SEPARATE OPINION OF JUDGE TOMKA

Interpretation of Article III, paragraph 1, of the 1955 Treaty of Amity — Meaning of the phrase "shall have their juridical status recognized" — Viewed in light of object and purpose of Treaty and against historical background, the recognition of "juridical status" in question concerns the legal personality and legal capacity of companies — Provision not equivalent to a warranty that companies shall have their corporate form respected in any circumstances.

Article X, paragraph 1, of the Treaty of Amity — Finding of the Court that the United States has violated its obligation to ensure "freedom of commerce" — Insufficient evidence for this finding — United States measures not aimed at limiting, or interfering with, freedom of commerce.

1. I regret that I am unable to agree with the decision of the majority of the Court that the United States of America has violated its obligation under Article III, paragraph 1, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (hereinafter the "Treaty of Amity" or "Treaty"). I feel compelled to explain my position on what I see as the proper interpretation of Article III, paragraph 1, of the Treaty and why the Applicant's submission in this regard must be rejected.

I am also unable to agree with the Court's finding that the United States has violated its obligation under Article X, paragraph 1, of the Treaty.

I. Article III, Paragraph 1, of the Treaty

A. Interpretation of Article III, Paragraph 1, of the Treaty

2. Article III, paragraph 1, of the Treaty reads as follows:

> "Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized. As used in the present Treaty, 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit."

3. Article III, paragraph 1, of the Treaty must be interpreted according to the customary rules of treaty interpretation which, as the Court has repeatedly stated, are reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties[1].

4. Before interpreting Article III, paragraph 1, of the Treaty, it may be useful, as a preliminary matter, to make two observations. First, Article III, paragraph 1, of the Treaty must be placed in its proper historical context and economic background. When the Treaty was concluded, legal persons were often not recognized as having juridical status outside of their State of incorporation, absent a treaty to this effect. Some States recognized each other's legal persons on the basis of reciprocity, while others only recognized legal persons that had been granted a special authorization[2]. Following the 1923 Treaty of Friendship, Commerce and Consular Relations concluded with Germany[3], several Friendship, Commerce and Navigation (hereinafter "FCN") treaties concluded by the United States with other States included provisions guaranteeing the reciprocal recognition of the juridical status of companies[4]. Indeed, more than two dozen of these FCN treaties contain the exact or a substantially similar provision to Article III, paragraph 1, of the 1955 Treaty of Amity. A similar trend can be observed in bilateral and multilateral treaties concluded at the time. The Hague Conference on Private International Law drew up, in 1956, a Convention concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Foundations[5]. It is worth recalling that, under customary international law, States have no obligation, as such, to recognize the existence or capacity of legal persons constituted under the laws and regulations of other States[6]. A recognition of juridical status is therefore necessary for legal persons to operate abroad, e.g. to conclude contracts, to collect debts, or to have

[1] See e.g. *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 33.

[2] Ernst Rabel, *The Conflict of Laws: A Comparative Study*, Vol. II (Chicago: Callaghan & Company, 1947), pp. 138-141.

[3] Treaty of Friendship, Commerce and Consular Rights between the United States and Germany (1926), *American Journal of International Law (AJIL)*, Vol. 20, Supplement 1, p. 4.

[4] Herman Walker Jr, "Provisions on Companies in United States Commercial Treaties" (1956) *AJIL*, Vol. 50 (2), p. 379.

[5] Hague Conference on Private International Law, 1 June 1956, *Collection of Conventions (1951-1996)*, p. 28.

[6] Florentino P. Feliciano, "Legal Problems of Private International Business Enterprises: An Introduction to the International Law of Private Business Associations and Economic Development" (1966) *Recueil des cours/Collected Courses*, Vol. 118, p. 265 (stating that the practice of States granting unconditional recognition of the legal personality of a foreign corporation "does not appear to reflect a belief that the grant of such recognition is a matter of obligation imposed by international law"); Thomas C. Drucker, "Companies in Private International Law", *International & Comparative Law Quarterly*, Vol. 17, Issue 1 (January 1968), p. 42 (stating that "as a matter of public international law, there is no obligation to recognise a company incorporated under the system of law of another State").

standing before courts[7]. The 1955 Treaty of Amity, and its Article III, paragraph 1, in particular, must be appreciated against this background.

