

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.
