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*CR 2018/32*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2018**

***Public sitting***

***held on Thursday 11 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)**

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**VERBATIM RECORD**

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**ANNÉE 2018**

***Audience publique***

***tenue le jeudi 11 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)**

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**COMPTE RENDU**

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| *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 |

*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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The PRESIDENT: Please be seated. The sitting is now open. The Court meets today to hear the second round of oral argument of the United States of America. I now give the floor to Sir Daniel Bethlehem. You have the floor.

Sir ***DANIEL*** BETHLEHEM:

**OPENING OBSERVATIONS AND ADMISSIBILITY**

1. Thank you, Mr. President. Mr. President, Members of the Court, I will open the US reply submissions this afternoon with some general observations going to cross-cutting themes in Iran's submissions yesterday. I will also briefly address Professor Pellet's submissions on the issue of abuse of process and ~~***of***~~ clean hands. I will be followed by Ms Grosh, who will address the application of the Treaty of Amity and the absence of normal commercial relations between the Parties. She will also address questions of interpretation and of applicable law relevant to these proceedings, as well as the US measures in issue in these proceedings and one or two points of brief rebuttal on the issue of Article XX (1) of the Treaty of Amity. Ms Grosh will be followed by Professor Childress, who will address the status of Bank Markazi and Iran's claim that it is a company entitled to rights accorded by the Treaty of Amity. He will be followed by Professor Boisson de Chazournes, who will address Iran's claim that the Treaty accords Iran and its State-owned entities sovereign immunity. The United States' Agent, Mr. Visek, will thereafter make some brief closing remarks and present the United States' formal submissions in these proceedings.

## I. General observations

2. Mr. President, Members of the Court, let me begin with some overarching observations going to what we heard from Iran yesterday.

3. The first point that warrants emphasis is that the sole basis of jurisdiction invoked by Iran in these proceedings is Article XXI (2) of the Treaty of Amity. This provides for the submission to the Court of disputes as to the interpretation or application of the Treaty of Amity. Article XXI (2) is *not* a compromissory clause of general application. It does not found jurisdiction in respect of disputes concerning the interpretation or application of customary international law. It does not

establish jurisdiction in respect of disputes that do not come within the scope of the Treaty. Its reach cannot be enlarged through some recourse to other relevant rules of international law to which reference may be appropriate solely for purposes of interpretation. The *acquis* of international law applicable between the United States and Iran does not become justiciable before the Court simply because Iran contends that a provision of the Treaty is capable of being construed by reference to some principle that is not addressed in the Treaty. Article 31 (3) *(c)* of the Vienna Convention on the Law of Treaties is neither a jurisdictional clause nor a device that a State may use to expand a compromissory clause in a treaty to encompass rules of law or rights or obligations that are not addressed in the treaty. Mr. Wordsworth's attempt to read the law on sovereign immunity into the Treaty of Amity under the guise of interpretation is neither sound nor appropriate. Professor Boisson de Chazournes will have more to say about this shortly.

4. There is a related point that follows from this. We heard yesterday, both from Professor Lowe and from Professor Pellet, that the US objections to jurisdiction and admissibility were somehow abusive; an attempt to deny Iran its day in court. Looking past the rhetoric, the Treaty of Amity does not afford jurisdiction in respect of disputes beyond those as to the interpretation and application of the Treaty of Amity. It is not a general act. And objections to jurisdiction and admissibility are a proper means to challenge abusive assertions of jurisdiction and invocations of the processes of the Court.

5. Professor Pellet expressed incredulity yesterday about how, as he put it, a claim concerning the alleged violation of the Treaty of Amity could undermine the integrity of the judicial process. The answer is simple. A litigant who comes to Court in bad faith, relying on an instrument of amity as the basis of the Court's jurisdiction, to assail measures put in place in response to and to address the egregious acts of that self-same litigant, is challenging the very essence of the function of a court of justice. This proposition reflects not only the *Northern Cameroons* principle, which articulates the point expressly, but it also runs through the Court's jurisprudence rejecting exorbitant assertions of jurisdiction in cases, such as the *Legality of Use of Force* cases brought by Slobodan Milošević's Serbia. That was another unclean hands series of cases, in which massive violations of human rights and international humanitarian law by the applicant called into question the propriety of its resort to the Court. And the Court, while not

expressly endorsing the respondents' reliance on the principle, was nonetheless swift and uncompromising in disposing of the cases at the jurisdictional stage. In those cases, so in this. Iran is abusing both the Treaty of Amity and the processes of the Court with the application in issue in these proceedings.

6. Moving beyond this point, there was a theme that was apparent across *all* of the submissions of Iran's counsel yesterday. It was the theme of joinder to the merits. Each of Iran's counsel, yesterday, dutifully made the assertion that the US objections, both jurisdiction and admissibility, could not be addressed at this preliminary stage of the proceedings but that Iran stood ready to engage with them, and to vigorously contest each point, when it came to the merits. Iran's submissions yesterday were intent on raising issues that, it was said, could only properly be addressed on the merits. We heard submissions on fair and equitable treatment from Mr. Wordsworth. We heard that the functions of Bank Markazi could only properly be addressed on the merits from Professor Thouvenin. We heard that Iran stood ready, and indeed eager, to rebut what Professor Lowe called the United States' "tendentious and untested allegations" of Iran's support for terrorism, but only when it comes to the merits, not now, not here, not in these proceedings.

7. Mr. President, Members of the Court, that is not good enough. An applicant challenged by preliminary objections to jurisdiction and admissibility cannot manoeuvre to join those proceedings to the proceedings on the merits by staying silent, by failing to engage, by refusing to address the objections, by trailing arguments that it says can only be addressed on the merits. As Professor Childress will address, the US Bank Markazi objection — that Bank Markazi is not a company, within the meaning of this term in the Treaty, entitled to avail itself of the rights afforded to companies under the Treaty — is an objection that rests squarely and solely on how Iran has characterized Bank Markazi in these proceedings and how Bank Markazi has characterized itself in the *Peterson* proceedings before the US courts. Iran cannot turn around now and say, as Professor Thouvenin said yesterday, that we will have to wait for the merits to address the status of Bank Markazi. Iran cannot simply reserve its position on the US allegations of bad acts and say that it will address them on the merits and that, *ergo*, the Court should join the objections to the merits. This is the stage at which Iran is required to address that conduct. Iran has had our written

objections to jurisdiction and admissibility for 18 months. The abusive conduct to which we point is detailed in judgments that Iran itself annexed to its Application of 14 June 2016 and its Memorial of 1 February 2017. Iran requires *neither* more time *nor* more information to address these issues. These issues would not be better illuminated by or better viewed through the prism of proceedings on the merits. Iran's explanation of its accountability for the Beirut barracks bombing, or the Beirut embassy bombings, or the multiple other egregious acts to which we have pointed, will not be more suitably conveyed in a merits hearing.

8. Mr. President, Members of the Court, as a matter of principle, preliminary objections to jurisdiction and admissibility are to be determined at the preliminary phase. As the Court stated in its Preliminary Objections Judgment in the *Territorial and Maritime Dispute* case between Nicaragua and Colombia:

> "In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits."[1]

This point was echoed by Judge Bennouna in his declaration appended to the Preliminary Objections Judgment in the *Bolivia* v. *Chile* case[2]. There is no basis, in the present case, for concluding that the objections raised by the United States cannot be determined at this stage of the proceedings. My colleagues, following me, will elaborate on this point in respect of each of the US objections to jurisdiction and I will say more about this shortly in respect of the US objections to admissibility.

9. Yesterday's submissions by Iran also made it clear, if clarity were needed, that this case is all about the *Peterson* proceedings before the US courts arising from the bombing of the Beirut barracks in 1983 and the attachment of Bank Markazi's assets in those proceedings. We heard the briefest of references from Professor Lowe to Bank Melli, to Bank Saderat and to the Telecommunications Infrastructure Company of Iran, but these were punctuation points; they were not elaborations.

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[1] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51.

[2] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, declaration of Judge Bennouna, p. 2.

10. Three points follow from this. The *first* is that this focus on the *Peterson* proceedings demonstrates the fundamental linkage between the US measures of which Iran complains and Iran's bad acts and unclean hands, its procuring and funding of the bombing of the Beirut Marine barracks which killed 241 US peacekeepers. The *second* point is that, of the 98 cases that Iran lists in Attachment 1 to its Memorial in which there have been judgments against Iran, over 20 per cent ~~***of those cases***~~ arise from and address the Beirut barracks bombing, 20 per cent of those 98 cases. When you add to this number the cases arising out of the two Beirut embassy bombings to which I drew your attention on Monday, and the cases arising out of another bombing incident which I will refer to in more detail a little bit later, that is of the US military personnel in the Khobar Towers residence in Dharan in Saudi Arabia on 25 June 1996, which killed 19 US service personnel, when you add these cases together, the percentage of the total number of judgments rises to over 30 per cent. So, we have four bombings. We have the Khobar Towers, we have the two embassy bombings in 1983 and 1984, and we have the Marine barracks bombing in 1983. And those four bombings account for a very significant number of the cases in issue, and in each of these cases the evidence of Iran's involvement is compelling. I will have a little bit more to say about the Khobar Towers bombing later in my submissions, but Dr. Mohebi's allegation that the US court decisions were "erratic and contradictory"[3], a claim that was echoed by Dr. Webb with her "erratic and inconsistent" allegation[4], simply ***does*** not withstand scrutiny. This is no more readily apparent than in Iran's reliance on the dissenting opinion in the *Bank Markazi* v. *Peterson* United States Supreme Court case rather than on the majority judgment delivered by Justice Ginsburg with whom five other justices concurred[5].

11. The *third* point goes wider. Professor Lowe, with an almost offhand sweep of expression, said yesterday that "significant part[s] of Iran's case" were not addressed by the US objections to jurisdiction[6]. He went on to say that jurisdiction over the claims regarding Bank Melli, Bank Sederat and the Iranian Telecommunications Infrastructure Company was not disputed.

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[3] CR/2018/30, p. 13, para. 13 (Mohebi).

[4] CR/2018/30, p. 47, para. 15 (Webb).

[5] *Bank Markazi, Aka Central Bank of Iran* v. *Peterson et al.*, US Supreme Court, 20 Apr. 2016; https://www.supremecourt.gov/opinions/15pdf/14-770_9o6b.pdf.

[6] CR/2018/30, p 37, para. 15 (Lowe).

12. But as I observed on Monday, this is not quite accurate. The reason why you have heard virtually nothing from Iran on these cases, other than the most cursory passing reference, is that the Bank Markazi and Iranian Armed Forces assets that have been attached in the *Peterson* proceedings and in two other sets of proceedings account for over 98.5 per cent of all of the Iranian assets attached in all the cases that Iran identifies in Attachment 1 to its Memorial. In other words, the Bank Melli, Bank Sederat and similar cases to which Professor Lowe alluded so briefly account for less than 1.5 per cent of all the Iranian attached assets.

13. The remaining less than 1.5 per cent of Iran's case could not survive to proceed to the merits absent the cases addressed by the US preliminary objections. Leaving aside for the moment the US unclean hands objection, which would be relevant and would be material, the reason for this is that, if you uphold our three objections to jurisdiction, it would follow that Iran's case would, for all material purposes, fall outside the scope of the Treaty of Amity and outside the scope of the compromissory clause in Article XXI (2) of the Treaty. It is our contention that Iran's invocation of the compromissory clause is abusive. As I noted on Monday, and as both Professor Lowe and Professor Pellet appeared to accept yesterday, this objection to admissibility cannot be easily separated from our objections to jurisdiction as it is an objection to Iran's abusive invocation of jurisdiction. We consider therefore, quite apart from any *de minimis* point that would also be relevant, that you could complete your reasoning on the less than 1.5 per cent of what would be left of Iran's case by reference to our abuse of process objection.

14. Mr. President, Members of the Court, I have one last observation of a wider nature to make before turning briefly to address Professor Pellet's response to our abuse of process and unclean hands objections. It is in response to the submissions made both by Professor Lowe and by Mr. Aughey, and indeed in passing by others as well, that you can simply in these proceedings rest on your judgments in *Oil Platforms* and *Nicaragua* to conclude that the US objection based on Article XX (1) of the Treaty of Amity is a matter for the merits. I do not address the substance of this objection, which Mr. Daley addressed on Monday, but I observe only that, in both of those earlier cases, in *Oil Platforms* and *Nicaragua*, the United States did not advance Article XX (1) as a *preliminary* objection for reasons that were particular to those cases. In the present case, however, the case now before you, the United States has advanced Article XX (1) as a preliminary objection

to jurisdiction and has done so on reasoned grounds that were neither advanced by the United States nor considered by the Court in either *Oil Platforms* or *Nicaragua*. It is therefore necessary, Mr. President, Members of the Court, it is necessary for the Court to address the substantive grounds that we have advanced in respect of Article XX (1) as a preliminary objection to jurisdiction in this phase of the proceedings. It will not be enough, as Iran suggests, for the Court simply to repeat what it said in *Oil Platforms* and *Nicaragua* about this being a matter for the merits. The Court's reasoning in those cases engaged with the arguments that were put in those cases. A different argument has been advanced in this case and it requires fresh attention by the Court.

