

## **Shaping the Immunity of Central Banks: The ICJ's Merits Decision in Certain Iranian Assets**

### **Introduction**

On March 30, 2023, the International Court of Justice (ICJ or the Court) announced the final judgment in a dispute between the Islamic Republic of Iran (the applicant) and the United States of America (the respondent) stemming from U.S. domestic legislation removing immunity from suit for “State sponsors of terrorism” in certain circumstances.<sup>1</sup> The Court’s jurisdiction was grounded in the Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States (the “Treaty of Amity”), signed in 1955.<sup>2</sup>

Though the Court ordered the United States to pay compensation for a number of breaches of the Treaty recognized by the Court, it rejected the largest chunk of Iranian claims linked to the freezing of assets of the Iranian central bank, Bank Markazi (now reaching around \$1.75 billion) by U.S. courts in actions brought to enforce terrorism-related domestic judgments obtained against Iran. Both parties appeared satisfied with the decision, at least as per their official statements.<sup>3</sup>

This *Insight* will review the background of the ICJ case and its resolution by the Court, which offers an interesting outlook into what might be coming in the future with respect to the role and position of central banks in international disputes, particularly in relation to asset freezes.<sup>4</sup>

### **Background of the Dispute**

After a deadly terrorist attack on American nationals in a U.S. Marine barracks in Beirut, Lebanon, in 1983, in which more than 200 American troops were killed, the United States sought to enable the victims to seek reparation in its domestic courts from states accused of supporting various paramilitary and terrorist groups responsible for the attacks. In 1984, the United States designated Iran a “State sponsor of terrorism”: it was believed that Iran was directly involved in the attack through its support to Hezbollah, which allegedly carried it out,<sup>5</sup> though Iran rejected that allegation before the ICJ.<sup>6</sup>

Twelve years later, in 1996, Congress amended the Foreign Sovereign Immunities Act (FSIA)—the domestic statute that provides the sole basis for haling a foreign sovereign into a U.S. court—so as to abrogate the baseline rule, grounded in customary international law, of immunity from suit for foreign sovereigns and their agencies and instrumentalities designated “State sponsors of terrorism.”<sup>7</sup> This change then resulted in Iran’s exposure to terrorism claims filed in U.S. courts by individuals seeking compensation. Iran refused to participate in any of the domestic proceedings, as it vigorously objected on the basis that the so-called “terrorism exception” to immunity in the FSIA did not comply with international law. Nonetheless, American courts not only issued default judgments in favor of claimants, but also—as a consequence of Iran’s failure to appear and satisfy the recognized claims and in accordance with the amended FSIA—were able to issue orders enforcing or securing these judgements through the seizure of Iranian assets located in the United States.

### **Iran’s Claims Before the ICJ**

In an application lodged before the ICJ in 2016, the Islamic Republic challenged the U.S. domestic legislation, i.e., the amendments to the FSIA, accusing the United States of breaching several provisions of the Treaty of Amity.

Specifically, Iran claimed the United States violated the Treaty through: failure to recognize the separate juridical status of Iranian companies (including the central bank); unfair and discriminatory treatment of such entities; failure to accord them protection and security required by international law; expropriation of their property; failure to accord them freedom of access to U.S. courts, including the abrogation of the immunities to which Iran and Iranian State-owned companies, including Bank Markazi, are entitled under customary international law; failure to respect the right of such entities to acquire and dispose of property; application of restrictions to such entities on the making of payments and other transfers of funds to or from the United States; and interference with the freedom of commerce.<sup>8</sup> These claims related to both Iranian state-controlled companies

that were conducting business activities on the United States' markets, as well as Bank Markazi—which undertakes both commercial financial activity and the sovereign tasks typically entrusted to a central bank.

Iran demanded reparation for losses suffered and a formal apology for the alleged breaches.<sup>9</sup>

### **Judgment on Preliminary Objections**

The United States raised several objections to jurisdiction of the ICJ and admissibility of Iran's claims.<sup>10</sup> One of the objections related to Bank Markazi's claimed legal status as a "company" within the meaning of the Treaty. The United States argued that since Bank Markazi predominantly acted as Iran's central bank, performing its public function, it thus did not fall within the scope of protection granted by the Treaty.<sup>11</sup>

In 2019, the ICJ issued its Judgment on preliminary objections.<sup>12</sup> Although the Court rejected most of the U.S.'s claimed objections, it did not consider the question of whether Bank Markazi was a "company" (i.e., whether its nature was essentially commercial or sovereign), as the Court reasoned that the argument did not possess an exclusively preliminary character and thus should be decided in the judgement on the merits.<sup>13</sup> Nevertheless, it did outline the most important characteristic regarding the constitutive aspect of a "company" as understood in the Treaty: legal personality, which did not distinguish between state-controlled and private entities.<sup>14</sup>

### **Judgment on the Merits**

The ICJ issued its final judgment on the merits on March 30, 2023. Perhaps unsurprisingly, it was by no means unanimous, with several separate decisions presenting a myriad of dissenting views.

