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CR 2018/31

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Wednesday 10 October 2018, at 3 p.m., at the Peace Palace,

President Yusuf presiding,

in the case concerning **Certain Iranian Assets (Islamic Republic of Iran *v.* United States of America)**

VERBATIM RECORD

ANNÉE 2018

Audience publique

tenue le mercredi 10 octobre 2018, à 15 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

en l'affaire relative à **Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique)**

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Gaja
		Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Judges *ad hoc*	Brower
		Momtaz
	Registrar	Couvreur

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Présents :	M.	Yusuf, président
	Mme	Xue, vice-présidente
	MM.	Tomka
		Abraham
		Bennouna
		Cançado Trindade
	M.	Gaja
	MM.	Bhandari
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa, juges
	MM.	Brower
		Momtaz, juges *ad hoc*
	M.	Couvreur, greffier

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Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit cet après-midi pour entendre la fin du premier tour des plaidoiries de la République islamique d'Iran. Je donne à présent la parole à M. Wordsworth. Vous avez la parole.

Mr. WORDSWORTH:

PART V

THE US JURISDICTIONAL OBJECTION TO THE SO-CALLED "SOVEREIGN IMMUNITY-RELATED CLAIMS OF IRAN"

A. INTRODUCTION

1. Mr. President, Members of the Court, it is a privilege to appear before you and to have been asked by Iran to respond to the US jurisdictional objection to what it has chosen to call "Iran's sovereign immunity-related claims"[1]. I make two introductory points.

2. First, the argument that you have heard is that such claims fall outside the scope of Article XXI of the Treaty when the Court's test from *Oil Platforms* is applied[2], and yet there is a curiosity here. As formulated in its written pleadings, and as you heard on Monday, the approach of the United States is to say — look at the Treaty and in particular its object and purpose, the Treaty is only concerned with commercial and consular relations, and there are no provisions expressly conferring sovereign immunity[3]. It is said by the United States that "FCN treaties are not, and were never intended to be vehicles for codifying sovereign immunity protections enjoyed by States or other State entities"[4] and it is said with ever-increasing urgency, that it is "absolument pas concevable" and "tout simplement inconcevable" that the Treaty parties would have intended to incorporate rules, customary rules, concerning immunity into the Treaty[5].

3. But the weight that the United States places on the supposed general intent behind the Treaty is wholly out of step with the Court's approach in the *Oil Platforms* case. In considering

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[1] POUS, Chap. 8.

[2] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16.

[3] See e.g. CR 2018/29, p. 23, para. 4; pp. 25-26, paras. 11-13 (Boisson de Chazournes); POUS, paras. 8.2, 8.5-8.9.

[4] POUS, para. 8.5; see also CR 2018/29, p. 26, para. 12 (Boisson de Chazournes).

[5] CR 2018/29, p. 27, paras. 14-15 (Boisson de Chazournes).

jurisdiction over the claims then before it, the Court did not confine its analysis to an enquiry as to whether, in general terms, the Treaty was aimed at the physical protection of petroleum infrastructure from armed attack and, likewise, it did not confine itself to an enquiry into what the United States FCN negotiators like Vernon Setser might have thought FCN treaties were aimed at in general terms[6]. Instead, it engaged in a careful step by step interpretation of each individual provision relied on by Iran before coming to a conclusion on whether the specific violations pleaded by Iran did or did not fall within each given provision[7]. And it is that *same* approach that falls to be followed here.

4. My second introductory point: the United States repeats on multiple occasions that Iran is seeking to incorporate customary international law rules on sovereign immunity into the Treaty[8], and it seeks to re-cast the *Oil Platforms* test to meet the way that *it* has chosen to present Iran's case. Thus, it was said on Monday —

> "La seule question à laquelle la Cour se doit de répondre à ce stade, est de savoir si les prétentions iraniennes «relèvent ou non» des dispositions du traité. [That is correct, and you have heard Professor Lowe say a little more on the relevant test. But the US argument then continued:] Autrement dit, les dispositions du traité contiennent-elles des obligations relatives à la protection des immunités?"[9]

5. That is *not* correct. The Court's task is not to engage in a "tick-box exercise" to see whether any Treaty provisions expressly accord immunities; rather the question for the Court is whether in its consideration of the claims as *actually* put by Iran by reference to the *specific* provisions that Iran invokes, the Court is able to consider issues of denial of immunities that arise as a matter of customary international law.

B. JURISDICTION IN RESPECT OF ARTICLE III (2) OF THE TREATY OF AMITY

6. I turn then to the provisions at issue under this head of the US objection, starting with Article III (2) [judges' folders, tab 1; on screen] which provides:

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[6] Cf. CR 2018/29, p. 26, paras. 12-15 (Boisson de Chazournes).

[7] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 803 paras. 24-31 with respect to Art. I, paras. 32-36 with respect to Art. IV (1), and paras. 37-51 with respect to Art. X (1).

[8] Cf. CR 2018/29, p. 25, para.10; also paras. 14-15, 18-19, 29, 32, 34, 40 (Boisson de Chazournes).

[9] CR 2018/29, p. 24, para. 7 (Boisson de Chazournes).

"Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done.

[That is a free-standing, unqualified entitlement to freedom of access, in defence or pursuit of rights, again unqualified. The provision then confers a further and separate line of protection.]

Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country.

[And finally there is a clarification that no territorial presence is required for enjoyment of these protections. The provision continues:]

It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication."

7. Looking at the first element in a little more detail [highlighted on screen], pursuant to its ordinary meaning, as already noted by Professor Lowe, Article III (2) does not purport to restrict or make any distinction as to the type of right that an Iranian company could defend or pursue before a US court. That is scarcely surprising. The provision is concerned with freedom of access to domestic courts, not with giving any definition to the almost unending list of procedural or substantive rights that nationals or companies may enjoy as a matter of a relevant law, whether domestic or international, and may then seek to rely on before the given court. It is *irrelevant* that no express mention is made of sovereign immunity[10], just as it is *irrelevant* that no mention is made of any other of the multiple forms of right that a national or company might enjoy.

8. As Dr. Webb has already explained, one of the rights that a company such as Bank Markazi could in the usual course assert before a US court is a US law right to immunity from enforcement[11]. Indeed, in the usual course, a party seeking to rely on sovereign immunity before a US court would be positively expected to assert this as a defence. According to the 1976 House Report on the FSIA, "sovereign immunity is an affirmative defense which must be specially pleaded"[12]. Yet the access to the US courts to plead such a defence is now entirely blocked off for

[10] Cf. CR 2018/29, p. 29, para. 18, first point.

[11] Sect. 1611 *(b)* (1) of the US Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2, (MI, Ann. 6). See also *NML Capital Ltd* v. *Banco Central de la República Argentina*, US Court of Appeal for the 2nd Circuit, 652 F. 3d 172 (2d Cir. 2011) as discussed *supra* at Chap. III, Sect. 2 (A) *(b)*, p. 58.

[12] HR Rep. No. 941487, p. 17 (1976) (MI, Ann. 7).

Bank Markazi and other State-owned or controlled Iranian companies. You have heard the details from Dr. Webb, and the bottom line is that, despite the right to immunity that Bank Markazi would in the usual course be able to assert as a matter of US law, and despite the procedural right to immunity under customary international law[13], Bank Markazi's security entitlements in the amount of around US$1.8 billion have been lost to it thanks to the enforcement orders of the US courts[14].

9. Whether those US acts do indeed constitute a breach of this first element of Article III (2) is a matter for the merits, but the point for now is that, pursuant to its ordinary meaning, Article III (2) is plainly engaged.

10. Professor Boisson de Chazournes placed very considerable weight on the recent decision in *Equatorial Guinea* v. *France*, and the Court's interpretation there of Article 4 (1) of the Palermo Convention[15]. But that case was, of course, materially different, as is emphasized [on screen, both provisions] when one compares the generalized requirement to carry out the obligations under the Palermo Convention "in a manner consistent with the principles of sovereign equality" with the specific, unqualified and free-standing obligation under Article III (2) to accord "freedom of access . . . in all degrees of jurisdiction". If as part of domestic or international law, one aspect of the right of freedom of access is a right to assert immunity, then reference to that domestic or international law is the necessary corollary of the application of Article III (2). Neither Article 4 (1) of the Palermo Convention, nor the case that was then being put by Equatorial Guinea, is in any way comparable to Iran's case on Article III (2) or indeed Iran's case on *any* of the provisions currently in play[16].

11. Moreover, in assessing whether there has been a breach or not, and in analysing what is required for "freedom of access", the Court will no doubt — and indeed *must* — take into account relevant rules of international law applicable in the relations between the Treaty Parties. That includes customary international law protections with respect to access to courts, including the

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[13] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60; see also *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 136 and 140, paras. 82 and 93.

[14] *Peterson et al.* v. *Islamic Republic of Iran et al.*, US District Court, Southern District of New York, 6 June 2016, No. 10 Civ. 4518 (S.D.N.Y. 2016) (MI, Ann. 68).

[15] CR 2018/29, p. 26, para. 13, p. 28, paras. 16-17, p. 38, para. 39 (Boisson de Chazournes).

[16] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, paras. 78 and 92-93.

right to assert any applicable immunity from court proceedings as a procedural matter[17]. But recourse to that mandated aspect of treaty interpretation does not somehow turn Article III (2) into an impermissible conduit for the law of sovereign immunity. Iran merely seeks application of Article III (2) in accordance with its plain terms and applying the well-established rules of treaty interpretation.

12. By contrast, the United States is asking the Court to read Article III (2) [on screen, amended in red] as if the words "in their private and professional (but non-sovereign) activities" followed immediately after "freedom of access", and likewise so far as concerns an equivalent amendment to Articles IV (1) and (2)[18]. But none of these provisions contain any such limitation, and you already have the point from Professor Thouvenin that where, for example in Article II (1), the Treaty parties intended to tie a provision back to "commercial activities", they did so, in express language.

13. And it is not somehow by referring to context or object and purpose that the unrestricted wording of Article III (2) can be revised so as to qualify an unqualified entitlement to freedom of access[19].

14. The relevant context is a series of broad protections for nationals and companies, including, most immediately [highlighted on screen], the entitlement in the second element of Article III (2) to freedom of access upon terms no less favourable than those applicable to nationals and companies of any third country. As to this further and separate entitlement, there is again no excluded matter: the only question is as to the freedom of access enjoyed by nationals and companies of any third State. And here, it appears to be common ground that companies of other States performing sovereign functions, including those companies that are central banks, *are* able to assert their immunities from jurisdiction as well as from enforcement before the US courts. It is only Bank Markazi that has been singled out in legislation specifically designed to remove all

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[17] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60; see also *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 136 and 140, paras. 82 and 93.

[18] See POUS, para. 8.32.

[19] Cf. POUS, paras. 8.5 *et seq.*

forms of defence to attachment to its property, that is, through Section 502 of the Iran Threat Reduction Act[20].

15. As a further element of relevant context [highlighted on screen], it is useful to turn briefly to the final element of Article III (2), which further confirms the breadth of the freedom of access that the Treaty parties wished to confer through the removal of any suggestion that a territorial presence would be required. By contrast, the United States now wishes to add a new understanding restricting the scope of freedom of access — an understanding that companies engaged in any activities *iure imperii* would not enjoy the right of access with respect to any assertion of immunity. But that is contrary to each of the three elements of Article III (2), and it can readily be supposed in light of the inclusion of this last element of Article III (2) that, if the Treaty parties had wished to include an understanding carving out one aspect of freedom of access, they would surely have done so.

16. The United States has also placed great weight on Article XI (4), but this exclusion of immunity *iure gestionis* merely demonstrates how the Treaty parties were able to, and did, restrict certain forms of access to a court when they wished to do so. I will come back to Article XI (4) a little later, but for the purposes of Article III (2) it is sufficient to note two points:

(a) First, Article XI (4) shows that the Treaty parties did specifically have sovereign immunity in mind, and that they contemplated that State-owned or controlled enterprises, including companies, could and would be entitled to claim or enjoy immunity from suit and execution of judgment save with respect to the stated exceptions, that is acts *iure gestionis* in essence. Irrespective of the separate question of whether Article XI (4) should be interpreted as establishing a Treaty obligation to accord immunity *iure imperii*, the very inclusion of Article XI (4) supports an understanding that the Treaty parties envisaged that issues of immunity might arise with respect to other provisions of the Treaty[21].

(b) Second, the wording of Article XI (4) [on screen, with highlights] confirms that immunity was regarded by the Treaty parties as one aspect of access to their courts — hence the provision is

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[20] See e.g. *Bank Markazi* v. *Peterson et al.*, US Supreme Court, 20 Apr. 2016, 578 US 1 (2016), joint diss. op. of Roberts C.J., and Sotomayor, J., p. 7; MI, Ann. 66.