## II. Objections to admissibility

15. Mr. President, Members of the Court, I come now to some remarks in response to Professor Pellet's reply on the US objections to admissibility and also to passing observations on this aspect by Dr. Mohebi and Professor Lowe. I will be brief as there are only a few points that warrant response.

16. I start with the United States' Treaty of Amity abuse of process objection. Professor Pellet misunderstands, or simply mischaracterizes, this objection. This objection did not advance an assertion that the Treaty was not in force. It was not a *new* objection — it was fully pleaded in our written observations. I do not, therefore, need to address most of what Professor Pellet said in apparent response to our argument. He was shooting at a straw man. There are only two points to make on this issue. The first is simply to restate the objection to ensure that it is properly understood. This objection is that Iran has seised the Court with these proceedings by reference to the compromissory clause in the Treaty of Amity, but in respect of a dispute that manifestly falls outside the scope of the Treaty. It falls outside the scope of the Treaty because the Treaty does not regulate relations between the Parties in a general sense but, rather, was predicated on a framework of relations between the Parties addressed in Article I of the Treaty, namely, conditions of a firm and enduring peace and sincere friendship between the Parties. Those predicate conditions have been absent for almost four decades. There were no normal commercial relations between the Parties or their nationals and companies. The dispute of which Iran endeavours to seise

the Court is thus a dispute that does not come within the purview of the Treaty. Iran's invocation of the compromissory clause in respect of this dispute is an abuse of the process of the Court.

17. Professor Pellet suggested that my characterization of this objection on Monday — as an abuse of process objection rather than an abuse of rights objection — took the objection outside the framework of Article 79 (1) of the Rules of Court. This is entirely unsustainable, as reference to the footnote details to the transcript of our written observations in Monday's proceedings will attest. This objection was fully pleaded in our written objections. The description of this objection as an abuse of process objection was warranted as, since our written objections, the Court, in *Equatorial Guinea* v. *France*, differentiated between abuse of process and abuse of right, a distinction that had not previously been apparent in the Court's jurisprudence. Clarification of the nature of our objection was therefore appropriate.

18. There is no more that I need to say in response to Professor Pellet on this objection. Ms Grosh will address the absence of the predicate conditions of the application of the Treaty.

19. Turning to the United States' unclean hands objection, there are two points that warrant comment, one of fact, and one of law.

20. On the facts, Iran yesterday, starting with Dr. Mohebi, followed by Professor Lowe, and concluding with Professor Pellet, contended both that the US allegations were irrelevant to these preliminary proceedings and that they would be addressed on the merits. But there was no elaboration of why they were apparently irrelevant to the present proceedings and no explanation as to why they were engaged by Iran's claims on the merits.

Professor Lowe went further than Dr. Mohebi. He asserted that . . .

The PRESIDENT: The interpreters are having some difficulties to catch up with your high-speed delivery. If you could kindly slow down for them.

***Sir DANIEL BETHLEHEM***: Thank you, Mr. President. You ***said*** the same to me the other day, just as I was getting to the unclean hands argument, I am just getting to the unclean hands argument, so I will slow down again, thank you very much.

21. So Professor Lowe went further than Dr. Mohebi. He asserted that the US unclean hands objection was based on "tendentious and untested allegations of terrorism"[7]. That is quite remarkable! We heard nothing whatever from Iran in response to any of the evidence that I laid out on Monday — the Beirut Marine barracks bombing and the judgment in the *Peterson* case; Iran's statements claiming responsibility for this attack; the guilty plea in response to the plot to assassinate the Saudi Arabian Ambassador to the United States in Washington; the Berlin Superior Court judgment in the *Mykonos Restaurant* case; the Argentine arrest warrants for senior Iranian officials in respect of the AMIA bombing; and more. Not so tendentious and untested, I think!

22. There is a good deal more tested and substantiated evidence of Iran's unclean hands. I do not propose to take you to any more documents at this point but we have included two additional cases in your bundles that will merit examination in due course. Both are cases identified in Iran's Attachment 1 as amongst the cases in respect of which damages judgments have been entered against Iran, though — as with the *Peterson* judgment — Iran did not provide you the relevant factual discussion of these decisions. The first case, which you will find at tab 31 of your folders is that of *Elahi* v. *Iran*, which is a December 2000 judgment of the DC District Court concerning the assassination in Paris of a US national, on 23 October 1990[8]. One of the salient features of this case is that a number of those involved in the assassination were arrested, interrogated, tried and convicted in France. The suit before the US courts followed the French action. The civil claim in the United States thus followed a criminal conviction in France. That criminal process in France established that the assassination was "organized and executed by Iranian government officials" — this is recorded at paragraph 28 of the US judgment. The evidence of Iranian official involvement is compelling. I invite you to examine the judgment for yourselves.

23. The second judgment, which is at tab ***30*** of the judges' folders is the case of *Heiser and others* v. *Iran*[9]. This concerns the Khobar Towers bombing in Dhahran, Saudi Arabia to which I referred a little earlier in my submissions, in which 19 US service personnel were killed. Once

[7] CR 2018/30, p. 33, para. 2.

[8] *Elahi* v. *Iran*: https://law.justia.com/cases/federal/district-courts/FSupp2/124/97/2569541/. For ease of reference, the extract of the judgment in the judges' folders is to a different published version.

[9] *Heiser* v. *Iran*, https://www.courtlistener.com/opinion/2402964/estate-of-heiser-v-islamic-republic-of-iran/. For ease of reference, the extract of the judgment in the judges' folders is to a different published version.

again, a striking feature of this judgment is the considerable array of evidence that was amassed establishing Iranian involvement in the atrocity[10]. For ease of reference — if you have a look at the *Heiser* judgment at paragraphs 21 to 35 and then again paragraphs 58 to 72, so a very considerable portion of the judgment — you will see the serious attention given by the Court to those allegations: you will see the witness evidence by Louis Freeh, the former Director of the Federal Bureau of Investigation, who oversaw a four-year investigation into that incident. You will see the reference to other expert testimony and lay testimony of that atrocity. A striking feature of this judgment is the considerable array of evidence that was amassed establishing Iranian involvement in that atrocity. Again, I would urge you look at this judgment as well, in slower time. So we have the *Mykonos* judgment before the Berlin Superior Court, we have the Paris judgment in the case to which I have just referred you, *Elahi*, we have ~~***got***~~ the Argentine prosecutors in the AMIA case, we have ~~***got***~~ the Bahraini allegations brought to the attention of the United Nations Secretary-General, we have a range of other proceedings, and that is quite apart from the cases before the US courts, the *Peterson* case, the *Heiser* case, and others.

24. Mr. President, Members of the Court, the US unclean hands objection rests on proven allegations of Iranian-sponsored terrorist atrocities — not one, not two, but many, in which Iranian involvement has been established through criminal indictments and court trials. Iran's argument that these issues are all for the merits is simply an attempt to manoeuvre these proceedings to a merits hearing. This is an abuse of process as well. If Iran has a response, other than a bald denial, to these assertions, it is for *this* stage of the proceedings. The reality is that Iran does not have a response. It is abusing the processes of this Court. It is a bad-faith litigant.

25. On the law, Professor Pellet studiously avoided reference to the conclusions by Professor John Dugard to which I referred you on Monday. He failed to address the affirmation of the unclean hands principle by Sir Gerald Fitzmaurice more than 60 years ago. He failed to engage with the affirmative invocation of the unclean hands principle by States before this Court, in the *Legality of Use of Force* cases and in other cases to which I referred and which are referred to in our written objections. Mr. President, Members of the Court, I conclude these submissions with the

[10] *Heiser*, paras. 21–35 and 58–76.

same submission with which I concluded my submissions on Monday. There is no stronger case of unclean hands, of abuse of process. Iran is here in these proceedings, in an attempt to enlist this Court in its efforts to evade attempts to hold it accountable for terrible atrocities. It would be an affront to the integrity of the Court, as a court of justice, to let this case continue to the proceedings on the merits.

26. Mr. President, Members of the Court, that concludes my submissions. I thank you for your attention. Mr. President, may I ask you to call Ms Grosh to the podium please.

The PRESIDENT: I thank Sir Daniel Bethlehem. I now give the floor to Ms Grosh. You have the floor, Madam.

Ms GROSH:

## TREATY OF AMITY, JURISDICTIONAL STANDARD, AND ARTICLE XX (1) OBJECTIONS

### I. Introduction

1. Mr. President, Members of the Court, good afternoon. It is an honour to appear before you again on behalf of the United States of America. Today I will cover three main topics: the Treaty of Amity's object and purpose; the proper jurisdictional standard at this phase of the proceedings; and the United States' objection under Article XX, paragraph 1, of the Treaty.

### II. The Treaty of Amity

2. I will begin with the Treaty of Amity and have two points to make.

3. *First*, I will discuss the object and purpose of the Treaty and respond to some of the points we heard yesterday from Professor Lowe.

4. *Second*, I will discuss the state of relations between Iran and the United States at the time of the events giving rise to this case, and in so doing, address some of the points made by Mr. Vidal.

**A. Meaningful commercial relations are a cornerstone of *the object and purpose of the Treaty.***

5. So to my *first* point: the object and purpose of the Treaty. As the United States stated on Monday, Iran's case is wholly untethered from the Treaty, as construed in good faith and in light of its object and purpose[11]. This is because, while the Treaty was intended to govern the private and professional spheres of activities, Iran's claims engage the sovereign sphere of activities, which are not encompassed in the Treaty. Iran's claims also concern measures essential to protect US security interests, which are expressly excluded from the Treaty. Finally, the state of Iran-US relations bears little resemblance to the one that prevailed when the United States and Iran entered into the Treaty. The conditions in which the Treaty was intended to operate have, thus, not arisen in decades, and the Parties have not been relying on the Treaty for its intended purpose. None of what you heard yesterday from Iran on this issue was successful in grounding the case more firmly in the Treaty of Amity.

6. The United States derived the object and purpose directly from the preamble of the Treaty. Iran can hardly take issue with this source. As we stated on Monday, the preamble makes clear that the Treaty of Amity is designed to "encourage[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations"[12].

7. We are puzzled by Iran's contention that the US statement of the object and purpose is overly narrow given that it is drawn from the Treaty's own preamble[13]. The US discussion of the object and purpose is also in no way inconsistent with that in other cases before this Court, as Iran suggested. It is not controversial that the US case in *United States Diplomatic and Consular Staff in Tehran*[14] was grounded in the Treaty's concern for "regulating consular relations" and Article II (4) and Article XIX of the Treaty. Not only did Iran seize the premises of the US consulate, Iran also held hostage US consular staff among others for 444 days, and failed to provide access to the other

[11] CR 2018/28, pp. 30-35, paras. 25-41 (Grosh).

[12] CR 2018/28, p. 25, para. 4 (Grosh).

[13] CR 2018/30, p. 36, para. 10 (Lowe).

[14] *United States Diplomatic and Consular Staff in Tehran (Islamic Republic of Iran* v. *United States of America)*, Memorial of the United States of America, p. 179-183.

Party's nationals, as Article II (4) of the Treaty plainly requires. There was simply no question that the US claims engaged the Treaty's object and purpose in order to prevail.

8. Likewise, in *Oil Platforms*, the United States noted at the outset of its Memorial its disagreement with the Court's construction of Article X, paragraph 1, as it related to Iran's claims in that case. In light of the Court's conclusion that it had jurisdiction over Iran's Article X (1) claim, the United States advanced its own counter-claim under Article X (1) consistent with the Court's holding and "based on facts directly at issue in assessing Iran's claims"[15].

9. Plainly, the United States has not suddenly adopted a novel position on the object and purpose of the Treaty, as Iran now contends[16]. The prior cases involved different types of legal claims and different factual patterns. More fundamentally, neither of the cases cited by Iran support Iran's theory that the United States had previously advocated for a broader understanding of the object and purpose or that the Treaty's object and purpose are engaged by Iran's claims in this case.

10. By contrast, Iran's own discussion yesterday may have left the Court without a clear sense of what Iran considers the Treaty's object and purpose. In Iran's telling, it appears that a treaty of commerce such as the Treaty of Amity can encompass any subject or rule of international law, provided Iran considers it relevant to its claims[17]. My colleague, Professor Boisson de Chazournes, will address the consequences of Iran's opportunistic reading for treaty law more generally, but it suffices to reiterate that for all the reasons put forth in the US pleadings and oral submissions, Iran's approach is unsustainable.

