13 FEBRUARY 2019

JUDGMENT

CERTAIN IRANIAN ASSETS

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

PRELIMINARY OBJECTIONS

CERTAINS ACTIFS IRANIENS

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

EXCEPTIONS PRÉLIMINAIRES

13 FÉVRIER 2019

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CERTAIN IRANIAN ASSETS

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

PRELIMINARY OBJECTIONS

Factual background.

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Jurisdiction — Article XXI (2) of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (hereinafter the "Treaty").

Not contested that Treaty in force at date of Application and that several of conditions in Article XXI (2) of Treaty are met — Dispute has arisen between Iran and United States — Has not been possible to adjust that dispute by diplomacy — No agreement to settle dispute by some other pacific means.

Parties disagree on whether dispute is one "as to the interpretation or application" of Treaty — Court observes that a particular dispute often arises in context of broader disagreement between parties — Court must ascertain whether acts complained of fall within provisions of Treaty and whether, as a consequence, dispute is one which the Court has jurisdiction ratione materiae *to entertain.*

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First objection to jurisdiction: Iran's claims arising from measures taken by United States to block Iranian assets pursuant to Executive Order 13599.

Question whether blocking measures fall outside scope of Treaty by virtue of Article XX (1) (c)*, which states that Treaty shall not preclude measures regulating production or traffic in arms, ammunition and implements of war, and Article XX (1)* (d)*, which states that Treaty shall not preclude measures necessary to protect essential security interests — Court has previously observed that Treaty contains no provision expressly excluding certain matters from its jurisdiction — Court has previously considered that Article XX (1)* (d) *did not restrict jurisdiction but was confined to affording a possible defence on the merits — No reason for Court to depart from earlier findings — Same interpretation applies to Article XX (1)* (c) *— First objection to jurisdiction rejected.*

*

Second objection to jurisdiction: Iran's claims concerning sovereign immunities.

Question whether claims predicated on purported failure to accord sovereign immunity are outside Court's jurisdiction — Court examines provisions of the Treaty on which Iran relies to ascertain whether question of sovereign immunities can be considered as falling within scope of Treaty.

Article IV (2), which guarantees protection and security to property of nationals and companies of either State in no case less than that required by international law — Meaning of phrase "required by international law" — Viewed in light of object and purpose of Treaty, the "international law" in question is that which defines minimum standard of protection for property belonging to "nationals" and "companies" of one Party engaging in economic activities within territory of the other — Context of Article IV indicates that purpose of this provision is to guarantee rights and protections of natural persons and legal entities engaged in commercial activities — Provision does not incorporate customary rules on sovereign immunities.

Article XI (4), which excludes from sovereign immunity publicly owned or controlled enterprises of either Party engaging in commercial or industrial activities within territory of other Party — Provision does not affect sovereign immunities under customary international law by State entities when they engage in activities jure imperii *— Provision does not implicitly guarantee, through an* a contrario *interpretation, sovereign immunity of public entities engaged in activities* jure imperii *— Object and purpose of Treaty support this interpretation — Provision does not incorporate sovereign immunities*.

Article III (2), which guarantees freedom of access to courts of other State on terms no less favourable than those applicable to nationals and companies of third States — Not linked to

sovereign immunities because breach of international law on sovereign immunities would not be capable of having impact on compliance with Article III (2) — Provision not seeking to guarantee substantive or procedural rights that a company might intend to pursue before courts — Nothing in ordinary meaning of provision, in its context and in light of object and purpose of the Treaty, to suggest that it entails an obligation to uphold sovereign immunities.

Article IV (1), which concerns fair and equitable treatment of nationals and companies of both Parties, and prohibits unreasonable or discriminatory measures — Similar reasoning as for Article IV (2) — Provision does not include an obligation to respect sovereign immunities.

Article X (1), which provides for freedom of commerce and navigation — Court has previously ruled that "commerce" in Article X (1) includes commercial exchanges in general, not limited to acts of purchase or sale, and covers a wide range of ancillary matters — Nevertheless, cannot cover matters having no or too tenuous connection with commercial relations between Parties — Violation of sovereign immunities to which certain State entities are said to be entitled in exercise of activities jure imperii *not capable of impeding freedom of commerce and thus does not fall within scope of this provision*.

Claims based on alleged violations of sovereign immunities do not fall within scope of Treaty's compromissory clause and Court lacks jurisdiction to consider them — Second objection to jurisdiction upheld.

*

Third objection to jurisdiction: Iran's claims alleging violations of Articles III, IV and V of the Treaty in relation to Bank Markazi.

Rights and protections guaranteed by Articles III, IV and V to "companies" of a Contracting Party — Definition of "company" in Article III (1) — Entity must have its own legal personality, conferred on it by law of the State where it was created — Definition makes no distinction between private and public enterprises — Bank Markazi endowed with its own legal personality by Iran's Monetary and Banking Act — Fact that Bank Markazi wholly owned by Iran does not, in itself, exclude it from category of "companies" within meaning of Treaty.

Definition of "company" in Article III (1) to be read in context and in light of object and purpose of Treaty — Treaty is aimed at affording protections to companies engaging in activities of a commercial nature — Question whether Bank Markazi is a "company" to be determined by reference to nature of its activities — Entity carrying out exclusively sovereign activities cannot be characterized as a "company" — Nothing to preclude a single entity from engaging in both commercial and sovereign activities.

Question of nature of activities of Bank Markazi in the United States — Iran's Monetary and Banking Act not discussed in detail by Parties — Court does not have before it all facts necessary

to determine whether Bank Markazi's activities at relevant time would lead to its characterization as a "company" within meaning of Treaty — Elements largely of factual nature and closely linked to merits — Third objection to jurisdiction does not possess, in circumstances of the case, an exclusively preliminary character.

*

Objections to admissibility: Abuse of process and "unclean hands".

Abuse of process — Initially characterized as "abuse of right" by United States — Recharacterization as "abuse of process" during oral proceedings does not constitute new objection — Court should reject claim based on valid title of jurisdiction on grounds of abuse of process only in exceptional circumstances — No exceptional circumstances in the present case.

"Unclean hands" — Court notes that the United States has not argued that Iran has violated Treaty — Without having to take a position on the "clean hands" doctrine, even if it were shown that Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold "unclean hands" objection to admissibility — Conclusion without prejudice to question whether United States' allegations could eventually provide a defence on merits.

Objections to admissibility rejected.

JUDGMENT

Present: *President* YUSUF; *Vice-President* XUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, GAJA, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, SALAM, IWASAWA; *Judges* ad hoc BROWER, MOMTAZ; *Registrar* COUVREUR.

In the case concerning certain Iranian assets,

between

the Islamic Republic of Iran,

represented by

Mr. Mohsen Mohebi, International Law Adviser to the President of the Islamic Republic of Iran and Head of the Centre for International Legal Affairs, Associate Professor of Public International Law and Arbitration at the Azad University, Science and Research Branch, Tehran,

as Agent, Counsel and Advocate;

Mr. Mohammad H. Zahedin Labbaf, Agent of the Islamic Republic of Iran to the Iran-US Claims Tribunal, Director of the Centre for International Legal Affairs of the Islamic Republic of Iran, The Hague,

as Co-Agent and Counsel;

Mr. Vaughan Lowe, QC, member of the English Bar, Essex Court Chambers, Emeritus Professor of International Law, University of Oxford, member of the Institut de droit international,

Mr. Alain Pellet, Emeritus Professor at the University Paris Nanterre, former member and former Chairman of the International Law Commission, member of the Institut de droit international,

Mr. Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary General of the Hague Academy of International Law, member of the Paris Bar, Sygna Partners,

Mr. Samuel Wordsworth, QC, member of the English Bar, member of the Paris Bar, Essex Court Chambers,

Mr. Sean Aughey, member of the English Bar, 11KBW,

Mr. Luke Vidal, member of the Paris Bar, Sygna Partners,

Ms Philippa Webb, Associate Professor at King's College London, member of the English Bar, member of the New York Bar, 20 Essex Street Chambers,

as Counsel and Advocates;

Mr. Jean-Rémi de Maistre, PhD candidate, Centre de droit international de Nanterre,

Mr. Romain Piéri, member of the Paris Bar, Sygna Partners,

as Counsel;

Mr. Hadi Azari, Legal Adviser to the Centre for International Legal Affairs of the Islamic Republic of Iran, Assistant Professor of Public International Law at Kharazmi University,

Mr. Ebrahim Beigzadeh, Senior Legal Adviser to the Centre for International Legal Affairs of the Islamic Republic of Iran, Professor of Public International Law at Shahid Beheshti University,

Mr. Mahdad Fallah Assadi, Legal Adviser to the Centre for International Legal Affairs of the Islamic Republic of Iran,

Mr. Mohammad Jafar Ghanbari Jahromi, Deputy Head of the Centre for International Legal Affairs of the Islamic Republic of Iran, Associate Professor of Public International Law at Shahid Beheshti University,

Mr. Mohammad H. Latifian, Legal Adviser to the Centre for International Legal Affairs of the Islamic Republic of Iran,

as Legal Advisers,

and

the United States of America,

represented by

Mr. Richard C. Visek, Principal Deputy Legal Adviser, United States Department of State,

as Agent, Counsel and Advocate;

Mr. Paul B. Dean, Legal Counselor, United States Embassy in the Kingdom of the Netherlands,

Mr. David M. Bigge, Deputy Legal Counselor, United States Embassy in the Kingdom of the Netherlands,

as Deputy Agents and Counsel;

Sir Daniel Bethlehem, QC, member of the English Bar, 20 Essex Street Chambers,

Ms Laurence Boisson de Chazournes, Professor of International Law, University of Geneva, associate member of the Institut de droit international,

Mr. Donald Earl Childress III, Counselor on International Law, United States Department of State,

Ms Lisa J. Grosh, Assistant Legal Adviser, United States Department of State,

Mr. John D. Daley, Deputy Assistant Legal Adviser, United States Department of State,

Ms Emily J. Kimball, Attorney Adviser, United States Department of State,

as Counsel and Advocates;

Ms Terra L. Gearhart-Serna, Attorney Adviser, United States Department of State,

Ms Catherine L. Peters, Attorney Adviser, United States Department of State,

Ms Shubha Sastry, Attorney Adviser, United States Department of State,

Mr. Niels A. Von Deuten, Attorney Adviser, United States Department of State,

as Counsel;

Mr. Guillaume Guez, Assistant, University of Geneva, Faculty of Law,

Mr. John R. Calopietro, Paralegal Supervisor, United States Department of State,

Ms Mariama N. Yilla, Paralegal, United States Department of State,

Ms Abby L. Lounsberry, Paralegal, United States Department of State,

Ms Catherine I. Gardner, Assistant, United States Embassy in the Kingdom of the Netherlands,

as Assistants,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 14 June 2016, the Government of the Islamic Republic of Iran (hereinafter "Iran") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter the "United States") with regard to a dispute concerning alleged violations by the United States of the Treaty of Amity, Economic Relations, and Consular Rights, which was signed by the two States in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter the "Treaty of Amity" or "Treaty").

2. In its Application, Iran seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article XXI, paragraph 2, of the Treaty of Amity.

3. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of the United States; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

4. By letters dated 23 June 2016, the Registrar informed both Parties that the Member of the Court of United States nationality, referring to Article 24, paragraph 1, of the Statute, had notified the Court of her intention not to participate in the decision of the case. Pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, the United States chose Mr. David Caron to sit as judge *ad hoc* in the case. Judge Caron having passed away on 20 February 2018, the United States chose Mr. Charles Brower to sit as judge *ad hoc* in the case.

5. Since the Court included upon the Bench no judge of Iranian nationality, Iran proceeded to exercise the right conferred upon it by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Djamchid Momtaz.

6. By an Order dated 1 July 2016, the Court fixed 1 February 2017 and 1 September 2017 as the respective time-limits for the filing of a Memorial by Iran and a Counter-Memorial by the United States. The Memorial of Iran was filed within the time-limit thus prescribed.

7. By a letter dated 30 March 2017, the United States, invoking Article 49 of the Statute and Articles 50 and 62 of the Rules, requested that the Court call upon Iran to produce, or arrange for the United States to have access to, "certain documents relevant to the claims Iran ha[d] asserted against the United States, which [had] not [been] included in the Annexes to Iran's Memorial, and to which the United States lack[ed] access", in particular pleadings and related documents that had been filed confidentially with the United States District Court for the Southern District of New York in the *Deborah Peterson et al.* v. *Islamic Republic of Iran* case (hereinafter, the "*Peterson* case").

By a second letter dated 30 March 2017, the United States requested that the Court extend the time-limit for the filing of preliminary objections to 16 June 2017 or a date not less than 45 days after the United States obtained the documents from the *Peterson* case.

By a letter dated 12 April 2017, Iran objected to these two requests.

By letters dated 19 April 2017, the Registrar informed the Parties that, at that stage of the proceedings, the Court had decided not to use its powers under Article 49 of the Statute to call upon Iran to produce the documents from the *Peterson* case, and that, consequently, it had also decided to reject the request for an extension of the time-limit for the filing of preliminary objections.

By letter dated 1 May 2017, the United States informed the Court that it would petition the federal court concerned to obtain access to the requested documents in the *Peterson* case and that it would seek to present to the Court any additional relevant material.

8. On 1 May 2017, within the time-limit prescribed by Article 79, paragraph 1, of the Rules, the United States presented preliminary objections to the admissibility of the Application and the jurisdiction of the Court. Consequently, by an Order of 2 May 2017, the President of the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules, the proceedings on the merits were

suspended, fixed 1 September 2017 as the time-limit within which Iran could present a written statement of its observations and submissions on the preliminary objections raised by the United States. Iran filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

9. By letter dated 24 August 2017, the United States informed the Court that the federal court in the *Peterson* case had directed the parties to file public versions of the documents to which it had sought access (see paragraph 7 above), and announced its intention to file these public versions with the Court, adding that they would constitute publications "readily available" within the meaning of Article 56, paragraph 4, of the Rules.

By letter dated 30 August 2017, Iran noted the content of the United States' letter of 24 August 2017 and indicated that it wished to reserve all its rights, in particular its right "to respond to any application by the United States to introduce new evidence and/or written submissions commenting upon evidence, outside the timetable fixed by the Court".

On 19 September 2017, the United States filed certain documents from the *Peterson* case, which had been made public on 31 August 2017. In an accompanying letter, the United States indicated that these documents were available on the website of the federal court concerned and that they would also be published on the website of the United States Department of State.

By letter dated 16 October 2017, Iran objected to the filing of the documents from the *Peterson* case, arguing that the United States had acted in violation of Article 79, paragraphs 3 to 8, of the Rules of Court and that these documents were not publicly available.

By letter dated 3 November 2017, the United States confirmed that it had placed the documents from the *Peterson* case on the website of the United States Department of State.

10. By letter dated 3 October 2018, the United States indicated that it considered it necessary to include four new documents in the case file. Given the nature of the said documents and the absence of objection from Iran, the Court decided to grant the United States' request.

11. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings, including the Memorial of Iran, and the documents annexed would be made accessible to the public on the opening of the oral proceedings.

12. Public hearings on the preliminary objections raised by the United States were held from 8 to 12 October 2018, at which the Court heard the oral arguments and replies of:

For the United States: Mr. Richard C. Visek,
Ms Lisa J. Grosh,
Sir Daniel Bethlehem,
Ms Emily J. Kimball,
Mr. John D. Daley,
Ms Laurence Boisson de Chazournes,
Mr. Donald Earl Childress III.

For Iran: Mr. Mohsen Mohebi,
Mr. Luke Vidal,
Mr. Vaughan Lowe,
Ms Philippa Webb,
Mr. Jean-Marc Thouvenin,
Mr. Samuel Wordsworth,
Mr. Sean Aughey,
Mr. Alain Pellet.

*

13. In the Application, the following claims were made by the Islamic Republic of Iran:

"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 recognise 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."

14. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of the Islamic Republic of Iran in its Memorial:

"On the basis of the foregoing, and reserving its right to supplement, amend or modify the present request for relief in the course of the proceedings in this case, Iran respectfully requests the Court to adjudge, order and declare:

(a) That the United States' international responsibility is engaged as follows:

(i) That by its acts, including the acts referred to above and in particular its failure to recognise the separate juridical status (including the separate legal personality) of all Iranian companies including Bank Markazi, the United States has breached its obligations to Iran, *inter alia*, under Article III (1) of the Treaty of Amity;

(ii) That by its acts, including the acts referred to above and in particular its: *(a)* 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 *(b)* 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, and *(c)* expropriation of the property of such entities, and its failure to accord to such entities freedom of access to the U.S. 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 1955 Treaty of Amity, and *(d)* failure to respect the right of such entities to acquire and dispose of property, the United States

has breached its obligations to Iran, *inter alia*, under Articles III (2), IV (1), IV (2), V (1) and XI (4) of the Treaty of Amity;

(iii) That by its acts, including the acts referred to above and in particular its: *(a)* application of restrictions to such entities on the making of payments and other transfers of funds to or from the United States, and *(b)* interference with the freedom of commerce, the United States has breached its obligations to Iran, *inter alia*, under Articles VII (1) and X (1) of the Treaty of Amity;

(b) That the United States shall cease such conduct and provide Iran with an assurance that it will not repeat its unlawful acts;

(c) That the United States 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 United States to Iran under the 1955 Treaty of Amity;

(d) That the United States shall, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other authorities infringing the rights, including respect for the juridical status of Iranian companies, and the entitlement to immunity which Iran and Iranian State-owned companies, including Bank Markazi, enjoy under the 1955 Treaty of Amity and international law cease to have effect;

(e) That Iran and Iranian State-owned companies are entitled to immunity from the jurisdiction of the U.S. courts and in respect of enforcement proceedings in the United States, and that such immunity must be respected by the United States (including the U.S. courts), to the extent required by the 1955 Treaty of Amity and international law;

(f) That the United States (including the U.S. courts) is obliged to respect the juridical status (including the separate legal personality), and to ensure freedom of access to the U.S. 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 companies[;]

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

(h) Any other remedy the Court may deem appropriate."

15. In the Preliminary Objections, the following submissions were presented on behalf of the Government of the United States of America:

> "In light of the foregoing, the United States of America requests that the Court uphold the objections set forth above as to the admissibility of Iran's claims and the jurisdiction of the Court, and decline to entertain the case. Specifically, the United States of America requests that the Court:
>
> *(a)* Dismiss Iran's claims in their entirety as inadmissible.
>
> *(b)* Dismiss as outside the Court's jurisdiction all claims that U.S. measures that block or freeze assets of the Iranian government or Iranian financial institutions (as defined in Executive Order 13599) violate any provision of the Treaty.
>
> *(c)* Dismiss as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on the United States' purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities.
>
> *(d)* Dismiss as outside the Court's jurisdiction all claims of purported violations of Articles III, IV, or V of the Treaty that are predicated on treatment accorded to the Government of Iran or to Bank Markazi."

