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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Monday 8 October 2018, at 3 p.m., at the Peace Palace,

President Yusuf presiding,

***in the case concerning* Certain Iranian Assets**
(Islamic Republic of Iran *v.* United States of America)

VERBATIM RECORD

ANNÉE 2018

Audience publique

tenue le lundi 8 octobre 2018, à 15 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***en l'affaire relative à* Certains actifs iraniens**
(République islamique d'Iran c. Etats-Unis d'Amérique)

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Gaja
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Judges *ad hoc*	Brower
		Momtaz
	Registrar	Couvreur

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
M. Gaja
MM. Bhandari
Robinson
Crawford
Gevorgian
Salam
Iwasawa, juges
MM. Brower
Momtaz, juges *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is now open. The Court meets this afternoon to hear the remainder of the first round of oral argument of the United States of America. I will now give the floor to Mr. Daley. You have the floor, Sir.

Mr. DALEY:

US PRELIMINARY OBJECTIONS UNDER ARTICLE XX (1) OF THE TREATY OF AMITY

I. Introduction

1. Mr. President, Members of the Court, good afternoon. It is an honour to appear before you on behalf of the United States of America.

2. I will be addressing you today on the United States' preliminary objections under Article XX (1) *(c)* and (1) *(d)*, in response to Iran's claims concerning Executive Order 13599. President Obama issued that Order on 5 February 2012. It froze the property and interests in property of Iran and Iranian financial institutions to the extent they were subject to United States' jurisdiction.

3. It was issued in order to counter what the President characterized as deficiencies in Iran's anti-money laundering régime, the risks that Iran posed to the international financial system, and deceptive practices of Iranian banks to conceal illicit transactions.

4. My submissions will be in three parts.

5. In the *first* part, I will discuss the jurisdictional nature of the United States objections under Article XX. We are mindful that the Court heard argument in the *Alleged Violations of the Treaty of Amity* case as to whether Article XX objections are jurisdictional, albeit in a fundamentally distinct procedural setting than we face now. The Court's Order last Wednesday did not decide the question or foreclose the point in this case, but rather left the door open for it to be considered now.

6. In the *second* part of my submissions I will turn to the *substance of our objections* — the interpretation of the exceptions set out in Article XX, paragraphs 1 *(c)* and 1 *(d)*, and the application of those exceptions to Executive Order 13599.

7. In the *third* part of my submissions I will explain that the United States' Article XX, paragraph 1, objections are exclusively preliminary in character. The Court has all the facts before it necessary to decide the objections, and to do so would require no prejudgment of the merits of Iran's claims.

II. The United States' objections are jurisdictional in nature

8. That is all I will say by way of general introduction. Mr. President and Members of the Court, I will now turn the first main heading of my submissions: the jurisdictional nature of our objections.

A. Articles XX (1) and XXI (2) read in tandem confirm the jurisdictional and *preliminary character of Article XX (1) objections*

9. I begin with an examination of the ordinary meaning of Article XX, paragraph 1, read together with the Treaty's compromissory clause, Article XXI, paragraph 2. The *chapeau* of Article XX, paragraph 1, states that the Treaty, "shall not preclude the application of" measures that fall within certain listed categories.

10. As Ms Kimball discussed this morning, the Sullivan Study's commentary on the compromissory clause itself makes clear that the United States Senate understood these areas to be specifically exempt from the purview of the Friendship, Commerce and Navigation treaties.

11. Where Article XX, paragraph 1, is invoked with respect to a challenged measure, the Court need only decide whether one or more of the Article's categories applies. If the Court's answer is yes — the measure is covered by Article XX, paragraph 1 — then no claims may be predicated on that measure. The Treaty is simply not relevant to the measure any longer.

12. As a consequence, there can be no further dispute under Article XXI, paragraph 2, the compromissory clause, about the "interpretation or application" of any other Treaty provisions with respect to that measure.

13. Iran has no answer to this basic point. Instead, it relies on a dictionary definition of "preclude" as "to make impossible" and leaps from there to the conclusion that Article XX, paragraph 1, can only ever provide a defence on the merits[1].

[1] WSI, para. 6.4.

14. Iran claims that if the Treaty parties intended the provision's listed exceptions to operate as carve-outs to the scope of the Treaty, they would have used the phrase "shall not *apply*" instead of "shall not *preclude*", and would have linked the Article directly to the compromissory clause in order to indicate its jurisdictional character[2].

15. But Iran cannot avoid the basic fact that, whatever the precise verb chosen, the impact of Article XX, paragraph 1, where applicable, is to eradicate any further dispute about the interpretation or application of any other Treaty article with respect to the measure in question. There is nothing left for the Court to *decide* as to that measure. And this, we say, is what gives the provision its jurisdictional character.

B. The Court's jurisprudence does not prevent consideration of *Article XX (1) as a question of jurisdiction*

16. This brings me to the Court's jurisprudence. The Court will no doubt recall the submissions Ms Grosh made in August on this issue in the *Alleged Violations* case. I will elaborate on and develop these submissions, although I will try to do so briefly. I have three points to make.

17. Firstly, when the Court considered the exceptions clause of the US-Nicaragua treaty in the *Nicaragua* case, it was considering a narrow point: whether the Court had competence to consider the scope of the exceptions clause in that treaty as it applied to the measures in question, or instead whether, as with the General Agreement on Tariffs and Trade, the only question was whether the United States *considered* the matter to relate to essential security[3]. Moreover, it bears noting that the Court was doing this during the merits phase.

18. In this respect, the Court will recall that the sole issue with respect to the Treaty of Amity claims at the preliminary objection phase of *that* case was whether Nicaragua was permitted to assert the treaty as a basis of jurisdiction in its Memorial, even though it had never raised the treaty in its Application[4]. The Article XX question that we face today had not been raised at any point. So

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[2] WSI, paras. 6.8-6.9.

[3] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 116, para. 222.

[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 426, para. 78.

in the merits decision, the Court's statements concerning whether the clause had jurisdictional implications was not strictly necessary to the judgment.

19. So that was my first point. The second point is that, like in *Nicaragua*, in *Oil Platforms*, the United States did not invoke Article XX, paragraph 1, at the preliminary objections phase of the case, but focused instead on broader treaty objections. The Court's ruling should be viewed in that context.

20. Moreover, in *Oil Platforms*, the Court refrained from making any sweeping statement that the provision could, in principle, only ever be treated as a defence on the merits.

21. And to be sure, the Court concluded that it would defer consideration of the clause to the merits phase "in the present case". But as we have stressed in our written pleadings in this case, and in our submissions in the *Alleged Violations* case, we do not understand the Court as an analytical matter to have foreclosed consideration of the issue as a jurisdictional one. As we understood it to be reaching a conclusion for that case alone, given its posture.

22. This brings me to my third point, which is this Court's ruling last week in the *Alleged Violations* case. That ruling was directed at the question of whether there was prima facie jurisdiction. It was not a definitive decision as to jurisdiction as is required in the present proceedings.

23. Paragraph 41 of the Court's Order does nothing more than repeat the Court's observations in the *Oil Platforms* case, including that "Article XX, paragraph 1, subparagraph *(d)* did not 'restrict its jurisdiction in that case'"[5]. Again, we would stress the phrase "in that case". This paragraph simply repeats what was said in *Oil Platforms*. It did not, in our view, close the door on the question of whether Article XX, paragraph 1, has jurisdictional implications.

24. The Court then observes in paragraph 42 of the Order that Article XX, paragraph 1, contains a number of provisions that allow for the application of measures notwithstanding any other provision of the Treaty. The Court goes on to state, "[w]hether and to what extent those exceptions have lawfully been relied on by the Respondent in the present case is a matter which is subject to judicial examination".

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[5] *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 (hereinafter, *"Alleged Violations"*), para. 41.

25. On this point, we simply observe that the question facing the Court is *limited* to whether the exception is appropriately invoked. Does the exception apply, or does it not apply? Put another way, does the Court have jurisdiction over the claims predicated on the measure, or does the measure come within the exception and so fall outside the Treaty's reach?

26. It is in this respect we say that Article XX, paragraph 1, should be understood as jurisdictional in nature. And we do not understand the Court's provisional measures decision last week to reach a final conclusion on the issue.

27. So to sum up, Mr. President, Members of the Court, on my first argument: objections under Article XX, paragraph 1, are appropriately considered jurisdictional in nature and should be treated as such in this case.

28. Let me turn next to the substance of the United States' objections. My remarks here will be summary in nature, as our arguments are fully set out in our written pleading[6] and Iran has made no response to them.

III. Executive Order 13599 is outside the scope of the Treaty because it is a measure regulating traffic in arms and is necessary to protect essential US security interests

A. Article XX (1) *(c)* applies to Executive Order 13599

29. I will begin with our objection under Article XX, paragraph 1 *(c)*. This clause provides an exclusion for any measures "regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment".

30. The inquiry for the Court in applying this exception is straightforward: as a factual matter, is Executive Order 13599 a measure "regulating the . . . traffic in" the listed materials? The United States' case is that the answer must be yes.

31. As is fully set out in our brief, Executive Order 13599 was "imposed to address Iran's evasion of US and international sanctions relating to its development of ballistic missiles and its provision of arms and other support to militant and terrorist groups"[7]. The blocking measures set

[6] POUS, Chap. 7, Sect. B.

[7] POUS, para. 7.10. See also *ibid.*, Chap. 3.

out in Executive Order 13599 form part of a *regulatory scheme* — encompassing US and international sanctions — designed to address Iranian arms trafficking, its ballistic missile programme and its support for terrorism.

32. The Executive Order thus works in conjunction with other proliferation- and terrorism-related measures to deter — and thus to "regulate" within the meaning of the Treaty — Iranian pursuit of ballistic missiles, its traffic in such missiles or their component parts, its traffic in arms and supplies to terrorist and militant organizations abroad, and traffic in arms and other military supplies to sanctioned entities within the Iranian military establishment[8].

33. Let me just make a few points to elaborate further.

34. Behind tab 24 of your judges' folders, you will find the US Treasury Department's November 2011 "Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern". This was a finding by the Treasury Department's Financial Crimes Enforcement Network, or FinCEN, published in the US Federal Register just a few months before Executive Order 13599 was issued. It begins by explaining the factors that must, under US statutory law, be evaluated in order to sustain such a finding. It then analyses the risks posed by Iran. The finding observes:

> "In recent years, many international financial institutions have severed ties with Iranian banks and entities because of a growing body of public information about their illicit and deceptive conduct designed to facilitate the Iranian government's support for terrorism and its pursuit of nuclear and ballistic missile capabilities. This illicit conduct by Iranian banks and companies has been highlighted in a series of United Nations Security Council ('UN Security Council') resolutions related to Iranian proliferation sensitive activities."[9]

35. The finding then goes on to detail Iran's conduct, including its support for terrorism — with reference to specific examples, including provision of weapons, funding, logistics and training to named terrorist groups — and its "use of government agencies and state-owned or controlled financial institutions" to facilitate its "nuclear and ballistic missile ambitions"[10].

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[8] See also POUS, para. 7.19.

[9] POUS, Ann. 152: 76 Fed. Reg., p. 72757 (Sect. "B. Iran").

[10] POUS, Ann. 152: 76 Fed. Reg., pp. 72758-72759.

36. Finally, the finding also discusses the "Iranian Government's Use of Deceptive Financial Practices" in order to evade existing sanctions aimed at addressing its illicit activities[11].

37. Mr. President, Members of the Court, these findings concerning the threats posed by Iran's conduct formed an integral part of the foundation for Executive Order 13599, which was issued three months later. As to the modality of "regulating" this conduct giving rise to the identified threats — an asset freeze — this type of measure has been widely recognized and even endorsed by the Security Council as an "important tool" in efforts to counter terrorist activities. We cited a number of Security Council resolutions on this point in our brief[12].

B. Article XX (1) *(d)* applies to Executive Order 13599

38. I turn next to the US objection under Article XX, paragraph 1 *(d)*, the essential security clause and I have three points to make.

1. The United States has essential security interests in preventing and deterring terrorist attacks and preventing the advancement of Iran's ballistic missile programme

39. Turning to the first point, the United States plainly has essential security interests in preventing and deterring terrorist attacks, particularly when those attacks have been and may again be directed against its own nationals and interests. Likewise, the United States has a clear essential security interest in preventing the advancement of Iran's ballistic missile programme. The essential security interests that the United States has identified should not be controversial.