## B. Iran has not established that meaningful economic relations *existed during the relevant period*

11. Mr. President, Members of the Court, we heard yesterday significant misunderstanding or mischaracterization of the United States' position with regard to the relationship between Iran and the United States, its connection to the Treaty of Amity, and how these factors bear on US objections.

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[15] *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Counter-Memorial and Counter-Claim of the United States of America, paras. I.10-I.14.

[16] CR 2018/30, p. 36, para. 11 (Lowe).

[17] CR 2018/30, pp. 39-40, paras. 26-50 (Lowe).

12. Iran takes issue with the proposition that there was a fundamental breakdown in relations between the United States and Iran, and contends that "noteworthy" trade continued between the Parties at the time the United States instituted measures to deter Iran's support for terrorism[18].

13. Iran does not engage with the larger and more significant observation that friendly relations between the United States and Iran, as envisaged by the Treaty of Amity, were fundamentally ruptured on 4 November 1979, when the type of relations on which the Treaty was predicated came to an abrupt halt[19]. Nor does Iran engage on the point that, in the decades since, Iran itself has undertaken a series of acts against the United States that are incompatible with the maintenance of the type of relations on which the Treaty is predicated[20]. Instead, Iran contends that the Treaty of Amity applies regardless of whether there is any trade between the Parties, and otherwise limits its submission to showing that there is a modicum of economic activity between the United States and Iran[21]. Mr. President, Members of the Court, Iran's first contention is contradictory to Iran's own prior statements, while its second is proven false by the facts before you.

14. *First*, you heard yesterday Iran contend that it has always maintained that the Treaty applies even in the absence of trade between the Parties[22]. In fact, in defending against claims of US nationals before the Iran-United States Claims Tribunal, Iran has explicitly argued that the Treaty is not applicable because of the absence of amity and friendship between the Parties since the Iranian revolution[23].

15. *Second*, Iran's contention that the Treaty continues to function in a business-as-usual manner[24] flies in the face not only of the well-known fact of the Parties' troubled relations, but also data showing the insignificant economic activity between the Parties. Iran provides you with charts and graphs in an effort to show that meaningful trade as envisaged by the Treaty continues. I

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[18] CR 2018/30, pp. 20-28, paras. 5-28 (Vidal).

[19] CR 2018/30, p. 21, para. 8 (Vidal).

[20] CR 2018/30, pp. 27-28, para. 24 (Vidal).

[21] CR 2018/30, pp. 22-25, paras. 11-17 (Vidal).

[22] CR 2018/30, p. 25, para. 17 (Vidal).

[23] See, e.g. *Sedco, Inc.* v. *National Iranian Oil Co.*, Award No. ITL 59-129-3 (Iran-US Claims Tribunal 27 Mar. 1986).

[24] CR 2018/30, pp. 22-30, paras. 11-30 (Vidal).

encourage you to study carefully the charts and graphs Iran has offered in support. They are interesting both for what they show, and more importantly, for what they do not show.

16. In its first slide that Iran used yesterday, for example, Iran's graph gives the impression of increasing trade in the period 2002-2016[25]. But this is misleading. Iran presents cumulative trade figures for the preceding years. That adding up numbers results in a larger figure is unsurprising, but tells you nothing about the trajectory in US-Iran trade levels. In fact, trade remained largely stagnant during the years in question, as shown in the same information Iran included in its Observations[26].

17. It is also telling that Iran does not choose to compare trade on an annual basis prior to 1979, with the present day, or even 2016, the last year Iran deems relevant[27]. Doing so would reveal that US exports and imports with Iran totalled some US $8.41 billion in 1978 right before the hostage crisis, compared to the combined import and export total of approximately US$258 million in 2016[28]. The difference is even more stark when you adjust those numbers for inflation.

18. But the Court need not engage in such a statistical exercise. Instead, it can simply look at the nature of the supposed trade between Iran and the United States and the measures both sides have enacted to discourage trade. Iran relies on licences granted by the United States in limited circumstances[29]. Iran cannot demonstrate normal economic relations by pointing to express exceptions to a general prohibition. This is especially so when those exceptions are for limited categories of goods, such as humanitarian exports.

19. In any event, Iran strains a bit too hard to paint the picture it wants you to see. For example, Iran includes in the volume of trade supposedly ongoing individual transactions that have not even been realized, such as the sale of aircraft to Iran by Boeing[30]. And Iran points to trade with

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[25] CR 2018/30, p. 22, para. 11 (Vidal).

[26] WSI, para. 2.19; MI, Ann. 97.

[27] CR 2018/30, p. 22, paras. 11-17, and 25-30 (Vidal).

[28] http://data.imf.org.

[29] CR 2018/30, pp. 26-27, paras. 21-24 (Vidal).

[30] CR 2018/30, p. 24, para. 16 (Vidal).

respect to an individual product, carpets, for which restrictions have been lifted, as evidence of a meaningful trade relationship[31].

20. Lastly, Iran fails to address the measures that Iran itself imposed to discourage trade[32]. For example, as to the consumer goods import ban, Iran contends that this was merely to boost national production, but a review of the very article Iran puts forward in support of that proposition reveals that, as the United States noted in its pleading, the ban was "to prohibit products that symbolize the presence of the United States in the country"[33]. Mr. President, Members of the Court, Iran's evidence of a supposed commercial relationship between itself and the United States does nothing to bolster its bad-faith reliance on the Treaty of Amity.

21. Iran's own conduct highlights the absence of the necessary relations, including commercial relations, that would lend relevance to the Treaty, or that would suggest that the Parties rely on the Treaty for its intended purpose, such as for investor protection or regulating consular relations. In so doing, this conduct reveals Iran's true purpose: to seek to rely on the Treaty of Amity as a vehicle to bring illegitimate claims against the United States without regard to whether those cases arise under the Treaty.

## III. The jurisdictional standard

22. Mr. President, Members of the Court, I will now make a few general points relating to the United States' jurisdictional objections. As my colleague, Ms Kimball, discussed on Monday, the test for jurisdiction *ratione materiae* under the Court's jurisprudence is to determine whether claims "*do or do not* fall within the provisions of a given treaty[34]. This inquiry requires the Court to *interpret* the terms of the Treaty to determine whether they encompass the subject-matter of the

[31] CR 2018/30, p. 24, para. 15 (Vidal).

[32] CR 2018/30, pp. 22-28, paras. 18-24 (Vidal).

[33] CR 2018/30, p. 28, para. 24 (Vidal); Watkinson, "Iran to ban brands such as Cola-Cola, Nike and Apple in American consumer goods blockade following nuclear deal", *International Business Times*, 7 Nov. 2015, available at: www.ibtimes.co.uk/iran-ban-cola-cola-nike-apple-us-consumer-goods-blockade-following-nuclear-deal-1527662.

[34] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, para. 46 (quoting *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16).

dispute[35]. And this phase of proceedings requires a definitive, not prima facie, assessment of our jurisdictional objections[36].

23. In our written pleadings and on Monday, we set out in detail why a proper treaty interpretation analysis — going article by article — establishes that the Treaty does not provide a basis for jurisdiction over Iran's sovereign immunity-related claims; that it does not provide a basis for Iran's challenges to the treatment of its Central Bank, Bank Markazi, under articles of the Treaty providing protections to "nationals and companies"; and that it does *not* provide a basis for Iran's challenge to Executive Order 13599[37]. It was hardly a "tick-box exercise"[38], as Mr. Wordsworth claimed yesterday.

24. Iran tried to suggest that the various qualifiers and caveats it used in its written pleadings to lower the jurisdictional bar were simply following the Court's case law. But the standard is whether Iran's claims "do or do not fall" within the provisions invoked. Even though the Court has also referred to this standard in some opinions as whether claims "are capable of" falling within a Treaty's provisions — that is quite different from the way Iran rests on the statement that its claims are "at the very least capable of" or "may be engaged" by a Treaty[39]. And Iran is not on solid ground in arguing that it is simply following prior cases, because these prior cases, including *Equatorial Guinea*, go on to conduct a rigorous treaty interpretation analysis in order to determine whether the claim advanced by the applicant falls squarely within the Treaty. Iran does no such thing, and instead seeks to rely on a lower jurisdictional bar.

25. Additionally, as I and then my colleagues will touch on briefly today, the actual treaty analysis Iran has put forward in support of its jurisdictional claims remains incomplete and fundamentally flawed. Iran continues to rely heavily on particular Articles, read essentially in isolation, with sweeping generalizations about their potential scope and a distortion of the object and purpose of the Treaty. Iran has not provided any sources that would support using FCN treaties in the manner Iran seeks to do in this case. Iran tries to suggest that the reason that there is no

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[35] CR 2018/28, pp. 62-64, paras. 5-10 (Kimball).

[36] *Ibid.*

[37] CR 2018/28, p. 61, para. 3 (Kimball).

[38] CR 2018/31, p. 11, para. 5 (Wordsworth).

[39] CR 2018/30, p. 34, para. 3 (Lowe).

doctrine or sources to support its reading of the Treaty is because the US measures at issue are so exceptional. But this is no answer. Disputes relating to sovereign immunity, central banking issues, and economic sanctions enacted to regulate traffic in arms or for national security reasons arise all the time between States outside of the FCN context. Yet Iran has not put forward any practice demonstrating that States rely on bilateral commercial treaties to resolve these disputes. Accepting jurisdiction over these types of claims would turn the Treaty into an instrument providing a broad and general grant of consent to the Court's jurisdiction, which, as Ms Kimball discussed, the Treaty was expressly intended *not* to be[40].

## IV. Iran's claims based on Executive Order 13599

26. I will now turn to the United States' objections under Article XX (1).

27. Mr. President, Members of the Court, in our submissions on Monday we made three points. *First*, Article XX, paragraph 1, is jurisdictional in nature[41], and the Court's decisions in *Oil Platforms* and *Alleged Violations* left open the door on whether Article XX (1) objections go to jurisdiction[42]. *Second*, Executive Order 13599 falls squarely within Article XX, subparagraphs *(c)* and *(d)*[43]. And *third*, regardless of whether the objections are jurisdictional or not, they *are* ripe for decision at this stage of the case because the objections are exclusively preliminary in character[44].

28. In its submissions yesterday from Mr. Aughey, Iran spent the majority of its time on the argument about the jurisdictional nature of Article XX, paragraph 1[45]. Iran did not engage at all on the substance of whether Executive Order 13599 was covered by Article XX, paragraphs (1) *(c)* and *(d)*, and said scarcely more on the issue of the preliminary nature of our objections[46].

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[40] CR 2018/28, pp. 68-70, paras. 15-20 (Kimball).

[41] CR 2018/29, pp. 11-12, paras. 9-15 (Daley).

[42] CR 2018/29, pp. 12-14, paras. 16-27 (Daley).

[43] CR 2018/29, pp. 14-16, paras. 29-37 (Daley).

[44] CR 2018/29, pp. 19-22, paras. 56-74 (Daley).

[45] CR 2018/31, pp. 27-35, paras. 6-42 (Aughey).

[46] CR 2018/31, pp. 35-38, paras. 43-56 (Aughey).

29. I begin with the point of whether the clause is jurisdictional. Mr. President, Members of the Court, I addressed you on this issue in August[47] and I expect that the Members of the Court have the issues fully in hand. So I will confine myself to the few new arguments we heard from Iran this week, and just make a few brief remarks on the *Alleged Violations* Order. I have three points to make.

30. *First*, Mr. Aughey argued yesterday that if the parties to the Treaty of Amity had intended for Article XX (1) to be jurisdictional in nature, the Article would have been placed either in, or after, the compromissory clause of the Treaty. It was suggested that it would be *"illogical"* for a jurisdictional exclusion to be placed with the substantive protections and to precede the compromissory clause, and therefore this must establish that Article XX (1) is not jurisdictional[48]. This contextual argument was not made in Iran's written pleadings in this case, which is why we did not address it on Monday.

31. Here, all I will say is that Iran puts far too much weight on the location of an article in the treaty as an interpretive matter. As evidence for this, the Court need look no further than an example Iran invoked in its oral pleadings yesterday.

32. The Court will recall that Mr. Aughey took you to the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore as an example of an essential security clause that Iran viewed as being jurisdictional in nature[49]. What he did not point out for you is that the essential security clause in that treaty, Article 6.12, was placed separate from and well before the compromissory clause (which is Article 6.21)[50]. So as Iran's own example demonstrates, the placement of an article in the treaty is far from determinative.