16. In its Observations and Submissions on the Preliminary Objections, the following submissions were presented on behalf of the Government of the Islamic Republic of Iran:

> "For the reasons given above, the Islamic Republic of Iran requests that the Court:
>
> *(a)* Dismiss the preliminary objections submitted by the United States in its submission dated 1 May 2017, and
>
> *(b)* Decide that it has jurisdiction to hear the claims in the Application by the Islamic Republic of Iran dated 14 June 2016, and proceed to hear those claims."

17. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the United States of America,

at the hearing of 11 October 2018:

> "For the reasons explained during these hearings and any other reasons the Court might deem appropriate, the United States of America requests that the Court

uphold the U.S. objections set forth in its written submissions and at this hearing as to the admissibility of Iran's claims and the jurisdiction of the Court, and decline to entertain the case. Specifically, the United States of America requests that the Court:

(a) Dismiss Iran's claims in their entirety as inadmissible;

(b) Dismiss as outside the Court's jurisdiction all claims that U.S. measures that block the property and interests in property of the Government of Iran or Iranian financial institutions (as defined in Executive Order 13599 and regulatory provisions implementing Executive Order 13599) violate any provision of the Treaty;

(c) Dismiss as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on the United States' purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities; and

(d) Dismiss as outside the Court's jurisdiction all claims of purported violations of Articles III, IV, or V of the Treaty of Amity that are predicated on treatment accorded to the Government of Iran or Bank Markazi."

On behalf of the Government of the Islamic Republic of Iran,

at the hearing of 12 October 2018:

"The Islamic Republic of Iran requests that the Court adjudge and declare:

(a) that the preliminary objections submitted by the United States are rejected in their entireties, and

(b) that it has jurisdiction to hear the claims in the Application by the Islamic Republic of Iran dated 14 June 2016 and proceed to hear those claims."

*

* *

I. FACTUAL BACKGROUND

18. The Court recalls that, on 15 August 1955, the Parties signed a "Treaty of Amity, Economic Relations, and Consular Rights", which entered into force on 16 June 1957 (see paragraph 1 above).

19. Iran and the United States ceased diplomatic relations in 1980, following the Iranian revolution in early 1979 and the seizure of the United States Embassy in Tehran on 4 November 1979.

20. In October 1983, United States Marine Corps barracks in Beirut, Lebanon, were bombed, killing 241 United States servicemen who were part of a multinational peacekeeping force. The United States claims that Iran is responsible for this bombing and for subsequent acts of terrorism and violations of international law; Iran rejects these allegations.

21. In 1984, the United States designated Iran as a "State sponsor of terrorism", a designation which has been maintained ever since.

22. In 1996, the United States amended its Foreign Sovereign Immunities Act (hereinafter the "FSIA") so as to remove the immunity from suit 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 (Section 1605 *(a)* (7) of the FSIA); it also provided exceptions to immunity from execution applicable in such cases (Sections 1610 *(a)* (7) and 1610 *(b)* (2) of the FSIA). Plaintiffs then began to bring actions against Iran before United States courts for damages arising from deaths and injuries caused by acts allegedly supported, including financially, by Iran. These actions gave rise in particular to the *Peterson* case, concerning the above-mentioned bombing of the United States barracks in Beirut (see paragraph 20 above). Iran declined to appear in these lawsuits on the ground that the United States legislation was in violation of the international law on State immunities.

23. In 2002, the United States adopted the Terrorism Risk Insurance Act (hereinafter the "TRIA"), which established enforcement measures for judgments entered following the 1996 amendment to the FSIA. In particular, Section 201 of the TRIA provides as a general rule that, in every case in which a person has obtained a judgment in respect of an act of terrorism or falling within the scope of Section 1605 *(a)* (7) of the FSIA, the assets of a "terrorist party" (defined to include, among others, designated "State sponsors of terrorism") previously blocked by the United States Government — "including the blocked assets of any agency or instrumentality of that terrorist party" — shall be subject to execution or attachment in aid of execution.

24. In 2008, the United States further amended the FSIA, enlarging, *inter alia*, the categories of assets available for the satisfaction of judgment 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 (Section 1610 *(g)* of the FSIA).

25. 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".

26. Also in 2012, the United States adopted the Iran Threat Reduction and Syria Human Rights Act, Section 502 of which, *inter alia*, made the assets of Bank Markazi subject to execution in order to satisfy default judgments against Iran in the *Peterson* case. Bank Markazi challenged the validity of this provision before United States courts; the Supreme Court of the United States ultimately upheld its constitutionality (*Bank Markazi* v. *Peterson et al.*, U.S. Supreme Court, 20 April 2016, Supreme Court Reporter, Vol. 136, p. 1310 (2016)).

27. Following the measures taken by the United States, many default judgments and substantial damages awards have been entered by United States courts against the State of Iran and, in some cases, against Iranian State-owned entities. Further, the assets of Iran and Iranian State-owned entities, including Bank Markazi, are now subject to enforcement proceedings in various cases in the United States or abroad, or have already been distributed to judgment creditors.

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28. The United States has raised several preliminary objections to the jurisdiction of the Court and to the admissibility of the Application. The Court will first deal with issues related to its jurisdiction.

II. JURISDICTION

29. Iran invokes as a basis of jurisdiction in the present case Article XXI, paragraph 2, of the Treaty of Amity, which 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."

30. The Court begins by noting that it is not contested that the Treaty of Amity was in force between the Parties on the date of the filing of Iran's Application, namely 14 June 2016, and that the denunciation of the Treaty announced by the United States on 3 October 2018 has no effect on the jurisdiction of the Court in the present case. Nor is it contested that several of the conditions laid down by Article XXI, paragraph 2, of the Treaty are met: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy; and the two States have not agreed to settlement by some other pacific means.

31. However, the Parties disagree on the question whether the dispute concerning the United States' measures of which Iran complains is a dispute "as to the interpretation or application" of the Treaty of Amity.

32. The Court recalls that, in its Application filed on 14 June 2016, Iran states that the dispute between the Parties concerns the adoption by the United States of a series of measures which have had a serious adverse impact on the ability of Iran and of certain Iranian companies to exercise their rights to control and enjoy their property, including property located outside the territory of Iran and, in particular, within the territory of the United States.

33. In its written pleadings, Iran alleges that, by failing to recognize the separate juridical status of Bank Markazi and other Iranian companies, the United States has breached Article III, paragraph 1, of the Treaty; that, by denying these various companies the immunities that they would otherwise enjoy, it has breached Article III, paragraph 2, and Article XI, paragraph 4, of the Treaty; that the unfair and inequitable treatment by the United States of these various companies has breached the obligations arising from Article IV, paragraph 1, of the Treaty; that, by failing to accord such companies and their property the most constant protection and security, the United States has also breached its obligations under Article IV, paragraph 2, of the Treaty; that, by failing to respect the right of such companies to acquire and dispose of property, the United States has breached Article V, paragraph 1, of the Treaty; and that the restrictions applied by the United States on financial transfers have interfered with freedom of commerce between the territories of the Parties to the Treaty, in breach of Article VII, paragraph 1, and Article X, paragraph 1, of the Treaty.

34. The United States maintains that Iran is not seeking the settlement of a legal dispute concerning the provisions of the Treaty, but is attempting to embroil the Court in "a broader strategic dispute". The Respondent also notes that the United States' actions of which Iran complains cannot be separated from their context, namely Iran's long-standing violations of international law with regard to the United States and its nationals and the consequent deterioration of United States-Iranian relations.

35. In Iran's view, the United States "mischaracterises" the dispute by contending that it would encompass the whole of the Iran-United States relationship since 1979. In its oral arguments, however, Iran acknowledged the existence of a complicated history and relationship between the two Parties, but argued that this must not prevent the two countries from seeking the peaceful settlement of their disputes through judicial means.

36. As the Court has observed, applications that are submitted to it often present a particular dispute that arises in the context of a broader disagreement between parties (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 604, para. 32; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 85-86, para. 32; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 91-92, para. 54; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, pp. 19-20, paras. 36-37). In this case, the Court must ascertain whether the acts of which Iran complains fall within the provisions of the Treaty of Amity and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2, thereof (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 809-810, para. 16).

37. The Court will examine in turn the three preliminary objections to jurisdiction raised by the United States.

A. First objection to jurisdiction

38. In its first objection to jurisdiction, the United States asks the Court to "[d]ismiss as outside the Court's jurisdiction all claims that U.S. measures that block the property and interests in property of the Government of Iran or Iranian financial institutions (as defined in Executive Order 13599 and regulatory provisions implementing Executive Order 13599) violate any provision of the Treaty". In its view, these claims fall outside the scope of the Treaty by virtue of Article XX, paragraph 1, subparagraphs *(c)* and *(d)*, thereof.

39. Those provisions read as follows:

> "1. The present Treaty shall not preclude the application of measures:
>
> . . . . . .
>
> *(c)* regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; and
>
> *(d)* necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

40. The United States submits that, when Article XX, paragraph 1, of the Treaty is invoked, "the Court's jurisdiction is limited to deciding, as an initial matter, whether the exclusions therein apply to the challenged measure". In that case, the Court would have no jurisdiction in respect of any claims predicated on such measure. The United States adds that this objection to jurisdiction is exclusively preliminary. To this end, it argues that the Court need not make any findings that concern the merits of Iran's claims, in particular with regard to Article XX, paragraph 1, subparagraph *(c)*, of the Treaty, which the United States notes was not invoked in the *Oil Platforms* case, in order to hold that Executive Order 13599 is excluded from the Court's jurisdiction under Article XX, paragraph 1, of the Treaty. It maintains that the Court should confine itself to observing that Executive Order 13599 is a measure which regulates traffic in the materials listed in Article XX, paragraph 1, subparagraph *(c)*, of the Treaty.

41. In addition, according to the United States, even if the Court were to find that Article XX, paragraph 1, of the Treaty could not sustain an objection to jurisdiction, this would nonetheless not bar it from considering any other objection under that article as a preliminary matter, without any consideration of the merits. The United States thus argues that its first objection is an objection upon which the Court should render a decision before any further proceedings on the merits, in accordance with Article 79, paragraph 1, of the Rules of Court.

42. According to Iran, Article XX, paragraph 1, of the Treaty provides for a potential defence on the merits. It maintains that conduct which would otherwise amount to a breach of the Treaty could thus be excused, adding that the United States' interpretation of the provision lacks a textual basis and is also inconsistent with the Court's jurisprudence. In support of its arguments, Iran cites, in addition to the Judgments rendered in the cases concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222, and p. 136, para. 271) and *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (*Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20), the Court's Order of 3 October 2018 indicating provisional measures in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)* (*Provisional Measures, Order of 3 October 2018*, paras. 40-42).

43. Responding to the United States' argument that the Court was not asked to consider Article XX, paragraph 1, subparagraph *(c)*, of the Treaty in the case concerning *Oil Platforms*, Iran claims that it is of little importance that the United States invokes a different subparagraph of the same article in the present case.

44. Iran also contends that the objection raised by the United States cannot, in any event, be regarded as exclusively preliminary, but that it is inherently tied to the merits in so far as it involves establishing factual allegations of an extremely grave nature which the Court is not in a position to rule on at this preliminary stage of the proceedings.

* *

45. The Court recalls that it previously had occasion to observe in its Judgment on the preliminary objection in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (*Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20) and more recently in its Order indicating provisional measures in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)* (*Provisional Measures, Order of 3 October 2018*, para. 41) that the Treaty of Amity contains no provision expressly excluding certain matters from its jurisdiction. Referring to its decision in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222, and p. 136, para. 271), the Court considered that Article XX, paragraph 1, subparagraph *(d)*, "[did] not restrict its jurisdiction" in that case "but [was] confined to affording the Parties a possible defence on the merits to be used should the occasion arise" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20). The Court sees no reason in the present case to depart from its earlier findings.

46. In the Court's opinion, this same interpretation also applies to Article XX, paragraph 1, subparagraph *(c)*, of the Treaty since, in this regard, there are no relevant grounds on which to distinguish it from Article XX, paragraph 1, subparagraph *(d)*.

47. The Court concludes from the foregoing that subparagraphs *(c)* and *(d)* of Article XX, paragraph 1, do not restrict its jurisdiction but merely afford the Parties a defence on the merits.

The first objection to jurisdiction raised by the United States must therefore be rejected.

B. Second objection to jurisdiction

48. In its second objection to jurisdiction, the United States asks the Court to dismiss

> "as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on the United States' purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities".

49. In substance, the United States argues that it follows from the text and context of the Treaty of Amity that it does not confer immunity on the States Parties themselves or on any of their State entities. The United States observes that none of the articles of which Iran alleges a breach in support of its claims mentions any protection with respect to immunity from jurisdiction or enforcement. It points out that the object and purpose of the Treaty indicate that it is not intended to govern such questions, but rather concerns commercial and consular relations between the two countries. According to the Respondent, this is confirmed by the historical circumstances in which the Treaty was adopted and by the absence of any reference in the *travaux préparatoires* to questions relating to sovereign immunities. Finally, the United States asserts that its conclusion is supported by the subsequent practice of the Parties to the Treaty, and in particular by the fact that, in the cases submitted to United States courts in the decades following the Treaty's entry into force, Iran did not claim any violation of a right to sovereign immunity allegedly protected by the Treaty.

50. Iran does not dispute that the Treaty of Amity contains no clause directly and expressly granting immunity from jurisdiction or enforcement to the States Parties or their State entities. However, it maintains that consideration of the immunities conferred on States and certain State entities by general international law is a necessary condition for the Court to adjudicate in full on Iran's claims relating to the violation of various provisions of the Treaty of Amity. Consequently, in Iran's view, the jurisdiction conferred on the Court by Article XXI, paragraph 2, of the Treaty includes jurisdiction to determine and apply the immunities at issue to the full extent necessary in order to decide whether the provisions invoked by Iran have been breached by the United States.

51. More specifically, in support of its claim that the second objection to jurisdiction should be rejected, Iran relies on two categories of provisions in the Treaty of Amity. Those in the first category refer to international law in general or to the law of immunities in particular, and, according to Iran, must be understood as incorporating into the Treaty, at least to some degree, the obligation to respect the sovereign immunities guaranteed by international law: they are Article IV, paragraph 2, and Article XI, paragraph 4, of the Treaty. The others, although containing no express reference to the law of immunities or to customary international law in general, necessarily entail, according to Iran, consideration of the immunities which States and State entities enjoy under international law, in order to be interpreted and applied in full: they are Article III, paragraph 2; Article IV, paragraph 1; and Article X, paragraph 1, of the Treaty.

52. The Court will examine below each of the provisions on which Iran relies, in order to ascertain whether it permits the question of sovereign immunities to be considered as falling within the scope *ratione materiae* of the Treaty of Amity.

1. Article IV, paragraph 2, of the Treaty

53. Article IV, paragraph 2, of the Treaty of Amity provides:

> "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."

54. Iran relies on the explicit mention of the "require[ments of] international law" contained in the opening sentence of the above paragraph to argue that this provision incorporates by reference the rules of customary international law on sovereign immunities into the obligation it lays down. According to Iran, if there has been a breach by the United States of the immunities enjoyed under customary international law by the Iranian State and Iranian State-owned entities, as it claims on the merits, it follows that the "[p]roperty of nationals and companies of either High Contracting Party" did not "receive the most constant protection and security", and that the protection and security received did not comply with the obligation that they be no "less than that required by international law"; that, consequently, Article IV, paragraph 2, has been breached by the United States. Since the Court has jurisdiction to rule on the alleged breach of any of the Treaty's provisions, it therefore also has jurisdiction, according to Iran, to apply the law of immunities in the context of Article IV, paragraph 2.

55. The United States disputes this interpretation. In its view, the "require[ments of] international law" referred to in Article IV, paragraph 2, concern the minimum standard of treatment for the property of aliens in the host State — a well-known concept in the field of investment protection — and not immunity protections of any kind. Furthermore, the fact that these guarantees apply indiscriminately to private companies (which may not benefit from immunity) and State entities confirms, in the Respondent's view, that the provision at issue cannot be understood as including sovereign immunity protections.

* *

56. For the purposes of the present discussion, the Court will leave aside the question whether Bank Markazi is a "company" within the meaning of Article IV, paragraph 2, quoted above. This point will be addressed below in the context of the Court's consideration of the third

objection to jurisdiction. The question to be answered now by the Court is whether, assuming that this entity constitutes a "company" within the meaning of the Treaty — which the United States disputes — Article IV, paragraph 2, obliges the Respondent to respect the sovereign immunity to which Bank Markazi or the other Iranian State-owned entities concerned in this case would allegedly be entitled under customary international law.

57. The Court observes in this regard that Iran's proposed interpretation of the phrase referring to the "require[ments of] international law" in the provision quoted above is not consistent with the object and purpose of the Treaty of Amity. As stated in the Treaty's preamble, the Parties intended to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations". In addition, the title of the Treaty does not suggest that sovereign immunities fall within the object and purpose of the instrument concerned. Such immunities cannot therefore be considered as included in Article IV, paragraph 2 (see, by analogy, *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 95). The "international law" in question in this provision is that which defines the minimum standard of protection for property belonging to the "nationals" and "companies" of one Party engaging in economic activities within the territory of the other, and not that governing the protections enjoyed by State entities by virtue of the principle of sovereign equality of States.

58. In addition, the provision in Article IV, paragraph 2, relied on by Iran must be read in the context of Article IV as a whole. Paragraph 1 of this Article concerns the "fair and equitable treatment" to be accorded to the nationals and companies of one Party by the other Party and the prohibition of any "unreasonable or discriminatory measures" that would impair their "legally acquired rights and interests". The second sentence of paragraph 2 provides that the property mentioned in the previous sentence (property which must receive protection, in no case less than that required by international law) "shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation". Paragraph 4 concerns "[e]nterprises which nationals and companies of either High Contracting Party are permitted to establish or acquire, within the territories of the other High Contracting Party". Taken together, these provisions clearly indicate that the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature. It cannot therefore be interpreted as incorporating, by reference, the customary rules on sovereign immunities.

2. Article XI, paragraph 4, of the Treaty

59. Article XI, paragraph 4, of the Treaty of Amity provides:

> "No 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."

60. Iran notes that this provision bars all "immunity" only in the case of enterprises of a Contracting Party which are "publicly owned or controlled" and engage in "commercial [or] industrial" activities within the territory of the other Party. It infers from this that the provision at issue does not affect the immunity enjoyed under customary international law by State entities that engage in activities *jure imperii*, and that it "confirms by strong implication the existence of a Treaty obligation that such immunity must be upheld".

