INTERNATIONAL COURT OF JUSTICE

APPLICATION

INSTITUTING PROCEEDINGS

filed in the Registry of the Court
on 14 June 2016

CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

COUR INTERNATIONALE DE JUSTICE

REQUÊTE

INTRODUCTIVE D'INSTANCE

enregistrée au Greffe de la Cour
le 14 juin 2016

CERTAINS ACTIFS IRANIENS

(RÉPUBLIQUE ISLAMIQUE D'IRAN c. ÉTATS-UNIS D'AMÉRIQUE)

2016
General List
No. 164

I. LETTER FROM THE AGENT OF THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

Embassy of the Islamic Republic of Iran
Agent Bureau
The Hague

IN THE NAME OF GOD

14 June 2016.

On behalf of the Islamic Republic of Iran, and in accordance with Articles 36 (1) and 40 (1) of the Statute of the Court, and Article 38 of the Rules of Court, I have the honour to notify the Court that the Islamic Republic of Iran is hereby presenting an Application concerning the violations by the Government of the United States of America of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and United States of America which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957.

As indicated in the Application, in accordance with Article 40 of the Rules of Court, the Government of the Islamic Republic of Iran informs the Court that it has appointed the undersigned as its Agent for this proceeding and that the address for service to the Agent is the Agent Bureau of the Embassy of the Islamic Republic of Iran, De Werf 15, 4th floor, 2544 EH, The Hague.

(Signed) M. H. Zahedin Labbaf,

I hereby certify the authenticity of the above signature,

(Signed) A. Jahangiri,
Ambassador of the Islamic Republic of Iran
to the Netherlands.

II. APPLICATION INSTITUTING PROCEEDINGS

IN THE NAME OF GOD

I, the undersigned, duly authorized by the Government of the Islamic Republic of Iran ("Iran") of which I am the Agent, have the honour to submit to the International Court of Justice, in accordance with Articles 36 (1) and 40 (1) of its Statute and Article 38 of its Rules, an Application instituting proceedings brought by Iran against the United States of America (the "USA") in the following case.

I. Subject of the Dispute

1. The dispute between Iran and the USA concerns the adoption by the USA of a series of measures that, in violation of the Treaty of Amity, Economic Relations, and Consular Rights signed at Tehran on 15 August 1955 (the "Treaty of Amity"), which entered into force between Iran and the USA on 16 June 1957[1], have had, and/or are having a serious adverse impact upon the ability of Iran and of Iranian companies (including Iranian State-owned companies) to exercise their rights to control and enjoy their property, including property located outside the territory of Iran/within the territory of the USA.

II. The Jurisdiction of the Court

2. The Court has jurisdiction in relation to the above dispute, and to rule on the claims submitted by Iran, pursuant to Article 36 (1) of the Statute of the Court and Article XXI (2) of the Treaty of Amity.

3. Article 36 (1) of the Statute of the Court provides in the relevant part that the Court's jurisdiction: "comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force".

4. Article XXI (2) of the Treaty of Amity provides:

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

5. The dispute has not been satisfactorily adjusted by diplomacy, and there has been no agreement to settle the dispute by some pacific means other than the Treaty of Amity.

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[1] 284 United Nations, *Treaty Series (UNTS)* 93; II *Recueil des traités bilatéraux* 69; 8 *UST* 899; *TIAS* No. 3853. The text of the Treaty of Amity is appended to this Application as Annex 1.

III. The Facts

6. The USA has adopted, and is implementing, a broad series of measures against Iran and Iranian companies, including Iranian State-owned companies such as the Central Bank of Iran (also known as "Bank Markazi Jomhouri Islami Iran" or "Bank Markazi"), and their property, which are in violation of the USA's obligations under the Treaty of Amity. The USA's violations of the Treaty of Amity include its *(a)* failure to recognize the separate juridical status of such entities including Iranian State-owned companies, *(b)* unfair and discriminatory treatment of such entities and their property, which impairs the legally acquired rights and interests of such entities including enforcement of their contractual rights, *(c)* failure to accord to such entities and their property the most constant protection and security that is in no case less than that required by international law, *(d)* expropriation of the property of such entities, *(e)* failure to accord to such entities freedom of access to the US courts, including the abrogation of the immunities to which Iran and Iranian State-owned companies, including Bank Markazi, and their property, are entitled under customary international law and as required by the Treaty of Amity, both with respect to jurisdictional immunities and immunities from enforcement, *(f)* failure to respect the right of such entities to acquire and dispose of property, *(g)* application of restrictions to such entities on the making of payments and other transfers of funds to or from the USA, and *(h)* interference with the freedom of commerce between the territories of Iran and the USA.

