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CR 2018/33

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Friday 12 October 2018, at 3 p.m., at the Peace Palace,

President Yusuf presiding,

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

VERBATIM RECORD

ANNÉE 2018

Audience publique

tenue le vendredi 12 octobre 2018, à 15 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

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

COMPTE RENDU

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

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 Islamic Republic of Iran. I will now give the floor to Professor Lowe. You have the floor.

Mr. LOWE:

INTRODUCTION

1. Thank you, Mr. President, Members of the Court: the core of Iran's case comes down to six propositions:

(a) The US measures of which Iran complains impeded a significant trade between Iran and the United States, in which Bank Markazi in particular, has a pivotal role as Iran's provider of foreign currency exchange.

(b) Each of Iran's claims is based on a provision of the 1955 Treaty of Amity.

(c) Article XX (1) of the Treaty does not exclude any subject-matter from the scope of the Treaty *ratione materiae*: it provides a non-self-judging defence on the merits.

(d) Iran refers to customary international law and domestic law only to the extent that is necessary in order to interpret and apply the Treaty of Amity, and only in accordance with the established rules on treaty interpretation.

(e) Bank Markazi has rights protected under the Treaty because it is a company, and rights protected under the Treaty because it functions as the Central Bank of Iran. There is no "paradox" there.

(f) A reasoned claim alleging specific breaches of a bilateral treaty cannot be dismissed *in limine litis* on the ground of abuse of rights or unclean hands.

2. Beyond that summary, Iran does not intend to repeat its submissions made in writing and on Wednesday, by which it stands. Iran's counsel will shortly respond to the few new points made in the United States' submissions yesterday that call for a response; but before they do I shall say a few words about the general submissions made by the United States.

3. It is said that Iran made no response to the collection of documents bearing on accusations of Iranian support for terrorism during the past four decades or so. Iran *did* respond. The response is that those documents and allegations are not relevant to the legal task now before the Court. Indeed, counsel for the United States spelled the point out yesterday, when he said: "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."[1] It is a jurisdictional objection.

4. The task before the Court at this stage is to decide if Iran's *claims* fall within the scope of the Treaty, not to decide whether or not they are well founded[2]. The Court's jurisdiction turns on the nature of the claim, and on the provisions of the Treaty. It is not affected by the motives of the Respondent in adopting the measures of which Iran complains, or by the nature of the defences that the Respondent may raise. The allegations made by the United States are legally irrelevant in this context; and that is why Iran is not being side-tracked now into addressing matters that should be raised at a later stage.

5. It was also obvious yesterday that the jurisdictional challenge rests on the proposition that the scope of the 1955 Treaty is limited to principles concerning "private and professional" (but non-sovereign) activities.

6. Nothing in the Treaty indicates such a limitation; and nothing justifies reading such a limitation into the terms of the Treaty.

7. In the *United States Diplomatic and Consular Staff* case, on the first occasion when it came before this Court to argue that its own claim based, on the 1955 Treaty of Amity, was within the jurisdiction of the Court and was admissible, the United States began its analysis of compromissory clauses by quoting the Court:

> "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in the context, that is an end of the matter.
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> . . . . . .

[1] CR 2018/32, p. 16, para. 16 (Bethlehem).

[2] CR 2018/32, p. 25, para. 22 (Bethlehem); p. 45, para. 4 (Boisson de Chazournes); CR 2018/31, p. 10, para. 2 (Wordsworth).

> When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning."[3]

8. That is Iran's starting point, too.

9. In the *United States Diplomatic and Consular Staff* case, the United States went on to focus on the 1955 Treaty of Amity, and the test that the Court should apply in order to determine if it had jurisdiction over the US claim against Iran. It said:

> "if the Government of Iran had made some contention in this Court that the United States interpretation of the Treaty was incorrect or that the Treaty did not apply to Iran's conduct in the manner suggested by the United States, the Court would clearly be confronted with a dispute relating to the 'interpretation or application' of the Treaty"[4].

10. But the United States now — and repeatedly — falls back on the plea that the "object and purpose" of the 1955 Treaty is limited, and "manifestly"[5] excludes Iran's claim. "Manifestly" appears to mean that Iran's contentions, that the United States' interpretation of the Treaty is incorrect, are so obviously wrong that even to raise them amounts to an abuse of process by Iran. The Court will decide if that US submission is to be taken literally; and if it is, to give it the weight that it merits. We think it is plainly wrong.

11. The United States points to the preamble of the Treaty to establish its purpose[6]. The preamble says that the Parties are desirous of "reaffirming the high standards in the regulation of human affairs to which they are committed, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations".

12. The United States concludes that "the Treaty was intended to govern the private and professional spheres of activities". Perhaps one sees what one wishes to see. Read bona fide, this paragraph of the preamble cannot be seen as a limitation of the purpose of this Treaty of Amity, Economic Relations, and Consular Rights to "private and professional activities". Encouraging

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[3] *United States Diplomatic and Consular Staff in Tehran* case, Memorial of the United States of America, 12 Jan. 1980, p. 144, quoting *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8.

[4] *United States Diplomatic and Consular Staff in Tehran* case, Memorial of the United States of America, 12 Jan. 1980, p. 153.

[5] CR 2018/32, p. 16, para. 16 (Bethlehem).

[6] CR 2018/32, p. 21, para. 6 (Grosh).

mutually beneficial trade, and closer economic intercourse, are wider objectives than governing private and professional spheres of activities.

13. The United States says that Iran ignores the object and purpose of the Treaty. It does not. It disagrees with the United States' interpretation of the object and purpose and with its application of the Treaty and that is why Iran has brought this case to the Court in accordance with Article XXI of the Treaty.

14. The United States refers often to investment protection agreements. But bilateral investment agreements have narrower objectives: unlike the 1955 Treaty, they do not have the objectives of promoting international trade and closer economic intercourse. Investment, trade and commerce are not interchangeable concepts. And, as the Court is no doubt aware, the first bilateral investment treaty was not signed until 1959, four years after the Treaty between Iran and the United States[7]. Investor protection treaties are a relatively recent development: they were not embedded in the mindset of the Parties when they concluded the 1955 Treaty.

15. There is a further point. It is for the treaty parties to decide what provisions are desirable to promote the objectives of the Treaty; and if they conclude that a clear provision is to be included, that is not to be ignored or cut down because it is thought unnecessarily wide for the purposes of the Treaty. The provisions of the 1955 Treaty are what the Parties thought appropriate in the light of the Treaty's purpose. The object and purpose of a treaty may be relevant to its interpretation: but they do not define its mandate, so that any provision that may later be thought unnecessary to the object and purpose of the treaty is, in effect, *ultra vires.*

16. Recognition of corporate personality, access to courts in order to pursue and defend rights, protection against expropriation and unreasonable measures and against unfair and inequitable treatment: these are all core principles essential to the conduct of trade and economic intercourse. They set the basic ground rules; and it is not in the least surprising to find them in a treaty on economic relations.

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[7] UNCTAD, *The Entry into Force of Bilateral Investment Treaties (BITs)*, (2006), available at https://unctad.org/en/Docs/webiteiia20069_en.pdf, p. 3: "The first ever BIT was concluded on 25 November 1959 between Germany and Pakistan and entered into force on 28 April 1962".

17. I referred to the Parties' intentions. There has been a tendency to refer to this and similar treaties as 'United States treaties'. The Court will not lose sight of the fact that bilateral treaties have two, equal, parties. The views of the United States on the meaning of its bilateral treaties are not dispositive.

18. The United States questioned Iran's observation that significant parts of ***Iran's*** case are not challenged in these United States' jurisdictional objections, and that the objections focused on Bank Markazi and did not affect claims in relation to other Iranian companies[8]. The United States pointed out that of the 98 cases listed 18 months ago in Iran's Memorial, over 20 per cent arose from the Beirut barracks bombing that was the basis of the *Peterson* claims. Or to put it another way, almost 80 per cent of them were not. They said that 98.5 per cent of the attached assets in these cases were attached in the *Peterson* proceedings, and had belonged to Bank Markazi and the Iranian Armed Forces.

