MUNLAWS 19

STUDY GUIDE

INTERNATIONAL COURT OF JUSTICE

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TABLE OF CONTENT

Certain Iranian Assets

Islamic Republic of Iran v. United States of America

SECTION I: Background to the Dispute

In 1996 the US amended its Foreign Sovereign immunities act so as to remove immunity from suits before its courts of States designated as 'state sponsors of terrorism' in certain cases involving allegations of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such acts. Iran was designated as a State sponsor of terrorism in 1996. Following this, cases were brought against Iran, in particular the *Bank Markazi v. Peterson* case, concerning the bombing of US military barracks in Beirut in 1983. In a nutshell, the Supreme Court of the US in the *Bank Markazi v. Peterson* case upheld a 2nd Circuit judgment ordering turnover of about $1.75 billion in Bank Markazi assets to families of victims of the 1983 Beirut barracks bombing. The funds were made available to the victims to satisfy previous judgments under the terrorism exception to the Foreign Sovereign Immunities Act, requiring Iran to pay damages to the victims' families for its role in the attack.[1] US also adopted further legislation broadening the categories of assets available for the satisfaction of judgement creditors, in particular to include all property of Iranian State-owned entities, whether or not that property had previously been "blocked" by the United States Government, and regardless of the degree of control exercised by Iran over those entities.

In 2012, the President of the United States issued Executive Order 13599, which blocked all assets ("property and interests in property") of the Government of Iran, including those of the Central Bank of Iran (Bank Markazi) and of financial institutions owned or controlled by Iran, where such assets are within United States territory or "within the possession or control of any United States person, including any foreign branch".

[1] Chacko, Iran Sues the U.S. in the ICJ – Preliminary Thoughts (18 June 2016), available at: https://www.lawfareblog.com/iran-sues-us-icj-–-preliminary-thoughts (accessed on 30 August 2019).

An additional timeline of certain events is provided below. *Agents are not limited to the facts presented in this study guide*.

On 16 June 2016, Iran initiated proceedings before the International Court of Justice (ICJ) claiming certain violations of the 1955 Treaty of Amity concluded between Iran and the USA. The USA objected to the jurisdiction of the ICJ on several grounds.

Firstly, the USA claimed that the ICJ does not have jurisdiction to decide the case because Iran's claims fall outside the scope of the treaty by virtue of Article XX(1)(c) and (d). However, the ICJ found that Article XX does not pertain the Court's jurisdiction and thus rejected the first preliminary objection.

Secondly, the USA objected to any claims made by Iran which are predicated on the purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities. Namely, Iran claimed that the Treaty of Amity incorporates certain general international law principles such as sovereign immunity. The Court agreed with the USA in that in found that the Treaty of Amity does not incorporate the principle of sovereign immunity. Therefore, the ICJ found that it has no jurisdiction concerning Iran's claims regarding alleged breaches of sovereign immunity.

Lastly, the USA objected to the Court's jurisdiction over claims made by Iran concerning the Bank Marakazi. The USA submitted that Bank Marakazi is not a *company* for the purposes of the Treaty of Amity because, being the Central Bank of Iran, it carries out exclusively sovereign functions and is not engaged in activities of a commercial nature. The ICJ found that it did not have before it all the facts necessary to determine whether Bank Markazi was carrying out, at the relevant time, activities of the nature of those which permit characterization as a "company" within the meaning of the Treaty of Amity. Because of this, and because the issue is closely linked to the merits of the case, it decided to consider this objection at the stage of the merits.

Agents are now required to prepare and plead the remaining issues of jurisdiction (i.e. whether Bank Marakazi is a "company") and the merits of the case between 1 -3 November 2019 in Ljubljana, Slovenia. Agents are limited to the claims provided in Section IV of this Study Guide, but *not* the legal arguments and facts provided herein. Agents are indeed encouraged to provide additional legal arguments and authorities while pleading their case.

This study guide further provides a timeline of events (Section II), some additional background to the claims and arguments (Section III), and the claims (Section IV). The bibliography and suggestions for additional reading can be found in Sections V and VI, respectively.

