

DECLARATION OF JUDGE TOMKA

Second preliminary objection — Jurisdiction ratione materiae — Question whether “third country measures” fall within the scope of the Treaty of Amity — Court departing radically from the approach set out in its prior case law relating to the same bilateral treaty.

1. The way the Court has treated the second preliminary objection raised by the United States calls for some observations.

2. According to this objection, Iran’s claims brought under the provisions of the Treaty of Amity that are predicated on “third country measures” fall outside the Court’s jurisdiction which, according to the Applicant, is based on Article XXI, paragraph 2, of the bilateral Treaty of Amity concluded by the Parties in 1955.

The United States specified that its objection on “third country measures” concerns three categories of measures, namely those relating to

- (i) the reimposition of certain sanctions provisions under United States statutes that had been waived pursuant to the Joint Comprehensive Plan of Action (these provisions concern sanctions against non-US persons that engage in trade with Iran or Iranian companies and nationals);
- (ii) the reinstatement, through issuance of Executive Order 13846, of certain sanctions authorities that were previously terminated (they concern sanctions against non-US persons that engage in trade with Iran or Iranian companies and nationals); and
- (iii) the relisting of certain persons on the Department of the Treasury’s Specially Designated Nationals and Blocked Persons List (or SDN List, which identifies natural or legal persons from specially designated countries or subject to a block on assets).

3. The Respondent argues that the Treaty of Amity “was not intended to, and does not, impose obligations on the United States concerning trade or transactions between Iran and a third country or between their nationals and companies”¹. In the Respondent’s view, therefore, Iran’s claims that the United States breached its obligations under the Treaty of Amity by adopting measures concerning trade or transactions between Iran and a third country (or their nationals and companies), must be dismissed at a preliminary stage as outside the Court’s jurisdiction².

4. Iran, in its Application, claims that these measures constitute breaches of the United States’ obligations under Article IV, paragraph 1, Article VII, paragraph 1, Article VIII, paragraphs 1 and 2, Article IX, paragraph 2, and Article X, paragraph 1, of the Treaty of Amity. In its Memorial, Iran further expands this list of allegedly breached obligations by adding those under Article IV, paragraph 2, and Article IX, paragraph 3, of the Treaty of Amity.

¹ Preliminary Objections submitted by the United States of America (hereinafter “POUS”), pp. 94-95, para. 7.3.

² *Ibid.*

5. Although the Parties devoted much attention, both in their written pleadings³ and during the hearings⁴, to the analysis of these provisions, the Court refrains from analysing and interpreting them and, after a short discussion, in some seven paragraphs, concludes that “the second preliminary objection of the United States relates to the scope of certain obligations relied on by the Applicant . . . and raises legal and factual questions which are properly a matter for the merits” (Judgment, paragraph 82). The Court states that “such matters would be decided . . . at [the merits] stage, on the basis of the arguments advanced by the Parties” (*ibid.*). To determine “the scope of certain obligations relied on by the Applicant” is nothing else than to interpret the provisions of the Treaty invoked by Iran as a source of such alleged obligations. The Court has been provided with sufficient information and arguments by both Parties in order to resolve this interpretative issue already at this stage of the proceedings.

6. However, the approach taken by the Court today radically departs from the one it adopted in 1996 when it had to determine its jurisdiction *ratione materiae* under the same Treaty between the same Parties⁵. In that case, Iran alleged that the acts complained of breached the United States’ obligations under Article I, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty of Amity and the Court, therefore, had jurisdiction *ratione materiae* to entertain the case⁶. The United States, for its part, argued that Iran’s claims bore no relation to the Treaty of Amity⁷.

7. In its 1996 Judgment, the Court devoted no less than 27 paragraphs to a detailed analysis of Article I, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty, inquiring whether the acts complained of were capable of falling within the scope of the provisions invoked by the Applicant. It concluded that “the destruction [of the platforms] was capable of having . . . an adverse effect upon the freedom of commerce as guaranteed by Article X, paragraph 1, of the Treaty of 1955”⁸. Already at the jurisdictional phase of the case, the Court arrived at the conclusion that Article I and Article IV, paragraph 1, of the Treaty could not form a basis for the Court’s jurisdiction⁹.