5. Second, it may be worthwhile to draw attention to the structure of Article III, paragraph 1, of the Treaty.

As can be seen, Article III, paragraph 1, contains four elements: the provision *(a)* defines the term "companies" for the purpose of the Treaty; *(b)* sets out what is required for a company to establish that it has the nationality of one of the Parties (i.e. it must be "constituted under the applicable laws and regulations of either High Contracting Party"); *(c)* requires both Parties to "recognize" the "juridical status" of such companies; and *(d)* provides that the "recognition of juridical status" does not of itself confer rights upon companies to engage in the activities for which they are organized.

While these four elements are laid down together in Article III, paragraph 1, practice shows that that need not necessarily be the case; they stand as independent clauses in some FCN treaties.

6. With this said, I turn to the interpretation of Article III, paragraph 1, of the Treaty.

7. I begin with the ordinary meaning to be given to the terms of the Treaty. The crux of the matter is to ascertain the meaning of the phrase "shall have their juridical status recognized". In this regard, it is true that the phrase "juridical status" is not in itself very clear, the term "status" having several meanings in international law. The term "recognition", however, is unmistakeably a term of art. While that term has several meanings[8], in the context of private international law (or conflict of laws) "recognition" has a narrow, technical meaning, whereby the recognizing State agrees to extend to its own system certain legal effects attributed to a fact or situation in the legal system of another State[9]. This could be, for instance, the "recognition" of a foreign award[10].

In particular, when used to refer to legal persons constituted under the applicable laws and regulations of another State, the concept refers to the

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[7] Matthias Herdegen, *Principles of International Economic Law* (Oxford University Press, 2nd ed., 2016), pp. 378-381.

[8] *Dictionnaire de la terminologie du droit international*, preface by Jules Basdevant (Paris: Sirey for the Union Académique Internationale, 1960), pp. 508-516.

[9] Eric Stein, *Harmonization of European Company Laws: National Reform and Transnational Coordination* (New York: The Bobbs-Merrill Co. Inc., 1971), pp. 394-396.

[10] See Reinmar Wolff (ed.), *New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1956: Article-by-Article Commentary* (Munich: C. H. Beck, 2019), p. 6.

recognition, by the recognizing State, of the legal personality and legal capacity of such legal persons.

8. This meaning of the term "recognition" has a long legal pedigree, as reflected in bilateral and multilateral treaties and in the work of international bodies and learned societies, such as the Committee of Experts for the Progressive Codification of International Law of the League of Nations, which studied the topic "Recognition of the Legal Personality of Foreign Commercial Corporations" in 1927. A report of the Sub-Committee of Experts asserts that recognition

> "implies that the corporation [incorporated in one State] . . . must be regarded [by the recognizing State] as possessing a general capacity, in virtue of which it is entitled to defend its rights . . . Supposing that the company should find itself compelled to defend its rights of this character before a foreign court, it would be unable to institute any legal proceedings if it were regarded by the *lex fori* as non-existent."[11]

9. This meaning of the term is also reflected in the resolutions and works of the Institut de droit international[12]. For instance, a preliminary report prepared by Rapporteur George van Hecke in 1963 on the topic of "Companies in Private International Law" explains that

> "[p]revious Institute resolutions, the convention drawn up by the Hague Conference [in 1956] and bilateral treaties generally deal with the 'recognition' of the personality of foreign companies. This need to ensure, by a separate rule, *the 'recognition' of foreign companies as subjects of law (including, in particular, the capacity to conclude contracts and to sue and be sued)* can be explained by the difficulties caused in the nineteenth century by certain theories . . . which denied the existence of juridical persons other than those created by an act of the local authority. It seems that these difficulties can now be considered as belonging to the history of law" (my translation)[13].

10. These materials indicate that the term "recognition" used in Article III, paragraph 1, of the Treaty, had a specific meaning as a concept in treaty practice when the Parties used it[14].

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[11] Shabtai Rosenne (ed.), *League of Nations. Committee of Experts for the Progressive Codification of International Law (1925-1928)*, Vol. II (Dobbs Ferry, New York: Oceana Publications Inc., 1972), p. 360.

[12] The Court has on occasion referred to the work of the Institut de droit international to ascertain the meaning of terms found in a treaty. See e.g. *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1062, para. 25.

[13] *Annuaire de l'Institut de droit international*, Vol. 51 (I), Session de Varsovie, 1965, pp. 252-253 (emphasis added).