7. The USA has for many years adopted the position that Iran may be designated a State sponsoring terrorism (a designation which Iran strongly contests)[2]. Consequent upon the enactment of the legislative and executive acts referred to below, a wide series of claims and enforcement proceedings have been determined or are underway against Iran and Iranian entities in the USA. As at the date of this Application, US courts had awarded total damages of over US$56 billion (consisting in approximately US$26 billion in compensatory damages and US$30 billion in punitive damages) against Iran in respect of its alleged involvement in various terrorist acts mainly outside the USA[3]. On 9 March 2016, the US District Court for the Southern District of New York ordered Iran to pay more than US$10.5 billion to families of people killed in the 11 September 2001 terrorist attacks, and to a group of insurers[4].

8. On 3 July 2012, the US District Court of Columbia stated that it had issued over US$8.8 billion in judgments against Iran regarding alleged involvement in the deaths of US Marines killed in the bombing of their barracks in Beirut, Lebanon, in 1983 alone[5]. In one such set of claims primarily concerning the 1983 Beirut bombing, *Deborah D. Peterson et al.* v. *Islamic Republic of Iran et al.*, the US District Court for the District of Columbia has ordered Iran in a default judgment to

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[2] The USA purported to designate Iran as a State sponsoring terrorism on 19 January 1984 (see Section 6 *(j)* of the Export Administration Act, Section 40 of the Arms Export Control Act, and Section 620A of the Foreign Assistance Act).

[3] A list of damages claims and enforcement proceedings determined, or in the course of being determined, by the US courts is appended to this Application as Annex 2. For an earlier list prepared by the USA see "Terrorism Judgments against Iran: US Court Cases under the Terrorism Exception to the FSIA (as of 11 August 2015)", publicly available at http://www.kirk.senate.gov/pdfs/AmericanIranianJudgments.pdf (accessed on 16 May 2016).

[4] *Terrorist Attacks on September 11, 2001*, US District Court for the Southern District of New York, memorandum opinion and order dated 9 March 2016, 3 MLD 1570 (GBD) (FM).

[5] *Brown* v. *Iran*, 08-cv-531 (RCL) US District Court for District of Columbia, 3 July 2012, Chief Judge Royce C. Lamberth.

pay in excess of US$2.6 billion. The US District Court for the Southern District of New York has granted summary judgment to the *Peterson* claimants and ordered the "turnover" of approximately US$1.75 billion in cash proceeds of security entitlements previously held in a custodial "omnibus account"[6] with Citibank N. A. in New York by the Luxembourg-based international central securities depository Clearstream Banking S.A. to the ultimate benefit of Bank Markazi (the "Blocked Assets")[7]. On 20 April 2016, the US Supreme Court upheld as constitutional the relevant enactment specifically abrogating the immunity from enforcement which would otherwise apply to such assets and interests of Bank Markazi. On 6 June 2016, the US District Court authorized the payment of the Blocked Assets to the judgment creditors and closed the proceedings[8].

(i) US Legislative and Executive Acts against Iran and Iranian Companies

9. In 1996, the USA enacted Section 1605 *(a)* (7) of the Foreign Sovereign Immunity Act (the "FSIA"), pursuant to which immunity was removed in respect of claims

> "in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act . . ."[9].

10. In 2008, a new Section 1605A of FSIA was enacted to replace and extend Section 1605 *(a)* (7) of FSIA[10]. In particular:

(a) Section 1605A *(a)* (1) provides: "NO IMMUNITY — A foreign State[11] shall not be immune from the jurisdiction of the courts of the United States . . . in any case . . . in which money damages are sought against a foreign State for personal injury or death that was caused by the act of torture, extrajudicial

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[6] An account opened in the name of a financial institution through which the assets of the financial institution's underlying customers are commingled.

[7] According to the US District Court's order of 9 July 2013, as at 4 June 2013, the Blocked Assets constituted US$1,895,600,513.03.

[8] *Deborah D. Peterson et al.* v. *Bank Markazi a.k.a. Central Bank of Iran et al.*, US District Court for the Southern District of New York, order authorizing distribution of funds dated 6 June 2016.

[9] In 1996, the USA enacted the Foreign Operations, Export Financing, and Related Programs Appropriations Act 1997, which extended the application of Section 1605 *(a)* (7) of FSIA to "an official, employee or agent of a foreign State designated as a State sponsor of terrorism designated under Section 6U) of the Export Administration Act of 1979 while acting within the scope of his or her office employment, or agency".

[10] The text of legislative and executive acts referred to below, including Section 1605A, is appended to this Application as Annex 3.

[11] A "foreign State" is defined in Section 1603 *(a)* of FSIA as including "a political subdivision of a foreign State or an agency or instrumentality of a foreign State as defined in subsection *(b)*". Section 1603 *(b)* of FSIA provides:

killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act . . .”

(b) Pursuant to Section 1605A *(a)* (2), US courts will hear a claim under Section 1605A *(a)* (1) where — but only where — the foreign State has been designated as a State sponsor of terrorism.
(c) Pursuant to Section 1605A *(c)*, a private right of action is established, i.e., it is established that a foreign State that is or was at the material time designated by the USA as a State sponsor of terrorism is liable to US nationals (and certain others) for personal injury or death caused by acts of torture. Punitive damages may be awarded.
(d) Pursuant to Section 1605A *(g)*, a lien of *lis pendens* is established over any real or personal property within a given US District Court’s judicial district.