19. But those observations miss the point. So far, something like US$1.8 billion have been not merely attached but seized and distributed. There is an additional US$1.7 billion which is the subject of enforcement proceedings before US courts and also attached by US plaintiffs in Luxembourg. There are other funds attached or seized inside or outside the United States. There is about US$75 billion in outstanding US court judgments against Iran. How can Bank Markazi play its pivotal role in Iranian foreign trade in the face of these measures? Whose assets will be seized next? The future — the future — application of the disputed measures is of vital concern to Iran. It is, indeed, a very clear illustration of why the rights under the Treaty are of fundamental importance for the encouragement of trade and closer economic relations.

20. There is one other matter on which I should touch. The United States said yesterday that:

> "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 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."[9]

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[8] CR 2018/32, p. 14, para. 10; p. 15, para. 12 (Bethlehem).

[9] CR 2018/32, pp. 56-57, para. 11 (Visek).

21. We have already made the point that the United States' reasons for acting as it has are irrelevant for the question whether or not there is a dispute under the Treaty, although it is possible that they might fall for consideration in the context of US defences at the merits stage. But let me make it perfectly clear that Iran is emphatically *not* suggesting, cynically or otherwise, that the United States' objections to jurisdiction and admissibility be joined to the merits. Iran asks the Court to dismiss the United States' objections, definitively, at this stage, so that the Parties can present their respective cases on the merits.

22. Mr. President, Members of the Court, most of the arguments set out yesterday by the United States were repetitions of arguments that have already been addressed by Iran orally or in writing. You have our submissions on those and it is unnecessary for us to repeat them. There are, however, a number of specific points on which Iran wishes to offer a response, and my colleagues Professor Thouvenin and Mr. Wordsworth will address them. I thank you for your patience and attention and, unless I can assist you further, I ask that you now call upon Professor Thouvenin.

The PRESIDENT: I thank Professor Lowe and I now give the floor to Professor Thouvenin. You have the floor.

M. THOUVENIN : Merci, Monsieur le président.

PREMIÈRE PARTIE

L'EXCEPTION FONDÉE SUR L'AFFIRMATION QUE BANK MARKAZI NE SERAIT PAS UNE «COMPANY» VISÉE PAR LE TRAITÉ

1. Monsieur le président, Madame et Messieurs les juges, ma tâche consiste à répondre aux arguments avancés par les Etats-Unis hier au soutien de l'exception d'incompétence fondée sur l'affirmation que Bank Markazi ne serait pas une «company» au sens du traité.

2. Je me bornerai à quatre remarques, en évitant bien entendu de revenir sur les points déjà traités dans les écritures et au premier tour des plaidoiries orales :

— la première porte sur la technique interprétative pertinente dans la présente espèce ;

— la deuxième sur la familiarité que les Etats-Unis pouvaient avoir, ou non, au moment de conclusion du traité, avec ces «créatures» décrites par mon contradicteur[10], à savoir les «companies» qui, le cas échéant, pourraient bénéficier d'immunités ;

— la troisième remarque portera sur l'affirmation entendue hier selon laquelle il serait «bizarre» d'associer «company» avec «immunity» ou «sovereign functions»[11] ;

— enfin, ma dernière remarque portera sur la manière dont la question posée par l'exception préliminaire des Etats-Unis se pose à la Cour.

I. INTERPRÉTATION CONTEMPORAINE OU ÉVOLUTIVE

3. En premier lieu, *quid* de la technique interprétative pertinente en la présente espèce ? Le professeur Childress vous exhorte, si je le comprends bien, à vous en tenir, s'agissant de l'interprétation du terme «companies» tel qu'il est utilisé dans le traité de 1955, à une interprétation fondée sur la technique dite du «renvoi fixe», par opposition à celle du «renvoi mobile»[12].

4. L'Iran, tout au contraire, considère que c'est une interprétation évolutive du terme «companies» qui s'impose[13]. En concluant le traité, les Parties avaient clairement l'intention de densifier autant que possible, sécuriser et renforcer leurs relations économiques et leurs échanges. C'est pourquoi elles ont retenu de la notion de «companies» une définition extrêmement ouverte, de par les termes employés, qu'il n'est pas inutile de rappeler : par «companies», il faut entendre «corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit». Ceci, et notamment les formules «and other associations» et «whether or not» vise manifestement à couvrir y compris les nouvelles formes de personnes juridiques que les ordres internes respectifs pourraient être amenés à créer. Le terme «companies» est donc un terme aussi générique que le terme «commerce» sur lequel la Cour s'est penchée dans

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[10] CR 2018/32, p. 35, par. 6 (Childress).

[11] CR 2018/32, p. 33, par. 4 (Childress).

[12] CR 2018/32, p. 33, par. 2 (Childress).

[13] *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 31, par. 53 ; *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 32, par. 77 ; *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 67-68, par. 112 ; *Rhin de fer*, sentence arbitrale relative au chemin de fer dit Iron Rhine entre le Royaume de Belgique et le Royaume des Pays-Bas, 24 mai 2005, Nations Unies, *Recueil des sentences arbitrales (RSA)*, vol. XXVII, p. 72-74, par. 79-81 ; sentence arbitrale sur la délimitation de la frontière maritime entre la Guinée et la Guinée Bissau *(RSA)*, vol. XX, p. 151-152, par. 85 ; *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua*), arrêt, *C.I.J. Recueil 2009*, p. 242-244.

l'affaire des *droits de navigation et des droits connexes*, et, comme dans cette affaire, le traité de 1955 a été conçu sans limitation de durée. Or, pour citer l'arrêt de 2009~~***, je cite la Cour***~~ :

> «lorsque les parties ont employé dans un traité certains termes de nature générique, dont elles ne pouvaient pas ignorer que le sens était susceptible d'évoluer avec le temps, et que le traité en cause a été conclu pour une très longue période ou «sans limite de durée», les parties doivent être présumées, en règle générale, avoir eu l'intention de conférer aux termes en cause un sens évolutif»[14].

5. Au demeurant, la pratique américaine des traités bilatéraux portant sur le domaine économique a toujours consisté à retenir de la notion de «companies» une définition large et délibérément «inclusive». C'est le cas par exemple des traités bilatéraux d'investissement. Par exemple, parmi une multitude d'autres, la définition de «company» à l'alinéa *b)* du paragraphe 1 de l'article 1 du traité de promotion et de protection des investissements conclu entre les Etats-Unis et l'Ukraine dispose :

> ««company» of a Party means any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled»[15].

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[14] *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 243, par. 66.

[15] Traité entre les Etats-Unis d'Amérique et l'Ukraine relatif à l'encouragement et à la protection réciproque des investissements, 4 mars 1994, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/2366 ; voir aussi : Argentine, 1991, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/127 ; Arménie, 1992, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/144 ; Bangladesh, 1986, al. *a)*, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/278 ; Bulgarie, 1992, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/556 ; Cameroun, 1986, al. *a)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/599; République Démocratique du Congo, 1984, al. *a)*, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/828 ; République Populaire du Congo, 1990, al. *a)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/820 ; Croatie, 1996, al. *a)*, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/897 ; République tchèque et Slovaquie, 1991, al. *a)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/994 ; Egypte, 1986, al. *a)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/1123 ; Estonie, 1994, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/1161 ; Grenade, 1986, al. *a)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/1487; Jamaïque, 1994, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/1726; Kazakhstan, 1992, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/1792; Kirghizistan, 1993, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/1864 ; Lettonie, 1995, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/1884; Moldavie, 1993, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/2019 ; Maroc, 1985, par. 2, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/2052 ; Panama, 1982, al. *b)*, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/3353 ; Pologne, 1990, al. *a)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/5339 ; Roumanie, 1992, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/2221 ; Sénégal, 1983, al. *a)*, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/2249 ; Sri Lanka, 1991, al. *b)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/2295 ; Tunisie, 1990, al. *c)*, par. 1, article premier, disponible à l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/2353 ; Turquie, 1985, al. *a)*, article premier, disponible à

Au surplus, et d'une manière générale, les Etats-Unis commentent cette définition comme étant «broad and inclusive in nature»[16].