SECTION II: Timeline

- 1955, 15 August - USA and Iran sign the Treaty of Amity, Economic Relations, and Consular Rights
- 1957, 16 June – Treaty of Amity enters into force
- 1983, October – Beirut bombings
- 1984 – USA designates Iran as a "State sponsor of terrorism"
- 1996 – amendment of the Foreign Sovereign Immunities Act (FSIA) – removal of immunity from suit and execution before US courts of States designated as "State sponsors of terrorism"
- 2002 – adoption of the Terrorism Risk Insurance Act (TRIA) which established enforcement measures for judgments entered following the 1996 amendment to the FSIA (previously blocked assets of "terrorist party" may be subject to execution)
- 2008 – further amendment of FSIA (all Iranian state-owned entities)
- 2012 – Executive order 13599 blocks all assets of the Iranian government
- 2012 – adoption of the Iran Threat Reduction and Syria Human Rights Act (ITRSHRA) which made the assets of Bank Markazi subject to execution in order to satisfy default judgments against Iran in the Peterson case

- 2016 – the US Supreme court issues judgement in *Bank Markazi v. Peterson*
- 2016, 16 June – Iran institutes proceedings before the ICJ
- 2019, 13 February – the ICJ issues the Judgment on Preliminary Objections

SECTION III: Legal Background

The Treaty of Amity contains typical substantive protections, which are in line with various Freedom of Commerce and Navigation treaties (FCN) and later Bilateral Investment Treaties (BIT).[2] The ICJ has previously dealt with the Treaty of Amity in the cases of *Oil Platforms*, *Teheran Hostages,* and *Aerial Accident*.[3] In the dispute at hand, Iran claims that the US is in breach of Articles III, IV, V, VII, and XI of the Treaty as it: "… has adopted a number of legislative and executive acts that have the practical effect of subjecting the assets and interests of Iran and Iranian entities, including those of the Central Bank of Iran (also known as "Bank Markazi"), to enforcement proceedings in the United States, even where such assets or interests "are found to be held by separate juridical entities . . . that are not party to the judgment on liability in respect of which enforcement is sought" and/or "are held by Iran or Iranian entities . . . and benefit from immunities from enforcement proceedings as a matter of international law, and as required by the [1955] Treaty".[4] The relevant Treaty provisions and the alleged breaches are briefly described in the section below.

Article III(1) - Recognition of the judicial status of companies

Article III(1) of the Treaty of Amity requires States parties to recognize the separate juridical status of companies constituted under the laws of Iran and the US.[5] This principle,

[2] In terms of the treaty interpretation, the delegates might consider whether and to what extent the modern investment treaty arbitration case law may be relevant for the case at hand.
[3] *Case Concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, I.C.J. Reports 1980, p. 3; *Oil Platforms (Iran v. United States),* Merits, Judgment of 6 November 2003, ICJ Reports 2003, 161; *Oil Platforms (Iran v. United States)*, Preliminary Objections, Judgment of 12 December 1996, ICJ Reports 1996, 803; *Aerial Incident of 3 July 1988* (Iran *v.* United States), Order of 22 February 1996, ICJ Reports 1996, 9.
[4] ICJ, Press Release No. 2016/19 - Iran institutes proceedings against the United States with regard to a dispute concerning alleged violations of the 1955 Treaty of Amity, 15 June 2019, URL: https://www.icj-cij.org/files/case-related/164/19032.pdf (29 August 2019).
[5] Treaty of Amity, Article III(1), first sentence.

that has been recognized by the ICJ in the *Barcelona Traction*[6] and *Diallo*[7] cases, means that a company holds rights and obligations separate from its shareholders – private or public.[8]

In the present case, Iran submits that the US is in breach of Article III of the Treaty because it enabled the seizures of property owned by Iranian companies in order to satisfy debts of the Iranian state and not debts of the companies themselves.[9] Iran contends that the seizures of property of the Iranian central bank (Bank Markazi) are particularly problematic due to its specific role.[10] The Applicant submits that the US is breaching Article III(1) of the treaty on the one hand by enacting and maintaining certain laws (TRIA, NDAA, ITRSHRA, FSIA) and an executive order and on the other hand by the US court decisions (see particularly *Peterson v. Bank Markazi* and *Benett v. Bank Melli*). Cumulatively, these allow for the seizure of the property of Iranian companies, including assets of its agencies, in order to facilitate judgements linked to the alleged violations of the Iranian state.

