SEPARATE OPINION OF JUDGE YUSUF

Disagreement with decision regarding Bank Markazi — Abandonment of criteria laid down in 2019 Judgment — New test in contradiction with earlier criteria — Goal posts moved in the middle of the case — Function of entity not decisive — Nature of activity determines characterization as "company" — Activities carried out by Bank Markazi in the United States most relevant — Nature of such activities commercial — Bank Markazi should have been characterized as company — Court has jurisdiction under Treaty — Court's findings of a breach of Articles III (1) and IV (1) and (2) should have been extended to Bank Markazi.

A. Introduction

1. I agree with the findings of the Court regarding the violation by the United States of its obligations under Articles III (1), IV (1) and (2) and X (1) of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (hereinafter the "Treaty"). These findings do not, however, extend to the measures adopted by the United States with regard to the assets of Bank Markazi. The Court has come to the conclusion that it has no jurisdiction to consider Iran's claims relating to the treatment of Bank Markazi's assets by the United States authorities.

2. I disagree with the reasoning and the conclusion of the Court on this point. I have therefore voted against operative paragraph 236 (1) of the Judgment. The reasons of my disagreement are as follows. First, the analysis of the Court that led it to this conclusion is in contradiction with the criteria the Court established in its 2019 Judgment on preliminary objections for determining the characterization of an entity as a "company" under the Treaty. Secondly, the definition of the term "company" in Article III (1) of the Treaty does not exclude a State-owned or State-controlled entity such as Bank Markazi in view of its functions, particularly when it engages in commercial activities in the territory of the host State. Thirdly, an application of the criteria established in the 2019 Judgment shows that the activities Bank Markazi was carrying out at the relevant time in the territory of the United States were of the nature of those which allow it to be characterized as a "company" within the meaning of the Treaty.

B. A brief background

3. To contextualize the above arguments, it is important to recall, albeit briefly, the background to the issues regarding Bank Markazi in the present proceedings. Between 2002 and 2007, Bank Markazi, the Central Bank of Iran, acquired assets in the United States, namely ownership interest in security entitlements worth around US$1.8 billion through a financial intermediary, Clearstream Bank, to be held in an account with Citibank in New York (see paragraph 18 below). As a result of the successive acts of the United States legislative, executive and judiciary branches of government, the assets of Bank Markazi were blocked, seized and taken from it to be distributed to 15 groups of plaintiffs in the case of *Peterson et al.* against Iran. These assets represent the vast majority of those at issue in the present case.

4. In 1984, the United States designated Iran a "State sponsor of terrorism". Thereafter, the United States Congress amended the Foreign Sovereign Immunities Act (FSIA) to allow private individuals to claim compensatory damages against "State sponsors of terrorism" for injury or death caused by acts of terrorism as an exception to sovereign State immunity in domestic courts. Moreover, through the Terrorism Risk Insurance Act of 2002 (TRIA), the United States Congress authorized the execution of judgments obtained under the FSIA's terrorism exception against "the blocked assets" of a State designated as a "terrorist party" and of any agency or instrumentality of

that party. The property of Bank Markazi was then blocked by Executive Order 13599, issued by the President of the United States in February 2012. Finally, also in 2012, the United States legislature enacted the Iran Threat Reduction and Syria Human Rights Act (ITRSHRA), Section 502 of which specifically targeted "the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al.* v. *Islamic Republic of Iran et al.*", making them subject to execution. These were the assets of Bank Markazi mentioned above. All these acts were put in place while the Treaty was still in force between the United States and Iran. The United States announced its denunciation of the Treaty on 3 October 2018, more than two years after Iran filed its Application before the Court on 14 June 2016.

5. On 1 May 2017, the United States presented preliminary objections to the admissibility of the Application and the jurisdiction of the Court. The third objection by the United States concerned whether Bank Markazi was a "company" within the meaning of the Treaty and was therefore justified in claiming the rights and protections afforded to "companies" by Articles III, IV and V of the Treaty[1].

6. In its Judgment on jurisdiction of 13 February 2019, the Court decided that the question whether Bank Markazi was a "company" was to be determined by reference to the nature of its activities, but that the Court did not have before it all the facts necessary to make such determination. It therefore joined this issue to the merits.

C. Changing criteria in mid-course

7. The Court's need for further information was premised on the quest for a better understanding of the nature of the activities carried out by Bank Markazi in the territory of the United States that were affected by the United States' measures at the relevant time. This focus flowed from the Court's conclusion, at the time, that,

> "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"[2].

8. The Court therefore stated that it must address

> "the question of the nature of the activities engaged in by Bank Markazi. More precisely, it must examine 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."[3]

Thus, the criteria developed by the Court in its 2019 Judgment for assessing whether Bank Markazi was a "company" under the Treaty were centred on the nature of the activities it was carrying out at the relevant time in the United States.

