing understandings of expropriation in connection with decisions by domestic courts. Paragraph 184 states that "an element of illegality is present, in certain situations, when a deprivation of property results from a denial of justice, or when a judicial organ applies legislative or executive measures that infringe international law and thereby causes a deprivation of property". This is a debatable proposition.

5. The prevailing understanding among international tribunals is that, in order for a judicial decision to constitute an expropriation, an element of international unlawfulness must taint the judicial decision itself. When a court in a lawful manner simply applies legislation that is itself in breach of a treaty obligation, or otherwise not in conformity with international law, that is not necessarily sufficient for the judicial decision to amount to an expropriation[1]. That latter scenario seems to reflect the Court's understanding of the facts in this case, given its specific finding that "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 Court then adds that "[t]he

[1] I note Iran's statement in its Memorial that "the U.S. judiciary has merely acted to implement U.S. legislation and executive orders": Memorial of the Islamic Republic of Iran, para. 5.64.

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*" (Judgment, para. 143, emphasis added).

6. The decisions of investor-State arbitral tribunals, the primary international tribunals to adjudicate expropriation claims today, largely accept the requirement that the domestic judicial decision *itself* must be tainted by unlawfulness. For the most part, these tribunals have distinguished legitimate judicial determinations from abusive interferences. They have done so by requiring, in addition to a finding that the conduct of a State's judiciary substantially deprived an investor of its economic rights, a further element of impropriety. Notably, these tribunals emphasized that a finding of judicial expropriation is an exception rather than the rule. In sum, no expropriation would, as a general rule, occur in the absence of a judicial decision amounting to a denial of justice or other violation of international law, such as lack of due process or non-compliance with specific procedural safeguards set out in treaties and customary international law.

7. Recent decisions have generally confirmed this understanding. *Lion Mexico Consolidated LP* v. *United Mexican States*, an arbitration under the North American Free Trade Agreement ("NAFTA"), concerned a fraudulent scheme of judicial and administrative proceedings initiated by a debtor. In its 2021 award, the tribunal reaffirmed the general rule that "liability for expropriation under [NAFTA] Art. 1110 arising from the decisions of domestic courts requires a finding of a denial of justice"[2].

8. *Krederi* v. *Ukraine* is a case from which the present Judgment seems to have drawn inspiration. In its 2018 award, the tribunal observed, in the context of private law disputes over ownership of movable or immovable property, that "judicial determinations [of which party prevails in a private law dispute over ownership of movable or immovable property] *do not constitute expropriation*"[3]. It added that where a court finds that a property transfer was invalid, "the resulting transfers of ownership *do not amount to expropriation*"[4]. The tribunal in *Krederi* then stated it is necessary to ascertain, in order to determine whether an indirect expropriation or a measure tantamount to expropriation had occurred in those circumstances, *"whether an additional element of procedural illegality or denial of justice was present"*[5]. The tribunal in *Krederi* dismissed the expropriation claim on the basis that the domestic judicial proceedings had not involved a breach of due process[6].

9. Other international decisions have adopted similar approaches. What they have in common is that the unlawfulness in question must attach to the judicial decision itself. Thus, in *Swisslion* v. *Macedonia*, the tribunal concluded with respect to an expropriation claim premised on a judicial decision that "[s]ince there was no illegality on the part of the courts, the first element of the

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[2] *Lion Mexico Consolidated LP* v. *United Mexican States*, ICSID Case No. ARB (AF)/15/2, Award, 20 September 2021, para. 188. In support, the tribunal cited *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America,* ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003, para. 141: "Claimants' reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105." The *Loewen* tribunal used the test of "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety" for the determination of unfair and inequitable treatment or denial of justice (*ibid.*, para. 132).

[3] *Krederi Ltd.* v. *Ukraine*, ICSID Case No. ARB/14/17, Award, 28 July 2018, para. 709 (emphasis added).

[4] *Ibid.* (emphasis added).

[5] *Ibid.*, para. 713 (emphasis added).

[6] *Ibid.*, para. 715.

Claimant's expropriation claim is not established"[7]. In *Manolium Processing* v. *Belarus*, the tribunal stated that "the standard [for an indirect expropriation claim based on a judgment of the Belarus Supreme Court] must be equivalent to that applied to judicial decisions which violate the [fair and equitable treatment] standard: judicial expropriation must result from denial of justice"[8]. The tribunal did not find that judicial expropriation had occurred, because it had found no denial of justice[9]. In *Muhammet Çap & Sehil* v. *Turkmenistan*, although the claimants had not alleged judicial expropriation in connection with domestic proceedings concerning the termination of contracts, the tribunal still observed that "[t]here is a high threshold to prove judicial expropriation and that has not been proved in this case"[10].