33. That brings me to my *second* point. In his brief discussion of FCN negotiating history yesterday, Mr. Aughey took you to a page in a treatise by Professor Kenneth Vandevelde. He argued that the United States had failed to inform the Court, as Mr. Aughey characterized it, of the

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[47] CR 2018/17, pp. 33-37, paras. 4-14 (Grosh); CR 2018/19, pp. 22-24, paras. 7-17 (Grosh).

[48] CR 2018/31, p. 32, paras. 29-30 (Aughey).

[49] CR 2018/31, p. 35, para. 42 (Aughey).

[50] Arts. 6.21 and 15.1, *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.

importance that the United States placed on the unqualified scope of the compromissory clause in its early FCN treaties[51]. This argument is misplaced.

34. The Court will recall that Ms Kimball on Monday observed that the FCN treaty with the Republic of China signed in 1948 received heavy scrutiny from the United States Senate because it was the first FCN to include a compromissory clause involving this Court[52]. Ms Kimball made the point that the Senate's decision to accept the inclusion of the ICJ clause was based on its understanding of its limited scope, and was informed by the fact that matters such as essential security were excepted from the purview of the treaty[53].

35. Mr. Aughey showed you an excerpt from page 532 of Professor Vandevelde's treatise in which he quoted a State Department memo that characterized the China FCN as accepting the Court's jurisdiction "without reservation"[54]. Mr. Aughey also noted that Mr. Wilson, another State Department official, characterized the FCN compromissory clauses as "unconditional" and characterized the absence of reservations as "not inadvertent"[55].

36. What Mr. Aughey did *not* show you is Professor Vandevelde's discussion several pages earlier concerning the issue of "reservations" during the FCN ratification debates in the US Senate. There, on page 529, Professor Vandevelde explains that during the ratification debate, senators expressed concern that the proposed FCNs did not contain a reservation that US consent to jurisdiction did not extend to matters essentially within the domestic jurisdiction of the United States as determined by the United States[56]. That type of reservation had been included in other treaties, including the United States' consent to this Court's general jurisdiction.

37. It is in *that* context that the State Department memo describes the China FCN as being "without reservation" — meaning it does not have the domestic jurisdiction reservation that the United States had traditionally included. This in no way undercuts the general point that the Senate

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[51] CR 2018/31, p. 33, para. 34 (Aughey).

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

[53] CR 2018/28, p. 67, para. 17 (Kimball).

[54] CR 2018/31, p. 33, para. 34 (Aughey).

[55] CR 2018/31, p. 33, para. 35 (Aughey).

[56] Kenneth J. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce and Navigation Treaties*, Oxford University Press, 2017, pp. 529-30. [Included in judges' folders of the Islamic Republic of Iran for Iran's first round of oral pleadings, 10 Oct. 2018, tab 14].

was only comfortable accepting the ICJ clause in light of its limited character, including that the Article XX (1) categories as being exempt from the treaty altogether, as Mr. Aughey wrongly implied[57].

38. This brings me to my *third* point on the question of the jurisdictional nature of Article XX (1): the Court's decisions in *Oil Platforms* and *Alleged Violations*. I expect the Court Members have heard enough on this issue and I will be brief.

39. The United States understands the Court in paragraph 42 of the *Alleged Violations* Order to have concluded that it has prima facie jurisdiction in that case to consider the question of whether the exception applies, just as it has jurisdiction to consider the scope of its own jurisdiction in any case before it.

40. Iran reads Article 42 differently, but did not explain how a decision on prima facie jurisdiction at the provisional measures stage in one case can serve to foreclose the jurisdictional issue as a final matter in another. As Ms Kimball made clear on Monday[58] and as I reiterated at the outset, the Court's inquiry now must be a full and final assessment of the Court's jurisdiction, not a prima facie one. In any event, the Court Members will know what they meant in paragraph 42 of last week's Order, and will no doubt clarify the matter if any clarification is needed.

41. I will now turn briefly to the issues of whether Executive Order 13599 is within the scope of Article XX (1), and whether this can be decided as a preliminary matter.

42. On Monday, my colleague Mr. Daley took you through these points in some detail. He showed you documentary evidence of the operation of and bases for Executive Order 13599, and explained why it was squarely within the arms trafficking and essential security clauses of Article XX[59]. He took you to findings not only of the United States Treasury Department but of the United Nations Security Council and the multilateral Financial Action Task Force detailing the participation of Iran's banks, including Bank Markazi, in money laundering and evasion of legal restrictions on arms trafficking, terrorism and weapons proliferation[60].

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[57] CR 2018/31, p. 33, paras. 34-35 (Aughey).

[58] CR 2018/28, pp. 62-66, paras. 5-14 (Kimball).

[59] CR 2018/29, pp. 14-18, paras. 29-47 (Daley).

[60] CR 2018/29, pp. 14-18, paras. 29-47 (Daley).

43. Iran yesterday — as in its written pleadings — hardly engaged on this point, refusing to address the US arguments in substance. Instead, Mr. Aughey said that analysing the objections "depends upon establishing factual allegations of an extremely grave nature regarding arms production and trafficking and terrorism financing, all of which are strenuously denied"[61]. Mr. Aughey went on to say that the allegations "cannot somehow be assumed to be true and the Court is not in a position to rule on them at this preliminary stage"[62]. He also referenced back to the fact that the Court in the *Nicaragua* case chose to examine the question of treaty violation first before examining the scope of Article XX[63].

44. With respect to the *Nicaragua* case, I would just refer you back to what Mr. Bethlehem said at the outset today about the Court's statements on this jurisdictional question in that case and in *Oil Platforms*, and the caution with which you should approach them.

45. With respect to the factual record, I have three points to make.

46. *First*, Mr. Aughey failed to explain how the factual or legal questions necessary to resolve the Article XX (1) objections are in any way interconnected with the factual and legal questions on the merits of its claims. As Mr. Daley explained, this is the critical issue when examining if an objection is preliminary in character[64]. Iran has made no effort in this respect.

47. *Second*, Iran has now had two chances to engage and present evidence in opposition to the allegations of support for terrorist financing, arms trafficking and the like. It has declined to engage in any meaningful way. Having failed to present evidence, Iran cannot now be heard to complain that the Court is not equipped to make a decision. Article 79 of the Rules of this Court requires the Court to make a legal decision on preliminary objections considering the factual record put forward by the parties. The Court has a thin record on Iran's side of the story because Iran decided not to *present* its side of the story, likely because it has nothing in its favour to present, which the Court may appropriately infer from Iran's avoidance of the issue. The United States is

[61] CR 2018/31, pp. 36-37, para. 51 (Aughey).

[62] CR 2018/31, p. 37, para. 51 (Aughey).

[63] CR 2018/31, p. 37, para. 53 (Aughey).

[64] CR 2018/29, pp. 20-22, paras. 62-70 (Daley).

simply asking the Court to examine the evidence it has presented in these proceedings. It is *Iran* that is asking you to make assumptions.

48. *Third*, as Mr. Daley explained on Monday[65] and I explained in August in the *Alleged Violations* case[66], the Court's decision in *Djibouti* v. *France* confirms that Article XX (1) of this Treaty is a clause that confers "wide discretion" on the invoking State. Mr. Aughey had a rather puzzling response on this point. After pointing out that the Treaty in *Djibouti* v. *France* had a different provision than our Treaty here — a point we have not contested — he said that the wide discretion is limited to how the Court should "approach the task of assessing the existence of contested facts — including the genuine nature, necessity and reasonableness of the measures"[67].

49. But this, Mr. President, Members of the Court, reinforces our point. The Court in assessing the evidence on these issues *should* give deference to the United States. We have put in *our* evidence. Iran has chosen to submit *no* evidence. Iran should not get a third bite at the apple. In the face of the wide discretion conferred by the Treaty and the evidence we have submitted, the Court should conclude that our objections have been proven and should sustain them.

50. Mr. President, Members of the Court, that brings me to the end of my submissions today. I thank you for your kind attention, and I would ask that you now give the floor to Professor Childress.

The PRESIDENT: I thank Ms Grosh and I now give the floor to Professor Childress. You have the floor.

Mr. CHILDRESS:

## JURISDICTIONAL OBJECTION TO IRAN'S CLAIMS PREDICATED ON TREATMENT OF BANK MARKAZI AS A "COMPANY" UNDER THE TREATY OF AMITY

### I. Introduction

1. Thank you, Mr. President, Members of the Court, good afternoon. It is an honour to appear once again before you on behalf of the United States. Mr. President, I am informed that the

[65] CR 2018/29, p. 18, para. 48 (Daley).

[66] CR 2018/17, p. 37, para. 18 (Grosh); CR 2018/19 p. 40, para. 27 (Grosh).

[67] CR 2018/31, p. 38, para. 56 (Aughey).

Court will rise at 4.30 p.m. for a coffee break and so my remarks will take us right up to that point. I do not expect to leak too much into that, but I would ask for your indulgence if I run one or two minutes into the break.

2. My task is to return to the United States' objection to jurisdiction over Iran's claims concerning treatment of Bank Markazi as a "company". As a preface to that task, permit me to set out a simple and no doubt familiar proposition. It is this: the goal of treaty interpretation is to give effect to the intentions of the parties at the time the treaty was concluded, as fully and fairly as possible. And that is what the United States seeks here: a good-faith interpretation of the Treaty that honours the Parties' intentions.

3. So the Court must ask itself: is it reasonable to think that in the 1950s, the United States and Iran intended to cover State entities like traditional central banks in their choice of the word "companies"? As I stated on Monday, we have encountered no prior example of any instance (save for Iran's arguments in this case) where an FCN treaty party, let alone these treaty parties, or any commentator, or any tribunal, has ever equated a traditional central bank with a standard "company" for FCN protection purposes. And Iran produced no such example yesterday. Indeed, from taxation to sovereign immunity legislation to participation in international organizations, central banks are not treated as standard "companies"; they are treated as *sui generis* and exercising sovereign functions.

4. As such, Iran's contradictory claims concerning Bank Markazi are *not* consistent with a good-faith interpretation of the Treaty. Professor Lowe referred yesterday to Schrödinger's cat, but I would like to talk about a paradox that is actually relevant to this case. I refer here to the "paradox" between Iran's claims that Bank Markazi is, on the *one* hand, a central bank carrying out important sovereign functions and entitled to immunity, and on the *other* hand, a "company" entitled to protections under the Treaty. The problem for Iran is that neither entitlement to sovereign immunity nor the exercise of sovereign functions are normally associated with "companies". Iran cannot explain why the Parties would have foreseen or accepted this bizarre result.

5. Yesterday, Iran baldly asserted that: "There is no paradox."[68] There was no further explanation, other than Iran's statement that no such paradox exists *unless* the United States is correct that central banks are not companies[69]. But that argument is completely circular. Iran is essentially saying, "The United States is wrong because it is wrong." That is not the answer. The point stands: Iran wants to have it both ways. It wants its Central Bank to benefit from the same protections extended to any company investing in the United States and operating in the marketplace, but *at the same time* it wants Bank Markazi to receive special protections *as a central bank*.

6. Iran seeks to wish away this paradox by having the Court read into the Treaty an entity that did not exist at the time the Treaty was concluded, even though doing so would create a category of one under the Treaty — a company so unlike any other company that it purportedly receives sovereign *and* "company" benefits. No article of this Treaty addresses such a creature. Here again, the Court must ask itself: was this Treaty at the time it was negotiated and concluded designed to achieve this bizarre result?

7. With that introductory point, let me now turn to the body of my submissions. *First*, I will return to the *novelty* of Iran's claim of "companies" protections for its Central Bank under this commercial treaty. *Second*, I will revisit the text, context, object and purpose, and negotiating history, where Iran has not answered us or where Iran has answered, but unconvincingly. *Third* and finally, I will address the exclusively preliminary character of our objection.

## II. Novelty of treating a traditional central bank as a "company" under a commercial treaty

8. Mr. President, Members of the Court, permit me to turn to the first part of my presentation.

9. One of the most striking features of the submissions we heard yesterday was Iran's continued failure to provide evidence of any kind showing that an FCN treaty like this one has *ever* been relied upon as a source — or even *contemplated* as a source — of protections for a State's

[68] CR 2018/30, p. 38, para. 19 (Lowe).

[69] *Ibid.*

central bank. I noted the novelty of Iran's position on Monday[70], and Iran's silence on this point yesterday was deafening. Iran instead tried to deflect the attention from the point by implying that the *United States'* position was somehow novel or surprising[71].

