

International Court of Justice — Alleged violations of Treaty of Amity, Economic Relations, and Consular Rights, 1955 — Alleged violations of customary rules of international law on sovereign immunity — Preliminary objections — Jurisdiction of the Court — Admissibility of claims

International Court of Justice — Jurisdiction — Jurisdiction under Article XXI(2) of Treaty of Amity, Economic Relations, and Consular Rights, 1955 — Jurisdiction *ratione materiae* — Article XX(1)(c) and (d) of 1955 Treaty — Whether 1955 Treaty including restrictions on scope of International Court of Justice jurisdiction — Issue already decided in Court’s earlier jurisprudence — Confirmation of earlier findings — Whether certain provisions of 1955 Treaty incorporating rules of customary international law on sovereign immunity — Article IV(2) — Article XI(4) — Article III(2) — Article IV(1) — Article X(1) — Definition of “company” under Article III(1) of 1955 Treaty — Whether Central Bank of Iran a “company” under 1955 Treaty — Relevance of an entity’s functions for it to be a “company” under 1955 Treaty — Determination of functions a matter for merits — Whether objection possessing an exclusively preliminary character

Claims — Admissibility of claims — Abuse of process — Distinction from abuse of rights — Abuse of process not a new objection — Re-characterisation of objection — Exceptional circumstances not present — Unclean hands — Allegations of sponsoring terrorism — No decision on status of unclean hands doctrine under international law — Whether conditions for unclean hands doctrine satisfied in the circumstances

CERTAIN IRANIAN ASSETS

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)¹

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International Court of Justice

Preliminary Objections. 13 February 2019

(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam and Iwasawa, *Judges*; Brower and Momtaz, *Judges ad hoc*)

SUMMARY:² *The facts:*—On 14 June 2016, the Islamic Republic of Iran (“Iran”) filed an application instituting proceedings against the United States of America (“the United States”) in a dispute relating to alleged violations of the Iran–United States Treaty of Amity, Economic Relations, and Consular Rights Iran signed on 15 August 1955 (“the 1955 Treaty”). Iran sought to found the jurisdiction of the International Court of Justice (“the Court”) on Article XXI(2) of the 1955 Treaty.

The dispute brought by Iran concerned the alleged violations of the sovereign immunities to which certain Iranian State-owned entities, including the Central Bank of Iran (“Bank Markazi”), were said to be entitled under international law. According to Iran, the United States breached the sovereign immunities of these State-owned entities by entering default judgments and enforcing such judgments in a number of cases filed against Iran with the federal courts of the United States. Iran especially took issue with the entering and enforcement of default judgment in *Peterson et al. v. Islamic Republic of Iran* before the United States District Court for the Southern District of New York (“the *Peterson* case”).³ The *Peterson* case originated in the 1983 bombing of the United States’ military barracks in Beirut (Lebanon), in which 241 United States’ servicemen who were part of a multinational peacekeeping force were killed. Iran rejected the United States’ allegation that Iran was responsible for this bombing.

The violations of the 1955 Treaty alleged by Iran were said to stem from the amendments to Sections 1605(a)(7), 1610(b)(2) and 1610(g) of the Foreign Sovereign Immunities Act 1976 (“FSIA”) in 1996 and 2008, which limited the immunity enjoyed under the FSIA by State-owned entities of States designated by the United States to be “sponsors of terrorism”. The United States adopted additional legislative measures, including the Terrorism Risk Insurance Act 2002, allowing the enforcement of judgments

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² Prepared by Dr M. Lando.

³ Relevant decisions in the *Peterson* case will be reported in volume 202 of the *International Law Reports*.

passed by United States courts under the amended provisions of the FSIA. The United States also passed the Iran Threat Reduction and Syria Human Rights Act 2012, Section 502 of which specifically made the assets of Bank Markazi subject to enforcement in order to satisfy default judgments against Iran in the *Peterson* case. In 2012, United States President Obama also issued Executive Order (“EO”) 13599, which blocked all “property and interests in property” of Iran, including those of Bank Markazi and of financial institutions owned or controlled by Iran, where such assets were either within the territory of the United States, or in the possession or control of any United States person.

