SEPARATE OPINION OF JUDGE NOLTE

1. I wish to explain why I voted against the finding that the United States has violated Article III, paragraph 1, of the Treaty of Amity (I), and to make some observations relating to the jurisdictional objection concerning Bank Markazi (II).

I. Article III, Paragraph 1

2. In my view, the United States has not violated Article III, paragraph 1, of the Treaty of Amity.

3. According to the Court's 2019 Judgment on preliminary objections, "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"[1]. By using the phrase "its own legal personality", the Court did not address, much less resolve, the question whether Article III, paragraph 1, merely protects the legal existence of a company or whether it also protects the separate legal personality of companies which possess such a personality by virtue of the domestic law under which they were established. This phrase does not imply, contrary to what paragraph 136 of the present Judgment affirms, that "[t]he recognition of a company's own legal personality entails the legal existence of the company as an entity that is distinct from other natural or legal persons, including States". A closer analysis in fact reveals that Article III, paragraph 1, does not protect any legally distinct (separate) existence of companies.

4. The ordinary meaning of the terms contained in the first sentence of Article III, paragraph 1, ("shall have their juridical status recognized") is open to several interpretations. "[T]heir juridical status" may mean the juridical status of companies as under the applicable law of either High Contracting Party, as Iran claims[2], but it may also mean their juridical status as entities which are legally existent, as the United States claims[3]. The second sentence of Article III, paragraph 1, makes clear that the "juridical status" of companies, as determined by the applicable law of the respective High Con-

[1] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 37, para. 87.

[2] CR 2022/15, pp. 65-66, paras. 40 to 42 (Thouvenin).

[3] CR 2022/17, p. 60, paras. 3 and 4 (Daley).

tracting Party, "does not of itself confer rights upon companies to engage in the activities for which they are organized". Thus, if the legal status of a company allows that company to engage in certain activities in the territory of the State party under whose laws it is constituted, the implications of that legal status need not be recognized by the other party for such activities within its own territory. Here again, the ordinary meaning of the terms of Article III, paragraph 1, is open to several interpretations. The legal separateness of a company can be regarded as a defining element of its "juridical status", but also as a right enabling the company to engage in activities for which the limited liability of its associates or shareholders is essential.

5. The context of Article III, paragraph 1, consists, first and foremost, in the fact that it precedes, and leads to, Article III, paragraph 2. That provision guarantees companies' freedom of access to courts "both in defense and pursuit of their rights". To be able to exercise this freedom, it is necessary, but also sufficient, for a company to be legally existent. If Article III, paragraph 1, guaranteed the separate legal personality of companies, in addition to their legal existence, it would be guaranteeing a right that is unrelated to Article III, paragraph 2. This element of the context suggests that Article III, paragraph 1, guarantees only the "juridical status" of companies in so far as this is necessary to safeguard the right of access to courts (Art. III, para. 2).

6. A restrictive interpretation of Article III, paragraph 1, as guaranteeing only the legal existence of companies (mainly for the purpose of claiming their rights before courts), would not leave unprotected the separate legal personality of companies which possess such a personality. In my view, such protection rather derives from Article IV, paragraph 1 — the fair and equitable treatment clause — which is another element of the context of Article III, paragraph 1. Article IV, paragraph 1, provides protection, in an appropriately balanced way, against an unreasonable disregard of any separate legal personality as well as the possibility for States parties to engage in regulation, including reasonable forms of lifting the corporate veil. Indeed, a guarantee of legal separateness has a different character than a mere guarantee of legal existence, because it must be open to certain exceptions[4]. Many domestic legal orders treat the rules on legal personality and the rules on liability separately, and a variety of corporate forms establish legal personality in respect of which associates or shareholders remain fully liable for the activities of these legal persons. Different domestic legal orders also provide a variety of rules relating to the conditions under

[4] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, pp. 38-39, paras. 56-58.

which any separate legal personality of companies may be disregarded[5]. Against this background, it appears counter-intuitive to assume that the parties to the Treaty of Amity envisaged that Article III, paragraph 1, would guarantee the separate legal existence of companies without at least hinting at possible exceptions. Article IV, paragraph 1, provides a more appropriate standard for the protection of the separate legal personality of companies because it leaves room for generally recognized exceptions.

7. The object and purpose of the Treaty of Amity, which is to facilitate and increase commerce between the two States, does not require that Article III, paragraph 1, be interpreted as guaranteeing the separate legal personality of companies involved in such commerce. Rather, it is sufficient that Article III, paragraph 1, ensures that companies can enter into legal obligations and invoke substantive and procedural rights before domestic courts without the need to prove that they meet requirements other than those resulting from the domestic law under which they were established. An additional protection of any separate legal status would go beyond the guarantee that companies be treated on an equal basis with other companies under the law of the State party in whose territory they operate. The object and purpose of the Treaty is rather appropriately furthered by a balanced protection of any separate legal personality under Article IV, paragraph 1.

