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FROM TEHRAN TO MOSCOW: THE ICJ'S 2023 CERTAIN IRANIAN ASSETS JUDGMENT AND ITS BROADER RAMIFICATIONS FOR UNILATERAL SANCTIONS, INCLUDING AGAINST RUSSIA

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1 Introduction

On 30 March 2023, the International Court of Justice ('ICJ' or 'Court') delivered its judgment on the merits in the "*Certain Iranian Assets*" case brought by the Islamic Republic of Iran ('Iran') against the United States of America ('United States' or 'US').[1] Similar to other ICJ cases, past[2] *and* pending, between the two countries, in particular the ongoing "*1955 Treaty of Amity*" procedure,[3] the case was initiated in June 2016 on the basis of the compromissory clause in the 1955 bilateral Treaty of Amity, Economic Relations, and Consular Rights[4] ('Treaty of Amity'). Surprisingly, the latter treaty long survived the hostile relations between the protagonist States. It was ultimately terminated by the United States in October 2018 on the same day the ICJ rendered its Order on provisional measures in the parallel *1955 Treaty of Amity* case.[5]

While the latter case broadly concerns the legality of the US primary and secondary sanctions against Iran in the wake of the Trump administration's withdrawal from the Iran 'nuclear deal', the *Certain Iranian Assets* case was more focused in scope. In particular, the dispute arose due to Iran challenging various legislative, executive and judicial measures by the US enabling victims of Iran-sponsored terrorist attacks to obtain compensation from Iran before US courts, and enabling successful litigants to enforce favorable awards against assets from Iran's central bank and other Iranian entities, including Iranian State-owned companies.

The ensuing judgment deals with an array of matters ranging from the clean hands doctrine to expropriation. The Court eventually ruled that several United States' measures were in violation of the 1955 Treaty of Amity and awarded compensation to Iran.[6] In their respective statements, both countries considered the judgment a victory.[7]

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[1] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (Judgment) [2023] ICJ Rep _ ('Certain Iranian Assets').

[2] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgment) [2003] ICJ Rep 161.

[3] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* (Preliminary Objections) [2021] ICJ Rep 9.

[4] Treaty of Amity, Economic Relations, and Consular Rights (adopted on 15 August, entered into force 16 June 1957) 284 UNTS 93.

[5] US Department of State, Remarks to the Media by Michael R. Pompeo (3 October 2018) <https://2017-2021.state.gov/remarks-to-the-media-3/index.html> and Certain Iranian Assets (Counter-Memorial submitted by the United States of America) 14 October 2019, para 4.9. The Treaty ceased to have effect on 3 October 2019 upon the expiry of the one-year notice period.

[6] Certain Iranian Assets, para 231.

[7] In a statement, the United States considered the judgment a "major victory for the United States and victims of Iran's State-sponsored terrorism." See US Department of State, Judgment in Certain Iranian Assets Case: press statement (30 March 2023) <www.state.gov/judgment-in-certain-iranian-assets-case>. Iran's Foreign Ministry called the Court's ruling "another proof of … Iran's righteousness and the violations by the US government." See Iran Ministry of Foreign Affairs, Iranian Foreign Ministry's statement about the ruling of the International Court of Justice (30 March 2023) <https://en.mfa.ir/portal/newsview/715766>.

The decision has a mixed outcome, and gave rise to considerable disagreement among the members of the bench. Most points of the *dispositif* ended in a split vote, with separate or dissenting opinions being expressed by thirteen out of the fifteen judges. While not unprecedented, such circumstances illustrate the extent of the opposing views within the Court.

This note takes a closer look at the Court's reasoning in the *Certain Iranian Assets* judgment. It follows the same structure as adopted by the Court, while also zooming in on noteworthy findings of interest for international law. In addition, it examines the potential ramifications of the judgment at a time when unilateral sanctions are increasingly prevalent and far-reaching. In particular, the note considers what the judgment holds in store for the pending *1955 Treaty of Amity* case as well as for the unprecedented range of unilateral sanctions adopted against Russia in response to its invasion of Ukraine.

2 Background of the dispute

As is well-known, the bilateral relationship between the United States and Iran deteriorated significantly following the 1979 Islamic revolution and the Tehran hostage crisis. The countries severed diplomatic ties in 1980. Relations have remained tense ever since. Over the years, the United States has accused Iran of having a hand in various terrorist attacks, including, most prominently, the 1983 bombing of the United States military barracks in Beirut which resulted in the deaths of 241 United States soldiers.[8]

Already in 1984, the US State department designated Iran a "State sponsor of terrorism".[9] This label acquired particular significance when in 1996, the US adopted an amendment[10] to the Foreign Sovereign Immunities Act[11] ('FSIA'), commonly referred to as the "terrorism exception" (Section 1605A). In particular, this exception removes the immunity from jurisdiction before US courts for designated 'State sponsors of terrorism' in respect of claims brought by US nationals or members of the US armed forces in respect of injury or death caused by *inter alia* torture and extrajudicial killing. As a result, several cases were indeed brought against Iran before US courts to seek compensation for damages resulting from deaths and injuries caused by terrorist acts allegedly supported by Iran. Most notable is the *Peterson v. Islamic Republic of Iran* case[12] regarding the aforementioned bombing of United States barracks in Beirut.

In subsequent years, additional legislation was introduced to similarly curtail the immunity from execution of Iran in order to enable successful litigations to enforce the awards obtained pursuant to Section 1605A. Thus, in 2002, the United States enacted the Terrorism Risk Insurance Act[13] ('TRIA'). Section 201(a) TRIA authorizes blocked assets of a State sponsor of terrorism to "*be subject to execution or attachment to satisfy*" a judgment obtained under the 1996 amendment of the FSIA. In 2008, an additional amendment[14] to the FSIA expanded the categories of assets that could be utilized to satisfy judgments regardless of whether those assets had been previously blocked by the US government (Section 1610(g)(1)). Lastly, in 2012, Executive Order ('EO') 13599[15] was issued, which effectively blocked all assets of the government of Iran, including the central bank of Iran (Bank Markazi) and other Iranian financial institutions, within United States jurisdiction. Shortly after, the United States adopted the Threat Reduction and Syria Human Rights Act[16], enabling the assets of Bank Markazi to be blocked, seized, and distributed amongst the plaintiffs in the *Peterson* case against Iran.

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[8] Certain Iranian Assets (Counter-Memorial submitted by the US) 14 October 2019, para 1.1-1.2.
[9] Determination Pursuant to Section 6(i) of the Export Administration Act of 1979 – Iran, 49 Federal Register (23 January 1984), 2836.
[10] Antiterrorism and Effective Death Penalty Act of 1996, para 221, codified at 28 U.S.C. para 1605 et seq.
[11] Foreign Sovereign Immunities Act, 28 U.S.C. para 1602 et seq.
[12] Deborah Peterson, et al. v. Islamic Republic of Iran, et al., case no. 10-cv-4518 (S.D.N.Y. Jul. 24, 2018).
[13] Terrorism Risk Insurance Act of 2002, Pub. L. 107–297, 116 Stat. 2322, codified at 28 U.S.C. para 1610.
[14] National Defense Authorization Act for Fiscal Year 2008, para 1083.
[15] Executive Order 13599, 77 Federal Register 6659 (5 February 2012).
[16] Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214, 22 U.S.C. para 8701.

