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Summary
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Certain Iranian Assets (Islamic Republic of Iran v. United States of America)

Summary of the Judgment of 13 February 2019

History of the proceedings (paras. 1-17)

The Court recalls that, on 14 June 2016, the Government of the Islamic Republic of Iran (hereinafter "Iran" or the "Applicant") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter the "United States" or the "Respondent") with regard to a dispute concerning alleged violations by the United States of the Treaty of Amity, Economic Relations, and Consular Rights, which was signed by the two States in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter the "Treaty of Amity" or "Treaty"). The Court notes that, in its Application, Iran seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article XXI, paragraph 2, of the Treaty of Amity.

The Court further recalls that, after Iran filed its Memorial in the case, the United States raised preliminary objections to the admissibility of the Application and the jurisdiction of the Court. Consequently, by an Order of 2 May 2017, the President of the Court, noting that by virtue of Article 79, paragraph 5, of the Rules the proceedings on the merits were suspended, fixed 1 September 2017 as the time-limit within which Iran could present a written statement of its observations and submissions on the preliminary objections raised by the United States. Iran filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections. Public hearings were held from 8 to 12 October 2018.

I. FACTUAL BACKGROUND (PARAS. 18-27)

The Court begins by setting out the factual background of the case. It recalls in this regard that Iran and the United States ceased diplomatic relations in 1980, following the Iranian revolution in early 1979 and the seizure of the United States Embassy in Tehran on 4 November 1979. In October 1983, United States Marine Corps barracks in Beirut, Lebanon, were bombed, killing 241 United States servicemen who were part of a multinational peacekeeping force. The United States claims that Iran is responsible for this bombing and for subsequent acts of terrorism and violations of international law; Iran rejects these allegations.

The Court notes that, in 1984, the United States designated Iran as a "State sponsor of terrorism", a designation which has been maintained ever since. In 1996, the United States amended its Foreign Sovereign Immunities Act (hereinafter the "FSIA") so as to remove the immunity from suit before its courts of States designated as "State sponsors of terrorism" in certain cases involving allegations of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support for such acts; it also provided exceptions to immunity from execution applicable in such cases. Plaintiffs then began to bring actions against Iran before United States courts for damages arising from deaths and injuries caused by acts allegedly supported, including financially, by Iran. These actions gave rise in particular to the Peterson case, concerning the above-mentioned bombing of the United States barracks in Beirut. Iran declined to appear in these lawsuits on the ground that the United States legislation was in violation of the international law on State immunities.

The Court further notes that, in 2002, the United States adopted the Terrorism Risk Insurance Act, which established enforcement measures for judgments entered following the 1996 amendment to the FSIA. The United States further amended the FSIA in 2008, enlarging, inter alia, the categories of assets available for the satisfaction of judgment creditors. In 2012, the President of the United States issued Executive Order 13599, which blocked all assets ("property and interests in property") of the Government of Iran, including those of the Central Bank of Iran (Bank Markazi) and of financial institutions owned or controlled by Iran, where such assets are within United States territory or "within the possession or control of any United States person, including any foreign branch". Also in 2012, the United States adopted the Iran Threat Reduction and Syria Human Rights Act, Section 502 of which, inter alia, made the assets of Bank Markazi subject to execution in order to satisfy default judgments against Iran in the Peterson case. Bank Markazi challenged the validity of this provision before United States courts; the Supreme Court of the United States ultimately upheld its constitutionality.

Finally, the Court observes that, following the measures taken by the United States, many default judgments and substantial damages awards have been entered by United States courts against the State of Iran and, in some cases, against Iranian State-owned entities. Further, the assets of Iran and Iranian State-owned entities, including Bank Markazi, are now subject to enforcement proceedings in various cases in the United States or abroad, or have already been distributed to judgment creditors.

