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INTERNATIONAL DECISIONS

EDITED BY OLABISI D. AKINKUGBE

International Court of Justice—1955 Treaty of Amity—economic relations—unilateral sanctions—central banks—asset freezes —free transfer of funds—International Monetary Fund—norm conflicts—exchange restrictions—national security

CERTAIN IRANIAN ASSETS (IRAN V. UNITED STATES). Judgment. *At* https://www.icj-cij.org/case/164.
International Court of Justice, March 30, 2023.

In *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, the International Court of Justice (ICJ) rendered its judgment on the dispute regarding the measures adopted by the United States to seize assets of the Central Bank of Iran (Bank Markazi) to compensate U.S. victims of terrorist attacks committed abroad with the alleged support of Iran.[1]

This judgment concluded only one of the two most recent chapters of the *Iran v. United States* saga, which continues before the ICJ with the *Alleged Violations* case.[2] Both disputes are rooted in the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Treaty).[3]

While the judgment under consideration offers much food for thought, I argue that the Court missed the opportunity to clarify the meaning of the Treaty's "transfer of funds" clause (Article VII),[4] a type of provision that has seldom been interpreted by international tribunals[5] and which is also at the center of the *Alleged Violations* case.

[1] Certain Iranian Assets (Iran v. U.S.), Judgment (Int'l Ct. Just. Mar. 30, 2023) [hereinafter 2023 *Certain Iranian Assets*].

[2] Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Judgment, Preliminary Objections (Int'l Ct. Just. Feb. 3, 2021), *at* https://www.icj-cij.org/sites/default/files/case-related/175/175-20210203-JUD-01-00-EN.pdf. The case is still pending.

[3] Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, 284 UNTS 93 (*entered into force* June 16, 1957), *at* https://treaties.un.org/doc/Publication/UNTS/Volume%20284/v284.pdf [hereinafter Treaty]. The Treaty includes a compromissory clause in Article XXI(2) providing for the jurisdiction of the ICJ.

[4] Pursuant to Article VII of the Treaty of Amity, a Contracting Party is in principle prohibited from applying restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other Contracting Party, with some exceptions applying. Iran contended that by freezing certain assets belonging to its Central Bank and some Iranian companies, the United States had breached the obligations arising from the provision.

[5] Free transfer of funds provisions are most often found in international investment agreements. In investor-state arbitration, though, transfer restrictions have been analyzed mostly as potential indirect expropriations or violations of the fair and equitable treatment standard. *See* AUGUST REINISCH & CHRISTOPH SCHREUER, INTERNATIONAL PROTECTION OF INVESTMENTS: THE SUBSTANTIVE STANDARDS 989 et seq. (2020).

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This comment illustrates the pivotal role of Article VII of the Treaty and the relationship it establishes with the legal framework of the International Monetary Fund (IMF).

* * * *

In 2016, Iran instituted proceedings before the ICJ, claiming that certain U.S. legislative, executive, and judicial measures were having a serious adverse impact upon the ability of the Islamic Republic, and of Iranian companies, to exercise their rights under the Treaty, as they allowed plaintiffs to attach the assets of Bank Markazi in cases brought before U.S. courts over Iran's alleged support of terrorist acts.

Two of such measures—which also included the so-called "terrorism exception" of the U.S. Foreign Sovereign Immunities Act (FSIA)[6] and Section 201 of the 2002 Terrorism Risk Insurance Act (TRIA)[7]—were at the very heart of the dispute: (1) U.S. Executive Order No. 13599,[8] a unilateral sanction which blocks all assets belonging to the Government of Iran, Bank Markazi, and Iranian financial institutions that are in the United States, that come to the United States, or that come in the possession or control of any U.S. person (including their overseas branches); and (2) Section 502 of the 2012 Threat Reduction and Syria Human Rights Act (ITRSHRA),[9] pursuant to which Iranian frozen assets—including those of Bank Markazi—may be subjected to execution or attachment to satisfy judgments in actions brought by victims of terrorist acts sponsored by Iran.