10. Iran's only basis for this contention was the 2014 opinion of the United States Court of Appeals for the Second Circuit in the *Peterson* case[72]. There, Bank Markazi had included as one of several arguments that the statutory provision at issue violated certain articles of the Treaty of Amity. The Second Circuit made two findings: first, as a matter of constitutional law, where a federal statute and a treaty conflict with one another, the last-in-time provision prevails[73]. In the case before the court, the statute came later in time and therefore controlled. That meant that it was irrelevant to the court's analysis whether the statute comported with the Treaty or not. Nevertheless, the Second Circuit went on to note that, in any event, the statute would not violate the cited Treaty protections[74]. The question of whether Bank Markazi in fact had rights under the Treaty was completely unnecessary to the court's decision.

11. I would note here in passing the irony in Iran's sudden rush to rely on the Second Circuit opinion — for a point that it did not even address — when Iran is explicitly challenging US court decisions in the present case, with the exception of the *dissenting* opinion that it relies on from the Supreme Court in the *Peterson* decision. There is no apparent consistency to Iran's position when it comes to US courts.

## III. The scope of the term "company" in the Treaty

12. Mr. President, Members of the Court, this brings me to the second part of my submissions: on the scope of the term "company" in the Treaty. Yesterday, Iran continued to advance an unsupportable and incomplete reading of this term. The United States maintains the firm view that, on a good-faith interpretation, Iran's claim of "company" protections for its Central

[70] CR 2018/29, p. 42, para. 3 (Childress).

[71] CR 2018/30, p. 59, para. 15 (Thouvenin).

[72] *Ibid.*

[73] MI, Ann. 62, p. 6.

[74] MI, Ann. 62, pp. 6-7.

Bank must be rejected as outside the Treaty and therefore outside the Court's jurisdiction. Permit me to explain why this is so.

**A. Ordinary meaning**

13. First, on the ordinary meaning of the "companies" definition in Article III, paragraph 1, Iran yesterday repeated its claim that "all legal persons, without exception" qualify as "companies" under the Treaty[75]. And that, according to Iran, is the end of the inquiry, because the Treaty's "companies" definition does not contain explicit language indicating that it would *exclude* an entity like a traditional central bank. But the difficulty here lies in the very novelty of Iran's position. At no point have traditional central banks and other entities exercising sovereign functions formed a part of States' practice under the "nationals and companies" articles of FCN treaties. It is difficult to understand why negotiators would draft a definition in such a way as to exclude entities that they likely never dreamed would be considered for *inclusion*. They would not have foreseen the need for any wordsmithing to avoid a problem they had no reason to believe would ever arise.

14. Leaving this point aside, however, let me just test the bounds of Iran's "all legal entities qualify" theory. I hesitate to give the following example, given that Iran has shown that it will adopt absurd positions. But imagine for a moment that Iran decided to adopt a statute according its Ministry of Defence separate legal personality under Iranian law, while leaving it entirely subject to the government's control and responsible for the same sovereign functions one would expect of such a ministry. Would Iran's position be that the Ministry would qualify as a "company" under the Treaty, entitled to all the same protections afforded to any ordinary company in the marketplace? That is obviously nonsensical: Iran itself acknowledges, as it must, that military activities are not the subject of the Treaty's "nationals and companies" articles[76]. Yet the inclusion of the Ministry of Defence as a "company" under the Treaty would be the logical result of Iran's position as currently pleaded.

[75] CR 2018/30, p. 61, para. 20 (Thouvenin).

[76] CR 2018/30, p. 67, para. 47 (Thouvenin).

15. Unless Iran in fact believes that this would indeed be the result — that a Ministry carrying out only sovereign functions could, by one twist of local law, become a "company" under the Treaty — it must acknowledge that the question of whether a State entity qualifies as a "company" *is* linked to that entity's functions and its comparability to an ordinary private-sector actor. As I will discuss next, that linkage is what the Treaty's context, object, and purpose demand. If the term "companies" is to be read coherently with context, object, and purpose, then State entities exercising sovereign functions cannot come within the scope of the term.

**B. Object and purpose**

16. This brings me to object and purpose. Yesterday, Iran made three points of note, none of them persuasive.

17. *First*, Iran summarily dismissed — without any explanation — the sources I discussed on Monday on object and purpose, which included contemporaneous commentary from officials who were integrally involved in drafting and negotiating the US FCN treaties[77]. Iran apparently could not bring itself to actually engage with those sources, and so it chose to provide no answer at all. This is somewhat ironic, given that Iran itself previously cited as authority one of the commentators that I referenced, Vernon Setser[78]. Iran has given no reason why the Court should not rely on these highly relevant sources, which set out quite clearly the Treaty's private and commercial — *not* sovereign — sphere of operation[79].

18. *Second*, Iran had nothing new to say about its 1979 brief to the United States' Court of Appeals for the Fifth Circuit, in which it stated that "commercial treaties such as the Treaty of Amity do not apply to the proprietary acts of a sovereign"[80]. It simply repeated the argument in its Observations that this brief was concerned with Article XI, paragraph 4[81]. But as I noted on Monday, Iran's interpretation in the 1979 brief was cast in terms of the Treaty as a whole, *not* just

[77] CR 2018/30, pp. 68-69, para. 52 (Thouvenin).

[78] E.g. WSI, para. 4.9, n. 123.

[79] See CR 2018/29, pp. 46-47, paras. 19-21 (Childress).

[80] Brief for Appellants Soc. Sec. Org. of Gov't of Iran, Ministry of Health & Welfare of Gov't of Iran, & Gov't of Iran, p. 35, *Elec. Data Sys. Corp. Iran* v. *Soc. Sec. Org. of Gov't of Iran* (5th Cir. Aug. 1979) (No. 79-2641), POUS, Ann. 228.

[81] WSI, para. 5.16; CR 2018/30, p. 65, para. 36 (Thouvenin).

Article XI. That point stands unrebutted, and shows that Iran's interpretation in 1979 was quite different from what it is telling the Court today. As I said on Monday, Iran had it right in 1979.

19. *Finally*, Iran claimed that it was inconsistent with the object and purpose of enhancing trade and promoting closer economic relations to read the Treaty as reserving the Parties' rights to "mistreat" their central banks[82].

20. There are two points to make to this argument.

21. *First*, there is a contradiction between, on the one hand, Iran's claim that central banks are *so important* to commercial relations that they must be protected as "companies," and on the *other* hand, the fact that every country does not necessarily set up a separate juridical entity to carry out its central banking functions. If States entering into FCN treaties truly wanted to bring central banking within the protections extended to "nationals and companies", they would have had to make this explicit. They would have needed to *specifically state* their intention to cover central banking activities in those articles. They could not count on the term "companies" to do the job, because not all entities carrying out central banking functions would have separate juridical status; therefore, even on Iran's overbroad test, they would not have *qualified* as "companies".

22. But the FCN "nationals and companies" articles contain no such explicit carve-in for central banking entities. So on Iran's theory, such entities were terribly important to commercial relations, yet only *some* FCN treaties protected them. This makes no sense. The much simpler and more obvious conclusion, in line with context, object, and purpose, is that the parties concluding FCN treaties were *not* concerned with ensuring that central banking activities were covered by the "nationals and companies" articles.

23. *Second*, Iran's claim that the Parties must have intended to include central banks within the scope of the term "companies" because they would otherwise have intended to *mistreat* these entities is a fallacy. This goes to a theme we heard many times yesterday. Iran implies that, by objecting to the Court's jurisdiction under the Treaty, the United States is somehow claiming a general right to take *any action* not prohibited by the Treaty. It is as if, for Iran, the Treaty is the only source of law that exists; if the Treaty does not address a given subject, then we are in a

[82] CR 2018/30, p. 69, para. 54 (Thouvenin).

lawless world as to that subject, and no rules of any kind apply. This is absurd. The fact that the Treaty does not provide protections to traditional central banks as "companies" does not mean that there are no rules regarding how such central banks are to be treated — or that the United States is claiming a right to "mistreat" central banks[83]. It simply means that *the rules pertaining to central banks are not found in the Treaty*.

24. Again, as we said on Monday, Iran's argument is simply that the Treaty's compromissory clause is an empty vessel into which Iran can pour all manner of complaints in order to gain a forum to air its political grievances before this Court.

**C. Context**

25. I now turn to context. As we have explained in our written and oral submissions, the context provided by other articles of the Treaty support the conclusion that entities exercising sovereign functions are not included within the scope of the term "companies". I will address three contextual elements here. *First*, the protections extended in the "nationals and companies" articles, and the types of activities and actors to which those protections would naturally be directed. *Second*, the immunity waiver in Article XI, paragraph 4. And *finally*, Article VII.

26. On the "nationals and companies" articles, Iran seems to accept that the protections contained in these articles are, as the Court held in *Oil Platforms* with specific regard to Article IV, paragraph 1, directed at "private and professional activities"[84]. This is consistent with Herman Walker's statement that the FCN treaties were "charters" regulating "relations in the domain of private affairs"[85]. As I pointed out on Monday, the Court's finding that "private and professional activities" are the proper sphere of operation for these articles shows that the articles' intended *subjects* are entities that one would expect to find engaged in such activities.

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[83] CR 2018/30, p. 69, para. 54 (Thouvenin).

[84] CR 2018/30, pp. 67-68, paras. 45-48 (Thouvenin).

[85] Herman Walker, Jr., "Modern Treaties of Friendship, Commerce and Navigation", *Minn. L. Rev.*, Vol. 42 (1958), p. 805; POUS, Ann. 1.

27. Iran's rejoinder is that central banks *do* engage in "professional" activities, even when carrying out sovereign functions[86]. But this misses the mark. It ignores the *sui generis* nature of central banks: even when their activities superficially appear like those that other banks engage in — for example, purchasing bonds — they are understood to be fundamentally different, because they are assumed to be acting for a sovereign purpose. They do not have private comparators. Rather, when it comes to comparators, a central bank is, again, in a category of one. Its only comparator is the *other party's* central bank.

28. As to Article XI, paragraph 4, Iran had nothing to say beyond what it already stated in its brief. There was no response to the points I raised on Monday. That being the case, I have nothing further to add here, other than to note once again the foundational principle animating the immunity waiver: fairness among private and public comparators. Yet as I just said, a traditional central bank *has no* private comparators.

29. This brings me to Article VII, the provision on exchange restrictions. Iran's submissions on this Article were a pleasant surprise, as they directly supported our argument. As a reminder, our point was that Article VII, which is addressed only to the High Contracting Parties but directly concerns activities of central banks, indicates that central banks were identified with the Parties themselves[87]. Iran said yesterday that the restrictions that Article VII regulates "may be imposed by laws or regulations, possibly by decisions of a central bank or by another financial or monetary authority, if and to the extent that they have been entrusted with this regulatory power by law"[88]. We agree. Article VII concerns restrictions that a central bank would impose pursuant to its powers — which are indisputably *sovereign* powers, devolved on the central bank by the State. This seems to be a direct acknowledgment from Iran that the central bank, receiving its powers from the State and carrying out a sovereign function, is not separated out from the Parties themselves in this article. Inexplicably, Iran went on to say that the United States had "no reason to

[86] CR 2018/30, p. 68, para. 48 (Thouvenin).

[87] CR 2018/29, p. 51, para. 34 (Childress).

[88] CR 2018/30, p. 68, para. 50 (Thouvenin).

claim" that Article VII uses the term "High Contracting Party" to refer to central banks[89]. But the statement I just quoted shows that there was *every* reason to draw this conclusion.

**D. Negotiating history**

30. This brings me to the Treaty's negotiating history. We were surprised that Iran once again completely ignored the *travaux* language highlighted in our submissions, which shows that only State-owned entities comparable to and operating alongside private entities were intended for inclusion as "companies"[90]. I will not repeat those points here.

31. Iran's only other point on the negotiating history concerned a statement in the same December 1954 cable that the United States did not discriminate against public corporations. Iran argued that US law was not described as "discriminating" against entities exercising *sovereign* functions[91]. But this does not advance Iran's case. Once again, the issue is not "discrimination" against such entities; it is that the Treaty *does not provide the governing rules* with respect to such entities.

## IV. The US objection to Iran's Article III, IV, and V claims concerning Bank Markazi has an exclusively preliminary character

32. This brings me to the third and final part of my submissions, on the exclusively preliminary character of our objection.

33. Yesterday, Iran tried every argument it could think of to race to the merits. It made a truly remarkable statement: "Iran contends that the conduct of the United States against Bank Markazi constitutes a violation of its treaty obligations. The United States maintains the opposite. There is therefore a dispute over the interpretation or application of the Treaty which falls within Court's jurisdiction."[92]

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[89] CR 2018/30, p. 68, para. 50 (Thouvenin).

[90] CR 2018/29, pp. 52-53, paras. 35-38 (Childress).

[91] CR 2018/30, pp. 62-63, para. 23 (Thouvenin).

[92] CR 2018/30, p. 70, para. 61 (Thouvenin).