II. JURISDICTION OF THE COURT (PARAS. 29-99)

The Court then turns to the question of its jurisdiction. Recalling that Iran seeks to rely on Article XXI, paragraph 2, of the Treaty of Amity, the Court notes that it is not contested that the Treaty was in force between the Parties on the date of the filing of Iran's Application, namely 14 June 2016, and that the denunciation of the Treaty announced by the United States on 3 October 2018 has no effect on the jurisdiction of the Court in the present case. The Court observes that it is also not contested that several of the conditions laid down by Article XXI, paragraph 2, of the Treaty are met: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy; and the two States have not agreed to settlement by some other pacific means. The Court notes that the Parties disagree, however, on the question whether the dispute concerning the United States' measures of which Iran complains is a dispute "as to the interpretation or application" of the Treaty of Amity. Relying on its jurisprudence, the Court observes that it must ascertain whether the acts of which Iran complains fall within the provisions of the Treaty of Amity and whether, as a consequence, the dispute is one which the Court has jurisdiction ratione materiae to entertain, pursuant to Article XXI, paragraph 2, thereof.

The Court examines in turn the three preliminary objections to jurisdiction raised by the United States.

A. The first objection: Iran's claims arising from measures taken by the United States to block Iranian assets (paras. 38-47)

In its first objection to jurisdiction, the United States asks the Court to "[d]ismiss as outside the Court's jurisdiction all claims that U.S. measures that block the property and interests in property of the Government of Iran or Iranian financial institutions (as defined in Executive Order 13599 and regulatory provisions implementing Executive Order 13599) violate any provision of the Treaty". In its view, these claims fall outside the scope of the Treaty by virtue of Article XX, paragraph 1, subparagraphs (c) and (d), thereof.

After summarizing the Parties' arguments, the Court recalls that it previously had occasion to observe in its Judgment on the preliminary objection in the case concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 811, para. 20), and more recently in its Order indicating provisional measures in the case concerning Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America) (Provisional Measures, Order of 3 October 2018, para. 41), that the Treaty of Amity contains no provision expressly excluding certain matters from its jurisdiction. It also took the view that Article XX, paragraph 1, subparagraph (d), did not restrict its jurisdiction but was confined to affording the Parties a possible defence on the merits to be used should the occasion arise" (Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 811, para. 20). Seeing no reason in the present case to depart from its earlier findings, and being of the opinion that Article XX, paragraph 1, subparagraph (c), of the Treaty should be interpreted, in this respect, in the same way as subparagraph (d), the Court concludes that these provisions do not restrict its jurisdiction but merely afford the Parties a defence on the merits. It thus rejects the first objection to jurisdiction raised by the United States.

B. The second objection: Iran's claims concerning sovereign immunities (paras. 48-80)

In its second objection to jurisdiction, the United States asks 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".

The Court thus examines each of the provisions the violation of which Iran alleges, and which, according to the Applicant, are capable of bringing within the jurisdiction of the Court the question of the United States' respect for the immunities to which certain Iranian State entities are said to be entitled.

Article IV, paragraph 2, of the Treaty of Amity (paras. 53-58)

The Court notes that Iran relies on the explicit mention of the "require[ments of] international law" contained in the opening sentence of Article IV, paragraph 2, of the Treaty to argue that this provision incorporates by reference the rules of customary international law on sovereign immunities into the obligation it lays down. The United States disputes this interpretation. In its view, the "require[ments of] international law" referred to in Article IV, paragraph 2, concern the minimum standard of treatment for the property of aliens in the host State — a well-known concept in the field of investment protection — and not immunity protections of any kind.

The Court begins by stating that it will leave aside the question whether Bank Markazi, in respect of which Iran claims sovereign immunity, is a "company" within the meaning of Article IV, paragraph 2. Addressing this point later in its decision (see Section II.C below), the Court considers that the question to be answered at this stage is whether, assuming that this entity constitutes a "company" within the meaning of the Treaty — which the United States disputes — Article IV, paragraph 2, obliges the Respondent to respect the sovereign immunity to which Bank Markazi or the other Iranian State-owned entities concerned in this case would allegedly be entitled under customary international law.

The Court observes in this regard that Iran's proposed interpretation of the phrase referring to the "require[ments of] international law" in the provision at issue is not consistent with the object and purpose of the Treaty of Amity. As stated in the Treaty's preamble, the Parties intended to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations". In addition, the title of the Treaty does not suggest that sovereign immunities fall within the object and purpose of the instrument concerned. Such immunities cannot therefore be considered as included in Article IV, paragraph 2. The Court considers that the "international law" in question in this provision is that which defines the minimum standard of protection for property belonging to the "nationals" and "companies" of one Party engaging in economic activities within the territory of the other, and not that governing the protections enjoyed by State entities by virtue of the principle of sovereign equality of States. In addition, the provision in Article IV, paragraph 2, relied on by Iran must be read in the context of Article IV as a whole. After examining each paragraph of Article IV in turn, the Court is of the view that, taken together, these provisions clearly indicate that the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature. It cannot therefore be interpreted as incorporating, by reference, the customary rules on sovereign immunities.