More precisely, Section 502 made certain Iranian assets specifically available to enforce the judgment in the *Peterson* case,[10] which concerned Iran's alleged liability in the 1983 killing of U.S. Marines and servicemen in Beirut. Bank Markazi filed a petition for *certiorari* with the U.S. Supreme Court (SCOTUS) arguing that the "tailor-made" statutory provision breached the principle of separation of powers, as Congress was directing courts to reach a pre-determined outcome in pending proceedings in violation of Article III of the U.S. Constitution. The Court of Appeals for the Second Circuit held that ITRSHRA Section 502 did not compel judicial findings; rather, it retroactively changed the law applicable in a given case, through a permissible exercise of legislative authority.[11] Ultimately, SCOTUS upheld the validity of the provision[12] and consequently, in June 2016, the U.S. District Court ordered the distribution among the plaintiffs in the *Peterson* case of Bank Markazi's

[6] Pursuant to the so-called "terrorism exception" of the FSIA (28 USC §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611), foreign states designated as "sponsors of terrorism" may not enjoy immunity from jurisdiction (FSIA Section 1605A) and from execution (FSIA Section 1610) before U.S. courts in civil actions for damages arising out of personal injury or death caused by an act of terrorism. Iran was designated a "State sponsor of terrorism" by the U.S. secretary of state on January 19, 1984. The State Immunity Act of Canada includes a similar "terrorism exception," which is at the center of the case concerning *Alleged Violations of State Immunities (Iran v. Can.)* filed by Iran before the ICJ on June 27, 2023.

[7] Section 201 of the TRIA (Pub. L. 107–297, 116 Stat. 2322) enables the adoption of enforcement measures for judgments obtained in respect of a certified act of terrorism against the blocked assets of any agency or instrumentality of a terrorist party.

[8] Exec. Order No. 13599, Blocking Property of the Government of Iran and Iranian Financial Institutions, 77 Fed. Reg. 6659 (Feb. 5, 2012).

[9] U.S. Threat Reduction and Syria Human Rights Act of 2012 (ITRSHRA), 22 USC § 8772 (as amended).

[10] Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (S.D.N.Y June 6, 2016).

[11] Peterson et al. v. Islamic Republic of Iran et al., 758 F. 3d 185, 191 (2d Cir. 2014).

[12] Bank Markazi v. Peterson et al., 578 U.S. 1 (S. Ct. Apr. 20, 2016) (with Chief Justice Roberts and Justice Sotomayor jointly dissenting).

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frozen assets worth U.S.$1,895 billion. The sum corresponded to the proceeds of the Bank's investments in financial assets in the United States (i.e., the nominal value of the securities denominated in U.S. dollars purchased by Bank Markazi between 2002 and 2007, plus interests accrued). Since then, Iranian frozen assets have been distributed to thousands of judgment creditors.

In its preliminary objections before the ICJ, the United States contended that Iran's claims concerning the U.S. adoption of unilateral blocking sanctions and the breach of sovereign immunity fell outside the scope of the Treaty and, therefore, of the jurisdiction of the Court.

On February 13, 2019, the ICJ rendered its judgment on the preliminary objections raised by the United States,[13] declaring that it had jurisdiction over all parts of the dispute, except the Applicant's claims based on the alleged violation of the customary international legal rules on the sovereign immunity of central banks, as these rules did not fall within the scope *ratione materiae* of the Treaty.[14]

With regard to the violations of the rights and protections afforded to the "companies" of a Contracting Party under Articles III, IV, and V of the Treaty, the ICJ postponed to the merits phase the decision on whether the activities carried out by Bank Markazi in the United States rendered it a "company" within the meaning of the Treaty (para. 97). In doing so, the Court nevertheless made clear that nothing precludes *a priori* a single entity from engaging both in business and in sovereign activities. Remarkably, the Court specified that "it is the *nature* of the activity actually carried out which determines the characterization of the entity engaged in it" (para. 92, emphasis added). An entity therefore qualifies as a company, even when the entity's activities of a commercial nature do not constitute its principal activities.