[21] See WSI, paras. 5.40-5.42.

aimed specifically at the "claim" to or enjoyment of immunity from "suit" and from "execution of judgment".

17. As to object and purpose[22], it is difficult indeed to see how, even accepting the US position that the focus should solely be on encouraging mutually beneficial trade and investment and closer economic intercourse[23], how such an object would be furthered by interpreting a provision in a manner contrary to its ordinary meaning so as to enable a contracting party to allow seizure of all the funds and assets of a company of the other party with the result that commerce through usual banking channels is severely impeded.

18. As to the complaint that Iran has pointed to no practice or doctrine to support its interpretation[24], the obvious rejoinder is that this is scarcely surprising. The Court will have it firmly in mind that the US measures at issue in this case that restrict freedom of access are wholly exceptional and, so far as concerns Section 502 of the Iran Threat Reduction Act, they are unique.

C. JURISDICTION IN RESPECT OF ARTICLE IV (1)

19. I move on to Article IV (1) [judges' folders, tab 1; on screen] and this again contains a series of discrete but related protections:

> "Each High Contracting Party shall [and this is protection 1] at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; [then protection 2:] shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and [then protection 3:] shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

20. As to the first of these three protections, the United States has not challenged any specific aspect of the detailed interpretation in Iran's Memorial, and appears to accept that the obligation to accord fair and equitable treatment would be breached by conduct that:

(a) is arbitrary, grossly unfair, unjust or idiosyncratic; or

(b) is discriminatory; or

(c) involves a lack of due process leading to an outcome which offends judicial propriety; or

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[22] CR 2018/29, p. 34, para. 31 (Boisson de Chazournes).

[23] See e.g. CR 2018/29, p. 25, para. 11 (Boisson de Chazournes).

[24] CR 2018/29, p. 34, para. 31 (Boisson de Chazournes).

(d) defeats the legitimate expectations of Iranian nationals and companies[25].

21. Given the weight that was placed on Monday on the views of the US State Department negotiators in the FCN treaty programme, one might also note that they saw the fair and equitable treatment standard as playing a general role in terms of interpretation as well as filling a stop-gap function. As recorded by Vandevelde in his recent treatise:

> "Finally, the provision was intended 'to suggest a general policy of liberal, rather than of narrow construction of the provisions of the treaty.' Where more than one construction of the treaty language was equally possible, the construction that would lead to an equitable result was to be preferred. That is, it provided an interpretive principle for the remaining provisions of the treaty.

[and then later:]

> [A]s has been seen, the Department repeatedly referred to the provision as one that would provide protection whenever other more specific provisions did not apply." [26]

You have the complete section at tab 14 of your judges' folders.

22. According to the US position on Monday[27], a sufficient interpretation of Article IV (1) has already been given by the Court in *Oil Platforms*, where the Court noted that Article IV (1) is "aimed at the way in which the natural persons and legal entities in question are, in their exercise of their private or professional activities, to be treated by the State concerned"[28]. But as Professor Thouvenin has already explained, the United States is merely seeking to take out of context the Court's reasoning on the quite separate point of whether this provision extended protection to Iran itself or not. The reasoning tells one nothing about whether Bank Markazi, a separate entity, should be accorded protection in the exercise of what can readily be characterized as its professional activities — the Court simply did not have the current batch of complex jurisdictional issues in mind.

23. The United States also argues in its written pleading that Iran is misusing Article 31 (3) *(c)* of the Vienna Convention so as to recast the fair and equitable treatment standard

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[25] See further MI, paras. 5.22-5.27.

[26] Kenneth J. Vandevelde, *International Law of Foreign Investment*, pp. 405-406. See also p. 413.

[27] CR 2018/29, p. 35, para. 32.

[28] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, *(II)*, p. 816, para. 36.

as a sovereign immunity guarantee, and it says the same for the two other protections in Article IV (1)[29]. But that is not, of course, what Iran is seeking to do.

24. To take the example of the prohibition of arbitrary conduct, this is not concerned with securing the application of some defined set of domestic or international law rules. It is concerned with the conduct of the State more broadly and, if the State has breached some identified rule of law, that may well be an indication of arbitrary conduct, but it does not per se establish arbitrariness. To quote the very well-known passage from the *Elettronica Sicula S.p.A. (ELSI)* case [on screen], the term "arbitrary" means "not so much something opposed to *a* rule of law, as something opposed to *the* rule of law . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety"[30].

25. Iran's case is that the United States has acted arbitrarily[31], and an important pointer in this respect is whether the measures at issue are consistent with the principles of customary international law or, by contrast, at odds with general State practice. Just as with a domestic law rule, the Court has jurisdiction to see whether a given rule of customary international law has been complied with, including a rule as to sovereign immunity, as part of its jurisdiction in identifying whether there has been arbitrary conduct. Any other approach would represent a significant narrowing of the *ELSI* test, as well as the Court's past approach in its exercise of jurisdiction[32].

26. The same basic point applies with respect to the other elements of the fair and equitable treatment standard. As to discrimination, there is no requirement that Iranian companies be treated in precisely the same ways as companies from other States, but it is well established that differences in treatment must not be based on unreasonable distinctions[33]. Here, they are unreasonable, and one factor going to unreasonableness is the withdrawal of a generally applicable immunity for companies engaged in sovereign activities, while another is the targeting of

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[29] POUS, para. 8.32.

[30] *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 76, para. 128; emphasis added. See further MI, para. 5.29.

[31] MI, para. 5.44.

[32] See also *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 18.

[33] See MI, paras. 5.31 and 5.45, and see e.g., *Saluka Investments BV (The Netherlands)* v. *The Czech Republic,* UNCITRAL, Partial Award, 17 March 2006, para. 307.

Bank Markazi's assets through very specific legislation. The Court must have jurisdiction to consider such factors, as otherwise the protection would become incapable of application.

27. Similarly, as to denial of justice, the question under Article IV (1) is not whether there has been a failure to comply with some identified rule of domestic procedural law, but whether, to quote one well-known definition, there has been "an unwarranted delay or obstruction of access to courts" or a "failure to provide those guarantees which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgment"[34]. The Court plainly has jurisdiction to see whether there has been such a failure and/or an unwarranted obstruction of access to the US courts and — through being accorded the jurisdiction to determine what is "unwarranted" or what guarantees are "indispensable" or whether there has been "a manifestly unjust judgment" — it is naturally accorded the jurisdiction to consider any relevant sources of law necessary to that end — be they domestic law or, as here, domestic and customary international law rules on immunity.

28. I could continue, but the Court has the point, which applies in equivalent terms to each of the elements that make up the fair and equitable treatment standard as well as to the other protections to be found in Article IV (1)[35].

D. JURISDICTION IN RESPECT OF ARTICLE IV (2)

29. I move on to Article IV (2) [judges' folders, tab 1; on screen, highlighted]:

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law."

30. Pausing there, this express *renvoi* to international law is not restricted in any way. Although, as a matter of the ordinary meaning of the provision, the *renvoi* could only be to those aspects of international law that accord protection and security to property and interests in property. Consistent with its position before the chamber in the *ELSI* case in relation to a more narrowly

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[34] Harvard Law School, *Draft Convention on the International Responsibility of States for Injuries to Aliens* (Cambridge, Mass., 1961) and (1961) 55 *American Journal of International Law*, pp. 548-584. Applied e.g. in *Liman Caspian Oil BV and Dutch Investment BV* v. *Republic of Kazakhstan,* ICSID Case No. ARB/07/14, Award, 22 June 2010, para. 277; also quoted at J. Paulsson, *Denial of Justice in International Law* (Cambridge: CUP, 2005), p. 96. See further MI, paras. 5.32-5.35.

[35] See further MI, paras. 5.36-5.41.

drafted provision, the United States appears to accept that protection and security in this context extends to legal as well as physical protection and security[36], and that is anyway plain from the reference in Article IV (2) to interests in property. Where international law confers protection on the property of a company, including through any applicable rule on immunity, it falls to be applied pursuant to Article IV (2), pursuant to the plain wording of that provision.

31. According to the United States, however, "where Iranian State-owned entities have rights under Article IV (2), it is *on the same basis as private companies*, which have no claim to sovereign immunity . . ."[37]. But there is no such limitation in Article IV (2), and there is no reference specifically to "commercial activities", such as is to be found in Article II (1). Professor Boisson de Chazournes referred on Monday to the finding in the *ELSI* case that the provision there, which established the standard of "full protection and security as required by international law" was interpreted as referring to the international law minimum standard[38]. That is of course correct, but the provision is not in fact identical, and the point anyway makes little difference, as it simply leads to the merits issue of whether an abrogation of sovereign immunity in breach of customary international law may breach the international law minimum standard.

32. Notably, the tribunal in the *Chagos* arbitration, which had to consider what was meant by a *renvoi* to international law in Article 2 (3) of UNCLOS[39], also declined the respondent's invitation to consider this or any other of the various issues as a preliminary matter[40]. It makes little or no difference that Article 2 (3) of UNCLOS is concerned with limitations on the exercise of a State's sovereignty within the territorial sea[41]. The protections contained in Articles III (2) and IV of the Treaty of Amity are all limitations on the contracting parties' exercise of sovereignty in one way or another.

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[36] *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 66, para. 111, applying Article V (1) of the 1948 Italy-United States FCN Treaty.

[37] POUS, para. 8.25.

[38] CR 2018/29, p. 36, para. 36 (Boisson de Chazournes).

[39] See *Chagos Arbitration*, UK Preliminary Objections, paras. 4.14 and 5.48 at https://pcacases.com/web/sendAttach/1797.

[40] See Procedural Order No. 2 (Application to bifurcate proceedings) of 15 Jan. 2013 at https://pcacases.com/web/sendAttach/1795 (no reasons were provided).

[41] Cf. CR 2018/29, p. 37, para. 36. (Boisson de Chazournes).

33. Article IV (2) also contains a broad prohibition on the taking of property [on screen, highlighted]: "Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation."

34. The United States avoided saying anything specific about this provision on Monday, but the US position appears to be that the prohibition is only concerned with according the same protection as would be accorded to a private company engaged in private or professional non-sovereign activities[42]. Yet, on its face, and consistent with the customary international law prohibition of expropriation, it may apply with respect to any executive, legislative or judicial taking.

There is likewise no restriction to the type of property to which the provision applies or to the type of company. The only exception is with respect to takings for a public purpose that are accompanied by compensation, and that exception does not apply here. The property of Iranian companies, including Bank Markazi, has been taken without compensation. The United States may wish to say as a defence that the taking of property was for some other yet unspecified "public purpose" reason not prohibited, but that would be a matter for the merits.

35. For the US jurisdictional objection to have any force, it would have to establish that the taking of property as a result of executive and legislative acts removing customary international law immunities could never be regarded as expropriatory in nature. But it cannot come close to doing so. To the contrary, a taking that results from a breach of well-established principles of international law appears a very obvious fit for a breach of this element of Article IV (2). And, just as with respect to Article IV (1), as part of its jurisdiction in determining whether there has been a prohibited taking, the Court can of course consider whether there has been compliance with any relevant domestic or customary international law rule.

E. JURISDICTION IN RESPECT OF ARTICLE X (1)

36. I move on to Article X (1) [on screen]: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

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[42] CR 2018/29, p. 35, para. 33. (Boisson de Chazournes).

37. This provision is not limited in scope to Iranian nationals and companies, but also extends to Iran itself. This matters not least because, if the United States were somehow right that Bank Markazi is not a company protected by provisions such as Articles III (2) and IV, its involvement in commerce between the territories of Iran and the United States could still fall for protection here.

38. The Court will have firmly in mind that it has already found as to the interpretation of this provision in the *Oil Platforms* case[43]. It was said on Monday that the Court found there that, beyond acts of purchase and sale, the term commerce "englobe uniquement" "the ancillary activities integrally related to commerce"[44]. You can see how the Court in fact put matters up on the screen [49-50 on screen], from which it appears that the Court saw "freedom of commerce" within Article X (1) as a broad concept that would be engaged wherever an act impeded that freedom. The focus was thus on the factual issue of impediment, not on whether the impediment resulted from a sovereign act — and the United States could scarcely suggest otherwise given the nature of its counter-claims in the *Oil Platforms* case, which was a complaint about a series of alleged armed attacks by Iran[45].