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[1] See *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 36, para. 84.

[2] *Ibid.*, pp. 38-39, para. 92.

[3] *Ibid.*, p. 39, para. 93.

9. However, in the present Judgment dealing with the merits phase of the same case, the majority engages in a volte-face and comes up with a new criterion which gives prominence to the function of the entity concerned. Thus, it is stated in paragraph 51 of the Judgment that the series of transactions carried out by Bank Markazi at the relevant time "must be placed in its context, taking particular account of any links that it may have with the exercise of a sovereign function", as though it was possible to imagine that the commercial activities of a central bank could have no link to its sovereign functions. This is a new test which was not part of the criteria developed by the Court in its 2019 Judgment. Instead of the nature of the activity carried out being the determining factor for the characterization of the entity engaged in it, as was stated in paragraph 92 of the 2019 Judgment, it is now the function of the entity and the link between that function and its activities that are considered decisive. This new test flies in the face of the reasons for which the Court invoked Article 79*ter* (4) of its Rules to join to the merits the third objection of the United States. If the decisive criterion was the link of the activities to the sovereign function of Bank Markazi, then there was no reason for the Court to insist that it did not have before it all the facts necessary to determine whether the activities carried out by Bank Markazi in the United States at the relevant time would permit its characterization as a "company".

10. It is not contested that Bank Markazi's primary function is a sovereign one, since it is the Central Bank of Iran. The link that such activities could have with the functions of a central bank was known to the Court. It has not been discovered as a result of the pleadings of the Parties during the merits phase of the case. Moreover, the link of a commercial activity with a sovereign function does not render it a sovereign activity nor does it deprive it of its nature as a commercial activity. Thus, the new criterion used by the Court neither withstands close scrutiny nor does it assist the Court in assessing whether an entity may be characterized as a "company". At any rate, it is legally erroneous for the Court to apply new criteria, and to move the goal posts in the middle of the case, when it had so clearly announced, in its Judgment on the preliminary objections, the criteria which it would use for the determination of whether the activities engaged in by Bank Markazi at the relevant time in the United States would qualify it as a "company" under the Treaty. A court of law cannot blow hot and cold in establishing criteria for resolving a legal issue or in applying them to the object of its determination while adjudicating the same case.

11. Furthermore, there is a clear difference between sovereign activities "linked to the sovereign functions of the State", which were referred to in the Court's 2019 Judgment, and commercial activities linked to a sovereign function. The latter link does not transform the commercial activities into sovereign acts or acts of sovereignty of the State. The ICSID Tribunal in the *Československá Obchodní Banka, A.S. (CSOB)* v. *The Slovak Republic* case had to deal with a similar issue. The question was whether the State-owned CSOB Bank could be characterized as a "national" of the contracting State within the meaning of Article 25 of the Washington Convention, or whether it was to be regarded as the State as such, since it carried out activities linked to sovereign functions. The Tribunal stated as follows:

> "It cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard. But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental

policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature."[4]

12. Moreover, as explained in the following section, the new test devised by the Court in the present Judgment for determining whether Bank Markazi's activities in the United States at the relevant time qualify it as a "company" under the Treaty runs counter to the definition of the term "company" in Article III (1) of the Treaty, and to the treatment to be accorded to government agencies and instrumentalities under Article XI (4) thereof.

D. The definition of the term "company" in Article III of the Treaty of Amity

13. Article III (1) of the Treaty defines a company as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit". As the Court observed in its 2019 Judgment, it is not contested that "Bank Markazi was endowed with its own legal personality by Article 10, paragraph *(c)*, of Iran's 1960 Monetary and Banking Act, as amended"[5]. It was also stipulated in the same Act that Bank Markazi "shall be governed by the laws and regulations pertaining to joint-stock companies in matters not provided for by this Act", and "shall not be subject to the general laws . . . relating to ministries, government companies and agencies". Moreover, the Court also stated, in the same Judgment, that "the fact that Bank Markazi is wholly owned by the Iranian State, and that the State exercises a power of direction and close control over the bank's activities . . . does not, in itself, exclude that entity from the category of 'companies' within the meaning of the Treaty"[6].

14. Nevertheless, in light of the object and purpose of the Treaty of Amity, which was aimed at guaranteeing rights and affording protection to natural and legal persons engaging in commercial activities, the Court was also of the view that having a separate legal personality under the domestic law of one of the Contracting Parties would not be a sufficient condition "for a given entity to be characterized as a 'company' within the meaning of the Treaty of Amity"[7]. Thus, in order to benefit from the protection offered to Iranian companies in the territory of the United States, Bank Markazi would have to show that its activities in the United States were of a commercial nature. I share fully this view of the Court as expressed in its 2019 Judgment. This is also the reason that led the Court to enquire into the nature of the activities that Bank Markazi was carrying out in the territory of the United States at the time its assets were affected by the United States measures complained of by Iran before the Court.