[14] See also Article 1, Resolution of the Institut de droit international dated 9 September 1891 on "Conflits de lois en matière de sociétés par actions", *Annuaire de l'Institut de droit*

11. As noted by the Court, the object and purpose of the Treaty of Amity, which is stated in its preamble, is to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally" (Judgment, para. 214). This object and purpose throws light upon the appropriate interpretation of Article III, paragraph 1, of the Treaty. The recognition of juridical status set out in Article III, paragraph 1, obviously espouses the goal of "encouraging mutually beneficial trade and investments" between the Parties, for a company of one Party with no recognized existence or no legal capacity would not be able to operate within the territories of the other Party.

12. The context is also relevant. Article III, paragraph 1, of the Treaty is linked with Article III, paragraph 2, which grants nationals and companies freedom of access to the courts of justice and administrative agencies within the territories of the other Party, both in defence and pursuit of their rights. This link, in my opinion, shows that the recognition of juridical status in Article III, paragraph 1, was granted primarily so that the companies of either Party may have free access to courts in the territories of the other.

13. What has been said so far, in my view, is sufficient to arrive at the proper interpretation of Article III, paragraph 1, of the Treaty. Recourse to supplementary means of interpretation, however, puts to rest any doubt on the matter. I refer, in particular, to the preparatory work of the Treaty of Amity.

14. A telegram dated 9 November 1954 from the United States Department of State to the Embassy in Tehran provides additional insight into the meaning of "juridical status". The telegram was sent during the negotiations between the Parties, as Iran expressed concerns about the scope of the term "companies" in Article III, paragraph 1. The telegram provided the following explanation:

> "Paragraph 1 confers no rights [on] corporations [to] engage in business. *It merely provides their recognition as corporate entities principally in order [that] they may prosecute or defend their rights in court as corporate entities. In this sense paragraph 1 [is] related [to] paragraph 2 [on access to courts].* Under [the] treaty, no U.S. corporation may engage in business in Iran except as permitted by Iran. *Corporate status should be recognized [to] assure [the] right [of]*

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international, Vol. 11, Session de Hambourg, 1889-1892, p. 171; Article 1, Resolution of the Institut de droit international dated 12 October 1929 on "Statut juridique des sociétés en droit international", *ibid.*, Vol. 35 (II), Session de New York, 1929, p. 301; Article 1, Resolution of the Institut de droit international dated 10 September 1965 on "Companies in Private International Law", *ibid.*, Vol. 51 (II), Session de Varsovie, 1965, p. 272.

> *foreign corporate entities — those that sell goods or furnish other services to Iran as well as those permitted [to] operate in Iran — [to] free access [to] courts [to] collect debts, protect patent rights, enforce contracts, etc*. If this explanation fails [to] remove difficulty, request [a] more detailed statement [of the] problem."[15]

A subsequent telegram from the United States Embassy confirmed that Iranian officials had understood the United States' explanation of this provision[16]. In my view, these telegrams reveal the shared understanding of the Parties regarding the interpretation of the Treaty.

15. In light of the foregoing, I conclude that Article III, paragraph 1, of the Treaty provides for the obligation of the Parties to recognize the "juridical status" of companies constituted under the applicable laws and regulations of either Party, understood as recognizing their legal personality and legal capacity.

B. Iran's Submission

16. In its final submissions, Iran asks the Court to adjudge and declare that,

> "by its acts, in particular its failure to recognise the *separate juridical status* (including the separate legal personality) of all Iranian companies including Bank Markazi, the United States has breached its obligations to Iran . . . under Article III (1) of the Treaty of Amity" (emphasis added).

As noted in the Judgment (para. 135), the Parties differ on how to interpret Article III, paragraph 1, of the Treaty, and the question whether the United States has breached its obligation under that provision. The Judgment, however, fails to truly capture the heart of their disagreement.

17. For the United States, to recognize a company's juridical status is to recognize the company's existence as a legal entity and its legal capacity[17]. In its view, Article III, paragraph 1, was "only intended to ensure that legal persons could, on the basis of being incorporated in one of the Parties,

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[15] Counter-Memorial of the United States of America, Vol. VI, Ann. 135, Telegram No. 936 from the US Department of State to the US Embassy in Tehran, dated 9 November 1954 (emphasis added).