According to Iran, at the time it lodged its application with the ICJ in 2016, US courts had awarded total damages in the amount of more than USD 56 billion, consisting in ca. USD 26 billion in compensatory damages and USD 30 billion in punitive damages.[17]

3 Questions of jurisdiction and admissibility

In 2019, the Court rendered a judgment on preliminary objections.[18] While several US objections to jurisdiction and admissibility were dismissed by the Court, one crucial objection was, however, upheld by a large majority of the judges. In particular, while the essence of the dispute revolves around the compatibility with international law of the so-called 'terrorism exception' to State immunity, the Court asserted that customary rules on State immunity were extraneous to the bilateral treaty upon which the Court's jurisdiction was grounded.[19] Accordingly, in a blow to Iran, the Court held that it could not pronounce on the legality of the terrorism exception as such, but could only examine whether US measures breached specific obligations of the 1955 Treaty.

Two further questions of jurisdiction and admissibility were left to be resolved in the 2023 judgment: a jurisdictional inquiry questioning whether Bank Markazi qualifies as a "company" within the meaning of the Treaty of Amity and an admissibility inquiry examining whether local remedies were properly exhausted before Iran initiated the case before the ICJ.

3.1 Bank Markazi as a "company" under the Treaty of Amity?

First, the United States' objection to the Court's *ratione materiae* jurisdiction relating to the qualification of Bank Markazi as a 'company' is worth highlighting. This jurisdictional inquiry was particularly significant as it represented a substantial portion of Iran's monetary claims, covering assets of nearly US$1.8 billion. The qualification of the bank as a company determined whether the bank fell under the protective regime of the Treaty of Amity.

In *casu*, Iran claimed that the bank's purchase of twenty-two security entitlements in dematerialized bonds on the United States financial market and the subsequent management of their proceeds were by nature commercial activities and therefore qualified Bank Markazi as a company.[20] Conversely, the United States claimed that Bank Markazi could not be considered a company as the transactions referred to by Iran were supposedly related to the management of Iran's currency reserves and accordingly fell within the traditional exercise of sovereign activities carried out by a central bank.[21]

It is somewhat ironic that the two countries put forth arguments diametrically opposed to the positions previously adopted in the context of the domestic proceedings before the US Courts, particularly the *Peterson* case. Indeed, in the latter case, Bank Markazi had consistently portrayed the activities in question as relating to its sovereign functions as a central bank, rather than characterizing them as commercial transactions. In turn, the United States authorities adopted a different view and deemed Bank Markazi's investment activities to be commercial in nature.[22] As a result, the bank could not claim immunity against the measures intended to freeze and attach its assets. Both countries made a volte-face in the context of the ICJ proceedings. Thus, the United States relied on the nature of the bank's activities so as to not grant immunity to Bank Markazi in the proceedings before its own courts but did not apply the

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[17] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (Application Instituting Proceedings), 14 June 2015, para 7.
[18] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (Preliminary Objections) [2019] ICJ Rep 7 ('Certain Iranian Assets (Preliminary Objections)').
[19] *Ibid*., para. 65.
[20] Certain Iranian Assets, para 38.
[21] *Ibid*., para 39.
[22] *Ibid*., para 38.

same criterion when it came to affording protection to the bank under the Treaty of Amity within the framework of the proceedings before the Court. Nevertheless, the Court did not consider the United States' previous characterization of the activities as commercial as decisive in the present case,[23] and stressed that the question of immunity was not before it.

As a point of departure, the Court recalled its 2019 judgment on preliminary objections, where it already found that "*there is nothing to preclude, a priori, a single entity from engaging both in activities of a commercial nature (or, more broadly, business activities) and in sovereign activities*".[24] It thus followed that in order for Bank Markazi to be considered a company, it had to engage in activities of a commercial character alongside its sovereign functions. The 2019 judgment nonetheless found that the Court did not have before it all the necessary facts to determine whether Bank Markazi was carrying out, at the relevant time, activities of a commercial nature, and left the matter to be settled in the judgment on the merits.[25]

Four years later, the Court held that the bank's operations on the United States market were not sufficient to consider Bank Markazi a company as they were carried out within the framework and for the purposes of Bank Markazi's principal sovereign activity. Indeed, the Court considered the operations inseparable from its sovereign function as a central bank.[26] The Court remarked that *"[i]n establishing whether a given entity may be characterized as a "company", consideration cannot be limited to a transaction – or series of transactions – "as such", carried out by that entity. That transaction – or series of transactions – must be placed in its context, taking particular account of any links that it may have with the exercise of a sovereign function*."[27] Based on this finding, the rights and protections afforded by the Treaty of Amity did not apply to Bank Markazi, and the Court had no jurisdiction over Iran's claims predicated on the treatment accorded to Bank Markazi. This resulted in the exclusion of a substantial portion of Iran's monetary claims.

The Court was divided on this ruling, and five judges voted against.[28] The opinions put forth by Judges Bennouna, Yusuf, Robinson, Salam, and Judge *ad hoc* Momtaz all expressed strong reservations regarding the *rationale* of the decision. In particular, these judges all believed it contravened the 2019 judgment that considered the nature of activities as a determining factor for characterizing an entity as a company within the framework of the Treaty of Amity.[29] As Judge Bennouna put it:[30]

> "in complete contradiction with the 2019 Judgment, the Court considers that it is not possible to rely on the nature of the activity alone in order to characterize Bank Markazi as a "company" within the meaning of the Treaty of Amity, even when that bank purchases security entitlements on the financial market on the same terms as any other operator. The Court clearly decides instead that the bank's sovereign function is a necessary and sufficient criterion for its characterization as a "company". This principal activity thus prevails over all other subsidiary activities of a commercial nature."

When comparing the 2019 and 2023 judgments, it is indeed difficult to escape the feeling that the Court 'changed criteria in mid-course' – as Judge Yusuf put it[31] –, notwithstanding the absence of new factual elements, and that it defined the concept of a "company" far more narrowly than envisaged in the judgment on preliminary objections.

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[23] *Ibid*., para 52.
[24] Certain Iranian Assets (Preliminary Objections), para 92.
[25] *Ibid*., para 97.
[26] Certain Iranian Assets, para 50, 52.
[27] *Ibid*., para 51.
[28] Certain Iranian Assets (Separate Opinion of Judge Bennouna); Certain Iranian Assets (Separate Opinion of Judge Yusuf); Certain Iranian Assets (Separate Opinion, partly concurring and partly dissenting of Judge Robinson); Certain Iranian Assets (Declaration of Judge Salam); Certain Iranian Assets (Separate Opinion of Judge *ad hoc* Momtaz).
[29] Certain Iranian Assets (Preliminary Objections), para 92.
[30] Certain Iranian Assets (Separate Opinion of Judge Bennouna), para. 8.
[31] Certain Iranian Assets (Separate Opinion of Judge Yusuf), para. 7.

3.2 Exhaustion of local remedies

The Court next turns to the US objection on admissibility based on an alleged failure of affected Iranian companies to exhaust local remedies.

When a State brings an international claim on behalf of one or more of its nationals on the basis of diplomatic protection, customary international law requires the exhaustion of local remedies before the claim may be examined. However, the obligation to exhaust local remedies does not apply when a State initiates a claim based on violations of its own rights and the individual rights of its nationals, and where those rights are interdependent. In the present case, however, no such interdependence was found to exist.[32] Nor did the Court deem it necessary to determine whether Iran's claims were brought "preponderantly" on the basis of an injury to one or more of its nationals, or on the basis of injury to the State in the sense of Article 14(3) of the ILC Articles on Diplomatic Protection ('ADP').[33]

Instead, the Court focused on Article 15(a) ADP, which provides an exception to the requirement of exhaustion of local remedies if there are no reasonably available local remedies to provide effective redress, or if the local remedies provide no reasonable possibility of such redress.[34] The Court concluded that Iranian companies had no reasonable possibility of successfully asserting their rights in United States court proceedings given the combination of the legislative character of the contested measures and the primacy accorded to more recent federal statutes over the 1955 Treaty of Amity in US jurisprudence, and accordingly rejected the argument put forward by the United States.[35] This holding, supported by a large majority of the judges[36], seems broadly in line with the position expressed by the ILC in the ADP Commentaries according to which the 'ineffectiveness' exception applies where 'the national legislation justifying the acts of which the alien complains will not be reviewed by local courts'.[37]

4 Defenses on the mertis put forth by the United States

Following its ruling on the remaining questions of jurisdiction and admissibility, and before zooming in on the specific treaty violations claimed by Iran, the Court proceeded to assess the United States' defenses on the merits of the case. It rejected all three.