As a result of these legislative and executive actions by the United States, the assets of Bank Markazi and of other Iranian State-owned banks were subject to enforcement proceedings in the United States and abroad, and have, in certain cases, already been distributed to judgment creditors.

The Parties disagreed on the subject-matter of the dispute. While Iran argued that the Court was requested to decide on the alleged violations, by the United States, of certain provisions of the 1955 Treaty, the United States contended that Iran was seeking to embroil the Court in a wider strategic dispute between the Parties.

The United States raised three objections to the Court’s jurisdiction, and two objections to the admissibility of Iran’s application.

In its first preliminary objection to the Court’s jurisdiction, the United States submitted that the Court had no jurisdiction under the 1955 Treaty because the measures adopted pursuant to EO 13599, of which Iran complained, fell outside the scope of that Treaty by virtue of its Article XX(1)(c) and (d).⁴ According to the United States, this provision acted as a jurisdictional limit, in the sense that measures falling within its scope would fall outside the scope of the Court’s jurisdiction *ratione materiae*. The United States maintained that, even if the Court were to find that Article XX(1)(c) and (d) could not ground an objection to the Court’s jurisdiction, the Court was nonetheless not barred from considering any other objection under that provision as a preliminary matter.

Iran relied on the Court’s judgments in *Oil Platforms (Preliminary Objection)*⁵ and *Military and Paramilitary Activities in and against Nicaragua (Merits)*,⁶ as well as on the Court’s order on provisional measures in *1955 Treaty of Amity*,⁷ to argue that the Court had already decided that Article XX of the 1955 Treaty did not impose limits on the Court’s jurisdiction but

⁴ For the text of the relevant provisions of Article XX of the 1955 Treaty, see para. 38 of the judgment.

⁵ *Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection)*, 130 ILR 174, p. 186, para. 20.

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, 76 ILR 1, p. 369, paras. 222 and 271.

⁷ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America) (Provisional Measures)*, 192 ILR 1.

provided potential defences on the merits. Iran contended that it was of little importance that the Court, in *Oil Platforms (Preliminary Objection)*, had not been requested to consider Article XX(1)(c). Iran added that, in any event, the United States' objection was not exclusively preliminary in character.

In its second preliminary objection to the Court's jurisdiction, the United States argued that Iran's claims that the United States had breached the sovereign immunity to which certain State-owned entities were entitled fell outside the scope of the 1955 Treaty. According to the United States, the text of the 1955 Treaty, its context, its object and purpose, and its drafting history, showed that the Parties did not intend that Treaty to govern issues of sovereign immunity. The 1955 Treaty was only intended to regulate trade and consular relations. With respect to its specific provisions, the United States argued that: (i) Article IV(2)⁸ concerned the minimum standard of treatment guaranteed to the property of aliens in the host State, and not immunity of any kind; (ii) Article XI(4)⁹ only prevented unfair competition by publicly owned enterprises, and was not germane to sovereign immunity for activities *jure imperii*; (iii) Article III(2)¹⁰ did not concern defences to be claimed by the "nationals" or "companies" of one State before the courts of the other State, but only intended to allow access to those courts; (iv) Article IV(1)¹¹ only aimed to afford certain protections to the "nationals" and "companies" carrying out private commercial activities, and did not apply to entities exercising sovereign activities; and (v) Article X(1)¹² concerning "freedom of commerce", only related to actual commerce and ancillary activities, without covering issues of sovereign immunity.

Iran argued that the Court was required to decide whether the United States respected relevant rules of international law on sovereign immunity, in order to decide whether the United States had breached the 1955 Treaty. According to Iran, a number of provisions of the 1955 Treaty incorporated, at least to some degree, rules of international law on sovereign immunity into that Treaty: (i) Article IV(2) explicitly mentioned "require[ments of] international law", which incorporated by reference rules of customary international law on sovereign immunity; (ii) Article XI(4) which barred "immunity" only for publicly owned enterprises engaging in commercial activity, did not limit the immunity of State entities engaging in activities *jure imperii* under customary international law, thus implying that such immunity had to be upheld under the 1955 Treaty; (iii) Article III(2) protected sovereign immunities as an integral part of freedom of access to the courts of the Parties; (iv) Article IV(1) incorporated rules on sovereign immunity through its references to "fair and equitable treatment" and to the need for the Parties to refrain from any "unreasonable or discriminatory

⁸ For the text of Article IV(2) of the 1955 Treaty, see para. 53 of the judgment.

