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DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN CERTAIN IRANIAN ASSETS (IRAN V. USA): LESSONS LEARNED FOR UKRAINE

Prepared by the
Public International Law & Policy Group
and
Orrick Herrington & Sutcliffe

ICJ Decision in Certain Iranian Assets (Iran v. USA): Lessons Learned for Ukraine

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Statement of Purpose

This case study summarizes and analyzes the decision of the International Court of Justice (the "ICJ") in *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* to identify lessons learned for Ukraine. This document is a follow-up memo to PILPG's and Orrick's memo on the same case of March 2023 (the "March 2023 Memo") and to the Policy Planning White Paper on Repurposing Frozen Russian Assets.

Introduction

This document provides an analysis of what the ICJ judgment in *Certain Iranian Assets* (*Islamic Republic of Iran v. United States of America*) means for the widespread interest of repurposing Russia's frozen assets for Ukraine's reconstruction. In particular, this document outlines what the judgment says and what the implications may be of this judgment for Ukraine regarding frozen Russian assets.

Summary of the Litigation

The Certain Iranian Assets case arises from litigation surrounding the 1983 Marine Corps Barracks bombing in Beirut, Lebanon. Various U.S. legislative actions permitted suits against Iranian state-owned entities for the bombing, resulting in a nearly $2.7 billion judgment executed against U.S. located assets of the Bank of Markazi. After losing an appeal at the U.S. Supreme Court, Iran sought reparations at the ICJ. The ICJ determined it had jurisdiction over violations of the Treaty of Amity but no jurisdiction to hear claims as to violations of Iran's sovereignty.

As summarized in the March 2023 Memo, the facts of *Certain Iranian Assets* arise from litigation surrounding the 1983 bombing of the United States Marine Corps Barracks in Beirut, Lebanon, which resulted in the loss of 241 U.S. service members. The victims and their survivors sued Iran and sought damages in United States courts.

Although the U.S. Foreign Sovereign Immunities Act ("FSIA")[1] would ordinarily block claims against a foreign State, the United States undertook various legislative and executive actions to permit the suit against Iran and to make the assets of certain Iranian state-owned entities available for execution of judgments. One such suit resulted in a judgment of nearly $2.7 billion for the plaintiffs.[2] The

[1] *See* 28 U.S.C. §§ 1330, 1332, 1391, 1441, and 1602–1611.

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

judgments were executed against the U.S.-located assets of Bank Markazi, Iran's central bank, and other Iranian state-owned entities. Iran appealed but lost at the U.S. Supreme Court.[3]

In response to these judgments and their execution against Iranian state-owned assets, Iran sought reparations at the ICJ alleging violations of international law by the United States. On February 13, 2019, the ICJ issued a judgment as to the preliminary jurisdictional questions, ruling that the ICJ did have jurisdiction to hear claims relating to violations of the bilateral treaty between Iran and the United States (the "Treaty of Amity"[4]), but no jurisdiction to hear claims that the United States failed to accord sovereign immunity to the Iranian government, Bank Markazi, or Iranian state-owned entities.[5]

The Judgment in Certain Iranian Assets and Lessons for Ukraine

The ICJ's final judgment, issued in March 2023, determined that the Bank of Markazi is not a "company" and, along with its assets, is outside the ICJ's jurisdiction. The ICJ, however, retained jurisdiction over other Iranian entities, determining the U.S. had not afforded them fair and equitable treatment and gave the parties 24 months to agree on compensation.

On March 30, 2023, the ICJ delivered the final judgment in *Certain Iranian Assets*,[6] addressing questions of jurisdiction and admissibility, defenses, and resolving the merits. The ICJ concluded that the Bank of Markazi could not be characterized as a company within the meaning of the Treaty of Amity, removing nearly all of the $2 billion worth of assets sought by Iran from the jurisdiction of the court. The ICJ, however, maintained jurisdiction over the remaining Iranian entities, dismissed the defenses raised by the United States, and found that the United States had failed to accord the entities fair and equitable treatment by expropriating their assets without compensation and a sufficient public purpose. Consequently, the ICJ awarded compensation to Iran, leaving the amount subject to subsequent proceedings if the parties fail to reach agreement within 24 months of the judgment.

