

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.