40. With regard to terrorism, the Security Council has clearly and repeatedly condemned terrorism as a threat to international peace and security[13]. And you heard this morning about the US nationals who have been killed or wounded in terrorist attacks and about Iran's role in sponsoring the groups carrying out those attacks.

41. With respect to ballistic missiles, the Security Council has also recognized the danger of allowing Iran to pursue ballistic missile capabilities[14]. For its part, the United States has made clear

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[11] POUS, Ann. 152: 76 Fed. Reg., p. 72760.

[12] POUS, fn. 275.

[13] POUS, Ann. 81 (S.C. Res. 1373); other S.C. resolutions cited in POUS, n. 297.

[14] POUS, Ann. 122 (S.C. Res. 2231), para. 7 and Ann. B, para. 3.

its view that Iran's ballistic missile programme "poses [a] fundamental threat[] to the region and beyond"[15].

2. Executive Order 13599 is necessary to protect the United States' essential security interests

42. This brings me to my second point, which is that the Executive Order was necessary to protecting the "essential security" interests I have just identified. The United States established the necessity of the Executive Order in its written submissions, and Iran has not engaged with any of those arguments[16]. The Executive Order was motivated by the United States' conclusion that the entire Iranian banking sector, including the Central Bank of Iran, posed terrorist financing, proliferation financing and money-laundering risks for the global financial system[17].

43. On the screen now are the United States Congress's conclusions in the 2012 National Defense Authorization Act, which informed and provided authority for Executive Order 13599, and you can see there the same motivations I have just described. I have already shown you the FinCEN finding concerning the threats posed by Iran, which similarly formed part of the basis for the Executive Order. Further sources are cited in our brief[18]. As I stated at the outset of my submissions, President Obama expressly included these concerns in the text of the Executive Order.

44. Mr. President, Members of the Court, the United States was not alone in its assessment of the risks posed by Iran. The Security Council in 2010 warned States to exercise vigilance over transactions involving Iranian banks, expressly including the Central Bank of Iran, so as to prevent transactions contributing to the development of weapon delivery systems[19].

45. The United States conclusions were also in accord with the findings of the multilateral Financial Action Task Force, or FATF.

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[15] POUS, Ann. 212, Statement of Thomas A. Shannon to the Senate Foreign Relations Committee.

[16] POUS, Chap. 7, Sect. C.

[17] POUS, para. 7.31, quoting MI, Ann. 17 (2012 NDAA, Sect. 1245 *(a)*).

[18] POUS, paras. 7.11-7.18, 7.31-7.34.

[19] POUS, Ann. 110: S/RES/1929 (2010) p. 3 ("*recalling* in particular the need to exercise vigilance over transactions involving Iranian banks, including the Central Bank of Iran, so as to prevent such transactions contributing to . . . the development of nuclear weapon delivery systems").

46. For example, in October 2011, the FATF stated with "renewed urgency" that it was "particularly and exceptionally concerned about Iran's failure to address the risk of terrorist financing and the serious threat this poses to the integrity of the international financial system"[20]. Iran was one of only two countries — the other being North Korea — on FATF's "call to action" list of countries against which the FATF advised States to take measures[21].

47. Finally, it bears repeating that Executive Order 13599 was not the United States first effort to address the security threat that Iran's misconduct posed to the United States. As we explained in our brief, the Order was adopted only in the wake of Iran's persistent efforts to evade more targeted sanctions[22]. The Order might have been unnecessary if not for Iran's conduct in the face of these earlier measures. And that is another reason why we say the necessity threshold has easily been met.

3. The invoking State is due substantial deference under the essential security clause

48. With that said I would like to turn to my third point, which is that the Court should accord substantial deference to the United States essential security determination. Here I would refer the Court to its 2008 Judgment in *Djibouti* v. *France*, which characterized the essential security clause of the Treaty of Amity in this case as providing, "wide discretion" to the invoking State[23]. You can see the relevant excerpt on the screen.

49. The negotiating history and other historical sources on essential security clauses in US Friendship, Commerce and Navigation treaties similarly support a wide margin of deference to the judgment of the State invoking the clause.

50. This is reflected in the negotiating history of this very Treaty. In response to a proposed Iranian amendment to Article II, paragraph 1, of this Treaty to provide the Parties latitude with

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[20] POUS, Ann. 222, FATF Public Statement, 28 Oct. 2011.

[21] POUS, Ann. 223, FATF list of high-risk and non-co-operative jurisdictions.

[22] POUS, para. 7.35.

[23] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France) Judgment, I.C.J. Reports 2008*, p. 229, para. 145, emphasis added:

> ("[W]hile it is correct, as France claims, that the terms of Article 2 [of the treaty at issue in the case] provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties [citations omitted]; *for the competence of the Court in the face of provisions giving wide discretion*, see [citations to *Nicaragua* Merits Judgment, para. 222, *Oil Platforms* Merits Judgment, para. 43].").

respect to internal safety regulations, the State Department noted that "[s]ecurity interests" were already "provided for in [Article] XX-1-d," and that the "Treaty fully recognizes [the] *paramount right* [of the] state [to] take measures to protect itself and public safety"[24].

51. This same principle is in the negotiating history of other, contemporaneous US Friendship, Commerce and Navigation treaties. You will recall that the Treaty of Amity was one of a series that the United States was negotiating all around the same time. We have put into the record examples from the treaties negotiated with many countries[25]. In the interest of time, I will highlight just one example.

52. In treaty negotiations with Germany carried out in the same year as the start of the negotiations with Iran, the United States explained that the essential security clause's "language had been drafted in such a manner as to leave a wide area of discretion to both parties in order to allow for necessary action over an indefinite future".

53. The United States stressed that the words "necessary" and "essential" had been "added to emphasize that the reservation was not to be invoked in a *frivolous* manner"[26].

54. In response to a question from the German side as to whether the clause was justiciable, the United States responded that, "national as well as international courts would probably give *very heavy weight to arguments presented by the government invoking the reservation . . .*"[27].

55. I will not belabour the point further now, but suffice to say that the record is replete with contemporaneous evidence of the intended latitude to be granted to the invoking State under the essential security clauses in FCN treaties like this one.

IV. The United States objections under Article XX (1) are exclusively preliminary in character

56. Mr. President, Members of the Court, that is what I have to say about the substance of our objections. I will now turn to the third and final part of my submissions and demonstrate that

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[24] Telegram No. 1561 from US Dept. of State to US Embassy Tehran (15 Feb. 1955) (POUS, Ann. 215); emphasis added.

[25] See POUS, paras.7.28-7.29.

[26] Dispatch No. 2254 from US High Commission, Bonn to US Dept. of State (17 Feb. 1954) (POUS, Ann. 220); emphasis added.

[27] *Ibid.*, emphasis added.

our objections under Article XX, paragraph 1, are exclusively preliminary and therefore are ripe for decision at this stage of the proceedings. I have two points to make.

57. The first point is a short one, just to highlight an argument in our written submissions[28] that Iran did not respond to in its Observations.

58. Mr. President and Members of the Court, while the United States believes that its Article XX objections are clearly jurisdictional in nature, it is not actually necessary that the objections be jurisdictional in order for the Court to decide them at this stage of the case.

59. Article 79, paragraph 1, of the Rules of Court refers to the submission of "[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits".

60. This Court has made clear that under Article 79, what matters is that the objections have an exclusively preliminary character, in that they are not closely interconnected with the merits. The Court clarified this point in its *Lockerbie* Preliminary Objections Judgment in 1998[29].

61. That was my first point. The second point is that the United States objections as to Executive Order 13599 are "exclusively preliminary" and should be decided now.

62. Here I will begin with *Oil Platforms*. It is notable that in its Merits Judgment, when the Court did examine the essential security objection of the United States under Article XX, paragraph 1 *(d)*, it did so before it turned to any questions on the merits of Iran's claims. I stress this just for the proposition that Article XX objections are preliminary in nature: they can be addressed without any prior consideration of the merits.

63. The Court in *Oil Platforms* recognized that it proceeded in the opposite order in the *Nicaragua* case. In so recognizing, the Court made clear that its method in the *Nicaragua* case was not, "dictated by the economy of the Treaty; it was rather an instance of the Court's 'freedom to select the ground upon which it will base its judgment'"[30].

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[28] POUS, para. 7.9.

[29] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 26-27, paras. 46-48.

[30] *Oil Platforms (Islamic Republic of Iran* v. *United States), Judgment, I.C.J. Reports 2003*, p. 180, para. 37.

64. Mr. President, Members of the Court, the Article XX objections in this case are not just preliminary in character, but exclusively so. They are entirely severable from the merits, and therefore ripe for decision here at the preliminary objections phase, prior to *any* consideration of the merits of Iran's claims.

65. Let us examine what questions the Court would need to address in considering the United States objections.

66. For the objection under Article XX, paragraph 1 *(c)*, the only question for the Court is whether the measure in question, the Executive Order, is a measure "regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment". If the answer to that question is yes, then nothing else in the Treaty, nothing, precludes the United States from applying that measure.

67. The Court need not examine, for example, if the article of the treaty concerning freedom of commerce is engaged. Even if the Executive Order would otherwise run up against the freedom of commerce provision, it is of no consequence because Article XX, paragraph 1 *(c)*, would remove the measure from the Treaty's scope. The only facts the Court needs to consider are those relevant to whether the Executive Order constitutes a measure regulating traffic in arms and so forth. Those facts are in no way interconnected with the facts relevant to applying the freedom of commerce provision.

68. The same analysis applies with respect to the essential security provision. That is also not a determination that requires any additional briefing or decisions as to the merits of the case. The only question is if the Executive Order was necessary to the United States essential security interests.

69. If the answer to that question is yes, then nothing else in the treaty precludes that measure. And therefore, there is no need to examine if the Executive Order breaches other provisions of the treaty.

70. Mr. President, Members of the Court, I would just contrast this case with the Court's decision in the *Lockerbie* Judgment. There, the Court held in the specific circumstances before it that, if it "were to rule on [the UK's] objection, it would . . . inevitably be ruling on the merits",

given that the "objection raised and the merits of the case were 'closely interconnected'"[31]. But the same cannot be said here. As I hope was clear when I took you to the substance of our Article XX objections, they are *not* "closely interconnected" with the merits of Iran's claims. They are entirely separate.

71. Iran itself has made little effort to argue otherwise on this point.

72. In the single paragraph of its brief that Iran devotes to contesting our Article XX objections' exclusively preliminary character, Iran simply cites to the *Nicaragua* and *Oil Platforms* decisions, which addressed the exceptions article at the merits phase. Based on those citations, Iran argues that the interpretation and application of Article XX, paragraph 1, "does not possess an exclusively preliminary character but is inherently tied to the merits"[32].

73. And that is all. There is no further analysis.

74. But as I showed you a few moments ago, the Court in *Oil Platforms* was able to consider the invoked Article XX exception *before* evaluating the merits of the challenged claim. And perhaps most significantly, in the present case, unlike in *Lockerbie*, there is no intrinsic link between the Article XX, paragraph 1, objections and the merits of the claims. There is no element that would benefit from merits briefings; the objections stand on their own. And for this reason, we submit the Court can and should decide the objections at this stage of the case.

V. Conclusion

75. Mr. President, Members of the Court, this brings me to the end of my submissions.

76. I would ask that you please call upon Professor Boisson de Chazournes to continue the United States first round oral submissions.

The PRESIDENT: I thank Mr. Daley. J'invite maintenant Mme la professeure Boisson de Chazournes à prendre la parole. Vous avez la parole, Madame.

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[31] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 29, para. 50.

[32] WSI, para. 6.7.

Mme BOISSON DE CHAZOURNES :

LA COUR N'EST PAS COMPÉTENTE EN VERTU DU PARAGRAPHE 2 DE L'ARTICLE XXI DU TRAITÉ D'AMITIÉ POUR STATUER SUR LES DEMANDES DE L'IRAN RELATIVES AUX IMMUNITÉS SOUVERAINES

1. Monsieur le président, Madame la vice-présidente, Messieurs les juges, c'est pour moi un grand honneur que de me présenter devant votre Cour au nom des Etats-Unis. Il me revient aujourd'hui de développer plus avant l'objection des Etats-Unis à la compétence de la Cour, en ce qui concerne les demandes iraniennes relatives aux immunités souveraines[33]. Au stade des exceptions préliminaires, il doit être rappelé, ainsi que votre juridiction l'a indiqué dans sa décision en l'affaire *Guinée équatoriale c. France*, que la Cour ne conduit pas une analyse provisoire ou *prima facie*. Du fait du caractère exclusivement préliminaire de l'exception dont je vais parler, la Cour peut d'ores et déjà rendre une décision finale sur cet aspect de l'affaire.