Jurisdiction and Admissibility

Compromissory Clause

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

[4] 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 States T. 899.

[5] *Certain Iranian Assets*, Judgment, 2019 I.C.J. Rep. 7 (Feb. 13). *See also* the March 2023 Memo.

[6] *Certain Iranian Assets*, Judgment, 2023 I.C.J. General List No. 164 (Mar. 30) (the "Final Judgment").

Since Ukraine and Russia do not have compromissory clauses in bilateral treaties directing disputes to the ICJ, they would not be able to invoke ICJ jurisdiction in the same manner as Iran.

In *Certain Iranian Assets*, Iran invoked a provision of the Treaty of Amity directing any dispute between the parties to the ICJ.[7]

There appears to be no such compromissory clause in a treaty between Ukraine and Russia to invoke ICJ's jurisdiction in a similar manner.

Treatment of State Banks

Under the Treaty of Amity, entities carrying out exclusively sovereign activities cannot be characterized, and receive the benefits, of companies. The central purpose of the Bank of Markazi is as a central bank and not as a "company", a finding that would likely apply to Russian central bank and some of Russian state banks unless it is established that they engaged in sufficient commercial activities. This would strip them of protections for companies under customary international law.

As described in the March 2023 Memo, in *Certain Iranian Assets*, the ICJ decided 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.[8] 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 of Amity to the extent that it is engaged in activities of a commercial nature, even if they do not constitute its principal activities.[9] In the final judgment, the ICJ determined that Bank Markazi carried relevant operations[10] within the framework and for the purposes of its principal activity, exercising its sovereign function as a central bank, and thus, it could not be characterized as a "company."[11]

If it is argued at the ICJ that the Russian central bank and certain Russian state banks are "companies," the ICJ will likely disagree, unless their relevant operations were sufficient to establish that they engaged in activities of a

[7] Treaty of Amity art. XXI, para. 2.

[8] *Certain Iranian Assets*, Final Judgment, para. 91.

[9] *Certain Iranian Assets*, Final Judgment, para. 92.

[10] In particular, purchase of security entitlements in dematerialized bonds and management of proceeds deriving from those entitlements.

[11] *Certain Iranian Assets*, Final Judgment, paras. 34-54.

commercial character. As a result, they may not be accorded protections for companies under customary international law (such as fair treatment).

Local Remedies

The ICJ will deem the requirement to exhaust local remedies prior to bringing a claim to the ICJ when there are no available local remedies. If Ukraine could make such a demonstration and local remedies were deemed exhausted, its claims could be deemed admitted.

Based on customary international law and as supported by *Certain Iranian Assets,* the ICJ will deem the requirement to exhaust local remedies before bringing a claim to the ICJ satisfied when there are no available local remedies providing the injured persons with a reasonable possibility of obtaining redress.

If Ukraine or another State party applies to the ICJ and demonstrates that it had no reasonable possibility of successfully asserting certain rights in local court proceedings, the requirement of exhausting local remedies would be deemed satisfied, making the claim admissible.

FSIA/Sovereign Immunity

Sovereign immunity applies to property of foreign States and their instrumentalities, although property of foreign State owned enterprises is generally excluded. This question was not before the ICJ and was not considered.

As described in the March 2023 Memo, under general principles of international law, sovereign immunity will apply to property of foreign States, including their instrumentalities.[12] Further, property of foreign central banks will generally enjoy immunity from jurisdiction like property of any other State entity, but property of foreign state-owned enterprises is generally not entitled to immunity from jurisdiction.

The question of immunity of the Iranian state banks was not before the ICJ.[13] Ultimately, the ICJ did not seem to consider whether the FSIA's abrogation of the immunity of Iran and Iranian state banks was permissible under international law.

Unclean Hands, Abuse of Rights

[12] See PILPG Policy Planning White Paper: Repurposing Frozen Russian Assets, (Mar. 2023), *available at* https://www.publicinternationallawandpolicygroup.org/policy-planning-ukraine-sanctions-and-frozen-assets, at pp. 10-14.
[13] See *Certain Iranian Assets*, Final Judgment, para. 52.

For Ukraine or Russia to use the "unclean hands" doctrine at the ICJ, the party would need to show that the other party committed a wrong or misconduct and that there was a nexus between the wrong and the ICJ claim. To rely on the "abuse of rights" doctrine, a State would need to demonstrate that other State seeks to exercise rights under international law for purposes other than those for which the right was established.

