

## DECLARATION OF JUDGE ABRAHAM

*[Translation]*

1. I am not convinced by the reasons given in the Judgment for the finding that the United States has violated its obligations under Article III, paragraph 1, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 (hereinafter the “Treaty”). Having set out the reasons why it considers that Article IV, paragraph 1, of the Treaty has been violated in this case by the Respondent, the Court concludes, without offering any further reasoning, that there has also been a violation of Article III, paragraph 1. In my view, there is no link between the two provisions in question that would necessarily result in the reasons given in support of the finding that Article IV has been violated leading to the conclusion that Article III has also been violated. Nor do I believe that any of the reasons given in the Judgment in support of the finding that there has been a violation of Article IV in this case convincingly demonstrates the violation of Article III. While I agree with the conclusion that Article IV, paragraph 1, of the Treaty has been violated in so far as it prohibits any “unreasonable measure” taken by a party that would impair the rights and interests of the companies of the other party, the measures complained of are not, in my view, in violation of Article III, paragraph 1, of the Treaty.

2. The first sentence of Article III, paragraph 1, provides that “[c]ompanies 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”. The main reason why Iran submitted that this provision had been violated by the United States is that United States law, as applied by the courts, enabled the attachment of assets belonging to certain Iranian companies with a view to paying the amounts obtained to the creditors of judgments against Iran ordering it to compensate the victims of certain terrorist acts. According to Iran, in attaching the property of the companies in order to satisfy creditors of the Iranian State itself, the United States disregarded the distinction between the respective legal personalities of the companies, on the one hand, and the State, on the other, a distinction that exists and that must be respected even where a company is, to whatever extent, the property of the State.

3. I agree that the legislative measures taken by the United States had the effect of, and were even clearly aimed at, waiving some of the most significant consequences normally attached to the distinction between legal personalities, including the fundamental rule that the property of one person cannot be subject to execution in order to settle the debt of another — which means, in particular, that the property of a company cannot be attached in

order to settle the debt of its shareholder. It is clear that the legislation in question derogates from ordinary law, and it is to be noted, moreover, that when it was first being discussed in the United States Congress, the planned provisions were strongly criticized by several executive departments, in particular the Department of State and the Treasury Department, on the ground that they violated the basic principles governing the separation of property rights arising from the distinction between legal personalities, as recognized by the jurisprudence of the United States Supreme Court, among others.

4. But does it necessarily follow that this legislation violates a State party's obligation to "recognize the juridical status of companies" constituted under the legal régime of the other State party, within the meaning of Article III, paragraph 1? I am not convinced. In my view, to consider that obligation to be violated by legislation such as that at issue in this case is to give the provision concerned a scope extending beyond that which the parties, in all likelihood, intended to confer upon it.

It is one thing to say that Article III, paragraph 1, obliges each party to "recognize" the other party's companies' own legal personality; it is another to consider that it prohibits a measure intended to evade the consequences normally attached to the separateness of legal personalities.

5. The Court is in fact offering a broad interpretation of Article III, paragraph 1, in finding that this provision has been violated. But, in my opinion, several provisions of Article III instead speak against such a broad interpretation. A case in point is the second sentence of paragraph 1, according to which "[i]t 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". While it does not directly settle the question that arises in this instance, this sentence clearly suggests that the "recognition of juridical status" required by the preceding sentence is not aimed at guaranteeing substantive rights for companies but rather at conferring on them the right to have their legal personality recognized, thus enabling them to perform the acts that presuppose possession of such a personality. Furthermore, paragraph 1 must be read in conjunction with paragraph 2, which aims to guarantee one party's companies the right to have access to the courts and administrative agencies of the other party. Recognition of a company's own legal personality is one of the requirements for that company to exercise its right of access to the courts. The obligation laid down by paragraph 1 must be understood in the light of the right protected by paragraph 2, even if the scope of the former extends beyond that of the latter.

6. In the present case, the Iranian companies were able, as separate legal entities, to access the United States courts. The courts never denied the applicant companies their legal personality and never found the legal actions

undertaken to be inadmissible on such a ground. The fact that the courts rejected on the merits the arguments put forward by the Iranian companies to persuade them that the federal measures that had been adopted violated the United States' treaty obligations, including the obligation to recognize their juridical status, in no way implies that those courts failed to recognize the applicant companies' own legal personality. Besides, in considering their claims, the courts respected the companies' "right of access" guaranteed by Article III, paragraph 2. I am of the view that neither the United States courts nor the federal legislature violated the obligation to "recognize" the juridical status of the Iranian companies, according to the ordinary meaning of the terms used in Article III, paragraph 1, read in their context, and from which I can see no reason to deviate.

7. I would add that if the parties to the treaty had intended to confer on Article III, paragraph 1, as broad a scope as that which the Applicant claimed it had — and which the Court has implicitly accepted —, namely that it precluded measures derogating from the principle of the separation of property rights between a company and its shareholders, it would be highly unlikely for them not to have included a clause allowing for exceptions in the provision concerned: "piercing the corporate veil" is widely accepted, in certain circumstances and for certain reasons, by both national laws and international law itself (as recalled in paragraph 137 of the present Judgment).

8. It is another matter whether, in evading some of the most significant consequences normally attached to the separateness of legal personalities, the United States authorities (the legislature first and foremost) complied with the obligation to afford fair and equitable treatment to Iranian companies, as provided in Article IV, paragraph 1. In this regard, as stated above, I share the Court's finding that they did not.

*(Signed)* Ronny ABRAHAM.

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