15. The issue in dispute in the present case is not whether Bank Markazi usually and generally engages in commercial activities in various parts of the world. What is of interest here, as far as the Treaty of Amity and the dispute between the Parties is concerned, is whether the activities undertaken by Bank Markazi in the territory of the United States which were the subject of the United States measures complained of by Iran were commercial activities. This is the crux of the dispute. Thus, the issue is not about broadly characterizing Bank Markazi as a "company" in all circumstances or

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[4] *Československá Obchodní Banka, A.S.* v. *The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 20.

[5] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 38, para. 88.

[6] *Ibid.*

[7] *Ibid.*, p. 38, paras. 90-91.

in all its operations, but only with respect to the activities in which it was engaged in the territory of the United States at the relevant time.

16. It is important to clarify this for the purposes of the dispute at hand, because what matters is not that Bank Markazi should always be treated as a "company" in the United States under the Treaty of Amity, irrespective of the activities in which it is engaged, but that it should be treated as such if its activities in the United States markets permit its characterization as such. In other words, it is only when Bank Markazi intervenes in the United States markets in a competitive manner and enters into business relationships with other entities that it becomes entitled to be treated as a "company" for the purpose of those activities under the Treaty. It should also be recalled that Article XI (4) explicitly allows State corporations, government agencies and instrumentalities to engage in commercial and other business activities within the territory of the other High Contracting Party but prevents them from claiming immunity from taxation or other liability to which privately owned enterprises are subjected. This provision also applies to Bank Markazi as a government agency or instrumentality of Iran, and protects its commercial activities or investments in the United States.

17. The fact that Bank Markazi is State-owned or State-controlled, or engages in sovereign activities in Iran, or has a sovereign function under Iranian law, does not exclude it from carrying out commercial activities as a "company" in the territory of the United States under the Treaty or from receiving the treatment owed by the United States, under the Treaty, to Iranian entities which qualify as a "company" in view of their business activities in the territory of the United States. To the extent that the activities undertaken by Bank Markazi in the United States are of a commercial or business nature, such activities would enable Bank Markazi to be characterized as a "company" under the Treaty and, consequently, to fall under the jurisdiction of the Court for the purposes of the present dispute. Whether the purpose for which the activities are pursued is for pecuniary profit or not, as indicated in Article III (1), or is to make money for the State or for the monetary reserves of the State does not deprive it from being considered a "company" under the terms of the Treaty. Nothing in the Treaty of Amity indicates that the treatment to be accorded to "companies" which are engaged in commercial or business activities in the territory of the other party depends on the purpose of the transactions or the function which the entities involved usually perform in their own country. The treatment is accorded because of the commercial or business nature of the activities in which they are engaged and which are entitled to protection under the Treaty. The Court affirmed as much in its 2019 Judgment. In paragraph 92 of that Judgment, the Court stated that,

> "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"[8].

Thus, the reasoning of the Court linking the characterization of the entity as a "company" under the Treaty to the purpose of the activity or to the function of the entity, instead of the nature of the activity as previously held by the Court in 2019, finds no basis in the Treaty of Amity.

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[8] *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.

E. The nature of the activities undertaken by Bank Markazi in the United States at the relevant time

18. The activities in question, based on the information available to the Court, consist of 22 security entitlements in United States dollars purchased by Bank Markazi during the years 2002 to 2007. They were purchased through Clearstream, a company based in Luxembourg, which acts as a bank for other banks and specializes in custody and settlement operations. As Clearstream does not have a bank branch in the United States, it uses cash operating accounts at J. P. Morgan and Citibank, both in New York, for payments, such as the payment of principal and interest on Clearstream's offshore security entitlements[9]. Once the security entitlements matured or were sold, the principal amount would be repaid with the proceeds deposited in a securities account maintained for Bank Markazi by Clearstream with Citibank and could generate additional interest[10]. It is the proceeds of these security entitlements held by Citibank for Bank Markazi that were blocked and later turned over to various claimants in the United States following the adjudication, by United States courts, of the *Peterson* cases.