8. The *travaux préparatoires* confirm a restrictive interpretation. An aide-memoire by the United States Embassy in Tehran, dated 20 November 1954, according to which Article III, paragraph 1, provides for the "recognition as corporate entities", suggests that this provision primarily serves to recognize the company as a legal entity for the purposes of asserting or defending claims in a judicial proceeding[6]. The United States has convincingly argued that, at the time of the adoption of the Treaty, "many countries would impose additional tests before recognizing a company's existence

[5] *Ibid.*

[6] Aide-memoire of the United States Embassy in Tehran, dated 20 November 1954 (Reply of Iran, Ann. 1): "The provision is intended to confer no right upon corporations to operate in Iran, but merely to provide their recognition as corporate entities, principally in order that they may prosecute or defend their rights in courts as corporate entities." See also Telegram No. 936 from the United States Department of State to United States Embassy in Tehran, dated 9 November 1954 (Counter-Memorial of the United States of America, Ann. 135) ("It merely provides their recognition as corporate entities principally in order [that] they may prosecute or defend their rights in court as corporate entities. In this sense paragraph one [is] related [to] paragraph two . . . [c]orporate status should be recognized [to] assure [the] right [of] foreign corporate entities . . . [to] free access [to] courts [to] collect debts, protect patent rights, enforce contracts, etc."); Telegram No. 1176 from the United States Embassy

within its borders, such as the location of its seat, the nationality of its ownership, or the character of its aims", and that the purpose of Article III, paragraph 1, was to abolish such requirements and to recognize the legal existence of a company that was established under the domestic law of the other party[7]. The documents submitted by the United States, which have also been referred to by Iran, suggest that Article III, paragraph 1, was only intended to allow corporate entities to enter into legal rights and obligations within the territory of the other State ("legal capacity") and to have standing before the domestic courts. There are no indications in the documents that the parties wanted to go further and to provide protection against any form of lifting of the corporate veil.

9. For all these reasons, I consider that the protection afforded by Article III, paragraph 1, is narrow, and limited to the recognition of the legal existence of a company. In contrast to Article IV, paragraph 1 (see paragraph 6 above), this provision does not include a broader guarantee of the separate legal existence of companies. Therefore, the United States has, in my view, not violated Article III, paragraph 1, of the Treaty of Amity. This conclusion does not, however, affect the finding of the Court, with which I agree, that the disregard by the United States of the separate legal personality of certain Iranian companies violated Article IV, paragraph 1, of the Treaty.

II. Bank Markazi

10. The Court's determination, in the present Judgment (para. 54), that Bank Markazi is not a "company" within the meaning of the Treaty of Amity is in line with its 2019 Judgment on preliminary objections. In that Judgment, the Court explained 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"[8]. At the same time, the Court held 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.

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in Tehran to the United States Department of State, dated 27 November 1954, p. 1 (Memorial of Iran, Ann. 4).

[7] CR 2022/20, p. 30, para. 21 (Daley).

[8] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 38, para. 91.

> In such a case, . . . 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."[9]

Since the Court then took "the view 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", it held that it would be able to rule on that question "only after the Parties have presented their arguments in the following stage of the proceedings"[10].

11. The Parties' arguments during the merits phase of the proceedings were then limited to the 22 security entitlements which had been at issue in the *Peterson* litigation. In its submissions regarding these security entitlements, Iran did not call into question the position Bank Markazi had taken before United States courts according to which "[a]s part of its foreign currency reserves, Bank Markazi held $1.75 billion in security entitlements in foreign government and supranational bonds at Banca UBAE S.p.A., an Italian bank"[11]. The question of the status of Bank Markazi as a "company" under the Treaty of Amity thus turned on the question whether this specific activity, i.e. the maintaining and managing of foreign currency reserves (in the form of the 22 security entitlements) by the bank in its capacity as a central bank, is a commercial activity within the meaning of the Treaty of Amity. The Court has now responded to this question by finding that

> "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).

This is the crucial element of the Court's reasoning, with which I agree.

12. I am writing separately to express my view regarding the scope of the Court's characterization of the activity undertaken by Bank Markazi as "a way of exercising its sovereign function as a central bank" (Judgment, para. 50). Would this characterization also apply, for example, to the purchase or holding of security entitlements by a sovereign wealth fund for the purpose of accumulating and managing sovereign wealth or to the issuance

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

[10] *Ibid*., p. 40, para. 97.