⁹ For the text of Article XI(4) of the 1955 Treaty, see para. 59 of the judgment.

¹⁰ For the text of Article III(2) of the 1955 Treaty, see para. 66 of the judgment.

¹¹ For the text of Article IV(1) of the 1955 Treaty, see para. 71 of the judgment.

¹² For the text of Article X(1) of the 1955 Treaty, see para. 75 of the judgment.

measures”; and (v) Article X(1) required that immunities be respected in order for “freedom of commerce” not to be impeded.

In its third preliminary objection to the Court’s jurisdiction, the United States argued that Bank Markazi did not qualify as a “company” within the meaning of Article III(1) of the 1955 Treaty, and therefore the protections of the 1955 Treaty did not apply. Although the United States admitted that a public enterprise could be a “company”, it could be so only if it acted as a private enterprise. The United States stated that Bank Markazi, a central bank exercising exclusively sovereign functions, was not such a “company”, relying on Iran’s 1960 Monetary and Banking Act, as amended, which put Bank Markazi under the full control of Iran’s Government.

Iran contended that the definition of “company” under Article III(1) of the 1955 Treaty was deliberately broad, and included any company, irrespective of its status as a publicly owned entity or the activity it carried out. Iran emphasised that Bank Markazi paid tax to the Iranian Government, bought securities, acquired goods and services, and appeared in courts of law. In the alternative, Iran argued that the objection was not exclusively preliminary in character.

In its first preliminary objection to the admissibility of Iran’s application, the United States contended that Iran’s application constituted an “abuse of rights” or an “abuse of process”. In the oral proceedings, the United States clarified that this objection was properly categorised as an objection concerning “abuse of process”. According to the United States, since the conditions of friendly, commercial and consular relations underlying the 1955 Treaty no longer existed between the Parties, Iran did not seek to vindicate its rights under the Treaty. The United States added that Iran’s application was abusive as it attempted to rewrite the Treaty in breach of principles of good faith.

Iran argued that there were no “exceptional circumstances” justifying a finding of abuse of process, and that any broader dispute between the Parties, as well as whether the conditions underlying the 1955 Treaty still existed, was irrelevant. Iran further argued that it was not attempting to rewrite the 1955 Treaty, as that Treaty already included references to sovereign immunity.

In its second preliminary objection to the admissibility of Iran’s application, the United States, relying on Iran’s alleged sponsoring of terrorism, maintained that Iran had come to the Court with “unclean hands”, and its application was therefore inadmissible. Iran rejected the argument that it sponsored terrorism. Iran argued that there was much uncertainty surrounding the “unclean hands” doctrine in international law. In any event, in the circumstances, the doctrine would not have been satisfied, as the United States had not argued that Iran had breached the provisions of the very treaty on which it was relying for its application against the United States.

Held:—(1) (unanimously) The first preliminary objection raised by the United States to the Court’s jurisdiction was rejected.

(a)(i) Although cases filed with the Court often arose in the context of broader disagreements between the States concerned, the Court had to ascertain whether the acts of which Iran complained fell within the scope of the 1955 Treaty (para. 36).

(ii) The 1955 Treaty did not contain provisions excluding matters from the Court's jurisdiction. The Court had already found that Article XX(1)(d) of the 1955 Treaty afforded a defence on the merits and was not a limit on the Court's jurisdiction. The same also applied to Article XX(1)(c) of the 1955 Treaty. The first objection to the Court's jurisdiction had to be rejected (paras. 45-7).

(2) (by eleven votes to four, Judges Bhandari, Robinson, Gevorgian and Judge ad hoc Momtaz dissenting) The second preliminary objection raised by the United States to the Court's jurisdiction was upheld.

