SEPARATE OPINION OF JUDGE *AD HOC* MOMTAZ

[Translation]

Jurisdiction of the Court — Claims relating to Bank Markazi's rights under Articles III, IV and V of the Treaty of Amity — Jurisdiction ratione materiae *of the Court — Primacy of the criterion of the nature of the transaction over the criterion of its function — Article I of the Treaty of Amity —Article I as a lodestar for interpretation of the Treaty's provisions.*

1. To my great regret, I had to vote against the first subparagraph of the operative part of the International Court of Justice's Judgment of 30 March 2023 on the merits in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*. I am unable to support the reasoning of the Court in reaching the conclusion that Bank Markazi is not entitled to the treatment provided for by Articles III, IV and V of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (hereinafter "Treaty of Amity") in respect of its investment activities, and that the Court itself therefore lacks jurisdiction *ratione materiae* over that question. The Court thus supports the United States' objection that Bank Markazi is not a "company" within the meaning of those articles.

2. In the opinion of the Court, the investment in and management of the 22 security entitlements purchased by Bank Markazi on the United States financial market during the relevant period (2002-2007) cannot be characterized as commercial activities. According to the Court, "the operations in question were carried out within the framework and for the purposes of [the] principal activity" (Judgment, para. 50) of Bank Markazi, the central bank of Iran, from which they are inseparable, namely the implementation of monetary policies such as maintaining price stability and managing foreign currency reserves — eminently sovereign tasks. Thus, in its view, these operations "are merely a way [for Bank Markazi] of exercising its sovereign function . . . and not commercial activities performed by [it] 'alongside [its] sovereign functions', to use the words of the 2019 Judgment" (*ibid.*). In my view, in characterizing the said operations as sovereign rather than commercial on the basis of the criterion of the purpose pursued by Bank Markazi, the Court preferred to break new ground and disregard the primacy of the criterion of the nature of the transaction, as established in customary international law, as well as the object and purpose of the Treaty of Amity.

3. *The primacy of the criterion of the nature of the transaction*. The United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 establishes the primacy of the criterion of

the nature of the transaction. According to Article 2, paragraph 2, of the Convention, in determining whether a transaction is commercial,

> "reference should be made *primarily* to the nature of the contract or transaction, but its purpose should also be taken into account . . . if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction" (emphasis added).

It would therefore appear that in State practice there is a hierarchy of criteria favouring the nature of the transaction in determining whether it has a commercial character, with priority thus being given to the nature criterion.

4. In its commentary on that provision, the International Law Commission states that the purpose criterion is designed "to provide a supplementary standard for determining, in certain cases, whether a particular contract or transaction is 'commercial' or 'non-commercial'. The 'purpose' test should not therefore be disregarded totally."[1] According to the same commentary, this test was included in Article 2, paragraph 2, of the Convention with a view to protecting "developing countries" by enabling them to enjoy immunity for certain transactions supported by *raison d'État*, such as the procurement of food supplies to feed a population, relieve a famine situation or revitalize a vulnerable area, or the purchase of medication to combat a spreading epidemic[2], which is clearly not the situation in the present case.

5. Moreover, under that provision, the application of the purpose test depends on the practice of the State that is party to the transaction. However, there is no such practice in the present case. In the United States, for the purpose of determining whether a transaction is commercial, the Foreign Sovereign Immunities Act (FSIA) as amended in 1996 refers only to the criterion of the nature of the activity, making no reference to the criterion of purpose[3], as confirmed by the jurisprudence in *Weltover*[4]. The same is true of the legal order in Iran, whose 1972 Monetary and Banking Act provides

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[1] *Yearbook of the International Law Commission*, 1991, Vol. II, Part Two, p. 20, para. 27.

[2] *Ibid*., para. 26.

[3] Section 1603 *(d)* of the FSIA.

[4] *Republic of Argentina* v. *Weltover Inc.*, 504 US 607 (1992), p. 614 (Weltover commercial activity test). See Avi Lew, "*Republic of Argentina* v. *Weltover, Inc.*: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception to Jurisdictional Immunity", *Fordham International Law Journal*, 1993, Vol. 17, Issue 3, pp. 725-775. Further, according to Joseph F. Morrissey,

> "[c]ourts have struggled with the first step of the analysis demanded by this provision: defining what constitutes commercial activity. This struggle seems to be abating, with agreement developing among the courts that activity is commercial for purposes of this exception where its nature is commercial and where it is an activity capable of being undertaken by a private party. Purpose is deemed irrelevant." ("Simplifying the Foreign

that, like all Iranian State companies, Bank Markazi is subject to income tax if it carries out commercial transactions[5].

6. To support its reasoning in the *Jurisdictional Immunities of the State* case[6], the International Court of Justice based itself on the United Nations Convention on Jurisdictional Immunities of States and Their Property despite the fact that it had yet to enter into force[7] — a clear recognition of the customary nature of some of its provisions, including those concerning the criteria for determining the commercial nature of a transaction.

