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CASE STUDY OF CERTAIN IRANIAN ASSETS (IRAN V. USA)

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Statement of Purpose

This case study summarizes and analyzes the ongoing International Court of Justice case, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America*. The analysis includes a contextualization of the International Court of Justice's decision, as well as relevant considerations for Russia's war in Ukraine. This document is a corollary memo to the Policy Planning White Paper on Repurposing Frozen Russian Assets. The legal analysis outlined within this document served as the underlying basis for that White Paper, which can be found **here**.

Introduction

This document provides an analysis of the *Certain Iranian Assets* (*Islamic Republic of Iran v. United States of America*), a case before the International Court of Justice.[1] The first part of this document lays out the factual and legal background of the case. The second part of this document analyzes issues raised in the case and lessons that can be learned for Ukraine. The Annex to this memorandum is a summary of the facts and key takeaways from the memorandum.

Overview of Certain Iranian Assets

Certain Iranian Assets: Factual Background

On June 14, 2016, Iran filed an application to the International Court of Justice alleging that the United States violated the Treaty of Amity, Economic Relations and Consular Rights between Iran and United States of America of 1955[2] (the "Treaty of Amity") after the United States Supreme Court allowed seizure of assets of the Iranian Central Bank ("Bank Markazi").[3]

The actions leading to the case arose from a 1983 attack on a United States Marine Corps barracks in Beirut, Lebanon, resulting in the loss of 241 United States service members. The victims and their survivors sued Iran in United States courts, alleging that Iran provided material and financial support to Hezbollah, the terrorist organization that carried out the attack. While Iran and the United States

[1] The International Court of Justice is the principal judicial body of the United Nations. One of its roles is to settle, in accordance with international law legal disputes submitted to it by States. The International Court of Justice does this through judgments which have binding force and are without appeal for the parties concerned. The second role of the International Court of Justice is to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system.

[2] Treaty of Amity, Economic Relations and Consular Rights between Iran and United States of America of 1955 (hereinafter "Treaty of Amity"), Iran-United States, Aug. 15, 1955, 8 United StatesT. 899.

[3] *Certain Iranian Assets (Iran v. United States)* (hereinafter "*Certain Iranian Assets*"), Judgment, 2019 I.C.J. Rep. 7, para. 18 (Feb. 13).

signed the Treaty of Amity in 1955, the parties ceased diplomatic relations in 1980, following the Iranian revolution in early 1979 and the seizure of the United States Embassy in Tehran in 1979. In 1984, the United States designated Iran as a "State sponsor of terrorism."[4]

Peterson Litigation Preceding Certain Iranian Assets

Ordinarily, in the United States, claims against foreign States or their instrumentalities would be blocked by the Foreign Sovereign Immunities Act of 1976.[5] The United States approach is consistent with the "restrictive" theory of sovereign immunity approach, where foreign States are barred from being subject to lawsuits brought against the foreign States in domestic courts.[6]

However, in 1996, the United States Congress amended the Foreign Sovereign Immunities Act to allow civil claims against a foreign State classified as a "State sponsor of terrorism"—as Iran has been classified since 1984—for acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or provision of material support for such an act. Thus, the United States implemented an exception to the jurisdictional immunity of foreign States in domestic courts.[7]

Shortly thereafter, the *Peterson* litigation began in the District Court for the District of Columbia in 2001, when victims and survivors of the 1983 United States Marine Corps barracks bombing in Beirut brought suit against Iran for injuries and wrongful death stemming from the attack.[8] Other plaintiffs began to bring claims to United States courts for money damages against Iran and its instrumentalities related to Iran's alleged support of acts of terrorism. The claims were consolidated and tried together before the District Court for the District of Columbia.[9] Iran refused to appear in the case, citing the international law principle of State immunity, leading to the court entering a default judgment of nearly $2.7 billion for the plaintiffs.[10]

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[4] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §221(a), 110 Stat. 1214, 1241–42 (1996).

[5] *See* Section I.D.1 below for discussion of Foreign Sovereign Immunities Act.

[6] *See* PILPG Policy Planning: Repurposing Frozen Russian Assets: Analysis Under International Law, (Mar. 2023), *available at* https://www.publicinternationallawandpolicygroup.org/policy-planning-ukraine-sanctions-and-frozen-assets, at pp. 18-19 for discussion of restrictive approach to jurisdictional immunity.

[7] *See* PILPG Policy Planning: Repurposing Frozen Russian Assets: Analysis Under International Law, (Mar. 2023), *available at* https://www.publicinternationallawandpolicygroup.org/policy-planning-ukraine-sanctions-and-frozen-assets for discussion of general exceptions to jurisdictional immunity.

[8] *Peterson v. Islamic Republic of Iran*, 246 F. Supp. 2d 46 (D.D.C. 2003).

[9] *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007).

[10] *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007).

In order to expedite the execution of judgments under the Foreign Sovereign Immunities Act terrorism exception, the United States took several additional measures relating to Iranian assets in the United States, making the assets available for attachment and execution. In 2002, the United States Congress passed the Terrorism Risk Insurance Immunities Act, which permitted judgment creditors in a case brought under the Foreign Sovereign Immunities Act's terrorism exception to execute their judgments against any assets belonging to a "terrorist party" (including a State sponsor of terrorism) previously "blocked"[11] by the United States government. In 2008, the United States Congress further amended the Foreign Sovereign Immunities Act, extending the categories of assets available for execution to all property of any Iranian state-owned entity, regardless of whether the property had been previously blocked.

However, the plaintiffs initially had trouble finding a pool of Iranian state-owned assets large enough to satisfy the judgment. It was not until 2008, when the plaintiffs discovered large Iran-owned assets to satisfy the claims. Plaintiffs subpoenaed the Department of Treasury's Office of Foreign Asset Control for information regarding Iranian accounts in the United States. In 2010, the the Office of Foreign Asset Control identified an account containing approximately $1.75 billion in bond proceeds belonging to Bank Markazi held by Citibank in New York. When the judgment creditors learned of the account, they secured an order to freeze the account and execute the judgment against this account in the Southern District of New York under the Terrorism Risk Insurance Immunities Act.[12]

While the action was pending, in 2012 President Obama signed the Executive Order 13599, which blocked Iranian assets in the United States.[13] However, the availability of these assets for execution was controversial and contested.[14]

It was unclear whether Bank Markazi was itself a "terrorist party" under the Terrorism Risk Insurance Immunities Act. In 2012, Congress passed the Iran Threat Reduction and Syria Human Rights Act, a provision of which - "Section 8772"[15] - specifically made "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern

[11] See Section I.D.2 below for discussion on "blocked" property.

[12] *Peterson v. Islamic Republic of Iran*, No. 10 CIV. 4518 KBF, 2013 WL 1155576 (S.D.N.Y. Mar. 13, 2013).

[13] *See* Section I.D.2 below.

[14] *See* Ylli Dautaj, William Fox, "Jurisdictional Immunities and Certain Iranian Assets: Missed Opportunities for Defining Sovereign Immunity at the International Court of Justice," 53 Cornell Int'l L.J. 379, 416 (Fall, 2020).

[15] Codified at 22 United StatesC. § 8772.

District of New York" available to holders of terrorism judgments against Iran in *Peterson et al. v. Islamic Republic of Iran*.

The court granted the judgment creditors' the account to satisfy their judgments.[16]

Bank Markazi appealed to the Second Circuit, contending that Section 8772 violated the Treaty of Amity, the separation of powers, by purporting to instruct the judicial branch how to rule in a particular case, and the "takings clause"[17] of the Fifth Amendment. The Second Circuit rejected all of these arguments, finding that Section 8772 superseded the Treaty of Amity, that Section 8772 did not violate the separation of powers because it was a valid exercise of Congress's legislative authority to retroactively change the law applicable in a case, and that the district court's order was a valid execution of an uncontested judgment and not an unlawful taking.[18]

Iran appealed to the Supreme Court, which granted certiorari on the separation of powers issue.[19] On April 20, 2016, the Supreme Court affirmed the Second Circuit court's decision.[20] It upheld as constitutional the relevant enactment specifically abrogating the immunity from enforcement which would otherwise apply to specified assets and interests of Bank Markazi.[21] As others noted, "the Supreme Court approved Congress's efforts to make certain Iranian assets available to satisfy the judgments in cases brought against Iran for its role in specific instances of international terrorism."[22] In other words, Iran argued that the United States legislative and executive branches' actions dictated the outcome of the litigation and thus usurped the power. The ultimate question before the Supreme Court was not a question of the sovereign immunity of Iran, but a constitutional question of separation of powers. The Supreme Court held the Congress' actions to make Iranian assets available for execution constitutional,

[16] *Peterson v. Islamic Republic of Iran*, No. 10 CIV. 4518 KBF, 2013 WL 1155576 (S.D.N.Y. Mar. 13, 2013).