[16] Memorial of the Islamic Republic of Iran, Vol. I, Ann. 4, Telegram of the US Embassy in Tehran to the US Department of State, dated 27 November 1954.

[17] CR 2022/17, p. 60, para. 3 (Daley).

have 'legal being' in the territory of the other Party"[18]. It maintains that the very fact that Iranian companies have appeared and participated in domestic judicial proceedings demonstrates that their juridical status has been recognized (Judgment, para. 130).

18. Iran seems to accept that recognition of juridical status includes recognizing a company's legal personality and capacity[19], but it goes one step further, suggesting that recognition of juridical status must include a third element, which it calls the "separate juridical status" of companies[20].

19. For Iran, Article III, paragraph 1, operates a *renvoi* to its domestic laws and regulations, such that the juridical status Iranian companies enjoy within the territories of the United States should be the same as those they enjoy under Iranian laws and regulations[21]. It refers to the Articles of Association of these companies. Iran asserts that the "juridical status" of a company is established by the law of the State where the company was constituted and includes

> "not only whether the entity has its own legal personality — which is one thing — but also the specific elements of that legal personality, that is to say, for example, whether it is a limited liability company, a public joint stock company, an association or any other kind of legal person"[22].

It would follow, says Iran, that "by entirely conflating those 'companies' with the Iranian State . . . and conflating their assets with those of the Iranian State, the United States has violated Article III, paragraph 1, of the Treaty"[23].

20. Iran does not argue that the United States has failed to recognize the legal personality or legal capacity of Iranian companies as such, for instance by denying their existence altogether or by denying their ability to sue in courts. Rather, Iran refers to legislative and executive measures taken by the United States which have made the assets of Iranian companies subject to attachment and execution to satisfy debts under default judgments against Iran. The question, then, is whether Article III, paragraph 1, requires the United States to recognize the *corporate form* of Iranian companies, beyond their legal personality and capacity.

21. Iran provides no authority for the proposition that the recognition of a company's "juridical status" under Article III, paragraph 1, also includes recognizing its *corporate form*.

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[18] *Ibid*., p. 61, para. 8 (Daley).
[19] CR 2022/15, p. 50, para. 45 (Thouvenin).
[20] Reply of the Islamic Republic of Iran, para. 4.8.
[21] *Ibid*., para. 4.7.
[22] CR 2022/15, p. 49, para. 42 (Thouvenin).
[23] *Ibid*., p. 50, para. 45 (Thouvenin).

22. Iran suggests that the recognition of juridical status in Article III, paragraph 1, is unqualified[24]. Iran is correct to say that this obligation is unqualified. Contrary to other FCN treaties which qualify the recognition of juridical status[25], the 1955 Treaty contains no such qualification. However, this fact does not indicate whether "recognition of juridical status" includes recognizing a company's *corporate form*.

In this respect, it is of interest to note that in the Persian-language text of the Treaty of Amity the expression "legal personality" is used as equivalent to the English phrase "juridical status". As both texts are equally authentic, the terms of the Treaty must be presumed to have the same meaning in both languages. This undermines Iran's interpretation that "juridical status" means corporate form.

23. In essence, Iran's submission is premised on a conflation of two different sets of issues: on the one hand, (i) the recognition of the legal personality and legal capacity of a company by the recognizing State under Article III, paragraph 1, and, on the other hand, (ii) the question whether a recognized company may have its assets attached and executed for the debts of its State of incorporation. Article III, paragraph 1, speaks to the former issue, but says nothing about the latter. Indeed, the Treaty of Amity says nothing about veil lifting or corporate form generally.

24. But even accepting that Iran is right that Article III, paragraph 1, provides that Iranian companies shall have their corporate form recognized within the territories of the United States, Iran does not explain why that corporate form should be inviolable or "unpierceable".

Under the Treaty, an obligation of *recognition* is not an obligation of *respect*. While the United States must recognize Iranian companies as existing in its territories, and therefore extend to its own system certain legal effects attributed to such existence, Iranian companies, like other domestic and foreign companies operating in the United States, are subject to its legislation, which is the *lex loci*. Indeed, the Court accepts as much when it observes in paragraph 137 of the Judgment that the legal situation of a company in the territories of a foreign State will not "always be the same as in the State in which it was constituted". Under the *lex loci*, the corporate form of a company may be disregarded or set aside under certain circumstances, for instance, by lifting the corporate veil[26].