With the question of Bank Markazi's sovereign immunity ruled outside the Court's jurisdiction, Iran was thus left to rely on the argument that its Central Bank was indeed a "company" for the purposes of Articles III, IV, and V of the Treaty. In a somewhat surprising twist, while Bank Markazi had always strenuously defended its sovereign immunity in the proceedings before U.S. courts, Iran claimed before the ICJ that the investment activities carried out by the Bank in the territory of the United States were of a commercial nature and that the Bank was performing financial activities like any other private company doing business in a free and competitive market.

The United States, on the other hand, contended that such transactions were part of the traditional tools used by central banks to exercise their sovereign functions, despite the fact that U.S. domestic courts had found Bank Markazi's financial operations to be commercial in nature and, therefore, not protected by immunity from freezing or attachment measures.

In the 2023 judgment on the merits, the ICJ developed—quite unusually—a different test for identifying a "company" within the meaning of the Treaty from the test that it had formulated in its preliminary objections decision. The Court established that the relevant criterion is not the nature of a single (commercial) activity *per se*, but rather the context in which the activity is carried out, "taking particular account of any links that it may have with the exercise of a sovereign function" (para. 51). Since the transactions conducted by Bank

[13] Certain Iranian Assets (Iran v. U.S.), Judgment, Preliminary Objections, 2019 ICJ Rep. 7 (Feb. 13, 2019).
[14] *Id.*, paras. 48 et seq.

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Markazi—i.e., the investments it had made on the U.S. financial markets—were "inseparable from its sovereign functions" (para. 52), the Court ruled that Bank Markazi could not be characterized as a "company" and concluded that it had no jurisdiction over Iran's claims on the issue.[15]

While dismissing what can be rightly considered the core of Iran's submissions, the Court gave the United States a pyrrhic victory, as it rejected the U.S. objection to admissibility[16] as well as its defenses on the merits.[17]

As regards the U.S. invocation of the essential security exception (Article XX(1)(d) of the Treaty), the ICJ not only reaffirmed its earlier holding that it was entitled to assess whether U.S. measures were indeed "necessary" to protect its essential security interests (para. 106)[18] but also ruled that Executive Order No. 13599 was too remote from the protection of U.S. security. In fact, the only risk to which it referred was the general risk to the international financial system stemming from deficiencies in Iran's anti-money laundering framework (para. 108).

On the substantive scope of protection under the Treaty and the alleged violations of the standards of treatment that each Party is bound to afford to nationals and companies of the other Party, the ICJ made three findings.

First, it held that U.S. measures—i.e., Section 1610 of the FSIA,[19] Section 201 of the TRIA,[20] and Executive Order No. 13599—disregarded the separate and autonomous legal personality of Iranian enterprises as provided for by Article III(1) and that, being "manifestly excessive" and "unreasonable," they violated the fair and equitable treatment standard of Article IV(1) (paras. 135 et seq.).

Second, the Court held that U.S. judicial decisions ordering the attachment and execution of the property of Iranian companies pursuant to the TRIA and FSIA "unreasonable provisions" amounted to a taking of property without compensation, in breach of Article IV(2) (paras. 177 et seq.).

Third, the ICJ found that the United States had also breached its obligation with respect to freedom of commerce under Article X(1). Here, the Court interpreted the term "commerce" in a broad sense, as encompassing not only trade in goods but even "activities entirely conducted in the financial sector, such as trade in intangible assets" (para. 215)[21] and ruled that Executive Order No. 13599 amounted to an "actual impediment to any financial transaction or operation" to be conducted by Iran or Iranian companies in the United States (para. 220).

[15] The Court's decision on this point was highly criticized. See, in particular, the Separate Opinions of Judges Bennouna, Yusuf, and Robinson, the Declaration of Judge Salam, and the Dissenting Opinion of Judge *ad hoc* Momtaz. The analysis of this issue falls outside the scope of this comment.

[16] On the U.S. contention that Iran had failed to exhaust local remedies, see 2023 *Certain Iranian Assets*, *supra* note 1, paras. 57 et seq.