[17] For a discussion of the applicability of the takings clause to seizures of Russian state assets, see Scott R. Anderson and Chimène Keitner, The Legal Challenges Presented by Seizing Frozen Russian Assets, LAWFARE BLOG, (May 26, 2022) available at https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets.

[18] *Peterson v. Islamic Republic of Iran*, 758 F.3d 185 (2014).

[19] *Bank Markazi v. Peterson* 578 United States ___ (2016).

[20] *Bank Markazi v. Peterson* 578 United States ___ (2016).

[21] *Bank Markazi v. Peterson* 578 United States ___ (2016).

[22] "Article III-Separation of Powers-Foreign Affairs-Bank Markazi v. Peterson," 130 Harv. L. Rev. 307, 307 (2016).

justifying its holding based on United States foreign policy objectives and political concerns.[23]

On June 6, 2016, the United States District Court for the Southern District of New York authorized the execution of judgment against Bank Markazi's assets at Citibank (bond proceeds belonging to Bank Markazi held as United States dollars) to the judgment creditors and closed the proceedings.[24]

As a result, the assets and interests of Iran and its instrumentalities became subject to enforcement proceedings, including those held by Bank Markazi (not a party to the judgment on liability in respect of which enforcement is sought).

According to the Iranian memorial in *Certain Iranian Assets*, nearly $2 billion (USD) held by a central securities depository in the interest of Bank Markazi were seized and distributed after the Supreme Court's judgment was rendered in 2016.[25] In addition, Bank Melli Iran has had the proceeds of the sale of a building that it owned in New York seized, and the Telecommunication Infrastructure Company of Iran did not receive the monies it was to receive from United States operators.[26] Iran Air's transaction with Boeing, in which Iran Air committed billions of United States dollars to purchase new aircraft from Boeing, came under threat as claimants started to seek ways to attach Iranian assets involved in that deal with Boeing.[27]

Summary of Claims in Certain Iranian Assets

In *Certain Iranian Assets*, Iran requested the International Court of Justice to adjudge, order and declare that the United States violated the Treaty of Amity, *inter alia*, by failing to recognize the separate legal personality of Iranian companies, discriminatory treatment of such entities, expropriation of the property of such entities, and failure to accord such entities access to United States courts by abrogating their immunity.[28] Iran requested that no branch of the United States

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[23] Dautaj & Fox, *supra* note 14, 417, referring to *Bank Markazi*, 136 S. Ct. at 1328 ("In pursuit of foreign policy objectives, the political branches have regulated specific foreign-state assets by, *inter alia*, blocking them or governing their availability for attachment.")

[24] *Peterson v. Bank Markazi*, US District Court for the Southern District of New York, order authorizing distribution of funds dated 6 June 2016.

[25] *Certain Iranian Assets*, Verbatim Record, para. 15 (Oct. 10, 2018, 10:00 AM) https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20181010-ORA-01-00-BI.pdf.

[26] *Certain Iranian Assets*, Verbatim Record, para. 15 (Oct. 10, 2018, 10:00 AM) https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20181010-ORA-01-00-BI.pdf.

[27] *Certain Iranian Assets*, Verbatim Record, para. 15 (Oct. 10, 2018, 10:00 AM) https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20181010-ORA-01-00-BI.pdf.

[28] See *Certain Iranian Assets*, Memorial of Iran (Feb. 1, 2017), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20170201-WRI-01-00-EN.pdf.

government shall take any further steps inconsistent with the Treaty of Amity, and that Iran and Iranian state-owned companies are entitled to immunity in United States courts under customary international law and the Treaty of Amity.[29] Finally, Iran requested full reparations from the United States.[30]

The United States disputed the International Court of Justice jurisdiction and argued that Iran came to the Court with unclean hands (supporting the 1983 Marine Corps barracks bombing).[31] The United States argued that it did not violate the Treaty of Amity on the merits. Additionally, the United States argued that even if Iran did have any actionable rights under the Treaty of Amity, Iran's invocation of its rights under the Treaty constitutes an abuse of right, deployed to frustrate the ability of terrorism victims to obtain redress for harm caused by Iran's actions.[32]

On February 13, 2019, the Court issued a judgment as to the preliminary jurisdictional questions, ruling that the International Court of Justice did have jurisdiction to hear claims relating to violations of the Treaty of Amity but no jurisdiction to hear claims that the United States failed to accord sovereign immunity to Iranian government, Bank Markazi, or Iranian state-owned entities.[33] On September 23, 2022, the International Court of Justice indicated that the public hearings on the merits have concluded, and the Court is to begin its deliberation.[34] The Court's judgment will be delivered at a public sitting, the date of which will be announced in due course.[35]

Relevant Legal Requirements

Foreign Sovereign Immunity Act

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[29] See *Certain Iranian Assets*, Memorial of Iran (Feb. 1, 2017), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20170201-WRI-01-00-EN.pdf.

[30] See *Certain Iranian Assets*, Memorial of Iran (Feb. 1, 2017), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20170201-WRI-01-00-EN.pdf.

[31] See *Certain Iranian Assets*, Preliminary Objections of the United States (May 1, 2017), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20170501-WRI-01-00-EN.pdf (hereinafter "United States Preliminary Objections").

[32] See *Certain Iranian Assets*, Preliminary Objections of the United States (May 1, 2017), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20170501-WRI-01-00-EN.pdf (hereinafter "United States Preliminary Objections").

[33] *Certain Iranian Assets*, Judgment, 2019 I.C.J. Rep. 7 (Feb. 13).

[34] Press Release, International Court of Justice, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, International Court of Justice Press Release No. 2022/44 (Sept. 23, 2022), accessible at https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20220923-PRE-01-00-EN.pdf.

[35] Press Release, International Court of Justice, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, International Court of Justice Press Release No. 2022/44 (Sept. 23, 2022), accessible at https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20220923-PRE-01-00-EN.pdf.

The Foreign Sovereign Immunities Act of 1976 provides foreign sovereigns and their instrumentalities with broad immunity from suit in United States Courts.[36] Although the Foreign Sovereign Immunities Act was the first statute to implement foreign sovereign immunity, judicial decisions have previously recognized the principle of foreign sovereign immunity.[37] Historically, these decisions applied an "absolute" theory of sovereign immunity, shielding foreign sovereigns from almost all litigation in United States courts.[38] Over time, however, the scope of foreign sovereign immunity in international law trended towards a "restrictive" theory that removes immunity in cases where the state is functionally acting as a private actor might (*acta jure gestionis*) (for example, a commercial lease for an embassy building) while preserving immunity where the state acts in a purely public capacity (*acta jure imperii*). Congress enacted the Foreign Sovereign Immunities Act to codify this "restrictive" theory of foreign sovereign immunity. Today, the Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign State in the courts of the United States.[39]

The Foreign Sovereign Immunities Act was enacted with the primary purpose to transfer the determination of sovereign immunity from the executive to the judicial branch, thereby minimizing the foreign policy implications and providing clearer legal standards and due process procedures.[40] Further, the purposes of the Foreign Sovereign Immunities Act were:

- to codify the restrictive principle of immunity whereby the immunity of a foreign State is restricted to suits involving its public acts (*jure imperii*) and is not extended to suits based on its commercial or private acts (*jure gestionis*);
- to ensure the application of this restrictive principle in the courts and not by the [United States] State Department;
- to provide a statutory procedure to make service upon and establish personal jurisdiction over a foreign State; and
- to remedy in part the private litigant's inability to obtain execution of a judgment obtained against a foreign State.[41]

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[36] Codified as amended at 28 United StatesC. §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611.

[37] *See, for example*, *The Schooner Exchange v. McFaddon*, 11 United States (7 Cranch) 116 (1812).

[38] *See, for example*, *The Schooner Exchange v. McFaddon*, 11 United States (7 Cranch) 116 (1812).

[39] *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015) (quoting *Argentine Republic v. Amerada Hess Shipping Corp*., 488 United States 428, 443 (1989)).

[40] Hazel Fox & Philippa Webb, The Law of State Immunity, at 241 (Oxford: Oxford University Press, revised and updated 3rd edn, 2015).

[41] Hazel Fox & Philippa Webb, The Law of State Immunity, at 241 (Oxford: Oxford University Press, revised and updated 3rd edn, 2015).

