IN THE NAME OF GOD

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
ALLEGED VIOLATIONS OF THE 1955 TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS

(ISLAMIC REPUBLIC OF IRAN V. UNITED STATES OF AMERICA)

OBSERVATIONS AND SUBMISSIONS

ON THE U.S. PRELIMINARY OBJECTIONS

SUBMITTED BY THE ISLAMIC REPUBLIC OF IRAN

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LIST OF ABBREVIATIONS AND ACRONYMS

B.Y.B.I.L.	British Yearbook of International Law
CAO.IRI	Civil Aviation Organization of Islamic Republic of Iran
CBI	Central Bank of Iran
C.F.R.	(U.S.) Code of Federal Regulations
CII	Central Insurance of Iran
CISADA	Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010
CRS	(U.S.) Congressional Research Service
C.U.P.	Cambridge University Press
EAR	Export Administration Regulations
E.O.	Executive Order
EU	European Union
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FMIs	Financial Market Infrastructures
GOI	Government of Iran
GDP	Gross Domestic Product
GTCI	Government Trading Corporation of Iran
IA	Iran Application
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
I.C.J.	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IEEPA	International Emergency Economic Powers Act
IFCA	Iran Freedom and Counter-Proliferation Act of 2012
IFSR	Iranian Financial Sanctions Regulations
I.L.C.	International Law Commission
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
IM	Iran Memorial
IMF	International Monetary Fund
INARA	Iran Nuclear Agreement Review Act of 2015
IOOC	Iranian Offshore Oil Company
IRISL	Islamic Republic of Iran Shipping Lines
ISA	Iran Sanctions Act of 1996
ITSR	Iranian Transactions and Sanctions Regulations
IUSCT	Iran – United States Claims Tribunal
JCPOA	Joint Comprehensive Plan of Action
MPEPIL	Max Planck Encyclopedia of Public International Law
NDAA …	National Defense Authorization Act for Fiscal Year …
NICO	Naftiran Intertrade Company
NIGC	National Iranian Gas Company
NIOC	National Iranian Oil Company
NITC	National Iranian Tanker Company
NPC	(Iran) National Petrochemical Company

OECD	Organisation for Economic Co-operation and Development
OFAC	Office of Foreign Assets Control
OHCHR	Office of the United Nations High Commissioner for Human Rights
OIETAI	Organization for Investment, Economic and Technical Assistance of Iran
OPEC	Organization of the Petroleum Exporting Countries
P&I	Protection and Indemnity
P.C.I.J.	Permanent Court of International Justice
PMO	(Iran) Ports and Maritime Organization
Pub. L.	Public Law
SDN	Specially Designated National
SLP	Statement of Licensing Policy
SRE	Significant Reduction Exemption
SWIFT	Society of Worldwide Interbank Financial Telecommunications
TRA	Iran Threat Reduction and Syria Human Rights Act of 2012
U.K.	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNCC	United Nations Compensation Commission
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
U.N. doc.	United Nations documents
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNRIAA	United Nations Reports of International Arbitral Awards
UNSC	United Nations Security Council
U.N.T.S.	United Nations Treaty Series
U.S.	United States
U.S.A.	United States of America
U.S.C.	United States Code
USD	United States dollar
U.S. PO	United States' Preliminary Objections
Y.I.L.C.	Yearbook of the International Law Commission

CHAPTER I.
INTRODUCTION

SECTION 1.
INTRODUCTORY OBSERVATIONS

1.1 In these Observations and Submissions, Iran responds to the United States' preliminary objections to the Court's jurisdiction and to the admissibility of Iran's claims.

1.2 The central objection of the United States is that "the true subject matter of this case is a dispute as to the application of the JCPOA, an instrument entirely distinct from the Treaty of Amity, with no relationship thereto".[1] This objection is flawed as a matter of legal principle.

1.3 First, as the Court has observed, "certain acts may fall within the ambit of more than one legal instrument and a dispute relating to those acts may relate to the 'interpretation or application' of more than one treaty or other instrument."[2] The fact that the JCPOA may form part of the factual backdrop to the case does not preclude the dispute falling within the ambit of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran ("the Treaty of Amity" or "the Treaty").

1.4 Second, as stated in Iran's Application and Memorial, this dispute concerns breaches of the provisions of the Treaty of Amity arising from the re-imposition by the United States of a comprehensive set of measures targeting Iran, Iranian companies and Iranian nationals.[3] It also encompasses the U.S. pre-announcement, with the aim of threatening those states, economic enterprises and other entities that wish to trade with

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1 U.S. Preliminary Objections, p. 7, para. 1.16.

2 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, p. 11, para. 38.

3 Iran's Application, p. 4, para. 1 and Iran's Memorial, p. 1, para. 1.2.

Iran and Iranian nationals and companies, of the intention to impose even tighter sanctions in the future. More specifically, this dispute concerns the interpretation and application of Articles IV(1), IV(2), V(1), VII(1), VIII(1), VIII(2), IX(2), IX(3) and X(1) of the Treaty.[4] However much the United States may wish to re-characterise the dispute so as make it appear to concern a different instrument, the Court is concerned only with the claim that Iran has actually brought – the claim under the Treaty of Amity.

1.5 The United States also raises an abuse of process argument, asserting that Iran's claims "would inescapably entangle this Court in sensitive multilateral diplomatic matters concerning that political instrument, contrary to the JCPOA participants' deliberate design".[5] But there is no reason for the Court to make any determination whatsoever concerning the JCPOA. The only question before the Court is whether the U.S. measures are compatible with the Treaty of Amity. Moreover, the United States has also failed to come anywhere near the high standard of "exceptional circumstances" that the Court has repeatedly said is required under international law for an abuse of process argument to succeed.[6]

1.6 Repeating arguments already made and rejected during the Provisional Measures phase of this case, the United States objects to the jurisdiction of the Court by invoking Article XX(1) of the Treaty of Amity. The Court has consistently held that this article provides a substantive defence on the merits and can only be addressed at that stage.[7] It shows little respect for the Court's pronouncements for the United States to raise the argument once again. The U.S. objections in relation to Article XX(1) are, moreover, not of an exclusively preliminary character, and cannot properly be determined on the basis of the evidence before the Court at this stage.

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4 Iran's Application, p. 4, para. 1 and Iran's Memorial, p. 11, para. 1.31.

5 U.S. Preliminary Objections, p. 7, para. 1.18.

6 *Immunities and Criminal Proceedings* (*Equatorial Guinea* v. *France*), *Preliminary Objections, Judgment of 6 June 2018*, p. 42, para. 150; *Certain Iranian Assets, (Islamic Republic of Iran v. United States), Preliminary Objections, Judgement of 13 February 2019*, p. 35, para. 114; *Jadhav case (India v Pakistan), Judgment of 17 July 2019,* p. 16, para. 49. See also *In the Matter of the South China Sea Arbitration (Republic of The Philippines v. People's Republic of China)*, *Award on Jurisdiction and Admissibility*, 29 October 2015, p. 43, para. 128, establishing a standard of "most blatant cases of abuse or harassment".

7 See Chapter V, Section 2 below.

1.7 Finally, the United States tries to introduce an artificial restriction into the scope of the Treaty of Amity by asserting that certain provisions "do not set out any obligations with respect to third countries or third country nationals and companies".[8] Yet no relevant restriction can be found in the Treaty. Where the United States elects to introduce a series of measures that specifically target the economic and commercial activities of Iran, its nationals or companies, then this inevitably engages the broad range of Iran's rights and protections, and of U.S. obligations, contained in the Treaty, which is centrally concerned with ensuring differing forms of fair and not less favourable treatment and freedoms with respect to such economic and commercial activities. It makes no difference whether the United States involves third State entities in the design of its attacks upon Iran, or not.

1.8 None of the objections raised by the United States in this effort to stop consideration of the U.S. measures by the Court is well-founded. The objections have delayed the prosecution of this case, and meanwhile Iran is suffering as the result of an extraordinary range of measures targeted at key areas of its economy and explicitly designed to inflict the maximum damage upon Iran, its people, and its economy, with a plain risk of irreparable prejudice that has already been identified by the Court when it considered Iran's request for provisional measures in October 2018. This risk of irreparable prejudice is ongoing, and increasing in both its subject and scope.

SECTION 2.
BRIEF PROCEDURAL HISTORY

1.9 On 16 July 2018, Iran filed its Application maintaining that the re-imposition by the United States of a comprehensive set of measures targeting Iran, Iranian nationals, and Iranian companies, and the pre-announcement of further aggravation of the measures, resulting from the U.S. Decision of 8 May 2018, constitute breaches of the Treaty of Amity. Iran invoked Article XXI(2) of the Treaty as the basis for the Court's jurisdiction.

[8] U.S. Preliminary Objections, p. 106, para. 7.26.

1.10 Also on 16 July 2018, Iran submitted to the Court a request for the indication of provisional measures. By a letter dated 23 July 2018, in accordance with Article 74, paragraph 4, of the Rules of Court, the President of the Court called the attention of the United States to the need to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effect.[9] The United States did not respond to the President's call.

1.11 A hearing on Iran's request for provisional measures was held from 27 to 30 August 2018. On 3 October 2018, the Court concluded that "*prima facie*, it has jurisdiction pursuant to Article XXI, paragraph 2, of the 1955 Treaty to deal with the case, to the extent that the dispute between the Parties relates to the 'interpretation or application' of the said Treaty."[10] It indicated the following provisional measures:[11]

> "(1) Unanimously,
>
> The United States of America, in accordance with its obligations under the 1955 Treaty of Amity, Economic Relations, and Consular Rights, shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of
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> (i) medicines and medical devices;
>
> (ii) foodstuffs and agricultural commodities; and
>
> (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation;
>
> (2) Unanimously,
>
> The United States of America shall ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to in point (1);
>
> (3) Unanimously,
>
> Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

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9 Letter from the I.C.J. to the United States (reference 150756), 23 July 2018 (IOS, Annex 8).

10 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, p. 14, para. 52.

11 *Ibid.*, p. 28, para. 102.

1.12 The United States responded by purporting to withdraw from the Treaty of Amity on 3 October 2018 in order to "limit[] its exposure to decisions by the International Court of Justice".[12] In a Diplomatic Note to the Ministry of Foreign Affairs of Iran, the U.S. State Department stated that "in accordance with Article XXIII, paragraph 3, of the Treaty and with its rights in light of the fundamental change in circumstances which has occurred with regard to those existing at the time of the conclusion of the Treaty, the United States hereby gives notice of the termination of the Treaty."[13] Iran rejected any suggestion that there had been a fundamental change in circumstances and stated that the "shift in the position of the United States" regarding its Treaty obligations "in no way prejudices the already acquired rights of the Iranian government, nationals and companies as well as the legal claims made against the United States in accordance with the said Treaty".[14] This point was developed by the Iranian Ministry of Foreign Affairs in a Note Verbale of 2 October 2019.[15]

1.13 Since the Court's Order, the United States has failed to implement the provisional measures ordered by the Court.[16] These breaches have been documented in Iran's correspondence with the Court[17] and have been the subject of concerns raised by the UN Special Rapporteur on the negative impact of unilateral coercive measures.[18] In response, the United States has been silent, or in outright denial, regarding its non-compliance with the Order. The United States has, for example, asserted that it is not obliged to take action to remove impediments to the free exportation of medicines and medical devices to Iran, or to ensure that payments and other transfers of funds are not subject to any restriction in so far as they relate to such goods.[19] It has purported

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12 Iran's Memorial, p. 8, para. 1.21; IM, Annex 336.

13 IM, Annex 57; see also IM, Annex 39.

14 IM, Annex 59.

15 Note Verbale No. 211543 from I.R. Iran to the Government of the United States, 2 October 2019 (IOS, Annex 13).

16 The United States merely notes in passing that it "respects the Court's provisional measures Order and takes this opportunity to re-affirm that it is acting in accordance with the Order": see U.S. Preliminary Objections, p. 5, para. 1.8.

17 See letters from I.R. Iran to the I.C.J. dated 19 February 2019 (IM, Annex 61) and 4 June 2019 (IOS, Annex 9).

18 Letter from the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, 5 November 2018 (IOS, Annex 2).

19 IM, Annex 43 (2 November 2018).

to present exceptions and authorizations that existed under U.S. sanctions laws *prior* to 8 May 2018 as steps taken in implementation of the Order.[20] The United States has also aggravated the situation by implementing a further tranche of measures against Iran on 5 November 2018. The U.S. Agent failed to reply to the letter of the Agent of Iran which asserted that "the United States is doing nothing by way of compliance with the Court's Order".[21]

1.14 On 19 June 2019, the Court informed Iran that it had "taken due note" of the Parties' responses to its request, made on 29 March 2019, for information on the implementation by the United States of the provisional measures. The Court considered "that any issues relating to the implementation of the provisional measures indicated by the Court may be addressed at a later junction, if the case proceeds to the merits" and reminded the Parties of the binding nature of the measures.[22] The Court's jurisdiction to decide, in due course, on the U.S. non-compliance with the provisional measures is undeniable.