61. The United States rejects this interpretation. In its view, Article XI, paragraph 4, seeks only to prevent unfair competition on the part of publicly owned enterprises, by ensuring that they cannot avoid the liabilities imposed on the private enterprises with which they are in competition. It is extraneous to the question of the immunities enjoyed by State entities engaging in activities *jure imperii*.

* *

62. The Court notes, in agreement with Iran's argument on this point, that Article XI, paragraph 4, which solely excludes from all "immunity" publicly owned enterprises engaging in commercial or industrial activities, does not affect the immunities enjoyed under customary international law by State entities which engage in activities *jure imperii*.

63. However, Iran goes further in contending that this provision imposes an implied obligation to uphold those immunities. The Applicant adopts, in this regard, an *a contrario* reading of Article XI, paragraph 4, whereby, in excluding from immunity only publicly owned enterprises engaging in commercial or industrial activities, this provision implicitly seeks to guarantee the sovereign immunity of public entities when they engage in activities *jure imperii*.

64. As the Court has stated previously,

> "[a]n *a contrario* reading of a treaty provision . . . has been employed by both the present Court (see, e.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 432, para. 29) and the Permanent Court of International Justice (*S.S. "Wimbledon", Judgment, 1923, P.C.I.J., Series A, No. 1*, pp. 23-24). Such an interpretation is only warranted, however, when it is appropriate in light of

> the text of all the provisions concerned, their context and the object and purpose of the treaty." (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 19, para. 37; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 35.)

65. In the present case, the Court cannot adopt the interpretation put forward by Iran. It is one thing for Article XI, paragraph 4, to leave intact, by not barring them, the immunities enjoyed under customary law by State entities when they engage in activities *jure imperii*. It is quite another for it to have the effect, as Iran claims it does, of transforming compliance with such immunities into a treaty obligation, a view not supported by the text or context of the provision.

If Article XI, paragraph 4, mentions only publicly owned enterprises which engage in "commercial, industrial, shipping or other business activities", this is because, in keeping with the object and purpose of the Treaty, it pertains only to economic activities and seeks to preserve fair competition among economic actors operating in the same market. The question of activities *jure imperii* is simply not germane to the concerns underlying the drafting of Article XI, paragraph 4. The argument that this provision incorporates sovereign immunities into the Treaty thus cannot be upheld.

3. Article III, paragraph 2, of the Treaty

66. Article III, paragraph 2, of the Treaty of Amity provides:

> "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 favorable 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."

67. According to Iran, sovereign immunities come into play in several ways in determining — a matter for the merits — whether the United States upheld the "freedom of access to the courts of justice and administrative agencies . . . both in defense and pursuit of their rights", which the provision quoted above accords to "nationals and companies" of Iran.

In Iran's view, the Court should determine whether the denial under United States law of the right of the Iranian entities concerned to avail themselves in judicial proceedings of a defence based on sovereign immunity is consistent with customary international law.

Iran is also of the view that the Court should take account of all the relevant rules of international law, including the right to assert jurisdictional immunity in judicial proceedings, in order to ascertain what is required by "freedom of access" to the courts within the meaning of Article III, paragraph 2. It argues that its right under that provision to freedom of access to United States courts on terms no less favourable than those applicable to nationals and companies of third States has been breached. This is because, according to Iran, entities of third States performing sovereign functions, in particular central banks, are able to avail themselves of their immunity before United States courts.

68. The United States disputes this interpretation and contends that the purpose of Article III, paragraph 2, is not to grant specific substantive rights or any substantive guarantees as to the defences that may be asserted by the "nationals" or "companies" of one Party before the courts of the other Party, but only to allow access to those courts. Similarly, freedom of access to the courts does not imply any guarantee that certain entities cannot be sued or that their property cannot be seized.

* *

69. Assuming for the purposes of the present discussion, as above (see paragraph 56 above), that Bank Markazi is a "company" — a question which will be examined below — the Court must now ascertain whether the alleged breach of the immunities that bank and the other Iranian State entities concerned are said to enjoy under customary international law, should that breach be established, would constitute a violation of the right to have "freedom of access to the courts" guaranteed by that provision. It is only if the answer to this question is in the affirmative that it could be concluded that the application of Article III, paragraph 2, requires the Court to examine the question of sovereign immunities, and that such an examination thus falls, to that extent, within its jurisdiction as defined by the compromissory clause of the Treaty of Amity.

70. The Court is not convinced that a link of the nature alleged by Iran exists between the question of sovereign immunities and the right guaranteed by Article III, paragraph 2.

It is true that the mere fact that Article III, paragraph 2, makes no mention of sovereign immunities, and that it also contains no *renvoi* to the rules of general international law, does not suffice to exclude the question of immunities from the scope *ratione materiae* of the provision at issue. However, for that question to be relevant, the breach of international law on immunities would have to be capable of having some impact on compliance with the right guaranteed by Article III, paragraph 2.

That is not the case. The provision at issue does not seek to guarantee the substantive or even the procedural rights that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party, but only to protect the possibility for such a company to have access to those courts or authorities with a view to pursuing the (substantive or procedural) rights it claims to have. The wording of Article III, paragraph 2, does not point towards the broad

interpretation suggested by Iran. The rights therein are guaranteed "to the end that prompt and impartial justice be done". Access to a Contracting Party's courts must be allowed "upon terms no less favorable" than those applicable to the nationals and companies of the Party itself "or of any third country". There is nothing in the language of Article III, paragraph 2, in its ordinary meaning, in its context and in light of the object and purpose of the Treaty of Amity, to suggest or indicate that the obligation to grant Iranian "companies" freedom of access to United States courts entails an obligation to uphold the immunities that customary international law is said to accord — if that were so — to some of these entities. The two questions are clearly distinct.

4. Article IV, paragraph 1, of the Treaty

71. Iran also relies on Article IV, paragraph 1, of the Treaty of Amity, which provides:

> "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 unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

72. According to Iran, the denial by the United States of the sovereign immunities to which the Iranian State entities concerned are entitled under customary international law is capable of constituting a breach of the obligation to accord "fair and equitable treatment" and to refrain from any "unreasonable or discriminatory measures" within the meaning of Article IV, paragraph 1. In Iran's view, the Court therefore has jurisdiction to ascertain whether the international law on immunities has been upheld, in order to determine whether the United States has complied with the requirements of Article IV, paragraph 1.

73. The United States contests this view. According to the Respondent, Article IV, paragraph 1, which is a classic provision in "Friendship, Commerce and Navigation" treaties, is aimed at affording certain protections to the nationals and companies of a State in the exercise of their private or professional activities, of a commercial nature, within the territory of the other Party. It does not concern entities engaged in sovereign activities.

* *

74. For reasons similar to those set out above regarding Iran's reliance on Article IV, paragraph 2, of the Treaty of Amity (see paragraph 58 above), the Court does not consider that the requirements of Article IV, paragraph 1, include an obligation to respect the sovereign immunities of the State and those of its entities which can claim such immunities under customary international law. It cannot therefore uphold on this point Iran's argument that the question of sovereign immunities falls within the scope *ratione materiae* of this provision, and consequently within the jurisdiction of the Court under the compromissory clause of the Treaty of Amity.

5. Article X, paragraph 1, of the Treaty

75. Article X, paragraph 1, of the Treaty of Amity provides that "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation".

76. According to Iran, the jurisdiction of the Court to pronounce on whether the United States respected the "freedom of commerce" guaranteed by Article X, paragraph 1, implies jurisdiction to determine whether the sovereign immunities guaranteed by customary international law have been respected and, if they have not, whether and to what extent freedom of commerce might thereby have been impeded.

77. The United States notes that the "freedom of commerce" mentioned in Article X, paragraph 1, appears in an article on matters relating to the treatment of vessels and of the cargo and products they carry. The Respondent concludes that this expression refers to actual commerce and to the ancillary activities linked directly thereto, but that it cannot cover the protection of sovereign immunity.

* *

78. The Court recalls that in its Judgment on the preliminary objection in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (*Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 803), it had to rule on the scope of the concept of "freedom of commerce" within the meaning of Article X, paragraph 1, of the Treaty of Amity, in order to determine whether the dispute between the parties fell within the scope of that provision.

It stated on that occasion that the word "commerce" within the meaning of the provision at issue refers not just to maritime commerce, but to commercial exchanges in general; that, in addition, the word "commerce", both in its ordinary usage and in its legal meaning, is not limited to the mere acts of purchase and sale; and that commercial treaties cover a wide range of matters ancillary to commerce, such as the right to establish and operate businesses, protection from molestation, and acquisition and enjoyment of property, etc. (*ibid*., pp. 818-819, paras. 45-46). The Court concluded that "it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce" (*ibid*., p. 819, para. 49).

79. The Court sees no reason to depart now from the interpretation of the concept of "freedom of commerce" that it adopted in the case quoted above. Nevertheless, even if understood in this sense, freedom of commerce cannot cover matters that have no connection, or too tenuous a connection, with the commercial relations between the States Parties to the Treaty. In this regard, the Court is not convinced that the violation of the sovereign immunities to which certain State entities are said to be entitled under international law in the exercise of their activities

jure imperii is capable of impeding freedom of commerce, which by definition concerns activities of a different kind. Consequently, the violations of sovereign immunities alleged by Iran do not fall within the scope of Article X, paragraph 1, of the Treaty.

*

80. The Court concludes from all of the foregoing that none of the provisions the violation of which Iran alleges, and which, according to the Applicant, are capable of bringing within the jurisdiction of the Court the question of the United States' respect for the immunities to which certain Iranian State entities are said to be entitled, is of such a nature as to justify such a finding.

Consequently, the Court finds that Iran's claims based on the alleged violation of the sovereign immunities guaranteed by customary international law do not relate to the interpretation or application of the Treaty of Amity and, as a result, do not fall within the scope of the compromissory clause in Article XXI, paragraph 2. Thus, in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities, the Court does not have jurisdiction to consider them.

The second objection to jurisdiction raised by the United States must therefore be upheld.

C. Third objection to jurisdiction

81. In its third objection to jurisdiction, the United States requests the Court to dismiss "as outside the Court's jurisdiction all claims of purported violations of Articles III, IV, or V of the Treaty of Amity that are predicated on treatment accorded to the Government of Iran or Bank Markazi".

82. The United States contends that Bank Markazi is not a "company" for the purposes of Articles III, IV and V of the Treaty of Amity, on the ground that, as the Central Bank of Iran, it carries out exclusively sovereign functions and is not engaged in activities of a commercial nature. According to the United States, the protections which Articles III, IV and V provide to "companies" apply only to entities whose activity is of a commercial nature and takes place in a competitive market. The United States acknowledges that the term "company" may also be applied to a public enterprise, but only if the enterprise in question is acting in a similar fashion to a private enterprise. On the other hand, according to the United States, a central bank with functions of an exclusively sovereign nature falls outside the scope of Articles III, IV and V of the Treaty. Such is the case, according to the United States, for Bank Markazi. The Respondent refers to the statutes of the bank laid down in Iran's 1960 Monetary and Banking Act, as amended, which it argues place this entity under the full control of the Iranian Government and confer on it exclusively sovereign functions, as is generally the case for a central bank. The United States concludes from the above that Iran's claims relating to the treatment of Bank Markazi fall outside the scope of Articles III, IV and V of the Treaty and that, as a result, the Court lacks jurisdiction to entertain the claims based on the alleged violation of those provisions.

83. Iran contends, to the contrary, that Bank Markazi is a "company" for the purposes of Articles III, IV and V of the Treaty of Amity. Iran points out that the definition of "companies" given in Article III, paragraph 1, is deliberately broad. According to the Applicant, it includes any entity that has its own legal personality in the legal order in which it was created, regardless of its activity or capital structure and of whether or not it engages in profit-making activities. Iran argues that, since Bank Markazi has legal personality under Article 10 of the Monetary and Banking Act, and since, under that same provision, it is generally subject to the law applicable to joint-stock companies — and not the law applicable to public entities, except for instances expressly laid down by law — it is a "company" within the meaning of the Treaty.

Iran adds that Bank Markazi is endowed with capital for the conduct of its professional operations, which may generate profits on which it must pay tax to the Iranian State, and that, like any legal person, it can enter into contracts of any nature, acquire and sell goods and services, own assets and other movable and immovable property, and appear in a court of law.

Lastly, Iran contends in the alternative that the third objection to jurisdiction is not of a preliminary character, since in order to rule on it, the Court would have to consider questions pertaining to the merits. Indeed, according to Iran, assuming that, as the United States claims, the Treaty only protects companies in so far as they are engaging in private, commercial or business activities, it would be necessary for the Court to determine to which of Bank Markazi's activities the treatment complained of by the Applicant relates. In Iran's opinion, that could only be done after the Parties have been heard on the merits.

* *

84. The Court observes first that, although the wording of the third preliminary objection refers to "treatment accorded to the Government of Iran or Bank Markazi", the question before it is solely that of whether Bank Markazi is a "company" within the meaning of the Treaty of Amity and is thereby justified in claiming the rights and protections afforded to "companies" by Articles III, IV and V. It is because Bank Markazi is endowed, under Iranian law, with a legal personality distinct from the State, that Iran takes the view that it is a "company" within the meaning of the Treaty. In the final version of its arguments presented to the Court, Iran does not contend that this characterization could be applied to the State itself. Consequently, the Court will endeavour solely to establish, in the following paragraphs, whether the characterization of "company" within the meaning of the Treaty of Amity is applicable to Bank Markazi. That is, in reality, the only question raised by the third objection to jurisdiction.

85. Articles III, IV and V of the Treaty of Amity guarantee certain rights and protections to "nationals" and "companies" of a Contracting Party, which must be respected by the other Party.

These include, in particular, the right to have "freedom of access to the courts of justice and administrative agencies . . . both in defense and pursuit of their rights" (Art. III, para. 2); the right to "fair and equitable treatment" and not to be subject to "unreasonable or discriminatory measures" (Art. IV, para. 1); the "most constant protection" of their property, "in no case

less than that required by international law", and the right for such property not to be taken "except for a public purpose, nor . . . without the prompt payment of just compensation" (Art. IV, para. 2); the protection of premises used by them from any entry or molestation without just cause and other than according to law (Art. IV, para. 3); the right for enterprises established by "nationals" and "companies" of one Party within the territory of the other to conduct their activities on terms no less favourable than for other enterprises of whatever nationality engaged in similar activities (Art. IV, para. 4); the right to benefit, in the lease or purchase of movable and immovable property, from treatment no less favourable than that accorded to nationals and companies of any third country (Art. V).

86. All these provisions refer to "nationals" and "companies" of a Contracting Party. The term "national" applies to natural persons, whose status is not at issue in the difference between the Parties as regards the third preliminary objection. The term "company" is defined thus in Article III, paragraph 1: "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."

87. On the basis of this definition, two points are not in doubt and, moreover, give no cause for disagreement between the Parties.

First, an entity may only be characterized as a "company" within the meaning of the Treaty if it has its own legal personality, conferred on it by the law of the State where it was created, which establishes its legal status. In this regard, Article III, paragraph 1, begins by stating that "[c]ompanies 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".

Secondly, an entity which is wholly or partly owned by a State may constitute a "company" within the meaning of the Treaty. The definition of "companies" provided by Article III, paragraph 1, makes no distinction between private and public enterprises. The possibility of a public enterprise constituting a "company" within the meaning of the Treaty is confirmed by Article XI, paragraph 4, which deprives of immunity any enterprise of either Contracting Party "which is publicly owned or controlled" when it engages in commercial or industrial activities within the territory of the other Party, so as to avoid placing such an enterprise in an advantageous position in relation to private enterprises with which it may be competing (see paragraph 65 above).

88. Two conclusions may be drawn from the above.

In the first place, the United States cannot contest the fact that Bank Markazi was endowed with its own legal personality by Article 10, paragraph *(c)*, of Iran's 1960 Monetary and Banking Act, as amended — and indeed it does not do so.

In the second place, the fact that Bank Markazi is wholly owned by the Iranian State, and that the State exercises a power of direction and close control over the bank's activities — as pointed out by the United States and not contested by Iran — does not, in itself, exclude that entity from the category of "companies" within the meaning of the Treaty.

89. It remains to be determined whether, by the nature of its activities, Bank Markazi may be characterized as a "company" according to the definition given by Article III, paragraph 1, read in its context and in light of the object and purpose of the Treaty of Amity.

90. In this regard, the Court cannot accept the interpretation put forward by Iran in its main argument, whereby the nature of the activities carried out by a particular entity is immaterial for the purpose of characterizing that entity as a "company". According to Iran, whether an entity carries out functions of a sovereign nature, i.e., acts of sovereignty or public authority, or whether it engages in activities of a commercial or industrial nature, or indeed a combination of both types of activity, is of no relevance when it comes to characterizing it as a "company". It would follow that having a separate legal personality under the domestic law of a Contracting Party would be a sufficient condition for a given entity to be characterized as a "company" within the meaning of the Treaty of Amity.

91. In the opinion of the Court, such an interpretation would fail to take account of the context of the definition provided by Article III, paragraph 1, and the object and purpose of the Treaty of Amity. As stated above in respect of the second objection to jurisdiction raised by the United States, an analysis of all those provisions of the Treaty which form the context of Article III, paragraph 1, points clearly to the conclusion that the Treaty is aimed at guaranteeing rights and affording protections to natural and legal persons engaging in activities of a commercial nature, even if this latter term is to be understood in a broad sense. The same applies to the object and purpose of the Treaty, as set out in the preamble (quoted in paragraph 57 above), and an indication of which can also be found in the title of the Treaty (Treaty of Amity, Economic Relations, and Consular Rights).

The Court therefore concludes that an entity carrying out exclusively sovereign activities, linked to the sovereign functions of the State, cannot be characterized as a "company" within the meaning of the Treaty and, consequently, may not claim the benefit of the rights and protections provided for in Articles III, IV and V.

92. However, there is nothing to preclude, *a priori*, a single entity from engaging both in activities of a commercial nature (or, more broadly, business activities) and in sovereign activities.

In such a case, since it is the nature of the activity actually carried out which determines the characterization of the entity engaged in it, the legal person in question should be regarded as a "company" within the meaning of the Treaty to the extent that it is engaged in activities of a commercial nature, even if they do not constitute its principal activities.

93. The Court must therefore now address the question of the nature of the activities engaged in by Bank Markazi. More precisely, it must examine Bank Markazi's activities within the territory of the United States at the time of the measures which Iran claims violated Bank Markazi's alleged rights under Articles III, IV and V of the Treaty.