The Foreign Sovereign Immunities Act applies with respect to foreign States, including political subdivisions of a foreign State, as well as agencies or instrumentalities of a foreign State. Entities closely linked with the structure of government and performing core public functions, such as the armed forces, are treated as the foreign State itself rather than an instrumentality or agency of the State.[42]

General Exceptions to Jurisdictional Immunity of Foreign States

The Foreign Sovereign Immunities Act both removes immunity and confers jurisdiction on United States federal courts, providing United States federal courts with an affirmative grant of both personal jurisdiction and subject-matter jurisdiction when an exception to foreign State sovereign immunity exists.[43]

Section 1605(a) of the Foreign Sovereign Immunities Act sets forth general exceptions to the jurisdictional immunity of foreign States. This includes where the foreign State waives the immunity, or in connection with a commercial activity within, or with a direct effect in the United States, or where money is sought against a foreign State for injury or death. These exceptions are consistent with general exceptions to State immunity under the restrictive approach to State jurisdictional immunity under international law.[44]

Terrorism Exception to Jurisdictional Immunity of Foreign States

In 2008, the United States enacted a new Section 1605A of Foreign Sovereign Immunities Act, pursuant to which foreign States shall have no sovereign immunity in the United States courts if the foreign State is designated as a State sponsor of terrorism.

Pursuant to Section 1605A(c), a United States national, a member of United States armed forces, United States government employee or contractor, or a representative of such parties, shall have a private right of action against a State sponsor of terrorism, for personal injury or death caused by acts of torture. Damages may include punitive damages.

Exception to Immunity from Attachment or Execution

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[42] Foreign Sovereign Immunities Act § 1603.

[43] *See* Fox & Webb, supra note 40, at 247.

[44] *See* PILPG Policy Planning: Repurposing Frozen Russian Assets: Analysis Under International Law, (Mar. 2023), *available at* https://www.publicinternationallawandpolicygroup.org/policy-planning-ukraine-sanctions-and-frozen-assets, at pages 20-25 (for discussion of the general exceptions).

Section 1610(b)(3) of the Foreign Sovereign Immunities Act applies to any property in the United States of an agency or instrumentality of a foreign State engaged in commercial activity in the United States. It provides that any such property shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States if the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A (described above) or section 1605(a)(7) (as was in effect on January 27, 2008[45]), regardless of whether the property is or was involved in the act upon which the claim is based.

Executive Order 13599

The International Emergency Economic Powers Act (50 United States C. 1701 et seq.) ("IEEPA") authorizes the United States President to block transactions and freeze assets based upon his identification of an "unusual and extraordinary threat [. . .] to the national security, foreign policy, or economy of the United States."[46]

In February 2012, under the authority of IEEPA and other laws, the President issued Executive Order 13599.[47] It designated as "blocked" i) the entire Iranian government, including Bank Markazi, ii) all Iranian financial institutions, and iii) a variety of other Iranian individuals and entities. All property and interests in property of the designated persons, that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person ("within the United States jurisdiction") were declared blocked.

The blocking sanctions also extend to entities that are owned 50% or more by one or more persons subject to such sanctions.[48] Individuals who, and entities that have, been designated under blocking measures are included on the Specially Designated Nationals And Blocked Persons List (the "SDN List"), and other lists of sanctioned persons.[49]

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[45] "For money damages sought against a foreign State for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or provision of material support or resources for such an act."

[46] 50 United StatesC. § 1701(a).

[47] Exec. Order 13599, 77 Fed. Reg. 6,659 (Feb. 8, 2012)

[48] *See* 31 C.F.R. § 560.425; the Office of Foreign Asset Control, Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked (Aug. 13, 2014); *see also* 31 C.F.R. § 560.313.

[49] http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx, List of Persons Identified as Blocked Solely Pursuant to Executive Order 13599, https://www.treasury.gov/resource-center/sanctions/Programs/Pages/13599_list.aspx.

As a result of the blocking sanctions, "United States persons" are generally forbidden to engage in dealings that involve, directly or indirectly, persons who are subject to blocking sanctions, and any assets the "blocked" parties may have within the United States jurisdiction are "frozen" or "blocked." A "United States person" is: i) any legal entity organized under United States law; ii) any United States citizen or lawful permanent resident; and iii) any other person (legal entity or individual) to the extent that the person is acting in the United States.[50] Prohibited activities include, among other things, terminating contracts and processing refunds, making of any contribution or the provision of funds, goods, or services to, or for the benefit of, any blocked party, and the receipt of any funds, goods, or services from any such party.

Treaty of Amity

Under the Treaty of Amity and in relevance to *Certain Iranian Assets*:

- Iranian and United States companies shall have their juridical status recognized within the territories of the United States and Iran;[51]
- Iranian and United States nationals and companies shall have freedom of access to courts of each the United States and Iran, respectively, "to the end that prompt and impartial justice be done," on terms no less favorable than those applicable to nationals and companies of each other or of any third country;[52]
- Both the United States and Iran shall accord fair and equitable treatment to nationals and companies of the other contracting party, to their property and enterprises, and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws;[53]
- The United States and Iran agreed that property of nationals and companies of either contracting party, including interests in property, shall receive the most constant protection and security within the territories of the other party, in no case less than that required by international law. Further, such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation;[54]

[50] See, for example, 31 C.F.R. § 560.314. Depending on the type of prohibition, the blocking sanctions measures can apply to activity by a non-United States person.

[51] Treaty of Amity art. III, para. 1.

[52] Treaty of Amity art. III, para. 2.

[53] Treaty of Amity art. IV, para. 1.

[54] Treaty of Amity art. IV para. 2.

- United States and Iranian nationals and companies shall be permitted to have and dispose of property on each other's territories on conditions no less favorable than that accorded nationals and companies of any third country;[55]
- Neither the United States nor Iran shall restrict payments, remittances, and other transfers of funds to or from each other's territories;[56]
- There shall be freedom of commerce and navigation between the territories of the United States and Iran;[57] and
- Any dispute between the United States and Iran as to the interpretation or application of the treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless agreed otherwise.[58]

Statute of the International Court of Justice

The International Court of Justice's Statute of the Court provides that the Court's jurisdiction comprises all cases which the parties refer to the Court, and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.[59] Parties to the Statute of the Court may at any time declare that they recognize the jurisdiction of the Court.[60] In the event of a dispute as to whether the Court has jurisdiction, the Court shall settle the matter by its decision.[61]

Analysis of Substantive Issues in *Certain Iranian Assets* and Lessons for Ukraine

Court Jurisdiction

Sovereign Immunities

Under general principles of international law, sovereign immunity will apply to property of foreign States, including their instrumentalities.[62] Further, property of foreign central banks will generally enjoy immunity from jurisdiction like

[55] Treaty of Amity art. V, para. 1.

[56] Treaty of Amity art. VII para. 1.

[57] Treaty of Amity art. X, para. 1.

[58] Treaty of Amity art. XXI para. 2.

[59] Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 art. 36 para. 1.

[60] Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 art. 36, para. 2.

[61] Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 art. 36, para. 2.

[62] *See* PILPG Policy Planning: Repurposing Frozen Russian Assets: Analysis Under International Law, (Mar. 2023), *available at* https://www.publicinternationallawandpolicygroup.org/policy-planning-ukraine-sanctions-and-frozen-assets, pages 13-14.

property of any other State entity, but property of foreign state-owned enterprises is generally not entitled to immunity from jurisdiction.

In *Certain Iranian Assets*, Iran argued that the *Peterson* litigation disregarded the rules of State sovereign immunity in relation to Iran itself, Bank Markazi and other Iranian state-owned entities.[63] Iran argued that in denying Bank Markazi and other Iranian state-owned companies the immunities that they would otherwise enjoy as a matter of United States and international law, the United States violated their right of freedom of access to United States courts with respect to their ability to defend proceedings brought against them and to pursue their right to immunity both from jurisdiction and enforcement.[64] The entities' immunities are rooted in international customary law, as well as established under the Treaty of Amity, Iran argued.[65]

The United States requested the International Court of Justice to dismiss these claims, because the Treaty of Amity does not confer sovereign immunity but is a treaty regulating private and commercial activity, writing:

> "States do not use bilateral commercial treaties to address disputes involving the application of customary international law rules on sovereign immunity, disputes relating to the treatment of their central banks, or disputes relating to economic sanctions enacted to regulate traffic in arms or for reasons of national security."[66]

However, the International Court of Justice declared that it had jurisdiction to rule on Iran's claims, except for regarding Iran's claims relating to sovereign immunities.[67] In particular, with respect to sovereign immunities, the International Court of Justice examined provisions of the Treaty of Amity on which Iran relied to ascertain whether the question of sovereign immunities could be considered as falling within the scope of the Treaty.[68] The International Court of Justice decided that Iran's claims, based on alleged violations of sovereign immunities, do not fall within scope of Treaty of Amity's compromissory clause, and the Court lacks jurisdiction to consider them (upholding the United States objection to

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[63] *Certain Iranian Assets*, Memorial of Iran, paras. 5.13, 5.17, 5.18, 5.44-48, 5.57-60, 6.19 (Feb. 1, 2017), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20170201-WRI-01-00-EN.pdf.

[64] *Certain Iranian Assets*, Application Instituting Proceedings (June 14, 2016), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20160614-APP-01-00-EN.pdf (hereinafter "Application of Iran").