11. The provisions of Section 1605A apply with respect to past actions, and without regard to defences such as *res judicata*, limitation of actions and collateral estoppel[12].

12. As to enforcement against property of the foreign State and State-owned companies, with respect to Section 1605A, Section 1610 *(b)* (3) provides:

> “In addition to subsection *(a)*, any property in the United States of an agency or instrumentality of a foreign State engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if —
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> . . . . . .
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> (3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of Section 1605A of this chapter or Section 1605 *(a)* (7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.”[13]

13. Further, Section 1610 *(g)* (1) of FSIA provides:

> “. . . the property of a foreign State against which a judgment is entered under Section 1605A, *and the property of an agency or instrumentality of such a State, including property that is a separate juridical entity or is an interest held directly*

“An ‘agency or instrumentality of a foreign State’ means any entity — (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign State or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign State or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in Section 1332 *(c)* and *(e)* of this title, nor created under the laws of any third country.”

[12] See Section 1083 *(c)* of the National Defense Authorization Act for Fiscal Year 2008, introducing the new Section 1605A of FSIA.

[13] Section 1610 *(b)* (3) of FSIA was introduced by Section 502 *(e)* (l) of the Iran Threat Reduction and Syria Human Rights Act of 2012 (referred to below).

or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, *regardless of —*

(A) the level of economic control over the property by the Government of the foreign State;
(B) whether the profits of the property go to that Government;
(C) the degree to which officials of that Government manage the property or otherwise control its daily affairs;
(D) whether that Government is the sole beneficiary in interest of the property; or
(E) whether establishing the property as a separate entity would entitle the foreign State to benefits in United States courts while avoiding its obligations."[14] (Emphasis added.)

14. It follows that the property of an agency or instrumentality of Iran may be the subject of enforcement even though (i) the relevant judgment is against Iran alone, and (ii) the property is owned by, or to the ultimate benefit of, a separate juridical entity, and (iii) the Government of Iran has no economic or management control over the separate juridical entity or its property. The US Court of Appeals for the Ninth Circuit recently held that:

> "Congress did not limit the type of property subject to attachment and execution under Section 1610 *(g)* to property connected to commercial activity in the United States. The only requirement is that property be 'the property of the foreign State or its instrumentality'."[15]

15. Section 1611 *(b)* (1) of FSIA provides that, notwithstanding the provisions of Section 1610, "the property of a foreign central bank or monetary authority held for its own account" shall be immune from attachment and from execution. However, in order to "lessen . . . enforcement difficulties"[16] the USA has deliberately abrogated the protection which would otherwise be granted to the property of Bank Markazi.

16. Through the Terrorism Risk Insurance Act 2002 ("TRIA"), the USA authorized the enforcement of certain judgments obtained under Section 1605 *(a)* (7) of FSIA against the "Blocked Assets"[17] of the (alleged) "terrorist party"[18] including the Blocked Assets of an agency or instrumentality of that

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[14] Section 1610 (l) *(g)* of FSIA was introduced by Section 1083 *(b)* (3) (D) of the National Defense Authorization Act for Fiscal Year 2008.

[15] *Michael Bennett et al.* v. *Bank Melli*, US Court of Appeals for the Ninth Circuit, order and opinion dated 22 February 2016, Circuit Judge Graber, p. 18.

[16] *Bank Markazi, a.k.a. Central Bank of Iran* v. *Deborah Peterson et al.*, US Supreme Court, judgment dated 20 April 2016, Judge Ginsburg, p. 3.

[17] The term "Blocked Asset" is defined in Section 201 *(d)* (2) of TRIA as any asset seized or frozen by the Executive Branch pursuant to either the Trading with the Enemy Act or the International Emergency Economic Powers Act.

[18] The term "terrorist party" is defined in Section 201 *(d)* (4) of TRIA as including "a foreign State designated a State sponsor of terrorism under Section 6 *(j)* of the Export Administration Act of 1979 . . . or Section 620A of the Foreign Assistance Act of 1961".

(alleged) "terrorist party". Section 201 *(a)* of TRIA, as amended[19], currently provides:

> "*Notwithstanding any other provision of law*, and except as provided in subsection *(b)*, in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under Section 1605 A or 1605 *(a)* (7) [as such Section was in effect on 27 January 2008] of title 28, United States Code, the *Blocked Assets* of that terrorist party (including the *Blocked Assets* of any agency or instrumentality of that terrorist party) *shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable*."[20] (Emphasis added.)

17. According to the US District Court for the Southern District of New York ("the US District Court"): "TRIA's broad language — 'notwithstanding any other provision of law . . . in every case' — provides one basis pursuant to which a separate 'central bank' analysis becomes unnecessary; TRIA trumps the central bank provision in 28 USC 1611 *(b)* (2)"[21].