First, the United States argued that Iran came to the Court with "unclean hands".[38] In short, the doctrine of clean hands stipulates that no action arises from willful wrongdoing of the applicant.[39] The status of the doctrine in international law has been characterized by uncertainty. Although several States have invoked this argument before the ICJ, the Court has neither upheld the doctrine nor established a test for its successful invocation.[40] The doctrine

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[32] Certain Iranian Assets, para 65.
[33] *Ibid*., para 66, 68.
[34] Article 15(a) International Law Commission ("ILC"), 'Draft Articles on Diplomatic Protection with commentaries' (2006) <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf>.
[35] Certain Iranian Assets, para 69, 72-73.
[36] This dictum was supported by all judges, save for Judge Sebutinde and Judge ad hoc Barkett.
[37] ILC, 'Draft Articles on Diplomatic Protection with commentaries' (2006) <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf> , at 47. In a similar vein, C. F. Amerasinghe, *Local Remedies in International Law* (CUP 2004), at 208.
[38] Certain Iranian Assets, para 77-78.
[39] International Law Commission, 'Diplomatic protection: Sixth report on diplomatic protection, by Mr. John Dugard, Special Rapporteur' (2004) UN Doc. A/CN.4/546, para 2.
[40] See e.g., *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) [2004] ICJ Rep 12, para 45-47; *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgment) [2003] ICJ Rep 161, para 27-30; *Legality of Use of Force (Serbia and Montenegro v. Belgium)* (Preliminary Objections of the Kingdom of Belgium) 5 July 2000, para 479.

has also not received explicit recognition by other tribunals.[41] However, some support for the doctrine can be found in opinions of individual ICJ Judges.[42]

Having dismissed the doctrine qua objection to admissibility in its 2019 Judgment on preliminary objections,[43] the Court further examined whether the clean hands doctrine qualifies as a defense on the merits. It recalled that it had never held that the doctrine was part of customary international law or a general principle of law, while stressing that it must be treated 'with the utmost caution'.[44] The Court further observed that one of the conditions acknowledged by the United States itself, was that, for the doctrine to apply, there must be "*a nexus between the wrong or misconduct and the claims being made by the applicant State*".[45] This condition was not fulfilled, as the United States had not argued that Iran, through its alleged conduct, had violated the very Treaty upon which its Application was based. In the end, by dismissing this defense on the merits, the Court contributes to the doctrine's overall lack of success in international litigation.

The second defense claimed that Iran committed an abuse of rights, *inter alia* by invoking the 1955 Treaty for the sole purpose of circumventing its obligation to make reparation to US victims of Iranian-sponsored terrorist attacks. The Court disagreed, stating that the United States failed to demonstrate that Iran wanted to exercise rights under the Treaty of Amity for purposes other than those for which the rights were established and that in doing so it was harming the United States.[46]

In respect to the third defense, the United States requested the Court, on the basis of Article XX(1)(c) and (d) of the Treaty of Amity, to consider Iran's claims relating to EO 13599 as falling outside its jurisdiction.[47] Article XX(1)(c) and (d) entail that the Treaty is not applicable to measures that regulate the production of or traffic in arms and measures necessary to protect a State Party's essential security interests. The Court disagreed with the United States' claims that the Executive Order – which sought to freeze the assets of the Iranian government and Iranian financial institutions – fell under any of these provisions. Concerning Article XX(1)(c), the Court found that it only applied to measures by which a State sought to regulate its own production of or traffic in arms, or the export of arms to, or import of arms from, the other party. By contrast, measures which only had an indirect effect on the production of and the traffic in arms by the other party did not come within its purview.[48] Additionally, the United States failed to demonstrate that EO 13599 was a measure necessary to protect its essential security interests in line with Article XX(1)(d).[49]

Citing prior case-law on similar 'security exceptions', the Court recalled that, even if such clauses grant States a wide discretion, the measures undertaken must be 'necessary' for the purpose of protecting the essential security interest at stake, and that such necessity is subject to judicial review.[50]

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[41] See e.g., *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (Final Award) PCA Case No. 2005-03/AA226, 18 July 2014, para 1358-1363; *Guyana v. Suriname* (Award) PCA Case No. 2004-04, 17 September 2007, para 418.

[42] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* (Judgment) [2002] ICJ Rep 3 (Dissenting opinion of Judge Van den Wyngaert), para 35; *Militarv and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment) [1986] ICJ Rep 14 (Dissenting opinion of Judge Schwebel), para 268-272.

[43] Certain Iranian Assets (Preliminary Objections), para 124.

[44] Certain Iranian Assets, para 81.

[45] *Ibid*., para 82.

[46] *Ibid*., para 93. Like the US argument based on the 'unclean hands' doctrine, the 'abuse of rights' plea had been dismissed as an objection to admissibility in the 2019 judgment. This did not, however, prevent the same argument from being invoked at the merits stage. Certain Iranian Assets, para. 88.

[47] Certain Iranian Assets, para 95.

[48] *Ibid*., para 102.

[49] *Ibid*., para 108.

[50] See e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Judgment) [1986] ICJ Rep 14, para 282.; *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection) [1996] ICJ Rep 803 ('Oil Platforms (Preliminary Objection)'), para 43; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular*

According to the Court, the United States did not meet the burden of proof as it had failed to convincingly demonstrate that EO 13599 constituted a measure necessary to protect its essential security interests. Interestingly, in dismissing the US argument, the Court observes that the reasons set out by EO 13599 itself only focus on the risk of money-laundering and related financial issues[51], but do not mention security considerations.[52] This appears to suggest that the way in which legislative or regulatory instruments are justified at the time of their adoption (for instance in preambular language) may impact the possibility of successfully invoking relevant security exceptions at a later stage, and that security reasons cannot be invoked *post facto* to justify legislation inspired by other motivations. The Court's approach was nonetheless criticized by Judge ad hoc Barkett who regretted that the Court had assessed the Executive Order as a stand-alone measure without considering the preceding measures to which it referred and of which it was an extension.[53]

5 Alleged violations of the Treaty of Amity

After examining the abovementioned matters, the Court turned to Iran's six remaining claims on alleged violations by the United States of its obligations under the Treaty of Amity. The Court ruled three times in favor of Iran, although the votes were split each time, and dismissed Iran's remaining claims.

5.1 The Court's assessment of "unreasonable" measures

In its first claim, Iran contended that the legislative, executive and judicial measures by the United States violated Articles III(1) and IV(1) of the Treaty of Amity.

