SEPARATE OPINION OF JUDGE BENNOUNA

[Original English text]

Objection to jurisdiction raised by the United States of America — Bank Markazi as a "company" for the purposes of the 1955 Treaty of Amity — Judgment of 13 February 2019 — Nature of the activity.

1. I agree with all the decisions in this case, with the exception of the first one, whereby the Court upheld

> "the objection to jurisdiction raised by the United States of America relating to the claims of the Islamic Republic of Iran under Articles III, IV and V of the 1955 Treaty of Amity, Economic Relations, and Consular Rights, to the extent that they relate to treatment accorded to Bank Markazi and, accordingly, [found] that it ha[d] no jurisdiction to consider those claims" (Judgment, para. 236 (1)).

To my regret, I had to vote against this first subparagraph of the operative clause of the Judgment, which has the effect of excluding the bulk of Iran's claims in this case from the jurisdiction of the Court. Indeed, Iran's claims relating to the injury suffered by Bank Markazi represent nearly US$1.9 billion, whereas its claims in respect of the other injuries invoked scarcely exceed US$25 million.

2. It should be borne in mind that, in its 13 February 2019 Judgment on the preliminary objections, the Court had already examined the objection raised by the United States in respect of which it requested that the Court decline to exercise jurisdiction to rule on "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"[1]. Indeed, in the view of the United States, "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"[2]. Therefore, according to the Respondent, it is a bank that exercises functions that are "sovereign in nature"[3]. In 2019, the Court considered that "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". It added:

> "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."[4]

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[1] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 19, para. 17.

[2] *Ibid.*, p. 35, para. 82.

[3] Rejoinder of the United States, paras. 5.13-5.23; Counter-Memorial of the United States, paras. 9.5-9.19.

[4] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, pp. 38-39, para. 92.

In light of this, the Court took the view that it did not have before it "all the facts necessary" to rule in that respect. Since those elements were "largely of a factual nature and [were], moreover, closely linked to the merits of the case", the Court concluded that the United States' third preliminary objection did not have, "in the circumstances of the case, an exclusively preliminary character"[5].

3. Thus, in 2019, it was clear that the joining of that preliminary objection to the merits was motivated by the need, in the view of the Court, to reserve the possibility of being informed of all the facts relating to Bank Markazi's activities. The question of law raised by the United States concerning whether that institution could carry out activities of a commercial nature, even if they did not constitute its principal activities, and whether it could therefore be characterized as a "company" within the meaning of the Treaty of Amity, was, for its part, clearly decided by the Court at the preliminary stage.

4. The Court thus ruled on this matter, with *res judicata* effect, by declaring 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"[6]. Indeed, "[t]he decision of the Court is contained in the operative clause of the judgment. However, in order to ascertain what is covered by *res judicata*, it may be necessary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question."[7] If that were not the case, and if the Court had considered that, since Bank Markazi's principal function is sovereign, it could not have a separate activity of a commercial nature that would permit it to be characterized as a "company" within the meaning of the Treaty of Amity, the Court would have upheld the United States' preliminary objection as such outright.

5. It follows that subparagraph 3 of the operative clause of the 2019 Judgment, relating to the not exclusively preliminary character of the objection, is binding on the Court in the present case, within the meaning given to that subparagraph by the reasoning set out in that Judgment.

6. However, far from "following" the line of reasoning adopted in its 2019 Judgment, as it claims in paragraph 47 of the Judgment on the merits of the case, the Court has chosen to make a clear departure from it in responding to the question of Bank Markazi's characterization as a "company" within the meaning of the Treaty of Amity, by basing itself on a new criterion, that of the purpose of the activity, and not its nature.

7. As a result, in its decision on the merits, after recalling that

> "the only activities on which Iran relies to found the characterization of Bank Markazi as a 'company' consist in the purchase, between 2002 and 2007, of 22 security entitlements in dematerialized bonds issued on the United States financial market and in the management of proceeds deriving from those entitlements" (Judgment, para. 49),

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[5] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 40, para. 97.

[6] *Ibid.*, p. 45, para. 126 (3).

[7] *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. 126, para. 61.

the Court concluded that

> "these operations are not sufficient to establish that Bank Markazi was engaged, at the relevant time, in activities of a commercial character. Indeed, the operations in question were carried out within the framework and for the purposes of Bank Markazi's principal activity, from which they are inseparable. They are merely a way of exercising its sovereign function as a central bank, and not commercial activities performed by Bank Markazi 'alongside [its] sovereign functions'" (Judgment, para. 50).

8. Therefore, in complete contradiction with the 2019 Judgment, the Court considers that it is not possible to rely on the nature of the activity alone in order to characterize Bank Markazi as a "company" within the meaning of the Treaty of Amity, even when that bank purchases security entitlements on the financial market on the same terms as any other operator. The Court clearly decides instead that the bank's sovereign function is a necessary and sufficient criterion for its characterization as a "company". This principal activity thus prevails over all other subsidiary activities of a commercial nature.

9. The reference to the criterion of the commercial nature of the activity, for the purpose of characterizing a company, has therefore disappeared between the two successive Judgments of 2019 and 2023, without the Court justifying this on the basis of any new facts.

10. However, the use of that criterion to characterize a company was not invented by the Court in 2019; as in the *Barcelona Traction*[8] case, it was informed by the approach of internal legal orders in determining the rights of shareholders of a limited liability company.

11. Furthermore, in support of its conclusion that Bank Markazi's activities are inseparable from its sovereign function, the Court considers that "the assertions made by Bank Markazi in the judicial proceedings in the *Peterson* case . . . accurately reflect the reality of the bank's activities" (para. 52). In this same paragraph, it nonetheless stated that Bank Markazi's assertions "are not opposable to Iran, which, moreover, did not make them", and that the United States courts rejected Bank Markazi's claims at the time, declaring that a number of its activities were of a commercial nature. Thus, even though the question of immunity is not at issue in the present case, the Court took into account statements made in the context of domestic proceedings in the United States, which are not binding on the Respondent and which concern immunities, in concluding that Bank Markazi's activities were not of a commercial nature. In short, Iran found itself confronted with the litigation strategy and arguments of an entity whose statements are not binding on it, employed in proceedings to which it was not a party.

12. It is therefore clear that there is no continuity between the reasoning of the 2019 Judgment on the preliminary objections and that of the Judgment on the merits in this case. Nevertheless, such continuity is indispensable for the credibility of the highest international judicial institution.

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[8] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, pp. 33-35, paras. 38-42, and pp. 38-39, para. 56.

In exceptional circumstances, changes in the Court's jurisprudence may certainly occur, but on the condition that they are for "compelling reasons"[9].

(Signed) Mohamed BENNOUNA.

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[9] *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*, p. 429, para. 54.