18. The USA's attempts unlawfully to permit or assist the seizure and attachment of the assets and interests of Iran and Iranian State-owned companies, including Bank Markazi, in the USA have intensified.

19. On 5 February 2012, pursuant *(inter alia)* to the International Emergency Economic Powers Act (50 USC 1701) and the National Defense Authorization Act for Fiscal Year 2012 (the "NDAA"), the President of the USA made Executive Order 13599 "Blocking Property of the Government of Iran and Iranian Financial Institutions"[22]. The purported effect of Sections 1 *(a)* and *(b)* of Executive Order 13599 is as follows:

> "*(a) All property and interests in property of the Government of Iran*[23]*, including the Central Bank of Iran*, that are in the United States, that hereafter come

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[19] Section 201 *(a)* of TRIA was amended by Section 502 *(e)* (2) of the Iran Threat Reduction and Syria Human Rights Act 2012 (referred to below).

[20] Subsection 201 *(b)* establishes scope for a Presidential waiver. There is no relevant waiver so far as concerns the current Application.

[21] *Deborah D. Peterson et al.* v. *Bank Markazi a.k.a. Central Bank of Iran et al.*, US District Court for the Southern District of New York, opinion and order dated 28 February 2013, at p. 16.

[22] Executive Order 13599 implements Section 1245 *(c)* of the National Defense Authorization Act for Fiscal Year 2012, which provides:

> "The President shall, pursuant to the International Emergency Economic Powers Act (50 USC 1701 *et seq.*), block and prohibit all transactions in all property and interests in property of an Iranian financial institution if such property and interests in property are in the United States, come within the United States, or are, or come within the possession or control of a United States person."

[23] Defined at Section 7 *(d)* of Executive Order 13599 as "the Government of Iran, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iran, and any person owned or controlled by, or acting for or on behalf of, the Government of Iran".

within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, *are blocked* and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(b) *All property and interests in property of any Iranian financial institution, including the Central Bank of Iran*, 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, including any foreign branch, *are blocked* and may not be transferred, paid, exported, withdrawn, or otherwise dealt in." (Emphasis added.)

20. The effect of Executive Order 13599 appears to be that the pre-condition specified in Section 201 of TRIA (that there be relevant Blocked Assets of the alleged terrorist party, including the Blocked Assets of any agency or instrumentality of that terrorist party) is to be considered met with respect to all property and interests in property of Iran and also any Iranian financial institution, including Bank Markazi, that are in the United States. According to the US District Court for the Southern District of New York:

> "E.O. 13599 had the effect of turning any restrained assets owned by the Iranian Government (or any agency or instrumentality thereof) into 'Blocked Assets'. As Bank Markazi is the Central Bank of Iran, any of its assets located in the United States as of 5 February 2012, became 'Blocked Assets' pursuant to E.O. 13599."[24]

21. On 1 August 2012, the US Congress passed the "Iran Threat Reduction and Syria Human Rights Act 2012" (the "2012 Act"). President Obama signed the 2012 Act into law on 10 August 2012. Pursuant to Section 502 of the 2012 Act (also known as 22 USC Section 8772), a definition of "Interests in Blocked Assets" of extraordinary breadth has been enacted, and with specific reference to the ongoing enforcement proceedings in *Deborah D. Peterson et al.* v. *Islamic Republic of Iran et al.* (referred to above):

"*(a)* INTERESTS IN BLOCKED ASSETS. —

(1) IN GENERAL. Subject to paragraph (2), *notwithstanding any other* provision of law, including any provision of law relating to sovereign immunity, and pre-empting any inconsistent provision of State law, a financial asset that is:

(A) held in the United States for a foreign securities intermediary doing business in the United States;

(B) a blocked asset[25] (whether or not subsequently unblocked) that is property described in subsection *(b)*; and

(C) equal in value to a financial asset of Iran[26], including an asset of the Central Bank or monetary authority of the Government of

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[24] *Deborah D. Peterson et al.* v. *Bank Markazi a.k.a. Central Bank of Iran et al.*, US District Court for the Southern District of New York, opinion and order dated 28 February 2013, at p. 12.

[25] Defined as any asset seized or frozen by the United States under Section 5 *(b)* of the Trading with the Enemy Act (50 USC App. 5 *(b)*) or under Section 202 or 203 of the International Emergency Economic Powers Act (50 USC 1701 and 1702) (s502 *(d)* (l)).

[26] The term "Iran" is defined as the Government of Iran, including the Central Bank or monetary authority of that Government and any agency or instrumentality of that Government (s502 *(d)* (3)).

> Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,
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> *shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran* for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act
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> . . . . . .
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> *(b)* FINANCIAL ASSETS DESCRIBED — The financial assets described in this Section are the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al.* v. *Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated 27 June 2008, and extended by court orders dated 23 June 2009, 10 May 2010, and 11 June 2010, so long as such assets remain restrained by court order." (Emphasis added.)