6. Le traité d'amitié ne suit pas une autre approche. Du reste, le télégramme de 1954 auquel le professeur Childress attache tant d'importance au titre des travaux préparatoires parce qu'il manifeste, de la part d'un négociateur, le souci de tenir compte des «tendances»[17], milite dans le sens d'une interprétation évolutive de la notion de «companies», dont la définition a décidément pour objet de couvrir, comme l'a du reste indiqué Walker, un commentateur dont mon contradicteur dit le plus grand bien, «juridical entities generally»[18].

II. BANK MARKAZI EST UNE «COMPANY» AU SENS DU TRAITÉ, QU'IL SOIT INTERPRÉTÉ SELON LA TECHNIQUE DU RENVOI FIXE OU MOBILE

7. Mais, et ce sera ma deuxième remarque, peu importe que la technique interprétative à laquelle vous vous référerez, Madame et Messieurs les juges, s'appuie sur le renvoi fixe ou mobile, car dans les deux cas la notion de «companies» au sens du traité s'applique à Bank Markazi.

8. Mon contradicteur a avancé un nouvel argument hier pour vous convaincre du contraire. Selon lui, donner raison à l'Iran conduirait à : «read into the Treaty an entity that did not exist at the time the Treaty was concluded»[19].

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l'adresse : investmentpolicyhub.unctad.org/Download/TreatyFile/2356.

[16] Traité entre le Gouvernement des Etats-Unis d'Amérique et le Gouvernement de la République d'Albanie relative à l'encouragement et à la protection réciproque des investissements, lettre d'accompagnement, département d'Etat, Washington, 3 août 1995, p. VI. disponible à investmentpolicyhub.unctad.org/Download/TreatyFile/39; voir aussi Azerbaijan, 1997, Letter of Submittal, Art. I («the definition of «company» is broad, covering all types of legal entities…»), al. *a)*, Art. 1, available at investmentpolicyhub.unctad.org/Download/TreatyFile/246; Bahrain, 1999, Letter of Submittal, Art. I, (the definition of «company» is broad, covering all types of legal entities…»), al. *a)*, Art. 1, available at investmentpolicyhub.unctad.org/Download/TreatyFile/246; Georgia, 1994, Letter of Submittal, Art. I («the definition of «company» is broad, covering all types of legal entities…»), al. *a)*, Art. 1, available at investmentpolicyhub.unctad.org/Download/TreatyFile/1327; Honduras, 1995, Letter of Submittal, Art. I («the definition of «company» is broad, covering all types of legal entities…»), al. *a)*, Art. 1, available at investmentpolicyhub.unctad.org/Download/TreatyFile/1512; Jordan, 1997, Letter of Submittal, Art. I («the definition of «company» is broad, covering all types of legal entities…»), al. *a)*, Art. 1, available at investmentpolicyhub.unctad.org/Download/TreatyFile/1776; Lithuania, 1998, Letter of Submittal, Art. I («the definition of «company» is broad, covering all types of legal entities…»), al. *b)*, para. 1, Art. 1, available at investmentpolicyhub.unctad.org/Download/TreatyFile/1929; Mongolia, 1994, Letter of Submittal, Art. I («the definition of «company» is broad, covering all types of legal entities…»), al. *b)*, para. 1, Art. 1, available at investmentpolicyhub.unctad.org/Download/TreatyFile/2029; Mozambique, 1998, Letter of Submittal, Art. I («the definition of «company» is broad, covering all types of legal entities…»), al. *a)*, Art. 1, available at investmentpolicyhub.unctad.org/Download/TreatyFile/2058; Trinidad and Tobago, 1994, Letter of Submittal, Art. I («the definition of «company» is broad, covering all types of legal entities…»), al. *a)*, Art. 1, available at investmentpolicyhub.unctad.org/Download/TreatyFile/2349.

[17] CR 2018/29, p. 52-53, par. 35-38 (Childress) ; CR 2018/32, p. 41, par. 30 (Childress).

[18] H. Walker, "The Post-War Commercial Treaty Program of the United States", Political Science Quarterly, Vol. LXXIII, n° 1 (1958), p. 67 (POUS, annexe 2).

[19] CR 2018/32, p. 34, par. 6 (Childress).

9. Il est vrai que Bank Markazi n'existait pas en 1955, puisqu'elle a été créée en 1960. Mais elle n'est que le successeur de banque Melli Iran qui, elle, existait en 1955, puisque sa création date de 1927.

10. La page du site Internet de banque Melli Iran consacrée à son statut et à ses activités de l'époque**,** indique et je cite cette histoire de la banque Melli Iran [début de la projection n° 1][20] :

> «The year 1307 (1928) should be regarded as a turning point in Iran's banking and economic history. … Bank Melli Iran, the first Iranian commercial bank was established …
>
> Bank Melli Iran … developed at later stages into an active and dynamic element assuming an accelerating role in the country's economic advancement.
>
> In the year 1310 (1931) Parliament granted sole powers to Bank Melli Iran to issue banknotes, thus establishing the bank as the country's bank of issue. Thereafter the bank assumed responsibility for additional central bank functions including government banking operations, the regulation of currency circulation, maintenance of balance of payments surpluses, credit regulation as well as supervision of the country's banking system.
>
> In the year 1339 (1960) pursuant to the promulgation of the State Banking and Monetary law and the establishment of Central bank of Iran, Bank Melli Iran relinquished its central banking functions.» [Fin de la projection n° 1]

11. Trois informations clefs ressortent de cet exposé. Premièrement, en 1955, Bank Melli Iran était une personne juridique distincte de l'Etat iranien. Elle avait été créée par une loi de mai 192***8*** en tant que société par actions. Deuxièmement, elle était à la fois une banque commerciale et opérait comme banque centrale de l'Iran. Elle était un rouage de l'économie iranienne tout à fait important. Troisièmement, Bank Markazi lui a succédé en 1960.

12. Au moment de la conclusion du traité qui nous occupe, les Etats-Unis étaient parfaitement au fait de l'existence de cette entité, Bank Melli Iran ; qu'elle opérait aussi bien dans le champ commercial qu'en qualité de banque centrale ; et que son rôle dans le développement de l'activité économique de l'Iran était important.

13. Un rapport de la Banque internationale pour la reconstruction et le développement consacré au développement économique de l'Iran, daté du 3 janvier 1957, est éclairant à cet égard. Voici un extrait de ce rapport, qui est d'accès public [début de la projection n° 2] :

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[20] Bank Melli, "History of Bank Melli Iran" (disponible à l'adresse : bmi.ir/en/bmihistory.aspx?smnuid=10011, consulté le 12 octobre 2018). Voir le dossier des juges, onglet n° 17.

> «The fact that Bank Melli, which functions as chief commercial bank as well as the central bank, operates under policies and regulations which tend to prevent excessive credit creation to both the public and private sectors, is an important safeguard against inflation.»[21]

> «The aid received from the United States — about 428 million in 1953/54 and a further $48 million in 1954/55 — permitted the Government and its agencies to reduce their new borrowings from the Bank Melli from Rls. 3,400 million in 1952/53 to Rls. 1,664 million in 1953/54 and to Rls. 1,288 million in 1954/55.»[22] [Fin de la projection n° 2]

14. Autrement dit, ***~~au moment de la conclusion du traité de~~ en*** 1955, les Etats-Unis connaissaient *parfaitement* le type de «companies» que constitue Bank Markazi à travers Bank Melli Iran, qui n'était ni une «créature»[23], ni «bizarre»[24], contrairement à ce que le professeur Childress croit pouvoir dire, mais un rouage tout à fait commun et déjà essentiel de l'économie iranienne, que les Parties au traité, soucieuses de faire en sorte de développer leurs relations économiques, connaissaient très bien.

III. LE FAUX PARADOXE

15. J'en viens à ma troisième remarque, Monsieur le président. La Partie adverse s'étonne d'une association entre les termes «companies», «immunity», et «sovereign functions», qu'elle semble voir comme contre-nature[25]. Ce serait la preuve, selon elle, que les parties au traité n'ont pas pu songer que la définition volontairement large des «companies» qu'elles avaient posée pût conduire à bénéficier à des entités qui, exerçant des fonctions souveraines, seraient également bénéficiaire d'immunités.