1.15 On 6 August 2019, Iran wrote to the Court, noting that the ostensible 'implementation' of the Order by the United States "clearly does not meet Iran's critical humanitarian needs" and is in clear breach of the Court's Order.[23] Iran noted that the U.S. pre-announcement of the imposition of more sanctions and issuance of more threats against Iran is further aggravating the dispute.[24]

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20 Letter from the United States to the I.C.J., 4 June 2019, sent by the I.C.J. under letter no. 152273 of 5 June 2019 (IOS, Annex 10).

21 Letter from the Agent of the Islamic Republic of Iran to the Agent of the United States, 10 December 2018 (IM, Annex 60). The fact is that U.S. measures regarding humanitarian transactions are, despite the Court's Order requiring 'free exportation' of such goods making the export of humanitarian goods to Iran even harder. See, e.g., United Nations, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, UN Doc. A/74/165, 15 July 2019, paras. 40–44 (IOS, Annex 3); Laura Rosen, 'Sanctions experts say new US Treasury measure could inhibit humanitarian trade with Iran', *Al-Monitor*, 25 October 2019 (IOS, Annex 15); U.S. Department of the Treasury, *Financial Channels to Facilitate Humanitarian Trade with Iran and Related Due Diligence and Reporting Expectations*, 25 October 2019 (IOS, Annex 6); Maya Lester QC, "New US Iran humanitarian mechanism & FinCEN Iran designation", *www.europeansanctions.com*, 29 October 2019 (IOS, Annex 16).

22 Letter no. 152411 from the I.C.J. to the Parties, 19 June 2019 (IOS, Annex 11).

23 Letter from I.R. Iran to the I.C.J., 6 August 2019 (IOS, Annex 12).

24 Table appended to the letter from I.R. Iran to the I.C.J., 6 August 2019 (IOS, Annex 12).

1.16 Iran filed its Memorial on 24 May 2019, in which it set out the practical impacts and dire consequences of the U.S. measures on Iran, its nationals and its companies.

1.17 The United States filed its Preliminary Objections on 23 August 2019. The United States notes that it "reserves all rights to raise additional objections to Iran's claims."[25] Even if it were possible to raise additional objections, the Court's decision on all objections that have been raised by the United States will be binding and definitive and cannot be reopened at a later stage.[26]

SECTION 3.

THE U.S. PRELIMINARY OBJECTIONS AND OUTLINE OF IRAN'S ARGUMENTS

1.18 Although, as noted above,[27] the United States' central objection concerns the JCPOA, it has formulated in total: two preliminary objections to jurisdiction, one preliminary objection to admissibility, and two objections that it claims "warrant[] decision before the merits".[28]

1.19 Before examining each of these objections, Iran notes that the Parties appear to be in agreement on four important points:

a. the Treaty of Amity of 1955 remains in force between the Parties for the purposes of Iran's claims;

b. given the Parties' shared acceptance of the Treaty being in force for these claims, a dispute under Article XXI(2) exists between them, including as to the interpretation of every provision of the Treaty invoked by Iran;[29]

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25 U.S. Preliminary Objections, p. 7, fn 7.

26 *Mavrommatis Palestine Concessions, Judgment No. 2, August 30th, 1924, P.C.I.J., Series A, No. 2*, p. 16; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 98, para. 132.

27 See para. 1.2 above.

28 U.S. Preliminary Objections, p. 5, para. 1.9.

29 See, e.g., U.S. Preliminary Objections, Chapters 6 and pp. 106-117, paras. 7.25-7.65 addressing Articles XX(1), IV(1), IV(2), V(1), VII(1), VIII(1), VIII(2), IX(2), IX(3) and X(1). See also *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, p. 8, para. 29 ("The

c. the test for the existence of the Court's jurisdiction *ratione materiae* is as established in the Court's Judgment in *Oil Platforms*;[30] and

d. Article XX(1) of the Treaty does not constrain the Court's jurisdiction.[31]

1.20 The *first preliminary objection* of the United States, already referred to in Section 1 above, is that the dispute is one concerning the JCPOA, and not concerning the Treaty of Amity. This not only ignores the legal principle that certain acts may fall within the ambit of more than one instrument, but also mischaracterises the subject matter of the dispute as defined in Iran's Application and Memorial.

1.21 The United States accompanies its first jurisdictional objection with an *objection to admissibility*.[32] As it did in the Provisional Measures phase of this case, the United States is using a spurious "abuse of process" argument as an excuse to parade irrelevant allegations before the Court, aiming to create prejudice against Iran while also delaying the progress of the case; and in the meantime, the U.S. measures continue to inflict very serious, and increasing, damage on the Iranian economy and its people. The United States goes nowhere close to proving the standard of "exceptional circumstances" required to reject, on the ground of abuse of process, a claim where the Court's jurisdiction is based on valid and applicable title of jurisdiction, such as the compromissory clause in the Treaty of Amity.[33]

1.22 The United States advances *two further objections, based on Article XX(1)(b) and (d) of the Treaty of Amity*, despite purporting to accept that these exceptions provide a

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Court observes that, in the present case, the Parties do not contest that a dispute exists. They differ, however, on the question whether this dispute relates to the "interpretation or application" of the 1955 Treaty.").

30 See, e.g., U.S. Preliminary Objections, pp. 43-44, paras. 4.7, 4.9 and p. 49, para. 4.19.

31 U.S. Preliminary Objections, p. 8, para. 1.20 and p. 70, para. 6.6. The United States notes that it "respectfully disagrees" with the Court's decision in *Certain Iranian Assets* but it "is not pressing this point for purposes of these Preliminary Objections": U.S. Preliminary Objections, p. 70, para. 6.6, fn 220.

32 U.S. Preliminary Objections, p. 7, para. 1.18.

33 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, p. 35, para. 113; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, p. 42, para. 150.

"substantive defense on the merits" and do not go to the Court's jurisdiction.[34] This is a transparent attempt by the United States to relitigate an aspect of the argument it lost in the Preliminary Objections phase of the *Certain Iranian Assets* case.[35] As the Court has made clear, the objections based on Article XX(1)(c) and (d) in that case could only be addressed at the merits stage because they are not jurisdictional in nature and are not of an exclusively preliminary character.[36] The same reasoning applies to Article XX(1)(b).[37]

1.23 Finally, the United States makes a further *preliminary objection to jurisdiction* by asserting that "the vast majority of the measures Iran challenges fall outside the scope of the Treaty of Amity, a *bilateral* commercial and consular agreement".[38] Iran considers that any action taken by the United States that, applying the usual rules codified in the Vienna Convention on the Law of Treaties, infringes the rights of Iran and Iranian nationals and companies under the Treaty, is a violation of the Treaty, no matter where that action or elements of a linked series of actions might occur.[39] It is the United States that is seeking to import into the Treaty an artificial concept of 'third country measures' that has no basis in the Treaty nor in international law more generally.

1.24 As in its previous submissions to the Court, the United States has used its pleading as an opportunity to make unsubstantiated and untrue allegations against Iran.[40] Making these prejudicial allegations before the Court is abusive. Iran categorically rejects the U.S. allegations, which are politically motivated. Iran does not intend to reply in this submission to them, which it considers to be irrelevant to the current proceedings before the Court, as is consistent with what the Court has held in previous cases.[41]

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34 U.S. Preliminary Objections, p. 8, paras. 1.19-1.21.

35 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, p. 18, para. 41.

36 *Ibid.*, pp. 19-20, paras. 45-47.

37 See Chapter V below and U.S. Preliminary Objections, p. 8, para. 1.20.

38 U.S. Preliminary Objections, p. 8, para. 1.22 (emphasis added); see also pp. 34-40, paras. 3.1-3.10.

39 See Chapter III, Section 2 below.

40 U.S. Preliminary Objections, Chapter 2, Chapter 5, Section B, Chapter 6, Sections B and C.

41 See, e.g., *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, p. 36, para. 122.

SECTION 4.

STRUCTURE OF THE OBSERVATIONS AND SUBMISSIONS

1.25 The subsequent chapters of these Observations and Submissions are structured as follows:

a. Chapter II reaffirms the nature and subject matter of Iran's claims, as set out in Iran's Application and Memorial;

b. Chapter III demonstrates that the Court has jurisdiction *ratione materiae* over all of Iran's claims for breaches of the Treaty of Amity;

c. Chapter IV rejects the U.S. contention that Iran's claim is an abuse of process or would compromise the integrity of the Court. It affirms that Iran's claims are squarely within the Court's jurisdiction and that deciding them is a perfectly proper and routine exercise of the Court's authority;

d. Chapter V responds to the United States' objection in relation to the exceptions listed in Articles XX(1)(b) and (d) of the Treaty of Amity by showing that these exceptions can only be addressed at the merits stage;

e. Chapter VI contains concluding observations.

PART I.
THE U.S. OBJECTIONS TO JURISDICTION SHOULD BE REJECTED

CHAPTER II
THE COURT HAS JURISDICTION OVER THE CASE SUBMITTED BY IRAN

SECTION 1.
THE SUBJECT MATTER OF THE CASE BROUGHT BY IRAN IS THE 'INTERPRETATION OR APPLICATION' OF THE TREATY OF AMITY

2.1 The case is brought under Article XXI of the Treaty of Amity. Iran complains about breaches of the Treaty of Amity, and specifically of Articles IV(1), IV(2), V(1), VII(1), VIII(1), VIII(2), IX(2), IX(3) and X(1) of the Treaty. It cannot credibly be denied that the subject matter of the case is the interpretation and application of the Treaty of Amity.

2.2 The U.S. objection that the subject matter of the case is a dispute as to the application of the JCPOA, and not as to the interpretation or application of the Treaty of Amity, is fundamentally misconceived. As the Court held in its Order on Provisional Measures:

> "… the fact that the dispute between the Parties arose in connection with and in the context of the decision of the United States to withdraw from the JCPOA does not in and of itself exclude the possibility that the dispute relates to the interpretation or application of the Treaty of Amity (cf. *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 811-812, para. 21). In general terms, certain acts may fall within the ambit of more than one legal instrument and a dispute relating to those acts may relate to the "interpretation or application" of more than one treaty or other instrument. To the extent that the measures adopted by the United States following its decision to withdraw from the JCPOA might constitute violations of certain

> obligations under the 1955 Treaty, such measures relate to the interpretation or application of that instrument".[42]

2.3 This is a principle of general application, not confined to the purposes of meeting the *prima facie* jurisdiction requirement at the Provisional Measures stage. It is a basic legal proposition, well-established in the Court's case law.[43]

2.4 Further, the Court has already defined the object and purpose of the Treaty of Amity in terms that amply cover the claims made by Iran in this case:

> "… The Treaty is aimed at guaranteeing rights and affording protections to natural and legal persons engaging in activities of a commercial nature, even if this latter term is to be understood in a broad sense".[44]

And it has found that "the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions".[45]

2.5 Iran's claim is wholly and exclusively a claim concerning violations of the Treaty of Amity. It is not for the Respondent to redefine the scope of a claim to suit its own defensive arguments, or to take isolated sentences from diplomatic notes and pleadings to present a distorted picture.[46] It is for the Court, and not the Parties, to determine the scope of the claim; but the Court will give "particular attention to the formulation of the dispute chosen by the Applicant".[47]

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42 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, p. 11, para. 38.

43 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008,* p. 387, para. 112.

44 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, p. 22, para. 57 and p. 31, para. 91, cited also in U.S. Preliminary Objections, p. 45, para 4.10.

45 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 815 at para. 31.

46 U.S. Preliminary Objections, pp. 53-54, paras. 5.6-5.9.

47 *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Reports 1998,* p. 448, para. 30; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II),* p. 848, para. 38; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 177, paras. 65, 69. See also Article 38(1) of the Rules of Court.

2.6 The measures challenged by Iran are those resulting from the U.S. Decision of 8 May 2018, as well as the threatening and the imposition of further and aggravated measures by the United States on 5 November 2018 and subsequently.[48] These include measures to prevent transactions involving the Central Bank of Iran, thus further impeding the delivery of food, medicine, and medical devices to Iran.[49] The threat of further measures is intended to dissuade traders and all manner of other economic enterprises from having any dealings with Iran, and is having that effect, even before the further measures are adopted. That is in itself a breach of the Treaty of Amity. The actual imposition of the further measures extends the prohibition on dealings with Iran; and it constitutes a further breach of the Treaty of Amity.