Article XI, paragraph 4, of the Treaty of Amity (paras. 59-65)

With regard to Article XI, paragraph 4, of the Treaty, the Court notes, in agreement with Iran's argument on this point, that this provision, which solely excludes from all "immunity" publicly owned enterprises engaging in commercial or industrial activities, does not affect the immunities enjoyed under customary international law by State entities which engage in activities jure imperii. It observes, however, that Iran goes further in contending that this provision imposes an implied obligation to uphold those immunities. The Applicant adopts, in this regard, an a contrario reading of Article XI, paragraph 4, whereby, in excluding from immunity only publicly owned enterprises engaging in commercial or industrial activities, this provision implicitly seeks to guarantee the sovereign immunity of public entities when they engage in activities jure imperii.

Recalling its jurisprudence whereby an a contrario reading of a treaty provision is only warranted when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty, the Court considers that the interpretation put forward by Iran cannot be adopted. It is one thing for Article XI, paragraph 4, to leave intact, by not barring them, the immunities enjoyed under customary law by State entities when they engage in activities jure imperii. It is quite another for it to have the effect, as Iran claims it does, of transforming compliance with such immunities into a treaty obligation, a view not supported by the text or context of the provision. In the opinion of the Court, if Article XI, paragraph 4, mentions only publicly owned enterprises which engage in "commercial, industrial, shipping or other business activities", this is because, in keeping with the object and purpose of the Treaty, it pertains only to economic activities and seeks to preserve fair competition among economic actors operating in the same market. The question of activities jure imperii is simply not germane to the concerns underlying the drafting of Article XI, paragraph 4. The argument that this provision incorporates sovereign immunities into the Treaty thus cannot be upheld.

Article III, paragraph 2, of the Treaty of Amity (paras. 66-70)

As regards Article III, paragraph 2, of the Treaty, the Court considers — once again assuming for the purposes of the present discussion that Bank Markazi is a "company" — that it must ascertain whether the alleged breach of the immunities which that bank and the other Iranian State entities concerned are said to enjoy under customary international law, should that breach be established, would constitute a violation of the right to have "freedom of access to the courts" guaranteed by that provision. The Court observes that it is only if the answer to this question is in the affirmative that it could be concluded that the application of Article III, paragraph 2, requires the Court to examine the question of sovereign immunities, and that such an examination thus falls, to that extent, within its jurisdiction as defined by the compromissory clause of the Treaty of Amity.

The Court is not convinced that a link of the nature alleged by Iran exists between the question of sovereign immunities and the right guaranteed by Article III, paragraph 2. In its view, it is true that the mere fact that Article III, paragraph 2, makes no mention of sovereign immunities, and that it also contains no renvoi to the rules of general international law, does not suffice to exclude the question of immunities from the scope ratione materiae of the provision at issue. However, for that question to be relevant, the breach of international law on immunities would have to be capable of having some impact on compliance with the right guaranteed by Article III, paragraph 2. According to the Court, that is not the case. The provision at issue does not seek to guarantee the substantive or even the procedural rights that a company of one Contracting Party might intend to pursue before the courts or authorities of the other Party, but only to protect the possibility for such a company to have access to those courts or authorities with a view to pursuing the (substantive or procedural) rights it claims to have. The wording of Article III, paragraph 2, does not point towards the broad interpretation suggested by Iran. The rights therein are guaranteed "to the end that prompt and impartial justice be done". Access to a Contracting Party's courts must be allowed "upon terms no less favorable" than those applicable to the nationals and companies of the Party itself "or of any third country". There is nothing in the language of Article III, paragraph 2, in its ordinary meaning, in its context and in light of the object and purpose of the Treaty of Amity, to suggest or indicate that the obligation to grant Iranian "companies" freedom of access to United States courts entails an obligation to uphold the immunities that customary international law is said to accord — if that were so — to some of these entities. The two questions are clearly distinct.

Article IV, paragraph 1, of the Treaty of Amity (paras. 71-74)

Regarding Article IV, paragraph 1, of the Treaty, the Court states that, for reasons similar to those set out regarding Iran's reliance on Article IV, paragraph 2, of the Treaty of Amity, it does not consider that the requirements of Article IV, paragraph 1, include an obligation to respect the sovereign immunities of the State and those of its entities which can claim such immunities under customary international law. It cannot therefore uphold on this point Iran's argument that the question of sovereign immunities falls within the scope ratione materiae of this provision and, consequently, within the jurisdiction of the Court under the compromissory clause of the Treaty of Amity.

Article X, paragraph 1, of the Treaty of Amity (paras. 75-79)

The Court then turns to Article X, paragraph 1, of the Treaty. It recalls in this regard that, in its Judgment on the preliminary objection in the case concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 803), it had to rule on the scope of the concept of "freedom of commerce" within the meaning of that paragraph. It stated on that occasion that the word "commerce" within the meaning of the

provision at issue refers not just to maritime commerce, but to commercial exchanges in general; that, in addition, the word "commerce", both in its ordinary usage and in its legal meaning, is not limited to the mere acts of purchase and sale; and that commercial treaties cover a wide range of matters ancillary to commerce, such as the right to establish and operate businesses, protection from molestation, and acquisition and enjoyment of property. The Court concluded that "it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce".

The Court sees no reason to depart now from the interpretation of the concept of "freedom of commerce" that it adopted in the case quoted above. Nevertheless, even if understood in this sense, freedom of commerce cannot cover matters that have no connection, or too tenuous a connection, with the commercial relations between the States Parties to the Treaty. In this regard, the Court is not convinced that the violation of the sovereign immunities to which certain State entities are said to be entitled under international law in the exercise of their activities jure imperii is capable of impeding freedom of commerce, which by definition concerns activities of a different kind. Consequently, the violations of sovereign immunities alleged by Iran do not fall within the scope of Article X, paragraph 1, of the Treaty.

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The Court concludes from its analysis that none of the provisions the violation of which Iran alleges, and which, according to the Applicant, are capable of bringing within the jurisdiction of the Court the question of the United States' respect for the immunities to which certain Iranian State entities are said to be entitled, is of such a nature as to justify such a finding. Consequently, the Court finds that Iran's claims based on the alleged violation of the sovereign immunities guaranteed by customary international law do not relate to the interpretation or application of the Treaty of Amity and, as a result, do not fall within the scope of the compromissory clause in Article XXI, paragraph 2. Thus, in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities, the Court does not have jurisdiction to consider them. It considers that the second objection to jurisdiction raised by the United States must therefore be upheld.

C. The third objection: Iran's claims alleging violations of Articles III, IV or V of the Treaty in relation to Bank Markazi (paras. 81-97)

In its third objection to jurisdiction, the United States requests the Court to dismiss "as outside the Court's jurisdiction all claims of 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".

After recalling the Parties' arguments, the Court observes that, although the wording of this objection refers to "treatment accorded to the Government of Iran or Bank Markazi", the question before it is solely that of whether Bank Markazi is a "company" within the meaning of the Treaty of Amity and is thereby justified in claiming the rights and protections afforded to "companies" by Articles III, IV and V. Consequently, the Court endeavours solely to establish whether the characterization of "company" within the meaning of the Treaty of Amity is applicable to Bank Markazi.

The Court notes that Articles III, IV and V of the Treaty of Amity guarantee certain rights and protections to "nationals" and "companies" of a Contracting Party, which must be respected by the other Party. It further notes that the term "national" applies to natural persons, whose status is not at issue in the difference between the Parties as regards the third preliminary objection. The term "company" is defined thus in Article III, paragraph 1: "As used in the present Treaty, 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." On the basis of this definition, the Court considers that two points are not in doubt and, moreover, give no cause for disagreement between the Parties. First, an entity may only be characterized as a "company" within the meaning of the Treaty if it has its own legal personality, conferred on it by the law of the State where it was created, which establishes its legal status. In this regard, Article III, paragraph 1, begins by stating that "[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". Secondly, an entity which is wholly or partly owned by a State may constitute a "company" within the meaning of the Treaty. The definition of "companies" provided by Article III, paragraph 1, makes no distinction between private and public enterprises. The possibility of a public enterprise constituting a "company" within the meaning of the Treaty is confirmed by Article XI, paragraph 4, which deprives of immunity any enterprise of either Contracting Party "which is publicly owned or controlled" when it engages in commercial or industrial activities within the territory of the other Party, so as to avoid placing such an enterprise in an advantageous position in relation to private enterprises with which it may be competing.

In the Court's view, two conclusions may be drawn from the above. In the first place, the United States cannot contest the fact 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 — and indeed it does not do so. In the second place, 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 — as pointed out by the United States and not contested by Iran — does not, in itself, exclude that entity from the category of "companies" within the meaning of the Treaty.

That being so, it remains to be determined by the Court whether, by the nature of its activities, Bank Markazi may be characterized as a "company" according to the definition given by Article III, paragraph 1, read in its context and in light of the object and purpose of the Treaty of Amity.

In this regard, the Court considers that it cannot accept the interpretation put forward by Iran in its main argument, whereby the nature of the activities carried out by a particular entity is immaterial for the purpose of characterizing that entity as a "company". According to Iran, whether an entity carries out functions of a sovereign nature, i.e., acts of sovereignty or public authority, or whether it engages in activities of a commercial or industrial nature, or indeed a combination of both types of activity, is of no relevance when it comes to characterizing it as a "company". It would follow that having a separate legal personality under the domestic law of a Contracting Party would be a sufficient condition for a given entity to be characterized as a "company" within the meaning of the Treaty of Amity.

In the opinion of the Court, such an interpretation would fail to take account of the context of the definition provided by Article III, paragraph 1, and the object and purpose of the Treaty of Amity. As stated above in respect of the second objection to jurisdiction raised by the United States, an analysis of all those provisions of the Treaty which form the context of Article III, paragraph 1, points clearly to the conclusion that the Treaty is aimed at guaranteeing rights and affording protections to natural and legal persons engaging in activities of a commercial nature, even if this latter term is to be understood in a broad sense. The same applies to the object and purpose of the Treaty, as set out in the preamble, and an indication of which can also be found in the title of the Treaty (Treaty of Amity, Economic Relations, and Consular Rights). The Court therefore concludes that an entity carrying out exclusively sovereign activities, linked to the

sovereign functions of the State, cannot be characterized as a "company" within the meaning of the Treaty and, consequently, may not claim the benefit of the rights and protections provided for in Articles III, IV and V.

The Court notes, however, 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. 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.

The Court observes that it must therefore 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.

After examining the Parties' arguments in this regard, the Court considers that it does not have before it all the facts necessary to determine whether Bank Markazi was carrying out, at the relevant time, activities of the nature of those which permit characterization as a "company" within the meaning of the Treaty of Amity, and which would have been capable of being affected by the measures complained of by Iran by reference to Articles III, IV and V of the Treaty. Since those elements are largely of a factual nature and are, moreover, closely linked to the merits of the case, the Court considers that it will be able to rule on the third objection only after the Parties have presented their arguments in the following stage of the proceedings, should it find the Application to be admissible. The Court therefore concludes that the third objection to jurisdiction does not possess, in the circumstances of the case, an exclusively preliminary character.

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Given that the Court has jurisdiction to entertain part of the claims made by Iran, which, moreover, were not covered in their entirety by the three objections to jurisdiction raised by the United States, the Court then considers the objections to admissibility raised by the Respondent, which seek the rejection of the Application as a whole.

III. ADMISSIBILITY OF THE APPLICATION (PARAS. 100-125)

The Court notes that the United States initially raised two objections to the admissibility of the Application, namely, first, that Iran's reliance on the Treaty to found the Court's jurisdiction in this case is an abuse of right and, secondly, that Iran's "unclean hands" preclude the Court from proceeding with this case. The Court observes, however, that, during the oral proceedings, the United States clarified that its first objection to admissibility was an objection based on "abuse of process" and not on "abuse of right".

The Court recalls that, in the case concerning Immunities and Criminal Proceedings (Equatorial Guinea v. France), it considered that "[a]lthough the basic concept of an abuse may be the same, the consequences of an abuse of rights or an abuse of process may be different" (Preliminary Objections, Judgment of 6 June 2018, para. 146). It further stated that "[a]n abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings" (ibid., para. 150) and that "abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits" (ibid., para. 151).

The Court notes that, in its oral pleadings, the United States submitted that the dispute did not fall within the scope of the Treaty of Amity and that Iran could not therefore seek to found the jurisdiction of the Court on that instrument. In the Court's view, the objection based on abuse of process is not a new objection, but merely a recharacterization of a position already set out by the United States in its Preliminary Objections.

A. The objection based on abuse of process (paras. 107-115)

With regard to the first objection, after presenting the Parties' arguments, the Court recalls that, in the case concerning Immunities and Criminal Proceedings (Equatorial Guinea v. France), it stated that only in exceptional circumstances should the Court reject a claim based on a valid title of jurisdiction on the ground of abuse of process. In this regard, there has to be clear evidence that the applicant's conduct amounts to an abuse of process (Preliminary Objections, Judgment of 6 June 2018, para. 150) (see also Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 255, para. 38). The Court notes that it has already observed that the Treaty of Amity was in force between the Parties on the date of the filing of Iran's Application, i.e., 14 June 2016, and that the Treaty includes a compromissory clause in Article XXI providing for its jurisdiction. The Court does not consider that in the present case there are exceptional circumstances which would warrant rejecting Iran's claim on the ground of abuse of process. The Court therefore finds that the first objection to admissibility raised by the United States must be rejected.

B. The objection based on "unclean hands" (paras. 116-124)

As regards the second objection, the Court notes that the United States has not argued that Iran, through its alleged conduct, has violated the Treaty of Amity, upon which its Application is based. Without having to take a position on the "clean hands" doctrine, the Court considers that, even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the "clean hands" doctrine (Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 38, para. 47; Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 52, para. 142). It observes that such a conclusion is however without prejudice to the question whether the allegations made by the United States, concerning notably Iran's alleged sponsoring and support of international terrorism and its presumed actions in respect of nuclear non-proliferation and arms trafficking, could, eventually, provide a defence on the merits. The Court concludes that the second objection to admissibility raised by the United States cannot be upheld.

OPERATIVE CLAUSE (PARA. 126)

THE COURT,

(1) Unanimously,

Rejects the first preliminary objection to jurisdiction raised by the United States of America;

(2) By eleven votes to four,

Upholds the second preliminary objection to jurisdiction raised by the United States of America;

IN FAVOUR: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Crawford, Salam, Iwasawa; Judge ad hoc Brower;

AGAINST: Judges Bhandari, Robinson, Gevorgian; Judge ad hoc Momtaz;

(3) By eleven votes to four,

Declares 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;

IN FAVOUR: President Yusuf; Vice-President Xue; Judges Abraham, Bennouna, Cançado Trindade, Bhandari, Robinson, Gevorgian, Salam, Iwasawa; Judge ad hoc Momtaz;

AGAINST: Judges Tomka, Gaja, Crawford; Judge ad hoc Brower;

(4) Unanimously,

Rejects the preliminary objections to admissibility raised by the United States of America;

(5) Unanimously,

Finds that it has jurisdiction, subject to points (2) and (3) of the present operative clause, to rule on the Application filed by the Islamic Republic of Iran on 14 June 2016, and that the said Application is admissible.

Judges TOMKA and CRAWFORD append a joint separate opinion to the Judgment of the Court; Judge GAJA appends a declaration to the Judgment of the Court; Judges ROBINSON and GEVORGIAN append separate opinions to the Judgment of the Court; Judges ad hoc BROWER and MOMTAZ append separate opinions to the Judgment of the Court.

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Joint separate opinion of Judges Tomka and Crawford

Judges Tomka and Crawford disagree with the Court's decision to join the United States' third preliminary objection to the merits. In their view, whether Bank Markazi is a "company" for the purpose of the Treaty of Amity is an exclusively preliminary question which should have been determined at this stage.

The predecessor to Article 79 of the Rules of Court allowed the Court greater latitude to defer objections to the merits phase of a case. Since the 1972 amendments to the Rules of Court, objections may only be deferred to the merits stage of proceedings if they do not possess an exclusively preliminary character.

In the opinion of Judges Tomka and Crawford, whether Bank Markazi is a "company" for the purpose of the Treaty of Amity has been fully argued and the relevant facts are known. In particular, the Court does not need to determine what activities Bank Markazi was carrying out at the time its assets were seized in execution of judgments of United States federal courts against the Government of Iran. Consequently, the third preliminary objection has an exclusively preliminary character and should have been determined at this stage of the proceedings.

Declaration of Judge Gaja

The Court should have rejected the third preliminary objection concerning jurisdiction. What is required for that purpose is to determine whether a reasonable case has been made that Bank Markazi, as a company constituted under the law of Iran, enjoys rights conferred by Articles III, IV and V of the Treaty of Amity, in particular the right to the recognition of its juridical status, and that these rights may have been violated. Some of a central bank's activities are not different from those executed by any commercial bank and, in performing them, Bank Markazi should be granted the same protection under the Treaty of Amity. Article XI, paragraph 4, confirms that State corporations, agencies and instrumentalities are covered by the Treaty generally, not only when they exercise business activities.

Separate opinion of Judge Robinson

1. In his separate opinion, Judge Robinson explains his disagreement with the finding in point (2) of paragraph 126 of the dispositif, which upholds the second preliminary objection to jurisdiction made by the United States of America. In his 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 of Amity.

2. Judge Robinson expresses the view that 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, Article XI, paragraph 4 ,of the Treaty of Amity 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. Rather, it compellingly implies that State enterprises carrying out acts jure imperii enjoy sovereign immunity by virtue of the Treaty.

3. Judge Robinson is of the view that 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" between the Treaty and the claim of sovereign immunity.

4. According to Judge Robinson, there is an innate and organic connectedness between acts jure imperii and jure gestionis which 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.

5. For Judge Robinson, 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.

6. He concludes that 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. In his view, 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. Consequently, in his view, 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.

Separate opinion of Judge Gevorgian

In his separate opinion, Judge Gevorgian explains the reasons for his disagreement with the Court's findings on its lack of jurisdiction over Iran's claims concerning the immunities of Bank Markazi, based on the assumption that the Iran-US 1955 Treaty of Amity, Economic Relations, and Consular Rights does not cover the norm of customary international law on the immunities of the assets of a country's central bank. In his opinion, the legislative and executive measures adopted by the United States against Iran that resulted in the seizure of assets of Bank Markazi (Iran's Central Bank) fall within the scope of at least two provisions of the 1955 Treaty.

First, the United States restrictions of Bank Markazi's immunities may have violated this entity's right of access to courts as protected by Article III, paragraph 2, of the 1955 Treaty. Second, given the essential role of Iran's Central Bank in the realization of commercial activities by Iranian companies in the United States, the attachment of Bank Markazi's assets may have rendered illusory Iran's freedom of commerce with the United States, as protected by Article X, paragraph 1, of the 1955 Treaty.

Separate opinion of Judge ad hoc Brower

Judge ad hoc Brower believes that the arguments of the Respondent in respect of the "clean hands" doctrine made incomplete references to the writings of the former President of the Court, Judge Schwebel, and of Professor John Dugard. A thorough reading of those writings shows that their authors were not convinced that the "clean hands" doctrine applies to inter-State dispute settlement. Moreover, the Respondent referred to the individual opinion of Judge Hudson in Diversion of Waters from the Meuse, which discussed principles of equity under international law. However, by the Respondent's own admission, one of the requirements for the application of such principles, said to be akin to the "clean hands" doctrine, was not fulfilled.

According to Judge ad hoc Brower, an additional reason for deciding that Article XX of the Treaty of Amity is not a jurisdictional limitation is that it is not self-judging. Self-judging clauses have been inserted into a number of commercial treaties, and if the Parties had wished for Article XX to be self-judging, they would have made it explicit in its text.

Judge ad hoc Brower is of the view that, since the Treaty of Amity makes express grants of immunity in relation to consular and diplomatic intercourse, it could not be purported implicitly to provide for the immunity of States and State entities. This conclusion emerges from the application of the canon of interpretation expressio unius est exclusio alterius. Moreover, Judge ad hoc Brower considers that reading State immunity into the Treaty of Amity by reference to Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties would amount to rewriting the Treaty itself. Additionally, Judge ad hoc Brower notes that the words repeatedly used in the Treaty of Amity confirm the Treaty's purely commercial character. Judge ad hoc Brower is also of the view that the authorities on which the Applicant relied to support its a contrario reading of Article XI, paragraph 4, of the Treaty of Amity are of no avail, as they show, to the contrary, that an a contrario reading of a provision cannot supersede its plain meaning.