Most importantly—and interestingly—the Court abstained from voicing an opinion on the biggest chunk of assets frozen by the United States: those belonging to Bank Markazi. It characterized the scarce commercial activity of the Bank in the American financial market as inseparable from its main, public role, and as such considered it to fall outside of the scope of protection provided by the Treaty of Amity. The Court stressed that the sole fact of performing commercial activities was not sufficient to assess whether the Bank could be defined as a "company" in light of the Treaty of Amity. Rather, it was crucial, as the ICJ highlighted, that those activities are interpreted not as individually standing

transactions, but rather in context. Thus, since Bank Markazi's commercial activity could be characterized as the standard activity of a central bank, it could not be assumed that it fell within the category of "companies" protected by the Treaty of Amity.<sup>15</sup> This assessment led the Court to find that it ultimately lacked jurisdiction to determine Iran's claims regarding Bank Markazi's frozen assets.<sup>16</sup>

The Court did not sustain any other arguments presented by the United States. While assessing the reasonableness of measures contested by Iran, however, it did note that providing effective remedies to domestic plaintiffs who have been awarded damages can constitute a legitimate public purpose justifying actions against international obligations, which might have remarkable consequences for future disputes.<sup>17</sup>

Additionally, as for the claims unrelated to the status of Bank Markazi, the Court considered the United States liable for several breaches of the Treaty of Amity, including Article IV(1) (fair and equitable treatment clause)<sup>18</sup> and Article IV(2) (expropriation clause) of the Treaty of Amity,<sup>19</sup> and awarded financial compensation to Iran as a result, in an amount to be agreed upon by the parties.<sup>20</sup>

The Court denied Iran's claim regarding the alleged breach of Article V(1) (right to acquire and dispose of property).<sup>21</sup> The ICJ also refrained from awarding Iran the non-financial compensation it sought, i.e., satisfaction in the form of an apology and cessation of wrongful acts.<sup>22</sup>

## **Conclusion**

On the surface, this ruling seems to lean towards an Iranian victory, with compensation awarded and a number of breaches recognized. However, on a more practical note, the actual result seems to be rather somewhere in the middle. Though the recognition of victory may be indeed going to Iran, the United States nevertheless achieved its principal objective of obtaining assets for compensation by securing a judgment permitting (or at least tolerating) the frozen Bank Markazi assets to be used for judgment enforcement in domestic proceedings.

That being said, the ICJ may have nonetheless opened the door for cases similar to this one in the future, as it has, in fact, partially recognized that the United States failed to observe its international obligations towards Iran, even when deemed a "State sponsor of terrorism," and as such should compensate Iran for its loss.<sup>23</sup> Thus, states invoking special anti-terrorist domestic procedures, possibly resulting in freezing or taking other

sovereign states' assets, should be wary of potential legal repercussions on the international level and exposure to compensation claims.

Further, as the definition of “company” in the Treaty of Amity follows a rather standard wording of international investment provisions,<sup>24</sup> it seems that establishing ICJ jurisdiction over disputes relating to central banks based on such provisions is unlikely to succeed and will require some other, more precise legal basis. This leads also to another conclusion: any decision on the lack of jurisdiction over asset freeze disputes will in fact be a decision in favor of the state imposing the sanction, as it is evident that no judgement is also a judgement – at least when we look at its consequences in practice.

Finally, one may easily conclude that due to its balanced outcome, this case will not pose a threat to the ICJ's credibility and popularity.<sup>25</sup> But the Court still has not fully addressed the most important issues regarding state-owned entities performing both commercial and public functions, i.e., the issue of central banks being vulnerable to asset freezes by foreign administrations. Whether it will do so in the future remains to be seen.

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<sup>1</sup> Certain Iranian Assets (Iran v. U.S.), Judgment, (Mar. 30, 2023), <https://www.icj-cij.org/case/164> [hereinafter Judgment on the Merits].

<sup>2</sup> The treaty entered into force on June 16, 1957, but was unilaterally terminated by the United States in 2018. Since the alleged breaches in this case had occurred before 2018, the Treaty could constitute the legal basis of Iran's claims. That agreement was also the basis of jurisdiction in two previous cases between the United States and Iran. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3 (May 24); and Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161 (Nov. 6).