Article III(1) of the Treaty determines that companies established in accordance with the relevant laws and regulations of either Party shall have their juridical status recognized within the territories of the other Party. On the basis of its 2019 judgment, the Court understood "juridical status" as referring to the companies' own legal personality.[54] Article IV(1) of the Treaty further provides that each Party shall accord fair and equitable treatment ('FET') to the nationals and companies of the other Party, and shall refrain from applying unreasonable and discriminatory measures that would hinder their legally acquired rights and interests. If some scholars and commentators held high hopes for the ICJ to shed greater light on the content of the controversial FET standard, these were quickly dispelled.[55] In particular, noting that Article IV(1) did not refer to the customary standard of treatment, the Court saw no need to explore the latter's substantive content.[56] Both parties and the Court agreed that fair and equitable treatment includes protection against denial of justice, but the Court found no denial of justice as

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Rights (Islamic Republic of Iran v. United States of America) (Provisional Measures, Order of 3 October 2018) [2018] ICJ Rep 623, para 37.

[51] The introduction of the Executive Order refers to "the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties, the deficiencies in Iran's antimoney laundering regime and the weaknesses in its implementation, and the continuing and unacceptable risk posed to the international financial system by Iran's activities". See EO 13599, 77 Federal Register 6659 (5 February 2012) < https://www.govinfo.gov/content/pkg/DCPD-201200083/pdf/DCPD-201200083.pdf>.

[52] Certain Iranian Assets, para 108.

[53] Certain Iranian Assets (Separate Opinion, partly concurring and partly dissenting of Judge *ad hoc* Barkett), para 18-21.

[54] Certain Iranian Assets, para 136.

[55] In this sense: J. Ostranský, 'The ICJ decides on the content of international protection standards: a lost opportunity?', IISD, 1 July 2023, available at https://www.iisd.org/itn/en/2023/07/01/the-icj-decides-on-the-content-of-international-protection-standards-a-lost-opportunity: "It could be safely said that the court has not brought much clarity on the topic. Perhaps aware of the potential impact of its decision beyond this case, the court adopted a highly restrained approach to the question, effectively all but sidelining the issue."

[56] Certain Iranian Assets, para 141.

the rights of Iranian companies to appear before United States courts had not been curtailed.[57] In the remainder, the Court focused on the provision's prohibition against "unreasonable" measures.

The Court established three cumulative conditions for a measure *not* to be unreasonable within the meaning of the Treaty of Amity. In particular, a measure (i) ought to pursue a legitimate purpose, (ii) there should be an appropriate relationship between the purpose pursued and the measure adopted, and (iii) its adverse impact should not be manifestly excessive in relation to the purpose pursued.[58] *In casu*, the Court confirmed that the aim of providing compensation to victims of terrorist acts can constitute a legitimate public purpose.[59] In addition, *"[t]he 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*."[60]

However, on the third condition, the Court observed that Section 201(a) of TRIA, Section 1610(g)(1) of the FSIA and EO 13599 employ very broad terms,[61] capable of encompassing any legal entity regardless of Iran's type or degree of control over them.[62] The Court found that these measures unjustifiably disregarded the legal personality of a wide range of Iranian companies, such as the Iranian Telecommunication Infrastructure Company or the Islamic Republic of Iran Shipping Group, with regard to judgments made in cases where those companies were unable to participate in the proceedings and regarding facts "in which those companies do not appear to have been involved".[63] Thus, the legislative and judicial measures were manifestly excessive in relation to the purpose pursued. In light hereof, the Court agreed with Iran's claims that the United States violated Article IV(1) of the Treaty of Amity due to the unreasonable nature of its measures and, by the same token found that they also violated the obligation to recognize the juridical status of Iranian companies under Article III(1) of the Treaty of Amity.[64] Having so held, the Court found it unnecessary to examine whether the measures were also discriminatory.

5.2 Expropriation and 'constant protection and security'

In its third claim, Iran argued that the measures adopted by the United States that block, seize, and dispose of the property of Iranian companies were contrary to Article IV(2) of the Treaty of Amity.[65] Article IV(2) of the Treaty ensures constant protection and security for the property of nationals and companies of both State Parties within each other's territory, and requires that property can only be taken if it serves a public purpose and that, in such cases, compensation must be paid.

Iran substantiated this finding by noting that the property was taken without compensation and transferred to plaintiffs who held default liability judgments against Iran. According to Iran, this amounted to unlawful expropriation and breached the obligation to accord the most constant protection and security.[66] In response, the United States invoked the police powers doctrine to justify its measures.[67] This doctrine provides that when States adopt bona fide non-discriminatory regulations in accordance with due process and in the public interest, such

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[57] Certain Iranian Assets, para 142, 143.
[58] *Ibid*., para 147-149.
[59] *Ibid*., para 147.
[60] *Ibid*., para 148.
[61] Section 201(a) of the TRIA encompasses "the blocked assets of any agency or instrumentality". Similarly, Section 1610(g)(1) of the FSIA denotes "the property of an agency or instrumentality" and explicitly includes "property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity". EO 13599 refers to "[a]ll property and interests in property of any Iranian financial institution".
[62] Certain Iranian Assets, para 150.
[63] *Ibid*., para 155.
[64] *Ibid*., para 159. Note: while twelve judges agreed with the Court's finding that the US infringed Article IV(1) of the Treaty, its finding of a parallel breach of Article III(1) was supported by eight votes to seven only.
[65] Certain Iranian Assets, para 170.
[66] *Ibid*.
[67] *Ibid*., para 176.

regulations will not constitute expropriation.[68] The doctrine has been confirmed by tribunals[69], legislation[70] and legal commentators[71].
The Court considered that Article IV(2) of the Treaty of Amity sets out two separate rules: (i) constant protection and security to property and interests in property, and (ii) protection against unlawful expropriation.[72] The Court structured its analysis by first addressing the second prong before tackling the first.

With regards to expropriation, the Court found that a judicial decision ordering the attachment and execution of property or interests in property does not automatically constitute expropriation of that property.[73] For the decision to be considered a compensable expropriation, it must be accompanied by a specific element of illegality which can result from a denial of justice or when a judicial body applies legislative or executive measures that violate international law, causing the deprivation of property.

The Court observed that both parties disagreed on the application of the police powers doctrine on Article IV(2) of the Treaty given that the Article does not refer to it.[74] It nonetheless confirmed that "*[i]t 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 (….).*" At the same time, while embracing the police powers doctrine, the Court insisted that "*[g]overnmental powers … are not unlimited*",[75] and that they are in particular subject to a requirement of reasonableness.[76]

Since the Court already judged that both Section 201(a) of the TRIA and Section 1610(g)(1) of the FSIA and their application by United States courts constituted unreasonable measures (see *supra*), it similarly held that the measures did not constitute a lawful exercise of regulatory powers and amounted to expropriation without compensation of the property and interest in property of Iranian companies, in violation of Article IV(2) of the Treaty of Amity.[77] Conversely, with respect to EO 13599, the Court did not establish such violation as Iran failed to identify property or interests in property of Iranian companies specially affected by the Executive Order, and because, in any event, the measure mostly concerned blocking Bank Markazi's assets, which were beyond the Treaty's scope (and thus outside the Court's jurisdiction).[78]

No further light was shed on the application of the police powers doctrine. The Court seems to be satisfied to apply the line of reasoning under Article IV(1) on unreasonable measures to conclude by extension that the obligation against unlawful expropriation has also been breached. It does not elaborate further on the application of the doctrine or whether the doctrine requires a test of proportionality.[79]

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[68] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012), 624.
[69] See *Philip Morris v. Uruguay* (Award) ICSID Case No. ARB/10/7, 8 July 2016, para 287-307; *Saluka Investments B.V. v. The Czech Republic* (Partial award) UNCITRAL, 17 March 2006, para 255, 262;
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States (Award) ICSID Case No. ARB (AF)/00/2, 29 May 2003, para 199.
[70] See Restatement (Third) of Foreign Relations of the United States para 712, Comment (g) (1987); Article 10(5) Harvard Draft Convention on the International Responsibility of States for Injury to Aliens.
[71] See Jeswald W. Salacuse, *The Law of Investment Treaties* (OUP 2021), 73; Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (OUP 2010), 448; OECD, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law', OECD Working Papers on International Investment, 2004/04, OECD Publishing, 18.
[72] Certain Iranian Assets, para 177.
[73] *Ibid*., para 184.
[74] *Ibid*., para 185.
[75] *Ibid.*
[76] *Ibid*., para 186.
[77] *Ibid*., para 186-7.
[78] *Ibid*., para 188.
[79] In its argumentation, Iran contended that the doctrine necessitates a proportionality test. The United States considered otherwise. See Certain Iranian Assets, para 173, 176.