[65] *See, for example*, *Certain Iranian Assets*, Verbatim Record, paras. 5, 30 (Oct. 10, 2018, 10:00 AM), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20181010-ORA-01-00-BI.pdf.

[66] *See, for example*, *Certain Iranian Assets*, Verbatim Record, para. 20 (Oct. 10, 2018, 10:00 AM), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20181010-ORA-01-00-BI.pdf..

[67] *Certain Iranian Assets*, Order, 2019 I.C.J. Rep. 7 (Feb. 13).

[68] *Certain Iranian Assets*, Judgment, at 9.

jurisdiction).[69] In particular, the Court concluded that none of the provisions of the Treaty of Amity, the violation of which Iran alleged, and which, according to Iran, were capable of bringing the question of sovereign immunities within the jurisdiction of the Court, justifies such a finding.[70]

Furthermore, the International Court of Justice decided to rule that it has jurisdiction to entertain Iran's claims of purported violations of those provisions the Treaty of Amity predicated on the treatment accorded to Bank Markazi at a later stage.[71] It ruled that Iran's application to the International Court of Justice was admissible.[72]

Abuse of Process and Unclean Hands

The United States further disputed the International Court of Justice jurisdiction based on the Treaty of Amity, because, *inter alia*, the activity that the treaty intended to govern (i.e., normal and ongoing bilateral commercial and consular relations) had not existed in any meaningful sense between the United States and Iran for nearly four decades.[73] In addition, the United States objected to the admissibility of Iran's application because it constituted an abuse of process and Iran came to the Court with unclean hands.[74]

The United States argued that even if the International Court of Justice concluded that Iran did have rights under the Treaty of Amity, Iran's claims constituted an abuse of right. The doctrine of abuse of rights has its genesis in the principle of good faith. The United States argued that Iran ran afoul of this doctrine by i) impermissibly seeking to stretch rights under the Treaty of Amity to factual circumstances that the parties never intended them to address and ii) seeking to prosecute rights as a shield against its accountability for its wrongful acts.[75]

An abuse of rights defense requires that four conditions are met: i) there is an identified right, ii) the applicant State has abused that right, iii) the respondent has presented clear evidence in support of any underlying factual allegations, and iv) there are "exceptional circumstances" justifying the application of the

[69] *Certain Iranian Assets*, Judgment, at 10.

[70] *Certain Iranian Assets*, Judgment, para. 80.

[71] *Certain Iranian Assets*, Judgment, para. 80.

[72] *Certain Iranian Assets*, Judgment, para. 80.

[73] See, for example, *Certain Iranian Assets*, Verbatim Record, para. 20 (Oct. 8, 2018, 10:00 AM), https://www.International Court of Justice-cij.org/public/files/case-related/164/164-20181008-ORA-01-00-BI.pdf.

[74] *Certain Iranian Assets*, Counter-Memorial Submitted by the United States of America (Oct. 14, 2019) (the "United States Counter-Memorial"), para. 18.3.

[75] *Certain Iranian Assets*, Counter-Memorial Submitted by the United States of America (Oct. 14, 2019) (the "United States Counter-Memorial"), *para.* 18.5.

doctrine.[76] If these four conditions are met, the holder of the right is precluded from exercising that specific right in the asserted abusive manner. The United States argued that the substantive protective rights from the Treaty of Amity that Iran invoked as a protection from claims, would be abused because they would be used in a manner manifestly apart from that in which they were intended to be exercised.[77]

With respect to the United States objection relating to Iran's abuse of right (process), the International Court of Justice found no exceptional circumstances in the case to reject Iran's claim.[78] For there to be an abuse of process, there would have to be "clear evidence" that a conduct amounts to an abuse of process.[79]

With respect to the United States allegations relating to Iran's "unclean hands" (causing the bombings), the Court concluded, without prejudice, that these allegations could subsequently provide a defense on merits.[80] The Court noted that even if it were shown that Iran's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the United States on the basis of the "unclean hands" doctrine.[81]

The doctrine of "unclean hands" affords the International Court of Justice discretion, exercisable on the basis of considerations of equity and good faith, to deny a party's request for relief where that party has engaged in serious misconduct that has a sufficiently close connection to the relief sought.[82] The International Court of Justice may consider five factors to determine whether the "unclean hands" doctrine should apply to a given situation: i) whether there is a qualifying wrong; ii) whether the wrong was undertaken by or on behalf of the state; iii) whether there is a nexus between the wrong and the claims being made by the applicant; iv) whether the wrong is of sufficient gravity to render the International Court of Justice's grant inequitable or improper; and v) whether any countervailing wrong exists on the part of the respondent that may cause the International Court of Justice to decline to exercise its discretion in favor of applying the doctrine.[83]

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[76] *Certain Iranian Assets*, Counter-Memorial Submitted by the United States of America (Oct. 14, 2019) (the "United States Counter-Memorial"), para. 18.8.

[77] *Certain Iranian Assets*, Judgment, *paras.* 122-125.

[78] *Certain Iranian Assets*, Judgment, *paras.* 122-125.

[79] *Certain Iranian Assets*, Judgment, *para.* 113.

[80] *Certain Iranian Assets*, Judgment, *para.* 113.

[81] *Certain Iranian Assets*, Judgment, *para.* 122, referring to *Avena and Other Mexican Nationals (Mexico v. United States of America*), Judgment, I.C.J. Reports 2004 (I), at 38, *para.* 47; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, at 52, *para.* 142).

[82] *See* United States Counter-Memorial.

[83] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory*, 2004 I.C.J. 136 (Jul. 24.)

The crux of the United States' defense of "unclean hands" was that Iran was seeking to deploy the Treaty of Amity to avoid the consequences of its own conduct: Iran's sponsorship of terrorist acts which were carried out against the United States and its nationals. Had Iran not sponsored the relevant terrorist acts, or had it acted consistently with its obligation to make reparation to its victims, the United States measures and legal proceedings now at issue would not have been necessary. Given those circumstances, the United States argued that Iran could not claim that the question of its unclean hands has no bearing on the International Court of Justice's determination on the legality of the impugned United States measures. The United States further argued that Iran's claims should have been dismissed on the basis that the impugned United States measures were *in response* to Iran's conduct.

Article XX(1) of the Treaty of Amity and Executive Order 13599

The United States further argued that Article XX(1) of the Treaty of Amity barred any Iranian claims based on Executive Order 13599, which had ordered sanctions blocking Iranian assets in the United States.[84] Article XX(1) provides that the "Treaty shall not preclude the application of measures . . .

> (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; and
> (d) 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.[85]

The United States argued that Article XX(1) barred Iran's claim as a jurisdictional matter. Thus, the United States argued that Article XX(1) excluded any qualifying measures from the scope of the Treaty of Amity, and therefore from the International Court of Justice's jurisdiction as well. The International Court of Justice rejected this argument, siding with Iran's contention that, if Article XX(1) applies at all, it applies as a defense on the merits to an otherwise valid claim under the Treaty of Amity, not as a bar to jurisdiction.[86]

The United States then argued that Article XX(1) precludes any claims related to Executive Order 13599 arising out of alleged violations of the Treaty of

[84] United States Preliminary Objections, paras. 7.1-7.4.

[85] Treaty of Amity, art. XX(1).

[86] *Certain Iranian Assets*, Judgment, paras. 38-47.

Amity's substantive provisions.[87] Towards that end, the United States cited evidence tending to show that the purpose of Executive Order 13599 was to "address Iran's illicit and destabilizing activities of grave national security concern to the United States, including arms trafficking, support for terrorism, and the pursuit of ballistic missile Capabilities."[88] Executive Order 13599 was therefore "both a measure regulating arms trafficking under Article XX(1)(c) and a measure necessary to protect United States essential security interests under Article XX(1)(d)."[89] All Iranian claims under any other Treaty of Amity provision were consequently barred by Executive Order 13599.

Jurisdiction of the International Court of Justice in Ukrainian Case

For the International Court of Justice to have jurisdiction – if Ukraine were to sue Russia in the International Court of Justice for damages resulting from personal injury or death caused by Russia's acts during the war in Ukraine – Ukraine would have to demonstrate a *prima facie* case that the subject matter of the claim relates to the interpretation of an agreement between the applicant and Ukraine/Russia, with a compromissory clause invoking International Court of Justice jurisdiction. Although both Ukraine and Russia are parties to the Statute of the Court of the International Court of Justice, neither Ukraine nor Russia recognize the jurisdiction of the International Court of Justice as compulsory (compulsory jurisdiction would allow either side to invoke the Court's jurisdiction to adjudicate the dispute). Further, even if the parties appear to agree that the International Court of Justice has jurisdiction, the International Court of Justice must itself decide whether it has jurisdiction to ensure that it has the requisite authority to handle the merits of the dispute.[90]

For example, in February 2022, Ukraine filed an application with the International Court of Justice denying Russia's allegations of genocide that had occurred in the Luhansk and Donetsk regions of Ukraine, and requesting the Court to establish that Russia had no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide (*Ukraine v. Russian Federation*).[91] In that case, Ukraine contends that Russia has been intentionally killing and inflicting serious injury on members of Ukrainian

[87] United States Counter-Memorial, para. 11.3.