2. L'Iran fait grief aux Etats-Unis de lui avoir indûment refusé, ainsi qu'à sa banque centrale et à d'autres entités étatiques iraniennes, la protection des immunités dans le cadre de poursuites intentées par des victimes américaines du terrorisme.

3. L'Iran avance que le traité d'amitié de 1955 confère à la Cour compétence pour examiner si les diverses procédures judiciaires aux Etats-Unis, dont celles relatives à l'affaire *Peterson*, et les divers textes juridiques émanant des pouvoirs exécutif et législatif dans le cadre de la lutte contre le terrorisme, constituent des violations du droit international coutumier relatif aux immunités souveraines.

4. La revendication de l'Iran est erronée. Le traité d'amitié ne fournit pas de base juridictionnelle pour ce type de prétentions. Il s'agit en effet d'un traité de commerce et de droits consulaires, principalement destiné à faciliter le commerce et les investissements privés entre les deux pays. Cet instrument n'impose aucune obligation aux Parties en matière de respect des immunités souveraines, en matière de respect des immunités de leurs banques centrales, en matière de respect des immunités d'autres entités étatiques, ou encore en matière de respect des immunités de leurs biens. Les demandes iraniennes relatives aux immunités souveraines n'entrent tout

[33] *Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique), Preliminary Objections submitted by the United States of America*, 1 May 2017 (hereinafter «POUS»), Chap. 8.

simplement pas dans le champ d'application *ratione materiae* du traité. La Cour n'a donc pas compétence sur la base de la clause compromissoire par laquelle elle est saisie pour se prononcer sur les questions d'immunités soulevées par l'Iran. Aussi ces demandes doivent-elles être rejetées dès ce stade de la procédure.

5. Madame et Messieurs les juges, je procéderai en trois parties. Je démontrerai tout d'abord que le traité d'amitié ne peut en aucun cas être considéré comme une source de protection des immunités souveraines, tant pour l'Iran que pour toute entité publique iranienne présumée être chargée d'exercer des fonctions souveraines. L'application des règles d'interprétation à chacune des dispositions du traité ne laisse aucun doute à ce sujet. Dans un second temps, j'aborderai certaines des conséquences fâcheuses qu'entraînerait l'acceptation pure et simple des arguments avancés par l'Iran. Enfin, je traiterai des efforts peu convaincants déployés par l'Iran pour se départir de ses anciennes positions ainsi que de celles des entités étatiques iraniennes et qui vont à l'encontre de ce que l'Iran avance aujourd'hui.

I. LE TRAITÉ D'AMITIÉ, DE COMMERCE ET DE DROITS CONSULAIRES NE DONNE PAS COMPÉTENCE À LA COUR POUR STATUER SUR LES DEMANDES DE L'IRAN RELATIVES AUX IMMUNITÉS SOUVERAINES

6. Monsieur le président, je tiens avant toute chose à mettre au clair le fait que, contrairement à ce que l'Iran allègue, les Etats-Unis n'ont absolument pas concédé que les mesures américaines violent les droits de l'Iran et des entités étatiques iraniennes relatifs à leurs immunités[34]. La question de savoir si, en vertu du droit international coutumier, l'Iran ou une quelconque autre entité iranienne, a le droit d'invoquer une immunité dans les procédures judiciaires engagées devant les tribunaux américains ne se pose pas au stade des exceptions préliminaires. Il n'est donc ni nécessaire ni approprié pour les Etats-Unis d'exprimer une position à cet égard à ce stade de la procédure. C'est d'autant plus le cas que les Etats-Unis considèrent que la Cour n'a pas compétence pour trancher de telles questions.

7. La seule question à laquelle la Cour se doit de répondre à ce stade est de savoir si les prétentions iraniennes «relèvent ou non» des dispositions du traité. Autrement dit, les dispositions du traité contiennent-elles des obligations relatives à la protection des immunités ?

[34] WSI, par. 3.4.

8. La Cour doit parvenir à une conclusion définitive en se fondant sur l'interprétation des dispositions du traité. Aussi la formulation iranienne «at least capable of» pour tenter d'établir la compétence de la Cour ne peut pas être retenue.

9. Venons-en au traité d'amitié et à l'objet et au but de celui-ci.

A. Le traité d'amitié vise à faciliter le commerce et l'investissement *et non à protéger les prérogatives souveraines*

10. Madame et Messieurs les juges, le traité d'amitié est d'ordre commercial. Il ne contient aucune disposition visant à accorder une immunité aux entités étatiques engagées dans des activités souveraines. A l'exception d'une seule disposition interdisant aux entreprises publiques actives sur le marché de revendiquer une immunité en matière de poursuites judiciaires — disposition sur laquelle je reviendrai plus tard —, le traité d'amitié ne contient aucune disposition traitant des immunités de l'Etat ou d'autres entités étatiques. Les travaux préparatoires du traité ne démontrent aucune intention des parties de voir cet instrument couvrir les immunités souveraines. L'Iran accepte cet état de fait. Il admet que le traité ne vise pas, et n'a pas pour but, de codifier une quelconque protection des immunités. Mais cela ne l'empêche pas toutefois d'affirmer que diverses dispositions du traité «by reference to their own terms, *may* protect rights to immunities that have their *source* in customary international law (and U.S. law)»[35]. Donc selon l'Iran, le droit des immunités tel qu'il résulte du droit international coutumier et du droit américain serait incorporé dans le traité par le biais de diverses dispositions conventionnelles pourtant complètement silencieuses sur le sujet. Cela ne peut pas être le cas. Le silence du traité sur ces questions signifie tout simplement qu'il ne porte pas sur la protection des immunités.

11. Comme l'a souligné Mme Grosh ce matin, l'objet du traité est selon les termes de son préambule d'«encouraging mutually beneficial trade and investments and closer economic intercourse generally» ainsi que de «regulating consular relations» entre les deux Etats. Ce traité fait partie d'un ensemble de traités d'amitié, de commerce et de navigation négociés par les Etats-Unis dans les années 1950 dans le but de satisfaire une directive du Congrès des Etats-Unis incorporée dans le *Mutual Security Act* et qui demandait au président d'«accelerate a program of

[35] WSI, par. 5.12.

negotiating treaties for commerce and trade … which shall include provisions to encourage and facilitate the flow of private investment to nations participating in programs under this act»[36]. Ni le libellé des dispositions du traité ni son objet et son but ne vont dans le sens des demandes de l'Iran.

12. Ceci est confirmé par les écrits de Vernon Setser, ancien chef de la direction des traités commerciaux du département d'Etat, que vous trouverez, tout comme le *Mutual Security Act* aux onglets n[os] 25 et 26 du dossier des juges. Dans ces écrits sur lesquels l'Iran s'appuie pour interpréter le traité, M. Setser dit que les traités d'amitié, de commerce et de navigation étaient destinés à constituer un «body of assurances for the support of private enterprise»[37]. Les droits que ces traités cherchaient à protéger étaient les droits des ressortissants et sociétés américains, principalement des sociétés privées. Les traités étaient censés leur permettre l'exercice d'activités commerciales avec et dans les territoires des autres parties contractantes. En échange, les ressortissants et sociétés des autres parties contractantes recevaient les mêmes assurances et protections aux Etats-Unis. C'est dans ce contexte que l'on doit appréhender l'interdiction faite aux entreprises publiques ou sous contrôle public et actives sur le marché de revendiquer une immunité. L'inclusion de cette interdiction dans le traité faisait suite à une période de nationalisation généralisée d'entreprises privées. Afin de promouvoir une concurrence loyale et faire en sorte que ces entreprises publiques ou sous contrôle public soient soumises aux mêmes charges et responsabilités que les entreprises privées, il s'était avéré nécessaire d'intégrer une telle interdiction dans les traités.

13. Monsieur le président, Madame et Messieurs de la Cour, les «rights to immunities» que l'Iran invoque dans cette affaire n'ont rien à voir avec l'objet et le but du traité que je viens de présenter. Ainsi que la Cour l'a récemment rappelé dans l'affaire *Guinée équatoriale c. France*, «les règles relatives à l'immunité de l'Etat procèdent du principe de l'égalité souveraine des Etats»[38]. Les règles relatives à l'immunité régissent la question de savoir quand les tribunaux d'un

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[36] Statement of Thorsten V. Kalijarvi, Department of State, *Hearing on Commercial Treaties with Iran, Nicaragua, and The Netherlands* (POUS, annexe 7 ; dossier des juges, onglet n° 25).

[37] Vernon G. Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties* (1961), 55 AM. SOC. INT'L L. PROC. 89, 90 (POUS, annexe 229 ; dossier des juges, onglet n° 26).

[38] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt du 6 juin 2018*, par. 93.

Etat peuvent exercer leur compétence à l'égard d'un autre Etat ou sur ses biens. Selon la doctrine de l'immunité restreinte en droit international, la protection des immunités est réservée aux seuls actes de caractère public, les actes *jure imperii*, c'est-à-dire des actes ayant trait à l'exercice du pouvoir souverain. L'Iran tente de contourner cet obstacle mais sans succès.

14. Les sociétés privées ne jouissent en effet d'aucune immunité souveraine. Leurs actions n'ont pas trait à l'exercice de prérogatives de puissance publique ou de pouvoirs souverains. Les droits aux immunités sont des droits qui existent au profit de l'Etat et non d'entités privées. Lorsque des entités publiques juridiquement distinctes de l'Etat revendiquent une immunité, c'est que ces entités exercent des fonctions ou une autorité souveraines. Le droit à l'immunité est un droit qui découle de la souveraineté de l'Etat et qui lui appartient. Il n'est donc absolument pas concevable que les dispositions du traité qui, je le rappelle, portent sur les droits des ressortissants et des sociétés, incorporent des droits dont seuls les souverains jouissent. Il n'est pas non plus envisageable que les dispositions du traité qui ont trait aux activités privées et commerciales non souveraines prévoient des protections pour des activités souveraines.

15. Par ailleurs, compte tenu de la diversité des vues qui existaient sur les questions d'immunité des Etats dans les années 1950, y compris en ce qui concerne la façon dont ces règles s'appliquaient aux entités distinctes de l'Etat, dans le cas où elles s'appliquaient à celles-ci, il est tout simplement inconcevable que les Parties aient eu l'intention que le traité d'amitié incorpore «en silence» — c'est-à-dire en l'absence de mention explicite — des règles concernant les immunités des Etats. Et pourtant, l'Iran prétend que l'inclusion par les parties de l'interdiction de revendiquer une immunité au paragraphe 4 de l'article XI du traité confirme leur intention d'incorporer dans le traité la doctrine de l'immunité restreinte, sans disposition explicite à cet effet, je le rappelle. L'Iran invoque pour ce faire la lettre du jurisconsulte Tate de 1952, par laquelle les Etats-Unis ont adopté la doctrine de l'immunité restreinte[39]. Mais là encore, l'Iran se trompe. Qui plus est, la seule source citée par l'Iran dans ses écritures contredit cette revendication. L'étude Sullivan, qui se trouve à l'onglet n° 27 du dossier des juges, souligne expressément l'objet limité des dispositions de renonciation aux immunités des traités d'amitié, de commerce et de navigation.

[39] WSI, par. 5.46.

Ces dispositions, dit l'étude Sullivan, ont «no direct connection with the issuance of the Tate letter» et ne sont pas «concerned with the private acts of the sovereign as such but with the acts of State entities that are in competition with enterprises to which treaty rights are accorded»[40].

16. Dans l'affaire *Guinée équatoriale c. France*, la Cour de céans a conclu que le différend relatif aux immunités des Etats et de leurs agents n'avait pas trait à l'interprétation ou l'application de la convention de Palerme, en notant que cela était «sans préjudice de l'applicabilité de ces règles»[41].