Judges Charlesworth, Barkett, Sebutinde and Bhandari all expressed strong reservations about the Court's approach, having regard in particular to the broad construction of the notion of judicial expropriation, the questionable reliance on the reasonableness test borrowed from Article IV(1), and the sparse reasoning of the Court. Thus, in their respective opinions, Judges Charlesworth and Barkett are unconvinced that the standard of unreasonableness could be used to determine a violation of Article IV(2) of the Treaty as that norm may require a higher threshold of violation.[80] Additionally, Judges Sebutinde and Barkett took the view that the challenged legislative and executive measures did amount to a bona fide, non-discriminatory exercise of the United States police power aimed at achieving legitimate regulatory purposes.[81] And according to Judge Bhandari, the Court's approach departed from the prevailing understanding among international tribunals according to which, for a judicial decision to constitute an expropriation, "an element of international unlawfulness must taint the judicial decision itself".[82] For similar reasons, one commentator has noted how the Court's treatment of judicial expropriation is "probably the most disappointing element" of the judgment.[83]

Next, with regard to Iran's claims related to the obligation to afford "constant protection and security", Iran argued that the standard of protection included physical and legal protection.[84] The standard has, however, been subject to diverse interpretations by arbitral tribunals. A considerable number of tribunals adopt a more restrictive approach, limiting the standard to physical protection only.[85] On the other hand, several other tribunals are in favor of extending the standard of full protection and security ('FPS') to encompass *legal* protection as well.[86] In its judgment, the Court unequivocally sides with the narrow approach, and expressly limits the standard to the protection from physical harm.[87] The Court further confirms that States must exercise due diligence in providing protection from physical harm,[88] which is in line with arbitral awards[89] and legal commentary[90]. In excluding legal (as opposed to physical) protection from the scope of the FPS standard, the Court stresses that there would be significant overlap between the FPS standard and the FET principle if the former were interpreted to include legal protection.[91] In so doing, the Court provides helpful clarification and aligns itself with other arbitration tribunals that have drawn attention to such unwarranted overlap.[92]

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[80] Certain Iranian Assets (Separate Opinion of Judge Charlesworth), para 3-4; Certain Iranian Assets (Separate Opinion, partly concurring and partly dissenting of Judge *ad hoc* Barkett), para 40.

[81] Certain Iranian Assets (Dissenting Opinion of Judge Sebutinde), para 30; Certain Iranian Assets (Separate Opinion, partly concurring and partly dissenting of Judge *ad hoc* Barkett), para 41.

[82] Certain Iranian Assets (Declaration of Judge Bhandari), para 5 et seq.

[83] Ostranský, loc. cit., supra n. 55.

[84] Certain Iranian Assets, para 171, 191.

[85] See e.g., *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (Award) ICSID Case No. ARB(AF)/11/2, 4 April 2016, para 632; *AWG Group Ltd. v. The Argentine Republic* (Decision on liability) UNCITRAL, 30 July 2010, para 179; *Saluka Investments B.V. v. The Czech Republic* (Partial award) UNCITRAL, 17 March 2006, para 484.

[86] See e.g., *National Grid plc v. The Argentine Republic* (Award) UNCITRAL, 3 November 2008, para 189; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (Award) ICSID Case No. ARB/97/3, 20 August 2007, para 7.4.15; *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic* (Partial award) UNCITRAL, 13 September 2001, para 613.

[87] Certain Iranian Assets, para 190.

[88] *Ibid.*

[89] See *El Paso Energy International Company v. The Argentine Republic* (Award) ICSID Case No. ARB/03/15, 31 October 2011, para 422; *Saluka Investments B.V. v. The Czech Republic* (Partial award) UNCITRAL, 17 March 2006, para 484.

[90] See Nartnirun Junngam, 'The Full Protection and Security Standard in International Investment Law: What and Who is Investment Fully[?] Protected and Secured From?' [2018] 7(1) American University Business Law Review 52; Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995), 61.

[91] Certain Iranian Assets, para 190. It is worth noting, by contrast, that the Court did not deem problematic the significant overlap between Articles IV(1) and IV(2) resulting from of its application of the reasonableness requirement to the issue of judicial expropriation (see above). In a similar sense: Ostranský, loc. cit., supra n. 75.

[92] *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (Award) ICSID Case No. ARB(AF)/11/2, 4 April 2016, para 634; *Spyridon Roussalis v. Romania* (Award) ICSID Case No. ARB/06/1, 7 December 2011, para 321; *AWG Group Ltd. v. The Argentine Republic* (Decision on liability) UNCITRAL, 30 July 2010, para 174; *Sempra Energy International v. The Argentine Republic* (Award) ICSID Case No. ARB/02/16, 28 September 2007, para. 323.

As Iran had not accused the US of failing to protect the property of Iranian companies from *physical* harm, the Court could not establish a violation of Article IV(2) of the Treaty with respect to the obligation of constant protection and security.[93]

5.3 Remaining claims of violations and the remedies

Of the remaining of Iran's claims, three were rejected by the Court. Firstly, Iran argued that Iranian companies were deprived of meaningful access to United States courts contrary to Article III(2) of the Treaty of Amity.[94] The Court disagreed and considered that the rights of Iranian companies to appear before United States courts and make submissions had not been limited.[95] The fact that the Iranian companies' arguments had been unsuccessful was immaterial, as this related to their substantive rights, rather than the access to court *an sich*.

Secondly, Iran contended that Article V(1) of the Treaty was violated, asserting that Iranian companies were deprived of their right to dispose of their property.[96] In this respect, the Court limited the scope of Article V(1) so that expropriation was excluded.[97] Since the Court previously determined that the measures implemented by the United States constituted expropriation (see *supra*), there could be no violation of the provision.

The Court further rejected Iran's claim that the US had breached Article VII(1) of the Treaty of Amity, which prohibits the two States Parties from applying "restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party", save for specific exceptions. In a rather cursory manner, the Court rejected the broad interpretation of the clause put forth by Iran, as this would give the provision the character of a general prohibition on any restriction on the movement of capital.[98] Instead, siding with the US, the Court emphasized that the provision was concerned solely with "exchange restrictions", without, however, further clarifying the latter concept.[99] As Iran's claims were deemed not to be related to an exchange restriction, the Court dismissed them.