39. The United States said on Monday that a decision to refuse sovereign immunity is not "integrally related to commerce", and also sought to portray Article X (1) as if it were only concerned with maritime transport and the transport of goods[46]. I make two points:

(a) As follows from the Court's existing analysis, the required focus is not on whether a given decision is "integrally related to commerce", but on whether a given act impedes the freedom of commerce — as to which there is of course no requirement that this have anything to do with transportation or indeed any form of physical as opposed to legal impediment.

(b) The United States is showing a wilful blindness to inconvenient aspects of how international commerce takes place as a practical matter, and likewise to the impact of the US measures now

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[43] See CR 2018/16 (Aughey), pp. 45-46, para. 30; and MI, paras. 6.12-6.16, referring to *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 818-819, paras. 45, 49-50.

[44] CR 2018/29, p. 33, para. 27 (Boisson de Chazournes).

[45] See e.g. *Oil Platforms (Islamic Republic of Iran* v. *United States of America),* Counter-Memorial and Counter-Claim (submitted on 23 June 1997), para. 6.16.

[46] CR 2018/29, p. 33, para. 28 (Boisson de Chazournes). See also POUS, para. 8.34.

at issue. As the United States is no doubt well aware, banks, including State-owned and in particular central banks, play a fundamentally important role in enabling and facilitating commerce, including in this case with respect to all currency exchange transactions, as Mr. Vidal has explained[47]. Where the funds and other property of State-owned banks and a given central bank are subject to immediate blocking and seizure, that role can no longer be fulfilled in the usual way with a resulting and obvious interference with freedom of commerce. The legal fact that the holding of funds by a central bank may be sovereign in nature as a matter of customary international law does not somehow undermine this. What matters for the purposes of Article X (1) is whether there is the interference with the freedom of commerce.

40. In its written pleadings, Iran has drawn an analogy with the mining of a port that was found to be an interference with the right to freedom of maritime commerce in *Nicaragua* v. *United States*[48]. It makes no odds that the impediment to commerce here is legal not physical. The ability of a bank to facilitate finance is a necessary gateway to commerce just as a port is a necessary gateway to maritime commerce.

(a) Denying customary international law immunities to Bank Markazi in terms of enforcement against its property means that it cannot operate in or through the United States so as to process payments arising from commercial acts between the two States, and it is thus severely impeded in terms of providing the financial infrastructure on which commerce depends.

(b) And in this respect, it is to be noted that, as appears to be unchallenged, Bank Markazi is involved in all Iranian foreign trade, because amongst other things it is the provider, via Iranian commercial banks, of foreign currency including of US dollars[49].

41. More generally as to Article X (1), the abrogation of Iran's entitlement to State immunity has led to a series of default judgments pursuant to which, as at the date of its Memorial, Iran had been ordered to pay in excess of US$60 billion, and the figure now stands at around US$75 billion[50]. As Iran's customary international law immunity from measures of constraint has

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[47] See further WSI, paras. 5.37-5.38, referring *inter alia* to *Gold Looted by Germany from Rome in 1943 (USA/France/UK/Italy)*, Award of 20 Feb. 1953, 20 *ILR* 441, p. 474.

[48] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 129, para. 253. See also at p. 139, para. 278.

[49] See further WSI, para. 5.38; see also at para. 1.6 *(b)* (iii); also the submissions of Mr. Vidal at CR 2018/30.

[50] See MI, attachment 1; also CR 2018/30, p. 13, para. 12 (Mohebi).

also been abrogated, its ability to engage in any form of commerce between the territories of the two Treaty parties has been severely impeded.

F. JURISDICTION IN RESPECT OF ARTICLE XI (4)

42. I move on to say a few more words on Article XI (4). This provision confirms by strong implication the Treaty parties' understanding of an international law entitlement to immunity *iure imperii*. That implication follows from the wording and the very existence of Article XI (4) in the Treaty, as there would have been no need to include such a provision had there been no understanding of the entitlement to sovereign immunity in the first place.

43. In light of the other provisions of the Treaty aimed at securing amicable and stable economic relations between the Parties, and in light of the broad object and purpose of the Treaty in terms of emphasizing friendly relations and encouraging mutually beneficial trade and investment, Iran considers that the implication goes further, and that Article XI (4) is correctly interpreted as reflecting the intention to accord a Treaty right to immunity *iure imperii* through an *a contrario* interpretation[51]. However, that is a matter separate to Iran's case on the correct interpretation of Articles III (2), IV (1), IV (2) and X (1), which is in no sense dependent on establishing the existence of any free-standing Treaty-based right to immunity.

G. FURTHER POINTS MADE BY THE UNITED STATES

44. I turn finally, and briefly, to the second and third limbs of the argument made by the United States on Monday: that is, the point made about the supposedly troubling repercussions of accepting Iran's approach to interpretation, and the case that Iran is departing from its prior positions on the meaning of the Treaty.

45. As to the supposed repercussions[52], this was perhaps a point that was first worked up before the United States elected last week to terminate the Treaty of Amity, and it is rather difficult to see what relevant repercussions there might be resulting from the Court's application of the

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[51] See e.g. *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. 18, para. 35. Cf. CR 2018/29, pp. 31-32, paras. 22-23 (Boisson de Chazournes).

[52] CR 2018/29, pp. 37-39, paras. 37-40 (Boisson de Chazournes).

usual rules on treaty interpretation with respect to a bilateral Treaty from which one Party has now withdrawn.

(a) The point largely came down to an unsupported assertion that Iran has not addressed numerous arguments in the US preliminary objections, as well as a repetition of the assertions as to the absence of practice or commentary to support Iran's interpretation and a repetition of the US invocation of the *Equatorial Guinea* case[53]. None of that assists the United States.

(b) Iran also appeared to be criticized for not setting out limits to how different treaties might require reference to different sources of international law, and it was said that Iran's approach, if accepted, would be destabilizing for the international legal order[54]. The hyperbole is rather wonderful, but the legal issues in this case are in fact exceptionally confined given the rarity of the US measures at issue, and one suspects that the legal world will continue to turn when the Court applies its well-established test in the *Oil Platforms* case to the particular issues of interpretation before it, which is all that Iran asks the Court to do.

46. As to the US reliance on supposedly significant silences to be deduced from the 1979 *Electronic data Systems* case or from Bank Markazi's position in the *Peterson* case or from some miscellaneous statements made in parliamentary debates and the like[55], Iran has dealt with all this in detail in its observations[56]. It was notable that you heard no explanation at all on Monday as to how any of this might amount to subsequent practice for the purposes of Article 31 (3) *(b)* of the Vienna Convention, and that point seems to have been pretty much dropped, leaving place only for a complaint about inconsistency that finds no reference point in Article 31[57], and which anyway goes nowhere as you have already heard from Dr. Webb and Professor Thouvenin looking at the two cases that the United States was focusing on. It is perhaps revealing that quite so much time should be spent by the United States on this line of argument, as opposed to devoting attention to what the Treaty provisions actually say.

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[53] CR 2018/29, pp. 37-38, paras. 37-39 (Boisson de Chazournes).

[54] CR 2018/29, pp. 38-39, para. 40 (Boisson de Chazournes).

[55] CR 2018/29, pp. 39-41, paras. 41-46 (Boisson de Chazournes); POUS, paras. 8.13-8.19.

[56] WSI, paras. 5.15-5.20.

[57] Cf. CR 2018/29, p. 39, para. 41 (Boisson de Chazournes).

47. Mr. President, Members of the Court, that concludes my submissions. I thank you for your attention, and ask you, Mr. President, to call Mr. Aughey to the podium.

Le PRESIDENT: Je remercie M. Wordsworth. Je donne à présent la parole à M. Aughey. Vous avez la parole.

Mr. AUGHEY:

PART VI

RESPONSE TO THE US OBJECTION UNDER ARTICLE XX (1) OF THE TREATY

1. Mr. President, Members of the Court: it is a privilege to appear before you and to have been asked by Iran to respond to the US objection based on Article XX of the 1955 Treaty as presented by Ms Kimball and Mr. Daley.

2. The United States claims that the Court lacks jurisdiction over Iran's claims concerning the US acts permitting default judgments against Iran to be enforced against the property of Bank Markazi which is blocked pursuant to Executive Order 13599[58]. Because the United States says that Executive Order falls under Articles XX (1) *(c)* and/or *(d)*.

3. The US objection rests on two legal propositions.

4. First, the United States contends that "measures covered by these exceptions are excluded from the Court's jurisdiction as reflected in the Treaty's compromissory clause"[59].

5. Second, the United States contends that, even if it is not jurisdictional in nature, the Article XX objection is "entirely severable from the merits, and so ripe for decision"[60]. I will deal with both of these propositions in turn in the two parts of my submissions and show that both propositions are untenable and should be rejected.

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[58] CR 2018/29, p. 10, para. 2 (Daley); CR 2018/28, p. 22, para. 29 (Visek) and p. 61, para. 3 (Kimball).

[59] CR 2018/28, p. 22, para. 29 (Visek). See also POUS, para. 7.4.

[60] CR 2018/29, pp. 20-21, para. 64 (Daley). See also POUS, paras. 7.1 and 7.9.

6. One introductory and fundamental point. This is well-trodden territory for the Court. Most recently, as Mr. Daley recognized, the United States made essentially the same submission during the August hearing in the *Alleged Violations* case[61].

7. In its Order of 3 October, the Court rejected the US argument and found that it had prima facie jurisdiction over Iran's claims under the 1955 Treaty[62]. Mr. Daley says that the United States is "mindful" of the Court's Order[63]. He says that the Order "did not foreclose or decide" the nature of the Article XX (1) objection but "left the door open" for that question to be determined now[64].

8. The Court will recall that it reached the conclusion that it had prima facie jurisdiction on the basis of the following unqualified interpretation of Article XX (1):

[Slide No. 1: What the Court decided in the *Alleged Violations* Order, paragraph 42]

> "The Court observes that Article XX, paragraph 1, defines a limited number of instances in which, notwithstanding the provisions of the Treaty, the Parties may apply certain measures. Whether and to what extent those exceptions have lawfully been relied on by the Respondent in the present case is a matter which is subject to judicial examination *and, hence, forms an integral part of the Court's jurisdiction as to the 'interpretation or application' of the Treaty under Article XXI, paragraph 2*."[65]

And there is then a citation to what the Court said in *Nicaragua* at paragraph 222.

9. Mr. Daley quoted from this passage but conveniently omitted the words highlighted on the screen[66]. The Court will know what it decided one week ago. Iran understands the Court to have meant what it said. The Court could have found that Iran's interpretation of Article XX (1) was merely "possible" or "plausible" but it did not do so. In Iran's view, this is sufficient to dispose of the materially identical US objection in the present case. There is simply no basis for reopening the Court's finding of last week. [End slide]

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[61] CR 2018/29, p. 10, para. 5. See *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018*, paras. 36-37.

[62] *Ibid.*, para. 41-44 and 52.

[63] CR 2018/29, p. 10, para. 5 (Daley).

[64] CR 2018/29, p. 10, para. 5 (Daley).

[65] *Alleged Violations*, *Order*, para. 42; emphasis added. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222)

[66] CR 2018/29, p. 13, para. 24 (Daley).

SECTION 1. ARTICLE XX (1) DOES NOT ESTABLISH EXCEPTIONS TO THE COURT'S JURISDICTION

10. Nevertheless, I turn to the first United States proposition. Prior to its Order of last week, the Court had already ruled on the proper interpretation of Article XX (1) *(d)* in its 1996 Judgment in *Oil Platforms*[67]. The Court's reasoning is found at paragraph 20 and consists of five steps. Mr. Daley did not take you to this passage, and so I must.

[Slide No. 1: *Oil Platforms, Preliminary Objection, Judgment,* p. 811, para. 20 — first step]

11. *First step*, the Court noted that "the treaty of 1955 contains no provision expressly excluding certain matters from the jurisdiction of the Court"[68]. The United States does not dispute this.

[Slide No. 2: *Oil Platforms, Preliminary Objection, Judgment,* p. 811, para. 20 — second step]

12. *Second step*, the Court observed that "[t]he text could be interpreted as excluding certain measures from the ***actual*** scope of the Treaty and, [as a result,] excluding [from] the jurisdiction of the Court [the assessment of] the lawfulness of such measures". The Court then recognized that the provision "could also be understood as affording only a defence on the merits". In other words, the Court recognized that there were two plausible interpretations. The rest of paragraph 20 is concerned with deciding which is the correct interpretation.

[Slide No. 3: *Oil Platforms, Preliminary Objection, Judgment,* p. 811, para. 20 — third step]

13. *Third step*, the Court recalled that, in its 1986 Judgment in *Nicaragua*, it found that "an identical clause" in the 1956 United States-Nicaragua FCN Treaty[69] afforded a potential defence on the merits and did not establish exceptions to the Court's jurisdiction[70].