34. This statement completely ignores the case law that Ms Kimball discussed on Monday, in which the Court held that it must decide at the preliminary objections phase whether the claims "do or do not" come within its jurisdiction[93]. In effect, Iran is trying to wish away the preliminary objections phase altogether. On its approach, every case would proceed to the merits so long as the Applicant simply stated its disagreement with a preliminary objection and indicated its intention of responding later.

35. Iran is wrong. Our objection with respect to its Bank Markazi claims is ripe for adjudication now, as a preliminary matter. There are two questions that this Court must decide: *first*, what is the scope of the term "company" under the Treaty? Specifically, does it include entities such as traditional central banks exercising sovereign functions? And *second*, if the answer to the first question is that entities exercising sovereign functions are indeed excluded, is Bank Markazi such an entity? I have already addressed the first question, and it is the second that Iran looks to for its claim that the United States' objection is too fact-intensive or entangled with the merits. So let me discuss the contours of that second question.

36. As we have already explained in our submissions, both written and oral, Iran *has not claimed* — at any point in these proceedings — that Bank Markazi exercises anything other than sovereign functions. It is not as if the United States says Bank Markazi does one thing while Iran says Bank Markazi does another. In fact, we have been clear that the United States does not, and need not, take *any* position on Bank Markazi's status or activities. But Iran, and Bank Markazi itself, *have* adopted the position that the Bank carries out sovereign functions only. Even yesterday, when Iran reiterated its argument that Bank Markazi is separate from Iran, it did not in any way disown or disagree with Bank Markazi's arguments in the *Peterson* litigation, characterizing its activities as governmental in nature[94]. For our part, we say that the Court should simply hold Iran to its word. It need look no further.

37. However, even if the Court *did* want to go beyond Iran's and Bank Markazi's own statements, it still would not need further briefing or exposition on the facts and the law. There is sufficient material already in the record. Permit me to just run quickly through the highlights.

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[93] CR 2018/28, p. 62, para. 6 (Kimball).

[94] CR 2018/30, pp. 53-55, para. 33 (Webb).

38. First, Iran has submitted into the record the 1972 Monetary and Banking Act, which creates and governs Bank Markazi. That Act is clear on its face as to Bank Markazi's lack of commercial or private functions. Yesterday, Iran put up a slide showing two paragraphs of Article 10 from the 1972 Act — paragraphs *(c)* and *(d)*[95]. Let me direct your attention to paragraphs *(a)* and *(b)* of that same article. These paragraphs state in turn that Bank Markazi shall "have the task of formulating and implementing monetary and credit policies on the basis of the general economic policy of the State", and that the Bank's "objectives" are to "maintain the value of the currency and equilibrium in the balance of payments, to facilitate trade transactions, and to assist the economic growth of the country"[96]. These are, on their face, wholly sovereign tasks and objectives.

39. Paragraph *(e)* then states that Bank Markazi's capital "shall belong to the Government". And the subsequent chapter of the act, Chapter 2, sets out the Central Bank's "Functions and Powers". Its articles address, sequentially, Bank Markazi's functions in its role as "the regulatory authority of the monetary and credit system of the State" and "the banker to the Government". Again: these are not commercial functions. They are, on their face, sovereign functions.

40. Furthermore, as we noted in our written pleading, Bank Markazi is Iran's representative to the IMF. This is once again set out in the 1972 Monetary and Banking Act, which states that the "liaison of the State with the International Monetary Fund shall be through the Central Bank of the Islamic Republic of Iran"[97]. This is also confirmed by the IMF itself, which lists the Governor of Bank Markazi as Iran's representative[98]. Once again: this is consistent with Bank Markazi's exercising sovereign functions.

41. Finally, it bears noting that Iran itself emphasized Bank Markazi's sovereign role to an even greater extent yesterday. It said that Bank Markazi, as Iran's Central Bank, is the "essential pillar of Iran's international economic relations", and that all foreign currency transactions must

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[95] CR 2018/30, pp. 57-58, para. 10 (Thouvenin).

[96] MI, Ann. 73, Art. 10.

[97] MI, Ann. 73, Art. 15.

[98] POUS, Ann. 241; POUS, Ann. 242.

run through it[99]. If the Court needed more evidence than that, on Iran's own case, Bank Markazi carries out sovereign functions and has no private comparator, this surely must be it.

## V. Conclusion

42. Mr. President, Members of the Court, this concludes my submissions. I ask that you call on Professor Boisson de Chazournes to the podium after the coffee break. I thank you for your kind attention.

The PRESIDENT: I thank you. The Court will observe a coffee break of 15 minutes. The hearing is suspended.

*The Court adjourned from 4.30 p.m. to 4.45 p.m.*

Le PRESIDENT : Please be seated. The sitting is resumed. J'invite maintenant la professeure Boisson de Chazournes à prendre la parole. Vous avez la parole, Madame.

Mme BOISSON DE CHAZOURNES :

### LA COUR N'A PAS COMPÉTENCE POUR STATUER SUR LES DEMANDES DE L'IRAN RELATIVES AUX IMMUNITÉS SOUVERAINES

1. Merci, Monsieur le président. Madame la vice-présidente, Messieurs les juges, la Partie adverse tente à tout prix de vous convaincre que le traité d'amitié constitue une base juridictionnelle pour se prononcer sur les questions d'immunités souveraines. Hier, nous avons donc — encore une fois — entendu le refrain préféré de l'Iran selon lequel les immunités trouveraient place dans le traité. L'argumentation iranienne prône une lecture des termes du traité pris isolément en dehors de leur contexte. Une telle lecture permettrait, selon l'Iran, d'intégrer des questions que le traité n'a pourtant jamais eu pour but de régir. D'ailleurs, vous l'avez constaté, l'Iran est incapable de produire une quelconque source à l'appui de ses argumentations.

2. Mais ce n'est pas la seule chose que l'Iran a omise. L'Iran n'a pas répondu aux arguments américains relatifs au caractère pour le moins novateur de son argumentation. En lieu et place, l'Iran s'est contenté de rejeter les arguments des Etats-Unis comme reflétant une conception trop

[99] CR 2018/30, p. 57, para. 7 (Thouvenin).

étroite de l'objet et du but du traité d'amitié et qui ferait trop grand cas de l'absence de mots explicites en matière d'immunité souveraine. Mais cela ne peut pas suffire.

3. Comme nous l'avons établi dans nos écritures et au cours du premier tour des plaidoiries orales, aucun des articles du traité de 1955 n'incorpore de protections en matière d'immunité souveraine. Cela ne veut pas dire, comme le prétend le professeur Lowe, qu'une conduite régie par le droit international coutumier ne peut pas aussi être régie par un traité[100]. Cela veut tout simplement dire qu'une interprétation rigoureuse et de bonne foi des dispositions dans leur contexte, à la lumière de l'objet et du but du traité, des négociations et du contexte historique général des traités d'amitié, de commerce et de navigation amène à conclure que les demandes iraniennes relatives aux immunités souveraines n'entrent pas dans le champ d'application *ratione materiae* du traité.

4. Madame et Messieurs les juges, l'Iran est apparu hier confondre exceptions préliminaires et questions de fond. ***Le docteur*** Webb s'est ainsi attelée à examiner les différentes législations visant l'Iran et les entités publiques iraniennes que les Etats-Unis ont adoptées dans le cadre de la lutte contre le terrorisme. Mme Webb l'a fait afin de souligner leur incompatibilité avec le droit international coutumier relatif aux immunités — un argument que les Etats-Unis n'acceptent pas. Ce ne sont pas là des questions auxquelles la Cour doit répondre à ce stade. Comme l'a reconnu la Partie adverse, la seule question à laquelle la Cour se doit de répondre est de savoir si les prétentions iraniennes «relèvent ou non» des dispositions du traité[101]. La Cour dispose de tous les éléments lui permettant de se prononcer. Cette objection ne porte pas en effet sur des questions factuelles contestées, ainsi que vous l'a dit précédemment sir Bethlehem. C'est une question purement juridique, ce que souligne d'ailleurs l'absence de tentative par l'Iran de l'habiller en une quelconque question impliquant des faits.

[100] CR 2018/30, p. 41, par. 36-38 (Lowe).

[101] CR 2018/31, p. 10, par. 2 (Wordsworth).

## I. Les dispositions du traité d'amitié ne permettent pas de faire entre le droit international coutumier des immunités souveraines dans le traité

5. Venons-en maintenant aux arguments de l'Iran portant sur les dispositions du traité d'amitié qui, selon ses revendications, permettraient de faire entrer les règles du droit international coutumier relatives aux immunités dans le traité. Monsieur le président, Madame et Messieurs les juges, nous avons assisté hier à de nombreux exercices de contorsion, voire des arabesques, mais non suivis de succès. Tout a été tenté par l'Iran, mais en vain — et sans avancée par rapport à ses écritures — pour ~~***tenter de***~~ faire entrer le droit international coutumier des immunités souveraines en son entier au sein d'un traité bilatéral d'amitié, de commerce et de navigation. On remarquera d'emblée que les arguments n'ont été assortis d'aucun support de pratique ou d'autres éléments pertinents.

6. A ce propos, l'affirmation iranienne selon laquelle on ne peut pas s'attendre à ce qu'elle fournisse une pratique ou un commentaire qui appuierait sa position en raison du caractère exceptionnel des mesures américaines n'est pas crédible[102]. Des différends sur la bonne application des règles en matière d'immunité surviennent régulièrement entre les Etats, mais ils ne sont tout simplement pas réglés dans le cadre de traités commerciaux.

## II. Les articles relatifs aux «Nationals and Companies»

7. Commençons tout d'abord par des articles relatifs aux «Nationals and Companies» du traité d'amitié, c'est-à-dire ***le*** paragraphe 2 de l'article III et ***les*** paragraphes 1 et 2 de l'article IV du traité. Selon M. Wordsworth, en privant les sociétés publiques iraniennes, et notamment la banque Markazi, de faire valoir leurs immunités dont elles auraient dû normalement jouir en droit international coutumier et américain, les Etats-Unis auraient violé, entre autres, les droits d'accès aux tribunaux, de non-discrimination ou de traitement juste et équitable. Ces prétentions ne sont tout simplement pas recevables.

8. Tout d'abord, ainsi que le professeur Childress vient de vous le rappeler, le terme «companies» du traité d'amitié ne vise pas à inclure les entités exerçant des fonctions ou une autorité souveraines. De ce fait, ces articles ne sont pas applicables à la banque Markazi.

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[102] CR 2018/31, p. 16, par. 18 (Wordsworth).

9. Mais si cela ne venait pas à suffire, il convient également de noter que l'argument iranien reflète une incompréhension fondamentale de la sphère d'activités visée par le traité. Le traité d'amitié de 1955 n'énonce pas de principes généraux qui s'appliquent quel que soit le contexte. Ainsi que l'a fait observer la juge Higgins, des dispositions telles que le paragraphe 2 de l'article III et les paragraphes 1 et 2 de l'article IV sont des «legal terms of art well known in the field of overseas investment protection»[103]. Les protections que ces articles incluent opèrent dans le contexte spécifique de la protection des investisseurs étrangers et de leurs biens. La protection revendiquée par l'Iran n'appartient clairement pas à la sphère d'activités spécifiques régies par les dispositions du traité d'amitié de 1955.

### III. Importance de la décision *Guinée équatoriale c. France*

10. Je voudrais, à ce stade, dire quelques mots de plus sur l'arrêt *Guinée équatoriale c. France* dans lequel votre juridiction a rejeté la demande de la Guinée équatoriale, considérant que le paragraphe 1 de l'article 4 de la convention de Palerme n'incorporait pas les règles de droit international coutumier relatives aux immunités des Etats. Les conseils de l'Iran ont été hier fort peu diserts sur cette décision, sans doute pour tenter de faire oublier l'obstacle insurmontable auquel ils font face pour établir la compétence de la Cour. M. Wordsworth a tenté de se distancer de cette décision en disant que l'article 4 est un «generalized requirement» qui est entièrement différent du paragraphe 2 de l'article III du traité d'amitié, lequel, a-t-il dit, établit un «necessary corrollary» pour l'application du droit international coutumier des immunités souveraines[104]. Cet argument ne peut pas être retenu.

11. A la différence des dispositions du traité que l'Iran invoque dans la présente affaire, l'article 4 de la convention de Palerme intitulé — je le rappelle — «protection de la souveraineté» se réfère à l'égalité souveraine. Il a trait aux relations entre Etats et dit explicitement que les parties doivent exécuter les obligations qu'ils tiennent de la convention dans le respect de ce principe. Et pourtant, la Cour rejeta la demande de la Guinée équatoriale, considérant après une interprétation

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[103] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment,* separate opinion of Judge Higgins, *I.C.J. Reports 1996 (II)*, p. 858, para. 39.