Iran's last claim was more successful. Iran argued that the measures by the United States amounted to a breach of Article X(1) of the Treaty of Amity which protects freedom of commerce and navigation. In contrast with the narrow interpretation of Article VII(1), the Court construes the clause in a very broad fashion. Thus, refusing the US plea to revisit its prior interpretation in the 1996 *Oil Platforms* case, the Court recalls how the latter judgment[100] already established that the word "commerce" is not exclusively connected with trade in goods.[101] Building on the foregoing, the Court asserts that activities entirely conducted in the financial sector also constitute "commerce" protected under Article X(1), and that financial transactions through intermediaries in the respective countries are within its scope.[102] What is more, in contrast to the FPS standard, the protection of commerce is not limited to protection from physical interference, but also encompasses legal protection.[103]
In casu, the Court concluded that the blocking of property and interest in property of Iran and Iranian financial institutions pursuant to EO 13599 constituted an impediment to commerce.[104] Likewise, the attachment and execution of assets of Iranian companies in which the State holds interest under Section 1610(g)(1) of the FSIA interfered with

[93] Certain Iranian Assets, para 191.
[94] *Ibid*., para 161-162.
[95] *Ibid*., para 167.
[96] *Ibid*., para 194.
[97] *Ibid*., para 199.
[98] *Ibid*., para 203.
[99] *Ibid*., para 207.
[100] Oil Platforms (Preliminary Objection), para 45, 49.
[101] Certain Iranian Assets, para. 214 et seq.
[102] *Ibid*., para 215-6.
[103] *Ibid*., para 219.
[104] *Ibid*., para 220.

commerce, as did the judicial application of the provision and Section 201(a) of the TRIA.[105] The Court thus concluded that the US violated Article X(1) of the Treaty of Amity.

Due to the termination of the Treaty of Amity in 2018, the Court could not order the cessation of the United States' acts.[106] Instead, the Court ordered the United States to compensate Iran for the aforementioned treaty violations.[107] Absent agreement between the parties on the amount of compensation within two years, either State can request the Court to determine the appropriate amount.[108]

6 Important take-aways from the Court's judgment, specifically in the sanctions domain

The judgment on the merits in the *Certain Iranian Assets* case contains a variety of findings of relevance for different fields of international law, including for international investment law, but also in the broader sanctions domain.

As a preliminary remark, it is worth recalling what the Court does *not* pronounce upon. In particular, while the underlying dispute between Iran and the US essentially revolves around the permissibility of the US 'terrorism exception' to State immunity (from jurisdiction and from execution), this crucial issue remained beyond the scope of the Court's jurisdiction – as the Court rightly asserted in its 2019 judgment on preliminary objections. It is interesting to note, however, that the Court may shortly have the opportunity to directly examine the legality of the 'terrorism exception' in another case brought by Iran, this time against Canada. Indeed, two days after having lodged an extremely narrow declaration accepting the Court's compulsory jurisdiction,[109] Iran on 27 June 2023 instituted proceedings against Canada – ostensibly the only country aside from the United States to have introduced a similar 'terrorism exception' – over measures broadly comparable to those forming the subject of the *Certain Iranian Assets* case.[110] Assuming the Court would find the application to be admissible, Canada will face an uphill battle in defending the permissibility of its 'terrorism exception' under customary law on State immunity.[111] This is all the more so as the ICJ previously confirmed that State immunity also applies to grave breaches of international law, including violations of peremptory norms,[112] and the US and Canada hitherto remain the sole countries to have embraced the exception, which has conversely been denounced by the members of the Non-Aligned Movement.[113] For the sake of completeness, it is noted that Canada struck back against Iran's surprise application. Indeed, mere days later, together with Sweden, Ukraine and the UK, it filed proceedings[114] against Iran over the downing of a civilian airliner by the Iranian Republic Guard in January 2020 – leading some to speculate whether this might incentivize Iran to settle both cases outside the courtroom.[115]

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[105] *Ibid.*, para 221.
[106] *Ibid.*, para 229.
[107] *Ibid.*, para 231.
[108] *Ibid.*
[109] Available at www.icj-cij.org/declarations/ir.
[110] *Alleged Violations of State Immunities (Islamic Republic of Iran v. Canada)* (Application Instituting Proceedings), 27 June 2023; V. Von Stosch and F. Herbert, 'Jurisdictional Immunities, all over Again?', *EJIL:Talk!*, 7 July 2023, available at https://www.ejiltalk.org/jurisdictional-immunities-all-over-again.
[111] See further on the 'terrorism exception': D. Stewart, 'Immunity and terrorism', in T. Ruys and N. Angelet (eds.), *The Cambridge Handbook of Immunities and International Law* (CUP 2019), pp. 651-669; V. Grandaubert, 'Is there a place for sovereign immunity in the fight against terrorism? The US Supreme Court says 'no' in Bank Markazi v. Peterson', *EJIL:Talk!*, 19 May 2016, available at https://www.ejiltalk.org/is-there-a-place-for-sovereign-immunity-in-the-fight-against-terrorism-the-us-supreme-court-says-no-in-bank-markazi-v-peterson.
[112] *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)* (Judgment) [2012] ICJ Rep 99, para 84.
[113] Letter dated 5 May 2016 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc. A/70/861, S/2016/420.
[114] *Aerial Incident of 8 January 2020 (Canada, Sweden, Ukraine and United Kingdom v. Islamic Republic of Iran)* (Joint Application Instituting Proceedings), 4 July 2023.
[115] Von Stosch and Herbert, loc. cit., *supra* n. 110.

The Court's judgment on the merits in the *Certain Iranian Assets* case was eagerly awaited by scholars and experts working in the field of international investment law.[116] As mentioned before, those who had hoped for ICJ clarification on the substance of the FET principle came home empty-handed. In turn, the Court did clarify that the FPS standard is limited to physical protection only (to the exclusion of legal protection), while adopting a broad reading of the notion of judicial expropriation, one heavily contested by several individual judges.

Beyond the realm of international investment law, it is interesting to explore what the Court's findings hold in store for the broader practice of unilateral sanctions, which have been booming in recent years. In particular, the Court's judgment may offer a partial sneak preview as to what to expect in the pending *1955 Treaty of Amity* case between Iran and the US. It may also be of particular significance in the context of the far-reaching sanctions adopted vis-à-vis Russia in the wake of Russia's invasion of Ukraine.

First, the Court's narrow interpretation of the notion of 'company' as excluding the Iranian central bank is worth singling out. Recent years have seen various States impose financial sanctions and other restrictions on the assets of central banks of foreign countries located within their jurisdiction. Such measures have been taken against the central banks of e.g. Afghanistan, Venezuela and Iran, but also, most prominently, against the Russian Central Bank. Thus, the bulk of the assets immobilized pursuant to the EU's consecutive packages of sanctions against Russia concern exactly assets of the Russian Central Bank, in a dazzling amount of ca. EUR 200 billion.[117] What is more, the EU has been exploring the possibility of confiscating the assets concerned (or, in an alternative scenario, at least the revenues generated by investing those assets) with a view to post-war reconstruction in Ukraine.[118] Against this background, the *Certain Iranian Assets* judgment bodes well for sanctioning States as it would seem to reduce the leeway for targeted States, such as Russia, to challenge such measures by leveraging dispute settlement clauses in similar bilateral treaties, such as the EU-Russia Partnership Agreement,[119] or bilateral investment treaties between the Russian Federation and various EU Member States.[120]

Furthermore, while the ICJ went to great lengths to assert that its assessment as to whether Bank Markazi was conducting activities of a commercial nature was unrelated to the question of immunity of central banks under customary international law, some spill-over of the Court's reasoning into the latter domain cannot be excluded altogether. According to Wuerth, State approaches to immunity from execution for central bank assets can be divided into three categories, viz. those countries granting near absolute immunity (similar to Article 21 of the 2004 UN Convention on State immunity), those granting broad immunity based on a 'sovereign purpose' or 'central banking function' test, and, lastly (and most narrowly), those adopting a 'commercial activity' approach.[121] What is more, with regard to the latter approach, Wuerth observes how the 'nature test' has on several occasions been applied in enforcement actions against Central Banks.[122] At the same time, she notes how the general trend in judicial practice is one "toward greater protection of central banks assets",[123] and how "*recent cases correctly reason that the distinction should not be between commercial and non-commercial uses, but instead between those assets used for*

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[116] See Ostranský, loc. cit., *supra* n. 55.