17. Permettez-moi d'insister sur l'importance et la pertinence de cet arrêt pour l'objection à la compétence dont je traite. La Guinée équatoriale cherchait à s'appuyer sur l'une des dispositions de la convention de Palerme — le paragraphe 1 de l'article 4 — pour incorporer les règles du droit international coutumier relatives aux immunités des Etats et de leurs agents. Selon cette disposition, les Etats parties doivent exécuter leurs obligations conformément aux principes de l'égalité souveraine. Ainsi, et contrairement au traité d'amitié qui nous concerne dans cette affaire, une des dispositions de la convention de Palerme abordait expressément le principe de l'égalité souveraine. Elle présentait de ce fait certains liens avec la question des immunités souveraines, ce qui la différencie du traité d'amitié de 1955. Pourtant, votre Cour rejeta la demande de la Guinée équatoriale, considérant que cette disposition n'incorporait pas les règles du droit international coutumier relatives aux immunités des Etats. La Cour a estimé que le paragraphe 1 de l'article 4 de la convention de Palerme ne pouvait être interprété comme imposant «par sa référence à l'égalité souveraine, l'obligation de se comporter d'une manière compatible avec les nombreuses règles de droit international qui protègent la souveraineté en général, ainsi qu'avec toutes les conditions dont ces règles sont assorties»[42]. La disposition en question a fait l'objet d'une interprétation rigoureuse[43] dans son contexte, à la lumière de l'objet et du but de la convention et

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[40] Sullivan Study (annexe 20 de l'Iran, p. 272 ; dossier des juges, onglet n° 27).

[41] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt du 6 juin 2018*, par. 102.

[42] *Ibid.*, par. 93.

[43] Voir, par exemple, *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt du 6 juin 2018,* par. 91 ; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I),* p. 109-110, par. 160.

des travaux préparatoires ainsi que de la prise en compte de documents et travaux relatifs à une convention comportant une disposition aux termes semblables.

18. Dans l'affaire qui nous concerne, la Cour doit *a fortiori* adopter la même approche. Le traité d'amitié n'incorpore pas les règles du droit international coutumier relatives aux immunités des Etats. Une interprétation du traité d'amitié, en conformité avec les règles coutumières d'interprétation, le confirme. Ainsi,

— Le texte du traité ne fait aucune référence à l'octroi de protections en matière d'immunité souveraine. A aucun moment, le sens ordinaire des dispositions ne laisse entendre que le traité incorpore de telles protections.

— S'agissant du contexte :

  — les dispositions du traité sur lesquelles l'Iran prend appui montrent à l'évidence qu'elles visent les transactions commerciales et les échanges commerciaux du type de ceux effectués par des personnes privées ou des sociétés privées et pour lesquels les questions d'immunité ne se posent pas ;

  — les références spécifiques aux immunités pour les fonctionnaires consulaires et la renonciation aux immunités pour les entreprises publiques indiquent que les parties ont traité des questions d'immunité lorsqu'elles l'ont souhaité.

— S'agissant de l'objet et du but du traité : il s'agit d'un traité de commerce et de droits consulaires. Ce n'est pas un traité chargé de réglementer les questions des immunités.

— Venons-en à la pratique des Parties : aucune des Parties n'a dans sa pratique perçu le traité comme protégeant les immunités souveraines. En particulier, l'Iran a historiquement refusé de faire de telles revendications dans des circonstances où pourtant il aurait été dans son intérêt de le faire. Cela est révélateur du fait que l'Iran ne considérait pas le traité comme couvrant cet aspect.

— Les moyens supplémentaires d'interprétation montrent qu' :

  — il n'y a eu aucune discussion lors des négociations du traité d'amitié qui aille dans le sens des revendications iraniennes ;

— il n'y a aucune preuve qui indique que des traités d'amitié, de commerce et de navigation conclus par les Etats-Unis ont été interprétés comme accordant une immunité souveraine aux Etats eux-mêmes, à leurs banques centrales ou à d'autres entités étatiques.

B. L'analyse article par article confirme que les protections ayant trait aux immunités souveraines ne sont pas incorporées dans les dispositions du *traité que l'Iran invoque*

19. Monsieur le président, après cette vue d'ensemble, je vais maintenant passer aux dispositions spécifiques du traité qui, selon l'Iran, incorporent des protections en matière d'immunité souveraine. Permettez-moi tout d'abord de souligner que l'analyse que je vais présenter ne porte pas sur des questions ayant trait au fond de l'affaire. Elle n'a pas non plus pour objectif d'être une interprétation exhaustive des dispositions du traité. Il s'agit simplement à ce stade de montrer que les revendications de l'Iran en matière d'immunité souveraine ne relèvent pas du traité d'amitié.

20. Afin de revendiquer que les immunités trouveraient place dans le traité, les mots fusent. L'Iran invoque tour à tour la «nature même» (en anglais the «very nature»), le «sens ordinaire», des «renvois» ou le «principe d'effectivité». De tels arguments sont indéfendables, particulièrement en l'absence de tout élément de justification et de preuve. L'Iran est incapable de produire un quelconque commentaire, une quelconque pratique de l'un ou l'autre Etat ou une référence dans les négociations au soutien de ses revendications.

21. Dans le cadre de cette analyse article par article, je commencerai par les deux articles du traité que l'Iran invoque comme fondement pour ses prétentions selon lesquelles les mesures américaines en cause ont violé aussi bien ses immunités souveraines que celles d'autres entités étatiques iraniennes, dont sa banque centrale[44]. Ce sont le paragraphe 1 de l'article X et le paragraphe 4 de l'article XI du traité d'amitié.

[44] WSI, par. 5.13, 5.25, 5.36.

1. Le paragraphe 4 de l'article XI

22. Dans ses écritures, l'Iran fait valoir que le paragraphe 4 de l'article XI impose une «implied obligation to grant immunity for acts *jure imperii*»[45]. Comme je l'ai déjà indiqué, le paragraphe 4 de l'article XI est une disposition qui interdit aux entreprises publiques ou sous contrôle public et actives sur le marché de revendiquer une immunité. Une simple lecture de la disposition ne révèle pas, ni même ne suggère, une intention de traiter des immunités des gouvernements contractants ou de celles d'entités étatiques qui ne relèveraient pas du champ d'application de la disposition. L'objet et le contexte de l'article le confirment. La disposition se trouve en effet dans un article commun aux divers traités d'amitié, de commerce et de navigation, conçu pour traiter des questions découlant du contrôle gouvernemental sur certaines entreprises. Son but est d'assurer «des conditions égales de concurrence» entre les entreprises privées et les entreprises publiques ou sous contrôle public. De nombreuses sources, y compris des sources citées par l'Iran dans le cadre de litiges antérieurs que vous trouverez à l'onglet n° 28 du dossier des juges, confirment que le paragraphe 4 de l'article XI a été conçu pour s'appliquer sans préjudice des autres questions d'immunité souveraine[46].

23. Ces points sont restés sans réponse de la part de l'Iran. L'Iran convient qu'il existe «un terrain d'entente» sur le fait que le paragraphe 4 est un «key element of the Treaty's effort to level the playing field between State enterprises and their private counterpart engaged in activities in the specific fields governed by the Treaty»[47]. Mais aussitôt l'Iran affirme sans aucune justification que «[by]plac[ing] no limit on the right to rely on immunity in respect of acts *jure imperii*», cette disposition «confirms by strong implication the existence of a Treaty obligation that such immunity

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[45] WSI, par. 5.14.

[46] Voir, par exemple, POUS, par. 8.10, 8.14-16, 8.21-8.23 ; Brief for Defendants-Appellants, *Electronic Data Systems Corporation Iran* v. *The Social Security Organization of the Government of Iran et al.* (No. 80-1641) (5th Cir. ; October 1, 1980), p. 31 (POUS, annexe 230) (quoting Herman Walker's annotation of a similar provision in the draft FCN with Portugal, which explained "[t]he waiver of immunity is only for business enterprises. *The situation of other types of government entities, agents and activities is left open, without prejudice*. Beds for the government's tourist hotel are covered, but those for the Army are not.") (dossier des juges, onglet n° 28) ; Brief for Appellants, Social Security Organization of the Government of Iran, Ministry of Health and Welfare of the Government of Iran, and the Government of Iran, p. 13-14, 36-42, *Electronic Data Systems Corporation Iran* v. *The Social Security Organization of the Government of Iran et al.* (No. 79-2641) (5th Cir. ; August 15, 1979), p. 34-35 (POUS, annexe 228) (citing Vernon G. Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, 55 AM. SOC. INT'L L. PROC. 89 (1961) (POUS, annexe 229).

[47] WSI, par. 5.12.

must be upheld»[48]. Cet argument non plus n'est pas tenable. Les conditions requises pour établir une interprétation *a contrario* d'un traité, ce que l'Iran invoque, ont été rappelées récemment par votre Cour en l'affaire de la *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne*. Les conditions citées par votre Cour ne sont clairement pas réunies[49]. En l'espèce, ni le texte, ni le contexte, ni l'objet et le but du traité d'amitié ne viennent justifier le recours à une interprétation *a contrario* comme le soutient l'Iran.

2. Le paragraphe 1 de l'article X

24. La seconde disposition que l'Iran invoque comme source d'une obligation générale de respect des immunités à son bénéfice ainsi qu'à celui d'entités publiques iraniennes telles la banque Markazi est le paragraphe 1 de l'article X[50]. Qu'une telle disposition puisse permettre à la Cour de statuer sur les questions relatives aux immunités des Etats et des banques centrales est impensable. La lecture que donne l'Iran de cette disposition dépasse très largement toutes les limites, même les plus généreuses, de l'interprétation du paragraphe 1 de l'article X.

25. Cet article dispose : «Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.»

26. Ce paragraphe 1 de l'article X spécifie le cadre général d'un article consacré aux questions relatives au traitement des navires, de leurs cargaisons et produits, à l'exception des bateaux de pêche et des bâtiments de guerre. Rien dans le texte, le contexte ou l'objet et le but du traité ne vient suggérer que le paragraphe 1 de l'article X devrait être interprété comme imposant une obligation de respecter les immunités des Etats contractants et des entités étatiques comme des banques centrales.

27. Madame et Messieurs les juges, même en soutenant l'argument que le paragraphe 1 de l'article X crée des obligations de fond distinctes des autres dispositions plus spécifiques du traité

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[48] WSI, par. 5.13.

[49] *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 116, par. 35 ; voir aussi *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 19, par. 37.

[50] WSI, par. 5.36.

relatives au commerce, l'argument de l'Iran selon lequel cette disposition comprend la protection des immunités souveraines ne peut pas être retenu. La Cour a en effet précisé dans son arrêt de 1996 en l'affaire des *Plates-formes pétrolières* qu'au-delà des actes d'achat et de vente, le terme «commerce» englobe uniquement les «activités accessoires qui sont intégralement liées au commerce»[51].

28. Une décision de refuser l'immunité souveraine n'est aucunement «intégralement liée» au commerce. Elle ne l'est certainement pas de la même manière que les mesures affectant le transport maritime ou le transport des marchandises[52]. La revendication doit donc être rejetée.

3. Les articles sur les «ressortissants et les sociétés»

29. Les trois autres dispositions du traité auxquelles l'Iran se réfère pour ses revendications en matière d'immunité souveraine sont des dispositions qui ne s'appliquent qu'aux «ressortissants et sociétés» des parties contractantes. C'est sans doute pour cela que l'Iran accepte que ces dispositions ne permettent pas à la Cour de statuer sur des questions relatives à sa propre immunité. L'Iran soutient que ces dispositions exigent des Etats-Unis qu'ils respectent les règles du droit international coutumier et de leur droit national relatives aux immunités pour ce qui est des entités étatiques distinctes de l'Etat, dès lors qu'elles sont considérées comme des «sociétés». Il suffirait pour cela qu'elles aient adopté certains traits des sociétés. Mais ce que l'Iran omet de dire, c'est que ces articles se rapportent au domaine des investissements à l'étranger. Ainsi que l'a dit la juge Higgins, ces dispositions comprennent «des expressions juridiques constamment appliquées au domaine des investissements à l'étranger, c'est-à-dire le domaine visé dans les dispositions en question»[53]. Ces dispositions n'ont jamais été considérées comme permettant ou incorporant de quelconques protections en matière d'immunité. Ces protections substantielles des investisseurs sont au cœur des traités d'amitié, de commerce et de navigation et ont été conçues pour veiller à ce que les ressortissants et les sociétés d'une partie ne soient pas indûment désavantagés sur le

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[51] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 819, par. 49.

[52] Voir POUS, par. 8.33-8.35.

[53] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt*, opinion individuelle de Mme la juge Higgins, *C.I.J. Recueil 1996 (II)*, p. 858, par. 39. Le texte anglais se lit comme suit «are legal terms of art well known in the field of overseas investment protection, which is what is there addressed».

territoire de l'autre partie dans l'exercice de leurs activités privées ou professionnelles, en raison de leur nationalité[54]. Aussi, lorsque des entités publiques iraniennes ont des droits en vertu de ces dispositions, *c'est sur la même base que les sociétés privées*. Les dispositions en question n'ont rien à voir avec les immunités souveraines.