14. Mr. Daley told you that the Court in *Nicaragua* was "considering a narrow point"[71] and that "the Court's statements concerning whether the clause had jurisdictional implications was not

[67] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 803.

[68] *Ibid.,* p. 811, para. 20.

[69] Entered into force on 24 May 1958, *UNTS*, Vol. 367, p. 3, available at: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280139d26.

[70] *Oil Platforms, Preliminary Objection, Judgment,* p. 811, para. 20, citing *Nicaragua, I.C.J. Reports 1986*, p. 116, para. 222, and p. 136, para. 271.

[71] CR 2018/29, p. 12, para. 17 (Daley).

strictly necessary to the judgment"[72]. He did not take you to the relevant passages or to the use the Court made of them in *Oil Platforms* and in its Order of 3 October.

15. In *Nicaragua*, the Court held that that identical clause "defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court"[73]. The Court also interpreted the phrase "shall not preclude the application of" such measures as giving rise to the question whether that provision "affords a *defence* to a claim"[74] and whether the relevant measures are "*justifiable*" by reference to that provision[75].

[Slide No. 4: *Oil Platforms, Preliminary Objection, Judgment,* p. 811, para. 20 — fourth step]

16. *Fourth,* the Court noted that its finding in *Nicaragua* was consistent with the US position in the *Oil Platforms* case "that 'consideration of the interpretation and application of Article XX, paragraph 1 *(d)*, was a merits issue'."[76]

[Slide No. 5: *Oil Platforms, Preliminary Objection, Judgment,* p. 811, para. 20 — fifth step (I)]

17. The *fifth* and final step. In light of the first four considerations, the Court concluded that "Article XX, paragraph 1 *(d)*, does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise"[77].

[Slide No. 6: *Oil Platforms, Preliminary Objection, Judgment,* p. 811, para. 20 – fifth step (II)]

18. The US objection in this case rests on four words of the sentence used by the Court in the *Oil Platforms* case: "in the present case"[78]. Mr. Daley said that this innocuous choice of words shows that the Court was "reaching a conclusion for that case alone"[79]. But the Court's use of that phrase simply reflects the fact that in the immediately preceding sentences, it had been recalling its

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[72] CR 2018/29, p. 13, para. 18 (Daley).

[73] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222. See also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 180, para. 35.

[74] *Ibid*., p. 136, para. 271; emphasis added.

[75] *Ibid.*, para. 272; emphasis added.

[76] *Oil Platforms, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20.

[77] *Oil Platforms, Preliminary Objections, Judgment*, p. 811, para. 20, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 136, para. 271.

[78] POUS, para. 7.7.

[79] CR 2018/29, p. 13, para. 21 (Daley).

Judgment in the *Nicaragua* case and was now turning to the case before it. In 1996, the Court saw "[n]o reason to reach conclusions different from those reached in 1986"[80], which, of course, concerned a different dispute (and, indeed, a different treaty).

19. The Court evidently reached the same conclusion in its Order of 3 October. Mr. Daley's contention that "[p]aragraph 41 of the Court's Order does nothing more than repeat the Court's observations in the *Oil Platforms* case"[81] ignores the fact that the Court there confirmed that its previous interpretation of Article XX (1) applied equally in the entirely different case before it then[82]. And I have already shown you that he similarly ignores the key part of paragraph 42, including the reaffirmation of what the Court said in the *Nicaragua* case.

20. There is no reason — and the United States has put forward no justification — for the Court to abandon its earlier consistent approach, in 1986, in 1996, and again last week, and to adopt a different interpretation of Article XX (1) in the present case.

21. In its written pleadings, the United States also attempted to make a point that the Court was not asked to consider Article XX (1) *(c)* in *Oil Platforms*.[83] That is a weak argument and it was not repeated on Monday. The Court's reasoning in *Nicaragua* and in *Oil Platforms* concerns primarily the chapeau of Article XX (1), which introduces subparagraphs *(a)* to *(d)*. It makes no difference that the United States of America invokes a different sub-category in the present case. [End slide.]

22. The Court's earlier consistent findings that Article XX (1) does not limit its jurisdiction is confirmed, and was of course underpinned, by application of the well-established rules of treaty interpretation, to which I now turn.

[Slide No. 7: Article XX (1) of the 1955 Treaty of Amity]

23. The chapeau of Article XX (1) introduces the provision with the words "[t]he present Treaty shall not preclude the application of measures . . .". The provision then enumerates four

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[80] *Oil Platforms*, *Preliminary Objection, Judgment*, p. 811, para. 20.

[81] CR 2018/29, p. 13, para. 23 (Daley).

[82] *Alleged Violations, Order*, para. 41.

[83] POUS, para. 7.7, n. 257.

categories of non-precluded measures, without expressly stating the consequence of a measure not being precluded.

24. The ordinary meaning of the phrase "shall not *preclude* the application of measures" is "shall not *make impossible* the application of measures"[84]. Mr. Daley did not dispute this, although he rather curiously suggested that this dictionary definition can hold "no answer" when it comes to identifying the ordinary meaning of the treaty term[85].

25. Article XX (1) neither permits nor prohibits the application of the measures specified; it simply provides that the 1955 Treaty is without prejudice to the application of such measures[86]. The Court has previously held, in *Nicaragua*, that the measures contemplated "are not barred by the Treaty"[87] and, in *Alleged Violations*, that "notwithstanding the provisions of the Treaty, the Parties may apply certain measures"[88]. In its preliminary objections, the United States accepts (as it did in the *Oil Platforms* case) that Article XX (1) "neither authorizes nor disallows any particular measure"[89].

26. As an additional point, the term "preclude" also reflects the language of circumstances precluding wrongfulness under general international law; that is, the existence of a defence rather than a jurisdictional limitation[90].

27. The United States of America asks the Court to read the phrase "shall not preclude the application of measures" as if it instead said "the dispute settlement provisions of Article XXI shall not apply to the following measures". That is an attempt to rewrite Article XX (1), as was confirmed by Mr. Daley's rather remarkable statement that the intended effect of Article XX (1) is somehow independent from "whatever the precise verb chosen"[91]. [End slide.]

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[84] "Preclude" in *Oxford English Dictionary*, Oxford: OUP, 7th ed., 2012.

[85] CR 2018/29, p. 11, para. 13 (Daley).

[86] See also CR 2018/18, p. 38, paras. 13-14 (Thouvenin).

[87] *Nicaragua*, p. 116, para. 223.

[88] *Alleged Violations, Order*, para. 42.

[89] POUS, para. 7.6, quoting para. 4.02 of the Rejoinder of the USA in *Oil Platforms (Iran* v. *United States)*(submitted 23 Mar. 2001).

[90] See e.g. Report of the International Law Commission on the Work of its Twenty-Fifth Session, 7 May-13 July 1973, *Yearbook of the International Law Commission (YILC)*, Vol. 1973-II, p. 176, para. 12.

[91] CR 2018/29, p. 12, para. 15 (Daley).

28. The context also confirms that Article XX (1) provides for a potential defence on the merits. I make two points.

[Slide No. 8: The basis of the Court's jurisdiction: Article XX1 of the 1955 Treaty of Amity]

29. First, Article XX is found at the end of the Articles conferring substantive protections and before the compromissory clause in Article XXI. The US contention that Article XX was intended to derogate from or to circumscribe the scope of Article XXI is illogical. Had the Parties intended that, they would have, for example, reversed the order of Articles XX and XXI so that the exception would follow the rule but they did not do so.

30. Second, Article XXI expressly and unambiguously records the Parties' consent to submit any dispute concerning the interpretation or application of the Treaty to the Court. If the Parties had intended to make exceptions to the jurisdiction of the Court, they could have easily either included those exceptions within Article XXI, or included a cross-reference to Article XX (1) in that provision, but, once again, they did not do so.

[Slide No. 9: The language of Article XX (1) of the 1955 Treaty is materially different to that of other dispute settlement provisions]

31. By contrast, that is precisely what is expressly provided for, for example, in Article 18 of the Sweden-Mexico Bilateral Investment Treaty, which is on the screen and can be found at tab 15 of your judges' folders[92]. [End slide]

32. Mr. Daley had no answers to these contextual arguments, instead (rather unfairly, it has to be said) asserting that Iran simply "leaps" from *[*the ordinary meaning*]* **"**to the conclusion**"**[93].

33. I move to the *travaux*. Ms Kimball told you that the United States "agreed to accept the inclusion of the [compromissory] clause based on [the US] understanding of its limited scope"[94]. This was also Mr. Daley's primary argument[95].

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[92] Article 18, Agreement between the Government of the Kingdom of Sweden and the Government of the United Mexican States concerning the Promotion and Reciprocal Protection of Investments, signed 3 Oct. 2000, entered into force 1 July 2001, *UNTS* Reg. No. 37747, IC-BT 750 (2000), available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2004.

[93] CR 2018/29, p. 11, para. 13 (Daley).

[94] CR 2018/28, p. 66, para. 16 (Kimball).

[95] CR 2018/29, p. 11, para. 10 (Daley).

34. The negotiating history of other FCN treaties based on the same US standard draft, a category of documentation that the United States places repeated emphasis on, confirms that Article XX (1) was, however, intended to afford a potential defence on the merits. The United States has omitted to inform the Court of the importance that it placed on the unqualified scope of the compromissory clause. An extract from Professor Vandevelde's recent treatise is on the screen and he reproduces the contemporaneous explanation of a State Department representative that the Senate's approval of the 1946 FCN treaty with China.

[Slide No. 10: US representatives emphasized that the compromissory clause is without reservation]

> "was a landmark decision, as it committed the United States to acceptance of the compulsory jurisdiction of the Court *without reservation*, for the first time in a significant context. The appearance of this clause in the FCN treaties establishes in the clearest possible manner the principle of the rule of law and of objectivity in the carrying out of treaty obligations and moreover it contributes to the building-up of the prestige of the Court as an arbiter of disputes between nations."[96] [End slide]

35. Similarly, Robert Wilson, a member of the US delegation responsible for negotiating US FCN treaties during the Truman Administration, characterized the formulation which is used in Article XXI as "an unconditional compromissory clause"[97] and confirmed that "[t]he omission of reservations was not inadvertent"[98].

36. None of that is contradicted by the passages from the Senate ratification debate on the US-China FCN treaty or by the Sullivan Study, the only two materials the United States relies on[99]. Even assuming the relevance of those materials — two points.

37. First, the ratification debate refers to authorities for the interpretation of the Treaty being established and well known only "to a considerable extent"[100], acknowledging that the full picture

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[96] Undated memorandum by Herman Walker headed "Compromissory Clause", NARA, Record Group 59, Department of State File 611.62A4/9-2454, quoted in K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties*, OUP 2017, 532.

[97] R. Wilson, *United States Commercial Treaties and International Law*, New Orleans, LA: Hauser Press, 1960, p. 25. See also p. 327.

[98] *Ibid.*, p. 24.

[99] CR 2018/28, pp. 66-67, paras. 16-18 (Kimball); CR 2018/29, p. 11, para. 10 (Daley).

[100] CR 2018/28, pp. 66-67, paras. 16-17 (Kimball), quoting *Hearing before a Subcomm. of the S. Comm. on Foreign Relations on a Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of China*, 80th Cong. 2d Sess., p. 30 (26 Apr. 1948) (statement of Charles Bohlen, Dep't of State); POUS, Ann. 217; emphasis added.

was not known and that disputes may yet arise. That was confirmed by the US speculation during negotiations with Germany that "national as well as international courts would *probably* give very heavy weight to arguments presented by the government invoking the reservation"[101].

38. Moreover, the statement that matters covered by Article XX "are specifically exempted from the purview of the Treaty" does not assist the United States. That merely reflects the fact that the provision establishes a potential defence on the merits. The same applies to the State Department's comment that the "Treaty fully recognizes [the] paramount right [of the] state [to] take measures to protect itself and public security"[102].

39. Second, the observation that the Parties' consent under Article XXI is narrower than "acceptance of the compulsory jurisdiction under Article 36 of the Statute of the Court" goes nowhere. That is, of course, true. But it simply begs the question of what is the scope of consent under Article XXI.

40. Accepting jurisdiction over Iran's claims would in no sense "turn the Treaty into an instrument providing general consent to the Court's jurisdiction" — the spectre that Ms Kimball sought to summon[103]. It would give effect to the ordinary meaning of Article XXI (2), in its context, and in a manner that the *travaux* confirms the Parties intended.