7. In the present case, in its Judgment on preliminary objections rendered on 13 February 2019, the Court, in response to the United States' argument that the treatment of Bank Markazi fell outside its jurisdiction, declared that the objection in question did not possess, in the circumstances of the case, an exclusively preliminary character.

8. A reading of the 2019 Judgment on preliminary objections suggests that this invitation for the Parties to the dispute to present additional factual evidence concerns the nature of Bank Markazi's activities in the United States during the relevant period. According to the 2019 Judgment,

> "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."[8]

Sovereign Immunities Act: If a Sovereign Acts like a Private Party, Treat It like One", *Chicago Journal of International Law*, 2005, Vol. 5, No. 2, pp. 683-684).

According to Jürgen Bröhmer, "[s]ection 1603 *(d)* FSIA defines the term 'commercial activity' as commercial conduct, transactions, or activities and stipulates that the 'commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose'" ("State Immunity and Sovereign Bonds", *in* Anne Peters (ed.), *Immunities in the Age of Global Constitutionalism*, Brill Nijhoff, 2014, p. 189).

[5] Article 24, paragraph *(b)*, of the Monetary and Banking Act.

[6] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 138-139, paras. 89-90.

[7] According to Article 30 of the Convention, that instrument "shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations". However, on the date the present Judgment was rendered, the number of instruments deposited by States had yet to reach that threshold (United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004).

[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.

The Court thus considered that it would be necessary to examine the commercial nature of the activities carried out by Bank Markazi[9].

9. There is little doubt that Bank Markazi's purchase and sale of securities are the same operations as those carried out by any commercial bank. Therefore, based on the nature criterion, they must be regarded as commercial transactions and, as such, enjoy the protection accorded in respect of such operations to companies of the parties to the Treaty of Amity, under the relevant provisions thereof.

10. Neither Party to the dispute was able to provide any additional factual evidence relating to Bank Markazi's commercial activities in the United States during the relevant period at this stage of the proceedings, as the Court had asked them to do. Their inability to do so certainly does not justify the new requirement imposed by the Court that, in order for a transaction carried out by Bank Markazi to be characterized as commercial, it must have no link with a sovereign activity. Indeed, in its Judgment on the merits, the Court affirms:

> "consideration cannot be limited to a transaction — or series of transactions — 'as such', carried out by that entity. That transaction — or series of transactions — must be placed in its context, taking particular account of any links that it may have with the exercise of a sovereign function." (Judgment, para. 51.)

Moreover, the fact that the 2019 Judgment, as the Court is careful to note, did not mention that requirement is not in itself sufficient for this new criterion to be considered "relevant" (*ibid.*) in its examination of the case at the present stage.

11. *Conformity of the criterion of the nature of the transaction with the object and purpose of the Treaty.* The phrase "the object and purpose" of the treaty to be interpreted — codified in Article 31 of the 1969 Vienna Convention on the Law of Treaties — can now be found in the methodology of the Court, which consistently recalls that "customary international law [is] reflected" in that provision[10].

12. The Treaty of Amity is not merely a commercial treaty, a term which does not even appear in its preamble. Its aim is not only to establish closer relations but also to deepen and strengthen the friendship between the contracting parties. In fact, the object and purpose of the Treaty is set out in Article I, which provides that "[t]here shall be firm and enduring peace and sincere friendship between the United States of America and Iran".

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[9] *Ibid.*, p. 39, para. 93; see also *ibid.*, p. 38, para. 91.

[10] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, para. 41.

13. The Court previously addressed the importance of the position of this provision, and its meaning and scope, at the preliminary objections stage of the *Oil Platforms* case[11], at a time when relations between the parties were already very strained. According to the Court,

> "by incorporating into the body of the Treaty the form of words used in Article I, the two States intended to stress that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations and that such a development would in turn reinforce that peace and that friendship. It follows that Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied."[12]

This important provision can thus be considered a lodestar for interpretation of the Treaty of Amity, one that the Court preferred to disregard in the present case, backtracking without good reason on the interpretative guidelines that it had set out in respect of the same Treaty in its Judgment in the *Oil Platforms* case.

14. In the opinion of the Court,

> "[t]he spirit and intent set out in this Article animate and give meaning to the entire Treaty and 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"[13].

This question arises in the present case as regards the possibility of according Bank Markazi the protections owed under the provisions at issue, in respect of its activities in the United States during the relevant period.

15. Bank Markazi's activities indisputably fall within this framework. As the central bank of Iran, it plays a key role in fostering commerce with the United States and, as such, is involved in ensuring that this general objective is achieved. Among other things, Bank Markazi provides foreign exchange for Iranian companies that do business with the United States. There is little doubt that the freezing of its assets by the United States authorities has dealt a severe blow to commerce with that country, especially considering that these assets represent approximately US$2 billion, the unblocking of which is the principal object of Iran's Application instituting proceedings before the Court.

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[11] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28, and p. 820, para. 52.

[12] *Ibid*., p. 814, para. 28.

[13] *Ibid*., p. 820, para. 52.

16. I regret that the approach that the Court itself set out in 1996 was not followed in the present case, making any resumption of commercial relations between the Parties all the more difficult.

(Signed) Djamchid MOMTAZ.