In *Certain Iranian Assets*, the ICJ opined on the "clean hands" doctrine and "abuse of rights" defenses when admitting Iran's claim.

For Ukraine or Russia to use the "unclean hands" doctrine at the ICJ, a party would have to show that the opposing party committed a wrong or misconduct itself (or by someone on its behalf), and that there is a nexus between the wrong and the claims being brought to the ICJ.

For Ukraine to rely on the "abuse of rights" doctrine, it would have to demonstrate, on the basis of compelling evidence, that the other party seeks to exercise rights conferred on it by international law for purposes other than those for which the rights at issue were established, and that it is doing so to the detriment of the party.[14] In *Certain Iranian Assets*, the ICJ found that the United States failed to make such a demonstration.[15]

Alleged Violations of International Law

Stripping Iran and Iranian Enterprises of Assets[16]

The ICJ may not uphold a State abrogating a company's separate legal personality and removing legal defenses, meaning that measures ordering satisfaction of orders may be unreasonable where the entities whose assets are blocked are not given fair and equitable treatment.

Iran argued that the U.S. legislative measures ordering satisfaction of U.S. courts' judgments from blocked assets of Iran and its organizations stripped Iranian enterprises of fair and equitable treatment to nationals and companies (which included protection against denial of justice).

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[14] *See Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, PCI., Series A, No. 7,* p.30 (holding that abuse of rights cannot be presumed, and [. . .] rests with the party who states that there has been such [an abuse]); *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objection, Judgment, I.C.J. Reports 2018 (I)*, pp. 335-336, para. 147) (explaining that on many occasions, abuse of rights was pleaded and rejected at the merits phase for want of sufficient proof).

[15] *Certain Iranian Assets*, Final Judgment, para. 93.

[16] Treaty of Amity art. III, para. 1 (depriving Iranian companies of the independent legal personality), art. IV, para. 1 (failure to afford them fair treatment), and art. III, para. 2 (freedom of access to courts).

The ICJ observed that Iran and the United States had divergent views on the question to what extent the Treaty of Amity imposed limits on a State's regulatory powers. The ICJ did not consider all claims with respect to the U.S. legislative measures.[17] The ICJ specifically did not consider these claims with respect to Bank Markazi because the ICJ did not find that the bank satisfied the definition of "company" to be afforded these rights.[18] With respect to those measures that the ICJ did consider, the ICJ found that the U.S. measures were unreasonable.[19] They disregarded the Iranian companies' own legal personality, which was not justified.[20]

Any Ukrainian or third State measures ordering satisfaction of judgments against Russian blocked assets will likely be subject to scrutiny and may be found unreasonable, if the Russian non-State parties whose assets are blocked and then are used to satisfy claims are not given fair and equitable treatment. In other words, the ICJ will not uphold a State abrogating Russian companies' separate legal personality and removing legal defenses available to them, making them liable for Russia's wrongful acts in judicial proceedings to which the companies were not parties.

The ICJ ruled that the rights of Iranian companies to appear before, and seek justice in, U.S. courts have not been curtailed.[21] Similarly, if Russia were to argue that Ukrainian or third state courts' application of law was unfavorable to the Russian parties and their arguments were unsuccessful in those jurisdictions, this would not seem to mean that their freedom of access to justice was abrogated.

Takings of Property[22]

Judicial decisions ordering attachment and execution of property of the Iranian companies was not a takings per se, but will amount to takings without compensation when there is deprivation of property resulting from a denial of justice. If State measures or judicial enforcement were found unreasonable, Russia would need to identify actual property or interests in property, which would be specifically affected by State legislative measures.

[17] *Certain Iranian Assets*, Final Judgment, para. 115.

[18] See id.

[19] *Certain Iranian Assets*, Final Judgment, para. 156.

[20] Id. para. 159.

[21] Id. paras. 143 & 167.

[22] Treaty of Amity art. IV, para. 2 (protection of property of companies).