<sup>3</sup> See Press Release, U.S. Department of State, Judgment in Certain Iranian Assets Case (Mar. 30, 2023), <https://www.state.gov/judgment-in-certain-iranian-assets-case/>; and Press Release, Ministry of Foreign Affairs of Iran (Mar. 30, 2023), <https://en.mfa.gov.ir/portal/newsview/715766>.

<sup>4</sup> A full discussion of all the issues discussed in the merits Judgment exceeds the scope of this piece. However, for further commentary, see Giulio Alvaro Cortesi, *The Case of Certain Iranian Assets: The Standard for Joining Preliminary Objections to the Merits Revisited and the Treatment of State-Owned Enterprises before the International Court of Justice*, 25 AUS. REV. INT'L & EUR. L. ONLINE (2022), or Philipp Janig and Sara Mansour Fallah, *Certain Iranian Assets: The Limits of Anti-Terrorism Measures in Light of State Immunity and Standards of Treatment*, 59 GER. Y.B. INT'L L. (2016), <https://papers.ssrn.com/abstract=2993225>, or Tom Ruys and Mira Deweerdt, *From Tehran to Moscow: The ICJ's 2023 Certain Iranian Assets Judgment and Its Broader Ramifications for Unilateral Sanctions, Including Against Russia*, 70 NETH. INT'L L. REV. 273 (2023).

<sup>5</sup> Janig and Mansour Fallah, *id.*, p. 2.

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<sup>6</sup> Judgment on the Merits, ¶ 23.

<sup>7</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 Sec. 221, Stat. 1214, 1241-43.

<sup>8</sup> Judgment on the Merits, ¶¶ 18(b), 19(a)(ii).

<sup>9</sup> *Id.* ¶ 19(c), p. 14.

<sup>10</sup> Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Judgement on Preliminary Objections, 2019 I.C.J. (Feb. 13) [hereinafter Judgment on Preliminary Objections]. The United States claimed that (i) the ICJ lacked jurisdiction to decide disputes arising from the Treaty of Amity, and (ii) even if jurisdiction was established, Iran's claims were inadmissible. As for the jurisdiction claims unrelated to the status of Bank Markazi, the Court rejected the objection regarding the regulation of arms trafficking and international peace and security (¶¶ 38-47), and upheld the objection based on lack of *ratione materiae* regarding failure to accord sovereign immunity from jurisdiction and/or enforcement to Iranian state entities in its domestic courts (¶¶ 48-80). The Court also rejected all the admissibility objections (¶ 125).

<sup>11</sup> *Id.* ¶ 34.

<sup>12</sup> Further on this subject see, e.g., Federica Paddeu, *Non-Precluded Measures Clause: Substance or Procedure? A comment on Certain Iranian Assets*. EJIL: TALK! (Mar. 6, 2019), <https://www.ejiltalk.org/non-precluded-measures-clause-substance-or-procedure-a-comment-on-certain-iranian-assets/>.

<sup>13</sup> Judgment on Preliminary Objections, ¶ 97.

<sup>14</sup> *Id.* ¶ 87.

<sup>15</sup> Judgment on the Merits, ¶¶ 50-54.

<sup>16</sup> As some judges pointed out in their separate opinions, this could be considered contradictory to the 2019 Judgement on preliminary objections mentioned above. See, e.g., the separate opinions of Judge Bennouna, Judge Yusuf, Judge Robinson, or Judge Salam.

<sup>17</sup> *Id.* ¶ 147.

<sup>18</sup> *Id.* ¶ 156.

<sup>19</sup> *Id.* ¶ 187.

<sup>20</sup> In case of failure to establish the amount of compensation within 24 months of the date of the judgement, the Court itself will assess the adequate sum in subsequent proceedings. *Id.* ¶ 231.

<sup>21</sup> *Id.* ¶ 201.

<sup>22</sup> *Id.* ¶ 223.

<sup>23</sup> Currently, in addition to Iran, the United States lists Syria, North Korea, and Cuba as state sponsors of terrorism. See U.S. Dept. State, State Sponsors of Terrorism, available at: <https://www.state.gov/state-sponsors-of-terrorism/>.

<sup>24</sup> See similar examples in: RUDOLPH DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 63-64 (2012).

<sup>25</sup> See also Labidi Lazhar, *Comments on the ICJ's Judgment of 30 March 2023 Concerning Certain Iranian Assets (Islamic Republic of Iran v. United States)* in Journal of Legal and Political Sciences 14, no. 01 (2023): 72-89, p. 88.