2.7 That these measures and threatened measures constitute violations of the Treaty would be true whether or not they are also measures and threats associated with, or adopted against the background of, the JCPOA: but the concern here is with the question whether those measures are, as Iran maintains, violations of the Treaty of Amity, without any need to determine whether or not they are also breaches of the JCPOA.

2.8 The measures are only the start of a massive, continuing programme designed to cripple Iran. The U.S. Secretary of State has asserted that "the sanctions that we put in place ultimately will cause the Iranian regime to shrink by between 10 and 15 percent in the year ahead [*sc.*, but] only went in place in May of this year [2019]. They're five months on. *We're at the beginning of that sanctions campaign*."[50]

2.9 The U.S. allegation of 'vagueness' in Iran's claims[51] is baseless. Iran's Memorial sets out in detail the measures that have been implemented on a progressive basis by the United States, as well as their initial and potential impacts on Iran, its people and its

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48 Iran's Application, pp. 10-11, paras. 18-19; Iran's Memorial, p. 245. See also *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, p. 9, para. 31.

49 U.S. Department of the Treasury, Update to the OFAC's SDN List, 20 September 2019 (IOS, Annex 5).

50 Transcript: Secretary of State Mike Pompeo on "Face the Nation", *www.cbsnews.com*, 22 September 2019 (emphasis added) (IOS, Annex 14).

51 U.S. Preliminary Objections, p. 10, para. 2.1, fn 9.

companies; it also sets out specific threats of further measures issued by the U.S. Government.[52]

SECTION 2.
THE JCPOA'S ABSENCE OF REFERENCE TO SETTLEMENT BY THE COURT IS IRRELEVANT

2.10 As a subsidiary argument, the United States repeats the point it made during the Provisional Measures phase: that the JCPOA provides no jurisdiction for the Court. Although the United States now acknowledges that the JCPOA "does not contain an express clause forgoing resort to this Court", it asserts that the "text, structure and context of the JCPOA reveal that it was intended to exclude such a possibility".[53] In particular, it states that the JCPOA dispute settlement mechanism provides for disputes to be resolved through political channels among participants rather than before any court.[54]

2.11 The JCPOA's absence of reference to settlement of disputes by the Court is, however, irrelevant. As recalled above, the inescapable fact is that the JCPOA is not the subject matter of the dispute before the Court. It is compliance with the Treaty of Amity that is the subject matter of this dispute. The JCPOA, moreover, does not specify that its dispute settlement mechanism has some kind of exclusive and preclusive competence, which could somehow remove from the jurisdiction of the Court any dispute with respect to measures which might be said to be relevant also to the JCPOA. Nothing in the JCPOA suggests that it might have some such effect. Indeed, the Court has already rejected this U.S. argument, for the purposes of the Provisional Measures phase. In its Order of 3 October 2018, the Court stated that "the JCPOA and its dispute settlement mechanism do not remove the measures complained of from the material scope of the Treaty of Amity nor exclude the applicability of its compromissory clause."[55] Further,

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52 Iran's Memorial, Chapters II and III.

53 U.S. Preliminary Objections, p. 57, para. 5.17.

54 *Ibid*.

55 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, p. 11, para. 39.

the U.S. assertion that the JCPOA "provides for disputes that arise under it to be addressed and resolved through political channels"[56] is inapplicable given that such a mechanism is only open to participants, and the United States is no longer a participant.

2.12 The United States attempts to construct 'evidence' to support its argument that the subject matter of the dispute is exclusively the U.S. withdrawal from the JCPOA, and thus exclusively within the scope of the JCPOA and outside the scope of the Treaty of Amity. It asserts that the "relief Iran seeks is the restoration of the very sanctions relief provided by the United States as part of its participation in the JCPOA."[57]

2.13 That point goes nowhere. The question is whether or not there has been a breach of the Treaty of Amity. If, for example, a particular ban on the export of U.S. products to Iran breaches the Treaty, the appropriate and indeed obvious relief is an Order declaring that the ban is unlawful and affirming the obligation to remove that ban. If that results in a situation that is the same as that which existed prior to May 2018, that is merely the consequence of applying the usual principles on *restitutio in integrum*.

2.14 The United States also asserts that the subject matter of the dispute must be the JCPOA withdrawal because "Iran did not pursue any challenge to the imposition of those measures leading up to and during the negotiation of the JCPOA under the Treaty of Amity".[58] Iran did in fact protest against the U.S. measures; and it maintains its position that the imposition and enforcement of all unilateral sanctions by the United States against Iran were and are contrary to international law.[59] Iran ensured that the JCPOA expressly provides that "Nothing in this JCPOA reflects a change in Iran's position on U.S. sanctions."[60]

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56 U.S. Preliminary Objections, pp. 19-20, paras. 2.18-2.22 and p. 57, para. 5.17.

57 U.S. Preliminary Objections, p. 54, para. 5.10.

58 U.S. Preliminary Objections, p. 55, para. 5.12.

59 This was noted in Iran's Application, p. 4, para. 2, fn 2, citing in particular para. 13 of the letter dated 20 July 2015 sent by the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/550 (IOS, Annex 7).

60 JCPOA, Annex II, fn 14 (IM, Annex 10). See also JCPOA, para. 26 ("Iran has stated that it will treat such a re-introduction or re-imposition of the sanctions specified in Annex II, or such an imposition of new nuclear-related sanctions, as grounds to cease performing its commitments under this JCPOA in whole or in part.") (IM, Annex 10).

2.15 But in any event, the timing of referral of disputes to the Court is a complex and multifaceted process, which includes attempts at diplomatic settlement, which the United States now acknowledges have been exhausted in this case.[61] A strong and resilient country such as Iran can endure much in the way of harm deliberately inflicted upon it and its people. But there are circumstances in which it is appropriate to have recourse to other peaceful means for the settlement of international disputes, such as recourse to the Court under procedures previously agreed with the other party. It is the right and the duty of each State to determine when those circumstances exist; and Iran has done so in bringing this dispute to the Court.

2.16 In sum, the Court has jurisdiction over the case submitted by Iran. The subject matter is the interpretation and application of the Treaty of Amity, pursuant to Article XXI(2) of the Treaty. None of Iran's claims is excluded from the jurisdiction of the Court by the fact that the United States' decision to withdraw from the JCPOA forms part of the context for the dispute between the Iran and the United States. As the following chapters will show, the U.S. breaches of the Treaty of Amity fall firmly within the provisions of that Treaty. And this Court possesses jurisdiction to adjudicate on those breaches and their consequences in fulfilment of its judicial function, without any compromise to its integrity.

[61] U.S. Preliminary Objections, p. 6, para. 1.13.

CHAPTER III.
THE COURT HAS JURISDICTION *RATIONE MATERIAE* OVER ALL OF IRAN'S CLAIMS FOR BREACH OF THE TREATY OF AMITY

SECTION 1.
INTRODUCTION

3.1 The United States contends that "the vast majority of Iran's claims do not concern the interpretation or application of the Treaty of Amity, and thus must be dismissed as outside this Court's jurisdiction".[62] This challenge to the Court's jurisdiction *ratione materiae* is based on the United States' introduction of a concept of "third country measures".[63] It is said that Iran's claims overwhelmingly concern such "third country measures", with the basic argument being that a U.S. measure that penalises a company from a third State for engaging in a transaction with Iran or Iranian nationals or companies falls outside the scope of the Treaty of Amity – because, it is said, the Treaty is only concerned with the bilateral commercial and consular relationship between Iran and the United States.[64]

3.2 This line of argument is obviously flawed, and Iran makes four introductory observations in this respect.

3.3 First, the concept of "third country measures", upon which this objection depends, is an invention on the part of the United States and is, moreover, very misleading – *all* of the U.S. measures at issue in this case are measures specifically targeted at Iran and Iranian nationals and companies, not third States or their nationals and companies. By way of illustration, in the words of the U.S. Treasury of 5 November 2018:

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62 U.S. Preliminary Objections, p. 94, para. 7.1.

63 *Ibid*. The United States takes no point on the applicability of the Treaty provisions so far as concerns other U.S. measures, which it characterises as the "revocation of certain licensing actions related to carpets, foodstuffs, commercial passenger aircraft and parts, and activities of U.S. owned or controlled entities": see *ibid* at p. 97, para. 7.9.

64 See e.g., U.S. Preliminary Objections, p. 39, para. 3.6 and p. 94, para. 7.3.

> "These are the toughest U.S. sanctions ever imposed on Iran, and will target critical sectors of Iran's economy, such as the energy, shipping and shipbuilding, and financial sectors."[65]

3.4 As correctly understood, all that is now happening through this jurisdictional objection is that the United States is seeking to avoid its accountability under the Treaty of Amity by positively relying on the extraordinary lengths to which it has gone, and the specific methods it has employed, to target Iran and its nationals and companies. This is not tenable.

3.5 Second, the Court is concerned with the agreement of the Treaty parties as expressed in the language of the individual Treaty provisions, not with the application of an impressionistic approach to the Treaty as a whole which, moreover, takes as its starting point the freshly constructed concept of "third country measures" (which finds no place in international law, let alone in the Treaty). It is useful to take as an example a provision well-known to this Court, Article X(1) of the Treaty. Unlike certain of the provisions that Iran invokes, Article X(1) does contain a form of bilateral territorial limitation,[66] and thus might be thought to be susceptible to this U.S. thesis. Yet, when it comes to identifying whether there has been a breach of the obligation that there be "freedom of commerce" "[b]etween the territories of the two High Contracting Parties", it can make no difference at all whether the obstruction to freedom of commerce is in the form of –

a. the withdrawal by the United States of a licence permitting a U.S. company to sell products (e.g. aircraft and aircraft spare parts or medicines or agricultural products) to an Iranian company, or

b. a U.S. sanction on a third State bank or insurance or shipping company that prevents the Iranian company from paying for, insuring and physically acquiring the products from the U.S. company (or likewise so far as concerns a U.S. company making payments etc. with respect to an acquisition from an Iranian company).

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65 U.S. Department of Treasury, Resource Center, Webpage "Iran Sanctions" (IM, Annex 20).

66 Article X(1): "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation." (IM, Annex 1).

What matters equally in both cases is whether there has been interference by the United States in the freedom of commerce between the territories of Iran and the United States, and not whether that interference was caused by a measure directed in the first instance at a U.S. or non-U.S. entity.

3.6 Third, and following closely on the above, it is to be emphasised that Iran's claim in this case is based on the application of certain provisions of the Treaty as interpreted pursuant to the usual rules codified in the Vienna Convention on the Law of Treaties. Each of these provisions is concerned with imposing obligations and limits on the way a Contracting Party may exercise its jurisdiction, thereby affording a particular right or protection to the other Contracting Party and/or its nationals and companies. It is not because the United States has chosen to exercise its jurisdiction in ways that are extraordinary – targeting the economic and trade links of Iran and Iranian nationals and companies with both U.S. and non-U.S. companies, in a way that the Treaty drafters may not have had in their immediate contemplation in 1955 – that the usual rules of Treaty interpretation cease to apply:

a. The ordinary meaning of the text remains of key importance, and it is by reference to that ordinary meaning that Iran brings its claims. As Sir Ian Sinclair noted at the Vienna Conference, "many of the issues that arise in treaty interpretation are not ones which the treaty's originators had ever even contemplated … 'it was wiser and more equitable to assume that the text represented the common intentions of the original authors and that the primary goal of treaty interpretation was to elucidate the meaning of that text in the light of certain defined and relevant factors'."[67]

b. As to context, notably some of the provisions of the Treaty do contain territorial limitations. Where this is the case, Iran accords to these provisions their full meaning and effect. However, Iran notes also that the inclusion of territorial limitations in certain provisions provides an important part of the context to interpretation of the provisions where such limitations are absent. The obvious inference is that such absence is deliberate, and a territorial limitation is not

[67] See Gardiner, *Treaty Interpretation*, 2nd ed., p. 7, referring to I. Sinclair, UN Conference on the Law of Treaties, First Session (26 March – 24 May 1968), Official Records: Summary Records, p. 177, para. 6.

somehow to be read in where it has been omitted, as the United States would now wish to do.

c. As to object and purpose, as explained further in Section 2 below, the United States focuses inappropriately on an over-narrow reading of the Treaty Preamble. It takes no account of the Court's finding in the *Oil Platforms* case that Articles IV(1) and X(1) of the Treaty are to be interpreted in the light of Article I:

> "In the light of the foregoing, the Court considers that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of Articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court."[68]

This finding concerns the interpretation of provisions that are before the Court in this case, and the reasoning applies equally to the other provisions that Iran now invokes. Yet, Article I is ignored by the United States.[69] This is because, interpreted in the light of the "objective of peace and friendship proclaimed in Article I" as the Court's prior analysis requires, a Treaty provision such as Article IV(1) could only be interpreted as prohibiting the infliction of deliberate harm on the economic activities of the nationals and companies of the other Party, regardless of whether the activities concerned transactions with U.S. nationals and companies or not. The infliction of such deliberate economic harm on Iranian nationals and companies is anathema to the objective of peace and friendship, and the obligation (for example) to accord fair and equitable treatment to Iranian nationals and companies, interpreted in light of that objective, could not be artificially restricted in the way that the United States now wishes, i.e., merely because the intended economic harm (the unfair and inequitable treatment) is achieved by imposing a sanction on a company or a national from another State.