The ICJ determined that a judicial decision ordering attachment and execution of the property and interests in property of the Iranian companies would not constitute a taking contrary to the international law *per se*.[23] But when a deprivation of property results from a denial of justice, it will amount to takings without compensation.[24]

For any seizure of property of Russian parties by Ukrainian or third State legislative measures or judicial enforcement, the ICJ will consider whether they are unreasonable. If found unreasonable (such as certain U.S. statutory provisions in *Certain Iranian Assets*), they would not be viewed as lawful exercise of regulatory powers and will amount to expropriation.[25] However, there will need to be identification of actual property or interests in property which would be specifically affected by State legislative measures.[26]

Free Disposal of Property[27]

If the ICJ considers the right of Russian companies to freely dispose of property, most-favored-nation treatment will likely arise. The ICJ will likely interpret international law provisions permitting state companies to carry out certain transactions in a second state as not absolute. A State would need to identify the property or interest in property specifically affected for the ICJ to consider a specific violation of the right to dispose of property.

If the ICJ considered a question of the Russian companies' right to freely dispose of their property, the question of the most-favored-nation treatment will likely arise. The ICJ may interpret an international law provision under which first State's companies "shall be permitted" to carry out certain transactions (e.g., lease property) at the territory of the second State not as an absolute obligation of the signatories. In addition, a State will have to identify the property or interest in property that were specifically affected by a specific measure, for the ICJ to consider a specific violation of the right to dispose of property.

Restrictions to Make Payments and Transfer Funds[28]

The ICJ determined that U.S. actions did not establish a restriction on payments, remittances and other transfers of funds under the Treaty of Amity.

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[23] *Certain Iranian Assets*, Final Judgment, para. 184.

[24] Id.

[25] See id. para. 186.

[26] See id. para. 188.

[27] Treaty of Amity art. V, para. 1 (rights to dispose freely of property).

[28] Id. art. VII, para. 1 (restrictions on the making of payments and transfers of funds)

The ICJ considered whether the U.S. measures through which it attached, blocked and confiscated funds belonging to Iranian entities and to Iran constituted restrictions on payments, remittances and other transfers of funds, in violation of the Treaty of Amity. The court concluded that Iran did not establish such a violation by the United States.

Interference with Freedom of Commerce[29]

There is a risk that ICJ would conclude that attachment and execution of Russian assets constitutes interference with freedom of commerce between Ukraine and Russia if it is conducted similarly to the procedure used in Section 1610(g)(1) of the FSIA in relation to assets of certain Iranian banks.

The ICJ may consider whether any legislative measures adopted by Ukraine (or a third party State) against Russian frozen assets constitute interference with freedom of commerce between Ukraine (or the third party State) and Russia. The ICJ may conclude that such a measure constitutes a concrete interference with commerce, if the measure is similar to Section 1610(g)(1) of the FSIA, stating that any assets of any Iranian company in which Iran holds any form of interest are subject to attachment and execution, even if not blocked.

Remedies

The ICJ determined that Iran was entitled to compensation and gave the parties 24 months to come to agreement before subsequent proceedings. If ICJ decides that seizure of the Russian assets by Ukraine and its allies had breached some applicable legal standards, there is a risk that the State that seized such assets may be responsible for repaying Russia for seized assets and for making a public apology to the extent any assets are wrongfully seized.

In *Certain Iranian Assets*, Iran has sought cessation, non-repetition, and reparation for breach by the United States. The ICJ determined that because the Treaty of Amity is no longer in force, cessation of wrongful acts is no longer a relevant claim.[30] However, the ICJ concluded that Iran is entitled to compensation for the injury caused by violations by the United States and observed that the amount may be determined in a subsequent phase of proceedings. If the parties are unable to agree on the amount of compensation due to Iran within 24 months of March 30, 2023, the ICJ will determine the amount due.[31] Additionally, the ICJ

[29] Id. art. X, para. 1 (freedom of commerce and navigation).

[30] *Certain Iranian Assets*, Final Judgment, para. 228.

[31] Id. para. 230 and 231.

determined that findings by the court of wrongful acts committed by the United States constitute sufficient satisfaction for Iran.[32]

For states interested in repurposing frozen Russian assets, this determination by the ICJ may suggest that such states would be responsible for repaying Russia for any assets that are determined by the ICJ to be wrongfully seized and may be forced to issue a public apology to Russia.

[32] Id. para 232.

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