[17] On clean hands, see 2023 *Certain Iranian Assets*, *supra* note 1, paras. 81 et seq. On abuse of rights, see *id.*, paras. 88 et seq. On non-precluded measures, see *id.*, paras. 102 et seq. On the essential security interests, see *id.*, paras. 106 et seq.

[18] Oil Platforms (Iran v. U.S.), Judgment, 2003 ICJ Rep. 161, para. 43 (Nov. 6, 2003).

[19] FSIA, *supra* note 6, § 1610.

[20] TRIA, *supra* note 7, § 201(a).

[21] *See also* Oil Platforms (Iran v. U.S.), Judgment, Preliminary Objections, 1996 ICJ Rep. 803, paras. 45–47, 49 (Dec. 12, 1996), *at* https://www.icj-cij.org/sites/default/files/case-related/90/090-19961212-JUD-01-00-EN.pdf.

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The Court rejected all other claims lodged by the Applicant (in particular, the one concerning Article VII of the Treaty, which will be analyzed in the following paragraphs)[22] and declared that Iran was entitled to compensation.

Significantly, however, the Court did not order the United States to cease its internationally wrongful acts and unfreeze assets belonging to Iranian companies[23] because the Treaty was no longer in force between the Parties at the time the decision was adopted.[24]

In sum, although carving out the issues concerning the freezing and attachment of the assets owned by the Central Bank of Iran, the Court dealt a hard blow—possibly not the last one—to the unilateral sanction regime of the United States.

* * * *

In this author's view, the Court was too quick to dismiss Iran's claim on the violation of Article VII of the Treaty, failing to recognize the significance of the issue and its possible future repercussions.

Pursuant to the first paragraph of Article VII of the Treaty:

> 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*" (emphasis added).

The second and third paragraphs of the provision clarify that certain types of transfers must be guaranteed even when the exceptions provided by letters (a) and (b) apply.

At the outset, it is worth noting that the prohibition set forth by Article VII is not limited to transfers of funds made by nationals and companies; it also applies to transfers made by a Contracting Party and its organs. As a consequence, the fact that Bank Markazi cannot be considered a company within the meaning of the Treaty is irrelevant for the purposes of establishing a violation of the provision. This issue, however, was not disputed by the Parties, which disagreed only on the interpretation of the term "restrictions."

In Iran's view, Article VII prohibits restrictions on inward/outward flows of payments as well as of capitals. Because the asset freezes in Executive Order No. 13599 entailed restrictions on capital movements (i.e., the repatriation of the frozen assets of Bank Markazi), Iran argued that the United States breached its treaty obligations.

The United States argued instead that Article VII prohibits only exchange restrictions on payments and transfers for current international transactions (i.e., the "exchange restrictions" prohibited by IMF Article VIII, Section 2(a), on which see *infra*) and that no such restrictions

[22] No violation was found of the right to access U.S. courts of Iranian companies under Article III(2), of the U.S. obligation to provide constant protection and security from physical harm under Article IV(2), and of the right of Iranian companies to dispose of their properties under Article V(1).

[23] *See* ILC Articles on State Responsibility, Art. 30, UN Doc. A/56/10; Rainbow Warrior (NZ/Fr.), 20 RIAA 217, 272–73, para. 114 (1990).

[24] On October 3, 2018, after the ICJ unanimously granted Iran the adoption of provisional measures in the *Alleged Violations* case—*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), Judgment, Provisional Measures, 2018 ICJ Rep. 623 (Oct. 3, 2018)—the United States gave written notice of the termination of the Treaty of Amity.

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were ever enacted by the United States. Moreover, since Executive Order No. 13599 was to be excluded from the scope of application of the Treaty by its essential security clause, Iran's claim should have been rejected.

The Court sided with the U.S. interpretation that Article VII only prohibited exchange restrictions: given the treaty practice existing at the end of World War II and the fact that at that time capital controls were widespread, it was difficult to maintain that the Parties had intended to renounce to the use of such tool (para. 207). As Iran's claim did not concern exchange restrictions but only the repatriation of the frozen assets of Bank Markazi (i.e., a movement of capital), the Court concluded that no violation of Article VII could be found.