94. Given that Iran's principal argument is that the nature of the activities engaged in is of no relevance when it comes to characterization of an entity as a "company" within the meaning of the Treaty (see paragraph 83 above), the Applicant has made little attempt to demonstrate that, alongside the sovereign functions which it concedes, Bank Markazi engages in activities of a commercial nature. It has nonetheless stated, in its written observations, that "[s]ome of Bank Markazi's activities are also performed by private companies (e.g., concluding contracts; owning property; buying securities), and they pertain to commerce". The Applicant added during the hearings that Bank Markazi "was endowed with capital for the conduct of its operations, which may generate profits on which it must pay tax to the Iranian State" and that it "can . . . enter into contracts of any nature, acquire and sell goods and services" (see paragraph 83 above). The United States, for its part, has asserted to the contrary that, like any central bank, Bank Markazi exercises sovereign functions, and has emphasized the fact that, before United States courts, Bank Markazi has always presented itself as a central bank in the traditional sense and not as a commercial enterprise.

95. The Court observes that the Monetary and Banking Act of 1960, as amended, containing the statutes of Bank Markazi, was included in the case file by Iran in an English translation which for the most part the United States has not contested. This law contains various provisions defining the types of activities in which Bank Markazi is entitled to engage, the scope of which has not been discussed in detail by the Parties before the Court.

96. Under Article 79, paragraph 9, of the Rules of Court, when it is called upon to rule on a preliminary objection, the Court must give its decision "in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character".

As the Court stated in its Judgment on the preliminary objections in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (*Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51):

> "In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits."

97. In the present case, the Court takes the view that it does 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, and which would have been capable of being affected by the measures complained of by Iran by reference to Articles III, IV and V of the Treaty. Since those elements are largely of a factual nature and are, moreover, closely linked to the merits of the case, the Court considers that it will be able to rule on the third objection only after the Parties have presented their arguments in the following stage of the proceedings, should it find the Application to be admissible.

Therefore, there is reason to conclude that the third objection to jurisdiction does not possess, in the circumstances of the case, an exclusively preliminary character.

D. General conclusion on the jurisdiction of the Court

98. It follows from the foregoing that the first objection to jurisdiction must be rejected, the second must be upheld, and the third does not possess, in the circumstances of the case, an exclusively preliminary character.

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99. Given that the Court has jurisdiction to entertain part of the claims made by Iran, which, moreover, were not covered in their entirety by the three objections to jurisdiction raised by the United States, it is now necessary for the Court to consider the objections to admissibility raised by the Respondent, which seek the rejection of the Application as a whole.

III. ADMISSIBILITY

100. The Court notes that the United States initially raised two objections to the admissibility of the Application, namely, first, that Iran's reliance on the Treaty to found the Court's jurisdiction in this case is an abuse of right and, secondly, that Iran's "unclean hands" preclude the Court from proceeding with this case. The Court observes, however, that, during the oral proceedings, the United States clarified that its first objection to admissibility was an objection based on "abuse of process" and not on "abuse of right", adding that an applicant who comes with "unclean hands" is committing an abuse of process.

101. The United States acknowledges that it used the term "abuse of right" in its written submissions, but states that the clarification provided by the Court on the nature of abuse of right and abuse of process in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)* made it more appropriate to characterize the objection it raised as one based on an abuse of process.

102. According to Iran, it is too late to raise this new objection. In support of its view, it invokes Article 79, paragraph 1, of the Rules of Court, according to which

> "[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial".

* *

103. The Court begins by recalling that, in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, it considered that "[a]lthough the basic concept of an abuse may be the same, the consequences of an abuse of rights or an abuse of process may be different" (*Preliminary Objections, Judgment of 6 June 2018*, para. 146). It further stated that "[a]n abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings" (*ibid.*, para. 150) and that "abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits" (*ibid.*, para. 151).

104. The Court notes that, in its oral pleadings, the United States submitted that the dispute did not fall within the scope of the Treaty of Amity and that Iran could not therefore seek to found the jurisdiction of the Court on that instrument, an attempt that it characterizes in its Preliminary Objections as being "disingenuous". In the Court's view, the objection based on abuse of process is not a new objection, but merely a recharacterization of a position already set out by the United States in its Preliminary Objections.

105. The Court further notes that, during the oral proceedings, the United States maintained that the "clean hands" doctrine was a subpart of the abuse of process principle. It added that if, however, the Court considered that abuse of process and the "clean hands" doctrine were distinct, the latter had a sufficient basis in international law.

106. The Court observes that even if the objections based on abuse of process and on the "clean hands" doctrine may be linked, in the present instance they remain distinct with regard to their scope and the acts relied upon in their support. The Court will first examine the objection based on abuse of process raised by the United States, followed by that based on the "clean hands" doctrine.

A. Abuse of process

107. The United States contends that in light of the "exceptional" circumstances of this case, the Court should decline to found jurisdiction on the Treaty of Amity. It points out in particular that the fundamental conditions underlying the Treaty of Amity no longer exist between the Parties, notably the friendly, commercial and consular relations envisaged therein. It adds that Iran's attempt to found the Court's jurisdiction on the Treaty does not seek to vindicate interests protected by the Treaty, but rather to embroil the Court in a broader strategic dispute.

108. In addition, the United States maintains that Iran's claims are abusive because they "subvert" the purposes of the Treaty. Focusing on Iran's claims in respect of sovereign immunity, it considers that Iran is attempting to rewrite the Treaty, thus violating basic principles of good faith by manipulating the Treaty in disregard of its object and purpose.

109. Finally, the United States cites the *Northern Cameroons* case to assert that Iran's claims are also incompatible with the Court's judicial function, because a judgment of the Court on the merits of the present case would, in its view, rest on "a fiction".

110. Iran, for its part, notes that, in this instance, the United States has invoked no "exceptional circumstances" linked to the procedure before the Court. It maintains that the "broader strategic dispute" referred to by the United States is irrelevant to the present case. It also rejects the Respondent's assertion that the fundamental conditions underlying the Treaty no longer exist between the Parties.

111. Responding to the United States' assertion regarding Iran's claims in respect of sovereign immunities, the latter reiterates that the Treaty expressly contains a *renvoi* to international law, which includes the law of sovereign immunities.

112. Finally, Iran considers that the *Northern Cameroons* case relied on by the United States is of no assistance to the latter in this instance, because the issue in that case was the interpretation of a treaty that was no longer in force. According to Iran, submitting a dispute to the Court under a jurisdictional title that is in force, and in a case in which the claims are related to a breach of the treaty in question, cannot be considered an abuse of process. In its oral pleadings, Iran added that the real question was whether the Treaty of Amity was in force, and noted that since it was, it must apply.

* *

113. The Court recalls that, in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, it stated that only in exceptional circumstances should the Court reject a claim based on a valid title of jurisdiction on the ground of abuse of process. In this regard, there has to be clear evidence that the applicant's conduct amounts to an abuse of process (*Preliminary Objections, Judgment of 6 June 2018*, para. 150) (see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 38).

114. The Court has already observed that the Treaty of Amity was in force between the Parties on the date of the filing of Iran's Application, i.e., 14 June 2016 (see paragraph 30 above), and that the Treaty includes a compromissory clause in Article XXI providing for its jurisdiction. The Court does not consider that in the present case there are exceptional circumstances which would warrant rejecting Iran's claim on the ground of abuse of process.

115. In light of the foregoing, the Court finds that the first objection to admissibility raised by the United States must be rejected.

B. "Unclean hands"

116. According to the second objection to admissibility raised by the United States, the Court should not proceed with the present case because Iran has come before it with "unclean hands". The United States alleges in particular that "Iran has sponsored and supported international

terrorism, as well as taken destabilizing actions in contravention of nuclear non-proliferation, ballistic missile, arms trafficking, and counter-terrorism obligations". It contends that Iran is seeking relief because of the outcome of the *Peterson* case, which, in its view, arose from Iran's support for terrorism.

117. The United States recognizes that in the past the Court has not upheld an objection based on the "clean hands" doctrine, but argues that it has not rejected the doctrine either, and that, in any event, the time is ripe for the Court to acknowledge it and apply it. According to the United States, the Court need not address the merits of this case to assess the legal consequences of Iran's conduct.

118. Iran, for its part, rejects the allegations of the United States that it has breached its counter-terrorism, nuclear non-proliferation and arms trafficking obligations. In its view, these allegations are ill-founded and irrelevant to the resolution of the present case, and thus cannot be a bar to the admissibility of the Application.

119. Iran also points out that there is uncertainty about the substance and binding character of the "clean hands" doctrine and that the Court has never recognized its applicability.

120. In Iran's view, it is nevertheless clear that the "clean hands" doctrine cannot be applied at the preliminary objections phase and that it cannot serve as a basis for the inadmissibility of a claim.

121. Iran argues lastly that, according to proponents of the "clean hands" doctrine, it only applies when the claimant is engaged in "precisely similar action, similar in fact and similar in law" as that of which it complains. It is of the view that the United States' objection does not satisfy that requirement, since the Respondent has not even claimed that the accusations on which it bases its assertion that Iran has "unclean hands" amount to a violation of the Treaty of Amity.

* *

122. The Court begins by noting that the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based. Without having to take a position on the "clean hands" doctrine, the Court considers that, even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the "clean hands" doctrine (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 38, para. 47; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 52, para. 142).

123. Such a conclusion is however without prejudice to the question whether the allegations made by the United States, concerning notably Iran's alleged sponsoring and support of international terrorism and its presumed actions in respect of nuclear non-proliferation and arms trafficking, could, eventually, provide a defence on the merits.

124. The Court concludes that the second objection to admissibility raised by the United States cannot be upheld.

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125. In light of the foregoing, the two objections to admissibility of the Application raised by the United States must be rejected.

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126. For these reasons,

THE COURT,

(1) Unanimously,

Rejects the first preliminary objection to jurisdiction raised by the United States of America;

(2) By eleven votes to four,

Upholds the second preliminary objection to jurisdiction raised by the United States of America;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Crawford, Salam, Iwasawa; *Judge* ad hoc Brower;

AGAINST: *Judges* Bhandari, Robinson, Gevorgian; *Judge* ad hoc Momtaz;

(3) By eleven votes to four,

Declares that the third preliminary objection to jurisdiction raised by the United States of America does not possess, in the circumstances of the case, an exclusively preliminary character;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Abraham, Bennouna, Cançado Trindade, Bhandari, Robinson, Gevorgian, Salam, Iwasawa; *Judge* ad hoc Momtaz;

AGAINST: *Judges* Tomka, Gaja, Crawford; *Judge* ad hoc Brower;

(4) Unanimously,

Rejects the preliminary objections to admissibility raised by the United States of America;

(5) Unanimously,

Finds that it has jurisdiction, subject to points (2) and (3) of the present operative clause, to rule on the Application filed by the Islamic Republic of Iran on 14 June 2016, and that the said Application is admissible.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirteenth day of February, two thousand and nineteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Islamic Republic of Iran and the Government of the United States of America, respectively.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges TOMKA and CRAWFORD append a joint separate opinion to the Judgment of the Court; Judge GAJA appends a declaration to the Judgment of the Court; Judges ROBINSON and GEVORGIAN append separate opinions to the Judgment of the Court; Judges *ad hoc* BROWER and MOMTAZ append separate opinions to the Judgment of the Court.

(Initialled) A.A.Y.

(Initialled) Ph.C.

JOINT SEPARATE OPINION OF JUDGES TOMKA AND CRAWFORD

[Original English Text]

Preliminary objections — United States' objection that Bank Markazi is not a "company" for the purposes of the Treaty of Amity — Disagreement with the Court's decision to join this objection to the merits — Predecessor to Article 79 of the Rules of Court allowed Court great latitude to defer objections to the merits phase — Delay caused by unnecessary deferral of objections — 1972 change to the Rules of Court limited the option of deferring objections to the merits — The Court has the necessary information about Bank Markazi to determine this preliminary objection now — Not necessary to characterize particular transactions of Bank Markazi in order to decide whether it is a "company" for the purposes of the Treaty of Amity.

1. We regret that the Court has decided to join the third preliminary objection to jurisdiction raised by the United States of America to the merits. In our view, whether Bank Markazi is a "company" within the meaning of Article III, paragraph 1, of the Treaty of Amity is an exclusively preliminary question of treaty interpretation, on which the Court should have ruled now.

2. We do not deal here with the substantive issue of whether Bank Markazi is a "company" for the purpose of the Treaty of Amity. However, we wish to express our serious doubts as to the appropriateness of the decision to defer the question. If Bank Markazi is not a "company" as defined in the Treaty, its key provisions, notably Articles III and IV, do not apply to it. The point has been fully argued and the Court has the necessary information about Bank Markazi to decide the question at this stage. To defer deciding the question is not an appropriate use of Article 79, paragraph 9, as we will explain.

3. The predecessor to Article 79 allowed the Court greater latitude to defer objections to the merits phase of a case. Pursuant to Article 62, paragraph 5, of the 1946 Rules of Court, after hearing the parties' arguments on preliminary objections, the Court had two options: rule on the objection or join it to the merits of the case[1]. That Article repeated the language of the identical provision in the 1936 Rules of the Permanent Court of International Justice[2].

[1] Article 62, paragraph 5, of the 1946 Rules of Court read: "After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits."

[2] 1936 Rules of the Permanent Court of International Justice, Art. 62, para. 5.

4. Acting under Article 62, paragraph 5, of the 1946 Rules of Court, in *Barcelona Traction* the Court joined the Respondent's third preliminary objection, concerning the Applicant's standing, to the merits of the case by a narrow margin of nine votes to seven (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, pp. 46-47). The decision on the preliminary objections was handed down in 1964. Six years later, in 1970, the Court determined that the Applicant lacked standing to bring its case, effectively upholding the Respondent's third preliminary objection, and concluded that the Court could not "pronounce upon any other aspect of the case" (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 51, para. 102).

5. The Court was criticized for the delay in the determination of the *Barcelona Traction* case in the context of a review of the role of the Court by the Sixth Committee of the United Nations General Assembly, which began in 1970. The views of governments expressed in the context of this review are reflected both in the 1970 and 1971 reports of the Sixth Committee on the question and in two reports of the Secretary-General, published in 1971 and 1972, which record the replies to a questionnaire sent to States. The 1970 report of the Sixth Committee records feedback from State representatives that "it would be useful for the Court to decide expeditiously on all questions relating to jurisdiction and other preliminary issues", as well as criticism of the Court's "practice of reserving decisions on such questions pending consideration of the merits of the case" (A/8238, para. 48). In the Sixth Committee's report of 1971, representatives put forward "a suggestion that the Court should be encouraged to take a decision on preliminary objections as quickly as possible and to refrain from joining them to the merits unless it was strictly essential" (A/8568, para. 47).

6. To some extent the Court had pre-empted such criticism by embarking, in 1967, on a revision of its Rules[3]. The Court took note of the views expressed in the Sixth Committee during the revision process. That process of revision produced significant changes to the Rules and in 1972 Article 62, paragraph 5, was extensively amended and renumbered as Article 67, paragraph 7[4]. The provision was renumbered twice more in 1978 and 2000 but was not further amended in substance[5]. Today the relevant provision, Article 79, paragraph 9, reads: "After hearing the par-

[3] Report of the International Court of Justice, 1 August 1969-31 July 1970, A/8005, para. 31.

[4] International Court of Justice, *Yearbook 1971-1972*, p. 8. See also S. Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, The Hague, Martinus Nijhoff, 1983, pp. 164-167.

[5] Article 67, paragraph 7, became Article 79, paragraph 7, in 1978, then Article 79, paragraph 9, in 2000. International Court of Justice, *Yearbook 1977-1978*, p. 118, and *Yearbook 2000-2001*, p. 3.

ties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character."

7. According to the Court, a distinct advantage of the new rule is "that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41). The new rule does not foreclose altogether the option for the Court to postpone its ruling on a preliminary objection to the merits stage, but limits this option "by laying down the conditions more strictly" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 28, para. 49; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 133, para. 48). The effect of the 1972 amendment was therefore intended to be substantive: it was not a mere matter of drafting. Most importantly, as one member of the Court wrote extracurially, "[t]he easy way out which was represented by the neutral, and in some cases diplomatic answer of a joinder but which really constituted a postponement of any decision is now excluded"[6].

8. Since the changes to the Rules in 1972, the Court has found that a preliminary objection does not possess an exclusively preliminary character in only five cases. In *Military and Paramilitary Activities* and in *Land and Maritime Boundary between Cameroon and Nigeria*, the Court found that an objection that third States might be "affected" by the Court's decision did not possess an exclusively preliminary character because it was possible to identify the effect on other States "only when the general lines of the judgment to be given become clear" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*,

[6] Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, Vol. 67, No. 1, January 1973, p. 16. Judge Jiménez de Aréchaga was a member of the Committee for the Revision of the Rules of Court from February 1970 until February 1976, including at the time of adoption in 1972 of amendments to the Rules of Court. International Court of Justice, *Yearbook 1977-1978*, pp. 111-112. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 425, para. 76: "the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court".

p. 425, paras. 75-76[7]; see also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 324-325, paras. 116-117). In the two *Lockerbie* cases, the Court held that the objection according to which Libya's claims were rendered "without object" by two Security Council resolutions dealing with the aerial incident had the character of a defence on the merits, and was "inextricably interwoven" with the merits (*Libyan Arab Jamahiriya* v. *United Kingdom, Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 28-29, para. 50; *Libyan Arab Jamahiriya* v. *United States of America, Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 133-134, para. 49). Finally, in *Application of the Genocide Convention*, the Court determined that Serbia's objection *ratione temporis* did not possess an exclusively preliminary character because the Court "need[ed] to have more elements before it" to make relevant findings and "[i]t would . . . be impossible to determine the questions raised by the objection without to some degree determining issues properly pertaining to the merits" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 459-460, paras. 127, 129-130)[8].

9. The decision of the Court in the present case to join the third preliminary objection of the United States to the merits marks a departure from the Court's previous adherence to the régime set out in Article 79, paragraph 9. The Court has held that

> "[i]n principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51).

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[7] The Court determined that "obviously the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem" (*I.C.J. Reports 1984*, p. 425, para. 76). The examination by the Court of jurisdictional questions in that case was opened by the Court *proprio motu* and not by the United States formally raising preliminary objections. However the Court dealt with the objection pursuant to Article 79, paragraph 7, of the original version of the 1978 Rules of Court *(ibid.)*.

[8] This decision was adopted by 11 votes to 6. See *I.C.J. Reports 2008*, p. 466, para. 146 (4). In their dissenting opinions, two judges briefly explained their reasons for voting against this decision of the Court. *Ibid.*, p. 547, para. 4, dissenting opinion of Judge Skotnikov and *ibid.*, pp. 633-635, paras. 192-194, dissenting opinion of Judge *ad hoc* Kreća. In his separate opinion, another judge was particularly critical of the Court's joinder decision, *ibid.*, pp. 515-523, paras. 7-17, separate opinion of Judge Tomka.