16. Mais ce qui est perçu de l'autre côté de la barre comme une bizarrerie n'est rien que de très commun et n'étonne que mon contradicteur.

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[21] Banque internationale pour la reconstruction et le développement, *Economic Development of Iran*, 3 Janvier 1957, (consultable à l'adresse : documents.worldbank.org/curated/en/622341468254365503/pdf/multi0page.pdf – dernière visite le 12 octobre 2018), p. 2.

[22] *Ibid.*, p. 22.

[23] CR 2018/32, p. 35, par. 6 (Childress).

[24] CR 2018/32, p. 33-34, par. 4 et 6 (Childress).

[25] CR 2018/32, p. 33, par. 4 (Childress).

17. Il est admis depuis longtemps, du point de vue du droit des immunités, que l'Etat peut agir exactement comme le ferait une personne privée. C'est le fruit de la doctrine restrictive qu'a rappelée Mme Webb mercredi[26], doctrine que les Etats-Unis connaissent bien puisqu'ils en ont été les promoteurs. Mais il est tout autant admis, à l'inverse, qu'une entité privée, une société, puisse exercer des fonctions souveraines et, dès lors, bénéficier d'immunités. Les Etats-Unis ont d'ailleurs produit à l'onglet n° 33 de leur dossier des juges d'hier un extrait d'une affaire *Blanco c. Etats-Unis* qui met en scène un navire privé, chargé d'une mission de service public, laquelle en a fait un navire public titulaire d'immunités. En outre, même si ce n'est pas notre sujet, il est assez illustratif de l'absence de «bizarrerie» dans tout ceci que l'article 5 des Articles sur la responsabilité de l'Etat pour fait internationalement illicite traite du cas des entités qui ne sont pas l'Etat, mais exercent des prérogatives de puissance publique, c'est-à-dire des fonctions souveraines. L'hypothèse visée par la Commission du droit international est notamment celle des anciennes entreprises publiques qui, bien que privatisées, conservent des prérogatives de puissance publique[27]. Il s'agit, donc, dans ce cas de ce que seraient des «companies» au sens du traité, habilitées à exercer des fonctions souveraines, et titulaires d'immunités à ce titre.

18. Je noterai encore que les Etats-Unis sont familiers de ce qui n'est décidément pas un paradoxe, puisque, par exemple, ils ont créé une Overseas Private Investment Corporation[28], sous forme de «corporation» établie comme une personne juridique distincte de l'Etat par un acte du Congrès, dont le capital est détenu par l'Etat fédéral et tous les administrateurs sont nommés par l'Etat, qui est en charge de la mise en œuvre d'une politique de l'Etat et qui bénéficie de certaines immunités en droit américain, comme cela ressort par exemple d'un jugement rendu par une Cour de district américaine en 2000[29].

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[26] CR 2918/30, p. 45, par. 6 (Webb).

[27] Rapport de la Commission du droit international, cinquante-troisième session, 23 avril-1er juin et 2 juillet-10 août 2001, Assemblée générale, cinquante-sixième session, *Documents officiels*, *Supplément n°°10* (A/56/10), p. 9, par. 2 (disponible à l'adresse : wwww.legal.un.org/ilc/documentation/english/reports/a_56_10.pdf).

[28] Foreign Assistance and Arms Exports Acts, Part I, Chapter 2, Title IV entitled *Overseas Private Investment Corporation*, pp. 122-154 (disponible à l'adresse : www.opic.gov/sites/default/files/statute1.pdf, consulté le 12 octobre 2018).

[29] *Bro Tech Corp., Stefan Brodie and Don Brodie* v. *European Bank for Reconstruction and Development, and Overseas Private Investment Corporation*, District Court for the Eastern District of Pennsylvania, Civil Action No. 00-2160, November 29th, 2000 (disponible à l'adresse : www.paed.uscourts.gov/documents/opinions/00D0888P.pdf, consulté le 12 octobre 2018).

19. Enfin, le jugement rendu par la Cour d'appel du deuxième circuit en 2014 que j'ai évoqué mercredi[30], que mon contradicteur a cherché à écarter en prétendant que «the question of whether Bank Markazi in fact had rights under the Treaty was completely unnecessary to the Court's decision»[31], alors même que la loi dont la Cour d'appel vérifiait la compatibilité avec les obligations issues du traité de 1955 ne vise *que* Bank Markazi, atteste lui aussi que personne, sauf le professeur Childress, ne s'étonne que Bank Markazi se voie reconnaître les droits posés par le traité au profit des «companies».

20. Monsieur le président, non sans hésitation, mon contradicteur a mis l'Iran au défi de dire si un ministère de la défense établi par la loi comme entité distincte de l'Etat serait une «company» au sens du traité.

21. Il a eu raison d'hésiter car sa question tombe «à plat». S'il y a bien un ministère auquel les Etats ne voudraient jamais confier la moindre indépendance, ne serait-ce que statutaire, c'est bien celui de la défense. Trop dangereux ! Du reste, à supposer même qu'un ministère de la défense de l'une des parties au traité se constitue en «company», il ne saurait s'en servir pour pénétrer indûment le territoire de l'autre partie en s'appuyant sur les droits reconnus aux «companies», puisque le traité prévoit expressément que — je cite le paragraphe 1 de l'article III :

> «Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized.»[32]

22. Ceci précisé, si les fonctions normalement assurées par le ministère de la défense d'une partie étaient confiées à une «company» créée conformément à son droit interne, c'est-à-dire comme une personne juridique autonome, avec un capital, des biens dont elle serait propriétaire, la capacité de conclure ses propres contrats, et d'agir en justice en son propre nom, pourquoi ne serait-elle pas titulaire des droits reconnus aux «companies» dans le traité, alors même qu'elle répondrait parfaitement à sa définition ? Bien sûr, ce qui est juste et équitable en matière de traitement d'une telle «company» pourrait éventuellement être différent de ce qui est juste et

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

[31] CR 2018/32, p. 35, par. 10 (Childress).

[32] Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, signed at Tehran on 15 August 1955, Art. III (1), *UNTS*, Vol. 284, p. 93 (MI, annexe 1).

équitable pour ce qui concerne une entreprise privée, mais ceci ne concerne le traitement dû à chacune des «companies», pas à la question de savoir si la «company» exerçant des fonctions de ministère de la défense répond à la définition de «company».

23. Je conclus sur le faux paradoxe inventé par les Etats-Unis. Bank Markazi est une «company» au sens du traité. C'est comme telle qu'elle s'est présentée durant les différentes procédures devant les juridictions internes, aux Etats-Unis, comme défenderesse dans l'affaire *Peterson*[33]. C'est également en tant que «stock company» ~~***société par actions***~~ que Bank Markazi s'est présentée devant la justice américaine bien avant l'affaire *Peterson,* comme en atteste un questionnaire rempli par Bank Markazi en 2004[34].

24. A ce titre, elle bénéficie, en application du traité, de ce que le droit interne américain offrait déjà, indépendamment du traité, et offre encore, du moins en principe, aux personnes morales étrangères constituées conformément au droit étranger, qu'elles soient dotées d'immunités ou non. Je l'ai indiqué mercredi, et le professeur Childress ne l'a pas contesté. Il semble donc établi que le droit des Etats-Unis consacre effectivement la reconnaissance de la personnalité juridique des entités publiques étrangères[35], y compris des banques centrales[36], ce qui leur permet en principe de faire valoir les droits qu'elles tiennent des contrats qu'elles concluent, ainsi que la protection de leur propriété, et consacrent également leur immunité le cas échéant. Au demeurant, si tel n'était pas le cas, les Etats-Unis n'auraient pas eu tant de mal à mettre au point la machinerie légale,

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[33] See US Court of Appeal, District of New York, Brief and Special Appendix for Defendant Appellant Bank Markazi, The Central Bank of Iran, *Peterson* v. *Bank Markazi*, 14 novembre 2013 and US District Court of New York, Petition for a Writ of Mandamus, 23 octobre 2013.

[34] Anti-Money Laundering and Anti-Terrorist Financing Questionnaire of Bank Markazi to Clearstream, 8 June 2004 (POUS, Relevant Documents Unsealed in the Peterson Proceedings Provided by the United States of America, Document A9).