The US responded by filling three jurisdictional objections. Third jurisdictional objection concerned the status of the Bank Markazi as a company under the Treaty of Amity. Pursuant to Articles III, IV, and V of the Treaty, only nationals and companies are granted the appertaining treaty rights.[11] The US contended that Bank Markazi could not qualify as a company as it carried out exclusively sovereign functions and was not engaged in commercial activities.[12] On the contrary, Iran claimed that the term "company" in the Article III(1) of the Treaty was to be understood broadly and hence covered Bank Markazi, which was an entity separated from the State of Iran. Additionally, it claimed that the bank

[6] *Barcelona Traction, Light and Power Company, Limited, Judgment,* I.C.J. Reports 1970, par. 39-41.
[7] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment,* I.C.J. Reports 2007, p. 582, para. 6.
[8] Muchlinski, P.: Corporations in International Law, Max Planck Encyclopedia of International Law (2014), paras. 1, 49.
[9] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*) – Memorial of the Islamic Republic of Iran, para. 1.22.
[10] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*) – Memorial of the Islamic Republic of Iran, para. 1.25
[11] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*, Preliminary Objections, para. 86.
[12] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*, Preliminary Objections, para. 82.

functioned in a similar manner to any other company in regard to the generation of profits, payment of taxes, acquisition of assets etc.[13]

Based on the wording of Article III(1), the Court concluded in its preliminary judgement that there is no distinction between private entities and wholly or partially state-owned entities, as long as the entity in question possesses its own legal personality, conferred on it by the law of the State where it was created, which establishes its legal status.[14] Thus, contrary to the US position, Iranian control over the Bank Markazi played no role in its qualification as a company; this is determined by the nature of its activities.[15] Pursuant to the Court, Bank Markazi cannot be classified as a company under the Treaty if it carries out exclusively sovereign activities, however if it engages in both sovereign and commercial activities, the bank can be considered a company. The Court concluded that it lacked factual knowledge to determine the nature of Bank Markazi's activities within the territory of the US at the time of the measures which Iran claimed violated Bank Markazi's alleged rights under Articles III, IV and V of the Treaty.[16] It concluded that the issue before it was not of exclusively preliminary nature. Hence, at the merits stage the Court will have to determine if the nature of the bank's activities is sovereign or/and commercial.[17]

Article III(2) - Prohibition of discrimination

Article III(2) grants Iranian nationals and companies unobstructed access to the US judicial and administrative bodies and additionally provides that such an access is no less favourable than the access provided to the US (national treatment) or third country

[13] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*, Preliminary Objections, para. 83
[14] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*, Preliminary Objections, paras. 86, 87.
[15] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*, Preliminary Objections, paras. 88, 89.
[16] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*, Preliminary Objections, para. 97.
[17] In this respect the delegates might look into requirements for the attribution of internationally wrongful acts to non-state actors (see Articles 4-8 ILC Articles on the Responsibility of States for Internationally Wrongful Acts) and draw parallels with international investment law (see e.g. *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic,* ICSID Case No. ARB/97/4; *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30.

nationals and companies (most favoured nation). This kind of provision ensures that foreign subjects have equal procedural rights while pursuing their substantive rights. National treatment (NT) and most favoured nation treatment (MFN) are relative standards of treatment that entail a comparative test between domestic/foreign or foreign/third country subjects in like situations.[18] Differential treatment may be allowed if objectively justified; whether the designation of a State as a "State sponsor of terrorism" fulfils this standard may be disputable.[19]

Article IV(1) – Fair and equitable treatment, unreasonable or discriminatory measures, and effective means of enforcement

As identified by Iran, Article IV(1) contains three separate elements and the US is allegedly in breach of all three. Fair and equitable treatment (FET) is a non-contingent standard of treatment usually read in connection to procedural rights.[20] It is governed exclusively by international law and usually understood to include the following guarantees: the prohibition of manifest arbitrariness, the prohibition of denial of justice, the prohibition of discrimination based on manifestly wrongful grounds, the prohibition of abusive treatment, and the protection of legitimate expectations.[21] In regards to the judiciary, FET protects access to a fair and efficient judicial system, including the provision of the mechanisms for settlement of disputes, judicial review, as well as the essential quality of the application of the law.[22] The administrative application of FET includes the proper use of power of governmental officials and the quality of their decision-making. Lastly, FET is very important for the legislative branch as it requires stability, consistency, and transparency of the legislation.[23] Naturally, States are allowed to modify their

[18] UNCTAD, Most-Favoured-Nation Treatment, 2010, URL: https://unctad.org/en/Docs/diaeia20101_en.pdf (29 August 2019), p. 23-24; Dolzer, R.; Schreuer, C.: PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), pp. 199, 206, 207.

[19] Janig, P.; Mansour Fallah, S.: Certain Iranian Assets: The Limits of Anti-Terrorism Measures in Light of State Immunity and Standards of Treatment (2017), URL: https://poseidon01.ssrn.com/delivery.php?ID=742110126119071028106066107101017127062041020052054087069122085029067089031112097088102031125025020116062124080071093123114084057017017032053100087077117113003113087041058031020097000090097123072007001093099025086124120026125010083104030098122122103097&EXT=pdf (29 August 2019).