22. As the US Supreme Court has stated, in its Judgment of 20 April 2016 upholding the constitutionality of Section 502 of the 2012 Act, the purpose and effect of that provision was "[t]o place beyond dispute the availability of some of the Executive Order No. 13599, Blocked Assets for satisfaction of judgments rendered in terrorism cases"[27]. In a passage approved by the US Supreme Court, the District Court recognized:

> "On its face, the Statute sweeps away the FSIA provision setting forth a central bank immunity, 28 USC Section 1611 *(b)* (l); it also eliminates any other federal or state law impediments that might otherwise exist, so long as the appropriate judicial determination is made . . . the 2012 Act therefore provides a separate basis — in addition to the FSIA and TRIA — for execution."[28]

23. In their joint dissenting opinion in the US Supreme Court's judgment in the *Peterson* case (as referred to above), President Roberts and Judge Sotomayor explained the effect of Section 502 as follows:

> "Section 8772 does precisely that, changing the law — for these proceedings alone — simply to guarantee that respondents win. The law serves no other purpose — a point, indeed, that is hardly in dispute. As the majority acknowledges, the statute 'sweeps away . . . any . . . federal or state law impediments that might otherwise exist' to bar respondents from obtaining Bank Markazi's assets . . . In the District Court, Bank Markazi had invoked sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 USC Sec-

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[27] *Bank Markazi, a.k.a. Central Bank of Iran* v. *Deborah Peterson et al.*, US Supreme Court, judgment dated 20 April 2016, Judge Ginsburg, at p. 5.

[28] *Deborah Peterson et al.* v. *Bank Markazi a.k.a. Central Bank of Iran et al.*, US District Court for the Southern District of New York, opinion and order dated 28 February 2013, at p. 21; cited in *Bank Markazi, a.k.a. Central Bank of Iran* v. *Deborah Peterson et al.*, US Supreme Court, judgment dated 20 April 2016, Judge Ginsburg, at p. 10.

> tion 1611 *(b)* (l) . . . Section 8772 *(a)* (l) eliminates that immunity. Bank Markazi had argued that its status as a separate juridical entity under federal common law and international law freed it from liability for Iran's debts . . . Section 8772 *(c)* (3) ensures that the Bank is liable. Bank Markazi had argued that New York law did not allow respondents to execute their judgments against the Bank's assets . . . Section 8772 *(a)* (l) makes those assets subject to execution."[29]

24. The practical impact of the above measures is that the assets and interests of Iran and Iranian entities are subject to enforcement proceedings in various cases in the USA, even where such assets or interests:

(a) are found to be held by separate juridical entities, such as Bank Markazi, that are not party to the judgment on liability in respect of which enforcement is sought, and/or

(b) are held by Iran or Iranian entities (including Bank Markazi) and benefit from immunities from enforcement proceedings as a matter of international law, and as required by the Treaty of Amity.

25. Consequent upon the USA's executive and legislative acts referred to above, a wide series of claims have been determined, or are underway, against Iran and Iranian entities in the USA. As at the date of this Application, the US courts have awarded approximately US$56 billion against Iran in respect of its alleged involvement in terrorist acts mainly outside the USA[30]. Moreover, the US courts have granted applications to enforce various of these compensatory awards against the property of Iranian companies, including Iranian State-owned companies (including Bank Markazi), which are separate juridical entities under Iranian law.

(ii) Recent US judicial acts against Iran and Iranian companies

26. In the set of claims comprising *Deborah D. Peterson et al.* v. *Islamic Republic of Iran et al.* (as referred to above), the US courts have issued default judgments ordering Iran to pay in excess of US$2.6 billion, and granted summary judgment permitting execution against the Blocked Assets pursuant to Section 201 of TRIA and Section 502 of the 2012 Act.

27. In the course of these proceedings, the US courts have repeatedly dismissed attempts by Bank Markazi to rely on the immunities to which such property is entitled (including under Section 1611 *(b)* (1) of FSIA), and the protections of the

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[29] *Bank Markazi, a.k.a. Central Bank of Iran* v. *Deborah Peterson et al.*, US Supreme Court, judgment dated 20 April 2016, joint dissenting opinion of President Roberts and Judge Sotomayor, at pp. 7-8.

[30] A list of damages claims and enforcement proceedings determined, or in the course of being determined, by the US courts is appended to this Application as Annex 2.

Treaty of Amity (including the requirement for recognition of the separate juridical status of Iranian companies). In summary:

(a) On 28 February 2013, the US District Court rejected Bank Markazi's motion to dismiss the enforcement claim for lack of subject matter jurisdiction, and granted partial summary judgment to the US judgment creditors. Specifically, the US District Court held that "Congress has abrogated any application of the Treaty in the FSIA context" and that "TRIA Section 201 *(a)*, E.O. 13599, and 22 USC Section 8772 expressly pre-empt any immunity" from enforcement[31].