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68 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 815, para. 31.

69 See the sole reference, notably as an example of how weight must be given to the Treaty Preamble, at U.S. Preliminary Objections, p. 104, fn. 323.

3.7 Fourth, and by contrast to the above, the United States seeks to direct attention away from the text of the individual provisions of the Treaty and instead invites the Court to analyse the Treaty of Amity on the basis of,

a. a selective account of the history of the U.S. FCN treaty programme,[70]

b. followed by a marked emphasis on the U.S. view as to the object and purpose of the Treaty of Amity,[71]

c. with the ordinary meaning of the Treaty provisions, which should be the starting point, relegated to third place in the analysis.

3.8 Thus it is only following a one-sided account of "the text and context of the Treaty as a whole" that the United States gets to the individual Treaty provisions.[72] Indeed, not only does the United States approach the task of interpretation on precisely the "impressionistic basis" that it purports to reject,[73] its account of the Treaty's "context" is of little assistance to it even if taken at face value. For example, reference is made by the United States to the writings of Hermann Walker, who "explained that the reticence of U.S. drafters [of FCN treaties] to extend greater protections to foreign corporations 'may have been attributable to a fear lest such commitments become a cloak under cover of which rights would be gained by interests of third countries'".[74] Yet the case now before the Court has nothing at all to do with alleged rights of "interests of third countries". It concerns – exclusively – the deliberate economic harm caused by one Party of the Treaty of Amity to the nationals and companies of the other Party and breach of the Treaty protections afforded with respect to those nationals and companies.[75]

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70 U.S. Preliminary Objections, pp. 36-37, paras. 3.3-3.4.

71 U.S. Preliminary Objections, p. 96, paras. 7.6-7.7.

72 U.S. Preliminary Objections, p. 106, paras. 7.25 *et seq.*

73 U.S. Preliminary Objections, p. 41, para. 4.7 referring to *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, Separate Opinion of Judge Higgins, p. 855, para. 29.

74 U.S. Preliminary Objections, p. 105, para. 7.23, referring to U.S. PO, Annex 156.

75 Moreover, Mr Walker was writing specifically about the potential abuse of corporate personality and hence the inclusion of denial of benefits clauses in FCN treaties. The Treaty of Amity does not have

3.9 In this Chapter, against the backdrop of these four introductory observations, Iran addresses, with respect to the specific terms of each of the Treaty provisions at issue, the U.S. objection to jurisdiction *ratione materiae* based on its concept of "third country measures".

3.10 As to the general approach to objections to jurisdiction *ratione materiae*, the Parties are in agreement that, pursuant to the well-known test from the *Oil Platforms* case, the Court "must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2".[76]

3.11 It is also noted that the United States has made no attempt to rebut the facts pleaded in Iran's Memorial with respect to the practical impacts of the U.S. measures, and those facts appear to be incontestable. Such facts must, at least for current jurisdictional purposes, be accepted as correct.[77] For the purposes of this phase of the case, the Court will therefore need to interpret a series of Treaty provisions – Articles IV(1) and (2), V(1), VII(1), VIII(1) and (2), IX(2) and (3) and X(1) – pursuant to the usual rules codified in the Vienna Convention on the Law of Treaties, and

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such a clause, and the abuse of corporate personality is a complete irrelevance so far as this case is concerned. See *ibid*.

[76] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 810, para. 16; see reference to this at U.S. Preliminary Objections, p. 43, para. 4.7. In this connection, it is noted that the Parties agree that reference may usefully be had to the articulation of the test in the Separate Opinion of Judge Higgins in the *Oil Platforms* case. She wrote: "'The Court can only determine whether there is a dispute regarding the interpretation and application of the 1955 Treaty, falling within Article XXI (2), by interpreting the articles which are said by Iran to have been violated by the United States destruction of the oil platforms. It must bring a detailed analysis to bear. …'".

[77] Even if there were somehow any challenge to the basic facts, this would not be a matter for determination at the preliminary objections stage. See *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, Separate Opinion of Judge Higgins, p. 855, paras. 29 and 32. The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro term* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes - that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them." See U.S. Preliminary Objections, p. 44, para. 4.7 referring to the Separate Opinion of Judge Higgins, p. 855, para. 29. It is presumed that the United States similarly endorses the further passage set out above.

identify whether, on the basis of Iran's claims of fact, there could occur a violation of one or more of those provisions. The relevant facts include that:

a. The object and effect of the U.S. measures, including the "third country measures", is to destroy, remove and harm the property and enterprises of Iranian nationals and companies on an almost inconceivably large scale. The U.S. measures have led to and/or are leading to the very destruction of Iranian companies and businesses in multiple sectors.[78]

b. Iranian nationals and companies operating in the key sectors of Iran's economy are being deliberately targeted by the U.S. measures for the purpose of causing economic harm to Iran as a whole and to Iranian nationals and companies. The sectors targeted include oil and gas and energy,[79] the financial and banking sectors (with the effect that Iranian banking institutions have been cut off from the international banking community),[80] the civil aviation sector (with the effect that the safety of passengers, crews and other customers of Iranian airlines is being jeopardised),[81] the automotive, shipping and shipbuilding sectors,[82] insurance,[83] and even health and agriculture.[84]

c. The sanctions are destroying the economy and currency of Iran, driving millions of people into poverty and making imported goods unaffordable. According to the IMF, in 2018, Iran's real GDP fell by 4.8%, consumer prices increased by 30.5% and unemployment rose by 14.5%.[85] Moreover, the IMF estimates that in 2019 real GDP will fall by a further 9.5%, consumer prices will rise by a further 35.7% and unemployment will rise by a further 16.8%. Notwithstanding

78 See, e.g., Iran's Memorial, pp. 106-116, paras. 3.81-3.101 and p. 155, para. 4.48.

79 See, e.g., Iran's Memorial, pp. 77-87, paras. 3.26-3.44 and pp. 157-158, paras. 4.51-4.56.

80 See, e.g., Iran's Memorial, pp. 67-77, paras. 3.3-3.25 and pp. 161-164, paras. 4.57-4.62.

81 See, e.g., Iran's Memorial, pp. 88-94, paras. 3.45-3.59 and pp. 164-167, paras. 4.63-4.68.

82 See, e.g., Iran's Memorial, pp. 95-106, paras. 3.60-3.80 and pp. 167-171, paras. 4.69-4.76.

83 See, e.g., Iran's Memorial, pp. 74-76, paras. 3.18-3.20 and pp. 173-174, paras. 4.77-4.79.

84 See, e.g., Iran's Memorial, pp. 116-125, paras. 3.103-3.123, pp. 127-130, paras. 3.130-3.135, and pp. 176-180, paras. 4.83-4.88.

85 IMF, *World Economic Outlook: Global Manufacturing Downturn, Rising Trade Barriers, October 2019*, p. 60 (IOS, Annex 4).

> the U.S. position that certain trade is in theory exempt from the U.S. measures, these measures make it all but impossible to acquire urgently needed humanitarian goods. The U.S. sanctions are having a 'chilling effect' on suppliers from all States "which is likely to lead to silent deaths in hospitals as medicines run out".[86]

3.12 Finally, it is recalled that the Court has already found that it has *prima facie* jurisdiction over Iran's claims and that the rights that Iran asserted under the Treaty at the provisional measures phase are plausible.[87] Rather defensively, the United States contends that the analysis applicable at the provisional measures and preliminary objections phases is "fundamentally different",[88] whereas the tests ask the same basic question, subject however to a different threshold: the question at the provisional measures phase is whether the acts complained of by the applicant are *prima facie* capable of falling within the provisions of the given treaty.

3.13 It is curious that the United States should seek repeatedly to quote an isolated passage from the Order of 3 October 2018 as if this somehow supported its thesis.[89] In that Order, the Court did not see the wording of the Treaty of Amity as rendering it incapable of application with respect to what are now called "third country measures". To the contrary, one specific area of concern identified by the Court as warranting the exceptional remedy of provisional measures was the U.S. measures impacting "foreign banks", i.e., what the United States would now cast as a "third country measure":

> "In this regard, the Court observes that, as a result of the measures, certain foreign banks have withdrawn from financing agreements or suspended co-operation with Iranian banks. Some of these banks also refuse to accept transfers or to provide corresponding services. It follows that it has become difficult if not impossible for Iran, Iranian companies and nationals to engage

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86 OHCHR, "Iran sanctions are unjust and harmful, says UN expert warning against generalised economic war", 22 August 2018 (IM, Annex 130).

87 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, paras. 52 and 70.

88 U.S. Preliminary Objections, p. 44, para. 4.8.

89 U.S. Preliminary Objections, p. 94, para. 7.3 and p. 103, para. 7.18, referring to *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, p. 12, para. 43.

> in international financial transactions that would allow them to purchase items not covered, in principle, by the measures, such as foodstuffs, medical supplies and medical equipment." [90]

3.14 Yet on the U.S. thesis this reasoning and the related protection afforded by the Court to Iran's rights under the Treaty must fall away. It would not matter how specifically targeted the U.S. sanctions are at the ability of Iranian companies and nationals to engage in the most basic international transactions (including banking); it would not matter how discriminatory and arbitrary the U.S. measures aimed at Iranian companies and nationals may be; it would not matter that the U.S. measures led and/or were intended to lead to severe restrictions and loss to Iranian companies and nationals including the loss of life due to the unavailability of medicines and medical products; the multiple provisions of the Treaty of Amity that on their face contain relevant protections to the rights of Iran and Iranian nationals and companies would be inapplicable on the U.S. thesis.

SECTION 2.
IRAN'S CLAIMS UNDER ARTICLES IV(1), IV(2) AND V(1) OF THE TREATY OF AMITY

3.15 Articles IV(1), IV(2) and V(1) of the Treaty of Amity accord a broad range of rights and protections with respect to the nationals and companies of Iran (and the United States). In introducing its argument with respect to Articles IV(1), IV(2) and V(1) of the Treaty of Amity, the United States asserts: "These provisions do not set out any obligations with respect to third countries or third country nationals and companies."[91] This is misconceived and incorrect. While the United States wishes to introduce an artificial distinction between (a) U.S. measures that embargo imports and exports to or from Iran and (b) U.S. "third country measures", as already noted the reality is that

[90] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, p. 25, para. 89.

[91] U.S. Preliminary Objections, p. 106, para 7.26.

all the measures at issue in this case target – quite specifically and deliberately – Iranian nationals and companies as well as Iran itself.[92]

3.16 The question is whether this U.S. targeting of Iranian nationals and companies potentially engages the broad range of rights and protections under Articles IV(1), IV(2) and V(1), not whether these provisions also specifically set out obligations with respect to third countries.

A. Article IV(1) of the Treaty of Amity

3.17 Turning first to Article IV(1), it is recalled that this provision establishes three discrete but related protections for Iranian nationals and companies:

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

3.18 The Article IV(1) protections are engaged by the U.S. measures at issue in this case, as explained at paragraphs 4.10-4.30 and 4.45-4.110 of Iran's Memorial. In brief, Iran's case is (*inter alia*) that the U.S. measures are arbitrary, disproportionate and discriminatory. Iranian nationals and companies are being targeted by the U.S. measures with the express intention that, in all aspects of the implementation of those measures, the harm is to be caused specifically to Iranian nationals and companies. And this is not because of anything that the targeted nationals and companies have done, but because of their importance to Iran's economy. As the U.S. Presidential Memorandum of 8 May 2018 states:

> "Those steps should be accomplished in a manner that, to the extent reasonably practicable, shift the financial burden of unwinding any transaction or course of dealing primarily onto Iran or the Iranian counterparty."[93]

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92 See, e.g., U.S. Department of Treasury, Resource Center, Webpage "Iran Sanctions" (IM, Annex 20).