30. La première disposition invoquée par l'Iran est le paragraphe 2 de l'article III du traité. Cette disposition classique a trait à la liberté d'accès aux tribunaux. Son texte prévoit que les ressortissants et les sociétés de l'autre partie jouiront d'un libre accès aux tribunaux judiciaires et aux organismes administratifs, à tous les degrés de la juridiction, tant pour faire valoir que pour défendre leurs droits, et ce, à des conditions non moins favorables que celles qui sont applicables aux ressortissants et sociétés de l'Etat hôte ou de tout pays tiers. La disposition précise en outre qu'il n'est pas nécessaire que les sociétés soient enregistrées ou constituées dans l'Etat d'accueil pour pouvoir bénéficier d'un tel accès. Le second paragraphe de l'article III garantit le libre accès de sorte que les ressortissants et sociétés étrangères puissent défendre leurs intérêts devant les tribunaux. L'article n'accorde cependant pas de droits particuliers ou de garanties substantielles quant aux moyens de défense qui doivent être disponibles ou qui prévaudront devant les tribunaux de l'autre partie en vertu des lois de cette autre partie[55].

31. Les arguments formulés par l'Iran et relatifs au paragraphe 2 de l'article III n'ont donc aucun lien avec son libellé, ni même avec l'objet et le but du traité. La liberté d'accès aux tribunaux ne constitue pas une garantie que certaines entités ne peuvent être poursuivies ou que leurs biens sont insaisissables. L'Iran n'a, là encore, mentionné aucune pratique, travaux préparatoires ou commentaires qui soutiendraient son argument. Il n'a pas non plus indiqué quelles règles pertinentes du droit international justifieraient une telle interprétation s'agissant d'une disposition relative à «l'accès aux tribunaux».

32. Passons maintenant au paragraphe 1 de l'article IV. C'est une autre disposition classique des traités d'amitié, de commerce et de navigation. Comme la précédente, elle ne peut pas

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[54] Voir POUS, par. 8.26 ; voir également *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 816, par. 36.

[55] Robert Wilson, United States Commercial Treaties and International Law (1960), p. 194-195 («the recognition of the capacity [to appear] does not determine the terms and conditions under which the right to sue and be sued may be exercised»).

permettre à l'Iran d'incorporer les règles du droit international coutumier relatives aux immunités. Cet article dispose que

> «Each High Contracting Party shall at all times accord fair and equitable treatment to national and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.»

Encore une fois, l'Iran n'a fourni aucun élément de preuve à l'appui de sa revendication selon laquelle ces termes seraient compris en droit international comme une garantie que les «applicable principles of sovereign immunity under international law would be respected»[56]. Ainsi que votre juridiction l'a jugé dans l'arrêt des *Plates-formes pétrolières*, les garanties de «traitement juste et équitable», de «non-discrimination» et de «protection des droits contractuels légitimement nés» «visent la manière dont les personnes physiques et morales en cause doivent, dans l'exercice de leurs activités privées ou professionnelles, être traitées par 1'Etat concerné»[57]. On est loin de la question des immunités souveraines…

33. L'Iran prétend que cette disposition, telle qu'interprétée par la Cour de céans, aurait dû permettre aux actifs de la banque Markazi de bénéficier du même niveau de protection en matière d'immunité que les actifs d'autres banques centrales étrangères, et ce, en vertu du droit international coutumier ou du droit américain. Une telle position est dénuée de sens. Lorsque des entreprises publiques iraniennes ont des droits en vertu du paragraphe 2 de l'article III et les paragraphes 1 et 2 de l'article IV, c'est *a)* sur la même base que les sociétés privées, qui n'ont bien évidemment pas droit aux immunités souveraines ; *b)* ainsi que dans le cadre de leurs activités privées ou professionnelles, où il n'y a pas d'immunité. Il convient pour la Cour de rejeter les revendications de l'Iran, comme elle le fit dans l'affaire des *Plates-formes pétrolières* pour ce qui est de l'utilisation de la force. Cette disposition n'est pas extensible au point de garantir que des entités souveraines agissant à titre souverain bénéficient de leurs immunités.

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[56] WSI, par. 5.24.

[57] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 816, par. 36 ; voir également POUS, par. 8.26.

34. Pour des raisons semblables, l'argument de l'Iran concernant le paragraphe 2 de l'article IV n'est pas recevable. Comme vous pouvez le voir sur la diapositive, il s'agit d'une protection classique prévue par les traités d'amitié, de commerce et de navigation qui s'applique aux biens des investisseurs se trouvant sur le territoire de l'autre Partie. Elle comprend la protection et la sécurité les plus constantes, une garantie contre les expropriations illégales et une exigence selon laquelle une indemnisation rapide, adéquate et efficace doit être versée en cas d'expropriation. Là encore, la référence à la protection et la sécurité les plus constantes «in no case less than that required by international law» est bien connue dans le domaine de la protection des investissements. Elle se réfère à la norme minimale de traitement des biens des étrangers dans l'Etat hôte.

35. L'Iran répète son refrain favori, à savoir que le «sens ordinaire» de la disposition doit être compris comme incluant toute règle du droit international coutumier relatives aux immunités des biens des entités publiques. Mais ce n'est pas parce que cela est répété encore et encore qu'il en est ainsi. Rien dans le texte ne montre qu'il inclut ou incorpore des protections en matière d'immunité. Les règles relatives à la norme minimale de traitement des biens et celles relatives à l'expropriation des biens sont des protections connues des traités commerciaux et d'investissement. Elles réglementent les mesures que l'Etat peut prendre à l'égard des investisseurs qui exercent des activités non souveraines. Les négociations de ce traité et celles d'autres traités d'amitié, de commerce et de navigation confirment ce point[58].

36. Une fois de plus, à aucun moment l'Iran n'indique de règles pertinentes du droit international pour étayer son affirmation. Les deux seules sources auxquelles l'Iran se réfère ne sont d'aucun soutien pour sa cause. Tout d'abord, l'Iran cite les observations des Etats-Unis dans l'affaire *ELSI*, dans laquelle votre Cour a explicitement déclaré que «la principale norme établie à l'article V [identique au paragraphe 2 de l'article IV du traité de 1955] est celle qui prévoit que les intéressés jouiront «entièrement ... de la protection et de la sécurité exigées par le droit international», autrement dit que la «protection et ... la sécurité» doivent être conformes à la norme internationale minimale»[59]. C'est précisément ce que nous affirmons. La seconde source

[58] POUS, par. 8.29.

[59] *Elettronica Sicula S.p.A. (ELSI) (Etats-Unis d'Amérique c. Italie), arrêt, C.I.J. Recueil 1989*, p. 66, par. 111.

mentionnée par l'Iran est une décision d'un tribunal international interprétant le paragraphe 3 de l'article 2 de la convention des Nations Unies sur le droit de la mer comme englobant les engagements du Royaume-Uni en matière de droits de pêche de Maurice. Le tribunal en question est parvenu à cette décision en raison du «renvoi» à «d'autres règles du droit international» prévues dans la disposition. Cette disposition est, on le saisit, d'un tout autre genre que celle en jeu dans le traité d'amitié et, qui plus est, cette disposition porte sur la «souveraineté sur la mer territoriale». Ni l'une ni l'autre des sources invoquées par l'Iran ne permet d'interpréter le paragraphe 2 de l'article IV comme incluant les protections en matière d'immunité souveraine des biens.

II. LES IMPLICATIONS FÂCHEUSES QU'AURAIT L'ACCEPTATION PURE ET SIMPLE DE L'ARGUMENTAIRE IRANIEN SELON LEQUEL LE TRAITÉ D'AMITIÉ INTÈGRE LES PROTECTIONS EN MATIÈRE D'IMMUNITÉ SOUVERAINE

37. Monsieur le président, je voudrais maintenant faire quelques remarques plus générales sur les implications très fâcheuses qu'entraînerait l'acceptation pure et simple des arguments iraniens. On l'a vu, au moyen d'un certain nombre de procédés, l'Iran essaie d'interpréter les dispositions du traité d'amitié à son profit, de manière à trouver des immunités souveraines pour lui-même, sa banque centrale et d'autres entités étatiques[60]. Mais à aucun moment, l'Iran n'apporte de justification ou même ne développe la position pour le moins originale qu'il tente d'esquisser. Par ailleurs, l'Iran s'est bien gardé de répondre aux nombreux arguments spécifiques faits par les Etats-Unis quant à l'interprétation du traité. La maigreur de ses observations écrites sur le sujet est frappante.

38. Pour la Cour, se prononcer sur les demandes iraniennes relatives aux immunités souveraines reviendrait à étendre la portée du consentement des Parties bien au-delà de ce qu'elles avaient prévu. Comme l'a dit Mme Kimball ce matin, la Cour a souligné, dans l'arrêt sur les *Plates-formes pétrolières*, que

> «la clause de règlement des différends figurant dans la plupart des traités d'amitié et de commerce … semble avoir été constamment présentée par le département d'Etat comme «limitée aux différends dont la cause immédiate est le traité concerné lui-même», ce type de traité portant sur des «questions familières» ayant fait l'objet d'une «jurisprudence abondante»»[61].

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[60] WSI, par. 3.4.

[61] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 815, par. 29.

L'Iran ne présente aucune pratique actuelle ou passée, ni même aucun commentaire venant soutenir ses arguments selon lesquels le traité intégrerait les protections relatives aux immunités.

39. L'argumentaire iranien est également en totale contradiction avec la façon dont les questions d'immunité des Etats sont comprises et traitées depuis bien longtemps. Les règles relatives aux immunités sont régies par un ensemble distinct de règles de droit international comprenant des règles du droit international coutumier, ainsi que certaines dispositions expresses contenues dans des traités multilatéraux, des traités bilatéraux et dans les législations nationales. Ce sont ces sources que les Etats consultent lorsqu'une question portant sur l'immunité des Etats se pose. C'est sans doute pour cela que l'Iran ne cite aucun exemple de traités interprétés comme établissant des obligations relatives aux immunités alors même qu'elles n'étaient pas expressément énoncées dans les instruments conventionnels. La Cour a d'ailleurs rejeté une telle approche dans l'affaire *Guinée équatoriale c. France*. L'Iran n'a pas non plus produit de pièces justificatives qui appuieraient l'interprétation *a contrario* d'une disposition de renonciation aux immunités comme créant une obligation implicite de respect des immunités.

40. Enfin, si l'approche erronée de l'Iran en matière d'interprétation des traités venait à être adoptée, cela aura des répercussions bien au-delà des seuls traités d'amitié, de commerce et de navigation. L'usage inapproprié que fait l'Iran de l'alinéa *c)* du paragraphe 3 de l'article 31 de la convention de Vienne sur le droit des traités conduit à pouvoir incorporer dans le traité d'amitié un nombre illimité de règles de droit international public. L'Iran tente de vous rassurer en précisant que sa démarche ne permet pas l'incorporation dans le traité d'amitié de toutes les règles du droit international et cite à son appui, «the rules on maritime delimitation»[62]. C'est sans doute un mot d'humour. L'Iran voudrait justifier également l'incorporation des protections en matière d'immunité par le fait que les règles relatives aux immunités faciliteraient «the harmonious development of commercial, financial, and consular relations», qui à leur tour «reinforce friendly relations» entre les parties, l'un des objets du traité[63]. Mais cela ne nous aide pas à comprendre où l'Iran place des limites à sa méthode d'interprétation, s'il en place. Une telle approche, si elle était

[62] WSI, par. 5.45.

[63] *Ibid.*

retenue, aurait des conséquences importantes en matière d'interprétation des traités, et pour le moins déstabilisantes pour l'ordre juridique international.

III. LES EFFORTS DE L'IRAN POUR SE DÉPARTIR DE SES ANCIENNES POSITIONS ET DE CELLES DES ENTITÉS ÉTATIQUES IRANIENNES SONT PEU CONVAINCANTS

41. Monsieur le président, Madame et Messieurs les juges, j'en viens maintenant à la dernière partie de mon exposé. Comme les Etats-Unis l'ont indiqué dans leur mémoire sur les exceptions préliminaires, la pratique antérieure de l'Iran et des entités étatiques iraniennes sape encore davantage les assertions iraniennes selon lesquelles le traité a trait aux immunités. L'Iran s'efforce d'écarter cette pratique en affirmant qu'elle ne peut être qualifiée de «pratique ultérieurement suivie … par laquelle est établi l'accord des parties» aux fins de l'alinéa *b)* du paragraphe 3 de l'article 31 de la convention de Vienne sur le droit des traités. Madame et Messieurs les juges, les Etats-Unis ne partagent pas ce point de vue mais, en tout état de cause, les exemples que je vais développer dans les prochaines minutes sapent, tout bonnement, l'argumentaire iranien relatif à l'inclusion dans le traité de protections en matière d'immunité.