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[24] Reply of the Islamic Republic of Iran, para. 4.6 *(a)* (iv).

[25] See e.g. Article 6, paragraph 3, of the Treaty of Friendship, Establishment and Navigation between the Kingdom of Belgium and the United States of America, signed at Brussels, on 21 February 1961, United Nations, *Treaty Series (UNTS)*, Vol. 480, p. 159.

[26] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, pp. 38-39, paras. 56-58.

25. The contrary would be surprising. Natural persons and legal persons, for instance, can be held liable for harm or damage caused by another person. To accept the Applicant's interpretation would seem to suggest that the companies of either Party are insulated from the *lex loci*. It is difficult to contemplate that this could have been the intention of the Parties. At no time did the Parties regard Article III, paragraph 1, as having the meaning now given to it by the Applicant (see paragraph 14 above).

C. The Court's Decision

26. I am unable to agree with the decision of the majority of the Court that the United States of America has violated its obligation under Article III, paragraph 1, of the 1955 Treaty of Amity.

27. The Judgment does not adequately explain the basis for the Court's finding. Paragraph 159 of the Judgment merely states that,

> "[o]n the basis of its finding that the measures taken by the United States were unreasonable (see paragraphs 156-157), the Court concludes that the United States has violated its obligation under Article IV, paragraph 1, of the Treaty of Amity.
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> In reaching this conclusion, *the Court has determined that the measures of the United States disregarded the Iranian companies' own legal personality, and that this was not justified*. In light of all of the foregoing, the Court also concludes that the United States has violated its obligation to recognize the juridical status of Iranian companies under Article III, paragraph 1." (Emphasis added.)

Not only does such a conclusion on Article III, paragraph 1, not flow from a finding that the United States' measures were unreasonable under Article IV, paragraph 1, but, in my view, the Court's decision is inconsistent with a proper interpretation of the Treaty.

II. Article X, Paragraph 1, of the Treaty

28. Article X, paragraph 1, of the Treaty provides that "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation". In Iran's submission, the measures adopted by the United States interfered with "freedom of commerce".

The Court has interpreted this provision in the past, in particular in the *Oil Platforms* case[27]. I do not believe that there is any compelling reason to

[27] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 817-820, paras. 37-50.

revisit this interpretation[28]. Freedom of commerce under Article X, paragraph 1, is not confined to maritime commerce[29].

29. In fact, Article X, paragraph 1, refers to two freedoms: freedom of commerce and freedom of navigation. In relation to the exercise of the freedom of navigation, more detailed provisions are contained in paragraphs 2 to 6 of Article X. If the parties wished to limit freedom of commerce to "maritime commerce", they could have done so simply by adding the adjective "maritime" into the text of Article X, paragraph 1.

30. According to the Court,

> "it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, . . . that it includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce"[30].

31. Subsequently, the Court specified that "freedom of commerce cannot cover matters that have no connection, or too tenuous a connection, with the commercial relations between the States Parties to the Treaty"[31].

32. As emphasized in the *Oil Platforms* Judgment, Article X, paragraph 1, of the Treaty of Amity "contains an important territorial limitation. In order to enjoy the protection provided by that text, the commerce or the navigation is to be *between the territories* of the United States and Iran."[32]

33. In my view, Iran has not provided sufficient evidence of interference by the United States' measures with actual commerce. These measures were not aimed at limiting, or interfering with, the freedom of commerce enjoyed by the Parties between their territories. Rather, they concerned the enforcement of judgments rendered by United States courts against Iran. The purpose of Article X, paragraph 1, of the Treaty certainly is not to provide protection against the enforcement of judgments.

34. Therefore, I am unable to support the Court's finding that the United States has violated its obligation under Article X, paragraph 1, of the Treaty of Amity (Judgment, para. 236 (6)).

(Signed) Peter TOMKA.

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[28] In the present case, the Court itself stated, in its Judgment on preliminary objections, that it saw "no reason to depart now from the interpretation of the concept of 'freedom of commerce' that it adopted in the [*Oil Platforms*] case": *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 34, para. 79.

[29] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 817, para. 43.

[30] *Ibid.*, p. 819, para. 49.

[31] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 34, para. 79.

[32] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 214-215, para. 119; emphasis in the original.