41. In its written pleadings, the United States argued that Article XX (1) should be interpreted by reference to the interpretation of Article XII (1) of the Canada-Ecuador BIT by the investor-State tribunal in *EnCana* v. *Ecuador*[104]. Iran pointed out the flaws in that argument in its observations and it was not repeated by the United States on Monday[105]. But it bears making the point that any comparison with Article XX (1) of the 1955 Treaty serves merely to highlight that where States have intended to exclude certain matters from the jurisdiction of the relevant ***Court*** or tribunal, they have used express language to that effect.

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[101] CR 2018/29, p. 19, para. 54 (Daley), citing Dispatch No. 2254 from US High Commission, Bonn to US Dept. of State (17 Feb. 1954); POUS, Ann. 220; emphasis added.

[102] Cf CR 2018/29, pp. 18-19, para. 50 (Daley), citing Telegram No. 1561 from US Dept. of State to US Embassy Tehran (15 Feb. 1995); POUS, Ann. 215.

[103] CR 2018/28, p. 68, para. 20 (Kimball).

[104] POUS, para. 7.5, citing *EnCana Corp* v. *Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3481, Award, 3 Feb. 2006, paras. 140-149.

[105] WSI, para. 6.8.

[Slide No. 11: The language of Article XX (1) of the 1955 Treaty is materially different to that of other security exceptions]

42. An additional example of this — Article 6.12 of the Comprehensive Economic Agreement between India and Singapore — is on the screen and at tab 16 of your judges' folders[106]. [End slide]

SECTION 2. RESPONSE TO THE US POSITION THAT ITS ARTICLE XX OBJECTION CAN, IN ANY EVENT, BE DECIDED NOW

43. I move to the second US proposition that even if Article XX is not a jurisdictional limitation, its application can somehow be decided now. The US objection cannot be determined now because it is inherently tied to the merits. It makes no difference whether the United States characterizes its argument as a jurisdictional objection or not[107]. Mr. Daley's suggestion that "Iran did not respond"[108] to that alternative characterization in its observations is, once again, a little unfair given that that point was specifically addressed at paragraph 6.7[109].

[Slide No. 12: Article XX (1) of the 1955 Treaty is not self-judging (I)]

44. Article XX (1) *(c)* applies only to measures which *regulate* the production or trafficking of arms and Article XX (1) *(d)* applies only to measures which are *necessary* to protect essential security interests. In its written pleadings, the United States accepted that these provisions are "not 'self-judging'"[110]. In other words, their interpretation and application is not shielded from judicial scrutiny.

45. Mr. Daley seeks to criticize Iran for making "little effort on this point" and for "simply cit[ing] to the *Nicaragua* and *Oil Platforms* decisions" without "further analysis"[111]. It is true that Iran bases its case on the Court's jurisprudence — on passages from those decisions which Mr. Daley did not take you to.

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[106] Article 6.12 (4), Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore, signed 29 June 2005, entered into force 1 Aug. 2005, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2707.

[107] Cf POUS, para. 7.9.

[108] CR 2018/29, p. 20, para. 57.

[109] WSI, para. 6.7, fn. 264.

[110] *Ibid.*, para. 7.30. See also Dispatch No. 2254 from U.S. High Commission, Bonn to U.S. Department of State, 1-2 (Feb. 17, 1954) (POUS, Ann. 220), quoted at POUS, para. 7.29.

[111] CR 2018/29, p. 22, paras. 71-73 (Daley).

46. With respect to Article XX (1) *(d)*, in *Oil Platforms* the Court emphasized that:

> "'the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be "necessary" for that purpose'; and whether a given measure is 'necessary' is 'not purely a question for the subjective judgment of the party' . . . and may thus be assessed by the Court"[112].

47. Mr. Daley sought to make a point that the Court considered the Article XX argument "before it turned to any question of the merits of Iran's claims".[113] That is a weak point for two reasons. First, when it came to consider Article XX, the Court had already heard the argument on the merits. Second, as Mr. Daley noted, the Court has the freedom to structure its judgments as it wishes[114].

48. More generally, with respect to the identically worded provision at issue in *Nicaragua* the Court held:

> "This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provisions in Article XXIV that any dispute about the 'interpretation or application' of the Treaty lies within the Court's jurisdiction."[115]

49. Mr. Daley's only point was to say that the Court reached this finding at the merits stage. But that is, again, irrelevant. What matters is the Court's reasoning and you heard *not one word* from Mr. Daley about that.

[Slide No. 13: Article XX (1) of the 1955 Treaty is not self-judging (II)]

50. And, as I have already recalled, the Court reiterated that conclusion in its Order of 3 October in the *Alleged Violations* case in a passage which the United States, again, elected to ignore[116]. [End slide]

51. Mr. Daley also told you that "[t]he inquiry for the Court in applying this exception is straightforward"[117]. However, the US position that these provisions apply in the present case depends upon establishing factual allegations of an extremely grave nature regarding arms

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[112] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 183, para. 43, quoting *Nicaragua*, p. 141, para. 282. See also *Nicaragua*, p. 117, para. 224.

[113] CR 2018/29, p. 20, para. 62 (Daley).

[114] CR 2018/29, p. 20, para. 63 (Daley), quoting *Oil Platforms*, p. 180, para. 37.

[115] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222.

[116] *Alleged Violations*, *Order*, para. 42.

[117] CR 2018/29, p. 14, para. 30 (Daley). See also p. 21, para. 68.

production and trafficking and terrorism financing, all of which are strenuously denied. Those factual allegations cannot somehow be assumed to be true and the Court is not in a position to rule on them at this preliminary stage.

52. The fact that the Security Council has endorsed asset freezing sanctions as a counter-terrorism tool in situations involving other States or entities says nothing about the specific allegations against Iran and Bank Markazi[118]. And it does not matter whether the United States says it is asking the Court to assume or look very closely at those factual allegations for the purpose of establishing an exception to jurisdiction.

[Slide No. 14: *Nicaragua, Merits, Judgment,* p. 116, para. 225]

53. As the Court recognized in *Nicaragua*:

> "Since Article XXI of the 1956 Treaty contains a power for each of the parties to derogate from the other provisions of the Treaty, *the possibility of invoking the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty*."[119]

54. Finally, a few words on the US reliance on the Court's Judgment in *Djibouti* v. *France*, to support its proposition that Article XX (1) *(d)* confers "wide discretion"[120]. This overlooks two key points.

[Slide No. 15: The treaty provision at issue in *Djibouti* v. *France* was substantially broader than Article XX (1) of the 1955 Treaty]

55. First, the language of the provision at issue in *that* case — Article 2 *(c)* of the 1986 convention — is significantly broader than Article XX (1) *(d)* of the 1955 Treaty. It provides that "Judicial assistance may be refused . . . 'If the requested State *considers* that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests'"[121].

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[118] Cf. CR 2018/29, p. 16, para. 37 (Daley).

[119] *Nicaragua*, p. 116, para. 225; emphasis added. See also para. 272.

[120] POUS, para. 7.27.

[121] Convention between the Government of the French Republic and the Government of the Republic of Djibouti concerning judicial assistance in criminal matters, 1695 *UNTS* 304, concluded 27 Sept. 1986, entered into force 1 Aug. 1992 (emphasis added), quoted in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145.

56. Since Article XX (1) *(d)* is, by contrast, not "self-judging", even if the Court accepts the US argument that it "calls for a deferential review"[122], that goes only to how it should approach the task of assessing the existence of contested facts — including the genuine nature, necessity and reasonableness of the measures — which are all matters for the merits. [End slide]

57. I conclude. The US objection based on Article XX (1) is untenable and should be dismissed because that provision does not establish exceptions to the Court's jurisdiction and, in any event, that objection cannot be decided at this stage.

58. Mr. President, Members of the Court, I thank you for your attention and ask that you kindly call Professor Pellet to the podium.

Le PRESIDENT : Je remercie Monsieur Aughey et j'invite maintenant le professeur Pellet à prendre la parole. Vous avez la parole.

M. PELLET : Merci beaucoup, Monsieur le président.

PARTIE VII

LA RECEVABILITÉ DE LA REQUÊTE

1. Monsieur le président, permettez-moi de commencer sur une note personnelle. Je suis très reconnaissant à la Cour et à vous-même d'avoir fixé le calendrier des audiences de telle manière que les Parties puissent se répondre effectivement sans que les conseils soient obligés de passer des nuits blanches pour vous exposer leurs thèses. Cela n'a malheureusement pas toujours été le cas dans le passé.

2. Monsieur le président, Madame la vice-présidente, Messieurs les juges, les Etats-Unis contestent la recevabilité de la requête iranienne pour deux raisons, liées mais distinctes, qu'ils présentent comme étant ***dirimantes («overarching»)***[123] :

- *premièrement*, l'Iran abuserait de son droit d'ester en justice ;
- *deuxièmement*, il n'aurait pas «les mains propres», ce qui lui interdirait de prétendre au bénéfice d'un arrêt de la Cour, sans que la distinction entre ces deux exceptions, qui se sont

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[122] POUS, para. 7.30.

[123] EPEU, p. 3, par. 1.8.

télescopées dans les plaidoiries que nous avons entendues avant-hier, soit très claire. L'une des phrases introductives de la présentation de sir Daniel Bethlehem illustre bien ces embrouillaminis : «The principle of unclean hands goes to the integrity of the judicial process. An applicant who comes with unclean hands is abusing that process.»[124] Ce serait donc l'absence de «clean hands» qui constituerait l'abus de droit initialement invoqué par les Etats-Unis et devenu aujourd'hui, comme par enchantement, un abus de procédure. Mais, Monsieur le président, puisque nos contradicteurs semblent tout de même maintenir qu'ils soulèvent deux exceptions préliminaires distinctes, je les examinerai successivement malgré la confusion qu'ils entretiennent à cet égard.

SECTION 1

L'ABUS DE DROIT OU DE PROCÉDURE

3. La manière dont les Etats-Unis justifient leur argument fondé sur l'abus, maintenant donc, «de procédure» est passablement «tarabiscotée» :

> «*First*, the United States objects to the admissibility of Iran's case on the grounds that it constitutes an abuse of process. This is because Iran's case does not come within the scope of the Treaty of Amity, and the friendly relationship on which the Treaty was predicated no longer exists. Iran's invocation of the compromissory clause in the Treaty is accordingly a misuse of the Court's judicial function.»[125]

4. Permettez-moi, Monsieur le président, de relever d'abord que si l'abus de procédure invoqué par sir Daniel — c'est lui que je viens de citer — consiste en ce que «Iran's case does not come within the scope of the Treaty of Amity», l'exception n'est en rien spécifique et se superpose ***à*** celle selon laquelle la Cour n'aurait pas compétence en vertu du traité, ce que d'ailleurs mon contradicteur reconnaît lorsqu'il dit : «This admissibility objection cannot therefore be neatly separated from our objections to jurisdiction.»[126] Quant à dire que «the friendly relationship on which the Treaty was predicated no longer exists», il faut savoir : le traité d'amitié de 1955 est-il ou non en vigueur ? «That is the question!». S'il l'est, il s'applique et le fait qu'il soit prétendument largement resté en sommeil durant ces dernières années ne saurait constituer un prétexte pour ne

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[124] CR 2018/28, p. 36, par. 8 (Bethlehem) ; voir aussi p. 37-38, par. 14 ; et p. 60, par. 96.

[125] CR 2018/28, p. 20, par. 20 (Visek) ; voir aussi EPEU, p. 4, par. 1.9.

[126] CR 2018/28, p. 38, par. 16 (Bethlehem).

pas l'appliquer. C'est ce que je montrerai dans un premier temps (A.) avant d'établir que les conclusions de l'Iran entrent pleinement dans le cadre des dispositions du traité, et qu'en les invoquant l'Etat requérant ne fait qu'utiliser les droits que lui reconnaît cet instrument sans en abuser (B.)

A. L'applicabilité du traité de 1955

5. Madame et Messieurs de la Cour, sans le dire vraiment, les Etats-Unis essaient de vous convaincre soit que le traité de 1955 n'est plus en vigueur, soit que son application a été suspendue — en tout cas qu'il ne s'applique pas dans les relations entre les Parties à l'heure actuelle. Ce n'est évidemment pas le cas.

6. Il est patent que jamais les Etats-Unis n'ont fait part de leur intention ni de dénoncer ni de suspendre l'application du traité de 1955 — dont je rappelle qu'il a également été invoqué devant les juridictions américaines, y compris dans des affaires qui ont un lien très direct avec celle qui nous occupe[127]. Il l'a été également devant le Tribunal des différends irano-américain[128], et le simple fait que les Etats-Unis ont, un peu rageusement, dénoncé le traité suite à votre ordonnance du 3 octobre dernier confirme, si besoin était, son applicabilité — jusqu'à l'expiration du préavis d'un an imposé par le paragraphe 3 de son article XXIII, en cas de retrait ; mais ceci est sans incidence sur notre affaire.

