JOINT SEPARATE OPINION OF JUDGES TOMKA AND CRAWFORD

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].

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 9 votes to 7 (*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

[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.

Court could not "pronounce upon any other aspect of the case" (*Barcelona Traction, Light and Power Company, Limited (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 parties, 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

[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.

one member of the Court wrote extra-curially, "[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*, 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

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[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, Jan. 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".

[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": 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: para. 76.

[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.

> 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).

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, paragraph 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 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

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[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), Judgment, I.C.J. Reports 1974,* 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 Oct. 1954 (MI, Ann. 2) and Aide-Memoire of the US Embassy in Tehran, 20 Nov. 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).

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).