[88]United States Counter-Memorial, paras. 11.2, 11.7-11.18.

[89] United States Counter-Memorial, paras. 11.2, 11.7-11.18.

[90] James D. Fry, Other Pacific Means of Resolving Iran's International Court of Justice Certain Iranian Assets Application, 28 Am. Rev. Int'l Arb. 191, 192 (2017).

[91] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Application of Ukraine (Feb. 27, 2022), accessible at https://www.International Court of Justice-cij.org/en/case/182.

nationality—the *actus reus* of genocide under Article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (the "Genocide Convention").

Ukraine requested the Court to take provisional measures in order to prevent irreparable prejudice to the rights of Ukraine and its people and to avoid aggravating or extending the dispute between the parties under the Genocide Convention.[92] In that case, Ukraine argued that the International Court of Justice has jurisdiction under the compromissory clause of the Genocide Convention, to which both Ukraine and Russia are parties, and Russia disputed the International Court of Justice's jurisdiction. On March 16, 2022, the International Court of Justice issued an order regarding provisional measures, finding that Ukraine had made a *prima facie* case that the International Court of Justice had jurisdiction over the dispute under the Genocide Convention.[93] The case is ongoing.

Alleging human rights violations by Russia will not likely be enough to overcome the sovereign immunities at the International Court of Justice. Notably, in the International Court of Justice's 2012 decision involving the issue of sovereign immunities, it concluded that under customary international law as it stood at the time, a State was not deprived of immunity by reason of the fact that it was accused of serious violations of international human rights law or the international law of armed conflict.[94]

In addition, before turning to the International Court of Justice, some scholars argued that Iran and the United States should have given other peaceful methods a chance to resolve the claims Iran has presented in its International Court of Justice application.[95]

Jurisdiction of a United States Court in Ukrainian Case

Under current United States and international law, Russia and Russian state entities would enjoy sovereign immunity and have certain rights in that capacity.[96]

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[92] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Application of Ukraine (Feb. 27, 2022), accessible at https://www.International Court of Justice-cij.org/en/case/182.

[93] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Application of Ukraine (Feb. 27, 2022), accessible at https://www.International Court of Justice-cij.org/en/case/182.

[94] *See Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening)*, Judgment, 2012 I.C.J. 99 (Feb. 3); *see also* Dautaj & Fox, supra note 14, 407.

[95] Fry, supra note 78, at 192.

[96] *See* PILPG Policy Planning: Repurposing Frozen Russian Assets: Analysis Under International Law, (Mar. 2023), *available at* https://www.publicinternationallawandpolicygroup.org/policy-planning-ukraine-sanctions-and-frozen-assets.

For its sovereign immunity to be abrogated for purposes of jurisdiction and seizing of property, Russia would have to have been designated, for example, as a State sponsor of terrorism. Further, there would be limitations with respect to the nationality of victims for cases brought in the United States courts.

In the *Peterson* litigation, the claimants were victims of the terrorist attacks who were United States nationals and members of the United States armed forces. If victims of Russia's invasion in Ukraine were to bring claims in the United States, under the current law, only United States nationals, members of United States armed forces, United States government employees or contractors, or their representatives, would be able to do that. This is the case even if Russia is designated as a State sponsor of terrorism, and Section 1605A of Foreign Sovereign Immunities Act allows for victims of the terrorist acts to bring claims in the United States. United States courts would lack jurisdiction over claims under the Foreign Sovereign Immunities Act Section 1605A brought by Ukrainian citizens who are not United States persons.

Separately from the Foreign Sovereign Immunities Act, in the United States the Alien Tort Statute, a provision in the 1789 Judiciary Act, provides United States federal courts with jurisdiction over civil actions for a tort only, committed in violation of the law of nations or a treaty of the United States.[97] Under certain conditions, that statute may provide the basis for jurisdiction.

For example, in *Kiobel v. Royal Dutch Petroleum Co.,* Nigerian nationals residing in the United States (who obtained political asylum in the United States) brought civil claims against a foreign corporation for aiding and abetting the Nigerian military in internationally unlawful attacks on civilians.[98] The court considered whether a claim brought under the Alien Tort Statute "may reach conduct occurring in the territory of a foreign sovereign," even assuming that the conduct was performed by an individual or entity that subsequently came within the personal jurisdiction of a United States court. The Supreme Court held that the Alien Tort Statute did not apply to violations of the law of nations occurring within territory of a sovereign other than the United States. The majority justices in *Kiobel* did not find anything in the text, history or purposes of the Alien Tort Statute to rebut the presumption against extraterritoriality, noting that the torts in violation of the law of nations could occur within or outside of the United States.[99] Justice Breyer set forth three scenarios under which the United States courts would have jurisdiction under the Alien Tort Statute: if the tort occurred on American soil, if

[97] 28 United StatesC. § 1350.

[98] 133 S. Ct. 1659, 1662 (2013).

[99] See Fox & Webb, supra note 40, at 279.

the defendant was an American national, and if there was United States national interest involved, such as "a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."[100]

Separate Juridical Status of State Entities

In *Certain Iranian Assets*, Iran argued that the United States failed to recognize separate juridical status of Iranian entities (including state-owned entities), treated them and their property unfairly, expropriated their property, failed to accord to such entities and their property protection and access to United States courts, abrogated immunities to which the entities are entitled under international law, and other protections.[101]

In particular, Iran argued that Iranian companies are entitled to the recognition of their separate juridical status.[102] The term "companies" as defined in Article III(1) of the Treaty of Amity mean "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." Iran relied on a broad definition of a "company" under the Treaty of Amity, arguing that it includes any legal entity that has its own legal personality, regardless of its activity of capital structure.[103] Pursuant to the Iranian law, the Iranian entity at issue – Bank Markazi – enjoys "legal personality and is subject to the rules and regulations pertaining to joint-stock companies.[104] It has a general assembly and a board of directors; it can enter into purchase or sale contracts, own or lease real property, etc.[105] Iran argued that the right to recognition of a company's juridical status includes the right to recognition of the company's separate legal personality and its right to own and dispose of property.[106] Furthermore, the assets and property of an Iranian company cannot be considered assets of another legal person, including the Iranian State.[107] Iran argued that by its legislative and executive acts, the United States breached its obligation to recognize Iranian entities as separate entities and violated the rights of Iranian companies.[108]

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[100] *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring)

[101] Application of Iran, para. 6; Memorial of Iran, Ch. IV.

[102] Memorial of Iran, paras. 4.1-4.36.

[103] *Certain Iranian Assets*, Judgment, para. 83.

[104] Memorial of Iran, para. 4.7, referring to the Monetary and Banking Act of Iran of July 9, 1972, as amended.

[105] Memorial of Iran, para. 4.7, referring to the Monetary and Banking Act of Iran of July 9, 1972, as amended.

[106] Memorial of Iran, para. 4.17, referring to the Monetary and Banking Act of Iran of July 9, 1972, as amended.

[107] Memorial of Iran, para. 4.17, referring to the Monetary and Banking Act of Iran of July 9, 1972, as amended.

[108] *See* Memorial of Iran, Ch. IV.

In response to these claims, the United States argued that Iran could not rebrand Bank Markazi as a "company" entitled to rights under the Treaty of Amity, whereas both parties described Bank Markazi as a traditional central bank, exercising sovereign functions.[109] The United States argued that as an entity exercising exclusively sovereign functions, Bank Markazi could not claim protections as a "company" under the Treaty of Amity.[110] The United States analyzed the Iranian law regulating Bank Markazi and highlighted that the sovereign functions assigned to Bank Markazi illuminate the general principle that traditional central banks are fundamentally unlike the ordinary companies, whether publicly or privately owned.[111] The United States continued that the claims in this case pertained to Bank Markazi's sovereign governmental activity,[112] pointing out that managing a country's foreign currency reserves – which Bank Markazi claimed it did – is to be understood as a sovereign activity.[113] Furthermore, the United States pointed out that even if Bank Markazi undertook activities in the private realm, this had no impact on the case, because Iran did not assert or demonstrate that Bank Markazi engaged in any such activity in the United States related to the United States legislative and executive measures.[114]

The International Court of Justice decided that the fact that Bank Markazi is wholly owned by the Iranian State, and that Iran exercises a power of direction and close control over the bank's activities does not, in itself, exclude that entity from the category of "companies" within the meaning of the Treaty of Amity.[115] But the Court could not accept Iran's interpretation that the nature of activities carried by a particular entity is immaterial for the purposes of characterizing it as a "company."[116] The Court concluded that an entity carrying out exclusively sovereign activities, linked to the sovereign functions of the State, cannot be characterized as a "company" within the meaning of the Treaty of Amity and, consequently, may not claim the benefit of the rights and protections provided for companies.[117] At the same time, an entity could engage in both commercial and non-commercial activity, and it should be regarded as a "company" within the meaning of the Treaty to the extent that it is engaged in activities of a commercial

[109] United States Preliminary Objections, para. 9.2, Memorial of Iran, para. 1.25.