42. Ainsi, lorsque l'Iran adopta une loi retirant l'immunité des Etats-Unis devant les tribunaux iraniens — ce qui eut pour conséquences de donner lieu à de nombreux jugements contre les Etats-Unis —, il présenta cette mesure comme une réponse aux violations présumées des règles du droit international coutumier relatives aux immunités et non une réponse aux violations du traité d'amitié[64]. Par ailleurs, lorsque l'Iran ou les entités étatiques iraniennes étaient poursuivis en raison des mesures américaines en cause dans la présente affaire, ils n'ont pas cherché à convaincre les tribunaux américains que les dispositions du traité pouvaient être invoquées pour protéger leurs immunités. Ces exemples démontrent bien le caractère novateur de leurs arguments par rapport à leurs positions antérieures. Ils soulignent également l'aspect abusif et peu crédible de ses revendications en l'espèce.

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[64] Voir POUS, par. 8.17 et note de bas de page n° 346. Voir aussi Ruznamehi Rasmi Jumhuri Islami Iran [The Official Gazette of the Islamic Republic of Iran], Parliamentary Debates, Public Session No. 323, at p. 32-33 (November 8, 1999) (POUS, annexe 167) ; Ruznamehi Rasmi Jumhuri Islami Iran [The Official Gazette of the Islamic Republic of Iran], Parliamentary Debates, Public Session No. 42, p. 28-30 (November 1, 2000) (POUS, annexe 168) ; Ruznamehi Rasmi Jumhuri Islami Iran[The Official Gazette of the Islamic Republic of Iran], Parliamentary Debates, Session No. 403, p. 15-18 (March 6, 2012) and Session No. 404, p. 2 (March 7, 2012) (POUS, annexe 169).

43. Ce point ressort également des écritures que la banque Markazi a soumises dans le cadre de l'affaire *Peterson* et que nous avons pu fournir à la Cour lorsqu'elles ont été rendues publiques. Ces documents confirment que l'Iran, par l'intermédiaire de la banque Markazi, a avancé des arguments qui vont à l'encontre de ce qu'il avance devant votre juridiction, ceux selon lesquels le traité protégerait les immunités souveraines[65]. L'Iran ne peut pas soutenir de manière crédible que les arguments avancés par la banque Markazi dans cette procédure ne sont pas pertinents. Tout d'abord, l'affaire *Peterson* est au cœur de celle présentée devant cette Cour. Ensuite, même si la banque Markazi est une entité distincte menant son «propre» procès, elle n'en demeure pas moins la banque centrale de l'Iran. Qu'il s'agisse ou non d'une entité juridiquement distincte, il est difficile de croire que la banque centrale iranienne ne se soit pas coordonnée avec le Gouvernement iranien alors même qu'elle plaidait devant les tribunaux américains sur le sort de deux milliards de dollars, qui, pour reprendre les termes de l'Iran, «belong to the Iranian people»[66].

44. Les documents de l'affaire *Peterson* sont saisissants. Ils montrent bien que la banque Markazi ne considérait pas les dispositions du traité d'amitié comme régissant les questions d'immunité souveraine entre les Etats-Unis et l'Iran. Encore plus saisissant, dans ses premières écritures sur les raisons pour lesquelles ses actifs ne devaient pas être distribués, la banque Markazi invoqua son immunité mais ne mentionna pas le traité, tout comme son expert en droit, le professeur Lowenfeld, ne le fit pas[67].

45. Toujours dans cette affaire, la banque Markazi a ensuite vigoureusement contesté l'affirmation des plaignants selon laquelle la levée de l'immunité pour les entreprises publiques ou sous contrôle public prévue au paragraphe 4 de l'article XI du traité constituait une base pour saisir

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[65] Voir POUS, par. 8.17-19.

[66] Voir dossier des juges, onglet n° 29 (16 mai 2016), «Full Statement of the Special Working Group of the Cabinet of the Islamic Republic of Iran regarding the Expropriation of the Assets of the Iranian Nation», disponible à l'adresse http://dolat.ir/detail/279041.

[67] Voir Defendant Bank Markazi's Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint for Lack of Subject Matter Jurisdiction, *Peterson et al.*, v. *Islamic Republic of Iran, et al.*, No. 10-cv-4518 (S.D.N.Y., May 11, 2011) (Ann. A1) ; Declaration of Professor Andreas F. Lowenfeld (May 6, 2011) (Ann. A4) (discussing the immunity of central bank assets under Section 1611 of the FSIA and referencing international sources on state immunity without any mention of the Treaty of Amity or other commercial treaties).

ses fonds. Mais à aucun moment elle n'a suggéré que cette disposition lui octroyait une protection en matière d'immunité[68].

46. Enfin, il convient de rejeter l'argument iranien selon lequel les écritures de la banque Markazi sont des «pleading within the specific meaning, and for the limited purpose» de la section 502[69]. La banque Markazi a fait valoir à maintes reprises que le Congrès américain n'avait pas affecté ses droits découlant du traité en promulguant en 2012 la section 502 du *Iran Threat Reduction and Syria Human Rights Act*, laquelle abrogeait «any provision of law relating to sovereign immunity and any inconsistent provision of State law»[70]. Considérant que le traité n'était pas couvert par l'abrogation de la section 502, il était loisible à la banque Markazi de faire valoir ses droits en vertu de celui-ci. Si elle ne l'a pas fait, c'est bien qu'il ne se rapportait pas à ses immunités.

IV. CONCLUSION

47. Monsieur le président, Madame et Messieurs les juges, les prétentions de l'Iran relatives au déni de ses immunités ne sont pas couvertes par le traité d'amitié de 1955. Le traité d'amitié ne contient pas les règles de droit nécessaires au traitement des demandes de l'Iran. Ces demandes ne relèvent pas du champ d'application du traité et doivent être rejetées. Ceci conclut ma plaidoirie. Je vous demanderai, Monsieur le président, de bien vouloir donner la parole à mon collègue, le professeur Childress.

Le PRESIDENT : Je remercie Mme la professeure Boisson de Chazournes. I now give the floor to the final speaker of this afternoon, Professor Childress. You have the floor, Sir.

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[68] Voir Defendant Bank Markazi's Reply Memorandum of Law in Further Support of Its Motion to Dismiss the Second Amended Complaint for Lack of Subject Matter Jurisdiction (June 22, 2012) (Ann. A15), p. 3, 25-26.

[69] WSI, par. 5.17.

[70] Voir Defendant Bank Markazi's Supplemental Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment (Oct. 26, 2012) (Ann. A22), p. 2-3.

Mr. CHILDRESS:

JURISDICTIONAL OBJECTION TO IRAN'S CLAIMS PREDICATED ON TREATMENT OF BANK MARKAZI AS A "COMPANY" UNDER THE TREATY OF AMITY

I. Introduction

1. Thank you, Mr. President, Members of the Court. It is an honour to appear again before you on behalf of the United States of America. Today, I will be addressing a further jurisdictional objection that relates specifically to Iran's claims concerning the treatment of Bank Markazi, the Central Bank of Iran.

2. In addition to the sovereign immunity-related claims that you have just heard about, Iran contends that Bank Markazi was denied protections that the Treaty extends to "nationals and companies" of the other Party under Articles III, IV, and V of the Treaty[71]. In its pleading, Iran argues that its Central Bank benefits from the protections that the Treaty accords to "companies" because Bank Markazi has separate legal personality under Iran's Monetary and Banking Act[72].

3. This argument — that a State's central bank should be treated like an ordinary company — is remarkable. It is novel, with no basis in law or logic. We have encountered no prior example of such a claim. And Iran is unable to sustain it here: it offers up no State practice, no commentary, nothing more than a strikingly narrow and incomplete textual argument to make its case.

4. The fact is that Articles III, IV, and V of the Treaty are standard commercial treaty provisions that were never designed to regulate the treatment of the Parties' central banks or of other State entities exercising sovereign functions. Rather, these provisions accord protections to foreign persons and entities engaged in *non-governmental*, private and professional activities.

5. Based on Iran's own pleading, Bank Markazi is *not* engaged in such activities. Iran does not claim that Bank Markazi is anything other than a traditional central bank, charged with carrying out the State's monetary policy and serving as the Government's banker. So on Iran's case, Bank Markazi is not comparable to any private entity. In fact, Bank Markazi itself argued in the

[71] See POUS, n. 375 (identifying these claims in MI).

[72] MI, para. 4.7.

Peterson proceedings that it was an "instrumentalit[y] *acting in a sovereign capacity*"[73]. Bank Markazi is *not entitled* to the treatment that each Party promised to the "companies" of the other. And the Court has no jurisdiction to adjudicate claims alleging violations of obligations that *do not exist* in the Treaty.

6. In my submissions today, I will develop these points by reference to the text of the relevant articles — which include Articles III, IV, V, and VII, plus the immunity waiver in Article XI — as well as the Treaty's overall object and purpose and the relevant negotiating history. My discussion of these points will be limited to what is needed for this Court to conduct the type of jurisdictional analysis that it did in *Equatorial Guinea*. I will not be venturing into the merits.

7. Before I turn to the body of my presentation, however, let me offer one preliminary framing point. Professor Boisson de Chazournes has just explained why Iran's sovereign immunity claims, including those concerning Bank Markazi, fall outside the scope of the Treaty. And I will be explaining why Iran cannot bring any other claims it has about the alleged mistreatment of Bank Markazi under the Treaty's "nationals and companies" articles. What I want to highlight here is the fundamental *contradiction* in Iran's efforts to shoehorn its claims about Bank Markazi's treatment into these provisions of the Treaty.

8. In summary form: Iran contends that Bank Markazi is an ordinary "company" entitled to protections in the Treaty that apply in the private and professional sphere. *But* at the *same* time, Iran contends that Bank Markazi is also entitled to immunity as a sovereign entity under the Treaty. Iran is trying to have its cake and eat it too. In its effort to rebrand Bank Markazi and claim Treaty protections, it seeks to emphasize the way in which its central bank engages in activities *similar* to those carried out by private companies[74]. Yet Iran does not argue that Bank Markazi *should* be treated like any other private company. Private companies do not enjoy sovereign immunity, and Iran wants the Treaty to protect Bank Markazi's sovereign immunity too. *Iran cannot have it both ways*.

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[73] Brief for Defendant-Appellee Bank Markazi aka Central Bank of Iran, p. 38, *Peterson* v. *Bank Markazi* (2d Cir. 31 Aug. 2015), p. 38 (Bank Markazi describing itself as an "instrumentalit[y] acting in a sovereign capacity"), No. 15-690, POUS, Ann. 235; emphasis added.

[74] WSI, para. 4.24.

9. With that, a brief word about structure. My submissions today will be in two parts. *First*, I will address the meaning and scope of the term "company" in Articles III, IV, and V of the Treaty, in light of the Treaty's context, object and purpose. I will also discuss the relevant negotiating history. *Second*, I will address Iran's own characterization of its Central Bank as a sovereign entity. In light of Iran's position in this regard, the Court can and should uphold the United States' objection to Iran's Bank Markazi's claims on the record before it.

II. A State entity exercising sovereign functions is not entitled to protections accorded to "companies" under the Treaty

10. Mr. President, Members of the Court, permit me to turn to the first part of my presentation. I should note at the outset that our view that the Treaty's "nationals and companies" articles do not provide rules on the treatment of State entities exercising sovereign functions is not unique to this litigation. Prior to this case, both parties to the Treaty had taken that position. It was the United States' interpretation in its brief as *amicus curiae* to the US Supreme Court in the *Peterson* case, before Iran lodged its claims before this Court. In that brief, the United States explained that the Treaty "is not naturally read to include entities like [Bank Markazi]," because the "central bank of Iran is an agency of the state that carries out sovereign functions"[75].