[35] *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626 (1983) : (Due respect for the actions taken by foreign sovereigns and for principles of comity between nations … leads us to conclude … that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.)

[36] *Thai Lao Lignite (Thailand) Co.* v. *Gov't of the* Lao *People's Democratic Republic*, 924 F. Supp. 2d 508, 522 (S.D.N.Y. 2013) ("The Lao Bank has provided ample statutory evidence to trigger a presumption of independence from the Lao Government, which Petitioners can only overcome by proving either (1) that the Lao Bank is "so extensively controlled" by the Lao Government that a principal/agent relationship is created (an alter ego theory), or (2) that recognizing the Lao Bank as a separate entity "would work fraud or injustice." *Id.* at 629, 103 S.Ct. 2591. Petitioners have not yet made such a showing, so the Court assumes that the Lao Bank is a separate entity independently entitled to sovereign immunity protections under the FSIA.")

réglementaire et judiciaire décrite par Mme Philippa Webb mercredi[37], pour parvenir à traiter Bank Markazi de la manière que j'ai rappelée, également mercredi[38].

IV. LA QUESTION POSÉE À LA COUR

25. Monsieur le président, Madame et Monsieur les juges, ma dernière remarque concerne la question qui se pose à vous. A cet égard, le long développement de mon contradicteur démontrant que Bank Markazi est la banque centrale de l'Iran a été inutile puisque cette question n'est pas en débat[39], mais il y a tout de même un point que je veux retirer de son exposé. Il vous demande de vous prononcer sur une unique question juridique, qui est de savoir si la notion de «company», dans le traité «include(s) entities such as traditional central banks exercising sovereign functions»[40].

26. Madame et Messieurs les juges, ce n'est pas du tout ainsi que la question se pose.

27. Sur le plan des faits, l'Iran affirme — et je ne crois pas que nos contradicteurs se soient opposés à cette affirmation — que Bank Markazi est une entité créée conformément à la loi iranienne, disposant d'une personnalité juridique distincte de celle de l'Etat, d'un capital, de locaux, et d'un personnel qui lui sont propres. Ses activités peuvent générer des profits sur lesquels elle paie des taxes à l'Etat. Elle poursuit et défend en justice en son propre nom. Devant la justice américaine, elle se présente comme une «company», notamment en tant que défenderesse dans l'affaire *Peterson*[41]. C'est également en tant que «company» que la Bank Markazi s'est présentée bien avant l'affaire *Peterson*, comme en atteste le questionnaire que j'ai ***évoqué*** à l'instant[42].

28. Quant à la question juridique, elle est de savoir si la définition de la notion de «companies», telle qu'elle est expressément prévue dans le traité, exclut une entité comme Bank Markazi, qui répond à cette définition, pour une raison liée à la fonction qui lui est assignée par ses

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[37] CR 2018/30, p. 46-55, par. 12-33 (Webb).

[38] CR 2018/30, p. 56-57, par. 4-6 (Thouvenin).

[39] CR 2018/32, p. 43-44, par. 38-41 (Childress).

[40] CR 2018/32, p. 43-44, par. 38-41 (Childress).

[41] See US Court of Appeal, District of New York, Brief and Special Appendix for Defendant Appellant Bank Markazi, The Central Bank of Iran, *Peterson* v. *Bank Markazi*, 14 novembre 2013, and US District Court of New York, Petition for a Writ of Mandamus, 23 octobre 2013.

[42] Anti-Money Laundering and Anti-Terrorist Financing Questionnaire of Bank Markazi to Clearstream, 8 June 2004 (POUS, Relevant Documents Unsealed in the Peterson Proceedings Provided by the United States of America, Document A9).

statuts, et ce, alors même que *rien* dans le texte du traité, lu à la lumière de son contexte et de son objet et de son but, ne le suggère.

29. La réponse à cette question, c'est la position de l'Iran, est négative.

30. Monsieur le président, Madame et Messieurs de la Cour, ceci conclut mon bref propos, et je vous prie de bien vouloir appeler M[e] Wordsworth à la barre.

Le PRESIDENT : Je remercie le professeur Thouvenin. J'invite M. Wordsworth à prendre la parole. Vous avez la parole, Monsieur.

Mr. WORDSWORTH:

PART II

THE US JURISDICTIONAL OBJECTION WITH RESPECT TO (I) ARTICLE XX (1) OF THE TREATY AND (II) THE SO-CALLED "SOVEREIGN IMMUNITY-RELATED CLAIMS OF IRAN"

1. Mr. President, Members of the Court, I will be responding to the points made yesterday by Professor Boisson de Chazournes on the US objection to what it calls the sovereign immunity-related claims of Iran, and then to the points by Ms Grosh on Article XX (1) of the Treaty.

I. RESPONSIVE POINTS ON THE SO-CALLED SOVEREIGN IMMUNITY-RELATED CLAIMS

2. As it did in opening, the United States has chosen again to characterize Iran as seeking to incorporate into the Treaty of Amity sovereign immunity protections that are nowhere to be found in the Treaty[43]. However, Iran's case is that the issue of the US denial of customary international law immunities arises in four separate ways, only one of which concerns incorporation. These are:

(a) First, through application of the Treaty standards, as part of the enquiry, for example, as to whether the US conduct has impeded freedom of access to the US courts, or freedom of commerce, or has been arbitrary or expropriatory;

[43] CR 2018/32, p. 45, para. 3, p. 48, para. 11, p. 50, para. 20, p. 51, para. 22, p. 52, para. 26, p. 53, para. 30 (Boisson de Chazournes).

(b) Second, through a standard exercise in interpretation and application of what is meant by the terms "freedom of access" and "rights";

(c) Third, through the express *renvoi* in Article IV (2) to international law;

(d) And finally, through an *a contrario* interpretation of Article XI (4).

3. As to the first of these, take as an example the freedom of access provision at Article III (2) of the Treaty [on screen]. Under this provision, an Iranian company is entitled to freedom of access to the US courts both in defence and pursuit of its rights, and, as explained by Dr. Webb on Wednesday, in the usual course, an Iranian State-owned company would have a US law right to immunity which could be asserted as a defence[44]. Iranian State-owned companies, including Bank Markazi, no longer have freedom of access to the US courts to assert that US law defence. In order to test whether the removal of that freedom of access was lawful pursuant to the international law protection in Article III (2), this Court will naturally wish to and have to consider whether the targeted US withdrawal of the right to immunity that existed as a matter of its domestic law was consistent with the immunity that exists as a matter of customary international law [off screen].

4. The same point applies so far as concerns testing whether the targeted withdrawal of the entitlement to invoke US law on immunity was one aspect of conduct which, taken together with other factors, is correctly seen as arbitrary or discriminatory or expropriatory, i.e. in breach of Articles IV (1) or IV (2) of the Treaty, and likewise so far as concerns breach of Article X (1) of the Treaty.

5. As we explained on Wednesday[45], this is just one aspect of the Court exercising the jurisdiction that has been conferred on it by the Treaty Parties in determining whether there has been a breach in terms of an impermissible restriction on freedom of access or arbitrariness or one of the other Treaty protections that Iran relies on. The point was summarized as follows by the tribunal in the *Chagos Arbitration* [on screen]:

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[44] CR 2018/30, p. 45, paras. 6-7 (Webb); CR 2018/31, p. 12, para. 8 (Wordsworth).

[45] E.g. CR 2018/31, pp. 18-18, paras. 24-27 (Wordsworth).

> "As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it (see *Certain German Interests in Polish Upper Silesia, Preliminary Objections, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6,* p. 18)."[46]

6. You see there that the reference the *Chagos Arbitration* tribunal is making is to the *Certain German Interests* case, and it was on the basis of that case that I made this point in our first round. And yesterday there was no comeback on that at all, and the United States merely elected once again to blank Iran's position on the different ways that the Court can look at the denial of customary international law immunities in this case[47]. I should add that what follows in the *Chagos Arbitration* reasoning on "real issue in the case" and "object of the claim" is not relevant, as the United States has made no objection by reference to the *Nuclear Tests* type objection on the purpose of a claim being to bring a disguised and quite separate non-treaty dispute before the Court [off screen].