(a)(i) The object and purpose of the 1955 Treaty, as it emerged from its title and preamble, did not indicate that sovereign immunities were included in its scope, and Article IV(2) of the 1955 Treaty only concerned the minimum standard of treatment afforded to foreign nationals or companies. The context of Article IV(2), stemming from the other paragraphs of that provision, also indicated that it did not concern sovereign immunities (paras. 57-8).

(ii) Article XI(4) of the 1955 Treaty left the immunities enjoyed by States and State-owned entities under customary international law untouched. Iran's *a contrario* reading could only support its interpretation if it were appropriate in the light of the object and purpose of the 1955 Treaty, and the context of Article XI(4). However, Article XI(4) did not concern the issue of activities *jure imperii*, but only sought to preserve fair competition between private and public enterprises (paras. 62-5).

(iii) The fact that Article III(2) of the 1955 Treaty neither mentioned sovereign immunities, nor referred to rules of general international law, was insufficient to exclude questions of immunity from the scope *ratione materiae* of the 1955 Treaty. Nevertheless, for such questions to be relevant, breaching the law of sovereign immunity had to be capable of affecting compliance with the right protected by Article III(2). That provision only guaranteed the right to access courts, and not the substantive or procedural rights which the company of a Party could vindicate before the courts of the other Party. Nothing in the text, context or object and purpose of Article III(2) suggested that the right of access to courts also entailed an obligation that the Party the courts of which were seised uphold the law of sovereign immunity (para. 70).

(iv) For the same reasons set out in respect of Article IV(2) of the 1955 Treaty, Article IV(1) of the 1955 Treaty could not be interpreted to require the courts of either Party to uphold rules of customary international law on sovereign immunity (para. 74).

(v) In its judgment in *Oil Platforms (Preliminary Objection)*, the Court had already decided that the term "commerce" under Article X(1) of the 1955 Treaty had to be interpreted broadly. However, even if understood in this

sense, the term “commerce” could not extend to the protection of sovereign immunities (paras. 78-9).

(b) None of the provisions invoked by Iran could bring within the Court’s jurisdiction the alleged violations by the United States of the law of sovereign immunity, and, therefore, the Court did not have jurisdiction over any claim by Iran that the United States breached the law of sovereign immunity. The second objection to the Court’s jurisdiction had to be upheld (para. 80).

(3) (by eleven votes to four, Judges Tomka, Gaja, Crawford and Judge ad hoc Brower dissenting) The third preliminary objection raised by the United States to the Court’s jurisdiction did not possess, in the circumstances of the case, an exclusively preliminary character.

(a)(i) Considering the definition of “company” under Article III(1) of the 1955 Treaty, an entity could only be a “company” if the law of the State where it was created conferred on it its own legal personality, and an entity could be a “company” also if it were partly or wholly owned by a State. Bank Markazi could in principle be a “company” within the meaning of the 1955 Treaty. However, the nature of the activities carried out by a company was material to its characterisation as a “company” within the meaning of the 1955 Treaty, as indicated by the context and the object and purpose of the 1955 Treaty. As the 1955 Treaty aimed to protect the rights of “nationals” and “companies” engaging in commercial activities, an entity carrying out only sovereign activities could not be a “company” within the meaning of that Treaty (paras. 87-91).

(ii) Since an entity could engage in both commercial and sovereign activities at the same time, the Court had to establish the activities in which Bank Markazi engaged. The Court did not have before it all the facts necessary to decide whether Bank Markazi was carrying out, at the relevant time, activities allowing for it to be characterised as a “company” within the meaning of the 1955 Treaty. Accordingly, the third preliminary objection did not possess, in the circumstances, an exclusively preliminary character (paras. 92-8).

(4) (unanimously) The first and second preliminary objections raised by the United States to the admissibility of Iran’s application were rejected.

(a) While abuse of process concerned the procedure before the Court, abuse of rights related to the merits of a State’s claims. The United States did not introduce a new objection, but merely recharacterized as “abuse of process” an objection it had already raised (paras. 103-4).