93 U.S. President, Presidential Memorandum, 8 May 2018, (IM, Annex 31).

3.19 According to the U.S. thesis, however, it does not matter that a U.S. measure is targeted at, and deliberately harms, Iranian nationals and companies; all that matters, it is said, is whether the U.S. sanction is directed immediately at an entity from a third State and that entity's transaction with the Iranian national or company.

3.20 The United States makes only one textual point in support of this proposition. It contends that Article IV(1) solely calls into question whether "the United States accorded treatment or applied unreasonable or discriminatory measures to Iranian nationals and companies", and it is said that the treatment so far as concerns the "third country measures" was "to" nationals and companies of third countries.[94] This is not a tenable interpretation of Article IV(1):

a. The interpretation is inconsistent with the ordinary meaning of according "fair and equitable treatment to nationals and companies". There is nothing in that broad wording that suggests that the relevant measure must be applied directly to such nationals and companies. What matters is how the nationals and companies are treated. If their economic activities are deliberately targeted through measures directed in the first instance at a third party (who is not however the real target of the measure but merely a means to an end), that naturally falls within the rubric of according "fair and equitable treatment to nationals and companies". At best, the United States wishes to insert the word "directly" between "treatment" and "to", whereas there is no indication of any kind that the Parties intended this (and it is not clear that even this insertion would lead to the meaning that the United States contends for).

b. To the contrary, fair and equitable treatment is to be accorded "at all times" to nationals and companies, which points to an intention to ensure the most effective protection.

c. Far from seeing the fair and equitable treatment standard as confined and requiring a narrow interpretation, the U.S. negotiators of FCN treaties saw the

94 U.S. Preliminary Objections, pp. 107-108, paras. 7.30-7.31.

standard as playing a gap-filling role. Thus, as noted in Iran's Memorial,[95] and as has not been challenged, the standard was intended as "a guiding principle to which resort may be had in situations where no specific rule of the treaty is applicable or in reference to which the specific rules of the treaty do not provide an adequate standard of treatment",[96] and as intended "to suggest a general policy of liberal, rather than of narrow construction of the provisions of the treaty".[97] The United States seeks to interpret and apply the standard (as well as to portray its own intention at the time the Treaty was negotiated) to precisely the opposite effect.

d. In this respect, if the intended meaning had been to accord fair and equitable "treatment directly to", the Parties would have used similar language in the further elements of Article IV(1). Yet that is entirely absent. Indeed, even taking the U.S. interpretation of "treatment to" at face value, the interpretation would not apply so far as concerns the prohibition on "unreasonable or discriminatory measures that would impair their legally acquired rights and interests". There is no suggestion there that in order to amount to an impairment the measure must be applied "to", let alone "directly to" the given nationals or companies. The same point applies with respect to the final element of Article IV(1), establishing the *unqualified* obligation to assure that lawful contractual rights are afforded effective means of enforcement. Such contractual rights are not limited, for example, to rights under contracts between Iranian nationals/companies and United States nationals/companies.

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95 Iran's Memorial, p. 141, para. 4.14.

96 Instruction dated 30 October 1953 from the Department of State to the U.S. High Commissioner in Bonn, NARA, Record Group 59, Department of State File No. 611.62A4/10-653 quoted in K. Vandevelde, *The First Bilateral Investment Treaties*, pp. 402-403.

97 K. Vandevelde, *The First Bilateral Investment Treaties*, pp. 405-406, citing Instruction dated 30 October 1953 from the Department of State to the U.S. High Commissioner in Bonn, NARA, Record Group 59, Department of State File No. 611.62A4/10-653; Despatch dated 26 February 1954 from the U.S. High Commissioner in Bonn to the Department of State, NARA, Record Group 59, Department of State File No. 611.62A4/ 2-2654; Airgram dated 31 December 1951 from the Department of State to the U.S. Political Adviser in Tokyo, NARA, Record Group 59, Department of State File No. 611.944/12-751. The passage continues: "Where more than one construction of the treaty language was equally possible, the construction that would lead to an equitable result was to be preferred. That is, it provided an interpretive principle for the remaining provisions of the treaty."

3.21 Moreover, as a matter of its ordinary meaning, the fair and equitable treatment standard in Article IV(1) should not be interpreted as if it contained any form of territorial restriction; it does not. This is an obvious point that the United States seeks to gloss over, whereas the absence of such a restriction could not have been inadvertent.

a. Various other provisions in the Treaty of Amity do contain a territorial restriction: for example, in the first sentence of Article IV(2), the obligation to afford the most constant protection and security to the property of nationals and companies is confined to "within the territories of the other High Contracting Party". The Parties are agreed that certain treaty provisions contain an express territorial limitation. In the United States' case on the intended scope of the Treaty, the inclusion of such an express limitation was unnecessary and those words should be regarded as redundant, while the absence of such an express limitation in other provisions should be regarded as immaterial. This makes no sense. Rather, the inclusion of an express limitation in the first sentence of Article IV(2) reflects the fact that the jurisdictional powers of the Parties are limited when it comes to ensuring matters such as the physical protection of the property of nationals and companies from the other Party. The United States, for example, could not ensure the physical protection of the property of an Iranian company outside the bounds of its own territorial jurisdiction. By contrast, the potential for exercise of a State's jurisdiction is not so limited when it comes to the fair and equitable treatment standard. It is easy to envisage that a Party to the Treaty could engage in some arbitrary act outside its own territory that caused, and perhaps was even intended to cause, harm to a national or company of the other Party. Article IV(1) prohibits such an act.

b. Moreover, the Court has already identified and given effect to the absence of a territorial limitation in Article IV(1). In *Oil Platforms*, in line with its current argument on "third country measures", the United States argued as to Article IV(1) that the actions allegedly committed by it did not concern Iranian nationals or companies that came within the territory of the United States, and hence the Court lacked jurisdiction. This argument was rejected, as follows:

> "The Court observes in the first place that Article IV, paragraph 1, unlike the other paragraphs of the same Article, does not include any territorial limitation. The general guarantee made available by paragraph 1 has, on that account, a wider scope than the particular obligations laid down by the other paragraphs in relation to expropriation, or acts of interference with property or in relation to the management of enterprises. It follows that the Court cannot accept the arguments of the United States on this point."[98]

c. The Court rejected Iran's then case on the potential applicability of Article IV(1), but in terms that show how this provision should now be approached. Thus the Court said that the different elements of Article IV(1) "aimed at the way in which the natural persons and legal entities in question are, in the exercise of their private or professional activities, to be treated by the State concerned".[99] The current claim plainly does concern the way in which Iranian nationals and companies are, in the exercise of their private or professional activities, being treated by the United States. The exercise of their private and professional activities is being deliberately and radically impeded by the U.S. measures now at issue.

d. The interpretation of the Treaty provisions must take appropriate account of the presence or absence of a territorial restriction in a given provision, and not proceed on the erroneous basis that the Treaty is concerned only with the protection of investments located in a host State, as may be the case in a modern investment protection treaty. Such treaties (or investment protection chapters in free trade agreements) have specific jurisdictional requirements – typically there must be a qualifying "investor" with a covered "investment" in the territory of the host State, and the substantive protections are generally tied back to these requirements. There are no equivalent jurisdictional requirements in the Treaty of Amity, and its substantive protections should not somehow be interpreted as if there were.

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98 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 816, para. 35.

99 *Ibid.*, p. 816, para. 36.

3.22 The U.S. objection is also not assisted by the interpretation of the language of Article IV(1) in light of the object and purpose of the Treaty of Amity, even though this is where it wishes to focus the argument. The United States repeatedly draws attention to the statement in the Preamble of the Treaty of Amity that the Parties are desirous of "encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations".[100] This is used to support the contention that the Treaty is concerned only with the protection of commercial and investment activities "within the territory of, or in trade between, the two Parties".[101]

3.23 There are three points.

3.24 First, a consideration of object and purpose is of course important to the correct interpretation of the provisions of the Treaty of Amity.[102] However, the fact that one object of the Treaty is encouraging mutually beneficial trade and investments (etc.) does not mean that the Treaty and its provisions are exclusively concerned with activities "within the territory of, or in trade between, the two Parties".[103] The object of mutually beneficial trade and investment is equally served by restrictions on adverse treatment of the nationals and companies of the other Party wherever this is an assertion of the jurisdiction – as opposed to merely in cases falling with the territorial jurisdiction – of the Party enacting a given measure.

3.25 Second, the Unites States argues as if there were only one object and purpose that can be derived from the Preamble. That is not correct. The Preamble states in terms that the Parties are "desirous of emphasizing their friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed", before arriving at the passage on which the United States focuses (to the exclusion of everything else). Article IV(1), as well as the other provisions that Iran invokes, must be interpreted in the light of these

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100 See, e.g., U.S. Preliminary Objections, p. 36, para. 3.2, p. 45, para. 4.10 and p. 104, para. 7.21.

101 U.S. Preliminary Objections, p. 36, para. 3.2 and p. 45, para. 4.10.

102 See, e.g., *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, p. 22, para. 57.

103 See U.S. Preliminary Objections, p. 36, para. 3.2 and p. 45, para. 4.10.

objects also. The Treaty is not divided up into sections, with a section on trade and investment to which only one of the stated objects in the Preamble could be considered applicable. And a Treaty prohibition on causing deliberate harm to the economic activities of the nationals and companies of the other Party is consistent with, and supported by, the objects of "emphasizing …friendly relations" and "reaffirming the high principles in the regulation of human affairs".

3.26 Third, as already noted above, the United States ignores altogether the role played by "the objective of peace and friendship proclaimed in Article 1 of the Treaty" – notwithstanding the express statement of the Court on this point in the *Oil Platforms* case.[104] It therefore ignores the point that the infliction of deliberate economic harm on Iranian nationals and companies is anathema to the objective of peace and friendship, and the obligation to accord fair and equitable treatment to Iranian nationals and companies, interpreted in light of that objective, could not be artificially restricted merely because the intended economic harm (the unfair and inequitable treatment) is achieved by imposing a sanction on a company or a national from another State.

3.27 By reference to all the above, the U.S. jurisdictional objection *ratione materiae* concerning Article IV(1) of the Treaty should be rejected. It is no part of the exercise of good faith interpretation to seek to re-label a series of measures that are specifically and deliberately targeted at Iran, Iranian nationals and companies as "third country measures", and then to seek to introduce into Article IV(1) a tightly drawn territorial limitation that finds no place at all in the actual text.

B. Article IV(2) of the Treaty of Amity

3.28 Turning to Article IV(2), it is recalled that this establishes two further discrete protections for Iranian companies and nationals, providing in relevant part:

> "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case

[104] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 815, para. 31. See para. 3.6 above.

> less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation."

3.29 Iran's case as to the correct interpretation of these two elements is to be found at paragraphs 4.31–4.40 of Iran's Memorial, whilst its case on breach is at paragraphs 4.111–4.117.

3.30 As to the first sentence of Article IV(2), there is a territorial restriction ("within the territories of the other High Contracting Party") as already noted above, and as fully accepted by Iran in its Memorial.[105] Iran's case on breach of Article IV(2) thus concerns property within the United States, including funds of Iranian companies and nationals within the United States (including, in turn, payments made to U.S. companies for goods and services that cannot be returned in circumstances where the underlying transaction has been terminated or rendered inoperable as a result of the U.S. measures).[106]

3.31 Although Iran does not understand how the "third country measures" objection arises on such facts, and does not agree with the U.S. position, there is no reason as a matter of principle why the imposition of "third country measures" should not lead to a breach of the obligation to accord to the property of Iranian nationals and companies "most constant protection and security within the territories of the other High Contracting Party". If, for example, as a result of a "third country measure", an Iranian company was prevented from making some form of required payment to a non-U.S. owner of property in the United States which it was renting, with the result that its property in the United States was lost, this would fall within the territorial restriction in this provision,[107] and there is no reason why the express protection that is accorded should somehow be lost. It is a complete irrelevance whether the "treatment" at issue – from which the restriction on the Iranian company flows – was, as now claimed by

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105 Iran's Memorial, p. 153, para. 4.39(d). See para 3.21 above.

106 Iran's Memorial, p. 187, paras. 4.111-4.112. See also U.S. Preliminary Objections, p. 109, para. 7.34. To the extent that there were already broad prohibitions in place, this makes no difference. The Court is concerned with the legality of the specific acts impugned in this case.