11. Iran itself had taken this position years earlier. In August 1979, in the wake of the Iranian Revolution, Iran filed a brief before the US Court of Appeals for the Fifth Circuit in a case brought by an American company against the Government of Iran, its Ministry of Health, and its Social Security Organization — the last of which was, according to Iran, a "separate juridical entity" under Iranian law[76]. In that brief, Iran argued that "commercial treaties such as the Treaty of Amity *do not apply* to the proprietary acts of a sovereign but govern only economic enterprises controlled by a foreign state that are in competition with private enterprises . . ."[77]. In other words, Iran's point *then* was that *sovereign* acts are not the sphere of the Treaty's operation. Yet Iran is now trying to

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[75] Brief for the United States as *Amicus Curiae*, p. 22, *Bank Markazi, aka Cent. Bank of Iran* v. *Deborah Peterson et al.* (No. 14-770) (S. Ct. Aug. 2015), POUS, Ann. 238.

[76] Brief for Defendants-Appellants, p. 40-41, *Elec. Data Sys. Corp. Iran* v. *Soc. Sec. Org. of Gov't of Iran* (5th Cir. Sept. 1980) (No. 80-1641) (describing the SSO as a "separate juridical entity" under the "Social Security law of Iran," and noting that it can "sue and be sued in the court of Iran"), POUS, Ann. 230.

[77] Brief for Appellants Soc. Sec. Org. of Gov't of Iran, Ministry of Health & Welfare of Gov't of Iran, & Gov't of Iran, p. 35, *Elec. Data Sys. Corp. Iran* v. *Soc. Sec. Org. of Gov't of Iran* (5th Cir. Aug. 1979) (No. 79-2641), POUS, Ann. 228; emphasis added.

persuade this Court of precisely the opposite. Iran was correct in 1979. Their current position is nothing more than opportunism.

12. Surprisingly, Iran's only comment on this statement in its Observations — in its chapter on "sovereign immunity" — is that "[i]n [that] case, Iran emphasized that the Treaty did not apply to the Government of Iran but only to its enterprises, but this was said in relation to Article XI (4) . . ."[78]. But the 1979 brief *plainly* states that the Treaty *does not apply* to the proprietary acts of a sovereign or sovereign entities. There is no reason why the particular Treaty articles at issue in the case would negate or detract from Iran's clear interpretive statement, given that it was explicitly cast in terms of the Treaty as a whole.

A. The ordinary meaning of the Treaty's references to "companies" does not compel inclusion of entities carrying out sovereign functions, *such as traditional central banks*

13. Mr. President, Members of the Court, permit me now to address *why* the view I have just described of the Treaty's reach is correct, using the basic interpretive tools set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

14. As a starting-point, by their terms, the treatment obligations set out in Articles III, IV, and V of the Treaty are expressly extended only to "nationals and companies". The term "companies" is defined in Article III, paragraph 1, as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit".

15. Iran's argument is that, because Bank Markazi has "legal personality" pursuant to Iran's Monetary and Banking Act[79], it automatically qualifies as a "company" for purposes of the Treaty[80]. According to Iran, it does not matter what governmental functions Bank Markazi performs or how incomparable it is to any *private* entity. Iran's position is that "*any* kind of corporate entity" automatically qualifies as a company under the Treaty, *full* stop[81].

16. But as we explained in our pleading, "the analysis as to whether a State entity is eligible for the protections granted to 'companies' . . . cannot simply begin and end with the question of

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[78] WSI, para. 5.16.

[79] 1972 Monetary and Banking Law, Art. 10 *(c);* MI, Ann. 73: "The Central Bank of the Islamic Republic of Iran enjoys legal personality and shall be governed by the laws and regulations pertaining to joint-stock companies in matters not provided for by this Act."

[80] MI, para. 4.7.

[81] MI, para. 4.4; emphasis added.

whether the entity has separate juridical status"[82]. Such a narrow approach would run counter to the injunction in Article 31, paragraph 1, of the Vienna Convention to read the ordinary meaning of a treaty's terms in *"good faith"*, "*in their context*, and *in light of [the treaty's] object and purpose*". Here, these various interpretive elements together establish that the Treaty was never intended to extend treatment to State entities carrying out *sovereign* functions — such as traditional central banks — in the guise of "companies".

17. Notably, Iran has not cited a single authority or example in support of its novel position that such entities *should* be considered "companies" for purposes of commercial treaties like this one. It limits itself only to the bland observation that central banks do sometimes have separate legal personality[83]. But again, this is only the starting-point of the interpretive exercise, not its end; the Treaty's context, object, and purpose must be allowed their say. Iran cannot restrict the analysis to a reading of the text devoid of context simply because it does not like the outcome.

B. The Treaty's object and purpose indicates that State entities exercising sovereign functions were not intended to be treated as "companies"

18. Mr. President, Members of the Court, permit me to turn now to object and purpose. This is out of the usual order of the interpretive elements, but will provide a useful frame of reference before I turn to the context provided by various articles of the Treaty.

19. As the Court stated in *Oil Platforms* and as many of my colleagues have already noted today, this Treaty's object and purpose "was not to regulate peaceful and friendly relations between the two States in a general sense"[84]. Rather, as we explained in our preliminary objections pleading, this Treaty, like other FCN treaties, was intended to facilitate engagement by nationals and companies of the two countries in commerce with one another[85]. Not to provide a set of rules for the States' interactions with one another as sovereigns. The Treaty seeks to achieve its objective by establishing a number of protections applicable to such nationals and companies in the context of their engagement in normal ordinary commercial and investment transactions and activities. As

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[82] POUS, para. 9.11.

[83] WSI, fn. 110 (noting that many central banks are "constituted as companies in their domestic legal systems") and fn. 115 (noting that, under the FSIA, "entities like central banks can certainly have a separate corporate status").

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

[85] POUS, para. 2.3.

Herman Walker explains, US FCN treaties served as "charters" regulating "relations in the domain of *private affairs*"[86].

20. Given this object and purpose, State entities exercising the powers and responsibilities of government do *not* inhabit the sphere of activity that the Treaty seeks to protect, except where those actions are — as in the case of consular services — specifically included in the Treaty in furtherance of private and commercial conduct[87]. This proposition finds additional support in a 1961 article authored by Vernon Setser, which you heard referenced by Professor Boisson de Chazournes earlier. In that article, Mr. Setser states: "The commercial treaties [that is, the FCN treaties] do not concern themselves in any very significant way with the regulation of the normal functions of government *in its proprietary capacity*."[88] If this language of "proprietary" government action sounds familiar, it is because Iran echoed it in its 1979 brief that I quoted earlier[89]. Actions "proprietary" to a government are naturally understood to be those undertaken by a sovereign, *jure imperii*.

21. Setser subsequently elaborates on the difference between the FCN treaties' commercial sphere and the sovereign acts of the Parties. As an example, he notes that a good deal of US government activity abroad at the time had to do with "the establishment and maintenance of military bases and the supply of military forces stationed abroad". He comments:

> "Obviously these activities involve much buying and selling, and numerous acts affecting the rights of private persons. But *there is no parallelism* between the governmental organizations carrying on these activities and the economic enterprises carrying on business activities for gain which are the subject matter of the commercial treaty."[90]

So the separation of the private and governmental spheres, and the application of commercial treaties only to the former, was quite clear.

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[86] Herman Walker, Jr., "Modern Treaties of Friendship, Commerce and Navigation", *Minn. L. Rev.*, Vol. 42 (1958), p. 805; POUS, Ann. 1; emphasis added.

[87] POUS, para. 2.3.

[88] Vernon G. Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, *Am. Soc. Int'l L. Proc.*, *Vol.* 55 (1961), p. 101; POUS, Ann. 229; emphasis added.

[89] Brief for Appellants Soc. Sec. Org. of Gov't of Iran, Ministry of Health and Welfare of Gov't of Iran, and Gov't of Iran, *Elec. Data Sys. Corp. Iran* v. *Soc. Sec. Org. of Gov't of Iran,* 651 F.2d 1007 (5th Cir. 1981) (No. 79-2641); POUS, Ann. 228, p. 35.

[90] Vernon G. Setser, *The Immunity waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, *Am. Soc. Int'l L. Proc.*, *Vol.* 55 (1961), p. 101; POUS, Ann. 229; emphasis added.

22. Iran's only rebuttal in its Observations with respect to the Treaty's object and purpose is to claim that this is not "merely a 'commercial' treaty" and that the word "commercial" does not appear in the Treaty's preamble[91]. It is not clear what Iran even means by these statements, or how they could advance its case. Of course the Treaty is a commercial treaty. In fact, the principal framers and commentators on these agreements often used "commercial treaty" as a shorthand reference. For example, one of the best-known works on US FCN treaties is Robert Wilson's 1960 treatise entitled "U.S. *Commercial Treaties* and International Law".

C. The Treaty's "Nationals and Companies" treatment articles, the immunity waiver in Article XI (4), and Article VII provide important context for the scope of "companies" under the Treaty

23. Mr. President, Members of the Court, this brings me to the scope of the term "companies" in its context. I will begin with the context provided by the protections set out in the "nationals and companies" articles themselves. An examination of what these articles actually provide for sheds important light on *who* and *what* they are meant to protect. In *Oil Platforms*, this Court held with respect to one of these provisions, Article IV, paragraph 1, that it was "aimed at the way in which the natural persons and legal entities in question are, *in the exercise of their private or professional activities*, to be treated by the State concerned"[92]. While this statement concerned Article IV, there is no logical reason why the same characterization would not hold true for *all* of the articles setting out "nationals and companies" protections.

24. In any event, it follows from the Court's statement that a "company", as the *subject* of the articles' protection, must be an entity engaged in "private or professional" (as opposed to sovereign) activities. In other words, where the "company" in question is government-owned, it must be *comparable to a private entity*, acting in a like fashion, because *that* is the proper sphere in which the treatment articles operate, and the substantive activity that the articles seek to protect[93].

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[91] WSI, para. 4.21.

[92] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 816, para. 36; emphasis added.

[93] See MI, Ann. 20, pp. 65-66:

> "The original intent [when crafting the FCN treaties] was to extend to government-owned or controlled corporations of the treaty partner at least those treaty provisions according rights and privileges to companies. That intent, however, was expressed in terms of granting to such corporations only the rights and privileges of *like private companies of the host country.*" Emphasis added.

25. Put simply, just as the "nationals and companies" articles cannot be read to regulate the treatment of the Parties themselves, they also cannot be read to regulate the treatment of State entities carrying out sovereign functions *on behalf of* the State. There is no reason why a State would look to a commercial treaty, especially the commercial treaty's principles such as the minimum standard of treatment accorded to foreign investors to answer questions that arise in relation to treatment of central banking activities by another State. Indeed, Iran has pointed to no evidence showing that States ever rely on these types of commercial treaty provisions to address issues relating to the treatment of their central banks engaged in sovereign activities.

26. The conclusion that these articles' protections were never meant to extend to traditional central banks also makes sense in light of the post-World War II period when this Treaty and similar FCN treaties were being concluded. The International Monetary Fund Articles of Agreement had only recently been adopted at Bretton Woods in 1944, just a decade before the Parties negotiated this Treaty. At the time, much of the activity that central banks would carry out would have been the subject of this entirely separate legal framework, and *not* FCN treaties focused on commercial matters.

27. In *contrast* to traditional central banks, the types of State-owned entities that *were* contemplated for coverage as "companies" under the Treaty are those that carrying out activities comparable to the activities of private companies. For example, an airline may be State-owned, but it will generally be competing in a marketplace against other companies undertaking the same activities for the same ends. For entities of this type, it *would* make sense to look to commercial treaty protections on subjects like buying or leasing property, expropriation, or tax treatment. The expectation would be that such entities would be treated just like private companies.

28. Hence, it is not the United States case that a company must be privately owned or engaged in any particular sector in order to qualify for protection under these articles of the Treaty. Instead, we press a broader and simpler point: that entities like traditional central banks are *fundamentally unlike* the ordinary "companies" (whether publicly or privately owned) whose activities the treatment articles aim to protect. When a State entity like a traditional central bank is entrusted with sovereign functions like supervising and regulating the country's banking system, issuing currency, and holding and investing the State's foreign reserves, it is presumed to be acting

on behalf of the State, *not* as a "company" with private comparators. To use the terminology of the Sullivan Study, such an entity acts not as a "creation of the State" — that is, a company that is simply constituted in accordance with the State's laws — but acts as "the State as such"[94]. That is what Setser's (and Iran's) phrase "proprietary acts" has to mean — actions on behalf of *the State as such*.