7. Dans l'affaire des *Plates-formes* la Cour avait relevé

> «que les Parties ne contestent pas que le traité de 1955 était en vigueur à la date d'introduction de la requête de l'Iran et est d'ailleurs toujours en vigueur. La Cour rappellera qu'elle avait décidé en 1980 que le traité de 1955 était alors applicable» ;

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[127] *Bennett et al.* v. *The Islamic Republic of Iran et al.*, U.S. Court of Appeals, Ninth Circuit, 22 February 2016, 817 F.3d 1131, as amended 14 June 2016, 825 F.3d 949 (9th Cir. 2016), p. 21-22 (MI, annexe 64) ; *Peterson et al.* v. *Islamic Republic of Iran et al.*, U.S. Court of Appeals, Second Circuit, 9 July 2014, 758 F.3d 185 (2nd Cir. 2014), at p. 7 (MI, annexe 62) ; voir aussi *Peterson et al.* v. *Islamic Republic of Iran et al.*, U.S. District Court, Southern District of New York, 28 February 2013, [2013 U.S. Dist. LEXIS 40470] (S.D.N.Y. 2013), p. 52 (MI, annexe 58) ; *Weinstein et al.* v. *Islamic Republic of Iran et al.*, U.S. Court of Appeals, Second Circuit, 15 June 2010, 609 F.3d 43 (2d Cir. 2010), p. 20-23 (MI, annexe 47).

[128] Voir notamment : *Sola Tiles, Inc. and The Government of the Islamic Republic of Iran*, Award No. 298-317-1, 22 Apr. 1987, reprinted in 14 Iran-U.S. C.T.R. 223, 234; *Starrett Housing Corporation, Starrett Systems, Inc. and others* v. *The Government of the Islamic Republic of Iran, Bank Markazi Iran and others*, Final Award, IUSCT Case No. 24 (314-24-1), 14 August 1987; *Phillips Petroleum Company Iran and The Islamic Republic of Iran, et al*., Award No. 425-39-2, 29 June 1989, reprinted in 21 Iran-U.S. C.T.R. 79.

et la Cour de conclure «qu'aucune circonstance n'a été portée en l'espèce à sa connaissance, qui pourrait l'amener aujourd'hui à s'écarter de cette façon de voir»[129].

8. Il en va de même s'agissant de la présente instance, au cours de laquelle, comme d'ailleurs dans l'affaire de la réimposition des sanctions, les Etats-Unis se sont toujours bien gardés de dire le contraire. Lundi dernier encore, nos contradicteurs n'ont pas formellement soutenu que le traité avait pris fin. De manière plus contournée, ils ont affirmé que

> «[t]he friendly bilateral relationship between Iran and the United States, on which the 1955 Treaty of Amity was based, was fundamentally ruptured on 4 November 1979, with the seizure of the US embassy in Tehran and the taking of hostages, which was the subject of this Court's decision in case concerning United States Diplomatic and Consular Staff in Tehran»[130].

Il s'ensuivrait, si l'on comprend bien, que, alors qu'il est demeuré en vigueur, le traité ne s'appliquerait pas — une sorte de traité-fantôme !

9. Pourtant, dans votre ordonnance de la semaine dernière, vous n'avez nullement mis en doute l'applicabilité du traité. Vous avez, au contraire, conclu que, *prima facie*, la Cour était «compétente en vertu du paragraphe 2 de l'article XXI du traité de 1955 pour connaître de l'affaire, dans la mesure où le différend entre les Parties a trait «à l'interprétation ou à l'application» du traité»[131].

10. Ce n'est donc que pour surplus de droit et pour ne rien laisser dans l'ombre que je dirai quelques mots des arguments que les Etats-Unis ont esquissés en vue de jeter un doute sur l'applicabilité du traité. Ces arguments me semblent être au nombre de trois :

— les circonstances auraient radicalement changé depuis sa conclusion ;

— faute d'application, il serait tombé en désuétude ; et

— la violation de ses dispositions par l'Iran empêcherait celui-ci de l'invoquer.

Pour éviter de tout mélanger à l'image de mon contradicteur, je reviendrai sur ce dernier point lorsque, tout à l'heure, j'aborderai la question des «clean hands».

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[129] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 809, par. 15, citant *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), arrêt, C.I.J. Recueil 1980*, p. 28, par. 54».

[130] CR 2018/28, p. 17, par. 11 (Visek) ; voir aussi p. 33, par. 34 et 36 (Grosh).

[131] *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. Etats-Unis d'Amérique), ordonnance du 3 octobre 2018*, par. 52.

11. Bien qu'ils ne tirent pas de conséquence expresse de cette affirmation, les Etats-Unis soutiennent que

> «the conditions that prevail today — and have prevailed for the past four decades — are far removed from the situation at the time the Parties entered into the Treaty. Friendly relations between the United States — the precondition of the Treaty — were fundamentally ruptured on 4 November 1979»[132].

Il est vrai, assurément, que la situation a changé, quoique, si l'on se remémore l'affaire des nationalisations décidées par Mossadegh en 1951 et les circonstances de son éviction en 1953 — éviction à laquelle les Etats-Unis ne sont pas étrangers[133] —, il est loin d'être certain que le genre de situation de crise dans laquelle nous nous trouvons n'a pas été présente à l'esprit des Parties lorsqu'elles ont signé le traité.

12. Dans ses arrêts du 2 février 1973 relatifs à la *Compétence en matière de pêcheries*, la Cour a décidé qu'un tel changement, fût-il fondamental, ne pouvait affecter une clause compromissoire et ne pourrait «avoir d'intérêt qu'aux fins de la décision *relative au fond du différend*» mais qu'il ne saurait «modifier en quoi que ce soit l'obligation d'accepter la compétence de la Cour, seule question qui se pose en la présente phase de l'instance»[134].

13. Au surplus, plus récemment, en l'affaire du *Projet Gabčíkovo-Nagymaros*, vous avez rappelé que «la stabilité des relations conventionnelles exige que le moyen tiré d'un changement fondamental de circonstances ne trouve à s'appliquer que dans des cas exceptionnels»[135]. Nous ne sommes assurément pas dans une telle situation exceptionnelle — qui doit être appréciée *au regard des obligations des Parties fixées dans le traité*.

14. Certes, les relations entre les Parties ne sont pas au beau fixe et le mot «amitié» qui figure dans le titre du traité sonne de manière étrange dans les circonstances actuelles. Mais ceci ne rend pas le traité caduc et rien ne s'oppose à ce que la Cour se prononce, sur le fondement de la

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[132] CR 2018/28, p. 33, par. 36 (Grosh) ; voir aussi p. 17, par. 11 (Visek), cité précédemment au paragraphe 7 ; et EPEU, p. 47-48, par. 6.3.

[133] Voir, par exemple : «La CIA reconnaît son rôle dans le coup d'État en Iran en 1953», *Le Monde*, disponible à l'adresse : https://www.lemonde.fr/ameriques/article/2013/08/19/la-cia-reconnait-avoir-renverse-le-premier-ministre-iranien-en-1953_3463576_3222.html ; S. K. Dehghan et R. Norton-Taylor, «CIA Admits Role in 1953 Iranian Coup», *The Guardian*, disponible à l'adresse : https://www.theguardian.com/world/2013/aug/19/cia-admits-role-1953-iranian-coup.

[134] *Compétence en matière de pêcheries (Royaume-Uni c. Islande), compétence de la Cour, arrêt, C.I.J. Recueil 1973*, p. 20, par. 40 et *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), compétence de la Cour, arrêt, C.I.J. Recueil 1973*, p. 64, par. 40 ; les italiques sont de nous.

[135] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 65, par. 104.

clause compromissoire de l'article XXI, sur le respect — ou sur la violation — des obligations des Parties en vertu des dispositions de fond du traité, dont la Cour a souligné la grande variété dans l'affaire des *Plates-formes*. Il serait assez absurde de prétendre que le traité ne trouve pas à s'appliquer au prétexte de l'absence de relations que cet instrument a précisément vocation à encadrer et que les Etats-Unis s'efforcent d'empêcher par tous les moyens.

15. Comme vous l'avez également souligné dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran :*

> «C'est précisément au moment où des difficultés se présentent que le traité prend toute son importance ; l'objet même de l'article XXI, paragraphe 2, du traité de 1955 est de procurer le moyen de parvenir au règlement amical de difficultés semblables par la Cour ou par d'autres voies pacifiques. Conclure qu'une action devant la Cour en vertu de l'article XXI, paragraphe 2, ne serait pas ouverte aux parties au moment précis où cette voie de recours est le plus nécessaire serait donc contraire au but même du traité de 1955.»[136]

16. Le traité d'amitié, de commerce et de droits consulaires étant en vigueur entre les Parties ***et*** rien ne justifiant sa suspension, celles-ci doivent l'appliquer de bonne foi conformément au principe *pacta sunt servanda* énoncé à l'article 26 de la convention de Vienne. Les Etats-Unis s'en montrent d'ailleurs d'accord puisqu'ils soulignent au paragraphe 6.13 de leurs exceptions préliminaires que «[t]he principle that all treaties in force must be performed in good faith is well established in customary international law»[137]. Cette obligation d'application de bonne foi inclut celle d'accepter la soumission à la Cour internationale de Justice de tout différend s'élevant entre les parties quant à l'interprétation ou à l'application du traité dès lors qu'il n'a pu «être réglé d'une manière satisfaisante par la voie diplomatique».

B. La saisine de la Cour est une application de bonne foi de l'article XXI du traité de 1955

17. Au bénéfice de ces remarques, nous reconnaissons sans ambages que, même si la convention de Vienne est muette à cet égard, l'application de bonne foi d'un traité implique qu'elle ne soit pas abusive.

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[136] *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), arrêt, C.I.J. Recueil 1980*, p. 28, par. 54 ; voir aussi *Compétence en matière de pêcheries (Royaume-Uni c. Islande), arrêt, C.I.J. Recueil 1973*, p. 17-18, par. 33.

[137] EPEU, par. 6.13 renvoyant à l'article 26 de la convention de Vienne sur le droit des traités.

18. Il reste que, comme l'Iran l'a rappelé dans ses écritures, l'existence d'un abus de droit ne saurait être présumée[138] et ce n'est sûrement pas un hasard si, jusqu'à présent, la Cour s'est constamment refusée à faire droit à une demande d'irrecevabilité fondée sur le principe de son interdiction[139]. Vous avez été particulièrement catégoriques à cet égard dans votre arrêt du 6 juin dernier sur les exceptions préliminaires soulevées par la France en l'affaire des ***Biens mal acquis*** ~~***relative aux Immunités et procédures pénales***~~, affaire pour laquelle les Etats-Unis manifestent une prédilection toute particulière — que je partage bien sûr entièrement ! — (nos contradicteurs l'ont citée pas moins de seize fois lors de leurs plaidoiries d'avant-hier !) : «La Cour est d'avis que l'abus de droit ne peut être invoqué comme cause d'irrecevabilité alors que l'établissement du droit en question relève *du fond de l'affaire*. Tout argument relatif à un abus de droit sera examiné *au stade du fond de la présente affaire*.»[140]

19. Dans leurs plaidoiries écrites, c'est bien d'un *abus de droit* imputable à l'Iran que les Etats-Unis se plaignaient : ils emploient l'expression «abus de droit» pas moins de huit fois dans leurs exceptions préliminaires — mais il n'y est pas question d'abus de procédure comme l'a relevé le professeur Lowe ce matin. Ils ont, à cet égard, totalement modifié leur position à l'occasion des plaidoiries orales après que leurs conseils semblent avoir eu une illumination tardive en lisant votre arrêt sur les exceptions préliminaires de la France dans l'affaire opposant celle-ci à la Guinée équatoriale.

20. Ce revirement des Etats-Unis, qui jette une lumière crue sur la fragilité de l'argumentation de nos contradicteurs, est difficilement acceptable. *Estoppel* mis à part, je rappelle que, aux termes des dispositions de l'article 79 du Règlement de la Cour, «[l]'acte introductif [d'une exception préliminaire] contient l'exposé de fait et de droit sur lequel l'exception est fondée» — c'est le paragraphe 4 de l'article 79 — et que (paragraphe 1) :

> «[t]oute exception à la compétence de la Cour ou à la recevabilité de la requête ou toute autre exception sur laquelle le défendeur demande une décision avant que la

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[138] *Zones franches de la Haute-Savoie et du Pays de Gex, arrêt, 1932, C.P.J.I. série A/B n° 46*, p. 167.