[104] CR 2018/31, p. 13, par. 10 (Wordsworth).

attentive que cette disposition n'incorporait pas les règles du droit international coutumier relatives aux immunités des Etats.

12. Aucune des dispositions du traité de 1955 n'est libellée de manière semblable à l'article 4 de la convention de Palerme. Il n'y a donc pas, pour reprendre les termes de la vice-présidente Xue, des juges Sebutinde et Robinson et du juge *ad hoc* Kateka dans leur opinion dissidente, «an intrinsic linkage»[105] entre les dispositions du traité d'amitié et les règles du droit international coutumier relatives aux immunités souveraines.

## IV. Le paragraphe 2 de l'article III

13. L'Iran a beaucoup insisté hier sur le fait que l'accès aux tribunaux prévu au paragraphe 2 de l'article III permettrait à votre Cour de statuer sur ses demandes selon lesquelles la banque Markazi et d'autres entités publiques iraniennes ne se sont pas vu reconnaître d'immunités devant les tribunaux américains.

14. Comme je l'ai dit lundi, la liberté d'accès aux tribunaux ne constitue pas une garantie que certaines entités souveraines ne peuvent pas être poursuivies ou que leurs biens soient insaisissables. Les règles de l'immunité souveraine régissent la question de savoir quand les tribunaux d'un Etat peuvent exercer leur compétence à l'égard d'un Etat, d'une entité étatique ou de leurs biens. La préservation des immunités ne relève tout simplement pas de la liberté d'accès aux tribunaux. Les Etats-Unis sont donc en complet désaccord avec l'argument iranien selon lequel le sens à donner à la liberté d'accès aux tribunaux est «plainly engaged» par le refus d'accorder la protection des immunités souveraines à une ***entité*** publique[106].

15. L'interprétation donnée par l'Iran du paragraphe 2 de l'article III est pour le moins radicale et hors de toute limite. M. Wordsworth a également invoqué le fait que de cet article découle un «unqualified right», qui comprend, «almost unending list of procedural or substantive rights that nationals or companies may enjoy as a matter of any relevant law, whether domestic or international»[107]. Le professeur Lowe est lui allé encore plus loin, disant que cette disposition

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[105] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment of 6 June 2018*, joint dissenting opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka, par. 24.

[106] CR 2018/31, p. 13, par. 9 (Wordsworth).

[107] CR 2018/31, p. 13, par. 7 (Wordsworth).

protège un large éventail de droits, qu'il a appelés «rights», incluant notamment des droits contractuels, des droits issus du droit international coutumier ou encore des droits en application du droit américain[108].

16. L'Iran va trop loin. Il est important de rappeler que l'accès aux tribunaux, tel qu'incorporé dans les traités d'amitié, de commerce et de navigation, avait pour but de permettre aux ressortissants et sociétés qui conduisaient des activités commerciales et d'investissement dans un autre pays d'avoir accès aux juridictions et organismes administratifs. A l'époque, il était apparu important d'éliminer les obstacles basés sur la nationalité[109]. De manière singulière, l'Iran donne à cet article un sens opposé. C'est celui de s'assurer que ses entités ne soient pas obligées de participer à des procédures devant les juridictions américaines.

17. L'interprétation iranienne n'est étayée d'aucune recherche, pratique, commentaire ou règle de droit international qui appuierait son interprétation selon laquelle la liberté d'accès aux tribunaux est un véhicule pour garantir les immunités souveraines. L'Iran invoque le paragraphe 4 de l'article XI du traité, mais en vain. Ce paragraphe n'emploie pas les termes «accès aux tribunaux» et rien dans l'historique de cet article ne vient suggérer qu'il ait été considéré comme une restriction à l'accès aux tribunaux. Cette disposition prévoit simplement que les entreprises publiques doivent être traitées de manière semblable aux autres entreprises devant les juridictions. Enfin, les deux arrêts que l'Iran cite, *Immunités juridictionnelles de l'Etat* et *Mandat d'arrêt du 11 avril 2000* portent sur des questions de droit international coutumier des immunités souveraines, mais ils n'ont cependant pas de lien avec l'«accès aux tribunaux»[110]. Les deux affaires n'y font jamais référence[111].

18. Tout cela, il est à peine besoin de le rappeler, va à l'encontre de l'approche suivie par votre Cour dans l'arrêt *Guinée équatoriale c. France*, sur laquelle nous nous sommes déjà exprimés. L'Iran ne peut importer dans le traité une quelconque règle de son choix. L'invocation

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[108] CR 2018/30, p. 40, par. 32-33 (Lowe).

[109] *Blanco* v. *United States*, 775 F.2d 53, 60-63 (2nd Cir. 1985), disponible à l'adresse : https://openjurist.org/775/f2d/53/blanco-v-united-states (dossier des juges, onglet n° 34).

[110] CR 2018/31, p. 13-14, par. 11 (Wordsworth).

[111] Voir *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002* ; *Immunités juridictionnelles de l'Etat (Allemagne c. Italie ; Grèce (intervenant)), arrêt, C.I.J. Recueil 2012 (I)*.

d'un «necessary corollary»[112] entre la protection des immunités et le droit d'accès aux tribunaux est une fiction, non fondée sur une interprétation rigoureuse du traité comme votre Cour l'exige au stade des ***exceptions*** préliminaires. Aussi la stratégie de l'Iran visant à transfigurer ce principe afin d'invoquer une garantie en matière de reconnaissance des immunités doit être rejetée.

## V. Article IV

19. Venons-en à l'article IV. Monsieur le président, l'Iran affirme à tort que les Etats-Unis ont accepté une interprétation détaillée du paragraphe 1 de l'article IV[113]. Comme j'ai déjà eu l'occasion de le dire lundi, les Etats-Unis n'ont abordé que ce qui était nécessaire pour l'étape des exceptions préliminaires[114].

20. Hier, nos contradicteurs se sont appuyés sur un écrit de M. Vandevelde pour affirmer que le traitement juste et équitable — plus connu sous son acronyme anglais FET — était un principe très large[115]. Mais à aucun moment M. Vandevelde ne suggère que cette disposition incorpore des immunités. Et encore une fois, l'Iran n'a pas répondu à l'argument américain que le FET est un concept bien connu dans le domaine de la protection des investissements. Tout comme les autres garanties prévues dans les dispositions du traité, d'ailleurs. Aussi, l'affirmation de M. Wordsworth selon laquelle ces protections seraient «incapable of application»[116], sauf à ce qu'elles incorporent les protections en matière d'immunité, n'est pas crédible.

21. Pour ce qui est du paragraphe 2 de l'article IV, l'Iran avance que le «renvoi» vers «the most constant protection and security … *in no case less than that required by international law*» permet d'incorporer les règles coutumières des immunités. Mais cet article ne fait que référence à la norme minimale de traitement ; un standard une nouvelle fois bien connu dans le domaine de la protection des investissements. Au lieu de répondre à cet argument, M. Wordsworth affirme cependant que la question de «whether an abrogation of sovereign immunity in breach of customary international law may breach the international law minimum standard» est une question

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[112] CR 2018/31, p. 16-17, par. 20 (Wordsworth).

[113] CR 2018/31, p. 10, par. 13 (Wordsworth).

[114] CR 2018/29, p. 30, par. 19 (Boisson de Chazournes) ; CR 2018/28, p. 28, par. 34 (Visek).

[115] CR 2018/31, p. 17, par. 21 (Wordsworth).

[116] CR 2018/31, p. 18-19, par. 26 (Wordsworth).

de fond[117]. Ce n'est pas une réponse. Tout comme sa suggestion que la protection contre l'expropriation contenue dans le même article pourrait être interprétée comme incluant les protections en matière d'immunité souveraine[118].

22. L'Iran n'a fourni hier encore une fois aucune source étayant son propos selon lequel les règles relatives aux immunités souveraines étaient incorporées dans le traité d'amitié. Les revendications de l'Iran ne tombent pas dans le champ *ratione materiae* du traité.

## VI. Le paragraphe 1 de l'article X

23. Venons-en au paragraphe 1 de l'article X. L'Iran a maintenu son argument selon lequel le paragraphe 1 de l'article X, relatif à la liberté de commerce et de navigation, fournit une base juridictionnelle à la Cour pour qu'elle statue sur les demandes relatives aux immunités des Etats et des banques centrales. Selon la Partie adverse, le refus d'accorder la protection des immunités à la banque Markazi et à l'Iran a «severely impeded» leur capacité à exercer ou organiser toute forme de commerce entre les deux territoires. Ce faisant, la Cour aurait donc compétence, en vertu du paragraphe 1 de l'article X, pour statuer sur la légalité du retrait des immunités par les Etats-Unis. Cela est farfelu, si je puis le dire ainsi.

24. Le paragraphe 1 de l'article X dispose — et je tiens à le rappeler — que «Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.» Cette disposition s'inscrit dans un article consacré aux questions relatives au traitement des navires, de leurs cargaisons et produits, à l'exception des bateaux de pêche et des bâtiments de guerre. En l'affaire des *Plates-formes pétrolières*, la Cour a précisé ce qu'il fallait entendre par le terme commerce. Au-delà des actes d'achat et de vente, le terme «commerce» englobe uniquement les «activités accessoires qui sont intégralement liées au commerce»[119]. Sont ainsi couverts sous cette rubrique des actes «qui emporteraient destruction de biens destinés à être exportés, ou qui seraient susceptibles d'en affecter le transport ou le stockage en vue de

[117] CR 2018/31, p. 20, par. 31 (Wordsworth).

[118] CR 2018/31, p. 21, par. 33-35 (Wordsworth).

[119] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 819, par. 49.

l'exportation»[120]. Mais, comme vous le voyez, ce terme ne couvre certainement pas la protection des immunités souveraines.

25. L'Iran ne fournit aucune preuve que le paragraphe 1 de l'article X a aussi trait à des obstacles d'ordre juridique. Il n'avance ainsi aucun exemple où une telle disposition a été interprétée comme visant autre chose que la circulation des biens[121]. Mais plus grave encore, une telle interprétation est difficile, si ce n'est impossible, à concilier avec les autres dispositions du traité qui visent à faciliter le commerce d'une manière spécifique et définie. En fait une telle interprétation rendrait les autres articles superflus. L'Iran ne fait d'ailleurs état d'aucune source qui appuie sa vision sans limite du champ de cet article. Il n'existe aucune preuve que les Parties elles-mêmes aient considéré que tel était le cas au moment où elles négociaient le traité ou au cours des décennies qui ont suivi.

26. Madame et Messieurs les juges, utiliser cette disposition pour incorporer des règles exigeant le respect des protections des immunités souveraines apparaît non seulement totalement en décalage avec le paragraphe 1 de l'article X mais aussi avec l'objet et le but du traité d'amitié. La Cour doit veiller à rester «dans les domaines précis prévus par le traité»[122].

## VII. Le paragraphe 4 de l'article XI

27. S'agissant du paragraphe 4 de l'article XI, vous avez entendu hier l'Iran prétendre que l'inclusion par les Parties de la renonciation aux immunités au paragraphe 4 de l'article XI confirmerait que les Parties «envisaged that issues of immunity might arise with respect to other provisions of the Treaty»[123]. Cela est incorrect. Rien ne vient appuyer cette affirmation sans fondement. Cette disposition n'a pas été conçue pour traiter d'autres questions relatives aux immunités souveraines que celles expressément visées par cette disposition[124]. A ce sujet, l'Iran n'a pas répondu hier aux diverses sources que les Etats-Unis ont citées. Il n'a pas non plus tenté de justifier son interprétation *a contrario* à la lumière de la jurisprudence de votre haute juridiction.

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[120] *Ibid.*, par. 50.

[121] CR 2018/31, p. 16-17, par. 23 (Wordsworth).

[122] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 137, par. 273.

[123] CR 2018/31, p. 15, par. 16 (Wordsworth).

[124] Voir, par exemple, POUS, par. 8.10, 8.14-16, 8.21-8.23.

## VIII. L'inconsistance des positions iraniennes actuelles avec ses positions antérieures

28. Madame et Messieurs les juges, avant de conclure, il me reste à rejeter les tentatives iraniennes visant à écarter la pertinence de ses positions antérieures. Elles ont pourtant été révélatrices. Durant des décennies de litiges devant les tribunaux américains, l'Iran a historiquement refusé d'invoquer le traité d'amitié comme support pour ses immunités souveraines alors qu'il aurait pourtant été dans son intérêt de le faire. Cela est remarquable.