19. The Monetary and Banking Act of Iran mentioned above, in its Article 13, paragraph 4, permits Bank Markazi, *inter alia*, "[p]urchasing and selling . . . [g]overnment bonds, and the bonds issued by foreign governments or accredited international financial institutions"[11]. The bonds purchased by Bank Markazi, worth around US$1.8 billion, were issued in the financial market by States, public enterprises or the World Bank and were processed through a bank in the United States. Bank Markazi bought them for profit and, as with any financial investment, it was able to resell some of the bonds or parts of bonds whenever such transactions enabled it to realize profits instead of keeping them until maturity. To this end, it had to monitor the inevitable fluctuations in the bond market. It was therefore involved in investment activities in the financial markets and it received the proceeds of its investments through Clearstream Bank, which had them deposited in an account with a United States bank. In 2012, "after the last bond matured, the cash associated with the bonds was placed on an interest-bearing account maintained at Citibank in New York"[12].

20. In the *Peterson* pleadings before the United States District Court, Southern District of New York, the attorneys for the plaintiffs characterized the above financial transactions by Bank Markazi as commercial activities in the territory of the United States. According to them, "[i]n order for Markazi to purchase the Restrained Bonds and receive interest and principal payments related to those bonds, the Defendant Agent Banks had to undertake substantial commercial activity in the United States as the agents for, and under the direction of, Markazi"[13]. They also argued that, "once the Banking Agent Defendants implemented Markazi's bond purchases, various entities acting as Markazi's agents had to engage in substantial commercial activity in the United States to enable Markazi to receive interest and principal payments related to its investments"[14]. These arguments were not rejected by the district court. Instead, in its Order of 28 February 2013, the district court rejected Bank Markazi's arguments asserting immunity from attachment for its assets since they were used for central banking purposes on the basis of the FSIA, paragraph 1611 *(b)* (1). The court rejected this plea, citing the "notwithstanding clause" of the TRIA and Executive Order 13599, which — according to the court — "suggest that Bank Markazi is not engaged in activities protected by

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[9] Preliminary Objections of the United States of America, Ann. 235, pp. 6-7.

[10] *Ibid.*

[11] Memorial of the Islamic Republic of Iran, Attachments and Annexes, Vol. IV, Ann. 73, p. 11.

[12] Reply of the Islamic Republic of Iran, p. 91, para. 3.26.

[13] Relevant documents unsealed in the *Peterson* proceedings provided by the United States of America, Vol. 1, doc. A12, p. 19, para. 86.

[14] *Ibid.*, p. 21, para. 96.

1611 *(b)* (1)" of the FSIA. The district court therefore found that no central bank immunity applied to the activities of Bank Markazi in the United States, which it considered to be of a commercial nature.

21. It is surprising, to say the least, that the Judgment finds the assertions made by counsel for Bank Markazi in United States court proceedings, and relied on by the United States before the Court, to "accurately reflect the reality of the bank's activities", while totally ignoring the arguments made by attorneys for the plaintiffs in the same court proceedings, which characterize the activities of Bank Markazi in the United States as commercial activities. The arguments put forward by Iran and the United States to describe the activities of Bank Markazi in the United States are practically the opposite of those made in United States court proceedings by Bank Markazi and the attorneys of plaintiffs. In the present proceedings before the Court, the two States appear to have taken their cue from the conclusions of the Court's 2019 Judgment on jurisdiction, with Iran arguing that those activities were of a commercial nature, and the United States asserting, on the contrary, that they were central banking activities — each one trying to convince the Court of their respective points of view with respect to the possible characterization of Bank Markazi as a "company" under the Treaty. Under these circumstances, the Court should have been guided by the criteria it laid down in its 2019 Judgment for assessing whether Bank Markazi was carrying out, at the relevant time, activities of the nature of those which permit characterization of an entity as a "company" within the meaning of the Treaty.

22. The criteria laid down by the Court in its 2019 Judgment emphasized the nature of the activities, since, as it stated, "it is the nature of the activity actually carried out which determines the characterization of the entity engaged in it"[15]. According to the Court's 2019 Judgment, "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"[16]. If the Court's 2019 criteria were properly applied to the activities carried out by Bank Markazi at the relevant time in United States markets consisting of the purchase of 22 security entitlements in dematerialized bonds and in their management and subsequent sale, I am of the view that such activities would be considered as commercial activities. It follows that Bank Markazi should have been characterized as a "company" within the meaning of the Treaty in the present Judgment. This would have entitled it to the treatment provided for such companies under Articles III (1) and IV (1) and (2) of the Treaty, which the Court has now found to have been violated by the United States with regard to other Iranian companies. The Court should have, therefore, upheld its jurisdiction with respect to the third objection raised by the United States and, consequently, extended its findings regarding the breach by the United States of its obligations under Articles III (1) and IV (1) and (2) to Bank Markazi.

(Signed) Abdulqawi Ahmed YUSUF.

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

[16] *Ibid.*, pp. 38-39, para. 92.