DECLARATION OF JUDGE SALAM

[Original English text]

Disagreement with the Court's conclusion on the characterization of Bank Markazi under the Treaty of Amity — Questionable interpretation of the 2019 Judgment — Problematic application of the criterion of the purpose pursued by Bank Markazi — Usefulness for the Court of being guided by the international law of immunities — Resort to the practice of the United States in characterizing Bank Markazi's activities.

1. To my great regret, I am unable to support the conclusion reached by the majority of my colleagues on the question whether Bank Markazi is a "company" within the meaning of the Treaty of Amity, Economic Relations, and Consular Rights signed by the two States to the present proceedings on 15 August 1955 (hereinafter the "Treaty of Amity" or the "Treaty"). On this matter, I disagree with the majority primarily on the methodology and reasoning followed in reaching its conclusion that Bank Markazi cannot be characterized as a "company" within the meaning of the Treaty of Amity and that, consequently, the Court does not have jurisdiction to entertain Iran's claims concerning alleged breaches of the Treaty relating to the treatment of that bank. I consider that the Court, in relying on its Judgment on the preliminary objections of 13 February 2019 (hereinafter the "2019 Judgment") and on the known solutions of international law regarding the distinction between the "commercial activities" and "sovereign activities" of a public entity, should have come to a different conclusion on the characterization of Bank Markazi.

2. The Court's reasoning on the status of Bank Markazi is set out in paragraphs 40 to 54 of the present Judgment. According to the Court, this reasoning "follow[s] the line of reasoning it adopted in its 2019 Judgment" (Judgment, para. 47). As the present Judgment recalls, the objection to jurisdiction *ratione materiae* relating to Bank Markazi was initially raised by the United States in the context of its objections to jurisdiction and admissibility which led to the 2019 Judgment. In this regard, the Court considered, on the basis of the arguments exchanged before it and the information presented to it, that it did not have all the facts necessary to decide the question and concluded that the objection did not possess, in the circumstances of the case, an exclusively preliminary character (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 40, para. 97, and p. 45, para. 126 (3)). The Court recalls that, although in its 2019 Judgment it "refrained from ruling on the objection to jurisdiction now under consideration, . . . that Judgment nevertheless contains, in its reasoning, a number of significant indications regarding the concept of 'company' as it is used in Articles III, IV and V of the Treaty of Amity" (Judgment, para. 40).

3. In its 2019 Judgment, the Court drew attention to

> "two points [which] are not in doubt and [which], moreover, give no cause for disagreement between the Parties.
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> First, an entity may only be characterized as a 'company' within the meaning of the Treaty if it has its own legal personality, conferred on it by the law of the State where it was created, which establishes its legal status. . . .
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> Secondly, an entity which is wholly or partly owned by a State may constitute a 'company' within the meaning of the Treaty. The definition of 'companies' provided by Article III, paragraph 1, makes no distinction between private and public enterprises. The possibility of a public enterprise constituting a 'company' within the meaning of

> the Treaty is confirmed by Article XI, paragraph 4, which deprives of immunity any enterprise of either Contracting Party 'which is publicly owned or controlled' when it engages in commercial or industrial activities within the territory of the other Party, so as to avoid placing such an enterprise in an advantageous position in relation to private enterprises with which it may be competing" (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 37, para. 87).

4. The Court also made it clear therein that

> "there is nothing to preclude, *a priori*, a single entity from engaging both in activities of a commercial nature (or, more broadly, business activities) and in sovereign activities.
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> In such a case, since it is the nature of the activity actually carried out which determines the characterization of the entity engaged in it, the legal person in question should be regarded as a 'company' within the meaning of the Treaty to the extent that it is engaged in activities of a commercial nature, even if they do not constitute its principal activities." (*Ibid.*, pp. 38-39, para. 92.)

5. As regards the first condition set out in paragraph 87 of the 2019 Judgment, the Parties agree that Bank Markazi has its own legal personality conferred on it by the law of the State where it was created. Similarly, they agree that the fact that this entity is owned by the State does not prevent it from being a company within the meaning of the Treaty of Amity. Both Parties also agree that, even though the bank has a sovereign function, it may be characterized as a "company" within the meaning of the Treaty of Amity if it fulfils the second condition set out in the Judgment on preliminary objections, namely if "it is engaged in activities of a commercial nature, even if they do not constitute its principal activities". As a matter of fact, they disagree about the characterization of the operations carried out by Bank Markazi, in particular those relating to the purchase of 22 security entitlements and other financial transactions. Iran holds that, by their nature, these activities are commercial and should therefore be characterized as such, while the United States considers that these operations were carried out as part of the bank's sovereign functions from which they cannot be separated.