[117] S. Bodoni and A. Nardelli, 'EU blocks more than €200 billion in Russian Central Bank Assets', *Bloomberg*, 25 May 2023; Anna Caprile and Angelos Delivorias, 'EU Sanctions on Russia: Overview, impact, challenges' (European Parliamentary Research Service, 2023), <https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739366/EPRS_BRI(2023)739366_EN.pdf>.

[118] See e.g., Commission Press Release, 'Ukraine: Commission presents options to make sure that Russia pays for its crimes', 30 November 2022, available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311>.

[119] Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] *OJ* L 327/3 ("Partnership Agreement"). See in particular the definition of a 'company' in Article 30(h).

[120] For a useful overview see the UNCTAD investment policy hub search engine https://investmentpolicy.unctad.org. It goes without saying that the scope and substantive protection may differ from one treaty to another.

[121] I. Wuerth, 'Immunity from execution of central bank assets', in Ruys and Angelet, *op. cit.*, *supra* n. 111, pp. 266-284 at 266.

[122] *Ibid.*, at 277.

[123] *Ibid.*, at 266.

central banking purposes and those that are not".[124] Against this background, the Court's insistence that the transactions of a central bank "*must be placed in [their] context, taking particular account of any links that [they] may have with the exercise of a sovereign function*",[125] may further steer domestic courts away from a pure 'nature' test to examining the 'commercial activities' of central banks (in those countries that adopt the third, and most narrow, approach to the immunity of central bank assets). Along the same lines, the Court's – admittedly confused – reasoning may indirectly provide further impetus to the trend of granting a more far-reaching immunity to central bank assets, also as compared to other State property. Conversely, it may – again indirectly – further complicate plans to confiscate assets of the Russian central bank on account of their supposedly commercial character.

Second, the Court's finding that the blocking of Iranian assets pursuant to EO 13.599 constituted an 'unreasonable' measure – both for purposes of Art. IV(1) and Art. IV(2)[126] of the Treaty of Amity – may have broader ramifications for the compatibility of unilateral financial sanctions (including those adopted at the EU level) with applicable FCN treaties and bilateral investment treaties containing comparable FET and expropriation clauses. In particular, the Court objected to the taking of measures against Iranian companies with separate legal personality over facts in which they did "not appear to have been involved".[127] Even if they pursued a legitimate public purpose, these measures could not be justified as a proper exercise of the State's "police powers" and were instead deemed "manifestly excessive". The implication appears to be that far-reaching financial sanctions, such as those at issue in the pending *1955 Treaty of Amity* case[128] appear *prima facie* wrongful. The Court's finding also casts doubt over the compatibility with similar treaty clauses (or with customary standards on the treatment of aliens) of, for example, the expanding listing criteria featuring in the EU sanctions packages against Russia. By way of illustration, Article 3 of Council Regulation 269/2014[129] initially provided primarily for the imposition of financial sanctions, among others, on persons responsible policies that undermine the sovereignty of Ukraine (Article 3(a)). The circle of primary sanctions targets has gradually been widened, however, to equally include natural or legal persons "benefitting from the Government of the Russian Federation" (Article 3(e)) or leading businesspersons and their immediate family members "involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation" (Article 3(g)). The question may be posed whether the latter groups of persons are sufficiently 'involved' in Russia's aggression and war effort, for these measures to pass the 'reasonableness' test. *A fortiori*, the imposition of 'secondary' asset freezes against the banks or companies of other countries may be difficult to square with the police powers doctrine.[130]

Furthermore, the *Certain Iranian Assets* judgment leaves little doubt that, where States have concluded agreements expressly protecting the "freedom of commerce" between them, such treaty obligations are *prima facie* breached,

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[124] I. Wuerth, 'Central bank immunity, sanctions, and sovereign wealth funds', (2023 - forthcoming) *George Washington Un. L. Rev.*, pre-publication version available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4363261, at 2.
[125] Certain Iranian Assets, para. 51.
[126] *Ibid.*, para. 188 of the judgment renders implicit support to the view that a (lengthy) asset freeze – as opposed to actual confiscation – may of itself qualify as a form of indirect expropriation of property without compensation (in a similar sense, see e.g.: Collins, *An introduction to international investment law*, 292; P.-E. Dupont, 'The arbitration of disputes related to foreign investments affected by unilateral sanctions', at 203; T. Ruys and C. Ryngaert, 'Secondary sanctions: a weapon out of control? The international legality of, and European responses to, US secondary sanctions', (2020) *British Yb. I.L.*, pp. 1-116, at 53-4. It is indeed noteworthy that the ICJ found that EO 13.599 did not entail a breach of Article IV(2) of the Treaty (dealing with expropriation) because Iran had failed to identify the property of Iranian companies specifically affected this instrument (other than Bank Markazi), without suggesting that a 'mere' asset freeze would, because of its supposedly temporary nature, be incapable of qualifying as a form of expropriation.
[127] Certain Iranian Assets, para 155-6.
[128] The Iranian application in the *1955 Treaty of Amity* case refers to sanctions against almost 500 entities, including the Central Bank of Iran, the majority of Iranian Banks, Iranian airlines, Iranian oil companies, etc. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* (Application Instituting Proceedings), 16 July 2018, para 28.
[129] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, *OJ* L-78/6, 17 March 2014 (as amended).
[130] Ruys and Ryngaert, *loc. cit.*, *supra* n. 126, at 54.

not only where one State Party adopts unilateral *trade* sanctions, taking the form of import or export restrictions, but also when it imposes sanctions of a purely *financial* nature, such as asset freezes. Conversely, the Court's narrow reading of Article VII(1) of the 1955 Treaty of Amity suggests that financial sanctions will not normally contravene treaty clauses, often found in FCN treaties, that prohibit the imposition of 'exchange restrictions.[131] Along the same lines, the Court's *dictum* could be read as indicating that asset freezes remain beyond the scope of international monetary law, and specifically beyond the reach of Article VIII(2)(a) of the International Monetary Fund's (IMF) Articles of Agreement, according to which "*no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions*."[132] At the same time, the Court's reasoning on this point is regrettably sparse and incomplete. In particular, the Court appears to have overlooked relevant practice at the IMF level, which could shed helpful light on the meaning of Article VII(1) of the Treaty of Amity and comparable clauses in many other FCN treaties. Such practice includes a 1952 decision of the IMF Executive Board which introduced a specific procedure for granting IMF approval for restrictions imposed on security grounds – a decision which was inspired nota bene by the imposition of economic sanctions against the People's Republic of China and North Korea.[133] In particular, the decision provides that when such restrictions are notified to the IMF and the Fund does not formally object, the restrictions are deemed to be tacitly approved under Article VIII(2)(a) of the IMF Articles of Agreement. What is more, the IMF's Annual Reports on Exchange Arrangements and Exchange Restrictions (AREAR)[134] make clear that States have notified a wide range of restrictions to the IMF pursuant to the 1952 Decision, including numerous financial sanctions against governments, entities and individuals. One of the many measures notified by the United States includes specifically EO 13.599 blocking property of the Government of Iran and Iranian Financial Institutions.[135] Put differently, the ICJ's approach appears difficult to reconcile with actual State practice, which seems to regard financial sanctions as payment restrictions subject to the IMF's tacit approval procedure. Along the same lines, the ICJ may have bypassed an opportunity to clarify the exception in Article VII(1) of the 1955 Treaty of Amity, according to which restrictions on payments are exceptionally justified if they are "specifically approved" by the IMF. One question that remains unresolved is whether a mere non-objected notification of a payment restriction to the IMF may or may not suffice for the notifying State to rely on the latter exception. The exact interplay between international monetary law and FCN clauses thus remains untested in judicial practice.[136]