Below, I intend to demonstrate that Article VII(1) can be interpreted as prohibiting both payment restrictions and capital controls. Second, I will address restrictions imposed for security reasons, an issue that is strikingly absent from both the Parties' arguments and the Court's analysis. Then, I will focus on the "substantial link" between the Treaty of Amity and the IMF legal framework. Last, I will focus on the relationship between "security restrictions" and essential security clauses.

First, Article VII must be interpreted taking into account the object and purpose of the Treaty, the very title of which broadly refers to "Economic Relations" and not merely to "Commerce" as done by the majority of bilateral treaties concluded by the United States until the late 1960s. Indeed, the Preamble of the Treaty clearly states that the Contracting Parties aimed at "encouraging mutually beneficial trade and investments and *closer economic intercourse generally* between their peoples" (emphasis added). In *Oil Platforms*, the ICJ confirmed that the Contracting Parties intended to promote the "harmonious development of their commercial, *financial* and consular relations."[25]

Moreover, Article VII is an embryonic "free transfer of funds clause" having almost unique features.[26] Unlike modern clauses typical of current investment agreements, it provides for a protection that is not limited to transfers "made in connection with an investment." Its purpose thus appears to be the protection of any transfer of funds that would foster close economic relations between the Parties and effectively protect their reciprocal interests.[27]

Following this interpretation, the Court could have easily found a breach of Article VII, as U.S. unilateral sanctions clearly prevent Iran, its organs and nationals—both natural and juridical persons—from transferring funds to or from the United States.

Second, even if we were to agree with the Court's position that Article VII applies only to exchange restrictions, Iran's claim would still stand when analyzing the issue from a "security restrictions" perspective.

By way of background, it is recalled that the IMF Articles of Agreement (IMF Articles)[28] treat asymmetrically capital movements and current transactions. While Article VI, Section 3 of the IMF Articles allows member states discretion in regulating and controlling capital

[25] *Oil Platforms*, *supra* note 21, para. 28 (emphasis added).

[26] On transfer clauses, see Jeswald W. Salacuse, The Law of Investment Treaties 343 et seq. (2021); Annamaria Viterbo, International Economic Law and Monetary Measures: Limitations to States' Sovereignty and Dispute Settlement 243 et seq. (2012); Michael Waibel, *BIT by BIT: The Silent Liberalization of the Capital Account*, *in* International Investment Law for the 21st Century (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009); Reinisch & Schreuer, *supra* note 5.

[27] Article II(1) of the Treaty grants nationals of the other Contracting Party the right of establishment and the right to transfer the amount of capital necessary for a foreign direct investment.

[28] Articles of Agreement of the International Monetary Fund, July 22, 1944, 2 UNTS 39, TIAS No. 1501 (*entered into force* Dec. 27, 1945, as amended).

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movements, Article VIII, Section 2(a) of the IMF Articles states that member countries[29] may impose restrictions on the making of payments and transfers for current international transactions ("exchange restrictions") only with the Fund's approval.[30]

Moreover, the IMF Articles do not list the circumstances that would justify exchange restrictions but only establish that such measures must be approved by the Fund, leaving to the IMF Executive Board the competence to regulate the matter.

Therefore, already back in the 1950s and 1960s, the Executive Board adopted a number of decisions—which are still in force—clarifying that IMF members can apply exchange restrictions not only for balance of payments reasons but also for the preservation of national or international security ("security restrictions").

In particular, Executive Board Decision No. 144-(52/51) established that security restrictions (including asset freezes) must be notified in advance in order to obtain the Fund's approval. However, such approval may be inferred from the Fund's silent assent: if the Executive Board does not reply within thirty days from notification, the member state "may assume that the Fund has no objection to the imposition of the restrictions."[31]

By approving asset freezes entailing exchange restrictions, the IMF exercises its competence over measures that would otherwise be prohibited by Article VIII, Section 2(a) of the IMF Articles. Instead, when the same sanctioning measure also entails capital controls, approval from the Fund is not required pursuant to Article VI, Section 3 of the IMF Articles.

