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].

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

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 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

---

[2] CR 2018/28, p. 56, para. 82 (Bethlehem). See Stephen 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, in *Yearbook of the International Law Commission (YILC) (2001)*, Vol. II, Part Two, p. 72, para. 9.

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

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

[10] Written Statement of Iran on the Preliminary Objections of the United States (WSI), para. 8.8.

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

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'; '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 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.

---

[12] WSI, para. 8.20.

[13] CR 2018/31, p. 52, para. 39 (Pellet).

[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, fn. 248.

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.

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 (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 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.

---

[22] *Oil Platforms (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.

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:

> "[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.

---

[28] *CC Devas (Mauritius) Ltd.* v. *India*, Award of Jurisdiction and Merits, 25 July 2016, paras. 218–219.

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

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 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

---

[30] POUS, para. 8.7.

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

[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, Dept. of State 1968, pp. 1263–1271.

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 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 categorical 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 Applicants' supplementary "by analogy" argument:

---

[34] Treaties and Other International Agreements of the United States of America 1776–1949, Vol. 8 (Germany-Iran), Washington, DC, Dept. of State 1968, p. 1264, para. 3, and pp. 1266–1267, para. 3.

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

[36] Art. XI, para. 4, of the Treaty of Amity.

[37] WSI, para. 5.13.

[38] MI, para. 5.8, fn. 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.

[40] *S.S. "Wimbledon", supra* note 39, p. 22.

> "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 intervenor 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.

---

[41] *S.S. "Wimbledon", supra* note 39, 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".

[44] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, 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, paragraphs 59 (on Art. IV), 71 and 93 (on Art. III).

[47] *Ibid.*, paragraph 66.

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 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:

---

[48] Judgment, joint separate opinion of Judges Tomka and Crawford, para. 2.

[49] *Ibid.*, para. 10.

[50] MI, Ann. 73.

— 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 (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 activity" from the legal meaning it possesses under the law of State

---

[51] MI, para. 4.7.

[52] *Ibid.*

[53] *Ibid.*

[54] WSI, para. 4.24.

[55] *Ibid.*, para. 4.34.

[56] CR 2018/30, pp. 57–58, para. 10 (Thouvenin).

[57] Judgment, paragraph 93.

[58] *Ibid.*

[59] WSI, para. 4.34.

[60] *Ibid.*

[61] *Ibid.* See also CR 2018/30, p. 70, para. 60 (Thouvenin).

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 preliminary 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".

---

[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.

[64] POUS, Anns. 233 and 235.

[65] *Ibid.*, Ann. 233, pp. 35–36.

[66] Judgment, paragraph 93.

[67] The use of this expression in a judicial context seems to harken back to the judgment of Buller J in *J'Anson* v. *Stuart*, (1787) 1 Term Reports 748. See also *Smith* v. *Baker*, (1872–73) L.R. 8 C.P. 357 (Honyman J). At the ICJ, 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).

[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.

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.

_____