In all, the *Certain Iranian Assets* judgment does offer useful pointers to understand the extent to which unilateral sanctions are prone to violate treaty obligations under applicable BITs and FCN treaties (depending of course on the exact language used in the treaty instrument concerned). One issue of timely relevance that is not addressed in the judgment is the extent to which such bilateral instruments can be invoked to contest so-called secondary sanctions, through which a State imposing sanctions (e.g., the US) seeks to restrict between the primary sanctions target (e.g., Iran) and third countries.[137] An answer to this question may well be forthcoming in the pending *1955 Treaty of Amity* case. Indeed, in the latter case, the United States has precisely argued that the vast majority of US sanctions that form the subject of the case are what it labels 'third country measures' – that is, measures addressed to third States and third-State nationals and companies. The US further claims that such measures are beyond the reach of the bilateral rights and obligations provided for in the FCN Treaty with Iran. In its 2021 judgment on preliminary objections, the ICJ asserted that measures of this type are not automatically excluded from the ambit of treaty. According to the Court:

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[131] See e.g. Article 10(2) of the US-Belgium FCN Treaty (Treaty of Friendship, Establishment and Navigation (adopted 21 February 1961, entered into force 3 October 1963) 480 UNTS 149).

[132] Articles of Agreement of the International Monetary Fund (signed 27 December 1945, entered into force 27 December 1945, as amended) 2 UNTS 39 (IMF Articles of Agreement), Article VIII(2)(a).

[133] IMF Executive Board, 'Payments Restrictions for Security Reasons: Fund Jurisdiction' (Decision No 144-(52/51), 14 August 1952). The Decision has a broad scope and 'applies to all restrictions on current payments and transfers, irrespective of their motivation and the circumstances in which they are imposed'. See further A Viterbo, 'Extraterritorial Sanctions and International Economic Law' in ECB, Building Bridges: Central Banking Law in an Interconnected World (ECB 2019) 157, at 164 et seq.; Ruys and Ryngaert, *loc. cit.*, *supra* n. 126, at 33-38.

[134] These reports can be consulted online at https://www.elibrary-areaer.imf.org/Pages/Home.aspx.

[135] *Ibid.* See e.g., the 'country report' for the United States for the year 2020 at https://www.elibrary-areaer.imf.org/Pages/Reports.aspx

[136] Ruys and Ryngaert, *loc. cit.*, *supra* n. 126, at 38.

[137] See further: *ibid.*

"[o]*nly through a detailed examination of each of the measures in question, of their reach and actual effects, can the Court determine whether they affect the performance of the United States' obligations arising out of the provisions of the Treaty of Amity invoked by Iran, taking account of the meaning and scope of those various provisions*."[138] Further clarification may come when the Court renders its judgment on the merits.

Lastly, even if unilateral sanctions may well contravene substantive obligations on the part of the sanctioning State under applicable bilateral treaties, it must be recalled that, like the 1955 Treaty of Amity, other FCN treaties and BITs generally contain a security exception that permits either State Party to adopt measures that 'are necessary', or 'which it considers necessary' for the protection of its essential security interests. Echoing earlier case-law, the *Certain Iranian Assets* judgment confirms that States' discretion in invoking such exceptions is not unfettered. As mentioned above, the Court appears to suggest that States must articulate the security interests which they seeks to protect at the time of adopting the measures concerned. Thus, the Court deemed it problematic that EO 13.599 did not make mention of security considerations. Admittedly, many sanctions instruments do not suffer the same defect, but effectively express the security concerns that inspire them. For example, the preamble of Executive Order 13.846, which is pivotal in the *1955 Treaty of Amity* case, explicitly references "the full range of threats posed by Iran", including WMD proliferation or support for terrorist groups.[139] It follows that, in practice, the more important question is whether sanctions can be said to be 'necessary' for the stated purpose. The necessity test will be easily met for sanctions that seek to prevent the export of military goods or proliferation-sensitive equipment. On the other side of the spectrum, restrictions on the export of humanitarian goods will not meet this bar. In its Order on Provisional Measures in the *1955 Treaty of Amity* case, the Court appears to go a step further by asserting that "*rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, cannot plausibly be considered to give rise to the invocation*" of the Treaty's security exception.[140] On this basis, in a unanimous ruling, the Court orders the US to remove any restrictions on the export to Iran of (i) medicines and medical devices; (ii) foodstuffs and agricultural commodities; and (iii) spare parts necessary for the safety of civil aviation. The Court's wholesale exclusion of restrictions on trade in agricultural commodities and spare parts for civil aviation is remarkable. Some tension exists, for instance, with the EU's sanctions against Russia. Thus, the European Commission has argued that export bans against Russia "can impact food items",[141] albeit that, on closer scrutiny, the relevant food items subject to export restrictions have hitherto remained limited to luxury goods, such as caviar and truffles.[142] Furthermore, the EU has also banned the export to Russia of goods and technology in the aviation industry. According to the Council of the EU, "*[t]his means that Russian airlines cannot buy any … spare parts … for their fleet and cannot perform the necessary repairs or technical inspections*".[143]

The question as to what type of restrictions meet the 'necessity' test is of crucial importance in light of contemporary State practice. For instance, in between the extremes of military goods and humanitarian equipment, how should one qualify restrictions on the trade in commodities that generate substantial revenues for the targeted State – and which, in the case of Russia, can be argued to fund and sustain its military campaign in Ukraine? Or what to make of the expansion of sanctions regimes to combat so-called sanctions evasion, such as the introduction at the EU level of a new listing criterion to impose financial sanctions on non-EU persons and entities that "significantly frustrate" the

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[138] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* (Preliminary Objections) [2021] ICJ Rep 9, para 81.

[139] Executive Order 13846, 83 Federal Register 38939 (6 August 2018) <https://www.govinfo.gov/content/pkg/DCPD-201800524/pdf/DCPD-201800524.pdf>.

[140] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* (Provisional Measures, Order of 3 October 2018) [2018] ICJ Rep 623, para 69.

[141] European Commission, 'Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014' (2023), Chapter D.1, Q 29, available at https://finance.ec.europa.eu/system/files/2023-07/faqs-sanctions-russia-consolidated_en_1.pdf.

[142] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, O.J. L 229, 31 July 2014 (as amended), Annex XVIII.

[143] See Council of the EU, 'EU sanctions against Russia explained', available at www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained ("over time the ban is likely to result in the grounding of a significant proportion of the Russian civil aviation fleet").

EU's sanctions against Russia?[144] Or, more generally, to what extent can 'secondary' sanctions that seek to curtail trade between the primary sanctions target and third States be 'necessary' to protect the essential security interests of the targeted State? These and related questions remain unanswered in the *Certain Iranian Assets* judgment. One might indeed regret that the Court did not provide further clarification on the necessity test, where it could arguably have chosen to do so. At the same time, the *Certain Iranian Assets* judgment is only a first shot across the bow when it comes to the interplay between unilateral sanctions and State obligations under international law. Fuller answers may be forthcoming when the 'sequel' procedure between the US and Iran finds its culmination in the Court's Great Hall of Justice.

[144] Council Regulation (EU) No 269/2014 (as amended), *loc. cit.*, *supra* n. 129.