6. The solution, in my view, should derive from paragraph 92 of the 2019 Judgment, quoted above. In that paragraph, the Court stated without ambiguity that what is important in determining the characterization of Bank Markazi within the meaning of the Treaty is the nature of the activities concerned and carried out within the territory of the United States. I would emphasize that, in order to ascertain whether Bank Markazi is a company within the meaning of the Treaty of Amity, an assessment should be made not of the bank's general activities, rather, an assessment should be made only of those activities of Bank Markazi referred to by the Court in its 2019 Judgment that were carried out "within the territory of the United States at the time of the measures which Iran claims violated Bank Markazi's alleged rights under Articles III, IV and V of the Treaty" (*ibid.*, p. 39, para. 93). This is not to dispute that Bank Markazi as the central bank of Iran, performs as such an essentially sovereign function. But as the Court made clear in its 2019 Judgment, this in no way precludes that entity from being characterized as a "company" within the meaning of the Treaty as far as its commercial activities are concerned. It was thus for the Court, at this stage of the proceedings, to determine on that basis alone whether or not the activities carried out by Bank Markazi within the territory of the United States and referred to here were commercial in nature.

7. It is difficult on the basis of this criterion not to accept that Bank Markazi's investment and securities management activities, including the investment of 22 security entitlements in dematerialized bonds issued on the United States financial market, are activities of a commercial nature. It does not matter whether, as the United States argues, these transactions were part of the management of Iran's currency reserves (Judgment, para. 39). What is important is that, as the United States courts have themselves pointed out, these transactions constitute commercial activities in the United States. Thus, for example, under the heading "The restrained bonds are held in New York and reflect commercial activity in the United States", the United States District Court for the Southern District of New York asserts, *inter alia*, that,

> "[i]n order for [Bank] Markazi to purchase the Restrained Bonds and receive interest and principal payments related to those bonds, the Defendant Agent Banks had to undertake substantial commercial activity in the United States as the agents for, and under the direction of, Markazi.
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> . . . . . .
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> [Bank] Markazi delivered its instructions to Citibank by causing Clearstream to engage in various methods of electronic communication with Citibank's New York operations.
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> . . . . . .
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> Accordingly, Iran, Markazi, Clearstream and UBAE . . . entered a tacit or spoken agreement to funnel Markazi's transactions in bonds, including bonds kept for safekeeping in the United States, through the UBAE/Markazi Account that UBAE opened at Clearstream exclusively for the purpose of conducting Markazi's business" (*Peterson et al.* v. *Islamic Republic of Iran*, United States District Court, Southern District of New York, 7 December 2010, 10 CIV 4518).

8. In my view, the remarks made by Judge Giorgio Gaja in his declaration appended to the 2019 Judgment are convincing in this regard:

> "The exercise of sovereign functions by Bank Markazi is not regulated by the Treaty, except with regard to exchange restrictions in Article VII. However, the fact that Bank Markazi exercises sovereign functions does not exclude that it also operates as a commercial bank when it engages in transactions in a foreign financial market. The decision to invest in securities may be part of a sovereign prerogative of a central bank, but that does not mean that the implementation of an investment is carried out through the exercise of a sovereign power. The acquisition or sale of securities is not different from that executed by any commercial bank and should enjoy the same protection under the Treaty as that of a commercial bank." (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, declaration of Judge Gaja, pp. 52-53, para. 3.)

9. This is the conclusion the Court should have reached if it were truly following the line of the 2019 Judgment on preliminary objections, as it states in paragraph 47 of the present Judgment. That it, however, reaches a different conclusion stems, in my opinion, from the majority's incorrect interpretation of that Judgment. In fact, it considers that,

> "[i]n its 2019 Judgment, the Court merely indicated that the decisive question was whether Bank Markazi was carrying out, alongside its sovereign activities, other activities, of a commercial nature. It did not state that, in determining whether particular activities were of a commercial nature, there was no need to take into account any link that they may have with a sovereign function. On the contrary, the Court considers this latter criterion to be relevant." (Judgment, para. 51.)

10. This reading of the 2019 Judgment by the majority is, in my view, questionable to say the least. The majority introduces into the assessment of Bank Markazi's activities a new criterion which cannot be regarded as following the line of the 2019 Judgment on preliminary objections. Thus, in making the link between any commercial activities and the sovereign activity a criterion that is not only "relevant" but essential in view of the place given to it, the present Judgment does not clarify the 2019 Judgment but deviates from it. Indeed, in the latter, only the intrinsic nature of the activity is considered and assessed, even if it "do[es] not constitute [the bank's] principal activities".