Judge ad hoc Brower disagrees with the Court with respect to the third objection to jurisdiction. He is of the view that the objection is of an exclusively preliminary character and therefore should have been decided. According to him, Iran adduced no proof that Bank Markazi actually has engaged in commercial activities, which is necessary for it to be a "company" within the meaning of the Treaty of Amity. Iran's Monetary and Banking Act 1972, as amended, confirms that Bank Markazi is not entitled to engage in anything other than sovereign activity. Moreover, Iran consistently has argued before United States courts that Bank Markazi carried out sovereign activities at the relevant time. Judge ad hoc Brower believes that the Applicant cannot "blow hot and cold at the same time". He concludes that the Court had all of the relevant facts before it and, based on the material made available to the Court by the Parties at this stage of the proceedings, he cannot see how the Court could have found otherwise than that Bank Markazi is not a "company" within the meaning of the Treaty of Amity.

Separate opinion of Judge ad hoc Momtaz

Introduction

The Parties disagreed as to the meaning and scope of Article XI, paragraph 4, of the Treaty of Amity in both their written pleadings and their oral arguments. There is no question that this dispute, which could not be satisfactorily adjusted by diplomacy, falls within the jurisdiction of the Court pursuant to the compromissory clause in Article XXI, paragraph 2, of that Treaty. The Court should therefore have rejected the second preliminary objection to jurisdiction raised by the United States and settled the said dispute at the merits stage, by interpreting Article XI, paragraph 4, in light of the rules of international law.

I. Interpretation in light of the object and purpose of the Treaty

According to the Treaty's preamble, the Parties wished to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples". The Court concluded from this that the object and purpose of the Treaty of Amity was not to regulate peaceful and friendly relations between the two States. Thus, Article I of the Treaty, which states that there will be firm and enduring peace and sincere friendship between the Parties, and which the Court considers gives meaning to the entire Treaty, must, in case of doubt, "incline the Court to the construction which seems more in consonance with its overall objective of achieving friendly relations over the entire range of activities covered by the Treaty" (Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 820, para. 52). Since the violation of the sovereign immunity of Iran's Central Bank in relation to its activities in a sovereign capacity (jure imperii) is capable of impeding freedom of commerce between the Parties, it is my view that Article XI, paragraph 4, should be interpreted in light of the Treaty's general objective.

II. The interpretation of Article XI, paragraph 4, in light of Article 31, paragraph 3, subparagraph (c), of the Vienna Convention on the Law of Treaties

According to Article 31, paragraph 3, subparagraph (c), of the Vienna Convention on the Law of Treaties, interpretation should also take account of "[a]ny relevant rules of international law applicable in the relations between the parties". In the Oil Platforms case, the Court did not hesitate to rely on the rules on the use of force to interpret Article XX, paragraph 1, subparagraph (d), of the Treaty and consider the lawfulness of the measures applied by the United States to protect its essential security interests (Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 182, para. 41). There is no reason, in the dispute between the Parties to the present case, for the Court not to rely on the rules on immunity to interpret Article XI, paragraph 4, of the Treaty.

III. The a contrario interpretation of Article XI, paragraph 4

In the Court's view, such an interpretation is only warranted "when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty" (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. 116, para. 35). In this case, an a contrario interpretation of Article XI, paragraph 4, might lead the Court to conclude that the Treaty's scope of application, and in particular the scope of the term "company", does not exclude entities carrying out activities jure imperii. This interpretation would, moreover, be consistent with Article III, paragraph 1, of the Treaty, which gives a broad and fluid definition of that term. In the recent past, the Court has noted that generic terms in treaties may have "a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 242, para. 64).

Conclusion

It should be noted that the basis for the enforcement measures taken against the Central Bank, namely the 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) depriving a

State of its immunity by reason of the gravity of the act perpetrated, is contrary to international law. According to the Court, "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict" (Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I), p. 139, para. 91).

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