Over the years, the Fund has tacitly approved countless security restrictions,[32] without distinguishing whether they were imposed by a member state as part of its unilateral sanctions policy or pursuant to a resolution of the UN Security Council adopted under Chapter VII of the UN Charter.

Remarkably, the United States is the IMF member that, since 1952, has most often relied on Executive Board Decision No. 144-(52/51), invoking its application for the vast majority of its unilateral sanctions[33]—including Executive Order No. 13599[34]—and always obtaining the Fund's tacit approval.

One might also contend that the tacit assent procedure set forth in Executive Board Decision No. 144-(52/51) does not satisfy the "specific approval" language of Article VII(1) of the Treaty, but this issue appears not to have been raised by the parties.

Third, a separate factor worth exploring is that Article VII is an *ex ante* coordination provision,[35] designed to reconcile the obligations deriving from the Treaty with those arising

[29] Reference is here made to IMF members that do not still avail themselves of the transitional regime of IMF Article XIV.

[30] The IMF founding fathers considered exchange restrictions harmful to international trade. On the contrary, they deemed capital controls useful to counter the destabilizing effects of hot money flows.

[31] IMF Executive Board Decision No. 144-(52/51) of Aug. 14, 1952.

[32] Decision No. 144-(52/51) requires notification of all restrictions "related to the preservation of national or international security." Country-by-country data about notified restrictions are available in the IMF Annual Report on Exchange Arrangements and Exchange Restrictions (AREAER) under the heading "Exchange Measures." To our knowledge, the IMF has always refrained from questioning the purposes of the notifying state.

[33] The United States does not usually notify the Fund of restrictions imposed to comply with the obligations deriving from its UN membership. *Cf.* International Monetary Fund, Annual Report on Exchange Arrangements and Exchange Restrictions 2021, 3910 et seq. (2022).

[34] *Id.* at 3912.

[35] *See* VITERBO, *supra* note 26, at 43 et seq.

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from the Contracting Parties' membership in the IMF.[36] To prevent any normative conflict, Article VII establishes a "substantial link" with IMF rules on current account convertibility and exchange restrictions.[37] In other words, the Parties to the Treaty decided to clarify what would happen in the event that one of them lawfully exercised its right either to impose exchange restrictions under Article VIII, Section 2(a) of the IMF Articles or to establish capital controls under Article VI, Section 3 of the IMF Articles, given that such restrictive measures can hamper the realization of the Treaty objectives.[38]

To this end, it was agreed that the Contracting Parties were nonetheless obliged both to ensure the withdrawal of certain types of funds under Article VII(2) of the Treaty and to administer the restrictions in a manner "not to influence disadvantageously the competitive position of the commerce, transport or *investment of capital* of the other High Contracting Party in comparison with the commerce, transport or investment of capital of any third country" (Article VII(3) of the Treaty, emphasis added).

In particular, pursuant to Article VII(2) of the Treaty, the Party imposing exchange restrictions has to "promptly make reasonable provision for the withdrawal" of compensation owed in case of expropriation, "earnings" in the form of "interests or dividends," and "capital transfers."

If we agree that security restrictions fall under the scope of the Treaty, it is therefore possible to contend that Bank Markazi was entitled to repatriate its assets, i.e., the nominal value of the securities it had purchased in the U.S. financial markets plus interests accrued.

Last but not least, it is worth noting that, in the judgment under consideration, the ICJ held that Executive Order No. 13599 did not amount to a measure necessary to protect the U.S. essential security interests pursuant to Article XX(1)(d) of the Treaty (para. 108). The question which remains unanswered is therefore the following: as the Court denied the essential security *purpose* of Executive Order No. 13599, could its security restriction *nature* have been taken into account instead?

Had the Court recognized that Executive Order No. 13599 amounts to a security restriction, such unilateral sanction would have been held legitimate not pursuant to the Treaty essential security clause but through the door left open by Article VII(1), which substantially links the Treaty to the IMF legal framework.