107 See U.S. Preliminary Objections, p. 108, para. 7.32.

the United States, accorded to some entity in a third State.[108] Just as with Article IV(1), that would be to read into the Treaty provision a requirement that is absent. As to the second sentence of Article IV(2), the expropriation provision, Iran's claims do concern both takings inside,[109] as well as outside the United States.[110] This is because, unlike the first sentence of Article IV(2), the expropriation provision does not contain a territorial restriction. While the Court in the *Oil Platforms* case appears to have proceeded on the contrary basis,[111] this was in the absence of any detailed argument on the point, and in circumstances in which there was no Article IV(2) claim before the Court.[112] The matter was not considered in *Certain Iranian Assets*.[113]

3.32 While the United States is understood to contend that the prohibition of takings in Article IV(2) does contain a territorial restriction, Iran notes:

a. Article IV(2) contains two legally separate protections: an obligation to accord most constant protection and security (sentence 1); a prohibition of takings (sentence 2).

b. These protections overlap to the extent that they both concern the property of nationals and companies (see: "Such property shall not be …"). As a matter of the legal standards they contain, however, they do not overlap. The obligation to accord most constant protection and security, and the prohibition of takings, are two very well-established but separate protections.

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108 See U.S. Preliminary Objections, p. 108, para. 7.31 and the attempt there to interpret the term "shall receive" as if it meant "accord treatment to" and, in turn, "accord treatment directly to".

109 Iran's Memorial, p. 187, para. 4.115.

110 Iran's Memorial, p. 187, para. 4.114.

111 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 816, para. 35.

112 See U.S. Preliminary Objections, p. 108, para. 7.32, referring to *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 816, para. 35.

113 See U.S. Preliminary Objections, p. 108, para. 7.32, referring to *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, p. 22, para. 57, where there is consideration only of the first sentence of Article IV(2), i.e., the most constant protection and security provision.

c. The obligation to accord most constant protection and security (sentence 1) is accompanied by a territorial restriction ("within the territories of the other High Contracting Party"), which is as would be expected for the reasons stated in paragraph 3.21 above. The prohibition of takings (sentence 2) does not contain such a restriction, and nor would this necessarily be expected. A State cannot in general terms act to protect the property of others that is located in the territorial jurisdiction of another State. A State can, however, control whether it does or does not pass a measure that leads to a taking in another State.

3.33 In light of this, and the object and purpose of the Treaty of Amity as already considered above, the prohibition on takings is correctly interpreted to cover takings both inside and outside the United States, where the intended effect of the U.S. measures has been that Iranian nationals and companies have in substance lost their property. It follows that there is no basis for the U.S. jurisdictional objection *ratione materiae* so far as concerns both limbs of Article IV(2) of the Treaty.

C. Article V(1) of the Treaty of Amity

3.34 Article V(1) of the Treaty of Amity provides so far as relevant:

> "Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: … (b) to purchase or otherwise acquire personal property of all kinds; and (c) to dispose of property of all kinds of sale, testament or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded to nationals and companies of any third country."

3.35 Unlike some other provisions of the Treaty of Amity, Article V(1) contains a territorial limitation. Iran's case on the correct interpretation of Article V(1) is at paragraphs 4.41–4.44 of Iran's Memorial, whilst its case on breach is at paragraphs 4.118–4.120. As is obvious from those passages of the Memorial, Iran fully accepts the territorial limitation in Article V(1), and its claim concerns only impediments to the purchase or acquisition of property, or the disposal of property, in the United States. Insofar as a "third country measure" interferes with such – for example because a non-U.S. bank refuses to process such a transaction – there is no reason in principle why it would not be caught by the provision. There is certainly nothing in Article V(1)

that restricts its application to treatment accorded directly to Iranian companies or nationals.[114] The only question is whether a right to acquire or dispose has been interfered with. It follows that the U.S. jurisdictional objection *ratione materiae* concerning Article V(1) of the Treaty should also be rejected.

SECTION 3

IRAN'S CLAIMS UNDER ARTICLE VII(1) OF THE TREATY OF AMITY

3.36 Article VII(1) lays down a general principle prohibiting the adoption by either Party of "restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party", subject to only two exceptions which are irrelevant to the present case, as Iran demonstrated in its Memorial without having been contradicted by the United States.[115]

3.37 The United States' jurisdictional objection with respect to Iran's claims based on the violation of Article VII(1) of the Treaty of Amity is strikingly succinct,[116] and does not engage with Iran's interpretation of Article VII(1) of the Treaty of Amity in accordance with its terms in their context. The United States does not dispute that this provision has a broad scope, and in particular does not dispute that:

a. The term "restrictions" covers any act the object or effect of which is to restrict, i.e., to limit or impede, the "making of payments, remittances, and other transfers of funds";

b. Any transfer of funds, regardless of the method of transfer, the nature of the funds, or its author, is protected from restrictions by Article VII(1), provided

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114 See U.S. Preliminary Objections, p. 107, para. 7.30.

115 Iran's Memorial, pp. 192-194, paras. 5.7-5.12. Article VII(1) provides in full that "Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund."

116 U.S. Preliminary Objections, p. 110, paras. 7.38-7.39.

that the transfer is made (i) from a third State to a Party's territories, (ii) from a Party's territories to a third State, or (iii) between the territories of the Parties.[117]

3.38 The United States makes only one point: it isolates and insists on the terms "to or from" in Article VII(1), on the basis of which it contends that this provision is limited to "restrictions on the making of payments, remittances, and other transfers of funds where the payment, remittance, or transfer *enters or exits the territory of Iran*".[118]

3.39 By using the verbs "enter" and "exit", the United States suggests that the transfers of funds contemplated by Article VII(1) are only those which *physically* reach or originate from the territory of Iran. This restrictive interpretation is not consistent with the ordinary meaning of the provision and does not reflect the intent of the Parties.

3.40 Indeed, even at the time the Treaty of Amity was negotiated, international transfers of funds were usually carried out using wire transfers, so that it would have made no sense for the Parties to only protect transfers of funds in hard cash.

3.41 Transfers of funds through the banking system are made by debiting the transferor's bank account and consequently crediting the transferee's bank account. Such movements are electronic. In practice, when an Iranian bank located in Iran instructs a foreign bank with which it holds an account to transfer funds to a creditor, the transfer originates from the territory of Iran in the sense of Article VII(1) of the Treaty of Amity; conversely, when a debtor located outside of Iran orders its bank to transfer funds to an account that an Iranian bank located in Iran holds with a foreign bank, the transfer is directed to the territory of Iran in the sense of Article VII(1). In other words, transfers made for the benefit or on behalf of persons located in Iran fall within the scope of Article VII(1).

3.42 Apart from this overly restrictive construction, the United States' reading of Article VII(1) is consistent with Iran's interpretation, according to which "the United States' obligation [under this Article] is to refrain from restricting all kinds of payments, remittances, and transfers of funds to the territory of Iran or from the

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[117] Iran's Memorial, pp. 191-192, paras. 5.5-5.6.

[118] U.S. Preliminary Objections, p. 108, para. 7.38 (emphasis added).

territory of Iran, regardless, respectively, of the origin or of the destination of the operation".[119]

3.43 In sum, it is not disputed that Article VII(1) covers restrictions on transfers of funds made in any currency, whoever their author – including third States and foreign nationals and companies – to or from the territory of Iran.

3.44 What the United States disputes, albeit vaguely, is the extent to which the measures identified by Iran[120] are breaches of Article VII(1). This is, by its very essence, an issue to be considered at the merits stage. What is asked of the Court at this preliminary stage is rather – and exclusively – to assess whether "the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty".[121]

3.45 In substance, the United States contends that:

a. The U.S. statutory provisions identified by Iran are encompassed by the 8 May Decision "only with respect to non-U.S. persons", and did not reimpose any prohibition, which never ceased to be in force, on the transit of transactions with Iran, Iranian entities, and individuals resident in Iran through the U.S. financial system;[122]

119 Iran's Memorial, p. 192, para. 5.6.

120 Iran's Memorial, pp. 195-203, paras. 5.15-5.35. These measures are the exclusion of Iran from the international banking system and from the transfers of funds it enables (Section 2 of E.O. 13846, Section 1245 of NDAA 2012, Section 220 of TRA); the prohibition of financial transactions denominated in the Iranian Rial (Section 6 of E.O. 13846); the re-listing and the listing of entities on the OFAC's SDN List – in their vast majority Iranian entities – which object and effect is to restrict the ability of the listed entity to transfer its assets from the United States' jurisdiction to Iran; the blocking of assets owned by persons taking part in the energy, shipping, or shipbuilding sectors of Iran and persons operating a port in Iran (Section 1(a)(iv) and (b) of E.O. 13846); measures precluding financial services and support related to the issuance of Iranian sovereign debt (Section 213(a) of TRA); and "menu-based sanctions" having a restrictive impact on transfers of funds from or to Iran" (Section 5 of E.O. 13846).

121 See para. 3.10 above.

122 U.S. Preliminary Objections, p. 110, para. 7.39.

b. The relevant sanctions provisions in E.O. 13846 "apply to transactions between Iran and non-U.S. persons (…) outside the United States regardless of whether the affected transaction was to or from the territory of Iran";[123]

c. Regarding the (re)listing on the SDN List, (i) to the extent the SDNs are located in Iran, they were in principle "already generally prohibited (…) from making payments to or from the United States, or payments that transit the U.S. financial system" – although the United States does not specify under which domestic law provision – and (ii) to the extent the SDNs are "third country persons", the transaction affected by the (re)listing and accompanying sanctions is "between the United States and the third country".[124]

3.46 None of these assertions can lead to the exclusion of any measure identified by Iran from the scope of Article VII(1) of the Treaty of Amity. They are not demonstrations that a particular nuclear-related measure would fall outside the scope of this provision, i.e., outside the Court's jurisdiction, and thus they cannot support a *preliminary* objection.

3.47 First, it is irrelevant that the statutory provisions which came back into force as a result of the 8 May Decision did so only with respect to what the U.S. law defines as "non-U.S. persons", since the "making of payments, remittances, and transfers of funds" to or from Iran is protected by Article VII(1) *whoever its author*, be it a U.S. or non-U.S. person.

3.48 The fact that transactions with Iran and persons under Iran's jurisdiction have already been precluded from transiting the U.S. financial system before the 8 May Decision is equally irrelevant – in addition to being wrong, as such transactions were still going on in some sectors at that time. It is irrelevant because one simply cannot see how it could have any effect on the question whether the measure falls within the scope of Art. VII(1). Moreover, this transfer ban, whether in force before or after the 8 May 2018, *is* a breach of the Treaty of Amity and general international law; the pre-

123 *Ibid.*

124 *Ibid.*

existence of the transfer ban (i) does not release the United States from its current breaches and (ii) could not offer any defence whatsoever to the United States pursuant to the principle *nemo auditur propriam turpitudinem allegans*, preventing a party from taking advantage of its own wrongdoing.

3.49 The pre-existence of the prohibition of the transit through the U.S. financial system is irrelevant also because the object and scope of each of the measures identified by Iran go far beyond such prohibition. For example:

a. Foreign financial institutions are prohibited from "knowingly conduct[ing] or facilitat[ing] any significant transaction" – i.e., from making transfers of funds in any currency – related *inter alia* to the trade in goods and services used in connection with the automotive and oil sector of Iran (Section 2 of E.O. 13846)[125] or to the purchase or sale of Iranian rials or a derivative (Section 6 of E.O. 13846),[126] or from conducting a "significant financial transaction" with the CBI and any sanctioned Iranian bank (Section 1245 NDAA 2012)[127] *whether or not the (financial) transaction transit the U.S. financial system*; the same is true regarding the prohibition on the provision of specialized financial messaging services to CBI or other Iranian financial institution (Section 220(c)(1) TRA).[128]

   As a matter of law, no reference to such transit as a criterion for prohibition can be found anywhere in E.O. 13846, Section 1245 of NDAA 2012, or Section 220(c)(1) of TRA;

b. The blocking of assets owned by persons (i) taking part in the energy, shipping, or shipbuilding sectors of Iran and persons operating a port in Iran or (ii) providing support to any transaction on behalf of a person taking part to these sectors (Section 1(a)(iv) of E.O. 13846)[129] operates upon the sole determination

125 Iran's Memorial, p. 195, para. 5.15.

126 Iran's Memorial, p. 197, paras. 5.20 et seq.

127 Iran's Memorial, p. 196, para. 5.16.

128 Iran's Memorial, p. 196, para. 5.17.

129 Iran's Memorial, p. 200, paras. 5.28 *et seq*.

that the person takes part in these sectors, or provides support to a transaction in any currency on behalf of such kind of person. The transit of the transactions concerned through the U.S. financial system is irrelevant to the application of these measures;

c. The restrictions on the issuance of the Iranian Sovereign debt as well as the debt of any Iranian governmental entity under Section 213 of TRA target any person knowingly purchasing, subscribing to, or facilitating the issuance of such debts.[130] There is no requirement that such operation on the Iranian debt transit the U.S. financial system.