(b) On 9 July 2013, the US District Court issued a final partial judgment and made directions for "turnover" of the Blocked Assets pursuant to Section 201 of TRIA and Section 8772[32]. These directions included making provision for the US judgment creditors to apply for an order authorizing distribution of the Blocked Assets, which were to be paid into a separate account, within thirty days of that judgment becoming a "Non-Appealable Sustained Judgment"[33]. Further, the US District Court issued anti-suit injunctions restraining Iran and Bank Markazi from initiating any claim to the Blocked Assets in another jurisdiction[34].

(c) Bank Markazi appealed to the Court of Appeals for the Second Circuit on the grounds, *inter alia*, that enforcement against the Blocked Assets pursuant to Section 201 of TRIA and/or Section 8772 was precluded by the Treaty of Amity and Section 1611 *(b)* (I) of FSIA. On 9 July 2014, the US Court of Appeals for the Second Circuit dismissed Bank Markazi's appeal, finding that it did not need to resolve the dispute regarding immunity under the TRIA because Congress "has changed the law governing this case" by enacting Section 8772[35]. Even assuming that this provision is inconsistent with the USA's obligations under the Treaty of Amity (which the Court of Appeals found it was not), "Section 8772 would have to be read to abrogate any inconsistent provisions in the Treaty"[36].

(d) Bank Markazi appealed to the US Supreme Court on the ground that Section 502 of the 2012 Act is unconstitutional. On 20 April 2016, the US Supreme

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[31] *Deborah D. Peterson et al.* v. *Bank Markazi a.k.a. Central Bank of Iran et al.*, US District Court for the Southern District of New York, opinion and order dated 28 February 2013, at p. 52.

[32] *Ibid.*, order dated 9 July 2013 entering partial final judgment and directing turnover of the Blocked Assets.

[33] Defined in paragraph 5 of the US District Court's order of 9 July 2013 as meaning "when the time to file an appeal from the partial judgment has expired or, if any appeal is filed and not dismissed, after the partial judgment is upheld in all material respects on appeal or after review by writ of certiorari and is no longer subject to review on appeal or review by writ of certiorari".

[34] *Deborah D. Peterson et al.* v. *Bank Markazi a.k.a. Central Bank of Iran et al.*, US District Court for the Southern District of New York, order dated 9 July 2013 entering partial final judgment and directing turnover of the Blocked Assets, at paras. 10 and 13.

[35] *Deborah D. Peterson et al.* v. *Islamic Republic of Iran et al.*, US Court of Appeals for the Second Circuit, opinion dated 9 July 2014, at p. 5.

[36] *Ibid.*, at p. 7.

Court dismissed the appeal and affirmed the judgment of the US Court of Appeals for the Second Circuit, upholding the lawfulness of Section 502 under the US Constitution[37]. On 23 May 2016, the US Supreme Court issued a certified copy of its judgment and order to the US Court of Appeals for the Second Circuit.

(e) On 6 June 2016, the US District Court authorized the payment of the Blocked Assets to the US judgment creditors and closed the proceedings[38].

28. Iran maintains that the assets of Iranian financial institutions and other Iranian companies have already been seized, or are in the process of being seized and transferred, or at risk of being seized and transferred, in a number of other proceedings. For example:

(a) On 22 February 2016, the US Court of Appeals for the Ninth Circuit held that the judgment creditors in *Michael Bennett et al.* v. *Bank Melli et al.* are entitled, pursuant to Section 201 *(a)* of TRIA, to attach to approximately US$17.6 million contractually owed to Bank Melli, an instrumentality of Iran and an Iranian State-owned company, by Visa Inc. and Franklin Resources Inc. in respect of the use of Visa credit cards in Iran[39]. If Bank Melli's pending petition for a rehearing is refused, the US District Court for the Northern District of California is expected to order "turnover" of the funds owed to Bank Melli to the judgment creditors.

(b) On 15 June 2010, in *Weinstein et al.* v. *Bank Melli et al.*, the US Court of Appeals for the Second Circuit held that the judgment creditors were entitled, pursuant to Section 201 *(a)* of TRIA, to the attachment and sale of a building in New York owned by Bank Melli[40]. The US court appointed a receiver and the property was sold on 22 December 2010 for a sale price of approximately US$1.6 million. On 19 December 2012, the US District Court for the Eastern District of New York ordered that the proceeds be disbursed to the judgment creditors[41].

(c) On 10 August 2011, in *Heiser et al.* v. *Iran*, the US District Court for the District of Columbia held that the sum of approximately US$616,500 owed by the US telecommunications company Sprint to the Iranian Telecommunication Infrastructure Co., which the US District Court found was an Iranian State-owned company and an instrumentality of Iran, is subject to attachment and execution pursuant to Section 1610 *(g)* of FSIA, and ordered that the funds be turned over to the judgment creditors[42].