The presumption is therefore in favour of a decision at the preliminary stage, rather than joinder to the merits. Article 79, paragraph 8, of the Rules of Court, the substance of which was added in 1972[9], reinforces this view, at least in relation to objections to the jurisdiction of the Court[10]. Article 79, paragraph 8, provides that "[i]n order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue". Members of the Court have previously highlighted the importance of limiting instances in which objections are joined to the merits to circumstances contemplated by Article 79, paragraph 9[11].

10. Whether Bank Markazi is a company for the purpose of the Treaty of Amity is a question of treaty interpretation on which different views may be held. However, the Court is in possession, already at this stage of the proceedings, of all the facts which might have a bearing on the question. The Applicant has supplied the Court with evidence of the creation of Bank Markazi and its functions[12]. Both Parties have had the opportunity to put forward their arguments in relation to whether Bank Markazi is a "company" for the purpose of the Treaty of Amity, supported by evidence such as records of negotiations during the elaboration of the Treaty[13]. In order to decide whether Bank Markazi is a company, it is not 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", as the Court states in justifying its decision to join the third preliminary objection to the merits (Judgment, para. 97). The activities of Bank Markazi, "at the relevant time", are not the subject-matter of the dispute before the Court. This is rather the enforcement measures taken by the United States against the property and assets of the Bank in order to satisfy judgments of federal courts against Iran and its Government. Moreover, the definition of the term "companies", in Article III, paragraph 1, of the Treaty of

[9] Article 79, paragraph 8, was previously Article 67, paragraph 6, in 1972 and Article 79, paragraph 6, in 1978.

[10] S. Rosenne, *op. cit.*, p. 163.

[11] See, for example, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, pp. 612-614, declaration of Judge Bennouna; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 304, separate opinion of Judge Petrén; *Nuclear Tests (New Zealand* v. *France), ibid.*, pp. 488-489, separate opinion of Judge Petrén.

[12] Specifically, Iran has supplied the domestic legislation which created Bank Markazi and regulates the bank's functions (Memorial of Iran (MI), Ann. 73).

[13] See, for example, Letter of the US Embassy in Tehran to the US Department of State, 16 October 1954 (MI, Ann. 2) and Aide-Memoire of the US Embassy in Tehran, 20 November 1954 (MI, Ann. 3), discussed in the Written Statement of Iran on the Preliminary Objections of the United States, p. 43. The United States has also supplied two volumes of Documents Unsealed in the *Peterson* proceedings which it argues are relevant to the determination of the question, CR 2018/32, p. 12, para. 7 (Bethlehem).

Amity does not refer to "activities" as a criterion for determining whether an entity is a company for the purposes of the Treaty.

11. If the Court had ruled on the objection at this stage of the proceedings, it would not have been ruling on matters pertaining to the merits of the case. The Applicant's case, as relevant to this objection, is that Bank Markazi has been denied its rights guaranteed by the Treaty of Amity because of measures taken by the Respondent[14]. The preliminary question is whether Bank Markazi is entitled, as a "company", to those Treaty rights. That question is separate from the Court's assessment, at the merits stage, of whether the Respondent has violated those rights, if they exist.

12. It follows from the above that the Court should have decided at the preliminary stage of these proceedings whether Bank Markazi is a "company" for the purpose of the Treaty of Amity. To decline to do so involves a misapplication of Article 79, paragraph 9, of the Rules of Court.

(Signed) Peter TOMKA.

(Signed) James CRAWFORD.

[14] Application of Iran, para. 1; CR 2018/30, p. 10, para. 3 (Mohebi).

DECLARATION OF JUDGE GAJA

Jurisdiction of the Court — Claims relating to alleged rights of Bank Markazi under Articles III, IV and V of the Treaty of Amity — Applicability of these provisions for the purpose of deciding on a preliminary objection — Sovereign and business activities of Bank Markazi.

1. In its third preliminary objection concerning jurisdiction, the United States of America requested the Court to "[d]ismiss as outside the Court's jurisdiction all claims of purported violations of Articles III, IV, or V of the Treaty [of Amity, Economic Relations, and Consular Rights] that are predicated on treatment accorded to the Government of Iran or to Bank Markazi". At the present stage of the proceedings, the Court's task is not to ascertain whether the mentioned provisions of the Treaty confer rights on Bank Markazi and whether those rights have been infringed. What the Court needs to examine for deciding upon this type of preliminary objection is whether "the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16). What is required is for the Court to ascertain that a reasonable case has been made that Bank Markazi enjoys rights under Articles III, IV or V of the Treaty and that these rights may have been violated. In my opinion, that threshold has been reached and the third objection to the Court's jurisdiction should be dismissed in so far as it concerns Bank Markazi.

2. According to Article III, paragraph 1, of the Treaty, "[c]ompanies 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 common ground that Bank Markazi has been constituted under a law of Iran, the Monetary and Banking Act of 1972 (Memorial of Iran, Ann. 73). Article 10 *(c)* of that Act states that "[t]he Central Bank of the Islamic Republic of Iran enjoys legal personality and shall be governed by the laws and regulations pertaining to joint-stock companies in matters not provided for by this Act". It is also common ground that the separate legal personality of Bank Markazi has not been recognized when the Bank's assets were seized. What has been challenged by the United States of America is the applicability of Articles III, IV and V of the Treaty to an entity (Bank Markazi) which exercises sovereign functions.

3. The exercise of sovereign functions by Bank Markazi is not regulated by the Treaty, except with regard to exchange restrictions in Arti-

cle VII. However, the fact that Bank Markazi exercises sovereign functions does not exclude that it also operates as a commercial bank when it engages in transactions in a foreign financial market. The decision to invest in securities may be part of a sovereign prerogative of a central bank, but that does not mean that the implementation of an investment is carried out through the exercise of a sovereign power. The acquisition or sale of securities is not different from that executed by any commercial bank and should enjoy the same protection under the Treaty as that of a commercial bank. It is true that, according to Articles 19 *(c)* and 21 *(c)* of the United Nations Convention on Jurisdictional Immunities of States and Their Property, "property of the central bank or other monetary authority of the State" enjoys immunity from "post-judgment measures of constraint". However, this comprehensive immunity is not necessarily explained by the nature of the activities of central banks; it also reflects a policy of encouraging foreign central banks to invest in the financial market of the host State.

4. Article XI, paragraph 4, of the Treaty provides that a State corporation, agency or instrumentality, "if it engages in commercial, industrial, shipping or other business activities", cannot "claim or enjoy, either for itself or for its property, immunity . . . from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject". This provision cannot mean that when a State entity engages in business activities it is deprived of all immunities to which it may be entitled under international law. Article XI, paragraph 4, rather conveys that State entities would not enjoy immunities with regard to their business activities. In any event, the provision confirms that State corporations, agencies and instrumentalities are covered by the Treaty generally, not only when they exercise business activities.

(Signed) Giorgio GAJA.

SEPARATE OPINION OF JUDGE ROBINSON

Whether a question of an alleged violation of sovereign immunity of a State enterprise such as Bank Markazi concerns the interpretation or application of the Treaty of Amity — Article XI, paragraph 4, of the Treaty of Amity — A contrario *interpretation — Object and purpose of the Treaty.*

1. In this opinion, I explain my disagreement with the finding in point (2) of the *dispositif*, which upholds the second preliminary objection to jurisdiction made by the United States of America (hereinafter the "United States").

2. In its second preliminary objection to jurisdiction, the United States asked the Court to dismiss

> "as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on the United States' purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities".

In order to uphold this objection, the Court must be satisfied that "the violations of the Treaty pleaded by Iran [do not] fall within the provisions of the Treaty"[1]. Whether the Treaty of Amity, Economic Relations, and Consular Rights (hereinafter the "Treaty") has actually been violated is not, of course, a matter for determination at this stage.

3. In my view, the question of a violation of an obligation to accord sovereign immunity from jurisdiction and/or enforcement to State entities engaged in acts *jure imperii* arises under Article XI, paragraph 4, of the Treaty, which provides:

> "No 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."

[1] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16.

In precluding only a State enterprise engaging in commercial activities from enjoying immunities from suit or other liability to which private companies would be subject, this paragraph does not, in its terms, say or imply that State enterprises carrying out acts *jure imperii* would also be deprived of the immunity they would otherwise enjoy under customary international law; it does, however, compellingly imply that State enterprises carrying out acts *jure imperii* enjoy sovereign immunity by virtue of the Treaty.

4. The question is whether an interpretation of the Treaty, in accordance with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, yields the conclusion that an allegation of a breach of immunity for State enterprises carrying out acts *jure imperii* falls within the provisions of the Treaty. In effect the question is whether there is a "reasonable connection"[2] between the Treaty and the claim of sovereign immunity.

5. To begin with, it must be said at once that the fact that the Treaty does not expressly refer to sovereign immunity for acts *jure imperii* is not decisive in determining whether the Treaty covers such immunity. For the interpretative function is perfectly capable of resolving the question whether an element not expressly mentioned in the Treaty is nonetheless covered by it.

6. The background to the Treaty is well known. In 1812, the United States Supreme Court enunciated the principle of absolute immunity in the case of *Schooner Exchange* v. *McFaddon.* In 1952 the State Department of the United States issued the Tate Letter implementing the restrictive approach to sovereign immunity. That Letter indicated that a government or governmental entity engaging in commercial activities was not entitled to immunity in the United States. It is clear that the Tate Letter left untouched and applicable the customary immunity of State entities for sovereign, governmental activities.

7. The provision in Article XI, paragraph 4, that a State entity engaging in commercial activities will not have immunity from suit or other liability to which a private entity is subject, immediately and inevitably requires a determination as to whether particular acts are commercial, in which case they do not attract immunity, or sovereign and governmental, in which case a question arises as to whether their customary right to immunity becomes applicable by virtue of the Treaty. The Treaty anticipates that determination and therefore makes provision for the resolution of the issue through the application of the customary rules of State immunity. In ascertaining whether acts are commercial under Article XI, paragraph 4, the Treaty calls for a determination that excludes those acts from characterization as sovereign and governmental. This call is implied and

[2] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 81.

requires recourse to customary international law to ascertain whether such acts are entitled to immunity. It is the Treaty itself that directs the Parties to customary international law to ascertain the treatment to be accorded to such acts. The Treaty gives this directive because the enjoyment of immunity by a State entity for sovereign, governmental acts is vital to the achievement of its object and purpose, which — as gathered from the preamble and the Treaty as a whole — is to maximize trade, investment and economic relations between the two countries. The Court should not take a narrow view as to what constitutes the object and purpose of the Treaty, the interpretative significance of which is stressed in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties. Immunities for sovereign, governmental acts carried out by a State enterprise contribute significantly to the achievement of the Treaty's object and purpose and are therefore part of its object and purpose.

8. The innate and organic connectedness between acts *jure imperii* and *jure gestionis* is endemic to the Treaty, foreseen and embraced by it, and therefore governed by it in all its aspects, including recourse to the customary rules of immunity. It is this interrelatedness that brings into the conventional régime of the Treaty, the customary rules on immunity for a State entity carrying out acts *jure imperii,* and dictates recourse to inferential reasoning. It matters not whether the reasoning in this interpretative process is described as *"a contrario"*, or "by necessary implication" or, more simply, "implied". What is important is that the inference is reasonable, and recourse to the customary rules on immunity required by the Treaty is, as demonstrated below, supported by an interpretation of the ordinary meaning of the terms of Article XI, paragraph 4, in their context, and in light of the Treaty's object and purpose of maximizing trade, investment and economic relations between the two countries.

9. In paragraph 63 of the Judgment, the Court describes the reasoning adopted by Iran as an *a contrario* reading of Article XI, paragraph 4, and in that regard cited a passage from its previous decision in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. However, it omitted a part of the passage in which the Court described an *a contrario* reading as follows: "by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded"[3]. This is not a full description of *a contrario* reasoning, which, more simply,

[3] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 19, para. 37.

calls for an inference that a matter is either included in or excluded from a treaty. Whether the inference is that comparable categories are excluded depends on the specific provision in the treaty to which those categories would be contrary. An *a contrario* interpretation does not always lead to an inference that other comparable categories are excluded. This means of interpretation can, as in this case, lead to an inference that a comparable category is included. In this case, the inference to be drawn from Article XI, paragraph 4, is that, by only denying immunity in respect of the commercial activities of a State enterprise, the Treaty is to be read as preserving immunity in respect of State entities carrying out acts *jure imperii*. That inference is supported by the fact that such immunities are, as is demonstrated below, a part of the object and purpose of the Treaty. It is an inference that points to a reasonable connection between the alleged violation and the Treaty, sufficient to give the Court jurisdiction. This interpretation, relying on an *a contrario* interpretation, is consistent with the Court's finding in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* that "[s]uch an interpretation is only warranted, however, when it is appropriate in light of the text [of the Treaty] of all the provisions concerned, their context and the object and purpose of the treaty"[4].

10. There was no need for paragraph 4 in Article XI of the Treaty to provide expressly that sovereign, governmental acts of State entities attract immunity from jurisdiction and enforcement. In the context in which the debate over sovereign immunity had taken place since 1812 and in which the Tate Letter was written only three years earlier, it would have been understood by both the United States and Iran that, under the Treaty, a State entity engaging in sovereign, governmental acts would continue to enjoy under the Treaty the immunity it had.

11. This conclusion is wholly consistent with the object and purpose of the Treaty to maximize trade, investment and economic relations between the peoples of the two countries. The immunity of State-owned companies engaged in sovereign, governmental acts is as important to and necessary for the achievement of this object and purpose as is the denial of immunity for State companies engaged in commercial activities. A State entity such as the Central Bank of one Party will have to carry out in the territory of the other Party several sovereign, governmental activities in the lawful discharge of its functions. These activities are as vital to the achievement of the above-mentioned object and purpose of the Treaty as are the activities of a private company.

12. In the oral proceedings Iran pointed to the important role played by the Central Bank of Iran, Bank Markazi, in providing international

[4] *I.C.J. Reports 2016 (I)*, p. 19, para. 37.

currency exchange services in relation to imports from or exports to the United States. The measures adopted by the United States in relation to Bank Markazi, including stripping it of its immunity, had, as also stated by Iran, an adverse effect on the discharge by the Bank of its functions and are precisely the kind of measures that the Treaty was intended to prevent and regulate. Consequently, there is a sufficient relationship between the alleged violations of sovereign immunity and the Treaty to give the Court jurisdiction. This point is not answered with the acknowledgment that there is a question of sovereign immunity, but it is governed by customary international law. This is so because the sovereign immunities of the Central Bank, being vital for the achievement of the Treaty's object and purpose, are a part of that object and purpose and thus a part of the Treaty. Therefore, the source of the obligation to recognize the Bank's sovereign immunities in respect of its sovereign, governmental functions is the Treaty itself, and not customary international law.

13. There can be no doubt that the activities of a central bank are governed by the Treaty. The Court has held that in case of doubt, one should adopt an interpretation of the Treaty that is "more in consonance with its overall objective of achieving friendly relations over the entire range of activities covered by the Treaty"[5]. The Central Bank's role in regulating the transfer of payments for goods and services traded between the countries undoubtedly falls within "the entire range of activities covered by the Treaty"[6].

14. Significantly, the Treaty has an article that highlights an aspect of the trade and economic relationship between the Parties in which a central bank has an important role. Article VII is designed to ensure that, subject to certain exceptions, restrictions are not placed on transfers of funds to or from the territory of the other Party. This article is central to the achievement of the Treaty's object and purpose of maximizing trade, investment and economic relations between the two countries. For if investors are not able to transfer funds to and from the host State, the achievement of the Treaty's object and purpose will be seriously impaired. Article VII is the lifeblood of the Treaty. Bank Markazi as a Central Bank is principally responsible for the activities that would be undertaken in the implementation of this Article. It is wholly natural that, in those circumstances, the Treaty would preserve the Central Bank's sovereign immunities and, therefore, a question must arise as to whether the measures adopted by the United States have breached its sovereign immunity, thereby giving the Court jurisdiction.

[5] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 820, para. 52.
[6] *Ibid.*

15. The third preliminary objection must be rejected because the question of sovereign immunities and their alleged breach can, on a fair reading of the Treaty, be said to be covered by it, and those immunities can, on a fair reading of the Treaty, be said to be part of the Treaty's object and purpose. There is a reasonable relationship between the question of sovereign immunities for State entities and the Treaty; the two are sufficiently connected through the Treaty's object and purpose to give the Court jurisdiction. An allegation of failure to accord Bank Markazi sovereign immunity from jurisdiction or enforcement falls within the scope of Article XI, paragraph 4. Therefore, the Court should have found that there is a dispute between the Parties as to the interpretation or application of the Treaty, thereby conferring on the Court jurisdiction under Article XXI, paragraph 2.

(Signed) Patrick L. ROBINSON.

SEPARATE OPINION OF JUDGE GEVORGIAN

Disagreement with the Court's findings on lack of jurisdiction on immunities of Bank Markazi (point (2) of the dispositif*) — Such immunities fall within the scope of application of the 1955 Treaty of Amity, Economic Relations, and Consular Rights — A link exists between Bank Markazi's activities to facilitate commerce by Iranian companies in the US and the Treaty's object and purpose — The interpretation of Article III, paragraph 2, of the Treaty — Distinction between procedural rights and the possibility to invoke such rights before US courts is artificial — Interpretation of Article X, paragraph 1, of the Treaty — Iran's "freedom of commerce" under this provision has been rendered illusory by the enforcement measures adopted by the US.*

1. I voted in favour of the Court's rejection of the first and third preliminary objections raised by the United States of America (hereinafter the "US"), as well as the findings on the admissibility of the Application filed by the Islamic Republic of Iran (hereinafter "Iran"). However, I voted against the Court's upholding of the second preliminary objection raised by the US. As a result, I disagree with the Court's limitation of its jurisdiction under point (2) of the *dispositif*. In this opinion, I shall set the reasons therefor.

2. On the merits, Iran challenges five measures or decisions allegedly affecting its immunities, including those of its Central Bank (Bank Markazi):

— the introduction in 1996 of a "terrorism exception" to jurisdictional immunities inserted in Title 28 of the United States Code (USC) as part of the "Antiterrorism and Effective Death Penalty Act"[1];

— the enactment in 2002 of the "Terrorism Risk Insurance Act", which in essence authorized the attachment of Iran's assets in order to give satisfaction to judgments on "terrorist claims" brought by private parties before US courts[2];

[1] According to the new exception, immunity under the US Foreign Sovereign Immunities Act of 1976 would not apply when "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" (28 USC, Section 1605 *(a)* (7), as adopted by Section 221 of the US Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214), (Memorial of Iran (MI), Ann. 10).

[2] US Terrorism Risk Insurance Act of 2002, Pub. L. 107-297, 116 Stat. 2322, (MI, Ann. 13).