[110] United States Preliminary Objections, para. 9.9.

[111] United States Preliminary Objections, para. 9.9.

[112] United States Preliminary Objections, paras. 9.10-9.15.

[113] United States Preliminary Objections, para. 9.15.

[114] United States Preliminary Objections, para. 9.16.

[115] *Certain Iranian Assets*, Judgment, para. 88.

[116] *Certain Iranian Assets*, Judgment, para. 90

[117] *Certain Iranian Assets*, Judgment, para. 91.

nature, even if they do not constitute its principal activities.[118] The Court did not have the facts at its disposal to determine whether Bank Markazi carried out commercial activities at the relevant time and decided to rule on the issue at a later stage of the proceedings.

A question of juridical status of Russia-owned entities might arise in a potential litigation brought by Ukraine against such entities. Similar to the International Court of Justice's deliberation in *Certain Iranian Assets*, if Russian state-owned entities rely on their status of a "company" under a particular treaty or customary international law,[119] the International Court of Justice would likely consider them to be "companies" to the extent they carried commercial activities. Subsequently, they would be afforded rights and freedoms accorded to companies under the international law norms. It would be relevant to consider the extent to which the Russia-owned entities engaged in commercial activities of relevance to any dispute, since these entities could rely on such commercial activities to claim international law protections afforded to commercial entities.

Freedom of Access to Courts, Fair and Equitable Treatment, Constant Protection and Security and the Prohibition of Taking, Actions with Property

Article III of the Treaty of Amity provides that nationals and companies of either contracting party "shall have freedom of access to the courts of justice and administrative agencies within the territories" of the other contracting party, and that such "access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country."[120]

Iran argued that the United States had breached Bank Markazi's entitlement to freedom of access under the Treaty i) through abrogation of its rights to put forward, and to be granted, immunity defenses (discussed above in more detail under Section II.A.1), and, relatedly, ii) through the legislative and judicial measures (for example, Executive Order 13599, which is discussed in more detail in Section I.D.2 above, and Section 8772, which is discussed in more detail in Section I.B. above) which affected Bank Markazi's ability to defend proceedings brought against it in United States courts and pursue its right to immunity.[121]

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[118] *Certain Iranian Assets*, Judgment, para. 92.

[119] *See*, for example, Treaty between the United States of America and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment (1992) ("United States-Russia Investment Treaty").

[120] Treaty of Amity art. III, para. 2.

[121] *See* Memorial of Iran, Ch. V.

The United States, on the other hand, argued that Iran was stretching Article III too far, and that "access to courts" did not equal the right to pursue certain defenses.[122] In fact, Iranian companies regularly appeared as named defendants, made detailed legal submissions, and were represented by counsel, all of which, the United States claimed, was equal to active participation in court proceedings. The International Court of Justice agreed with the United States and rejected Iran's broad interpretation of Article III, explaining that Article III does not guarantee substantive or procedural rights, only the possibility of such a company to pursue those substantive or procedural rights, whether or not successful.[123]

Article IV(1) of the Treaty of Amity states that each contracting party "shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."[124]

Similarly to Article III, the United States argued that Iran is too broad in its interpretation of Article IV(1), and once again, the International Court of Justice agreed. "Fair and equitable treatment," prohibits the denial of justice, but Iran's additional claims that fair and equitable treatment prohibits other "arbitrary, grossly unfair, unjust, or idiosyncratic" treatment has no basis in international law. Thus, in order to prove that the United States breached the first clause of Article IV(1), Iran would have to prove that the United States' actions resulted in a denial of justice – and in this case, the denial of sovereign immunity by the United States does not qualify.[125]

Article IV(2) of the Treaty provides that the property of nationals and companies of either party shall receive "protection and security within the territories of the other" party, "in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the

[122] *See* United States Counter-Memorial, Ch. 13.

[123] United States Preliminary Objections, para. 69.

[124] Treaty of Amity art. IV, para. 1

[125] *See* United States Counter-Memorial.

property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."[126]

Iran argued that the property at issue with respect to Article IV(2), the property of the Iranian companies including Bank Markazi, is entitled to a high level of physical and legal protection, which the United States has breached by expropriating such property without providing compensation.[127] The United States, on the other hand, argued that there was no such deprivation of property, and that the legislative, executive, and judicial acts performed by the United States were bona fide, non-discriminatory acts of United States police power which would not trigger a right to compensation under United States law.[128] The United States described the Iran Threat Reduction and Syria Human Rights Act of 2012 as measures used to enforce a judicial judgment—i.e., satisfying a debt—and not a substantial taking. Furthermore, the United States argued that Bank Markazi is not a "company," while Article IV(2) only applies to the property of nationals and companies of contracting parties.[129]

Article V(1) of the Treaty states that nationals and companies of either contracting party shall be permitted, within the territory of the other party: "(a) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (b) to purchase or otherwise acquire personal property of all kinds; and (c) to dispose of property of all kinds by sale, testament or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded to nationals and companies of any third country."[130]

Iran argued that Iranian companies that fell or whose property fell within the ambit of Section 502 of the Iran Threat Reduction and Syria Human Rights Act had the right to dispose of their property as they saw fit. The United States argued that Iran had not proved that such companies had attempted to dispose of any property nor did the United States prevent such a disposal attempt.[131]

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[126] Treaty of Amity art. IV, para. 2.

[127] *See* Memorial of Iran, Ch. V.

[128] *See* United States Counter-Memorial, Chs. 13-15.

[129] *See* United States Counter-Memorial, Chs. 13-15.

[130] Treaty of Amity, art. V, para. 1.

[131] *See* United States Counter-Memorial, Chs. 13-15.

Similar to *Certain Iranian Assets*, questions may arise regarding Russian assets under applicable law[132] regarding freedom of access to the courts, fair and equitable treatment, the treatment of property, and further, how those issues are intertwined (or not intertwined) with the concept of sovereign immunity. Russia may bring up the arguments raised by Iran, and they could be countered with the counterarguments put forward by the United States described above.

Entitlement to Freedom from Restrictions on Making Payments and Other Transfers

In *Certain Iranian Assets*, Iran argued that the United States violated Articles VII(1) and X(1) of the Treaty of Amity.[133] Article VII(1) effectively prohibits restrictions on making of payments, remittances and other transfers between the two parties. Article X(1) entitles the parties to freedom of commerce and navigation. The United States challenged Iran's arguments largely on the basis that Iran had misinterpreted the articles, expanding their coverage beyond the drafters' original intentions.

With respect to Article VII(1), Iran argued that the United States, through its blocking sanctions (including the Executive Order 13599, and Section 201 of the the Terrorism Risk Insurance Immunities Act), had violated the article by prohibiting the transfer of funds from the United States to Iran.[134] Iran reasoned that the plain language of the article "establishes a general prohibition of restrictions on the making of payments, remittances, and other transfers of funds to or from the territory of the United States and/or Iran," preventing prohibitions on transfers by nationals of a party as well as "organs of the [government of a party]."[135] Moreover, Iran noted that only two exceptions from the article's protections - one permitting restrictions to address the availability of foreign exchange and one permitting restrictions "specifically approved by the International Monetary Fund" - were inapplicable to the present dispute.[136]

The United States countered Iran's arguments along the following two lines. First, the United States argued that Article VII(1) only limits restrictions on the exchange of currency.[137] The United States supported the argument by pointing out

[132] *See*, for example, United States-Russia Investment Treaty setting forth principles similar to Articles III-IV of the Treaty of Amity. *See* Section 5.B above for a more detailed discussion on "companies" and the separate juridical status of state entities

[133] Memorial of Iran, para. 6.1.

[134] Memorial of Iran, paras. 6.8, 6.9.

[135] Memorial of Iran, para. 6.3.

[136] Memorial of Iran, para. 6.4.