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[37] *Bank Markazi, a.k.a. Central Bank of Iran* v. *Deborah Peterson et al.*, US Supreme Court, opinion dated 20 April 2016.

[38] *Deborah D. Peterson et al.* v. *Bank Markazi a.k.a. Central Bank of Iran et al.*, US District Court for the Southern District of New York, order authorizing distribution of funds dated 6 June 2016.

[39] *Michael Bennett et al.* v. *Bank Melli et al.*, US Court of Appeals for the Ninth Circuit, opinion and order dated 22 February 2016.

[40] *Weinstein et al.* v. *Bank Melli et al.*, US Court of Appeals for the Second Circuit, opinion dated 15 June 2010.

[41] *Ibid.*, US District Court for the Eastern District of New York, order dated 19 December 2012.

[42] *Estate of Michael Heiser et al.* v. *Islamic Republic of Iran*, US District Court for the District of Columbia, opinion and order dated 10 August 2011.

29. The effect of the enactments and decisions set out above is to confirm the USA's unlawful removal of the jurisdictional immunities and immunities from enforcement to which Iran and Iranian State-owned companies are entitled under both customary international law and the Treaty of Amity.

30. Specifically, the various decisions of the US courts in the *Peterson* case (as referred to above) confirm that Section 502 of the 2012 Act has been drafted precisely to secure enforcement against Bank Markazi's interest in the security entitlements previously held by Clearstream. Pursuant to the US Supreme Court's decision in *Bank Markazi* v. *Peterson et al.*, the US District Court has ordered that the Blocked Assets be paid out to the judgment creditors. As a result, there is a real and immediate risk that such funds will be dissipated.

31. As a result of the USA's executive, legislative and judicial acts referred to above, Iran and Iranian entities are suffering ongoing harm, and face actual and imminent seizure of assets and interests and/or the enforcement of judgments against third parties (such as international central securities depositories holding funds or security entitlements in banks in the USA to the ultimate benefit of Iran and Iranian entities).

IV. Breach of the Treaty of Amity

32. As will be more fully developed in a subsequent stage of the proceedings, the measures outlined above breach a number of provisions of the Treaty of Amity, including in particular those expressly referred to below.

(a) Pursuant to Article III (1) of the Treaty of Amity:

> "Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized. As used in the present Treaty, 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit."

It follows that the USA is obliged to recognize the juridical status of Bank Markazi (which is a "company", for the purposes of Article III (1) of the Treaty of Amity, constituted with its own legal personality pursuant to the Banking and Monetary Act of Iran 1960 as amended in 1972) and all other Iranian companies, including Iranian State-owned companies. The right to recognition of juridical status in Article III (1) is not qualified in any way; and yet the rights of Bank Markazi and other Iranian entities, as juridical persons distinct from Iran, have been or are being abrogated by Section 1610 *(g)* (l) of FSIA, Section 201 *(a)* of TRIA, Executive Order 13599 and Section 502 of the 2012 Act, while as a practical matter the assets and interests of Bank Markazi and other Iranian financial institutions are under real threat of seizure and transfer by the US courts. Specifically, the Blocked Assets of Bank Markazi at issue in the *Peterson* proceedings (as referred to above)

have been seized and transferred to the US judgment creditors by the US courts, and now face the real and imminent threat of being dissipated.

(b) Pursuant to Article III (2) of the Treaty of Amity:

> "Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favourable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication."

In denying to Bank Markazi and other Iranian State-owned companies the immunities that they would otherwise enjoy as a matter of US and international law (and that State-owned companies of third States, including central banks, enjoy), the USA violates their right of freedom of access to US courts with respect to their ability to defend proceedings brought against them and to pursue their right to immunity both from jurisdiction and enforcement, and thereby breaches Article III (2) of the Treaty of Amity. Article XI (4) confirms that

> "[n]o enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."

This provision is aimed at judgments against enterprises, as opposed to a High Contracting Party, in respect of their commercial acts. It follows that Iran and Iranian State-owned companies are entitled to immunity in respect of acts *jure imperii*.

In addition, the enactment of Section 502 of the 2012 Act during the course of the *Peterson* case retroactively changed the law by depriving Bank Markazi of defences upon which it had previously relied, including under US law, and preventing impartial justice being done.

(c) Pursuant to Article IV (1) of the Treaty of Amity:

> "Each High 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 unreasona-

> ble 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."

The treatment currently being accorded to Bank Markazi and other Iranian companies, including Iranian financial institutions, and their respective assets and interests, is unfair and inequitable and also discriminatory and unreasonable, and impairs the legally acquired rights and interests of such entities including enforcement of their contractual rights, and thus is in breach of Article IV (1) of the Treaty of Amity. For example, Section 502 of the 2012 Act effected a retroactive change of the law, which deprived Bank Markazi of defences upon which it had previously relied, including under US law, and which is explicitly limited to the *Peterson* proceedings against Iran (as referred to above).