7. To conclude on this, the first of the four ways that the US denial of immunity comes within the Treaty, in the *Libya/Malta* case, the Court stated [on screen]:

> "Since the jurisdiction of the Court derives from the Special Agreement between the Parties, the definition of the task so conferred upon it is primarily a matter of ascertainment of the intention of the Parties by interpretation of the Special Agreement. The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent."[48]

8. That statement was of course made in the context of a special agreement, but it is plainly of general application, and applies with equal force to the Court's discharge of its mandate under a compromissory clause such as Article XXI (2) of the 1955 Treaty. This is all that Iran seeks [off screen].

9. I move to the second of the four different ways, Article III (2) [on screen] establishes freedom of access to defend or assert rights, and one of the rights that a State-owned company may have is a right under international law to immunity from enforcement. That might raise the question

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[46] See *Chagos Arbitration*, Award, para. 219. Available at files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf. See also e.g. *AES Summit Generation Limited AES-Tisza Erömü KFT* v. *The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 Sept. 2010, para. 6.7.9. See also *White Industries Australia Limited* v. *The Republic of India*, UNCITRAL, Final Award, para. 10.4.11, including Arbitrator Brower's views expressed at No. 69.

[47] Cf. CR 2018/31, p. 18, para. 25 and fn. 32 (Wordsworth).

[48] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 23, para. 19.

of whether Article III (2) should be interpreted as restricted to domestic law rights, but there is no such restriction in the language of this provision, and likewise no restriction of the protection by reference to "commercial activities", such as there is of course in Article II (1), a point that we made on various occasions, in fact, on Wednesday, and as to which there has been no comeback at all. It also appears to be accepted by the United States that an Iranian company would have freedom to assert any rights that it had under the Treaty in domestic proceedings. That was the clear implication of the argument that you heard yesterday by reference to the failure of Bank Markazi to rely on a right to immunity under the Treaty in US domestic proceedings and[49], for example, in the *Weinstein* case Bank Melli asserted its right to separate legal personality under the Treaty[50], albeit unsuccessfully. So it appears that it is not being said here that the term "rights" is limited to domestic law rights.

10. And the term "rights" in this treaty context, just as the term "freedom of access", cannot be interpreted as if it existed in a vacuum [off screen]. The legal position was well expressed by the ILC, as quoted with approval by the Annulment Committee in the *Tulip Real Estate* v. *Turkey* case, and the relevant passage is now on the screen [on screen]:

> "It is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply the law that goes 'beyond' the four corners of the constituting instrument or that when arbitral bodies deliberate the award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute or the relevant *compromis*. But if, . . ., all international law exists in systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment. This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relationship to its normative environment — that is to say "other" international law. This is the principle of systemic integration to which article 31 (3) *(c)* VCLT gives expression."[51]

11. You can also see on the screen the views expressed by Judge Simma and Theodore Kill. Iran merely seeks that the Court interpret and apply the terms "freedom of access" and "rights" not by reference to some restriction to commercial activities that is not hinted at in the actual text but,

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[49] CR 2018/29, pp. 40-41, paras. 44-45; CR 2018/32, p. 53, para. 29 (Boisson de Chazournes).

[50] *Weinstein et al.* v. *Islamic Republic of Iran et al.*, US Court of Appeals, Second Circuit, 15 June 2010, 609 F.3d 43 (2nd Cir. 2010); MI, Ann. 47.

[51] *Tulip Real Estate and Development Netherlands B.V.* v. *Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 Dec. 2015, para. 89, quoting ILC, Report of a study group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN doc. A/CN.4/L.682, para. 423 (13 Apr. 2006); emphasis in the original.

rather, taking into account the unqualified language used and the rights that are relevant in international law in the context of access to domestic courts, including the right to assert immunity[52]. [Off screen]

12. I move on to the third of the different ways in which the provisions of the Treaty enable the Court to consider the US denial of customary international law immunities in this case, and this is through incorporation — that is through the *renvoi* in Article IV (2) which the Court will recall [on screen, highlighted]. There is a debate as to whether this is a reference only to that part of customary international law that addresses the minimum standard of treatment, and you have the Parties' competing positions on that, including our position that you cannot just read across what the Chamber said in *ELSI* because the wording of the treaty provision then before it was different. Iran was criticized for making the point that the time for establishing the precise contours of the minimum standard of treatment would anyway be at the merits phase[53], but it was not explained why Iran's proposition was in any way incorrect.

13. The fourth and final way in which Iran says a denial of immunity may be considered is by reference to Article XI (4) of the Treaty [on screen, highlighted]. The only point I wish to add here is to note that it was being argued yesterday that this provision is not concerned with restriction on access to courts[54]. The Court need only read Article XI (4) to see that is not a very good argument.

14. I make six further responsive points on the sovereign immunity issue.

15. First, you heard time and again yesterday that Iran has failed to refer you to relevant practice or commentary[55]. There was an interesting attempt at dealing with the rather obvious point that this is wholly unsurprising given the exceptional nature of the US measures in the present case, with Ms Grosh saying that disputes relating to sovereign immunity or central banks arise all the time between States without bilateral commercial treaties being used to resolve such disputes[56].

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[52] E.g. *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, pp. 136 and 140, paras. 82 and 93.

[53] CR 2018/32, pp. 50-51, para. 21 (Boisson de Chazournes).

[54] CR 2018/32, p. 49, para. 17 (Boisson de Chazournes).

[55] E.g. CR 2018/32, p. 27, para. 25 (Grosh); p. 56, para. 6 (Boisson de Chazournes).

[56] E.g. CR 2018/32, p. 27, para. 25 (Grosh).

(a) And, of course, it would be entirely correct to say that such disputes *are* ordinarily resolved by the domestic courts. But in the present case the United States has blocked off that usual avenue of recourse by changing the law to deny any immunity defence to Iran and Iranian State-owned companies such as Bank Markazi, and of course it has at the same time blocked off a series of other important procedural rights of which Iran also complains in its pleadings[57].

(b) It is only because of the exceptional state of affairs created by the United States[58] that Iran has had to have recourse to the Treaty of Amity, and Iran would be more than happy if the United States were willing to re-establish the usual methods of resolving any immunity issues.

16. Second, Professor Boisson de Chazournes affected surprise that Iran did not spend more time on Wednesday on the Court's recent decision in *Equatorial Guinea* v. *France*, although she did appear to accept that Article 4 of the Palermo Convention is quite differently worded to all the provisions at issue in this case[59], as indeed it is. [Round 1 slide back on screen] Article 4 of the Palermo Convention is a generalized requirement on the Convention parties to carry out their other obligations "in a manner consistent with the principles of sovereign equality".

(a) The Court's conclusion that this did not incorporate protections on immunity simply has no bearing on Iran's case that the specific, unqualified and free-standing obligation under Article III (2) to accord freedom of access to assert rights enables the Court to consider the US withdrawal of domestic law rights to immunity, as well as the existence of such rights at customary international law.

(b) It appeared also to be the US position that the correct test to be applied is that of "intrinsic linkage", as derived from paragraph 24 of the dissenting opinion of Vice-President Xue, and Judges Sebutinde, Robinson and Judge *ad hoc* Kateka[60]. It was not explained, however, why there is no "intrinsic linkage" between an obligation to accord freedom of access to domestic courts to defend or assert rights when immunity is not merely linked to, but *is*, one aspect of

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[57] MI, Chap. 2 and e.g. paras. 5.15-5.18.

[58] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 138, paras. 88-89.

[59] CR 2018/32, p. 48, para. 12 (Boisson de Chazournes).

[60] CR 2018/32, p. 48, para. 12 (Boisson de Chazournes).

access to domestic courts, and *is* a right that exists as a matter of US law in the usual course, as well as under international law.

17. Third point: Professor Boisson de Chazournes referred yesterday to the separate opinion of Judge Higgins in the *Oil Platforms* case, where Judge Higgins is said to have noted that provisions such as Articles III (2), IV (1) and IV (2) were "legal terms of art well known in the field of overseas investment protection"[61]. [You can see that towards the bottom of the passage on your screens] In fact, as you can also see, Judge Higgins was only considering Article IV (1), and she said nothing at all about Articles III (2) and IV (2), which is unsurprising, given that those provisions were not then at issue in the case before the Court and, even as to Article IV (1), there is nothing in what Judge Higgins says there to suggest that one element of arbitrary or discriminatory conduct could not be the targeted withdrawal of a domestic law immunity from enforcement.