10. Some tribunals have articulated a particularly high threshold in this regard. In *Garanti Koza* v. *Turkmenistan*, the tribunal found that a seizure of property does not amount to an expropriation unless there existed "an element of serious and fundamental impropriety about the legal process"[11].

11. Similarly, by way of comparison, in litigation before the European Court of Human Rights ("ECtHR") concerning the right to property under Article 1 of Protocol 1 to the European Convention on Human Rights and alleged interferences with that right by national judiciaries, the emphasis has also generally been on the judicial process itself. *Vulakh and others* v. *Russia*, for example, concerned a dispute between private parties regarding a compensation claim. The ECtHR noted that a State's role in a dispute under Article 1 of Protocol 1 was limited to providing a forum for the determination of the applicants' civil rights and obligations in the form of its judicial system. While providing a judicial forum did not, the ECtHR stated, by itself engage the State's responsibility under Article 1 of Protocol No. 1, "the State may be held responsible for losses caused by such determinations if the court decisions were not given in accordance with domestic law or if they were flawed by arbitrariness or manifest unreasonableness contrary to Article 1 of Protocol No. 1"[12]. The ECtHR explained that, in order to afford the protections required by Article 1 of Protocol 1, "States are under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons"[13].

12. Certain international tribunals have adopted a more lenient posture. While this is a defensible view, it appears overall to be the less favoured position. In *Saipem* v. *Bangladesh*, the tribunal stated that judicial expropriation does not presuppose a denial of justice (although it did "concur[] with the parties that expropriation by the courts presupposes that the courts' intervention

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[7] *Swisslion DOO Skopje* v. *The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, para. 314.

[8] *OOO Manolium Processing* v. *Republic of Belarus, PCA Case No. 2018-06*, Final Award, 22 June 2021, para. 591.

[9] *Ibid.*, para. 592.

[10] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti.* v. *Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, para. 950. The tribunal noted that the claimants "were represented at the hearings", "put forward arguments", "had the opportunity to and did in fact file replies to the statements of claim", and "exercised [the] right to appeal", concluding for these reasons that there were no due process violations. *Ibid.*, paras. 953-954.

[11] *Garanti Koza LLP* v. *Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, para. 365.

[12] *Vulakh and others* v. *Russia, Application No. 33468/03, Judgment*, 10 January 2012, para. 44. See further *Melnychuk* v. *Ukraine, Application No. 28743/03*, *Decision*, 5 July 2005, para. 3.

[13] *Vulakh and others* v. *Russia, Application No. 33468/03*, *Judgment*, 10 January 2012, para. 45.

was illegal")[14]. In *Sistem* v. *Kyrgyzstan*, the investor's ownership rights in a hotel had been abrogated by decisions of the host State's judiciary invalidating a share purchase agreement. The tribunal did not separately examine the lawfulness of the judicial decision. It found that the State's abrogation of contractual rights was tantamount to an expropriation of property, stating that "[t]he Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree"[15]. In *Standard Chartered Bank (Hong Kong)* v. *Tanzania*, the tribunal stated that "judicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its property or property rights, can still amount to expropriation". It added that "[w]hile denial of justice could in some case[s] result in expropriation, it does not follow that judicial expropriation could only occur if there is denial of justice"[16]. Certain tribunals have also upheld expropriation claims involving domestic judicial decisions where those decisions formed part of a series of acts or omissions or of a composite act attributable to the State[17].

13. These materials make it plain that most international decisions support a stance different from the one adopted in this Judgment. While those views are, of course, not binding on the Court, it requires sufficient reasons and more justification to swim against the tide of international jurisprudence. In any case, yet especially in light of the Court's stance on this point, it would have done well to adopt a fuller analysis, more thoroughly reasoned and supported by authority, on the question of judicial expropriation.

(Signed) Dalveer BHANDARI.

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[14] *Saipem S.p.A.* v. *The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, para. 181.

[15] *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş.* v. *Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, para. 118.

[16] *Standard Chartered Bank (Hong Kong) Limited* v. *United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019, para. 279.

[17] See e.g. *Rumeli A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S.* v. *Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 705-715; *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud* v. *Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award, 7 February 2014, paras. 501-505.