(b)(i) A finding of abuse of process could only be made in exceptional circumstances. As the 1955 Treaty was in force at the time of the filing of Iran’s application, there were no exceptional circumstances to justify a decision that Iran had abused the Court’s process. The first objection to the admissibility of Iran’s application had to be rejected (paras. 113-15).

(ii) The United States did not argue that Iran had breached the provisions of the 1955 Treaty, which was not *per se* sufficient to find that Iran had come before the Court with unclean hands. However, this finding was without prejudice to the defences which could be raised at the merits stage of the

proceedings. The second objection to the admissibility of Iran's application therefore had to be rejected (paras. 122-4).

(5) (unanimously) The Court had jurisdiction, subject to its decisions relating to the second and third preliminary objections raised by the United States to the Court's jurisdiction, to entertain the application filed by Iran; Iran's application was admissible (para. 125).

Joint Separate Opinion of Judges Tomka and Crawford: (1) Whether Bank Markazi was a "company" within the meaning of Article III(1) of the 1955 Treaty was an objection having an exclusively preliminary character, and to defer its consideration to the merits stage of the proceedings was inappropriate. Article 62(5) of the 1946 Rules of Court allowed the Court greater latitude concerning how to deal with preliminary objections. Although some States had criticised the Court for its decision in *Barcelona Traction*,¹³ to join a preliminary objection to the merits only finally to uphold it, the Court had already undertaken a revision resulting in the current formulation of Article 79(9) of the Rules of Court. This provision formulated stricter limits for a decision to consider a preliminary objection at the merits stage of the proceedings (paras. 1-7).

(2) Since 1972, the Court had found that an objection did not possess an exclusively preliminary character in only five cases, and the present case marked a departure from the Court's adherence to the regime under Article 79(9) of the Rules. Whether Bank Markazi was a company was merely a question of treaty interpretation. Since the subject-matter of the dispute between the Parties did not concern Bank Markazi's activities, but compliance by the United States with certain provisions of the 1955 Treaty, deciding on the status of Bank Markazi as a "company" would not have required the Court to address the merits of Iran's claims (paras. 8-11).

Declaration of Judge Gaja: (1) At this stage of the proceedings, the Court only had to ascertain whether Iran had made a reasonable case that Bank Markazi enjoyed rights under the 1955 Treaty, and that these rights could have been violated. This threshold was reached, and the third objection to the Court's jurisdiction should have been dismissed. That Bank Markazi engaged in sovereign activities did not mean that it could not also have engaged in commercial activities (paras. 1-3).

(2) Article XI(4) of the 1955 Treaty confirmed that the Treaty covered State entities also when such entities did not exercise commercial activities (para. 4).

Separate Opinion of Judge Robinson: (1) Article XI(4) compellingly implied that State entities carrying out activities *jure imperii* enjoyed sovereign immunity under the 1955 Treaty. The fact that the 1955 Treaty did not

¹³ *Case concerning Barcelona Traction, Light and Power Company Limited*, 46 ILR 1.

explicitly mention sovereign immunities was not dispositive of whether those immunities were covered under that Treaty. Article XI(4) of the 1955 Treaty required a determination of whether certain activities were commercial (and thus attracted immunity), or sovereign, in which case an issue arose as to whether a customary right to immunity applied under that Treaty. Since the 1955 Treaty envisaged the need for that determination, it also made provision for the resolution of the issue by applying customary rules of sovereign immunity (paras. 3-7).

(2) It did not matter whether the reasoning to reach this conclusion was described as “*a contrario*” or “implied”, as what mattered was that the conclusion was a reasonable one. The inclusion of customary international law rules on sovereign immunity was also confirmed by the object and purpose of the 1955 Treaty, namely to maximise trade between the Parties. The activities of a central bank were governed by the 1955 Treaty, as the provision under Article VII confirmed (paras. 8-14).

(3) The third preliminary objection to the Court’s jurisdiction had to be rejected because sovereign immunities fell within the scope *ratione materiae* of the 1955 Treaty (para. 15).