— the enlargement in 2008 of the "terrorism exception" initially introduced in 1996[3];
— the issuance in 2012 of Executive Order 13599, which blocked all assets of the Government of Iran, including, *inter alia*, those of its Central Bank[4];
— the enactment in the same year of the "Iran Threat Reduction and Syria Human Rights Act", which deprived the assets of Bank Markazi of immunity in order to give satisfaction to private claims brought before a US District Court in the case *Peterson et al.* v. *Islamic Republic of Iran et al*[5].

3. Iran claims that such measures — the scope of which is not disputed by the Parties — have violated its immunities (including those applicable to Bank Markazi) and that such immunities fall within the scope of various provisions of the Iran-US Treaty of Amity, Economic Relations, and Consular Rights of 1955 (hereinafter the "1955 Treaty"). The US considers that the question of immunities is outside the Court's jurisdiction *ratione materiae*, since the rule on the central bank immunities is a rule of customary international law and is not covered by the 1955 Treaty. The present Judgment agrees with the Respondent's position.

4. Before addressing the Court's analysis of the substantive provisions of the 1955 Treaty, I shall first make two preliminary observations.

First, while no provision of the 1955 Treaty mentions expressly the protection of foreign State immunities (including those of central banks), such immunities are invoked by Iran in relation to various *substantive* rights protected by the Treaty. From this perspective, the present case differs from *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, where the Court excluded its jurisdiction in relation to a treaty (the Palermo Convention), which allegedly incorporated immunities in a *general* "disclaimer" clause limiting that treaty's scope of application[6].

[3] *Inter alia*, the new Section 1605A of Title 28 of the US Code would allow judges to award punitive damages against so-called "State sponsors of terrorism" (28 USC, Section 1605A *(c)* as adopted by Section 1083 *(a)* (1) of the US National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206, (MI, Ann. 15).

[4] Executive Order 13599, 5 February 2012, Federal Register, Vol. 77, p. 6659, (MI, Ann. 22).

[5] Section 502 *(b)* of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214 (MI, Ann. 16), in relation to *Peterson et al.* v. *Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG).

[6] It must also be recalled that, in that case, the Court's conclusion was confirmed by the *travaux préparatoires* of the Palermo Convention (*Immunities and Criminal Proceedings*

Second, the fact that the object and purpose of the 1955 Treaty is not to protect State sovereignty, but rather to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations"[7], is not sufficient per se to dispose of the Court's jurisdiction over Iran's claims regarding immunities, and notably those protecting its Central Bank. As Iran has argued in the present proceedings (and the US has not contested), Bank Markazi plays a crucial role in the conclusion of commercial transactions by Iranian companies in the US, to the point that the attachment of its assets may have rendered such transactions impossible[8]. While the scope of the alleged harm caused by the US measures is a matter for the merits, Iran has, at this stage, sufficiently demonstrated the existence of a link between such measures and the object and purpose of the 1955 Treaty.

5. I shall now turn to the substantive rights invoked by Iran in the present case. In my opinion, two provisions of the 1955 Treaty are particularly relevant as sources of the Court's jurisdiction over Iran's claims concerning immunities: Article III, paragraph 2 (access to courts of justice) and Article X, paragraph 1 (freedom of commerce and navigation).

6. According to Article III, paragraph 2,

> "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 favorable 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."

7. The present Judgment differentiates between, on the one hand, the substantive and procedural rights that a national or company of a Contracting Party might claim before a domestic court or authority, and on the other, the "possibility for such a [national or] company to have access to those courts or authorities with a view to pursuing the (substantive or

(Equatorial Guinea v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 322-323, paras. 96-102). This is not the case here.

[7] Paragraph 57 of the present Judgment.

[8] See, in particular, CR 2018/30, pp. 31-33, paras. 33-36 (Vidal).

procedural) rights it claims to have"[9]. According to the Court, only the latter is protected by Article III, paragraph 2[10]. To this effect, the Court recalls that the rights enshrined in that provision are only guaranteed "to the end that prompt and impartial justice be done"[11].

8. This differentiation is in my view artificial and disregards the "essentially procedural" and "preliminary" nature of immunities, as defined by the Court in *Arrest Warrant* and *Jurisdictional Immunities*[12]. Indeed, in the latter Judgment, the Court explained that "a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established"[13].

9. Moreover, if we follow this logic, practically nothing is left of the right of access to courts once Iran's Central Bank (Bank Markazi) has been deprived of a "preliminary" procedural defence of such importance as immunities (thereby leaving it in a clearly less favourable situation than that of other central banks operating in the US). As well expressed in the dissenting opinion to the judgment of the US Supreme Court in *Bank Markazi* v. *Peterson et al.*, Bank Markazi was "strip[ped] . . . of any protection that federal common law, international law, or New York State law might have offered against respondents' claims"[14]. It must be underscored, in this respect, that one of Iran's aims in relation to Article III, paragraph 2, is not so much that US courts "uphold" immunities (as the present Judgment wrongly assumes in its paragraph 70), but rather that Iranian companies be put in a position to effectively invoke such immunities before US courts. At present, this is not possible due to the measures adopted by the United States[15].

10. Another provision that, in my opinion, brings claims on immunities within the scope of the Court's jurisdiction *ratione materiae* under the 1955 Treaty is Article X, paragraph 1, which provides that "[b]etween the territories of the two High Contracting Parties there shall be freedom of

[9] Paragraph 70 of the present Judgment.

[10] *Ibid.*

[11] *Ibid.*

[12] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 124, para. 58; *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60.

[13] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 136, para. 82.

[14] *Bank Markazi* v. *Peterson et al.*, *Supreme Court Reporter*, Vol. 136, p. 1310 (2016), Roberts, C. J., dissenting, p. 14.

[15] See CR 2018/33, pp. 27-29, paras. 9-11 (Wordsworth), and partially, CR 2018/31, p. 13, para. 10 (Wordsworth).

commerce and navigation". As the present Judgment acknowledges, the Court interpreted this provision broadly in its Judgment on preliminary objections in the *Oil Platforms* case:

> "whether the word 'commerce' is taken in its ordinary sense or in its legal meaning, at the domestic or international level, it has a broader meaning than the mere reference to purchase and sale.
>
> Treaties dealing with trade and commerce cover a vast range of matters ancillary to [. . .] commerce, such as shipping, transit of goods and persons, the right to establish and operate businesses, protection from molestation, freedom of communication, acquisition and tenure of property."[16]

11. In paragraphs 78 and 79, the present Judgment concludes that the protection of a central bank's immunities is not included in the expression "matters ancillary to commerce". In so doing, it fails to acknowledge that, in *Oil Platforms*, the Court referred to Article X, paragraph 1, as protecting not only "commerce" between the Contracting Parties (a term already defined in broad terms), but also the larger concept of "freedom of commerce". In the Court's view,

> "[a]ny act which would impede that 'freedom' is thereby prohibited. Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export."[17]

12. Given the essential role played by Bank Markazi in the effective conclusion of commercial transactions by Iranian companies in the United States, Iran now invokes before the Court an alleged serious violation of its rights under this provision. Such an interference appears to be the direct consequence of the restriction of immunities by means of a series of measures specifically targeting Iran and Iranian-owned companies. In such circumstances, it appears unjustified to limit the Court's jurisdiction under Article X, paragraph 1, in the manner done in the present Judgment.

13. For all these reasons, I am of the view that the Court should have dismissed the second preliminary objection raised by the United States, and accordingly, should have exercised its full jurisdiction over Iran's claims on the merits.

(*Signed*) Kirill GEVORGIAN.

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[16] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 818, paras. 45-46.

[17] *Ibid.*, p. 819, para. 50.

SEPARATE OPINION OF JUDGE *AD HOC* BROWER

Clean hands — Incomplete references in support of the Respondent's argument — Judge Hudson's individual opinion — Limitation not satisfied.

Article XX of the Treaty of Amity — Article XX is not a jurisdictional limitation because not self-judging — Parties could have drafted Article XX as a self-judging clause — Other treaties on commercial matters contain self-judging clauses.

Sovereign immunity — Treaty of Amity governs economic relations and consular rights — Treaty of Amity expressly grants consular immunities — Expressio unius est exclusio alterius *— Interpretation based on Article 31, paragraph 3* (c)*, of the Vienna Convention on the Law of Treaties would amount to rewriting the Treaty of Amity — Words used in the Treaty of Amity further strengthen the conclusion that the Treaty is of a purely commercial nature —* A contrario *interpretation is of no avail.*

The third objection to jurisdiction is of an exclusively preliminary character — Bank Markazi's basic function as Iran's Central Bank determines whether or not it is a "company" under the Treaty of Amity — Iran adduced no proof that Bank Markazi actually engaged in commercial activities — Under Iran's Monetary and Banking Act 1972 as amended Bank Markazi is not authorized to engage in commercial activity — Iran's pleadings contain few arguments that Bank Markazi engaged in commercial activity — All immune State organs and international organizations carry out some degree of ancillary commercial activity required for their support and maintenance — Iran has consistently argued in United States' courts that Bank Markazi carries out strictly sovereign activities — Iran cannot "blow hot and cold at the same time" — Court had before it all the facts necessary to decide whether Bank Markazi is a "company" within the meaning of the Treaty of Amity.

1. I agree with the Court's conclusions on the first and second objections to jurisdiction, and on both objections to admissibility. I could not vote, however, in favour of the operative paragraph concerning the third objection to jurisdiction. First, I wish to highlight certain points of agreement with the majority, but on which the Judgment did not elaborate at length. Second, I intend to set out the reasons for my partial dissent.

I. Clean Hands

2. In the oral proceedings, the United States referred to the words of Professor John Dugard, seven times judge *ad hoc* of the Court, acting in

his capacity as Special Rapporteur of the International Law Commission (hereinafter "ILC") on diplomatic protection. The United States quoted Professor Dugard's statement according to which it is:

> "difficult to sustain the argument that the clean hands doctrine does not apply to disputes involving direct inter-State relations. States have frequently raised the clean hands doctrine in direct inter-State claims and in no case has the ICJ stated that the doctrine is irrelevant to inter-State claims."[1]

The United States also cited a writing of former President of the Court Judge Schwebel which it argued should be understood as confirming that "a number of States have maintained the vitality and applicability of the principle of clean hands in inter-State disputes and that the Court has not rejected the principle"[2]. Iran simply commented that there exist serious doubts concerning the existence and the relevance of the clean hands doctrine[3].

3. The Court has not commented on these references, but both Professor Dugard and Judge Schwebel were cited incompletely. In his contribution on the clean hands doctrine, Judge Schwebel had concluded that "[w]hether indeed the principle of clean hands is a principle of contemporary international law is a question on which opinion is divided"[4]. Judge Schwebel also made reference to the work of Professor Dugard as ILC Special Rapporteur, especially to the latter's statement that evidence in favour of the clean hands doctrine is "inconclusive"[5]. Professor Dugard himself was cautious as to the existence and relevance of that doctrine in inter-State dispute settlement. Although he maintained that the clean hands doctrine may apply to inter-State relations[6], his remarks were made in the context of a study on diplomatic protection, of which the present dispute is not an example. Furthermore, Professor Dugard concluded his report with the words of Judge Schwebel to the effect that "the evidence in favour of the clean hands doctrine is inconclusive"[7]. Thus, a complete reading of the references cited to support the Respondent's

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[1] CR 2018/28, p. 56, para. 82 (Bethlehem). See John Dugard, *Sixth Report on Diplomatic Protection*, UN doc. A/CN.4/546 (11 August 2004), p. 5, para. 6.

[2] CR 2018/28, p. 56, para. 82 (Bethlehem). See Stephen M. Schwebel, "Clean Hands, Principle", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012), Vol. II, pp. 232-235.

[3] CR 2018/31, pp. 51-52, paras. 35-37 (Pellet).

[4] Schwebel, *supra* note 2, p. 233, para. 3.

[5] *Ibid.*, p. 234, para. 13.

[6] Dugard, *supra* note 1, para. 6.

[7] *Ibid.*, para. 18. Judge Crawford, then ILC Special Rapporteur on State responsibility, stated that the clean hands doctrine had been invoked before international tribunals, but rarely applied. See "Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries", *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 72, para. 9.

unclean hands argument shows that, in fact, they provide scant support for that argument.

4. Furthermore, in its preliminary objections, the United States referred to Judge Hudson's individual opinion in *Diversion of Water from the Meuse (Netherlands* v. *Belgium)*[8]. According to the United States, Judge Hudson considered that the Court may apply principles of equity as part of international law, one of which is "representative of the clean hands doctrine"[9]. In its observations, Iran responded that Judge Hudson's comments "dealt not with the clean hands principle but, more generally, with the principle of equity"[10]. Moreover, Iran commented on the 2007 arbitral award in *Guyana* v. *Suriname*, which, in turn, elaborated on the clean hands doctrine by reference to Judge Hudson's individual opinion. On the basis of the *Guyana* v. *Suriname* award, Iran contended that "[t]he Claimant's conduct must relate to the same reciprocal obligation on which it bases its claim"[11], and, in relation to the United States' clean hands argument, that the United States itself "has not even claimed that the accusations upon which it bases its assertion that Iran has unclean hands amount to an ongoing violation of Iran's obligations under the Treaty of Amity"[12]. At the oral proceedings, the United States did not mention Judge Hudson's individual opinion, while Iran added that Judge Hudson's views related to the merits of a case and not the admissibility of an application[13].

5. In the relevant part of his individual opinion, Judge Hudson wrote that:

> "[i]t would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, 'Equality is equity';

[8] *Diversion of Water from the Meuse (Netherlands* v. *Belgium), Judgment, 1937, P.C.I.J., Series A/B, No. 70*, individual opinion by Mr. Hudson, p. 77.

[9] Preliminary Objections of the United States (POUS), p. 61, para. 6.37.

[10] Observations and Submissions of Iran on the Preliminary Objections of the United States (OSI), p. 92, para. 8.8.

[11] *Ibid.*, para. 8.19. Iran cited the *Award in the Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname of 17 September 2007 (Guyana* v. *Suriname)*; United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXX, pp. 117-118, paras. 420-421.

[12] OSI, pp. 97-98, para. 8.20.

[13] CR 2018/31, pp. 52-53, para. 39 (Pellet).

> 'He who seeks equity must do equity'. It is in line with such maxims that 'a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper' . . .
>
> The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness."[14]

Thus, Judge Hudson did not write specifically about the clean hands doctrine, but more generally addressed principles of equity applicable by international courts and tribunals. Notably, he also commented that "[t]he general principle [of equity] is one of which an international tribunal should make a very sparing application"[15], while at the same time urging that "a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness"[16] if to do so comports with "scrupulous regard for the limitations which are necessary"[17].

6. The limitations to which Judge Hudson referred included "that where two parties have assumed an identical or a reciprocal obligation"[18] and that "one party . . . is engaged in a continuing non-performance of that obligation"[19] while, at the same time, there is "a similar non-performance of that obligation by the other party"[20]. The United States admitted, however, that this limitation was "not precisely the circumstances of this case"[21], and instead focused its clean hands argument on a broader range of alleged violations by Iran of international law rules not set forth in the Treaty of Amity.

7. Therefore, leaving aside the issue of the existence of the clean hands doctrine and its possible content, the United States, relying on Judge Hudson's individual opinion, admittedly did not meet its central "limitation". For all these reasons, I could not accept the "clean hands" objection to admissibility.

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[14] *Diversion of Water from the Meuse*, *supra* note 8, p. 77.
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] POUS, para. 6.37, p. 61, n. 248.

II. Article XX of the Treaty of Amity

8. The Court has rejected the argument that Article XX of the Treaty of Amity limits the scope of its jurisdiction *ratione materiae* without much discussion, relying on the fact that it already had considered and rejected that argument in *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*[22]. The Court also noted that the same argument had been rejected earlier in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*[23], which concerned a similarly worded article in the Nicaragua-United States Treaty of Friendship, Commerce and Navigation.

9. I believe, however, that the Court could have come to the same conclusion independently of its previous jurisprudence. It is my view that unless Article XX of the Treaty of Amity were self-judging it only could raise an issue for the merits. Self-judging clauses limiting the scope of treaties on economic relations are older than the Treaty of Amity. The paradigmatic example is Article XXI, paragraph *(b)*, of the 1947 General Agreement on Tariffs and Trade (hereinafter "GATT")[24], under which "[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests". Under this provision, it is the State party to the GATT that is entitled to decide whether "it considers" a course of action necessary for the protection of its "essential security interests"[25]. The same provision was subsequently included in Article XIV*bis*, paragraph 1 *(b)*, of the General Agreement on Trade in Services (hereinafter "GATS")[26]. The manner in which Article XXI of the GATT and Article XIV*bis* of the GATS are worded is clearly different from the manner in which Article XX of the Treaty of Amity is drafted.

10. In 1946, nearly a decade before concluding the Treaty of Amity, the United States had accepted the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute. The reservation attached to its declaration provided that the Court would not have compulsory jurisdiction over "[d]isputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America"[27]. In 1955, the United States thus was very well aware of, and capable of drafting, self-judging clauses, which

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[22] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 811-812, paras. 20-21.

[23] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 115-116, paras. 221-222, and pp. 135-136, para. 271.

[24] United Nations, *Treaty Series (UNTS)*, Vol. 55, p. 187.

[25] Panel Report, *United States-Export Restrictions (Czechoslovakia) (1949)*, GATT/CP.3/SR.22, 8 June 1949.

[26] *UNTS*, Vol. 1869, p. 185.

[27] *Ibid.*, Vol. 1, p. 10.

strongly suggests that, had the intention been that of making Article XX of the Treaty of Amity self-judging, the United States and Iran would have done so. The United States, however, manifested no such intention, even on its own part, while negotiating with Iran, according to the drafting history of the Treaty of Amity that has been made available to the Court in this proceeding.

11. Clauses similar to Article XX of the Treaty of Amity have been included in certain bilateral investment treaties (hereinafter "BITs"). By way of example, the India-Mauritius BIT contains a provision which states that:

> "[t]he provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pests and animals or plants".

Referring to the Court's jurisprudence, an arbitral tribunal has recently interpreted this provision not to be self-judging[28].

12. I note, however, that, in paragraph 123 of the Judgment, the Court has commented that the United States' allegations adduced in support of its clean hands argument "could, eventually, provide a defence on the merits".

III. Sovereign Immunity

13. I agree with the Court's reasoning in paragraphs 48-80 of the Judgment. I find, however, that there are a number of additional reasons why the claims of Iran relating to the alleged violations of sovereign immunity by the United States cannot fall within the Court's jurisdiction *ratione materiae*.