[20] Angelet, N.: Fair and Equitable treatment, Max Planck Encyclopedia of International Law (2011), para. 2, 3.

[21] UNTCAD: Fair and Equitable Treatment (2012), URL: https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (29 August 2019), p. xvi.

[22] Angelet, N.: Fair and Equitable treatment, Max Planck Encyclopedia of International Law (2011), para. 17.

[23] Angelet, N.: Fair and Equitable treatment, Max Planck Encyclopedia of International Law (2011), para. 26.

legislation, but this must be done prudently and in the boundaries of ordinary adjustments that can be predicted by foreign entities.[24] In addition to the relatively general FET standard, Article III(1) also grants more specific guarantees of the prohibition of unreasonable or discriminatory measures and the provision of effective means of enforcement.

Article IV(2) - Constant protection and security and the prohibition of taking

First part of Article IV(2) guarantees constant protection and security of the property and interests in property of nationals and companies, which are in no case less than that required by international law. The provision granting protection and security is contained in most investment treaties and means that the State must actively engage in the protection of investments from adverse measures.[25] It is generally understood that this provision refers to the physical security of property and addresses the State's duty to protect the property from threats stemming for the State organs and private actors.[26] The State is under a due diligence and not strict liability obligation to protect the property. Contrary to the more orthodox reading of the FPS, Iran bases its argumentation on the ICJ case *ELSI*[27] to advance the broader understanding of the FPS provision, which includes both physical and legal protection and security.[28]

The second part of Article IV(2) contains the standard conditions for a lawful expropriation, which include taking of assets for a public purpose and against the payment of compensation. Generally, an expropriation may be direct or indirect and there is no distinction between the two in respect to the obligation to pay damages in the case of an unlawful expropriation.[29] Direct expropriation stands for a taking of assets or similar acts

[24] Dolzer, R.; Schreuer, C.: PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012), pp. 115, 116.
[25] Schreuer, C.: Full Protection and Security (2010), URL: https://www.univie.ac.at/intlaw/wordpress/pdf/full_protection.pdf (29 August 2019).
[26] Schreuer, C.: Full Protection and Security (2010), URL: https://www.univie.ac.at/intlaw/wordpress/pdf/full_protection.pdf (29 August 2019).
[27] *Elettronica Sicula S.p.A. (ELSI), Judgment,* I.C.J. Reports 1989, p. 15.
[28] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*) – Memorial of the Islamic Republic of Iran, paras. 5.56, 5.57
[29] Collins, D.: INTRODUCTION TO INTERNATIONAL INVESTMENT LAW (2017), pp. 159.

short of direct possession by means of the title transfer (e.g. by an official decree).[30] Direct expropriations nowadays are rare, by contrast, indirect expropriations remain highly relevant and may take a variety of forms. An indirect (*de facto*) expropriation is an interference of a State with assets without a formal transfer of title, i.e. the owner retains the ownership of assets but is deprived of the benefits.[31] Iran claims that acts of the US legislative and judiciary were expropriatory in nature as they were not enacted for a public purpose.[32] Additionally, it denies to the US the reliance on the police powers doctrine due to the discriminatory nature of measures and lack of legitimate public welfare objectives. The police powers doctrine and the sole effect doctrine are two distinct approaches to the determination if a governmental measure constitutes an expropriation.[33] The sole effect doctrine is understood as "investor-friendly" since it considers only the effect of the measure on the property, while the police powers doctrine also takes into account other factors such as the purpose, the context and the nature of the measure.

National security exception

Article XX of the Treaty of Amity contains a so called non-precluded measures clause. It provides, in the relevant part, that:

> "1. The present Treaty shall not preclude the application of measures: …
> (d) necessary to fulfil 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."

[30] Shaw, M. N.: INTERNATIONAL LAW (2018), p. 629. Collins, p. 158
[31] Collins, D.: INTRODUCTION TO INTERNATIONAL INVESTMENT LAW (2017), pp. 161, 162.
[32] *Case concerning certain Iranian assets (Islamic Republic of Iran v. United States of America*) – Memorial of the Islamic Republic of Iran, para. 5.71.
[33] Mostafa, B.: The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law (2008) URL: https://search.informit.com.au/documentSummary;dn=066837449517184;res=IELHSS (29 August 2019), pp. 267, 268.

Such provisions are a common occurrence in both FCN treaties and international investment agreements. They have thus been subject to the interpretation of international courts and tribunals.

In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the ICJ was faced with an argument that invoking Article XXI of the FCN treaty between Nicaragua and the USA, which has an identical wording to Article XX of the Treaty of Amity, removes the dispute from the jurisdiction of the Court.[34] The Court did not accept this argument. It found that any dispute concerning the interpretation and application of the treaty falls within its jurisdiction, which is not affected by the non-precluded measure provision.[35] In its reasoning, the Court made reference to Article XXI of the GATT. It found that while the GATT does not prevent any contracting party from taking any action which it "*considers necessary for the protection of its essential security interests*", Article XXI of the FCN does not make any reference to what a contracting party *considers* necessary. It must rather determine simply what *is* necessary.[36]

The Court found that self-defence against an armed attack would definitely fall under measures necessary to protect essential security interests. However, essential security interests are broader than simply armed attacks.

> "The Court has therefore to assess whether the risk run by these "essential security interests" is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but "necessary"."[37]

[34] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, para.222.

[35] Ibid.

[36] Ibid.

[37] Ibid., para.224.

The Court did not further specify the concept of essential security interest as it found that the actions taken by the USA were not necessary to protect those interests, whatever they may be.[38]

In the *Oil Platforms* case, the ICJ was faced with an argument by the USA that the scope of review concerning the invocation of Article XX should be deferential to a party's good faith application of the measures.[39] In its Counter Memorial in the case, the United States defined its essential security interests to include "the uninterrupted flow of maritime commerce in the Gulf" which was "essential to the economy and security interests of many States, including the United States."[40] Iran recognised that "some of the interests referred to by the United States - the safety of United States vessels and crew, and the uninterrupted flow of maritime commerce in the Persian Gulf - as being reasonable security interests of the United States".[41] However, the ICJ again did not specify further what essential security interest might be, as it found that the actions of the USA were not necessary to protect those interests.[42]

Similar non-precluded measures provisions can be found in certain bilateral investment agreements (BITs). For example, Article XI of the Argentina-USA BIT was subject to several controversial awards. In *Enron v. Argentina*, the tribunal found that because the BIT does not define "essential security interests", it must look for its meaning in customary international law of necessity.[43] However, an ad hoc annulment committee later annulled this award because the original tribunal wrongly (according to the ad hoc committee)

[38] Burke-White & von Staden, 'Investment Protection in Extraordinary Times- The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) VJIL 307, p.350.

[39] *Oil Platforms (Iran v. United States),* Merits, Judgment of 6 November 2003, ICJ Reports 2003, p.196.

[40] Counter Memorial of the United States, Oil Platforms (Iran v. U.S.), para.3.11 (June 23, 1997).

[41] *Oil Platforms (Iran v. United States),* Merits, Judgment of 6 November 2003, ICJ Reports 2003, p.196.

[42] Ibid.

[43] Enron Corporation Ponderosa Assets L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras 303-342.

substantially equated Article XI and necessity.[44] In *El Paso v. Argentina*, the tribunal found that Article XI of the same BIT is a *lex specialis* to the customary international law of necessity. On a theoretical level, it made a distinction between Article XI and necessity – while measures under Article XI do not breach the BIT, measures that fall under the customary defence of necessity breach the primary norm in the BIT, while their wrongfulness is precluded on the secondary level. While the tribunal did not equate the two, it did proceed to inquire whether the conditions of both are met.[45]

SECTION IV: Claims of Parties

1. Claims of the Islamic Republic of Iran
    a. The Bank of Marakazi is a company for the purposes of the Treaty of Amity. Therefore, the International Court of Justice has jurisdiction to decide on the wrongfulness of the measures undertaken by the United States of America.
    b. The measures undertaken by the United States of America violate Articles III and IV of the Treaty of Amity.
    c. The measures undertaken by the United States of America do not fall under the exceptions in Article XX(1)(c) and (d) of the Treaty of Amity.
    d. The International Court of Justice should award appropriate reparations.

2. Claims of the United States of America
    a. The Bank of Marakazi is not a company for the purposes of the Treaty of Amity. The International Court of Justice has no jurisdiction to decide on the alleged wrongfulness of the measures undertaken with respect to it.
    b. There are no violations of Articles III and IV of the Treaty of Amity.
    c. In any event, the measures undertaken by the United States of America fall under the exceptions in Article XX(1)(c) and (d).
    d. The International Court of Justice should reject Iran's claim for reparations

[44] Enron Corporation Ponderosa Assets L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 30 July 2010, paras 403-405.

[45] El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 552 et seq.

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