Separate Opinion of Judge Gevorgian: (1) Iran claimed that the United States had breached the sovereign immunities to which certain State entities were entitled in relation to certain substantive provisions of the 1955 Treaty, which marked a difference with Equatorial Guinea’s argument in *Immunities and Criminal Proceedings*.¹⁴ The limited object and purpose of the 1955 Treaty, namely to encourage and maximise trade between the Parties, was not sufficient to find that customary international law rules on sovereign immunity were excluded from the scope of that Treaty (para. 4).

(2) In relation to Article III(1) of the 1955 Treaty, nothing would remain of the right of access to courts if Iran were deprived of a preliminary procedural defence such as the invocation of sovereign immunity. Given Bank Markazi’s role in facilitating commerce between the Parties, depriving it of the right to invoke sovereign immunities before United States courts could amount to a restriction on freedom of commerce guaranteed under Article X (1) of the 1955 Treaty (paras. 7-12).

Separate Opinion of Judge ad hoc Brower: (1) The authorities on which the United States relied in relation to its “unclean hands” argument provided only scant support. Similarly, the United States failed to meet the main requirement for its “unclean hands” argument to succeed, as set out by Judge Hudson in his Individual Opinion in *Diversion of Water from the Meuse*¹⁵ (paras. 2-7).

¹⁴ *Immunities and Criminal Proceedings (Equatorial Guinea v. France) (Preliminary Objections)*, 191 ILR 219.

¹⁵ *Diversion of Water from the River Meuse (Netherlands v. Belgium)*, 8 ILR 444.

(2) Concerning Article XX of the 1955 Treaty, the Court could have reached the same conclusion without relying on its previous jurisprudence, but only on the basis of the self-judging character of that provision (paras. 8-12).

(3) There were additional reasons for the Court to uphold the United States' second objection to jurisdiction. The 1955 Treaty governed economic relations on one hand, and consular rights on the other hand. The grant of immunities in the realm of consular and diplomatic relations stood in stark contrast to the absence of immunities for any other purpose, which, according to the interpretive canon *expressio unius est exclusio alterius*, indicated that the 1955 Treaty did not cover the latter category of immunities. Numerous other provisions of the 1955 Treaty strengthened the Court's view that that Treaty was commercial in character. Iran's *a contrario* argument could not be upheld, given the Court's cautious attitude towards this interpretive technique in its jurisprudence (paras. 13-23).

(4) The Court should not have concluded that the third objection to jurisdiction did not possess an exclusively preliminary character. Iran's Monetary and Banking Act 1972, as amended, nowhere authorized Bank Markazi to carry out non-sovereign activities, and Iran did not even make a serious attempt to persuade the Court that Bank Markazi carried out non-sovereign activities. Iran seemed to have confused matters in its pleadings, but never did it deny that Bank Markazi carried out exclusively sovereign activities. To the contrary, before the United States' courts Iran had argued that Bank Markazi was entitled to sovereign immunity precisely because it carried out sovereign activities. In the circumstances, the Court had before it all facts necessary for it to decide which kind of activities Bank Markazi carried out, which should have led it to conclude that Bank Markazi was not a "company" within the meaning of Article III(1) of the 1955 Treaty (paras. 24-32).

Separate Opinion of Judge ad hoc Momtaz: (1) The Court should not have upheld the second preliminary objection to its jurisdiction. The Parties disagreed on the interpretation of Article XI(4) of the 1955 Treaty, which entailed that there was a dispute concerning the interpretation or application of that Treaty. The Court should have rejected the United States' objection by reference to the dispute between the Parties concerning the interpretation of Article XI(4) of the 1955 Treaty (paras. 1-7).

(2) The alleged breach of the sovereign immunities to which Bank Markazi was entitled as a State-owned entity was a restriction on freedom of commerce under Article X(1) of the 1955 Treaty. The conclusion that the Court had jurisdiction should also have been reached by interpreting Article XI(4) of the 1955 Treaty on the basis of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 1969, as well as *a contrario* as argued by Iran (paras. 11-22).

The text of the judgment and Opinions and Declaration is set out as follows: