SEPARATE OPINION OF JUDGE GEVORGIAN

Disagreement with the Court's findings on lack of jurisdiction on immunities of Bank Markazi (point (2) of the dispositif*) — Such immunities fall within the scope of application of the 1955 Treaty of Amity, Economic Relations, and Consular Rights — A link exists between Bank Markazi's activities to facilitate commerce by Iranian companies in the US and the Treaty's object and purpose — The interpretation of Article III, paragraph 2, of the Treaty — Distinction between procedural rights and the possibility to invoke such rights before US courts is artificial — Interpretation of Article X, paragraph 1, of the Treaty — Iran's "freedom of commerce" under this provision has been rendered illusory by the enforcement measures adopted by the US.*

1. I voted in favour of the Court's rejection of the first and third preliminary objections raised by the United States of America (hereinafter the "US"), as well as the findings on the admissibility of the Application filed by the Islamic Republic of Iran (hereinafter "Iran"). However, I voted against the Court's upholding of the second preliminary objection raised by the US. As a result, I disagree with the Court's limitation of its jurisdiction under point (2) of the *dispositif*. In this opinion, I shall set the reasons therefor.

2. On the merits, Iran challenges five measures or decisions allegedly affecting its immunities, including those of its Central Bank (Bank Markazi):

— the introduction in 1996 of a "terrorism exception" to jurisdictional immunities inserted in Title 28 of the United States Code (USC) as part of the "Antiterrorism and Effective Death Penalty Act"[1];

— the enactment in 2002 of the "Terrorism Risk Insurance Act", which in essence authorized the attachment of Iran's assets in order to give satisfaction to judgments on "terrorist claims" brought by private parties before US courts[2];

[1] According to the new exception, immunity under the US Foreign Sovereign Immunities Act of 1976 would not apply when "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources" (28 USC, Section 1605 *(a)* (7), as adopted by Section 221 of the US Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214), (Memorial of Iran (MI), Ann. 10).

[2] US Terrorism Risk Insurance Act of 2002, Pub. L. 107-297, 116 Stat. 2322, (MI, Ann. 13).

— the enlargement in 2008 of the "terrorism exception" initially introduced in 1996[3];
— the issuance in 2012 of Executive Order 13599, which blocked all assets of the Government of Iran, including, *inter alia*, those of its Central Bank[4];
— the enactment in the same year of the "Iran Threat Reduction and Syria Human Rights Act", which deprived the assets of Bank Markazi of immunity in order to give satisfaction to private claims brought before a US District Court in the case *Peterson et al.* v. *Islamic Republic of Iran et al*[5].

3. Iran claims that such measures — the scope of which is not disputed by the Parties — have violated its immunities (including those applicable to Bank Markazi) and that such immunities fall within the scope of various provisions of the Iran-US Treaty of Amity, Economic Relations, and Consular Rights of 1955 (hereinafter the "1955 Treaty"). The US considers that the question of immunities is outside the Court's jurisdiction *ratione materiae*, since the rule on the central bank immunities is a rule of customary international law and is not covered by the 1955 Treaty. The present Judgment agrees with the Respondent's position.

4. Before addressing the Court's analysis of the substantive provisions of the 1955 Treaty, I shall first make two preliminary observations.

First, while no provision of the 1955 Treaty mentions expressly the protection of foreign State immunities (including those of central banks), such immunities are invoked by Iran in relation to various *substantive* rights protected by the Treaty. From this perspective, the present case differs from *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, where the Court excluded its jurisdiction in relation to a treaty (the Palermo Convention), which allegedly incorporated immunities in a *general* "disclaimer" clause limiting that treaty's scope of application[6].

[3] *Inter alia*, the new Section 1605A of Title 28 of the US Code would allow judges to award punitive damages against so-called "State sponsors of terrorism" (28 USC, Section 1605A *(c)* as adopted by Section 1083 *(a)* (1) of the US National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 206, (MI, Ann. 15).

[4] Executive Order 13599, 5 February 2012, Federal Register, Vol. 77, p. 6659, (MI, Ann. 22).

[5] Section 502 *(b)* of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. 112-158, 126 Stat. 1214 (MI, Ann. 16), in relation to *Peterson et al.* v. *Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG).

[6] It must also be recalled that, in that case, the Court's conclusion was confirmed by the *travaux préparatoires* of the Palermo Convention (*Immunities and Criminal Proceedings*

Second, the fact that the object and purpose of the 1955 Treaty is not to protect State sovereignty, but rather to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations"[7], is not sufficient per se to dispose of the Court's jurisdiction over Iran's claims regarding immunities, and notably those protecting its Central Bank. As Iran has argued in the present proceedings (and the US has not contested), Bank Markazi plays a crucial role in the conclusion of commercial transactions by Iranian companies in the US, to the point that the attachment of its assets may have rendered such transactions impossible[8]. While the scope of the alleged harm caused by the US measures is a matter for the merits, Iran has, at this stage, sufficiently demonstrated the existence of a link between such measures and the object and purpose of the 1955 Treaty.

5. I shall now turn to the substantive rights invoked by Iran in the present case. In my opinion, two provisions of the 1955 Treaty are particularly relevant as sources of the Court's jurisdiction over Iran's claims concerning immunities: Article III, paragraph 2 (access to courts of justice) and Article X, paragraph 1 (freedom of commerce and navigation).

6. According to Article III, paragraph 2,

> "Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication."

7. The present Judgment differentiates between, on the one hand, the substantive and procedural rights that a national or company of a Contracting Party might claim before a domestic court or authority, and on the other, the "possibility for such a [national or] company to have access to those courts or authorities with a view to pursuing the (substantive or

(Equatorial Guinea v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 322-323, paras. 96-102). This is not the case here.

[7] Paragraph 57 of the present Judgment.

[8] See, in particular, CR 2018/30, pp. 31-33, paras. 33-36 (Vidal).

procedural) rights it claims to have"[9]. According to the Court, only the latter is protected by Article III, paragraph 2[10]. To this effect, the Court recalls that the rights enshrined in that provision are only guaranteed "to the end that prompt and impartial justice be done"[11].

8. This differentiation is in my view artificial and disregards the "essentially procedural" and "preliminary" nature of immunities, as defined by the Court in *Arrest Warrant* and *Jurisdictional Immunities*[12]. Indeed, in the latter Judgment, the Court explained that "a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established"[13].

9. Moreover, if we follow this logic, practically nothing is left of the right of access to courts once Iran's Central Bank (Bank Markazi) has been deprived of a "preliminary" procedural defence of such importance as immunities (thereby leaving it in a clearly less favourable situation than that of other central banks operating in the US). As well expressed in the dissenting opinion to the judgment of the US Supreme Court in *Bank Markazi* v. *Peterson et al.*, Bank Markazi was "strip[ped] . . . of any protection that federal common law, international law, or New York State law might have offered against respondents' claims"[14]. It must be underscored, in this respect, that one of Iran's aims in relation to Article III, paragraph 2, is not so much that US courts "uphold" immunities (as the present Judgment wrongly assumes in its paragraph 70), but rather that Iranian companies be put in a position to effectively invoke such immunities before US courts. At present, this is not possible due to the measures adopted by the United States[15].

10. Another provision that, in my opinion, brings claims on immunities within the scope of the Court's jurisdiction *ratione materiae* under the 1955 Treaty is Article X, paragraph 1, which provides that "[b]etween the territories of the two High Contracting Parties there shall be freedom of

[9] Paragraph 70 of the present Judgment.
[10] *Ibid.*
[11] *Ibid.*
[12] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 124, para. 58; *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60.
[13] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 136, para. 82.
[14] *Bank Markazi* v. *Peterson et al.*, *Supreme Court Reporter*, Vol. 136, p. 1310 (2016), Roberts, C. J., dissenting, p. 14.
[15] See CR 2018/33, pp. 27-29, paras. 9-11 (Wordsworth), and partially, CR 2018/31, p. 13, para. 10 (Wordsworth).

commerce and navigation". As the present Judgment acknowledges, the Court interpreted this provision broadly in its Judgment on preliminary objections in the *Oil Platforms* case:

> "whether the word 'commerce' is taken in its ordinary sense or in its legal meaning, at the domestic or international level, it has a broader meaning than the mere reference to purchase and sale.
>
> Treaties dealing with trade and commerce cover a vast range of matters ancillary to [. . .] commerce, such as shipping, transit of goods and persons, the right to establish and operate businesses, protection from molestation, freedom of communication, acquisition and tenure of property."[16]

11. In paragraphs 78 and 79, the present Judgment concludes that the protection of a central bank's immunities is not included in the expression "matters ancillary to commerce". In so doing, it fails to acknowledge that, in *Oil Platforms*, the Court referred to Article X, paragraph 1, as protecting not only "commerce" between the Contracting Parties (a term already defined in broad terms), but also the larger concept of "freedom of commerce". In the Court's view,

> "[a]ny act which would impede that 'freedom' is thereby prohibited. Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export."[17]

12. Given the essential role played by Bank Markazi in the effective conclusion of commercial transactions by Iranian companies in the United States, Iran now invokes before the Court an alleged serious violation of its rights under this provision. Such an interference appears to be the direct consequence of the restriction of immunities by means of a series of measures specifically targeting Iran and Iranian-owned companies. In such circumstances, it appears unjustified to limit the Court's jurisdiction under Article X, paragraph 1, in the manner done in the present Judgment.

13. For all these reasons, I am of the view that the Court should have dismissed the second preliminary objection raised by the United States, and accordingly, should have exercised its full jurisdiction over Iran's claims on the merits.

(*Signed*) Kirill GEVORGIAN.

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[16] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 818, paras. 45-46.

[17] *Ibid.*, p. 819, para. 50.