[137] United States Counter-Memorial, para. 16.1.

that both the second and third paragraphs of the article describe exceptions to "exchange restrictions."[138] Citing a prior International Court of Justice decision which clarified that "special words, according to elementary principles of interpretation, control . . . general expressions," the United States contended that when all three paragraphs are read together, the entire article could only apply to "exchange restrictions" rather than to all "payments, remittances, and other transfers of funds."[139] In addition, the United States supported its interpretation by pointing to the drafting history of the article, including contemporaneous telegrams revealing a deep concern by Iranian officials over the "availab[ility of] foreign exchange."[140]

With respect to the second line of argument, the United States argued that even if Iran's broad interpretation prevailed, Article VII(1) still would not exclude "judicial mechanisms for enforcing judgments."[141] Appealing to reason, the United States argued that the article was never intended to prohibit judicial attachments because "commercial relations in fact depend in part on . . . courts to adjudicate disputes, and mechanisms to ensure enforcement of the judgments issued by those courts."[142] Conversely, to "interpret Article VII as prohibiting judicial attachments in furtherance of satisfaction of valid court judgments" would greatly exceed the original "scope and purpose" of the Treaty of Amity.[143]

With respect to Article X(1), Iran argued that the United States had violated Iran's right to commerce and navigation because the clause protects against legislative or executive acts that result in the "blocking" of Iranian assets.[144] Iran cited the International Court of Justice repeatedly to argue that "freedom of commerce within Article X(1) is a broad concept, and is apt to protect against legislative or executive acts that result in the automatic 'blocking' or seizure by one of the Treaty Parties of the assets of the other."[145] For example, Iran noted that the International Court of Justice had found that "commerce" means "commercial activities in general – not merely the immediate act of sale and purchase, but also the ancillary activities integrally related to commerce," including "all transactions of import and export, relationships of exchange…and financial operations between

[138] United States Counter-Memorial, para. 16.5.

[139] United States Counter-Memorial, para. 16.6.

[140] United States Counter-Memorial, para. 16.12.

[141] United States Counter-Memorial, para. 16.16.

[142] United States Counter-Memorial,

[143] United States Counter-Memorial,

[144] Memorial of Iran, para. 6.16.

[145] Memorial of Iran, para. 6.17 (quotations removed).

nations."[146] Consequently, Iran concluded that the "impact of the legislative, executive and judicial acts of the United States" to block the assets of "Iran, Bank Markazi and other Iranian companies" violated the provisions of Article X(1).[147]

The United States challenged Iran's arguments with respect to Article X(1) along the following three lines. First, the United States contended that Article X(1)'s reference to "commerce" was limited to "commerce that is related to [nautical] navigation.[148] The United States noted that paragraphs 2 through 6 of the article reference "vessels," and even paragraph 1 references commerce alongside "navigation."[149] The article's drafting history likewise supports a clear understanding between Iran and the United States that the article addresses "seaborne traffic."[150] Moreover, even if the article addressed all kinds of commerce, the United States, citing the court's *Oil Platforms* Judgment, alternatively argued that commerce could only apply to "goods, including ancillary activities integrally related to that trade…"[151] Accordingly, because Iran had failed to "identify any underlying trade in goods at issue," it could not succeed with respect to Article X(1).[152]

Second, the United States argued that Iran had failed to address Article X(1)'s territorial limitation. Relying once more on *Oil Platforms*, the United States argued that the provisions of Article X(1) could only apply to "commerce or the navigation…between the territories of the United States and Iran."[153] In that case, the court found "that Article X(1) would not protect Iranian oil exports in general, but would protect Iranian oil that was exported [directly] to the United States.[154] Following such reasoning, the United States pointed to a number of financial transactions between Bank Markazi and financial institutions located in third countries, like Italy, which granted indirect access to the markets of the United States.[155] Consequently, Article X(1) could not serve to protect Bank Markazi's activities because they were conducted through foreign intermediaries

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[146] Memorial of Iran, para. 6.13., citing *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment*, I.C.J. Reports 1996, p. 803 at p. 819, para. 49.

[147] Memorial of Iran, paras. 6.19, 6.20.

[148] United States Counter-Memorial, para. 17.2.

[149] United States Counter-Memorial, para. 17.4.

[150] United States Counter-Memorial, para. 17.8.

[151] United States Counter-Memorial, para. 17.2.

[152] United States Counter-Memorial, para. 17.13.

[153] United States Counter-Memorial, para. 17.14.

[154] United States Counter-Memorial, para. 17.14.

[155] United States Counter-Memorial, para. 17.19.

rather than "direct commerce between the territories of Iran and the United States."[156]

Third, the United States finally argued that Iran could not rely on Article X(1) to stop "terrorism-related litigation in United States courts."[157] The United States reasoned that the Treaty of Amity cannot apply to all judgments against the assets of Iranian companies, and judgments must be appropriate in some circumstances. For example, if an Iranian entity breached a contract, nothing in the Treaty would suggest that a United States court couldn't enforce the contract.[158] The United States further noted that other articles of the Treaty of Amity expressly contemplated certain impediments to commerce, such as customs administration under Article VIII. If Iran was correct that Article X(1) could stop all restrictions on commerce, then "Article X(1) would swallow up these other provisions."[159] Consequently, the United States concluded that the Court should reject Iran's Article X(1) claim.[160]

Substantial Loss by Iranian Companies and Iran

Iran argued that it had suffered material losses and injury to the Iranian State as a result of the United States freezing the assets of Iranian companies. Iran further argued that the United States had violated the Treaty of Amity because the United States had denied Iranian corporations and companies access to their property.

Among the material losses that Iran cited was the *Peterson* litigation in which $1.895 billion (USD) were transferred from Bank Markazi to beneficiaries of default judgments. Less quantifiable material losses included the increased risk of seizure of property, increased costs for Iranian companies who seek to own property in the United States, and reduced incentives to conduct lawful business activities in the United States.

Iran further argued that it had been injured because of a loss of commercial opportunities due to reputational damage and "moral" damage. Although not quantifiable, these losses would significantly harm the ability of Iranian companies to conduct business internationally, attract investors, and form international partnerships.

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[156] United States Counter-Memorial, para. 17.19.

[157] United States Counter-Memorial, para. 17.21.

[158] United States Counter-Memorial, para. 17.23.

[159] United States Counter-Memorial, para. 17.24.

[160] United States Counter-Memorial, para. 17.25.

Russia could bring potential claims similar to those by Iran in *Certain Iranian Assets* regarding Russian persons' access to property under applicable law.[161]

Remedies

There are three primary remedies that a Court may order for violations of international law: cessation, non-repetition, and reparation for breach. Iran has sought all three of these remedies.

First, an order for cessation requires the wrongful party to immediately cease and remedy the injury caused by the breach. Iran requested an order of cessation against the United States for the infringing upon the rights of Iran and Iranian companies in violation of Iran's immunity and international law.

Second, a state may seek an order for non-repetition. However, the Court stated that as a general rule, it would not assume that a State would repeat a wrongful act and would instead presume good faith. Therefore, an order for non-repetition is issued very rarely, when there are special circumstances to justify such assurances. The Court would assess the necessity of this order on a case-by-case basis. Iran sought this order against the United States because Iran wanted assurance that its assets would not be frozen and re-purposed again in the future.

Lastly, a State may request reparation under Article 31 of the International Law Commission's Articles of State Responsibility, which provides that a "responsible State is under an obligation to make a full reparation for the injury caused by the internationally wrongful conduct." The form of reparation, outlined in Article 34, may be restitution, compensation, and satisfaction. Iran sought all three forms of reparation for the United States' alleged breach of the Treaty of Amity. Iran sought restitution for the property of Iranian companies that was seized, compensation for any property that was dissipated or no longer identifiable, and satisfaction for the non-material and moral damage that the State of Iran sustained.

Treatment of Blocked Property

In connection with the *Certain Iranian Assets*, the Executive Order 13599 "had the effect of turning any restrained assets owned by the Iranian government (or any agency or instrumentality thereof) into '[b]locked [a]ssets'. As Bank Markazi is the Central Bank of Iran, any of its assets located in the United States as

[161] *See*, for example, United States-Russia Investment Treaty, art. IX.

of 5 February 2012, became '[b]locked [a]ssets' pursuant to [the Executive Order 13599]."[162] The International Court of Justice has not yet ruled on the substantive issue of seizing the assets.

Foreign Sovereign Immunities Act Section 1610(g) and the Terrorism Risk Insurance Immunities Act Section 201(a) allow attachment of the property of a foreign State.

Since the designation of the Russian entities as "blocked" parties by the Office of Foreign Asset Control, their property and interests in property are "blocked" and remain frozen. If Ukraine succeeds in obtaining a United States court judgment against those assets, to enable attachment and enforcement against the property in the United States, a special legislative measure would be required, similar to the Executive Order 13599 with respect to Iran and Bank Markazi.

In addition, any effort to seek attachment and execution of Russia-owned crypto assets would also likely require government approval. Sanctions targeting Russian persons include blocking programs that cover property interests very broadly defined, which would include crypto assets. For example, pursuant to Executive Order 14024, "[a]ll property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person" and belong to certain persons determined by the Secretary of the Treasury to be participating in certain specified activities, such as in the defense or resource sectors.[163] "Property" for the purposes of sanctions programs is very broadly defined:

> "[t]he terms *property* and *property interest* include money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership, or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts

[162] *Peterson v. Islamic Republic of Iran*, No. 10-civ-4518 at 12 (S.D.N.Y. Feb. 28, 2013).