29. En ce qui concerne les documents *Peterson*, il convient de noter que, contrairement à ce que l'Iran affirme, ce dernier était partie à cette affaire. Il a simplement choisi de ne pas comparaître[125]. Les Etats-Unis rappellent également qu'ils ne considèrent pas crédible l'argument selon lequel l'Iran n'aurait joué aucun rôle dans l'élaboration de la défense de la banque Markazi. Tout comme ne l'est pas l'argument avancé hier par ***le docteur*** Webb lorsqu'elle affirme qu'il est «perfectly understandable» que la banque Markazi n'ait pas soutenu devant les tribunaux américains l'argument selon lequel le traité d'amitié protégeait ses droits aux immunités[126]. En effet, en vertu du droit américain, les dispositions du FSIA sur les immunités sont expressément soumises aux accords internationaux existants[127]. Par conséquent, les traités contenant des dispositions portant sur les immunités sont pertinents dans les procédures judiciaires américaines. Le fait que la banque Markazi ne se soit pas référée au traité de 1955 dans l'affaire *Peterson* pour faire valoir ses immunités sape donc l'argument iranien selon lequel celui-ci comprend des protections en matière d'immunité.

## IX. Remarques finales

30. Monsieur le président, Madame et Messieurs les juges, les dispositions du traité ne permettent pas d'importer les règles de droit international coutumier relatives aux immunités. Ces règles ne sont pas inscrites dans le traité d'amitié ainsi que cela a été reconnu par le conseil de l'Iran[128]. Elles ne peuvent pas être artificiellement incorporées dans le traité. L'Iran le sait et,

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[125] POUS, par. 1.3 ; voir également Declaration of Liviu Vogel in Support of Plaintiffs' Motion for Partial Summary Judgment, *Peterson* v. *Islamic Republic of Iran*, No. 10 CIV 4518 (S.D.N.Y. Apr. 2, 2012), Ex. CC (Salmon Marrow Service Papers) (annexe A8 des Etats-Unis).

[126] CR 2018/30, p. 54, par. 33 (Webb).

[127] 28 U.S.C. 1604.

[128] CR 2018/31, p. 11, par. 5 (Wordsworth).

comme arme de salut dans ses écritures et plaidoiries, il a brandi l'alinéa *c)* du paragraphe 3 de l'article 31 pensant que cette disposition serait la porte d'entrée pour l'application des normes du droit international coutumier. On est loin de l'interprétation au sens des articles 31 et 32 de la convention de Vienne sur le droit des traités. En fait, l'Iran souhaite tout bonnement réécrire de manière unilatérale le traité d'amitié. Mais telle n'est pas la fonction de l'interprétation. Alors, rappelons-nous des mots sages du président Bedjaoui. Ceux-ci reviennent à l'esprit, lorsqu'il mettait en garde contre une «revision détournée» au titre de l'interprétation, ou encore lorsqu'il soulignait le fait qu'««[i]nterprétation» n'est pas «substitution» à un texte négocié d'un tout autre texte, ni négocié, ni convenu»[129].

31. Monsieur le président, Madame et Messieurs les Membres de la Cour, je vous remercie de votre attention. Je vous prie, Monsieur le président, de bien vouloir donner la parole à l'agent des Etats-Unis, M. Visek.

Le PRESIDENT : Je remercie la professeure Boisson de Chazournes. Je donne à présent la parole à M. Richard Visek, agent des Etats-Unis d'Amérique. Vous avez la parole, Monsieur.

Mr. VISEK: Thank you, Mr. President.

## CLOSING OBSERVATIONS AND FINAL SUBMISSION

### I. Iran's claims are ripe for dismissal

1. Mr. President, Members of the Court, I will conclude our presentations on behalf of the United States. You have heard our arguments. We have provided you with compelling reasons why Iran's case invoking the Treaty of Amity must be dismissed at this preliminary stage. Permit me to state them briefly.

2. Having come to the Court with unclean hands and having abused the judicial function of the Court, Iran's claims call out for dismissal on admissibility grounds. Similarly, Iran has brought claims that are expressly excluded or not encompassed by the Treaty as interpreted in its context

[129] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt,* opinion individuelle de M. le juge Bedjaoui, *C.I.J. Recueil 1997*, p. 123, par. 12.

and in light of its object and purpose. As such, those claims must be dismissed for lack of jurisdiction.

## II. Iran has not approached this case in good faith and has failed to rebut the United States' objections

3. Mr. President, Members of the Court, in addition to the strength of the United States' objections, there is another theme that runs through this case. Iran has not approached this case in good faith.

4. Let us start at the beginning. Iran's initiation of this case was not a good-faith application to the Court. This is at the core of our abuse of process and unclean hands objections.

5. It is not a show of good faith for Iran to invoke a treaty of friendship, while at the same time engaging in a continuing pattern of international terrorism directed against the other party to the Treaty. As Mr. Bethlehem set out in detail with reference to relevant documents, Iran comes to the Court with unclean hands having supported repeated violent attacks against the United States, its nationals, and its interests, up to the present time. And while Iran has conspicuously avoided engaging before the Court on what led to the *Peterson* litigation, it bears remembering that Iran is asking this Court for relief from the outcome of a legal proceeding assessing Iran's liability for support for the terrorist attack on the US Marine barracks in Beirut on 23 October 1983. That attack, which the Minister of the Islamic Revolutionary Guard Corps bragged about in describing Iran's role, killed 241 US peacekeepers.

6. As we have shown this week, the United States responded to these and other bad acts by Iran by implementing measures to deter Iran and provide justice for the victims of terrorism. We find it inconceivable that Iran would use a Treaty of Amity to challenge the United States' response to Iran's own actions that brought death and destruction to Americans and others.

7. It is also not a show of good faith for Iran to invoke the Treaty's compromissory clause to bring claims that are both tainted by its support for terrorism and fall outside the scope of the Treaty. It is true that Iran does not have an alternate route of getting before the Court, but that does not make Iran's use of the compromissory clause any less inappropriate.

8. Notwithstanding Iran's creative efforts to read new rights into the Treaty's provisions, there is no basis for finding sovereign immunity protections within those provisions. Doing so

would disregard long-standing rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties. Moreover, Iran has failed in its pleading and presentations to explain satisfactorily how its Central Bank can be simultaneously considered a "company" subject to the attendant rights afforded to companies under the Treaty, and a sovereign entity performing sovereign functions. These irreconcilable claims illustrate the lack of seriousness of Iran's case. Finally, Iran's challenge to Executive Order 13599 must be dismissed. It was issued to address the threats posed by Iran, including its ballistic missile programme and its sponsorship of terrorism. The Executive Order is indisputably a critical part of the régime regulating arms trafficking and necessary to protect US essential security interests, and therefore excluded from the scope of the Treaty.

9. As this case has progressed, we have seen further examples of Iran's determination to obscure and avoid the facts and law. Iran's unwillingness to provide access to the United States to Bank Markazi's sealed pleadings from the *Peterson* proceedings is one such example. In addition to submitting the *Peterson* documents once we were able to gain access to them, we explained on Monday how they belie some of Iran's claims in this case. Iran did not say much on this subject yesterday, simply stating that those documents were not a revelation[130]. But this just underscores the issue — if they were not revelatory, why the dogged opposition to including them in the case file and why did Iran in its letter of 12 April 2017 question the relevance of the documents, characterizing the United States' statement of relevance as a "mere assertion"[131]? Iran's lack of transparency with respect to *Peterson* calls into question its credibility as a litigant.

10. Another such example is Iran's repeated unwillingness to respond directly to United States' arguments or objections combined with a reflexive plea that the matter should be joined to the merits.

11. Whether a matter is to be joined to the merits or decided as a preliminary basis is a decision for the Court. But, for its part, Iran appears to have made a cynical tactical decision that it will not respond to the factual elements of the United States' objections, and then simply argue that

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[130] CR 2018/30, p. 50, para. 33 *(c)* (Webb).

[131] *Certain Iranian Assets*, letter from Iran responding to US request for production of *Peterson* documents (12 Apr. 2017), p. 2.

the matter should be joined to the merits because the factual record is not fully before the Court. For example, Iran has refused to engage on the matter of its support for international terrorism even though as the United States has demonstrated, this is *the reason* for the United States' measures that Iran challenges in this case[132]. Given that Iran cannot rebut its documented support for terrorism, its avoidance is perhaps not surprising. At the same time, however, it should not be tolerated by the Court.

12. Perhaps Iran hopes that the Court will simply assume that what is to come from Iran at the merits phase is necessary to decide the matter and the Court will decline to decide it preliminarily. The Court should not allow this delay tactic to bear fruit. Rule 79, paragraph 4, clearly contemplates that the Court will issue a legal ruling on preliminary objections in light of the facts presented by the Parties that are relevant to those objections. Iran simply cannot avoid the facts the United States has presented and then claim the factual record is insufficient to rule on the United States' preliminary objections. Where the United States has demonstrated that Iran's case is not admissible and that claims are outside the scope of the Treaty and therefore the Court's jurisdiction, the Court should sustain those objections. Where those objections are unrebutted because of Iran's own choice, the Court should draw the inference that Iran has no rebuttal to make, not that it must wait to see what Iran will say at the merits. Iran has had every opportunity in this preliminary proceeding to respond to the objections. And it has not.

13. To accept Iran's response as adequate would mean that there is effectively no preliminary objections procedure and everything would necessarily be pushed to the merits. An applicant cannot get to the merits by making a strategic decision not to engage in the substance of preliminary objections.

14. I have one final point to make before closing. Lest there be any doubt as to Iran's bad acts, Germany recently announced the extradition to Belgium of Asadollah Assadi, an Iranian diplomat accredited in Austria, on charges that he was part of a failed plot to bomb an Iranian

[132] CR 2018/30, p. 16, para. 21 (Mohebi); CR 2018/30, pp. 33-34, para. 2 (Lowe).

opposition rally near Paris on 30 June[133]. The scale of that plot, which involved the arrest of numerous suspects across Europe — including in Belgium, France and Germany — reminds us that Iran remains the world's leading State sponsor of terrorism. Last week, France seized assets belonging to Iran's intelligence services and two Iranian nationals in response to the plot. In a joint statement by France's foreign, interior and economy ministries, France made clear that: "An incidence of such gravity on [its] national territory could not go unpunished."[134] France's response to Iran's terrorist acts, like the United States' response, was measured and peaceful.

15. In sum, Iran's support for terrorism is not simply a US problem. And this case is not just about the United States' decision to deter Iran's support for terrorism and provide compensation for victims. The recent events in Europe show that this is an international problem that involves and will involve decisions of many countries to deter terrorism and provide justice for victims. Iran, a State sponsor of terrorism, is trying to use this Court to thwart such efforts. The Court should recognize the severe implications for the fundamental rules of international treaty law if Iran is permitted to use clearly inapplicable treaty obligations to manufacture jurisdiction over measures undertaken by the United States in response to Iran's own bad acts.

16. Mr. President, Members of the Court, Iran's case must be dismissed for the reasons the United States has put forward.

## III. Conclusion

17. Mr. President, honourable Members of the Court, in conclusion I present to you the final submission of the United States.

18. For the reasons explained during these hearings and any other reasons the Court might deem appropriate, the United States of America requests that the Court uphold the U.S. objections set forth in its written submissions and at this hearing as to the admissibility of Iran's claims and the jurisdiction of the Court, and decline to entertain the case. Specifically, the United States of America requests that the Court:

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[133] "Iranian diplomat faces extradition from Germany over 'bomb plot'", BBC News (1 Oct. 2018), available at https://www.bbc.com/news/world-europe-45705799; "Extradition of Iranian Official Asadollah Assadi for Role in Paris Terrorist Plot", US Department of State (10 Oct. 2018), available at https://www.state.gov/secretary/remarks/2018/10/286532.htm.

[134] "France points fingers at Iran over bomb plot, seizes assets", Reuters (2 Oct. 2018), available at https://www.reuters.com/article/us-france-security-idUSKCN1MC12X.

(a) Dismiss Iran's claims in their entirety as inadmissible;

(b) Dismiss as outside the Court's jurisdiction all claims that U.S. measures that block the property and interests in property of the Government of Iran or Iranian financial institutions (as defined in Executive Order 13599 and regulatory provisions implementing Executive Order 13599) violate any provision of the Treaty;

(c) Dismiss as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on the United States' purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities; and

(d) Dismiss as outside the Court's jurisdiction all claims of purported violations of Articles III, IV, or V of the Treaty of Amity that are predicated on treatment accorded to the Government of Iran or Bank Markazi.

19. Mr. President, Members of the Court, this concludes the United States' submissions on its preliminary objections. We thank you for your thoughtful attention to the submissions of the United States in these proceedings.

The PRESIDENT: I thank the Agent of the United States of America. The Court takes note of the final submissions which you have just read out on behalf of your Government. The Court will meet again tomorrow afternoon, at 3 p.m., to hear the second round of oral argument of the Islamic Republic of Iran. The sitting is adjourned.

*The Court rose at 5.30 p.m.*

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