[11] Petition for a Writ of Certiorari 7-8, *Bank Markazi* v. *Peterson*, No. 14-770 (29 December 2014) (contained in Counter-Memorial of the United States of America, Annex 117, and cited in Counter-Memorial of the United States of America, para. 9.13, note 243). Furthermore, Iran did not call Bank Markazi's representation into question (*ibid*., para. 9.15).

of bonds by a central bank as part of a debt-financing program[12]? Would such activities be (inherently) "commercial" within the meaning of the Treaty or also a "way of exercising [a] sovereign function" which would exclude their commercial nature? This question is, in the first place, one of treaty interpretation.

13. To answer this question it is, in principle, necessary to interpret the treaty term "company" and to define more precisely the term "commercial activity" (which is itself derived from the treaty term "company"). However, the definition of a term not only involves a positive determination of what falls within its scope; it also involves a negative determination of what does not (*per genus et differentiam*)[13]. In the present case, the Court has found that activities which are of a sovereign nature do not fall within the scope of the term "commercial activity" and that a line must be drawn between commercial activities and activities of a sovereign nature.

14. This distinction brings to mind questions which arise in the context of the international law on sovereign immunities. Can the law on sovereign immunities be helpful in determining the scope of what constitutes "commercial activities" under the Treaty and thus the line between commercial activities and activities of a sovereign nature? In paragraph 48 of the Judgment, the Court strongly suggests that this is not the case, affirming that "it is not required to ascertain whether the entity in question could claim, with regard to those activities, immunity from jurisdiction or enforcement under customary international law", that "[t]hese are two separate questions" and that "[t]he rules on sovereign immunities and those laid down by the Treaty of Amity concerning the treatment of 'companies' are two distinct sets of rules".

15. This repeated affirmation is certainly true in the most immediate sense, and the Court has thereby made clear that it does not intend to overstep the limits of its jurisdiction by adjudicating rights and obligations of the Parties under the law on sovereign immunities. However, this affirmation does not preclude the Court, in a less immediate sense, from taking "any relevant rules of international law applicable in the relations between the parties" into account when interpreting a rule under the Treaty of Amity (see Article 31, paragraph 3 (*c*), of the Vienna Convention on the Law of Treaties,

[12] Supreme Court of Sweden, *Ascom Group S.A. et al.* v. *The Republic of Kazakhstan et al.*, Case No. Ö 3828-20, Decision of 18 November 2021, English translation available at: https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/engelska-oversattningar/o-3828-20-eng.pdf/; see also United States Supreme Court, *Republic of Argentina et al.* v. *Weltover, Inc. et al.*, 504 U.S. 607 (2d Cir. 1992), p. 614.

[13] See, for example, *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 321-322, paras. 92-96, where the Court held that Article 4 of the Palermo Convention, in referring to "sovereign equality", does not "incorporate" the rules on State immunity under customary international law.

a provision which reflects customary international law)[14]. Such relevant rules of international law include the customary rules on sovereign immunities. While the Court has not explicitly taken them into account, I think it worth noting that the Court's interpretation of the Treaty of Amity conforms with practice, which indicates that the holding and managing of currency reserves by central banks abroad is an activity which is generally recognized as a typical sovereign activity in which the central banks of most States regularly and reciprocally engage, and which is specifically protected by customary rules on State immunity[15]. The same does not seem to be true for the activities of sovereign wealth funds[16].

16. In my view, this background confirms that the Court has appropriately determined, in conformity with the 2019 Judgment[17], that the relevant activities of Bank Markazi are not commercial in nature and that Bank Markazi is therefore not a company within the meaning of the Treaty of Amity.

(Signed) Georg NOLTE.

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[14] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 182, para. 41.

[15] See Article 21 (1) *(c)* of the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted on 2 December 2004, not yet in force), UN doc. A/RES/59/38; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company* v. *The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability of 28 April 2011, paras. 574-592, particularly paragraph 592; *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company* v. *The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Judgment of the High Court of Justice of England and Wales [2005] EWHC 2239, 20 October 2005, para. 58; Federal Court of Germany (Bundesgerichtshof), Order of 4 July 2013 — VII ZB 63/12, published in NJW-RR 2013, pp. 1532-1535; United States Court of Appeals, *NML CAPITAL, LTD* v. *BCRA*, 652 F.3d 172 (2d Cir. 2011), pp. 194-195; United States Court of Appeals, *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), pp. 1392-1393.

[16] Supreme Court of Sweden, *Ascom Group S.A. et al.* v. *The Republic of Kazakhstan et al.*, Case No. Ö 3828-20, Decision of 18 November 2021, English translation available at: https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/engelska-oversattningar/o-3828-20-eng.pdf/.

[17] *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.