3.50 Second, the contention that the sanctions provisions in E.O. 13846 complained of by Iran generally "apply to transactions between Iran and non-U.S. persons (…) outside the United States regardless of whether the affected transaction was to or from the territory of Iran"[131] is equally irrelevant, since the alleged breaches each concern an "affected transaction" that falls within the scope of Article VII(1) because they plainly are to, or from, the territory of Iran. Moreover, the notion of "non-U.S. persons" does not refer to any term found in the Treaty, and certainly not in Article VII(1), which prohibits measures that "restrict" transfers of funds without limiting the measures contemplated to those addressing only U.S. persons or persons within the U.S. territory.

3.51 Third, the (re)listing of persons or entities on the SDN list not only results in the blocking of their assets held within the U.S. jurisdiction, but also isolates them from all foreign financial institutions, which face similar sanctions if they entertain any kind of financial transaction with a SDN.[132] This is a restriction on the transfer of funds to or from the Iranian territories that the Iran-based SDN would have contemplated. By the same token, the SDN who are located outside of Iran (the so-called "third country persons") are precluded from seeking financial support from a non-U.S. financial institution, including those located in Iran – i.e., from transferring funds from Iran.

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130 Iran's Memorial, p. 202, para. 5.33 and pp. 31-32, paras. 2.31-2.34.

131 U.S. Preliminary Objections, p. 110, para 7.39.

132 Iran's Memorial, p. 200, para. 5.27.

3.52 Beyond its flawed argument regarding the relisting on the SDN List, the United States completely disregards the *effect* of the measures complained of by Iran – corresponding to their *object* – which is of course to be considered when assessing whether these measures fall within Article VII(1) of the Treaty of Amity since the "restrictions" prohibited by this provision include any act whose object or effect is to limit transfers of funds.[133]

3.53 In this regard, the United States' argument that "where a measure is directed towards a transfer that occurs between two bank accounts, neither of which is located inside the territory of Iran (…), there can be no violation of Article VII(1)"[134] is plainly wrong: when a transfer of funds occurring between two bank accounts located outside of Iran is the precondition for the further transfer of such funds to or from Iran, the U.S. measure that prevents the first transfer is a breach of Article VII(1). In any event, transfers of funds between two bank accounts located outside of Iran fall within the scope of this Article as far as the ultimate beneficiary of the transaction is located in Iran.[135]

3.54 As demonstrated by Iran in its Memorial, the effect – and object – of these measures is to discourage, or bar, the payments, remittances, or transfers originating from or directed to the territory of Iran.[136] As such, the U.S. jurisdictional objection *ratione materiae* concerning Article VII(1) of the Treaty should be rejected.

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133 See para. 3.37 above.

134 U.S. Preliminary Objections, p. 110, para. 7.38.

135 See para. 3.41 above.

136 Iran's Memorial, p. 58, para. 5.19; p. 61, para. 5.27; pp. 63-64, paras 5.30-5.32; p. 65, paras 5.34-5.35. Since the filing of the Memorial, examples of international payments to or from Iran prevented because the counterpart or the bank concerned refused to proceed to, or receive, such payment for fear of the U.S. sanctions have multiplied, including in the critical fields covered by this Court's order of 3 October 2019 (medicines and medical devices; foodstuffs and agricultural commodities; spare parts, equipment and associated services necessary for the safety of civil aviation).

SECTION 4.

IRAN'S CLAIMS UNDER ARTICLES VIII(1) AND VIII(2) OF THE TREATY OF AMITY

3.55 Paragraphs 1 and 2 of Article VIII of the Treaty of Amity provide respectively that:

> "Each High Contracting Party shall accord to products of the other High Contracting Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other High Contracting Party, by whatever route and by whatever type of carrier, treatment no less favourable than that accorded like products of or destined for exportation to any third country, in all matters relating to: (a) duties, other charges, regulations and formalities, on or in connection with importation and exportation; and (b) internal taxation, sale, distribution, storage and use. The same rule shall apply with respect to the international transfer of payments for imports and exports".

and:

> "Neither High Contracting Party shall impose restrictions or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the territories of the other High Contracting Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited."

A. Interpretation of Article VIII(1) and (2)

3.56 The United States asserts that "Iran appears to acknowledge that the products encompassed within both provisions are only those that are either (a) products of Iran destined for import to the territory of the United States, or (b) products of the United States destined for export to the territory of Iran".[137]

3.57 This is an incomplete presentation of Iran's position regarding the meaning of Article VIII. Iran has demonstrated in its Memorial that the products covered by the

[137] U.S. Preliminary Objections, p. 111, para. 7.44. To falsely convey the idea of an agreement between the Parties as regards the scope of Article VIII of the Treaty of Amity, the United States insists that this article concerns only "imports of Iranian products into the United States or exports of products from the United States destined for Iran" (U.S. Preliminary Objections, p. 113, para. 7.48).

two first paragraphs of Article VIII are not limited to those two categories mentioned by the United States, but encompass more broadly:

a. Iranian products imported into the United States from any territory and any products destined to be exported to Iran (Article VIII(1), first sentence), as well as any products imported and exported from and to Iran whatever their destination or origin (Article VIII(1), second sentence, concerning "all international transfers of payment" for such imports and exports);[138]

b. Iranian products imported into any territory and any products – originating from any country – exported to Iran (Article VIII(2)).[139]

3.58 For the sake of clarity, Iran will recall in the following paragraphs the correct interpretation of Article VIII(1) and (2), as it results from a proper application of the rules of interpretation enshrined in Article 31 of the Vienna Convention.

3.59 The first sentence of Article VIII(1) of the Treaty of Amity provides as follows:

> "Each High Contracting Party shall accord to products of the other High Contracting Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other High Contracting Party, by whatever route and by whatever type of carrier, treatment no less favourable than that accorded like products of or destined for exportation to any third country, in all matters relating to: (a) duties, other charges, regulations and formalities, on or in connection with importation and exportation; and (b) internal taxation, sale, distribution, storage and use."

3.60 This provision lays down an obligation for either Party to accord, in two categories of "matters" ((a) and (b)), a "no less favorable treatment"[140] to:

a. "products of" the other Party. The "products" are expressly qualified by reference to their national origin, not by reference to their territorial origin: the

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138 Iran's Memorial, p. 205, paras. 6.6-6.7 (first sentence of Article VIII(1)) and para. 6.8 (second sentence of Article VIII(1)).

139 Iran's Memorial, p. 208, paras. 6.16-6.17.

140 That is, a treatment no less favourable than that accorded to "like products of or destined for exportation to any third country".

products imported by either Party must be "of", i.e., originate from, "the other High Contracting Party". This is regardless of the territory from where the products are imported ("from whatever place […] arriving") and of the shipping mode ("by whatever type of carrier");

b. "products destined for exportation to the territories of" the other Party. "[P]roducts" as used here is only qualified by its territorial destination, *not* by reference to its national or territorial origin. It is therefore not limited to products of the United States or from the United States' territories. Moreover, the products destined for exportation to the territories of the other Party are covered regardless of the route traveled ("by whatever route") and of the mode of shipment ("by whatever type of carrier"); this plainly concerns *any* product destined for exportation to the territories of the other Party.

3.61 "[N]o less favourable treatment" must be accorded in all matters relating to, in particular, charges and regulations "on or in connection with importation and exportation", these two last terms being unqualified. As a consequence, a U.S. measure restricting import and/or export of (i) Iranian products imported in the United States and/or (ii) any products destined for exportation to Iran, falls within the scope of Article VIII(1), first sentence.[141]

3.62 Iran's interpretation of the second sentence of Article VIII(1) of the Treaty of Amity is disputed by the United States.[142] The text reads:

> "The same rule shall apply with respect to the international transfer of payments for imports and exports".

3.63 Two points clearly emerge from this wording:

a. The "same rule" refers to the "no-less favourable treatment" described in the previous sentence, i.e., an obligation to accord to the products referred to in this previous sentence – including Iranian products imported into the United States and any products destined for exportation to Iran – a treatment no less

[141] On the U.S. measures falling within the scope of Article VIII(1), see section B, below.

[142] U.S. Preliminary Objections, p. 111, paras. 7.45-7.46.

favourable than that accorded to "like products" originating from, or destined for exportation to, any third country;

b. "Payments" are only defined by what they are referring to – "imports and exports"; and such "imports and exports" are unqualified, territorially or otherwise, so that the application of this provision is not limited to imports and exports between the Parties' territories, or to imports or exports of products originating from the Parties.[143]

3.64 The United States purports to read this provision "in light of its immediate context" – which is, according to the United States, the previous sentence in paragraph 1 – which, it is alleged, makes "clear that the obligation in the final sentence is intended to protect an importer and exporter of goods moving between the territories of Parties who wishes to transfer funds to pay for the transaction".[144] This argument is not tenable.

3.65 First, the U.S. interpretation completely disregards the starting point of any interpretation process, which is the ordinary meaning of the terms used in the provision. Since nothing qualifies or limits "imports and exports" in the second sentence, these imports and exports must be regarded as being those from or to the territory of either Party, including imports between a Party and any third country.

3.66 Second, the U.S. interpretation does not correctly rely on the "immediate context" of the provision. This context consists of:

a. the previous sentence of paragraph 1, which should be read, as demonstrated above, as applying to (i) any products destined to be exported to the Iranian territory from any other territory and (ii) Iranian products destined to be imported into the United States from any territory; and

b. other articles of the Treaty of Amity that do contain territorial limitations, in contrast with Article VIII, such as Article II, which grants nationals of either Party the right to "enter and remain in the territories of the other [Party] for the

143 Iran's Memorial, p. 206, para. 6.8.

144 U.S. Preliminary Objections, p. 112, para. 7.46.

purpose of carrying on trade *between their own country and the territories of such other* [Party]", or Article X, enshrining the freedom of commerce and navigation "*between the territories* of the two High Contracting Parties".[145] Where the Parties intended to limit the scope of their obligations to the trade between their territories, they clearly expressed such limit.

3.67 Third, the material called upon to support this argument, the so-called "Sullivan Study",[146] does not say what the United States would like it to say:

a. Nowhere at p. 230 of this document – or anywhere in the commentary to the standard article XIV, which is similar to Article VIII of the Treaty of Amity – is there language "explaining that whereas the article on exchange restrictions was designed to protect nationals and companies who wished to transfer funds *from* the other treaty partner, this article protected those who wished to transfer funds from their own country *to* the treaty partner";[147]

b. Although article XIV of the standard draft of the FCN Treaty commented on by Sullivan "uses the same phrase 'international transfer of payments for imports or exports', [included] in a single and longer sentence that comprises the entire paragraph"[148], the Parties to the Treaty of Amity precisely chose to separate the phrase relating to the international transfer of payments for imports or exports from the rest of the sentence and to establish it as a separate sentence. This shows that they intended this phrase to be understood independently. In any event, the construction of this phrase in the context of the first sentence of

145 IM, Annex 1. Emphasis added.

146 The "Sullivan Study" is a study commissioned by the U.S. Department of State to provide commentary and analysis on the provisions of the U.S. standard draft FCN treaty and prepared by Charles Sullivan in 1981. The United States submitted excerpts of this study to the Court (U.S. PO, Annex 160).

147 U.S. Preliminary Objections, p. 112, fn. 348 (emphasis in the original), referring to p. 230 of the Sullivan Study (U.S. PO, Annex 160).

148 U.S. Preliminary Objections, p. 112, fn. 346. This single, longer sentence reads as follows: "Each Party shall accord most-favored-nation treatment to products of the other Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other Party, by whatever route and by whatever type of carrier, with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with imports and exports" (U.S. PO, Annex 160, pp. 229-230).

Article VIII(1) reveals that "imports or exports" are not limited to transactions directly between the territories of the two Parties.

3.68 Iran's interpretation of the two sentences of Article VIII(1) is also consistent with the object(s) and purpose(s) of the Treaty as a whole. Reading these provisions, as the United States does, as (i) providing obligations of no-less-favourable treatment solely with respect to international payments for importations and exportations of the Parties' products directly between the Parties territories but, conversely, as (ii) authorizing prohibitions and restrictions by either Party on the international payments for importation and exportation of products by the other Party from and to third States in such a way as deliberately to damage the economy and commercial capacity of the other Party, would run counter to the object and purpose of establishing friendly relationships through the prosperity generated by trade.