(d) Pursuant to Article IV (2) of the Treaty of Amity:

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting 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 property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

Article IV (2) establishes a right to most constant protection and security that is "in no case less than that required by international law", thus incorporating relevant customary international law protections, including those pertaining to the immunity of State-owned companies and their property. In addition, Article IV (2) establishes a separate protection from takings (which is correctly interpreted to include takings consequential upon judicial acts). Both these elements of Article IV (2) have been, and are in the process of being, breached by the USA in respect of its treatment of Iranian companies, including Iranian State-owned companies such as Bank Markazi, and their property. As a practical matter the Blocked Assets of Bank Markazi at issue in the *Peterson* proceedings (as referred to above) have been seized and transferred to the US judgment creditors by the US courts, and now face the real and imminent threat of being dissipated.

(e) Pursuant to Article V (1) of the Treaty of Amity:

> "Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting 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 favourable than that accorded nationals and companies of any third country."

The treatment currently being accorded to Bank Markazi and other Iranian companies, including Iranian financial institutions, and their respective property, interferes with their rights under Article V (1) of the Treaty of Amity.

(f) Pursuant to Article VII (1) of the Treaty of Amity:

> "Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except *(a)* to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or *(b)* in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund."

The treatment currently being accorded to Bank Markazi and other Iranian companies, including Iranian financial institutions, and their respective property, interferes with their rights under Article VII (1) of the Treaty of Amity.

(g) Pursuant to Article X (1) of the Treaty of Amity:"Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

The treatment currently being afforded to Iran, Bank Markazi and other Iranian companies, including Iranian financial institutions, and their respective property, interferes with the right to freedom of commerce between the territories of Iran and the USA under Article X (1) of the Treaty of Amity.

V. Judgment Requested

33. On the basis of the foregoing, and while reserving the right to supplement, amend or modify the present Application in the course of further proceedings in the case, Iran respectfully requests the Court to adjudge, order and declare as follows:

(a) That the Court has jurisdiction under the Treaty of Amity to entertain the dispute and to rule upon the claims submitted by Iran;

(b) That by its acts, including the acts referred to above and in particular its *(a)* failure to recognize the separate juridical status (including the separate legal personality) of all Iranian companies including Bank Markazi, and *(b)* unfair and discriminatory treatment of such entities, and their property, which impairs the legally acquired rights and interests of such entities including enforcement of their contractual rights, and *(c)* failure to accord to such entities and their property the most constant protection and security that is in no case less than that required by international law, *(d)* expropriation of the property of such entities, and *(e)* failure to accord to such entities freedom of access to the US courts, including the abrogation of the immunities to which Iran and Iranian State-owned companies, including Bank Markazi, and their property, are entitled under customary international law and as required by the Treaty of Amity, and *(f)* failure to respect the right of such entities to acquire and dispose of property, and *(g)* application of restrictions to such entities on the making of payments and other transfers of funds to or from the

USA, and *(h)* interference with the freedom of commerce, the USA has breached its obligations to Iran, inter alia, under Articles III (1), III (2), IV (1), IV (2), V (1), VII (1) and X (1) of the Treaty of Amity;

(c) That the USA shall ensure that no steps shall be taken based on the executive, legislative and judicial acts (as referred to above) at issue in this case which are, to the extent determined by the Court, inconsistent with the obligations of the USA to Iran under the Treaty of Amity;

(d) That Iran and Iranian State-owned companies are entitled to immunity from the jurisdiction of the US courts and in respect of enforcement proceedings in the USA, and that such immunity must be respected by the USA (including US courts), to the extent established as a matter of customary international law and required by the Treaty of Amity;

(e) That the USA (including the US courts) is obliged to respect the juridical status (including the separate legal personality), and to ensure freedom of access to the US courts, of all Iranian companies, including State-owned companies such as Bank Markazi, and that no steps based on the executive, legislative and judicial acts (as referred to above), which involve or imply the recognition or enforcement of such acts shall be taken against the assets or interests of Iran or any Iranian entity or national;

(f) That the USA is under an obligation to make full reparations to Iran for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves the right to introduce and present to the Court in due course a precise evaluation of the reparations owed by the USA; and

(g) Any other remedy the Court may deem appropriate.

34. For the purposes of Article 31 (3) of the Statute and Article 35 (1) of the Rules of Court, Iran declares its intention to exercise the right to designate a judge *ad hoc*.

The Government of the Islamic Republic of Iran has designated the undersigned as its Agent for the purposes of these proceedings. All communications relating to this case should be sent to the Agent Bureau of the Embassy of the Islamic Republic of Iran, De Werf 15, 4th Floor, 2544 EH, Den Haag.

14 June 2016.

(Signed) M. H. Zahedin Labbaf,
Agent of the Government
of the Islamic Republic of Iran.

LIST OF ANNEXES*

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* Annexes not reproduced in print version, but available in electronic version on the Court's website (http://www.icj-cij.org, under "cases").