11. However, in the present Judgment, the majority chooses not to assess per se the transaction or series of transactions carried out by Bank Markazi, but to place "[t]hat transaction — or series of transactions — . . . in its context, taking particular account of any links that it may have with the exercise of a sovereign function" (Judgment, para. 51). I am not convinced that such an approach is appropriate. Bank Markazi is the Iranian central bank and, like any central bank, it always pursues a public interest, even when carrying out revenue-generating activities as in the present case. Indeed, the revenues sought or acquired are for the purpose of carrying out sovereign and regalian activities. The question remains whether any activities carried out by a central bank such as Bank Markazi could be completely separated from its sovereign functions. For example, would the rental of a building, or the purchase of furniture and office equipment not be "carried out within the framework and for the purposes of Bank Markazi's principal activity, from which they are inseparable", to use the wording of paragraph 50 of the Judgment?

12. Owing to this approach, which departs from and contradicts the 2019 Judgment that it claims yet to be following, the majority makes it difficult, if not impossible, for the same entity to carry out both activities of a commercial nature (or, more broadly, business activities) and sovereign activities, as pointed out by the Court in paragraph 92 of the Judgment on preliminary objections. In contrast, the Court's 2019 pronouncement that only the nature of the activity concerned should be taken into account is well justified by the difficulty in separating the activities of a central bank from the sovereign purposes it serves. In this respect, the comments about States made by the Special Rapporteur of the International Law Commission ("ILC") on Jurisdictional Immunities of States and their Property are fully valid and applicable to central banks in general and to Bank Markazi in this case:

> "The activity or course of conduct or particular act attributable to a foreign State should not be determined by reference to its motivation or purpose. An act performed for a State is inevitably designed to accomplish a purpose which is in a domain closely associated with the State itself or the public at large. In the ultimate analysis, reference to the purpose or motive of an activity of a foreign Government is therefore not helpful in distinguishing the types of activity which could be regarded as commercial from those which are non-commercial. The present article proposes a reference to the nature of the activity or the character of the transaction or act. If it is commercial in nature, the activity can be regarded as a trading or commercial activity. Further reference to the purpose which motivated the activity could serve to obscure its true character. The purpose could best be overlooked in determining whether an activity is commercial or not, especially for the purpose of deciding upon the availability or applicability of State immunity." (Second report on jurisdictional immunities of States and their property, by

Mr. Sompong Sucharitkul, Special Rapporteur, *Yearbook of the International Law Commission*, 1980, Vol. II, Part One, p. 211, para. 46.)

13. It should of course be noted that the Special Rapporteur was considering the issue in the context of State immunities and that the Court stated that its jurisdiction in the present case did not extend to immunities falling outside the scope of the Treaty of Amity. However, it is difficult to understand why different criteria should be defined and applied here for the characterization of a commercial activity. It would be manifestly illogical, if not absurd, to consider that an activity of Bank Markazi could be considered as sovereign and thus excluded from the scope of protection of the Treaty of Amity while have being characterized by the concerned local jurisdictions as commercial and, therefore, not be covered by immunities under international law.

14. While I share the Court's conclusion in the present Judgment that "[t]he rules on sovereign immunities and those laid down by the Treaty of Amity concerning the treatment of 'companies' are two distinct sets of rules" (Judgment, para. 48), it remains that the fact that immunities are not the subject of the dispute before the Court does not prevent the latter from drawing inspiration from State practice and the solutions adopted in this field. The very nature of the question posed called for this approach by analogy.

15. It should also be noted that under Article 2, paragraph 2, of the United Nations Convention on Jurisdictional Immunities of States and their Property (hereinafter the "2004 Convention"), itself based on the work of the ILC,

> "[i]n determining whether a contract or transaction is a 'commercial transaction' under paragraph 1 *(c)*, reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction".

16. The Convention thus prescribes that recourse first be had to the nature criterion in order to determine the "commerciality" of the activity or transaction carried out by a public entity such as Bank Markazi. This is also the approach adopted in Article 7 of the European Convention on State Immunity. However, Article 2, paragraph 2, of the 2004 Convention provides for recourse, in the alternative, to the purpose criterion, if the parties to the contract or transaction have so agreed or if that criterion is used in the practice of the forum State.

17. In the present case, neither Iran nor the United States has invoked any agreement between Bank Markazi and its partners or co-contractors aimed at defining the characterization of the bank's activities. The purpose criterion could therefore only have been applied if it were the criterion used in the legal system of the United States, the forum State in this instance, to determine the commercial or non-commercial nature of a public entity's transactions. However, this is not the case: as the United States pointed out during the discussions on the ILC's Draft Articles on Jurisdictional Immunities of States and their Property, it is the nature of the act criterion that is applied in the United States legal system:

> "Section 1603 *(d)* of the FSI Act provides that the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." (ILC, Jurisdictional immunities of States and their property — Information and materials submitted by Governments, UN doc. A/CN.4/343, p. 65.)