29. This brings me to the next point of contextual significance: Article XI, paragraph 4. As you have already heard, this provision sets out a waiver of immunity for State-owned enterprises engaged in "commercial, industrial, shipping or other business activities" within the other Party's territory. It is part of a broader Article that restricts State-owned enterprises from enjoying unfair advantages when competing with private companies. Setser notes that "[t]he typical United States commercial treaty of the group here under consideration has been developed as an integrated document, and the sovereign immunity provision may not properly be separated from the general context of the instrument"[95]. So the immunity waiver must be read in its context, and conversely, the waiver itself provides important context to understand other aspects of the Treaty, including the scope of the term "companies".

30. Iran has argued that this is not the case: that the term "companies" and the immunity waiver serve different functions, with the latter affecting only a particular segment of State-owned entities, those engaged in commercial activities[96]. But this assertion does not hold up under careful analysis.

31. To be clear, the United States does *not* take the position that every State-owned entity potentially qualifying as a "company" under the Treaty will automatically become subject to the Article XI immunity waiver. For example, a State-funded charity that operates in the territory of the other party as an incorporated non-profit entity might conceivably qualify for treaty protections as a "company", but not come within the immunity waiver. But that does not mean that the immunity waiver has no bearing on the meaning of the term "company". This is where Iran goes wrong.

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[94] MI, Ann. 20, p. 318.

[95] Vernon G. Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, Am. Soc. Int'l L. Proc., Vol. 55 (1961), p. 93; POUS, Ann. 229.

[96] WSI, paras. 4.14-4.18.

32. The foundational principle animating the immunity waiver is *fairness among private and public comparators*. The waiver itself is specifically focused on comparators operating in the marketplace, in competition with one another. It is not concerned with public and private entities *outside* the marketplace. But this does not mean that State entities outside the commercial field that might claim benefits under the Treaty are not expected to be *similar in character to comparable private entities*. In the example I gave of a State-funded charity, the entity would be comparable to private organizations doing the same sort of work, for the same sort of reasons. It would be within the Treaty's proper sphere. In principle, there would be nothing fundamentally sovereign about the entity's character, objectives or activities.

33. But the same cannot be said of a traditional central bank. In fact, even in the realm of sovereign immunity that Iran tries so hard to drag within the confines of the Treaty, central banks are treated differently from other State-owned entities. They are generally subject to separate provisions, dedicated specifically to central banks. The only comparator for one party's central bank would be the other party's central bank — the plane of operation is, in other words, entirely sovereign and *governmental* in character. To use Setser's term, there is no "parallelism" between a traditional central bank and an enterprise in the private realm.

34. Finally, our pleading included a further contextual point that Iran did not even mention in its Observations. We pointed out that, where the Treaty of Amity *does* address central banking activities — in Article VII, on foreign exchange restrictions — the provision is addressed *to the High Contracting Parties themselves*[97]. There are two observations to draw from this. *First*, for purposes of the Treaty, central banking activities are presumed to be governmental in character. The article states that the "High Contracting Parties" are to "appl[y] exchange restrictions" in certain ways, but the entity *actually applying* such restrictions would naturally be the central bank. And *second*, if the Parties had wanted the protections in the Treaty's "nationals and companies" articles to cover State entities carrying out sovereign functions, they could simply have included in those articles a reference to the High Contracting Parties themselves.

[97] POUS, fn. 404.

D. The Treaty's negotiating history confirms that only State-owned entities comparable to private enterprises were intended to receive protections extended to "companies"

35. Mr. President, Members of the Court, the conclusion that emerges from the primary means of interpretation is that State entities exercising sovereign functions do not come within the scope of the Treaty's protections for "companies". This brings me to supplementary means of interpretation, which also support this conclusion. There is important evidence in the Treaty's negotiating history as to *why* the Parties decided to include *some* State-owned entities within the ambit of the "companies" under the Treaty, and what *kinds* of State-owned entities they aimed to include.

36. A 3 December 1954 telegram from the Department of State to the US Embassy in Tehran, cited by both Parties, states:

> "to define companies for all treaty purposes as private companies establishes [a] precedent of questionable effect on [the] interests [of] both countries [in] view [of the] trend [in] many countries toward state enterprises. Iran appears [to] recognize this in proposing [a] separate agreement assuring [the] rights [of] their public corporations in [the] US."[98]

37. The language in this cable is highly significant, yet Iran nowhere addresses it. The motivation for including public companies — the "trend [in] many countries toward state enterprises" — has nothing to do with entities exercising sovereign functions. Such entities were not a new "trend". Rather, the "trend" to which the cable refers was the then growing entry of States into the *commercial* sphere. Setser explains:

> "When the Department of State at the end of World War II embarked upon an extensive commercial treaty program, one of the most significant international facts of life to which it had to adjust its treaty projects was the almost universal growth of state activity in the economic field. The countries of Eastern Europe . . . were socializing industry at a rapid pace. Extensive programs of nationalization were also being pursued in Western Europe, particularly by Great Britain and by France. The pattern was not localized in Europe, but was in evidence rather generally throughout the world . . . In formulating treaty provisions for such countries, the Department's specialists could hardly have avoided giving attention to the problem created by the nationalization programs."[99]

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[98] MI, Ann. 5.

[99] Vernon G. Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, Am. Soc. Int'l L. Proc., Vol. 55 (1961), pp. 91-92; POUS, Ann. 229. Iran cites this same Setser article at note 123 of its Observations.

38. This, then, was the reason for ensuring that some State-owned entities could be treated as "companies" under the Treaty. It had nothing to do with State entities like central banks carrying out *sovereign* functions. In fact, there is no evidence *anywhere* in the negotiating history that the Parties intended such entities to enjoy protections as "companies" under the Treaty. None.

III. On Iran's case, Bank Markazi is a State entity exercising sovereign functions

39. Mr. President, Members of the Court, this brings me to the second part of my presentation: that Iran has never characterized Bank Markazi as anything other than a State entity exercising sovereign functions.

40. In order to rule on the US preliminary objection concerning Bank Markazi, no extensive fact-finding on Bank Markazi's conduct or prejudgment of the merits is required. It suffices for the Court to simply hold Iran to its word on the subject. For example, Iran asserts in its Memorial that Bank Markazi merits special protections as a central bank, arguing that "[t]he essential duty of a central bank is to serve as the guardian and regulator of the monetary system and currency of that State both internally and internationally. Central banks therefore play a key role in the exercise of a State's monetary sovereignty"[100].

41. I should note that Iran's statement accords with the view expressed by the United States as a general matter with respect to traditional central banks when negotiating FCN treaties. When negotiating with the Dutch in 1953, the United States noted that there was a "presumption" that a "State's 'central bank' which acts as an arm of the Government in executing the Government's monetary control and fiscal policy represents the Government in its sovereign capacity . . ."[101].

42. In this case, Iran references, and has annexed to its Memorial, the 1972 Monetary and Banking Act from which Bank Markazi derives its personality, its objectives, and its powers[102]. That Act makes it very clear that the Bank is intended to serve sovereign, and not commercial,

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[100] MI, para. 3.24; see *ibid.*, para. 1.25. Further references to Iran's pleadings may be found in POUS, fn. 379.

[101] Department of State Instruction A-52 to Embassy The Hague, Aug. 4, 1953, at 2, *in* Brief for the United States, Appendix C, *Elec. Data Sys. Corp. Iran* (2d Cir. Oct. 18, 1979) (POUS, Ann. 231).

[102] MI, Ann. 73; see POUS, paras. 9.5-9.6.

functions. It even states, in an article that Iran quotes in its Memorial, that Bank Markazi is not subject to "general laws and regulations" relating to "governmental companies"[103].

43. However, it is not even necessary for the Court to look to that Act: Iran's own statements are enough, and they are further augmented by *Bank Markazi*'s assertions about itself in the *Peterson* litigation. Iran makes no attempt to distance itself from these statements, so it presumably agrees with them. And as Professor Boisson de Chazournes pointed out, it is difficult to believe that Iran played no role in shaping its Central Bank's arguments in a case with billions of dollars at stake.

44. In that litigation, Bank Markazi described itself as an entity carrying out sovereign functions[104]. This is also reflected in additional Bank Markazi submissions found among the previously sealed *Peterson* documents that the United States filed with this Court last September[105]. For example, Bank Markazi filed in that case the sworn affidavit of Mr. Gholamhossein Arabieh, then the director of the Bank's Legal Studies and Research Department[106]. Mr. Arabieh's now-unsealed affidavit sets out Bank Markazi's various functions under its governing statute, all of a sovereign rather than a commercial nature, as well as the Bank's role as Iran's representative before international organizations such as the IMF[107].

45. And with specific regard to the assets at issue in the *Peterson* case, Bank Markazi took the position before the US court that the bonds in question were held for "the classic central banking purpose of investing Bank Markazi's currency reserves"[***108***], and further, that this investment served "an important *governmental* purpose"[109]. These were Bank Markazi's *own statements*.

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[103] MI, Ann. 73, art. 10 *(d)*; MI, para. 4.7.

[104] See, e.g., POUS, Ann. 235 (Brief for Defendant-Appellee in *Peterson*, 2d Cir. Aug. 31, 2015), p. 38 (Bank Markazi describing itself as an "instrumentalit[y] acting in a sovereign capacity").

[105] See, e.g., POUS, Ann. A01 (Bank Markazi Motion to Dismiss, SDNY 11 May 2011), p. 29 (stating that, since its establishment under Iran's 1960 Banking and Monetary Act, Bank Markazi "has fulfilled its mandate as the Central Bank of Iran, which includes (i) formulating and implementing Iran's monetary policy; (ii) issuing Iran's currency; (iii) maintaining custody of the country's foreign currency and precious metals reserves; and (iv) supervising and policing Iran's banking system.").

[106] POUS, Ann. A03 (Affidavit of Gholamhossein Arabieh, dated 20 Dec. 2010), para. 5.

[107] POUS, Ann. A03, paras. 27-37.

[***108***] ***POUS, Ann. 233, pp. 35-36.***

[109] POUS, Ann. A15, p. 3.

46. Perhaps most significantly, Iran nowhere argues in its Observations on our objections that Bank Markazi is anything *other* than a State entity that exercises sovereign functions. In fact, even where Iran states that central banks *may* undertake non-sovereign activities, the only example it cites is the Bank of England[110]. It does not say that the United States has misunderstood Iran's position, and that in fact Iran views Bank Markazi as an ordinary commercial entity that just happens to be State-owned. It simply argues that some of Bank Markazi's operational activities as a central bank, like buying and selling securities, are of a kind that can also be carried out by private companies and are therefore "professional" in nature[111]. But this reductionism is no answer. For example, an NGO may provide monetary aid to a development project in another country just as a State's foreign assistance agency does. But that does not mean that the foreign assistance agency is not exercising a sovereign function: providing aid from public coffers in furtherance of the State's foreign policy.

47. What matters is that Bank Markazi, on its own case in *Peterson* — and with no disagreement from Iran here — makes Iran's monetary policy; supervises Iran's banks; issues Iran's currency; represents Iran before numerous international bodies; and, as it claims to have done with the assets at issue in *Peterson*, invests Iran's foreign currency reserves. These are sovereign functions.

48. So if the Court agrees with the United States that a State entity such as a traditional central bank cannot be a "company" under the Treaty, it can simply assume, for purposes of deciding the objection, that Iran's (and Bank Markazi's) *own allegations* are true and that Bank Markazi is just such an entity.

IV. Conclusion

49. Mr. President, Members of the Court, with that, let me conclude my submissions. In short, Iran cannot have it both ways: it cannot simultaneously claim that Bank Markazi is a sovereign entity entitled to immunity *and* that Bank Markazi should be regarded as an ordinary "company". For all of the reasons I have explained and that are further set out in our written

[110] WSI, para. 4.21.

[111] WSI, paras. 4.21, 4.34.

submissions, the Court should find that it lacks jurisdiction over Iran's Article III, IV and V claims concerning the treatment of Bank Markazi. Those claims fall outside the scope of the enumerated articles. The Court can, and the Court should, uphold this jurisdictional objection without any forays into the merits. The objection is exclusively preliminary in character and is ripe for decision.

50. Mr. President, Members of the Court, this concludes my submissions, and it also concludes the first-round submissions of the United States. I thank you for your kind attention.

The PRESIDENT: I thank Professor Childress. As you pointed out, your statement brings to an end the first round of oral argument of the United States of America. The Court will meet again on Wednesday morning at 10 a.m. to hear the first round of oral argument of the Islamic Republic of Iran. The sitting is adjourned.

The Court rose at 4.55 p.m.

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