[139] Voir OEI, par. 7.14-7.16 et la jurisprudence citée.

[140] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt du 6 juin 2018*, par. 151 ; les italiques sont de nous.

> procédure sur le fond se poursuive doit être présentée par écrit dès que possible, et *au plus tard trois mois après le dépôt du mémoire*»[141].

Le mémoire de l'Iran a été déposé le 1er février 2017, il y a plus de 20 mois. Il est trop tard pour soulever une nouvelle exception préliminaire si, comme cela ressort de la plaidoirie de sir Daniel, abus de droit et abus de procédure constituent des exceptions distinctes ~~— ***et je le cite à cet égard*** —~~ :

> «[L]et me emphasize», he said, «that this is an abuse of process objection; it is not an abuse of right objection. Iran's case does not come properly within the scope of the Treaty of Amity. Accordingly, Iran's invocation of Article XXI (2) of the Treaty, that is, the compromissory clause, in order to found the jurisdiction of the Court is an abuse of process.»[142]

21. Au demeurant, cet engouement, soudain et tardif, pour cette distinction et pour la préférence donnée à l'abus de procédure semble résulter d'une lecture un peu rapide, partiale et incomplète de votre arrêt du 6 juin dernier. Certes, vous avez considéré que

> «[d]ans la jurisprudence de la Cour et de sa devancière, une distinction a été établie entre abus de droit et abus de procédure. Si la notion fondamentale d'abus est peut-être la même, les conséquences qu'emportent, d'une part, l'abus de droit, et de l'autre, l'abus de procédure, peuvent varier.»[143]

Mais, tout en estimant qu'«[u]n abus de procédure se rapporte à la procédure engagée devant une cour ou un ***tribunal se*** *rapporte à la procédure engagée*, c'est cela qui est ***important et*** peut être examiné au stade préliminaire de ladite procédure», vous avez souligné que «*[s]eules des circonstances exceptionnelles* peuvent justifier que la Cour rejette pour abus de procédure une demande fondée sur une base de compétence valable»[144].

22. Dans ce même arrêt, vous avez rappelé votre jurisprudence antérieure, notamment vos décisions dans les affaires relatives à la *Sentence arbitrale du 31 juillet 1989* et à *Certaines terres à phosphates à Nauru*, dans lesquelles vous avez considéré que les Etats requérants avaient présenté leur requête «de manière appropriée dans le cadre des voies de droit qui [leur étaient] ouvertes devant la Cour dans les circonstances de l'espèce»[145] et que, en conséquence, la Cour «n'a[vait] pas

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[141] Les italiques sont de nous.

[142] CR 2018/28, p. 35, par. 2 (Bethlehem).

[143] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt du 6 juin 2018*, par. 146.

[144] *Ibid.*, par. 150 ; les italiques sont de nous.

[145] *Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), arrêt, C.I.J. Recueil 1991*, p. 63, par. 27 ; voir aussi *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 255, par. 38.

à ce stade à apprécier les conséquences éventuelles [de leur] comportement sur le fond de l'affaire ... [et qu'i]l lui su[ffisait] de constater que ce comportement n'équi[valait] pas à un abus de procédure»[146]. Pour les mêmes raisons, en l'affaire *Guinée équatoriale c. France*, vous n'avez pas estimé «devoir déclarer irrecevable pour abus de procédure ou abus de droit la ... demande de la Guinée équatoriale»[147]. En la présente occurrence, les Etats-Unis n'ont invoqué aucune «circonstance exceptionnelle» *liée à la procédure* devant la Cour, que l'Iran a saisie de manière appropriée sur une base de compétence dont mes collègues ont démontré la validité, si bien que vous n'avez «pas à ce stade à apprécier les conséquences éventuelles de son comportement sur le fond de l'affaire» — ce qu'il vous appartiendra de faire, le cas échéant, durant l'examen au fond.

23. Monsieur le président, puisque les Etats-Unis semblent avoir renoncé à se prévaloir d'un abus de droit imputable à l'Iran, il n'est peut-être pas nécessaire d'y revenir longuement. Je note tout de même que le seul argument qu'ils invoquaient — il faut parler à l'imparfait maintenant — à l'appui de leur accusation d'abus de droit semble être que l'Iran regarderait «the Treaty as a vehicle for waging this wider strategic dispute. But to permit Iran to do so in the present case would subvert the purpose of the Treaty and misappropriate the Court's judicial function.»[148]

24. Qu'il existe entre les deux Etats un différend plus vaste que celui que l'Iran vous a soumis le 14 juin 2016, voilà qui ne fait aucun doute. Du reste, la Cour est saisie d'un autre litige, lui aussi juridique, mais distinct de celui qui nous occupe aujourd'hui, dans le cadre de l'affaire relative aux sanctions réimposées par les Etats-Unis le 8 mai dernier.

25. A nouveau, la réponse à l'argument des Etats-Unis se trouve donnée de la manière la plus claire qui soit par votre jurisprudence. En l'occurrence, en particulier, de nouveau, en l'affaire des *Plates-formes pétrolières*, dans laquelle, la Cour a rappelé

> «que, dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran,* elle s'est exprimée ainsi :
>
> > «La Cour a souligné ... qu'aucune disposition du Statut ou du Règlement ne lui interdit de se saisir d'un aspect d'un différend pour la

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[146] *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 255, par. 38.

[147] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt du 6 juin 2018,* par. 152. Voir aussi, notamment *Ambatielos (Grèce c. Royaume-Uni), fond, arrêt, C.I.J. Recueil 1953*, p. 23.

[148] EPEU, p. 50, par. 6.10.

> simple raison que ce différend comporterait d'autres aspects, si importants soient-ils.»»

Et elle a ajouté, un peu plus loin :

> «Nul n'a cependant jamais prétendu que, parce qu'un différend juridique soumis à la Cour ne constitue qu'un aspect d'un différend politique, la Cour doit se refuser à résoudre dans l'intérêt des parties les questions juridiques qui les opposent. La Charte et le Statut ne fournissent aucun fondement à cette conception des fonctions ou de la juridiction de la Cour ; si la Cour, contrairement à sa jurisprudence constante, acceptait une telle conception, il en résulterait une restriction considérable et injustifiée de son rôle en matière de règlement pacifique des différends internationaux.»[149]

26. Ce même raisonnement fait également justice de l'argument selon lequel «Iran's claims concern various actions taken in the context of long-running antagonism between the Parties. This dispute has nothing to do with the interests protected by the Treaty.»[150] Ce n'est pas parce que les actions américaines contestées s'inscriraient dans le cadre d'un «antagonisme de longue date entre les Parties» que le différend soumis à la Cour ne concernerait pas les intérêts protégés par le traité : ce différend porte (et ne porte que) sur les violations de celui-ci. Il suffit de lire de bonne foi les conclusions de l'Iran telles qu'elles sont énoncées à la fin de son mémoire *sub littera a)* de sa «demande de réparation» pour s'en convaincre. L'Iran y prie la Cour de déclarer que la responsabilité des Etats-Unis est engagée pour la violation de ses obligations à son égard :

i) notamment en vertu du paragraphe 1 de l'article III du traité d'amitié ;

ii) *inter alia*, par celle du paragraphe 2 de l'article III, des paragraphes 1 et 2 de l'article IV, du paragraphe 1 de l'article V et du paragraphe 4 de l'article XI du traité ; et

iii) toujours «entre autres» pour la violation de ses obligations au titre du paragraphe 1 des articles VII et X[151].

Il est clair que, quoiqu'en disent les Etats-Unis, «selon leurs propres termes» («by their own terms», they write), les demandes de l'Iran portent sur des activités «que le traité était conçu pour protéger»[152].

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[149] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 439-440, par. 105, citant «*C.I.J. Recueil 1980,* p. 20, par. 37». Voir aussi *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 123, par. 23-24.

[150] EPEU, par. 6.17.

[151] Voir MI, par. 8.1 *a).*

27. Que ces conclusions soient ou non fondées, que les Etats-Unis puissent ou non invoquer des raisons qui justifieraient les mesures contestées, ce ne sont pas les questions que vous devez — ou que vous pouvez — trancher au présent stade de la procédure : il vous appartiendra d'y répondre lorsque vous examinerez le fond de l'affaire. Mais ce qui est certain c'est que celle-ci concerne (et ne concerne *que*) l'application et l'interprétation du traité de 1955.

28. Les Etats-Unis se plaignent que «Iran's claims in this case do not concern disputes arising in the course of ordinary and friendly economic or consular activity, for the simple reason that, as noted above, such activity currently does not exist between the parties.»[153] Il y a du vrai dans ceci, Monsieur le président : les demandes de l'Iran consistent précisément à reprocher aux Etats-Unis de ne pas se comporter d'une manière normale et d'empêcher que les activités protégées par le traité d'amitié de 1955 puissent se dérouler conformément à ses dispositions. Au demeurant, comme nous l'avons montré dans nos observations écrites[154], et comme Luke Vidal l'a à nouveau très bien établi ce matin, il n'était pas exact, au moment où l'Iran a formé sa requête, que les relations économiques entre les deux Etats étaient inexistantes. Et ce n'est toujours pas complètement exact, même si elles le deviennent à l'heure actuelle du fait des sanctions réimposées par le président des Etats-Unis le 8 mai dernier en dépit des exceptions limitées qui subsistent et de celles que vous avez indiquées dans votre ordonnance de la semaine dernière. Plus généralement, la Cour est saisie par ailleurs de la licéité de ces sanctions mais

- d'une part, ce n'est pas notre sujet ;
- d'autre part, la situation en résultant est postérieure à celle qui fait l'objet de la présente instance ;
- enfin, l'Etat défendeur ne saurait se plaindre d'une situation qu'il a lui-même créée.

29. Je relève au demeurant que le traité de 1955 a été invoqué devant les juridictions américaines, précisément à l'encontre des mesures faisant l'objet de la présente requête, sans que

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[152] EPEU, p. 52, par. 6.15 ; voir aussi CR 2018/28, p. 33, par. 34 (Grosh).

[153] EPEU, p. 52, par. 6.14 ; voir aussi CR 2018/28, p. 33, par. 37 (Grosh).

[154] OEI, par. 2.18-2.28.

cette invocation, par des entités distinctes de la République islamique, ait été considérée comme étant abusive[155].

30. Monsieur le président, en conclusion des développements de leurs exceptions préliminaires consacrées à l'abus de droit, les Etats-Unis affirment avec véhémence que «[t]he integrity of the Court's judicial function compels the Court to decline to exercise jurisdiction in the circumstances of the present case»[156] ; et sir Daniel a développé cette idée bizarre avec plus de véhémence encore dans la péroraison de son discours[157]. J'ai un peu de mal à comprendre en quoi se prononcer sur des violations alléguées d'un traité d'amitié et de relations économiques — que ces violations soient avérées ou qu'elles se révèlent infondées à un stade ultérieur de la procédure — ~~***en quoi ceci***~~ pourrait de quelque manière que ce soit porter atteinte à l'intégrité des fonctions judiciaires de la Cour. En se prononçant au fond, la Cour s'acquittera pleinement de sa mission qui est de «régler conformément au droit international les différends qui lui sont soumis» et de contribuer ainsi «à créer les conditions nécessaires au maintien de la justice et du respect des obligations nées des traités», objectif premier que la Charte fixe aux Nations Unies. Loin de constituer un quelconque abus de procédure, la requête iranienne a pour effet de permettre à chacune des Parties d'être entendue par la haute juridiction. Le règlement judiciaire des différends est l'un des moyens expressément envisagés par le paragraphe 1 de l'article 33 de la Charte et destinés à empêcher qu'un litige s'envenime et menace la paix et la sécurité internationales.

SECTION 2

«CLEAN HANDS»

31. J'en viens maintenant, Madame et Messieurs les juges, à la question des «mains propres» ou, si l'on n'est pas un puriste francophone (et j'avoue ne pas l'être !), des «clean hands».

32. Selon les Etats-Unis, «Iran comes to the Court with unclean hands, and the Court should decline to exercise any such jurisdiction it may have, given that the U.S. measures that Iran now seeks to impugn were taken in response to Iran's own conduct»[158]. The reason for that would be

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[155] Voir ci-dessus note 127.

[156] EPEU, par. 6.19.

[157] CR 2018/28, p. 60, par. 96 (Bethlehem).

[158] EPEU, p. 4, par. 1.10.

that the challenged measures would «engage the legal and political responsibility of Iran as a sponsor of terrorism directed at the United States, its nationals, and others over the past forty years, as well as its persistent violations of counter-terrorism, weapons proliferation, and arms trafficking obligations»[159].