18. Favouring the nature of the act in characterizing the activities of a public entity is thus founded on a legal provision, Section 1603 *(d)* of the Foreign Sovereign Immunities Act (hereinafter "FSIA"). This characterization based solely on the nature of the activity or transaction, regardless of the purpose pursued, has been confirmed by the United States courts and by the Supreme Court in particular. In fact, in 1992, the latter set out what is known as the "Weltover commercial activity test", which is applied by the country's courts for this purpose:

> "[W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' . . . the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce'" (United States Supreme Court, *Republic of Argentina* v. *Weltover Inc.,* 12 June 1992, 504 U.S. 607 (2d. Cir. 1992), p. 614).

19. In *Saudi Arabia* v. *Nelson*, the Supreme Court confirmed and clarified this position, removing any ambiguity:

> "We explained in *Weltover*, . . . that a state engages in commercial activity under the restrictive theory where it exercises '"only those powers that can also be exercised by private citizens,"' as distinct from those '"powers peculiar to sovereigns."' Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts 'in the manner of a private player within' the market. . . .
>
> We emphasized in *Weltover* that whether a state acts 'in the manner of' a private party is a question of behavior, not motivation" (United States Supreme Court, *Saudi Arabia* v. *Nelson,* 23 March 1993, 507 U.S. 349 (1993), p. 360).

20. It should of course be recalled here that the United States courts that have considered the matter have held, based on these criteria, that part of Bank Markazi activities were no different from those of a private actor and should therefore be characterized as commercial (see, *inter alia*, *Peterson et al.* v. *Islamic Republic of Iran*, United States District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (S.D.N.Y. 2013), p. 53; *Peterson et al.* v. *Iran, Bank Markazi*, *Banca UBAE, Clearstream, JP Morgan Chase Bank*, United States District Court for the Southern District of New York, Amended Complaint, 25 April 2014, No. 13-cv-9195-KBF, p. 3, para. 6; *Peterson et al.* v. *Iran, Bank Markazi, Banca UBAE, Clearstream, JP Morgan Chase Bank*, United States District Court for the Southern District of New York, Amended Complaint, 25 April 2014, No. 13-cv-9195-KBF, p. 6, para. 20).

21. Although these decisions and the FSIA evolved specifically in the context of foreign State immunities, I see no reason why they should not be applied in this case, particularly in establishing

the practice of the forum State in accordance with the guidelines of the 2004 Convention. It strikes me as inconsistent for a party to adopt the nature of the act criterion to deny immunities to foreign States and their organs, but to refuse to apply it when it comes to affording them the protection of an agreement such as the Treaty of Amity.

22. I would like to conclude with another point I find problematic in the Court's reasoning in determining the status of Bank Markazi within the meaning of the Treaty of Amity. This is found at the end of paragraph 52 of the Judgment. Here the Court states, *inter alia*, that "the assertions made by Bank Markazi in the judicial proceedings in the *Peterson* case, which are cited above, accurately reflect the reality of the bank's activities".

23. As has already been noted, the present case has, in an earlier phase, been brought before the national courts of the United States. During that phase, and in particular in the context of the *Peterson* case brought before the Federal Court for the Southern District of New York, whose judgment was confirmed by the United States Supreme Court, the nature of the activities carried out by Bank Markazi and at issue in the present proceedings were debated by the Parties, in particular to ascertain whether they were covered by immunities. Notably, each of the Parties adopted the opposite position to that taken before the Court in the present proceedings. This is no doubt a question of legal strategy and tactics. Thus, Bank Markazi presented the activities at issue as part of the exercise of its sovereign function as central bank, and not commercial in nature (see Judgment, para. 39), while the United States authorities considered that the activities of Bank Markazi were of a commercial nature, which is why they deemed that the bank was not entitled to invoke its immunity from the measures to freeze and seize the assets at issue (Judgment, para. 38).

24. The Court began by noting, quite rightly in my view, that it should not "consider the statements made in United States court proceedings by counsel for Bank Markazi and relied on by the United States . . . to be decisive" (Judgment, para. 52). It states, in this regard, that these statements by the bank "are not opposable to Iran" and may be explained by the specific context of the proceedings before the United States courts in which the Bank Markazi sought immunity. Despite this, the Court, somewhat surprisingly, ends up relying on these statements in the final sentence of that paragraph. It thus does the very thing it ruled out just a few lines earlier. Beyond the obvious contradiction, this appeared neither justified nor defensible to me in the context of the present case.

(Signed) Nawaf SALAM.

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