[163] Exec. Order 14024 of April 15, 2021, 86 Fed. Reg. 20,249 (Apr. 19, 2021).

payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, **and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.**"[164]

Specifically, the Office of Foreign Asset Control has made clear that property for the purposes of sanctions programs include crypto assets (referred to as virtual currency).[165] Once a United States person determines that they hold crypto assets that are required to be blocked pursuant to the Office of Foreign Asset Control's regulations, the United States person must deny all parties access to that crypto asset, ensure that they comply with the Office of Foreign Asset Control regulations related to the holding and reporting of blocked assets, and implement controls that align with a risk-based approach.[166]

Once assets, including "crypto assets," are blocked, however, claimants will still need approval from the federal government, even if non-sovereign entities have an interest in the assets. Assets that are blocked are effectively placed "'in the hands of the President' . . . to maintain the foreign assets at his disposal or use in negotiating the resolution [of emergencies]."[167] Accordingly, several blocking programs prohibit the attachment, judgment, or execution against the blocked assets without executive approval or licenses (conveyed from the Office of Foreign Asset Control).[168] More generally, United States blocking sanctions measures also prevent any dealing in blocked property unless authorized, creating a barrier preventing United States persons from delivering blocking assets to claimants seeking to execute writs of attachment.[169]

At the same time, Ukraine could explore adjudicating against assets of countries other than Russia that act as Russian allies and who are already designated as State sponsors of terrorism, such as Iran or Syria.[170] In this regard,

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[164] 31 CFR § 587.311 (emphasis added).

[165] *See* the Office of Foreign Asset Control: Frequently Asked Questions: Question No. 560 (providing guidance that United States persons' the Office of Foreign Asset Control compliance obligations are the same, regardless of whether a transaction is denominated in digital currency or traditional fiat currency).

[166] *See* the Office of Foreign Asset Control: Frequently Asked Questions: Question No. 646.

[167] *Dames & Moore v. Regan*, 453 United States 654, 673 (1981).

[168] *See, for example*, 31 C.F.R. § 587.201(f).

[169] *See, for example, id.* § 587.201.

[170] *See, for example,* Joby Warrick, Souad Mekhennet and Ellen Nakashima, "Iran Will Help Russia Build Drones for Ukraine War, Western Officials Say," Washington Post, Nov. 19, 2022; Gordon Lubold, Nancy A. Youssef and Alan Cullison, "Russia Recruiting Syrians for Urban Combat in Ukraine, United States Officials Say," The Wall Street Journal, Mar. 6, 2022.

the United States Court of Appeals for the D.C. Circuit recently expanded on the class of assets that may be attached by holders of judgments against State sponsors of terrorism. In *Estate of Levin v. Wells Fargo Bank, N.A.*,[171] the court ruled that bank transfers that can be "traced" to terrorist States - using general principles of asset tracing - can be attached by a plaintiff. Notably, this decision creates a "split" with another United States court, meaning that plaintiffs seeking to attach frozen transfers from a sanctioned entity will fare much better in the D.C. Circuit.[172]

If Ukraine pursues claims against Russian allies, such as Syria and Iran, any attachment and collection of property in which their governments have an interest, including crypto assets, must operate through the Foreign Sovereign Immunities Act § 1610(g) and the Terrorism Risk Insurance Immunities Act § 201(a), in addition to sections analogous to those outlined above.[173] Such efforts should also align with particular United States foreign policy interests. It can be expected that the United States government would appear as *amicus curiae* in cases of significant interest to the government, as it does, on occasion, with respect to sovereign immunities of foreign States.[174]

Breach of International Law

In *Certain Iranian Assets*, Iran claimed breach of the Treaty of Amity by the United States.

With respect to Ukraine, Ukraine may explore breach by Russia of international agreements relating to comity and cooperation to which both Ukraine and Russia are parties. For example, both Russia and Ukraine signed the Agreement on Creation of the Commonwealth of Independent States ("Commonwealth of Independent States Agreement") of 1994. Notably, Ukraine formally withdrew from participation in this agreement as of 2018. Over the course of 2022, Ukraine has withdrawn from several Commonwealth of Independent States Agreement agreements, including agreements regarding customs, common agrarian market, illegal migration, transnational corporation (draft law), intergovernmental courier cooperation and perpetuating the memory of heroes of the great patriotic war. Ukraine has additionally withdrawn from a number of bilateral agreements with Russia, including the Russia-Ukraine Friendship Treaty (allowed to lapse as of 2019), the treaty regarding atomic energy cooperation, and a treaty regarding taxation. The Commonwealth of Independent States Agreement

[171] 45 F.4th 416 (D.C. Cir. 2022).

[172] Freshfields Bruckhaus Deringer LLP, D.C. Circuit Expands the Class of Assets That May Be Attached by Holders of Judgments Against State Sponsors of Terrorism (Oct. 18, 2022).

[173] *See, for example,* 31 C.F.R. § 535.203(e).

[174] Fox & Webb, supra note 40, at 253.

proclaims sovereign immunity, cooperation, equal rights to nationals of each contracting party, and other rights and freedoms. At the same time, the agreement proclaims territorial integrity of Commonwealth of Independent States Agreement States and non-interference in each other's sovereign affairs. Besides regional and bilateral agreements, Ukraine and Russia are parties to a number of global multilateral treaties (for example, the Genocide Convention, Chemical Weapons Convention, Geneva Conventions I-IV and Protocols 1-11) that may confer the International Court of Justice's jurisdiction.

If Ukraine passes legislation or adopts measures to dispose of property of the Russian State on its territory, Russia may claim violation of international law, including the regional Commonwealth of Independent States Agreement agreements. It appears, however, that it would be hard to sustain that argument in light of Russia's "unclean" hands and breaching the territorial integrity of Ukraine, violating the same agreements.

Annex 1

Summary of Facts and Analysis

This is an executive summary of the facts and analysis of the Case Study of *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* ("*Certain Iranian Assets*").

Facts of the Case:

- A 1983 Hezbollah' attack on a United States Marine Corps barracks in Beirut, Lebanon led to *Peterson* litigation in United States courts alleging Iran's material and financial support to Hezbollah
- United States legislative and executive actions effectuated blocking of, and making available for execution and enforcement of judgments against, assets of Iranian government and entities
- Iran submitted an application to the International Court of Justice ("International Court of Justice") alleging violation of international law norms by the United States and seeking reparations
- The International Court of Justice ruled on jurisdiction but has not yet ruled on substantive matters

Issues at the International Court of Justice:

- Sovereign immunities of Iranian State and State entities did not fall within scope of the Treaty of Amity (a United States and Iran bilateral agreement at issue), and the court lacked jurisdiction to consider them
- Abuse of process objection must be based on clear evidence that a country's conduct amounts to an abuse of process
- "Unclean hands" theory would not be sufficient per se to uphold the objection of admissibility of a claim to the International Court of Justice

Lessons for Ukraine:

- The *Certain Iranian Assets* case raised issues in connection with the Treaty of Amity – a bilateral treaty between the United States and Iran, not applicable to Ukraine. However, the Treaty of Amity embodies many well-accepted principles of international customary law, potentially applicable to the Ukraine situation
- For the International Court of Justice to hold jurisdiction over a claim by Ukraine against Russia, an applicant must demonstrate a *prima facie* case

that the subject matter of the claim relates to the interpretation of an agreement between the parties with a compromissory clause invoking International Court of Justice jurisdiction

- A mere involvement of human rights violations by a State will not likely be enough to overcome the sovereign immunities at the International Court of Justice
- At the International Court of Justice, state-owned entities may enjoy sovereign immunities and also have rights and protections as commercial entities to the extent they carry out commercial activities at relevant time
- The United States Foreign Sovereign Immunities Act ("Foreign Sovereign Immunities Act") establishes sovereign immunities of foreign States in United States courts, but Section 1605A provides an exception to States declared as State sponsors of terrorism
- For the victims to have standing in United States courts under Foreign Sovereign Immunities Act, they must be United States nationals
- The *Peterson* litigation in the United States involved United States service members harmed by activities connected to a State that the United States designated as a State sponsor of terrorism. These unique circumstances differ from the Ukrainian nationals being harmed as a result of Russian hostilities in Ukraine
- Once a judgment against a foreign State is obtained under the terrorism exception (Foreign Sovereign Immunities Act § 1605A), two statutes allow a plaintiff to attach assets of the foreign State to satisfy the judgment:
    - Foreign Sovereign Immunities Act § 1610(g) "subject[s] to attachment" "the property of a foreign [terrorist] State . . . and the property of an agency or instrumentality of such a State;" and
    - The Terrorism Risk Insurance Immunities Act of 2002, § 201(a) "subject[s] to execution or attachment" "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)."
- To enable attachment and enforcement against the "blocked" property of Russian parties in the United States, special legislative and/or executive measures would be required.

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