One important lesson is that the tacit assent of the IMF and its tolerance of unilateral security restrictions may reach other treaty regimes, potentially allowing a state the discretion to exonerate itself from other treaty commitments that in some way tie into the IMF.

Although only a few international investment agreements and free trade agreements[39] contain an *ex ante* coordination clause providing for a substantial link with IMF

[36] Both Iran and the United States are among the IMF original members.

[37] *See* Instructions from U.S. Dep't of State to U.S. Embassy Tehran, A-18 (July 23, 1954). The document is cited in the U.S. Counter-memorial, Oct. 14, 2019, para. 16.8, and can be found as Annex 227.

[38] *See also* Charles H. Sullivan, *Treaty of Friendship, Commerce and Navigation, Standard Draft*, U.S. Department of State, 212 (1962). The document can be found as Annex 20 to Iran's Memorial, Feb. 1, 2017.

[39] Nowadays, norm conflict provisions establishing a link with the IMF legal framework are most often included in balance-of-payments clauses, which however are not typical of U.S. treaties (*cf.* 2012 U.S. Model Bilateral Investment Treaty), the most notable exception being Article 32.4 of the Agreement between the United States, Mexico, and Canada (USCMA). See also Article 28.5 of the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), Article 17.15 of the Regional Comprehensive Economic

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rules,[40] it should be underlined that the Fund is, in its own words, not "a suitable forum" for the discussion of political and military issues.[41] The question, then, is: on what grounds should it tacitly approve discriminatory long-term unilateral security restrictions the legitimacy of which is being fiercely debated?

In all likelihood, this issue will resurface in the pending *Alleged Violations* case,[42] because that dispute was triggered by Executive Order No. 13846,[43] a security restriction that the United States promptly notified to the IMF Executive Board in 2018.[44]

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ICC—sexual and gender-based crimes—forced marriage—forced pregnancy—grounds for excluding criminal responsibility—mental disease or defect—duress—victim perpetrator

PROSECUTOR V. DOMINIC ONGWEN. Judgment on the Appeal of Mr. Ongwen Against the Decision of Trial Chamber IX of 4 February 2021 Entitled "Trial Judgment." *At* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07146.PDF.
Judgment on the Appeal of Mr. Dominic Ongwen Against the Decision of Trial Chamber IX of 6 May 2021 Entitled "Sentence." *At* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07148.PDF.
International Criminal Court, December 15, 2022.

On December 15, 2022, the Appeals Chamber of the International Criminal Court (ICC) upheld the conviction and sentence of Dominic Ongwen in two separate judgments.[1] The Trial Chamber had convicted Ongwen, a Lord's Resistance Army (LRA) commander, on sixty-two counts of crimes against humanity and war crimes committed in Northern

Partnership (RCEP) and Article 29.3 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

[40] When consistency with the IMF Articles is provided for in a balance-of-payments clause, it might become more difficult to contend that the exception also covers security restrictions not introduced for economic reasons.

[41] IMF Executive Board Decision, *supra* note 31.

[42] Iran would have to demonstrate that U.S. secondary sanctions amount to an "indirect" restriction on the transfer of funds to and from the territory of Iran under Article VII(3) of the Treaty or to a violation of the fair and equitable standard.

[43] Exec. Order No. 13846, Reimposing Certain Sanctions with Respect to Iran, 83 Fed. Reg. 38939 (Aug. 6, 2018).

[44] IMF, Annual Report, *supra* note 33, at 3911.

[1] Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-2022-Red, Judgment on the Appeal of Mr. Ongwen Against the Decision of Trial Chamber IX of 4 February 2021 Entitled "Trial Judgment" (Dec. 15, 2022), *at* https://www.icc-cpi.int/court-record/icc-02/04-01/15-2022-red [hereinafter Appeal Judgment]; Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-2023, Judgment on the Appeal of Mr. Dominic Ongwen Against the Decision of Trial Chamber IX of 6 May 2021 Entitled "Sentence" (Dec. 15, 2022), *at* https://www.icc-cpi.int/court-record/icc-02/04-01/15-2023 [hereinafter Sentencing Appeal Judgment].