18. Judge Higgins also stated in the very same paragraph, as you can see at the top of paragraph 39 [highlighted]: "I agree that the use of force is not *per se* 'outside of' the 1955 Treaty", which is notably at odds with the United States' current position that this treaty is in essence nothing more than a bilateral investment treaty; and she continued: "the issue rather is whether the use of force in issue could in principle cause a violation of the Treaty". As one can see from her subsequent analysis, in particular at paragraphs 50 and 51, her view was that the use of force could be a violation. So it is perplexing that the United States is referring to this separate opinion. If the paradigm example of a sovereign act — the use of force — can be a breach of the Treaty of Amity, on what tenable basis can it be said that the executive and legislative acts at issue in this case cannot be?

19. I move on to my fourth point. It was said again yesterday that Article III (2) is concerned only with protecting nationals and companies engaged in commercial and investment activities, the support for this proposition being a statement that, at the time, it had been important to eliminate obstacles based on nationality[62]. It is rather unclear how that would assist the United States given the specifically targeted nature of the legislation at issue in this case, but I anyway note that the

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

[62] CR 2018/32, p. 48, para. 12 (Boisson de Chazournes).

support for the statement is nothing more than a 1985 domestic court case, *Blanco* v. *USA*[63], concerning a 1928 Treaty between the United States and Honduras containing a much shorter and differently worded provision on freedom of access. So one does wonder which provision of Articles 31 and 32 of the Vienna Convention that source is meant to fit within.

20. My fifth point: the only new argument on Article X (1) was the suggestion that Iran's interpretation was difficult, if not impossible, as it would render superfluous the other provisions in the Treaty aimed at facilitating commerce in a more specific and limited way[64].

(a) Unfortunately, it was not made clear what provisions Professor Boisson de Chazournes had in mind, and either the United States thinks that pretty much everything in an FCN treaty concerns commerce or it is seeking to conflate (i) the protections in the Treaty that accord to nationals and companies freedom of access to courts and protections of property from arbitrary and expropriatory conduct and the like with (ii) the quite separate protection accorded with respect to commerce under Article X (1), which moreover is to the benefit of the contracting parties and not just nationals and companies — a point that matters, as the Court will recall, as Article X (1) would protect interference with commerce concerning Bank Markazi, even if we were somehow wrong as to Bank Markazi being a protected company under *other* provisions. There was, I note, no comeback to that point yesterday[65].

(b) There are certain limited references to commerce in Articles VII (3), VIII (4) and XI of the Treaty, but these in no sense render Article X (1) superfluous, and no doubt if they did, the Court would have considered this, in its analysis in Article X (1) in the *Oil Platforms* case, to which we, of course, refer this Court.

21. Indeed, to borrow from the wording of paragraph 51 of the Court's Judgment in *Oil Platforms* on Article X (1) [on screen], the Court in this case is not able to make any determinations now, but the attachment and seizure of all the assets of Bank Markazi that come within the purview of US jurisdiction — as well as the mounting tens of billions US-dollar judgment debts that US judgment creditors are seeking to enforce against Iran and all Iranian

[63] US judges' folders, tab 33.

[64] CR 2018/32, p. 52, para. 25 (Boisson de Chazournes).

[65] Cf. CR 2018/31, p. 22, para. 37 (Wordsworth).

State-owned companies — are capable of having an effect upon commerce and, consequently, of having an adverse effect upon the freedom of commerce as guaranteed by Article X (1) of the Treaty of 1955. It follows that its lawfulness can be evaluated in relation to that paragraph.

22. Sixth point: the United States has once again sought to make something of the fact that Iran or Iranian companies have not sought to invoke a right to sovereign immunity under the Treaty of Amity in past US domestic cases[66]. It was also said that Iran was wrong to say that it had not been a party in the *Peterson* case.

23. There are a number of confusions here. First, Iran was not a party to the *Peterson* litigation concerning the enforcement of the prior judgments against Bank Markazi, that is, the litigation that the United States says this case is all about. What Dr. Webb said on Wednesday was entirely correct[67]. Second, where a party appears before a domestic court with domestic legislation on immunity such as the FSIA, the natural and obvious thing to do is to invoke that legislation. Third, the United States simply does not wish to understand what this current case is about, and why it is quite different to the case that Bank Markazi may have pleaded in *Peterson*. This is a Treaty case about denial of freedom of access, about arbitrariness, about discrimination. It is not the carbon copy of the *Peterson* litigation that ***~~Iran~~ the United States*** would have this Court believe.

II. RESPONSIVE POINTS ON ARTICLE XX (1) OF THE TREATY

24. I move now to Article XX (1), as to which Iran has four short points to make.

25. First, on Monday, the United States — you will recall — asked you to revisit your interpretation of Article XX (1) in your Order of last week in *Alleged Violations*[68]. Yesterday, the United States spread its net rather wider, saying that the Court's findings in the *Nicaragua* case and in *Oil Platforms* require "fresh attention"[69] and must be approached with "caution"[70]. It is notable that the United States is accepting that its current arguments are inconsistent with the Court's past

[66] CR 2018/32, p. 52, para. 25 (Boisson de Chazournes).

[67] CR 2018/30, p. 53, para. 33 *(a)* (Webb).

[68] CR 2018/32, p. 30, para. 39 (Grosh).

[69] CR 2018/32, p. 16, para. 14 (Bethlehem).

[70] CR 2018/32, p. 31, para. 44 (Grosh).

judgments, but there is an inescapable legal reality that the Court has considered the proper interpretation of the text of Article XX (1) on three separate occasions over the last 30 years — in 1986, in 1996 and on 3 October of this year — and the United States has not this week come up with some magic new point that somehow unsettles all that has gone before.

26. Second, as to what was said yesterday, the big argument appeared to be that the positioning of Article XX before Article XXI was not in any way significant, as Iran had suggested[71], in one rather minor interpretative point, in particular because it was said Iran was wrong to refer to the India-Singapore Comprehensive Economic Agreement because, there, the exclusion clause precedes the dispute-settlement clause, just as with the Treaty of Amity[72]. But Ms Grosh did not engage with the real point — that the relevant provision of the India-Singapore Agreement, and that is Article 6.12 (4) [on screen], expressly excludes the specified matters from the scope of the dispute-settlement clause. In those circumstances, the location of that provision is an irrelevance. [Off screen] Article XX (1) contains no equivalent language and it is for that reason that its location prior to the compromissory clause takes on some significance. And, of course, the Parties could have included any jurisdictional exceptions in Article XXI or included a cross-reference to Article XX (1) in that provision, but they did not do so[73]. The United States simply has had no answer to that very obvious interpretative point.

27. Third, Ms Grosh challenged the significance of the various statements contained in the extract from Professor Vandevelde's treatise that Mr. Aughey took you to on Wednesday[74]. Iran merely asks the Court to read the entire extract carefully in due course, including the record of Mr. Wilson's statement that [on screen]:

> "In the final analysis, neither party to a treaty containing an unconditional compromissory clause must accept as final the other party's interpretation or application of the treaty. Interpretation and application of the establishment (as *of all*) provisions of the treaties become, as of right, a matter for international judges."[75] [Off screen]

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[71] CR 2018/32, p. 23, para. 31 (Grosh).

[72] CR 2018/32, p. 23, para. 32 (Grosh).

[73] CR 2018/31, p. 32, para. 30 (Aughey).

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

[75] K. Vandevelde, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017), p. 531, quoting R. Wilson, *United States Commercial Treaties and International Law* (New Orleans, LA: Hauser Press, 1960), p. 25; emphasis added.

28. Finally, Ms Grosh stated that "Iran did not engage at all on the substance of whether Executive Order 13599 was covered by Article XX, paragraphs 1 *(c)* and *(d)*"[76]. Yet, as Mr. Aughey explained at the outset of his submissions[77], Iran's claims concern the US acts permitting default liability judgments against Iran to be enforced against the property of Bank Markazi, which is blocked pursuant to Executive Order 13599.