14. The Treaty of Amity governs two distinct substantive areas of Iran-United States relations: economic relations (Arts. II-XI) and consular rights (Arts. XII-XIX). Consular immunities are expressly regulated by numerous provisions of the Treaty of Amity. Article XIII, paragraph 1, states that "[c]onsular officers and employees shall enjoy the privileges and immunities accorded to officers and employees of their rank or status by general international usage", while Articles XIV-XVI govern matters of taxation, tax exemptions, and immunity from the host State's taxation. Article XIV, paragraph 2, for example, states that:

[28] *CC/Devas (Mauritius) Ltd. et al.* v. *Republic of India*, Award on Jurisdiction and Merits, 25 July 2016, p. 58, paras. 218-219.

> "[t]he baggage, effects and other articles imported exclusively for the personal use of consular officers and diplomatic and consular employees and members of their families residing with them, who are nationals of the sending state and are not engaged in any private occupation for gain in the territories of the receiving state, shall be exempt from all customs duties and internal revenue or other taxes imposed upon or by reason of importation"[29].

Article XV, paragraph 2, states that "[l]ands and buildings situated in the territories of either High Contracting Party, . . . which are used exclusively for governmental purposes . . ., shall be exempt from taxation of every kind". Article XVI, paragraph 1, provides that "consular officers and employees, who . . . are not engaged in private occupation for gain within the territories of the receiving state, shall be exempt from all taxes or other similar charges". Article XVIII further provides that "[c]onsular officers and employees are not subject to local jurisdiction for acts done in their official character and within the scope of their authority". Grants of consular immunities are stated expressly and repeatedly to attach solely to official consular activities.

15. These express grants of immunities for the purposes of consular and diplomatic relations stand in stark contrast to the total absence of any express grant of immunity for any other purpose, including in respect of economic relations. These explicit and comprehensive grants of consular and diplomatic immunities strongly indicate that, had Iran and the United States intended for the Treaty of Amity also to grant immunity to State entities, they would have done so expressly. This results from application of the established canon of interpretation *expressio unius est exclusio alterius*.

16. I thus agree with the argument of the United States that "[h]ad the Parties chosen to codify sovereign immunity protections in this commercial treaty, they would have done so simply and directly"[30]. Vague and indirect references to general international law in the Treaty of Amity's articles on economic relations are insufficient to remedy the complete absence of express provisions conferring immunities on State entities.

17. Iran also contended, in accordance with Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties (hereinafter "VCLT")[31], that "the provisions of the 1955 Treaty of Amity must be

[29] Note that Article XIV, paragraph 3, of the Treaty of Amity also refers to "diplomatic . . . employees", and Article XIV, paragraph 1, refers to "diplomatic office". Article XVI, paragraph 3, refers to "diplomatic officers and employees". These provisions further confirm that the Treaty excludes any and all immunities of State entities.

[30] POUS, p. 80, para. 8.7.

[31] *UNTS*, Vol. 1155, p. 331.

interpreted taking into account relevant treaty obligations, rules of customary international law and general principles of international law"[32]. In the context of the present case, which is characterized by the complete absence from the Treaty of Amity of rules addressing immunities of State entities, adopting the approach pleaded by Iran would amount to rewriting the text of the Treaty of Amity itself. It is not the Court's role to do so. Although the Court has not commented explicitly on Article 31, paragraph 3 *(c)*, of the VCLT, its findings on the second preliminary objection to jurisdiction are consistent with my view of Iran's argument based on systemic interpretation.

18. Furthermore, the exclusively commercial nature of the Treaty of Amity, elaborated in paragraphs 53-80 of the Judgment, is further strengthened by the fact that the Treaty of Amity refers to the rights of "enterprises" 13 times (Arts. II, para. 1; IV, para. 1; IV, para. 4; XI, para. 1; XI, para. 3; XI, para. 4; and XX, para. 4); to "trade", in the context of trade in goods and services, six times (Arts. II, para. 1; V, para. 1; VIII, para. 3 *(b)*; VIII, para. 5; VIII, para. 6; and X, para. 3); to "products" nine times (Arts. VIII, para. 1; VIII, para. 6; IX, para. 3; and X, para. 4); to "goods and services" (Art. VII, para. 1); and to "investing, a substantial amount of capital", "investment of capital" and "investing a substantial amount of capital" three times (Arts. II, para. 1; VII, para. 3; and XX, para. 4). Beyond those references, Article X, paragraph 1, refers to "freedom of commerce and navigation"; Article X, paragraph 3, refers to "cargoes", as well as to "places and waters . . . open to foreign commerce"; and Article X, paragraph 4, refers to "duties" and "administration of the customs".

19. Additional support for the Court's determination that the Treaty of Amity is essentially commercial in nature is supplied by Article XXII of the Treaty itself, which provides that it "shall replace" two earlier treaties between Iran and the United States, namely "*(a)* the provisional agreement relating to commercial and other relations, concluded at Tehran May 14, 1928" and "*(b)* the provisional agreement relating to personal status and family law, concluded at Tehran July 11, 1928". A review of the first of these treaties[33] reveals that it had set up a "regime to be applied to the Commerce [of the States parties to it]", which applied most-favoured-nation status to "merchandise", "imports", "exports", "duties and charges affecting commerce", "transit warehousing", "facilities accorded to commercial travelers' samples", "commodities", and "tariffs"[34]. Like the Treaty of Amity, the 1928 provisional commercial

[32] Memorial of Iran (MI), para. 3.14.

[33] Treaties and Other International Agreements of the United States of America, 1776-1949, Vol. 8, (Germany-Iran), Washington, DC, Department of State 1968, pp. 1263-1271.

[34] *Ibid.*, p. 1264, para. 3, and pp. 1266-1267, para. 3.

treaty it "replace[d]"[35] was clearly concerned with free-market commercial activity, and contained no indication that it encompassed protection of sovereign immunity of State entities.

20. Iran also relied on an *a contrario* reading of Article XI, paragraph 4, of the Treaty of Amity. It argued that its express waiver of immunity for "publicly owned or controlled" enterprises "engag[ing] in commercial, industrial, shipping or other business activities"[36] "confirms by strong implication the existence of a Treaty obligation that . . . immunity must be upheld"[37] in respect of State entities engaging in activities *jure imperii*. In support of its *a contrario* argument, Iran relied on the Court's 2016 Judgment in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*[38]. In that Judgment, the Court referred to two earlier decisions, which Iran omitted to mention in its submissions[39]. None of the three cases on which Iran relied, however, supports its *a contrario* argument.

21. *S.S. "Wimbledon"* arose out of Germany's failure on 21 March 1921 to allow passage through the Kiel Canal of the named ship, laden with munitions and artillery stores destined for the Polish Naval Base at Danzig, on the grounds of Germany's neutrality towards the then ongoing Russo-Polish War of 1920-1921. The refusal of passage was found by the Permanent Court of International Justice (hereinafter "PCIJ") to have violated Article 380 of the Treaty of Versailles, which provided that "[t]he Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality". Article 380 was the first Article in Part XII, Section VI of that Treaty, which section consisted of just seven articles (Arts. 380-386) and was entitled "Clauses Relating to the Kiel Canal". Articles 381-386 were described by the PCIJ as "provisions intended to facilitate and regulate the exercise of this right to free passage". The Applicants argued that Article 380 was entirely clear, adding as a second argument, however, that Article 380's claimed import was strengthened by "analogy" to the further Articles 381-386. The PCIJ did not hesitate to rule at the beginning of its analysis that "the terms of article 380 are cat-

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[35] Treaty of Amity, Art. XXII, para. 1.

[36] *Ibid.*, Art. XI, para. 4.

[37] OSI, p. 54, para. 5.13.

[38] MI, para. 5.8, note 246; CR 2018/31, p. 24, para. 43 (Wordsworth). See *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 35.

[39] *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, pp. 23-24; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 432, para. 29.

egorical and give rise to no doubt"[40]. Much later in its Judgment, however, the PCIJ, having distinguished Articles 380-385 from separate sections of Part XII of the Treaty of Versailles dealing strictly with "inland navigable waterways", added the following support for its decision, rejecting the Applicants' supplementary "by analogy" argument:

> "The idea which underlies Article 380 and the following articles [381-386] of the Treaty [of Versailles] is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario* [impliedly by contrast with the 'inland navigable waterways' terms elsewhere in Part XII of the Treaty of Versailles], a method of argument which excludes them."[41]

Thus the PCIJ made it clear that an *a contrario* interpretation yields to the plain language of a treaty. The *a contrario* argument of Iran in the present case, which sought to imply an unexpressed right from an express contrasting provision, was a pale version of *a contrario* by comparison to the Judgment in *S.S. "Wimbledon"*, in which that technique of interpretation was applied to oppose the express Kiel Canal provisions of the Treaty of Versailles to contrasting express provisions contained in that Treaty governing other waterways.

22. In the 2011 Judgment on Honduras's Application to intervene in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* the Court stated that

> "[i]f it is permitted by the Court to become a party to the proceedings, the intervening State may ask for rights of its own to be recognized by the Court in its future decision, which would be binding for that State in respect of those aspects for which intervention was granted, pursuant to Article 59 of the Statute. *A contrario* . . . a State permitted to intervene in the proceedings as a non-party 'does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law'."[42]

In that 2011 Judgment, the Court was not interpreting a treaty provision *a contrario*, as Iran requested it to do in the present case. Instead, the Court was developing its own jurisprudence on Article 62 of the Statute[43], as the distinction between party intervenor and non-party interve-

[40] *S.S. "Wimbledon"*, *supra* note 39, p. 22.
[41] *Ibid.*, pp. 23-24.
[42] *Territorial and Maritime Dispute*, *supra* note 39, p. 432, para. 29.
[43] Under Article 62 of the Statute, "a State [which] consider[s] that it has an interest of a legal nature which may be affected by the decision in the case . . . may submit a request to the Court to be permitted to intervene".

nor is not expressed in the Statute itself, but results from the Court's own interpretation of Article 62 in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*[44].

23. In addition, in *Nicaragua* v. *Colombia* the Court rejected Colombia's *a contrario* argument and found that an *a contrario* interpretation "is only warranted . . . when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty"[45]. In paragraph 65 of the present Judgment, however, the Court has recognized that, "in keeping with the object and purpose of the Treaty [of Amity], [Article XI, paragraph 4,] pertains only to economic activities and seeks to preserve fair competition among economic actors operating in the same market". In its Judgment, the Court also states that the context of various provisions of the Treaty of Amity[46], including Article XI, paragraph 4[47], shows their eminently commercial character. Consequently, to accept Iran's *a contrario* argument would run counter both to the context of Article XI, paragraph 4, and to the object and purpose of the Treaty of Amity.

IV. Bank Markazi as a "Company"

24. Unfortunately, the Court has concluded that the third objection to jurisdiction, namely that Bank Markazi cannot be regarded as a "company" within the meaning of Article III, paragraph 1, of the Treaty of Amity, is not exclusively preliminary in character, and thus has reserved the decision on this issue for the merits stage of the proceedings. I concur entirely with the joint separate opinion of Judges Tomka and Crawford. The Court indeed "ha[d] the necessary information about Bank Markazi to decide the question at this stage"[48].

25. As that opinion points out, "[b]oth Parties have had the opportunity to put forward their arguments in relation to whether Bank Markazi is a 'company' for the purpose of the Treaty of Amity"[49]. It was incumbent upon Iran at this preliminary stage of the proceedings to produce evidence supporting its claimed entitlement to immunity. As the Court pointedly has noted in paragraph 94 of the Judgment, however, "the Applicant has made little attempt to demonstrate that, alongside the sovereign functions which it concedes, Bank Markazi engages in activities of a commercial nature". The Court's expression "little attempt" is in truth

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[44] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene by Nicaragua, Judgment, I.C.J. Reports 1990*, p. 92.
[45] *Question of the Delimitation of the Continental Shelf*, *supra* note 38, p. 116, para. 35.
[46] Judgment, paras. 59 (on Article IV), 71 and 93 (on Article III).
[47] *Ibid.*, para. 66.
[48] Judgment, joint separate opinion of Judges Tomka and Crawford, para. 2.
[49] *Ibid.*, para. 10.

exceedingly charitable, as Iran has done nothing whatsoever, either generally or with respect to its presence in the United States at the critical time, to provide even a scintilla of an indication that Bank Markazi has engaged anywhere in commercial activity.

26. Bank Markazi's legislative constitution, the Monetary and Banking Act 1972 as amended (hereinafter "1972 Act"), produced to the Court by Iran, nowhere authorizes such activity. It states that Bank Markazi acts exclusively as the Central Bank of Iran, and is at all times subject to the control of Iran's Government[50]. Article 10 of the 1972 Act provides that Bank Markazi "shall have the task of formulating and implementing monetary and credit policies on the basis of the general economic policy of the State" (para. *(a)*), and that its "objectives . . . are to maintain the value of the currency and equilibrium in the balance of payments, to facilitate trade transactions, and to assist the economic growth of the country" (para. *(b)*). Articles 11-14 of the 1972 Act determine Bank Markazi's functions, which include: "[i]ssuing notes and coins" (Art. 11 *(a)*), "[s]upervising over banks and credit institutions" (Art. 11 *(b)*), "[e]xercising control over gold transactions" (Art. 11 *(d)*), "[k]eeping account[] of ministries, government and government-affiliated institutes, governmental companies and municipalities" (Art. 12 *(a)*) and setting interest rates (Art. 14 (4)). In accordance with Article 17 *(a)* of the 1972 Act, Bank Markazi's General Meeting is composed of Cabinet-level ministers, and the President of Iran appoints the Bank's Governor. The 1972 Act nowhere empowers Bank Markazi to engage in any "commercial activity".

27. Furthermore, beyond the text of the 1972 Act itself, the thousands of pages encompassed by Iran's written and oral submissions include only the following scraps of argument (not evidence) attempting to persuade the Court that Bank Markazi has engaged in commercial activities:

— in its Memorial, Iran stated that Bank Markazi "can enter into purchase or sale contracts, own or lease real property, and appear before courts of law to litigate or defend claims"[51], in addition to "pay[ing] taxes"[52] on "net profits"[53];
— in its observations, Iran stated that "buying and selling securities in the context of open market operations are economic activities in nature, carried out by private companies as well as by central banks, and pertain to 'professional activities'"[54], and that "[s]ome of Bank Markazi's activities are also performed by private companies

[50] MI, Vol. IV, Ann. 73.
[51] *Ibid.*, para. 4.7.
[52] *Ibid.*
[53] *Ibid.*
[54] OSI, para. 4.24.

(e.g. concluding contracts; owning property; buying securities), and they pertain to commerce"[55];

— in the oral proceedings, counsel for Iran stated that Bank Markazi "was endowed with capital for the conduct of its operations, which may generate profits on which it must pay tax to the Iranian State", and that it "can of course enter into contracts of any nature, acquire and sell goods and services, own assets and other movable and immovable property, and appear in a court of law as a plaintiff or defendant"[56].

28. Leaving aside the mention of profit and taxation thereof, neither of which inherently detracts from the sovereign status of a central bank, the signing of contracts, the purchase and sale of securities, appearance in courts as a legal person and the ownership of real property are all acts performed routinely by central banks. Perhaps with the exception of the purchase and sale of securities, such activities also are performed by the United Nations, the International Bank for Reconstruction and Development (including member institutions of its Group), and by all other international organizations protected by immunity, including this Court. They are essential to the support and maintenance of any institution. They are not an indication of a central bank engaging in "commercial activities" whatsoever as that term is understood in the law of sovereign immunity, let alone "within the territory of the United States at the time of the measures which Iran claims violated Bank Markazi's alleged rights under Articles III, IV and V of the Treaty"[57].

29. The Court's conclusion to postpone the decision on Bank Markazi's status under the Treaty, and to impose as the test for such decision whether "Bank Markazi's activities within the territory of the United States at the time of the measures which Iran claims violated Bank Markazi's alleged rights under Articles III, IV and V of the Treaty"[58], appears to have been the result of some confusion in Iran's pleadings. Iran alleged that Bank Markazi engages in "plainly 'professional'"[59] activities, as well as in activities which are "performed by private companies"[60] and which "pertain to commerce"[61]. Iran has never expressly denied, however, that Bank Markazi has engaged exclusively in "sovereign activities". Iran's submissions suggest that Iran has separated the term "commercial

[55] OSI, para. 4.34.
[56] CR 2018/30, pp. 57-58, para. 10 (Thouvenin).
[57] Judgment, para. 93.
[58] *Ibid.*
[59] WSI, para. 4.34.
[60] *Ibid.*
[61] *Ibid.* See also CR 2018/30, p. 70, para. 60 (Thouvenin).

activity" from the legal meaning it possesses under the law of State immunity, which distinguishes it from "sovereign activity"[62], while using that term descriptively in order to make the submission that Bank Markazi engages exclusively in "sovereign activities", some of which are "commercial" in character.

30. The Court's approach is further puzzling in that the opening paragraph of Iran's Memorial states that the United States "violates . . . the specific immunity of the Central Bank of Iran . . . in respect of its sovereign bank activities in the United States"[63]. Moreover, Iran consistently has argued before the courts of the United States that Bank Markazi is entitled to sovereign immunity for the activities at issue in this case, precisely because those activities are sovereign in character[64]. In the *Peterson* proceedings, Bank Markazi clearly argued that its affected assets enjoyed immunity as they were being "used for the classic central banking purpose of investing Bank Markazi's currency reserves"[65]. All of Iran's claims relating to Bank Markazi concern ongoing statutory enforcement proceedings before United States courts. Iran claims that all of those proceedings are in violation of Bank Markazi's sovereign immunity because they involved assets that Bank Markazi used or intended to use for sovereign activities "within the territory of the United States at the time of the measures"[66] of which Iran complains. Therefore, on Iran's own case Bank Markazi was at all material times acting in a sovereign capacity. The Court interpreted Iran's submissions as allegations that Bank Markazi engages in non-sovereign activities, despite Iran's claims relating to Bank Markazi being expressly based on the opposite proposition. The Court should have heeded the aged judicial maxim that rejects a litigant who "blows hot and cold at the same time"[67].

31. At paragraph 96 of the Judgment, the Court refers to its statement in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* concerning the grounds on which it may find that an objection is not exclusively pre-

[62] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 125, para. 60.
[63] MI, para. 1.1.
[64] POUS, Anns. 233 and 235.
[65] *Ibid.*, Ann. 233, pp. 35-36.
[66] Judgment, para. 93.
[67] The use of this expression in a judicial context seems to harken back to the judgment of J. Buller in *J'Anson* v. *Stuart*, (1787) 1 Term Reports 748. See also *Smith* v. *Baker*, (1872-73) L.R. 8 C.P. 357 (J. Honyman). At the International Court of Justice, this expression was used in *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 78, para. 98 (separate opinion of Judge Ajibola).

liminary in character[68]. In the present case, determining whether or not Bank Markazi is a "company" under the Treaty of Amity would not have prejudiced per se the merits of Iran's Application. Iran requested the Court to find that the United States is internationally responsible for breaching certain provisions of the Treaty of Amity[69]. The issue here is whether or not the Court had before it all the facts necessary to decide the objection raised concerning Bank Markazi's character as a "company".

32. It is my view that the Court had all the facts necessary to decide the question raised, and that it thus erred in concluding that such objection was not exclusively preliminary in character. Furthermore, I cannot see how the Court, on the record placed before it by the Parties on this issue in this preliminary proceeding, had it proceeded to decide the matter, could have found otherwise than that Bank Markazi is not a "company" for purposes of the Treaty. For these reasons, I was unable to vote in favour of the third operative paragraph.

(Signed) Charles N. BROWER.

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[68] See *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51.

[69] Application of Iran, para. 33.

SEPARATE OPINION OF JUDGE *AD HOC* MOMTAZ

[Translation]

Iran's claims based on the violation of sovereign immunities guaranteed by customary international law relate to the interpretation and application of the Treaty of Amity, Economic Relations, and Consular Rights of 15 August 1955 — The existence of a dispute between the Parties regarding the interpretation of Article XI, paragraph 4 — The object and purpose of the Treaty, as set out in Article I, confirm that the Treaty of Amity must be interpreted in accordance with the customary rules on the immunities of States — The essential role of Bank Markazi in the implementation of certain rights deriving from the Treaty of Amity — Article XI, paragraph 4, must be interpreted taking account of the rules of customary international law on immunities, pursuant to Article 31, paragraph 3 (c)*, of the Vienna Convention on the Law of Treaties — The* a contrario *interpretation of Article XI, paragraph 4, of the Treaty of Amity — The measures taken by the United States authorities on the basis of the legislation modifying the Foreign Sovereign Immunities Act are not in conformity with the customary rules relating to the immunities of States — The second preliminary objection to jurisdiction should have been rejected and the dispute between the Parties as to the interpretation of Article XI, paragraph 4, settled at the merits stage of the case.*

1. In this opinion I will explain why I was unable to support the conclusions reached by the Court in point (2) of the operative clause of the Judgment, namely its decision to uphold the second preliminary objection to jurisdiction raised by the United States of America.

2. With this second objection to jurisdiction, the United States asked the Court to dismiss

> "as outside [its] jurisdiction all claims that US measures that block the property and interests in property of the Government of Iran or Iranian financial institutions . . . violate any provision of the Treaty" (Final submissions of the United States, para. *(b)*).

This objection relates to Iran's claims that there has been a failure to respect the immunity from jurisdiction and enforcement of entities owned or controlled by the Iranian State, notably its Central Bank, Bank Markazi. The United States argued that the Treaty of Amity "does not contain any provisions that afford immunities to Iran or Iranian entities" and that, consequently, there is no dispute capable of falling within the scope of the compromissory clause in Article XXI, paragraph 2 (Preliminary Objections of the United States (POUS), para. 1.14).

3. The United States contends that Iran's claims contesting the blocking of "[a]ssets to a value of about US$2 billion belonging to Iranian companies [which] have already been seized and have either been turned over to third parties or are currently frozen in accounts in the United States" (Memorial of Iran (MI), para. 1.4) are founded on US Executive Order 13599 of 5 February 2012. This order authorizing enforcement proceedings against the assets of Iran's Central Bank, in execution of the judgments of United States courts against the Iranian State in respect of alleged acts of terrorism, merely supplemented the amendment of 30 September 1996 to the Foreign Sovereign Immunities Act (FSIA) of 21 October 1976. That amendment permitted the abrogation of immunities in any case

> "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" (Section 1605 *(a)* (7) of the FSIA).

The scope of this exception was extended in 2008 (see Section 1605 A of title 28 of the United States Code, as adopted by Section 1083 *(a)* (1) of the US National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206 (MI, Ann. 15)). The measures in question are justified as being intended to protect the essential interests of the United States, pursuant to Article XX, paragraph 1 *(d)*. According to the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, "whether a measure is necessary to protect the essential security interests of a party is not . . . purely a question for the subjective judgment of the party" (*Merits, Judgment, I.C.J. Reports 1986*, p. 141, para. 282).

Introduction

4. Article XI, paragraph 4, of the Treaty of Amity reads as follows:

> "No 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."

5. In this case, the Parties hold clearly opposing views as to whether Article XI, paragraph 4, recognizes immunities as a procedural defence for entities owned or controlled by the Iranian State when those entities are acting in a sovereign capacity *(jure imperii)* (MI, paras. 1.26, 1.37, 5.13; see CR 2018/29, p. 31, paras. 22-23 (Boisson de Chazournes)). On the one hand, Iran claims that the measures adopted by the United States prevented Iranian entities, including those acting on behalf of the Iranian State, from asserting their immunity before courts of justice and administrative agencies, even though Article XI, paragraph 4, "confirms the Treaty Parties' intention that, *inter alia*, State-owned or controlled corporations, be entitled to immunity in respect of acts *jure imperii*" (MI, para. 5.7). According to Iran,

> "[t]his provision confirms by strong implication the Treaty parties' understanding of an international law entitlement to immunity *iure imperii*. That implication follows from the wording and the very existence of Article XI (4) in the Treaty, as there would have been no need to include such a provision had there been no understanding of the entitlement to sovereign immunity in the first place." (CR 2018/31, p. 24, para. 42 (Wordsworth); see also the Written Statement of Iran, para. 5.40.)

The United States, on the other hand, considers that

> "[a]part from a single provision *barring* State-owned business enterprises from raising a sovereign immunity defense in the other State's courts (Article XI (4)), the Treaty does not govern, and was not intended to govern, questions relating to sovereign immunity of the State as such or other State entities" (POUS, para. 8.2; CR 2018/28, p. 30, para. 23 (Grosh)).

It follows that Iran's views are positively opposed by the United States as regards the scope of application of immunities under the Treaty of Amity and, in particular, whether the Treaty enables the State companies of a Contracting Party to use immunities as a defence. There is thus a dispute between the Parties as to the meaning and scope of this provision.

6. According to the Court's well-established jurisprudence, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). For a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). "'[T]he two sides [must] hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections,*

Judgment, I.C.J. Reports 2016 (I), p. 26, para. 50, quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). More specifically, in order to determine whether a dispute concerns the interpretation or application of the Treaty of Amity, the Court "must ascertain whether the violations of the Treaty . . . pleaded . . . do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16). Since there is a "difference of opinion" between the Parties regarding the scope of one of the Treaty's provisions, the dispute is one which falls within the scope of the compromissory clause (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 333, para. 134).

7. Thus, I do not support the Court's conclusion that

> "Iran's claims based on the alleged violation of the sovereign immunities guaranteed by customary international law do not relate to the interpretation or application of the Treaty of Amity and, as a result, do not fall within the scope of the compromissory clause in Article XXI, paragraph 2" (Judgment, para. 80).

The Court should have rejected the preliminary objection raised by the United States and settled the dispute at the merits stage of the case by interpreting Article XI, paragraph 4, in light of the rules of international law on the interpretation of treaties.

I. The Interpretation of Article XI, Paragraph 4, in Light of the Object and Purpose of the Treaty

8. A treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. The various elements found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which codify customary international law, are taken into account in the interpretation. Although "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41), this is not always sufficient.

9. According to the preamble of the Treaty of Amity, the Parties wished to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples". The Court has concluded from this that the object and purpose of the Treaty "was

not to regulate peaceful and friendly relations between the two States in a general sense" and that, "[c]onsequently, Article I cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28). Nevertheless, as noted by the Court,

> "Article I states in general terms that there shall be firm and enduring peace and sincere friendship between the Parties. The spirit and intent set out in this Article animate and give meaning to the entire Treaty and must, in case of doubt, incline the Court to the construction which seems more in consonance with its overall objective of achieving friendly relations over the entire range of activities covered by the Treaty." (*Ibid.*, p. 820, para. 52.)

10. The Court further stated in the same Judgment that

> "[a]ny action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means." (*Ibid.*, pp. 811-812, para. 21.)

It concluded from this that "[m]atters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955" (*ibid.*, p. 812). In this case, one is entitled to ask why the Court reached an entirely different conclusion with regard to Iran's claims founded on the violation of the sovereign immunities of entities acting in a sovereign capacity *(jure imperii)*, when failure to comply with these rules obstructs the implementation of rights and obligations deriving from the Treaty of Amity.

11. In my opinion, the violation of the sovereign immunities of Bank Markazi in relation to its activities *jure imperii* is capable of impeding freedom of commerce between Iran and the United States and thus of depriving the Treaty of its object and purpose. As noted by the Court,

> "it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce" (*ibid.*, p. 819, para. 49).

12. According to its statutes, Bank Markazi is the guardian and regulator of the monetary system, both internally and internationally, and of Iran's monetary policy. As the regulatory authority of the monetary and credit system, it fulfils a range of very different functions directly related

to commerce, which is promoted and protected by the various provisions of the Treaty of Amity (see Judgment, paras. 78-79). For example, under its statutes, it falls to the Central Bank to exercise control over any transactions involving gold, foreign currencies and bank holdings (see Article 11 of the 1972 Monetary and Banking Act, MI, Vol. IV, Ann. 73; see also Articles 31-32 of the 1960 Monetary and Banking Act). It is also the Central Bank which guarantees the provision of the liquid assets needed by Iranian companies and nationals to invest, export and import. It is above all during a period of crisis, as is currently the case in Iran, that banks turn to the Central Bank for funds to help nationals and businesses conduct their commercial activities. This is the Bank's essential function, to lend the money needed for trade and commercial relations. It follows that the Parties' compliance with their international obligations concerning the activities and assets of a central bank *(jure imperii)*, as well as the immunities associated therewith, are in fact a precondition for upholding the specific rights and obligations provided for in the Treaty. In other words, the infringement of Bank Markazi's immunity from enforcement resulting from the United States' measures is a major obstacle to the implementation of the Treaty and to the smooth and uninterrupted flow of commerce between the territories of the two Parties to that Treaty.

II. The interpretation of Article XI, Paragraph 4, in Light of Article 31, Paragraph 3, Subparagraph *(c)*, of the Vienna Convention on the Law of Treaties

13. Article 31, paragraph 3, subparagraph *(c)*, of the Vienna Convention on the Law of Treaties provides that in the interpretation of a treaty "[t]here shall be taken into account, together with the context: . . . *(c)* Any relevant rules of international law applicable in the relations between the parties". To my mind, this rule sets general international law as the backdrop for the interpretation of a treaty or one of its provisions. It codifies the customary international law (see, for example, *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 237, para. 47; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 46, para. 65).

14. As previously emphasized by the Arbitral Tribunal in the *Pinson* v. *Mexico* case, "[a]ny international Convention must be deemed to refer tacitly to general law in respect of any question that it does not itself expressly and differently resolve" (*Georges Pinson (France)* v. *United Mexican States, Decision No. 1, 19 October 1928, Reports of International Arbitral Awards*, Vol. V, p. 422, para. 50, subpara. 4). Similarly, the Court has repeatedly stated that "an international instrument has to be inter-

preted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53). Hence, in the past, the Court did not hesitate to take account of the rules on the use of force in international law when interpreting the Treaty of Amity (see *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 182, para. 41).

15. Other courts and tribunals have followed the Court's example, taking account of the rules on State immunity in the interpretation of treaty provisions of a specific nature. Thus, the European Court of Human Rights (ECHR) noted in its judgment in the case of *Al-Adsani* v. *The United Kingdom* that: "[t]he [European] Convention [on Human Rights] should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity" (ECHR, *Al-Adsani* v. *The United Kingdom,* Application No. 35763/97, judgment of 21 November 2001, para. 55; see also *Jones and Others* v. *The United Kingdom*, Applications Nos. 34356/06 and 40528/06, judgment of 14 January 2014, para. 195). The ECHR therefore concluded in paragraph 56 of its judgment that:

> "[i]t follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity." (ECHR, *Al-Adsani* v. *The United Kingdom*, Application No. 35763/97, judgment of 21 November 2001, para. 56.)

16. If there is no question of incorporating the rules on immunities as applicable law falling within the Court's jurisdiction under Article XXI of the Treaty, it is therefore wrong to interpret Article XI, paragraph 4, as the Court has done here, without taking account of the rules of customary international law on immunities because of the Treaty's limited object (see Judgment, para. 65). As the report of the International Law Commission (ILC) on fragmentation explains, "[a]ll treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law" (Report of the Study Group of the International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and

Expansion of International Law", UN doc. A/CN.4/L.682, para. 414). As the ILC rightly pointed out, Article 31, paragraph 3, subparagraph *(c)*, "gives expression to the objective of 'systematic integration' according to which, whatever their subject-matter, treaties are a creation of the international legal system and their operation is predicated upon that fact" ("Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", reproduced in the *Yearbook of the International Law Commission (YILC)*, 2006, Vol. II, Part Two, p. 180, para. 17). Where appropriate, this rule makes it possible to counteract the process of normative fragmentation in a horizontal system such as that of international law. I am therefore disappointed that the Court did not adopt an interpretative approach to Article 31, paragraph 3, subparagraph *(c)*, in its Judgment and failed to take sufficient account of the rules on immunities.

III. The *A Contrario* Interpretation of Article XI, Paragraph 4

17. The above reading of Article XI, paragraph 4, is also confirmed by an *a contrario* interpretation of this provision. First, it should be noted that the Vienna Convention on the Law of Treaties was not intended to cover every principle or technique of interpretation in general international law. In addition to the general rule of interpretation set out in Article 31 of the Vienna Convention, and the supplementary means of interpretation described in Article 32, there are other principles, such as the maxim *ut res magis valeat quam pereat* and *a contrario* reasoning, which do not appear among those rules. When drawing up its draft articles on the Law of Treaties, the ILC did not intend to codify all the rules governing interpretation, but rather "to codify the comparatively few rules which appear to constitute the strictly legal basis of the interpretation of treaties" (Sir Humphrey Waldock, Special Rapporteur, "Third Report on the Law of Treaties", UN doc. A/CN.4/167, reproduced in *YILC*, 1964, Vol. II, p. 54, para. 8). The Special Rapporteur was thus clearly of the view that the ILC was not expected to try to codify all rules of interpretation, which often depend on the specific context and circumstances.

18. In its Judgment on the preliminary objections in the case concerning *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, the Court observed that:

> "An *a contrario* reading of a treaty provision — by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded — has been employed by both the present Court (see, e.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Applica-*

tion by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II), p. 432, para. 29) and the Permanent Court of International Justice (*S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, pp. 23-24). Such an interpretation is only warranted, however, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case." (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 35.)

19. In this case, an *a contrario* interpretation of Article XI, paragraph 4, might lead the Court to conclude that the Treaty's scope of application, in particular the scope of the term "company", does not exclude entities carrying out activities *jure imperii*. This *a contrario* interpretation would, moreover, be consistent with Article III, paragraph 1, which provides that "'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit". Nor would an *a contrario* interpretation of Article XI, paragraph 4, be an evolutionary interpretation of the term "company". The Court has noted on a number of occasions that generic terms in treaties may have "a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 818-819, paras. 45-48).

20. With regard to the scope of Article XI, paragraph 4, there is still some uncertainty in this case as to whether State immunities are excluded from the Treaty's scope of application, or, conversely, if they are covered by the interpretation of the above provision. In my view, the interpretation of this provision must take account of the following elements.

21. First, when the Treaty of Amity was concluded in 1955, the erosion of "absolute" immunity had already begun and the United States had adopted the doctrine of restrictive immunity. Article XI, paragraph 4, therefore, merely codified certain specific exceptions to the general rules on immunities accorded to State entities, rather than excluding the application of those rules to every entity covered by the Treaty's scope of application. Second, the English version of Article XI, paragraph 4, which is authoritative, uses the term "immunity" to limit the ability of State companies acting *jure gestionis* to claim immunity from jurisdiction or enforcement and thereby upset the competitive equilibrium between public and private enterprises. This is a specific situation that in no way prejudges the question of the application of sovereign immunities to the

central banks of the High Contracting Parties. Third, Article XI, paragraph 4, must be read in conjunction with Article IV, paragraph 2. Minimum protection in international law for companies acting *jure imperii* must include the régime of immunities; the inverse would lead to the imposition of an artificial equilibrium between private and State companies, to the latter's detriment, and this would be contrary to the minimum conditions to which Article IV, paragraph 2, refers. Fourth, in any event, the exact nature of the activities and functions of a State's central bank, and whether they can be characterized as *jure imperii*, is a question of substance, and the Court should not have prejudged conclusions it might reach on the merits.

22. In other words, having recourse to the *a contrario* interpretation of Article XI, paragraph 4, would not be an artificial digression. Quite the opposite; it would be in keeping with the object and purpose of the Treaty and the ordinary meaning of its provisions.

Conclusion

23. Ultimately, Article XI, paragraph 4, of the Treaty of Amity should have been interpreted in light of general international law on the immunities of States and their central banks, as codified in Article 21, paragraph 1, subparagraph *(c)*, of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, and in Article 4, paragraph 2, of the 1972 European Convention on State Immunity, and as set out in Section 1605 *(b)* (1) of the 1976 FSIA, which provides that "the property of a foreign state shall be immune from attachment and from execution".

24. It should also be noted that the very basis for the United States' measures at issue, namely the amendment to the FSIA by which the legislature introduced a "terrorism exception", the scope of which was enlarged by subsequent legislative amendments, implemented in this case by Executive Order 13599, is not in accordance with the general international law on immunity. As previously stated by the PCIJ in the *Greco-Bulgarian "Communities"* case, "it is a generally accepted principle of international law that . . . the provisions of municipal law cannot prevail over those of the treaty" (*Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32). This "fundamental principle of international law" (*Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 34, para. 57) was also reflected in Article 27 of the Vienna Convention on the Law of Treaties, which states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty", and whose customary nature is not in doubt

(*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 222, para. 124).

25. At the same time, it is true that "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 109, para. 207). However, the withdrawal of immunities for certain specified acts, as results from the United States' legislation, has not been adopted by other States. On the contrary, as noted by the Court in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, "this amendment has no counterpart in the legislation of other States. None of the States which has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged." (*Judgment, I.C.J. Reports 2012 (I)*, p. 138, para. 88; only Canada has since adopted similar legislation.) The Court concluded that "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict" (*ibid.*, p. 139, para. 91).

26. As the Court stated in the case concerning *Right of Passage over Indian Territory (Portugal* v. *India)*, "[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it" (*Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142).

27. In light of the above, it is my view that the second preliminary objection to jurisdiction raised by the United States should have been rejected by the Court and the question resolved at the merits stage of the case.

(*Signed*) Djamchid MOMTAZ.