33. Je m'abstiendrai de croiser le fer avec nos adversaires sur le bien-fondé de ces accusations que, bien évidemment, l'Iran récuse catégoriquement, comme l'agent l'a rappelé avec force ce matin. Au demeurant, l'on se demande pourquoi.

> «[u]nlike in *Oil Platforms* [in which the Court decided «that in order to make that finding it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period»[160]], the Court need not engage in a review of the merits of this case to reach a judgment about the appropriate legal consequences of Iran's conduct»[161] Why would it be so ?

L'Iran devrait-il être condamné sans être entendu ? Monsieur le président, ces griefs (dont l'Iran récuse totalement le bien-fondé) concernent le fond de l'affaire et il est tout à fait clair qu'ils ne peuvent être appréciés au stade actuel de la procédure. L'Iran se réserve de discuter, lors des plaidoiries sur le fond, si la Cour l'estime utile, les graves accusations formulées par sir Daniel lundi matin ; sauf peut-être à des fins «atmosphériques», elles ne présentent pas de pertinence dans le cadre des audiences qui nous réunissent.

34. Ceci étant, il me semble qu'il suffit de rappeler que :

- *premièrement*, la doctrine des «clean hands» est mal établie dans son principe même ; et
- *deuxièmement*, qu'en tout cas elle ne saurait produire d'effet au stade de la recevabilité de la requête.

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[159] EPEU, p. 4, par. 1.10.

[160] Voir *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2003*, p. 177, par. 29.

[161] EPEU, par. 6.34.

35. Comme nous l'avons établi dans nos observations écrites, il existe plus que des doutes sur la consistance et le caractère obligatoire de la «doctrine» des «clean hands»[162]. Je rappelle en outre et surtout, comme l'Iran l'a fait dans ses écritures, que la Cour, pour sa part, n'a jamais reconnu l'applicabilité de la doctrine des «clean hands»[163]. Mon contradicteur s'en déclare d'accord et, mêlant à nouveau l'argument tiré des «clean hands» avec celui de l'abus de procédure, il se réfère une fois encore à *Guinée équatoriale c. France* pour affirmer que, dans cette affaire, la Cour

> «accepted the existence of the closely related principle of abuse of process, subject to the appreciation that it only operates in «exceptional circumstances» and requires «clear evidence» that the conduct in question «could amount to an abuse of process»[164]. The United States' objection falls squarely within the scope of these requirements.»[165]

A vouloir sur-utiliser ainsi votre arrêt de juin dernier, mon contradicteur et néanmoins ami tourne en rond — je ne peux donc que vous renvoyer, Madame et Messieurs les juges, aux réponses que j'ai déjà données à cette affirmation péremptoire[166].

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[162] Voir notamment, *C.I.J. Mémoires, Barcelona Traction, Light and Power Company, Limited (nouvelle requête: 1962)* (*Belgique c. Espagne)*, vol. II ; CR 1964/1, p. 336 (Rolin) ; Ch. Rousseau, *Droit international public,* t. V. *Les rapports conflictuels*, Sirey, Paris, 1983, p. 177, par. 170 ; Deuxième rapport sur la responsabilité des Etats par M. James Crawford, rapporteur spécial, 3 mai-23 juillet 1999, *in Annuaire de la Commission du droit international 1999*, vol. II, première partie, A/CN.4/SER.A/1999/Add.1, p. 91, par. 336 ; Sixième rapport sur la protection diplomatique par John Dugard, rapporteur spécial, 2 mai-3 juin et 4 juillet-5 août 2005, *in Annuaire de la Commission du droit international 2005*, vol. II, première partie, A/CN.4/SER.A/2005/Add.1, p. 4, par. 9 et Rapport de la Commission du droit international sur les travaux de sa cinquante-troisième session (23 avril-1er juin et 2 juillet-10 août 2001), *in* Commentaire du chapitre V — Circonstances excluant l'illicéité, *Annuaire de la Commission du droit international 2001*, vol. II, deuxième partie, A/CN.4/SER.A/2001/Add.1, p. 72, par. 9 ; ou J. Salmon, «Des mains propres comme conditions de recevabilité des réclamations internationales», *Annuaire français du droit international*, vol. 10, 1964, p. 265-266. Voir aussi : Final Award, 10 July 2014, *Yukos Universal Limited* v. *The Russian Federation*, PCA Case No. AA 227, p. 431-432, par. 1358-1363 ; ou *Niko Resources (Bangladesh) Ltd.* v. *Bangladesh Petroleum Exploration & Production Company Limited («Bapex») and Bangladesh Oil Gas and Mineral Corporation («Petrobangla»)*, ICSID Case No. ARB/10/11 and No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, par. 477.

[163] Voir OEI, par. 8.8, citant *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 134, par. 268 ; *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 73, par. 133 ; *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002*, opinion dissidente de Mme la juge *ad hoc* Van den Wyngaert, p. 160-162, par. 35 ; *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt*, *C.I.J. Recueil 2003*, p. 177-178, par. 28-30 ; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004*, *C.I.J. Recueil 2004 (I)*, p. 163, par. 63 ; *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004 (I),* p. 38, par. 45-47 ; *Délimitation maritime dans l'océan Indien (Somalie c. Kenya), exceptions préliminaires, arrêt, C.I.J. Recueil 2017*, p. 51-52, par. 139-143.

[164] Voir note no 37 dans l'original : «*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 150».

[165] CR 2018/28, p. 37-38, par. 14 (Bethlehem) ; voir aussi, p. 56, par. 83.

[166] Voir ci-dessus, par. 20-26.

36. Et s'il est vrai que l'Iran lui-même a parfois invoqué la doctrine des «clean hands» devant le Tribunal des différends irano-américain[167], il reste que celui-ci a constamment refusé de le suivre sur ce terrain, comme nous l'avons fait remarquer dans nos observations écrites[168].

37. Au demeurant, s'il existe des doutes sur le contour de la «doctrine des «clean hands»», voire sur son existence même en droit international positif, il n'existe aucun doute sur le fait que cette doctrine ne saurait trouver application au stade des exceptions préliminaires. Il est tout à fait frappant à cet égard que *tous* les précédents qu'invoquent les Etats-Unis, pour incertains qu'ils soient, concernent le fond des affaires en cause ; *aucun* ne porte sur la recevabilité des requêtes.

38. Cela est vrai s'agissant, par exemple, de l'opinion individuelle du juge Hudson dans l'affaire des *Prises d'eau à la Meuse*. Outre qu'il s'agit de l'opinion personnelle d'un juge — qui, pour respectable qu'il ait pu être n'a pas été suivie par la majorité — et que Hudson évoquait un «principe d'équité» (dont la nature proprement juridique est dès lors incertaine), son opinion, comme d'ailleurs l'arrêt auquel elle est jointe, porte sur le fond du droit et pas sur la recevabilité de la requête. Il en va de même, par exemple, de l'arrêt de 1986 rendu dans l'affaire des *Activités militaires et paramilitaires au Nicaragua*[169] au sujet duquel les Etats-Unis ne veulent retenir que l'opinion dissidente et fort isolée du juge Schwebel[170]. De même :

— en l'affaire de *Nauru*, que j'ai déjà citée, la Cour a considéré qu'il ne lui appartenait pas «à ce stade [d']apprécier les conséquences éventuelles du comportement de Nauru sur le fond de l'affaire. Il lui suffit de constater que ce comportement n'équivaut pas à un abus de procédure» et elle a rejeté l'exception de l'Australie sur ce point[171] ;

— en l'affaire *Avena*, la Cour a décidé que «même s'il était démontré que la pratique du Mexique ... n'était pas exempte de critique, les Etats-Unis ne pourraient s'en prévaloir comme

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[167] Voir EPEU, p. 58, par. 6.32.

[168] OEI, par. 8.14.

[169] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 134-135, par. 268.

[170] EPEU, par. 6.31.

[171] *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 255, par. 38.

exception à la recevabilité de la demande mexicaine» et la Cour a rejeté en conséquence l'exception d'irrecevabilité des Etats-Unis fondée sur le comportement du Mexique[172] ; et

— *last but not least :* dans l'affaire des *Plates-formes pétrolières*, la Cour a estimé n'être «pas tenue, à ce stade de son arrêt, de se pencher sur la conclusion des Etats-Unis tendant à ce que la demande de l'Iran soit rejetée et à ce que la réparation qu'il sollicite lui soit refusée en raison du comportement attribué à l'Iran»[173].

39. Le Tribunal arbitral dans *Guyana c. Suriname* a parfaitement résumé la situation : «*The I.C.J. has on numerous occasions declined to consider the application of the doctrine*[174]*, and has never relied on it to bar admissibility of a claim or recovery*»[175]. Ceci est également vrai, à ma connaissance, pour l'ensemble des tribunaux arbitraux interétatiques — en tout cas depuis 1945.

40. Au surplus, dans les très rares cas dans lesquels la Cour ou un tribunal international ont semblé envisager la possibilité d'adopter la doctrine (sur le fond — jamais au stade des exceptions préliminaires), il n'en a été question qu'à la condition que des faits *de même nature* soient opposés à ceux prétendument illicites. Tel avait été l'un des éléments essentiels du raisonnement de Manley Hudson dans l'opinion individuelle qu'il avait jointe à l'arrêt de la CPJI dans l'affaire des *Prises d'eau à la Meuse* et dont les Etats-Unis ont fait grand cas dans leurs écritures[176] ; ils ne s'y sont, à juste titre, pas référés lundi. En effet, dans cette opinion, Hudson avait insisté sur le fait que les Pays-Bas eux-mêmes avaient exercé «un acte qui est précisément semblable, en droit et en fait»

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[172] *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt*, *C.I.J. Recueil 2004 (I)*, p. 38, par. 47.

[173] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt*, *C.I.J. Recueil 2003*, p. 17, par. 30.

[174] Note n° 477 dans le texte original : «*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *I.C.J. Reports 2004 (I)*, p. 136, para. 63; *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, *Judgment, I.C.J. Reports 2003*, p. 161, para. 100; *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 279: in this case Belgium raised the question of clean hands in its preliminary objections (Preliminary Objections of the Kingdom of Belgium, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* (5 July 2000), available at http://www.icj-cij.org/docket/files/105/8340.pdf), but the Court did not address the argument in its judgment».

[175] *Guyana* v. *Suriname*, Arbitral Tribunal, Award, 17 September 2007, PCA Case No. 2004-04,p. 135-136, par. 418 (Annex VII).

[176] EPEU, par. 6.37, voir notes nos 248-250.

à celui qu'ils reprochaient à la Belgique[177]. Telle a été également la position du Tribunal arbitral dans *Guyana* v. *Suriname* — qui a d'ailleurs cité l'opinion du juge Hudson[178].

41. Madame et Messieurs de la Cour, en vous saisissant des mesures qu'il estime grossièrement contraires au traité d'amitié de 1955, dont on ne peut prétendre qu'il ne soit plus en vigueur, l'Iran n'a commis aucun abus de droit : il a mis en application une disposition particulièrement indispensable en cette période de grande tension sur le règlement des différends entre les deux Etats. Les Etats-Unis affectent de s'en offusquer au prétexte que l'Iran n'aurait pas «les mains propres» : c'est une façon cavalière d'essayer de se débarrasser d'un débat contentieux. ***Vous*** ne sauriez l'admettre.

42. Cette présentation clôt le premier tour des plaidoiries de la République islamique d'Iran que je vous remercie d'avoir écoutées avec attention et bienveillance au nom de toute notre délégation. Merci beaucoup.

Le PRESIDENT : Je remercie le professeur Pellet, dont l'exposé clôt le premier tour de plaidoiries de la République islamique d'Iran. La Cour se réunira de nouveau demain après-midi, à 15 heures, pour entendre le second tour de plaidoiries des Etats-Unis d'Amérique. L'audience est levée.

L'audience est levée à 17 heures.

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[177] *Prises d'eau à la Meuse, arrêt, 1937, C.P.J.I. série A/B nº 70*, opinion individuelle du juge Hudson, p. 78.

[178] *Guyana* v. *Suriname*, Arbitral Tribunal, Award, 17 September 2007, PCA Case No. 2004-04, p. 137-138, par. 420-421 (Annex VII). Dans le même sens : *Niko Resources (Bangladesh) Ltd.* v. *Bangladesh Petroleum Exploration & Production Company Limited («Bapex») and Bangladesh Oil Gas and Mineral Corporation («Petrobangla»)*, ICSID, Decision on Jurisdiction, 19 August 2013, Case No. ARB/10/11 and No. ARB/10/18, par. 481.