29. The key US act that Iran challenges in this respect is Section 502 of the Iran Threat Reduction Act, and that legislative provision cannot just be elided with the Executive Order 13599. The United States has made no attempt to show that Section 502 is a measure regulating arms production or trafficking or terrorism financing, and so there was nothing for Iran to respond to on that point on Wednesday.

30. In any event, the appropriate time for the Court to assess these matters will be at the merits stage. But it is worth noting that the United States did not dispute the fact that the purpose of permitting default liability judgments against Iran to be enforced against the property of Bank Markazi was to facilitate recovery of compensation for judgment creditors in the cases brought against Iran[78]. And that, of course, is not one of the subcategories to which the Court has been referred under Article XX (1).

31. Mr. President, Members of the Court, I thank you for your attention and I ask you, Mr. President, to call upon the honourable Agent of Iran.

The PRESIDENT: I thank Mr. Wordsworth and I now give the floor to Mr. Mohebi, Agent of the Islamic Republic of Iran. You have the floor, Sir.

Mr. MOHEBI: Bismilla al-Rahman al-Rahim.

CONCLUSIONS

1. Mr. President, honourable Members of the Court, I shall now present the Court with Iran's concluding remarks and final submissions.

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[76] CR 2018/32, p. 27, para. 28 (Grosh).

[77] CR 2018/31, p. 26, para. 2 (Aughey).

[78] CR 2018/30, pp. 13-14, para. 14 (Webb).

2. You will have noted that Professor Alain Pellet, along with Mr. Aughey, Mr. Vidal and Dr. Webb, has not taken the floor during this second round. They considered that the United States' second round of pleadings, in particular on the admissibility of Iran's claim, did not call for further development on their part and we agreed that there was *no* need to waste the time of the Court in this respect. We, of course, fully maintain all the arguments we have presented during our first round.

3. Mr. President, Members of the Court, I shall start by noting that the United States' allegations that Iran's claim before the Court is an abuse of right or an abuse of process, is merely part of the US administration's wider strategy towards the judicial functions of the Court as the arbiter of inter-State disputes. The US National Security Adviser slammed the principal judicial organ of the United Nations as "politicized and ineffective" and announced that the United States would review all international agreements that could expose it to binding decisions by the International Court of Justice. Not surprisingly, Mr. President, the United States confirmed its decision to terminate the Treaty of Amity on the very same day, and immediately after the Court delivered its Order in the case concerning *Alleged Violations*. ***Mr. President, Members of the Court, t***his approach simply undermines the very foundations of the rule of law and the Court's role as guardian of international peace and security through peaceful settlement of disputes.

4. Yesterday, the United States expressed its grievances with the way that Iran has behaved in these proceedings. It alleged that we have not approached this case in good faith; we refused to discuss the United States' accusations, which were supposedly "the reason for the US measures that Iran challenges in this case". But Iran is entitled, under Article XXI, paragraph 2, of the Treaty of Amity to bring to the Court any matter relating to the interpretation and application of the Treaty of Amity. It is not for the United States to decide how Iran is to present its case or if Iran is to answer to each and every irrelevant argument of the United States, especially at the preliminary objections phase and especially when it comes to accusations that clearly fall beyond the scope of the Treaty of Amity. It is also, of course, up to the United States to present its case as it seems fit — but it cannot use the possibility to introduce preliminary objections as a substitute to a defence on the merits.

5. The United States would like to enter, at this stage, into a full-length discussion about accusations that cover the last 40 years and include numerous countries and events, and which might, at best, constitute a defence on the merits if the United States were to raise an argument relying on an alleged right to adopt the disputed measures under Article XX (1) of the Treaty of Amity. We think that this is by no means justified but, in any case, this has nothing to do with the preliminary objections before you.

6. The position of the United States is in fact paradoxical. If the United States were convinced that the "bad acts" that it attributes to Iran are contrary to the provisions of the Treaty of Amity and requires Iran's claim, under this Treaty, to be dismissed, it could have brought a case before this Court. But it never did. Yet, the United States considers that the Court nonetheless has jurisdiction to consider them at a preliminary phase.

7. This position is so absurd that it hides another agenda of the United States. Unable to justify why claims regarding violations of specific treaty provisions would not fall within the ambit of the compromissory clause, the United States has decided to use this dispute as yet another means to convey their aggressive rhetoric against Iran. They knew that Iran would not fall for their attempt to divert the subject-matter of this hearing and that they would therefore be free to bring any "fact", however baseless, to the attention of this Court.

8. This, Mr. President, honourable Members of the Court, is in fact a misuse of the procedural right to raise preliminary objections. The only question that the Court has to decide — and my country is confident that the Court *will* perform its duty impartially and fairly, as usual — is whether it has jurisdiction *to hear* the **c**laims of Iran. Since it is not contested that the Treaty was in force at the time of the filing of the Application of Iran, then the Court's duty is — and I shall quote the Judgment on preliminary objections in the *Oil Platforms* case — "ascertain whether the violations of the Treaty of Amity of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty"[79].

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

9. These violations have been set out in Iran's Application and Memorial. They concern the passing and implementation by different branches of the US Government of measures targeting Iran, its nationals and companies. These acts interfered with the freedom of commerce between our two countries and, notably, deprived Iranian companies of their separate juridical personality, of their assets, of their right to access the US courts and, for the Iranian Central Bank, in particular, of its right to defend sovereign immunities. Altogether, they are in plain contravention of Articles III (1), III (2), IV (1), IV (2), V (1), VII (1), X (1) and XI (4) of the Treaty of Amity.

10. The only question which your Court has to answer at this stage is if this dispute "is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2"[80]. The question is, Mr. President, Members of the Court, *not* whether the United States' alleged justification of its disputed acts are well founded; it is *not* whether the United States can invoke in response to Iran's claim the provision of Article XX, paragraph 1; and it is *not* how the Court should apply the provisions of the Treaty of Amity to the facts. Iran is *not* afraid to answer any of these points, both from a factual and a legal point of view. But none of these issues are a matter for a preliminary phase and they should therefore be rejected in their entirety as a bar to the Court's jurisdiction.

11. This nearly closes my remarks, Mr. President. On behalf of my Government, I shall only respond to one of the US Agent's closing observations. It is undisputed that terrorism, however~~,~~ undefinable yet in international law, is an international problem that involves and will involve lawful decisions and actions of all countries to deter it to which Iran has contributed affirmatively during the time. Suffice it to refer you to the WAVE (World Against Violence and Extremism) resolution of the General Assembly of the United Nations — adopted on President Rouhani's suggestion of September 2013 — and also to the reports that Iran has filed with the Security Council in compliance with resolution 1373 dated 2001. On Monday, at the very time that the United States were repeating, *ad nauseam*, its accusations against Iran regarding support for terrorism, the Iranian Parliament has voted for Iran to become a party to the United Nations

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

Convention for the Suppression of the Financing of Terrorism in addition to the laws that it had adopted in the past.

12. I will now read out Iran's final submissions.

The Government of the Islamic Republic of Iran requests that the Court adjudge and declare:

(a) that the preliminary objections submitted by the United States are rejected in their entireties, and

(b) that it has jurisdiction to hear the claims in the Application by the Islamic Republic of Iran dated 14 June 2016 and proceed to hear those claims.

Mr. President, honourable Members of the Court, on behalf of the Government of the Islamic Republic of Iran and the people of Iran, I thank you for the careful attention you have devoted to this matter. I am also grateful to the Registrar, Mr. Couvreur, the interpreters and all of the other court staff for their dedicated work. This concludes the second round of Iran's oral submissions. Thank you very much.

The PRESIDENT: I thank the Agent of the Islamic Republic of Iran. The Court takes note of the final submissions which you have just read out on behalf of your Government.

This brings us to the end of the hearings on the preliminary objections raised by the United States in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*. I thank the representatives of the two Parties for the assistance they have given to the Court by their presentations in the course of these hearings. In accordance with practice, I would ask the Agents to remain at the Court's disposal.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment. As the Court has no other business before it today, the sitting is now closed.

The Court rose at 4.30 p.m.

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