8. The Court recently followed the same approach to the analysis of various provisions of the Treaty of Amity, invoked by Iran in support of its claims, in the 2019 Judgment on preliminary objections in the *Certain Iranian Assets* case¹⁰. When it turned to the consideration

³ POUS, pp. 94-117, in particular pp. 106-117, paras. 7.26-7.64; Observations and Submissions on the U.S. Preliminary Objections Submitted by the Islamic Republic of Iran, pp. 17-60, in particular pp. 25-60, paras. 3.15-3.101.

⁴ CR 2020/10, pp. 34-48, paras. 1-47; CR 2020/11, pp. 27-41, paras. 1-46, and pp. 42-54, paras. 3-46; CR 2020/12, pp. 25-26, paras. 17-21, and pp. 27-34, paras. 3-32; CR 2020/13, pp. 24-29, paras. 14-26, and pp. 30-36, paras. 4-29.

⁵ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 812, para. 22 *et seq.*

⁶ *Ibid.*

⁷ *Ibid.*, p. 809, para. 14, and p. 812, para. 22.

⁸ *Ibid.*, p. 820, para. 51.

⁹ *Ibid.*, p. 815, para. 31, and p. 816, para. 36.

¹⁰ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), p. 7.

of the second preliminary objection raised by the United States, the Court analysed Article IV, paragraph 2, Article XI, paragraph 4, Article III, paragraph 2, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty of Amity¹¹.

9. In the present case, by contrast, the Court avoids analysing the articles relied on by Iran when it alleges that the United States' measures, which target third countries (and their nationals or companies) because they maintain trade, commercial or financial relations with Iran (and its nationals or companies), are in breach of the United States' obligations under the Treaty of Amity.

10. The legal question which the Court should have determined at the present stage of the proceedings is whether the Treaty of Amity provides Iran (and its nationals or companies) with a right not to have its trade, commercial or financial relations with third States (and their nationals or companies) interfered with by the United States' measures, or, in other words, whether the United States have obligations under the provisions invoked by Iran not to interfere with these trade, commercial or financial relations. In order to answer this question, the Court should have analysed the text of the provisions of the Treaty, relied on by Iran, in light of the Treaty's object and purpose. Without going into the detail, one may just recall the preamble of the Treaty, which sets out the object and purpose of the Treaty. The preamble specifies, in particular, that the United States and Iran concluded the Treaty with the desire to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally *between their peoples*"¹². What was required from the Court was to interpret the text of the various articles of the Treaty of Amity invoked by Iran in order to determine whether Iran's claims are capable of falling within these provisions. The Court received detailed submissions by both Parties on the interpretation of these provisions.

11. Instead of answering the above question, which captures the substance of the United States' second preliminary objection, the Court rejects it (Judgment, paragraph 83). But, at the same time, the Court leaves open the possibility for the Parties to argue "legal and factual questions" raised by the second preliminary objection (Judgment, paragraph 82). It is almost as though the Court considers that the objection does not possess an exclusively preliminary character. However, that is not the Court's conclusion. It simply rejects the objection.

12. If, at the merits stage of the proceedings, the Court comes to the conclusion that the provisions relied on by Iran do not provide it (and its nationals or companies) with a right not to have its trade, commercial or financial relations with third States (and their nationals or companies) interfered with, the logical conclusion should be that Iran's claims do not fall within those provisions and therefore the Court lacks jurisdiction. However, such a conclusion is foreclosed by today's Judgment rejecting the second preliminary objection. In such hypothesis, the Court would be left with only one option — to conclude that there was no breach of the provisions invoked since they do not provide for the right claimed by Iran.

¹¹ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, pp. 25-35, paras. 48-80.

¹² Emphasis added.

13. I cannot share the approach adopted by the Court in this case, which is inconsistent with the approach it took in 1996 and 2019 in cases concerning the same Treaty. As my learned colleagues have stated in the past: “Consistency is the essence of judicial reasoning. This is especially true . . . with regard to closely related cases.”¹³

14. As the issues of applicability of particular provisions of the Treaty to the claims advanced by Iran will be reargued, upon the Court’s invitation, during the merits stage, I do not consider it appropriate for me to disclose my position at this stage with respect to each of the provisions relied on by Iran.

(Signed) Peter TOMKA.

¹³ *Legality of Use of Force (Serbia and Montenegro v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2004 (III)*, joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, p. 1353, para. 3.