3.69 As a supplement to the 'no less favourable treatment' standard with respect to imports/exports as well as to payment for imports and exports provided in the first paragraph of Article VIII, the second paragraph of this Article lays down a similar obligation of non-discriminatory treatment. It reads:

> "Neither High Contracting Party shall impose restrictions or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the territories of the other High Contracting Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited."

3.70 The United States does not dispute Iran's interpretation of Article VIII(2). Therefore, it suffices to recall that this obligation to accord a non-discriminatory treatment applies to restrictions or prohibitions on:

a. "the importation of any product of" the other Party; as the term "importation" is territorially undefined, this provision reads according to its ordinary meaning as protecting the importation of Iranian products into *any* territory, including the United States, from U.S. discriminatory restrictive measures;

b. "the exportation of any product to the territories of" the other Party; as the term "product" is expressly unqualified ("*any* product", without any limitation), the

phrase is to be understood, in accordance with the ordinary meaning of its terms, as covering the exportation to Iran of products originating from any territory.[149]

3.71 As with Article VIII(1), this interpretation of Article VIII(2) is consistent with the object(s) and purpose(s) of the Treaty as a whole, which is to bring prosperity to both Parties and thus to strengthen a peaceful and friendly relationship between them. This objective of mutual enhancement of the other Party's economy in order to promote peace contradicts a construction according to which the scope of the provisions regarding importations and exportations – and of the Treaty of Amity in general – would be limited to bilateral trade so as to permit measures the object of which is expressly to destroy the other Party's economy through economic sanctions.

B. U.S. measures complained of by Iran which fall within the scope of Article VIII(1) and (2)

3.72 The United States contends that Iran's Memorial is "vague about which measures Iran claims are breaches of [Article VIII, paragraphs 1 and 2 of the Treaty of Amity]",[150] and uses this alleged vagueness to avoid any discussion on whether these acts fall within the ambit of Article VIII(1) and (2).

3.73 Thus the United States fails to engage with Iran's Memorial, which sets out in detail the object of the measures resulting from the 8 May Decision (Chapter II) and their effects on Iran, its people and its companies (Chapter III), before assessing these measures against the relevant provisions of the Treaty of Amity (Chapters IV through VIII).

3.74 Iran will briefly recall the points made in the Memorial demonstrating that the U.S. measures fall within the scope of Article VIII(1) and (2).

3.75 As noted above, the first sentence of Article VIII(1) applies to regulations prohibiting, or interfering with, importation of Iranian products or exportation of any products to

[149] Iran's Memorial, p. 208, paras. 6.16-6.17.

[150] U.S. Preliminary Objections, p. 112, para. 7.47.

Iranian territory;[151] such regulations are unlawful under this provision in so far as they accord a less favourable treatment than the one accorded by the United States to any like product of third countries.

3.76 The question of whether some States receive better treatment from the United States than Iran with respect to the import/export of any kind of product is reserved to the merits phase. The only question to be addressed at this stage of proceedings is whether the U.S. measures fall within the scope of Article VIII(1). It is the case if the measure is a "treatment" regarding trade between Iran and any country, and if it relates to "duties, other charges, regulations and formalities, on or in connection with importation and exportation", or "internal taxation, sale, distribution, storage and use."

3.77 The measures complained of by Iran in its Memorial, which are all "regulations", plainly meet this definition:

a. Section 201 of the ITSR, which prohibits the importation into the United States of Iranian-origin luxury goods, including carpets and foodstuffs;[152]

b. Section 1245 of IFCA, which generally prohibits the sale, supply or transfer (i.e., the import/export) of precious metals, graphite, raw, or semi-finished metals, and industrial software to or from Iran;[153]

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151 This first sentence provides the following general principle that "[e]ach High Contracting Party shall accord to products of the other High Contracting Party from whatever place (…) arriving, and to products destined for exportation to the territories of such other High Contracting Party (…), treatment no less favorable than that accorded like products of or destined for exportation to any third country, in all matters relating to" regulation on or in connection with importation and exportation, and to internal disposition. According to this language, the United States shall accord to products of Iran destined for importation to its territory, and to any products destined for exportation to the territories of Iran, treatment no less favorable than that the United States accords to like products of or destined for exportation to any third country in the matters specified by Article VIII(1).

152 Iran's Memorial, p. 36, para. 2.47.

153 Iran's Memorial, pp. 24-29, paras. 2.19-2.26.

c. Section 1(a)(ii) of E.O. 13846, which *inter alia* prohibits the provision of goods or services in support of NIOC, NICO or the Central Bank of Iran (i.e., the importation of goods to Iran);[154]

d. Subsections 2(a)(iv)-(a)(v) of E.O. 13846, which applies to "any significant transaction for the purchase, acquisition, sale, transport or marketing of" (i.e., for the exportation of, petroleum, petroleum products, or petrochemical products from Iran);[155]

e. Section 3(a) of E.O. 13846, which prohibits "significant transaction for the sale, supply or transfer to Iran" (i.e., importation to Iran), of "significant goods and services used in connection with the automotive sector of Iran";[156]

f. The revocation of the Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services ("SLP"), and of General License I, which reimposed the prohibition on the export or re-export to Iran of commercial passenger aircraft and related parts and services under ITSR.[157]

3.78 Similarly, the following measures fall within the ambit of the second sentence of Article VIII(1) – the requirement of no-less-favorable treatment regarding international transfers of payments for imports or exports – since they are regulations regarding transfers of payments of imports exports:

a. Section 201 of the ITSR, which prohibits certain financial transactions related to the importation into the United States of Iranian-origin luxury goods;

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154 Iran's Memorial, pp. 44-45, paras. 2.69-2.71.

155 Iran's Memorial, pp. 45-46, paras. 2.72-2.74.

156 Iran's Memorial, pp. 32-33, paras. 2.35-2.39.

157 Iran's Memorial, pp. 34-35, paras. 2.42-2.45.

b. Section 2(a)(iii) of E.O. 13846, which generally prohibits "any significant financial transaction" with NIOC or NICO, that is, financial transactions related to the importation into Iran of goods destined to NIOC or NICO;[158]

c. Subsections 2(a)(iv)-(a)(v) of E.O. 13846, described above: insofar as this prohibition concerns non-U.S. financial institutions, it limits financial transactions related to the exportation of petroleum, petroleum products, or petrochemical products from Iran;[159]

d. Subsection (c) of section 1245 of IFCA, which prohibits "significant financial transactions" for the import/export of precious metals, graphite, raw, or semi-finished metals, and industrial software to or from Iran;[160]

e. Section 2(a)(i) of E.O. 13846, which prohibits "significant financial transactions for the sale, supply, or transfer to Iran of goods or services used in connection with Iran's automotive sector";[161]

f. Section 6 of E.O. 13846, which prohibits operations related to the Iranian Rial and thus international transfers of payments for imports/exports in this currency;[162]

g. The re-listing and the listing of Iranian and non-Iranian persons on the SDN List, which results in the blocking of the assets under United States' jurisdiction belonging to these persons and in the prohibition on transfers of these assets, can be characterized, insofar as these assets could be used to pay for import/export of products to or from Iran, as a restriction of international transfers of payments;[163]

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158 Iran's Memorial, pp. 45-46, paras. 2.71-2.74.

159 Iran's Memorial, p. 45, para. 2.72.

160 Iran's Memorial, p. 28, paras. 2.22-2.23.

161 Iran's Memorial, p. 33, para. 2.38.

162 Iran's Memorial, pp. 29-31, paras. 2.27-2.30.

163 Iran's Memorial, pp. 37-40, paras. 2.50-2.60.

h. Section 1(a)(iv) of E.O. 13846, which provides for the blocking of assets owned by any person taking part in the energy, shipping, or shipbuilding sectors of Iran or operating a port in Iran, in a way similar to the blocking of the SDN's assets.[164]

3.79 Finally, almost all the U.S. measures that Iran has identified in Chapter II of its Memorial fall within the scope of Article VIII(2) in so far as they impose a restriction on exportations and importations of products into Iran and from Iran. This includes the following measures:

a. The revocation of the SLP, and of General License I "Authorizing Certain Transactions Related to the Negotiation of, and Entry into, Contingent Contracts for Activities Eligible for Authorization Under the Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services";[165]

b. The revocation of General Licence H "Authorizing Certain Transactions relating to Foreign Entities Owned or Controlled by a United States Person";[166]

c. Subsection 1(a)(i) of E.O. 13846 prohibiting the support for the Government of Iran's purchase or acquisition of precious metals, i.e., importation in Iran of such metals;[167]

d. Section 1245 IFCA prohibiting, in combination with section 5 of E.O. 13846, the transactions with Iran in precious metals, graphite, raw, or semi-finished metals, and industrial software;[168]

164 Iran's Memorial, pp. 41-43, paras. 2.62-2.66.

165 Iran's Memorial, pp. 34-36, paras. 2.42-2.45.

166 Iran's Memorial, pp. 62-63, paras. 2.109-2.112.

167 Iran's Memorial, pp. 23-24, paras. 2.15-2.18.

168 Iran's Memorial, pp. 24-29, paras. 2.19-2.26.

e. Section 3(a)(i) of E.O. 13846, and other related provisions, prohibiting automotive-related importations and exportations;[169]

f. The re-listing and the listing of Iranian and non-Iranian persons on the SDN List, which results in the blocking of the assets under the U.S. jurisdiction belonging to these persons and in the prohibition on transferring these assets, prohibit the exportation of these assets;[170]

g. Section 1(a)(iv) of E.O. 13846 which prohibits, in combination with provisions of Section 1244 IFCA, the provision of goods and services, i.e., the exportation, to operators of a port in Iran or to persons involved in or providing support to the energy, shipping or shipbuilding sectors of Iran; various provisions of Section 1244 IFCA restricting the importation and exportation of products from or to Iran as far as Iran's energy sector is concerned (oil, gas, or any goods);[171]

h. The provisions of E.O. 13846 and related statutory authorities prohibiting the exportation of goods to NIOC, NICO, or the Central Bank of Iran; and generally the importations and exportations of petroleum, petroleum products or petrochemical products to or from Iran.[172]

SECTION 5.

IRAN'S CLAIMS UNDER ARTICLES IX(2) AND IX(3) OF THE TREATY OF AMITY

3.80 Article IX(2) of the Treaty of Amity reads:

> "Nationals and companies of either High Contracting Party shall be accorded treatment no less favorable than that accorded nationals and companies of the other High Contracting Party, or of any third country, with respect to all matters relating to importation and exportation."

169 Iran's Memorial, pp. 32-34, paras. 2.35-2.40.

170 Iran's Memorial, pp. 37-40, paras. 2.50-2.60.

171 Iran's Memorial, pp. 41-42, paras. 2.62-2.65. See also Iran's Memorial, pp. 51-53, paras. 2.85-2.94.

172 Iran's Memorial, pp. 45-48, paras. 2.70-2.79.

3.81 This provision requires the Parties to accord to the other Party's nationals and companies treatment no less favourable than that accorded to their own nationals and companies or to those of any third country with respect to all matters relating to importation and exportation. Moreover, since this provision contains no territorial limitation – in particular with respect to "importation and exportation" – it applies to all Iranian nationals and companies engaged in activities of importation from, or exportation to, any territory, including, but not limited to, U.S. territory.[173]

3.82 The United States disputes Iran's interpretation by asserting that "[m]easures that do not relate to importation into the United States and exportation from the United States (…) are outside the clear terms of this Article".[174] Yet, it does not submit any (interpretative) argument to show that this provision is territorially limited.

3.83 The United States' objection with regard to Article IX(2) rests on another point which is equally untenable. The United States asserts that since the "national treatment" which is guaranteed by Article IX(2) is to be accorded to Iranian nationals and companies, the U.S. "third-country measures", which "provide for treatment of the nationals and companies of third countries, or of those third country nationals' and companies' property [under U.S. jurisdiction]",[175] are not caught by this provision.

3.84 This argument relies on a misrepresentation of the concept of "national treatment" – or, as written in Article IX(2), "no less favorable treatment than that accorded nationals". The assurance of national treatment prohibits any discrimination against aliens by legislation. In addition, and in the light of the rule of non-discrimination, the phrase "accorded to", on which the United States relies to support its argument, only means "granted". This covers two types of "treatment": the one that explicitly targets the person, and the other that, although its declared subject is not the person, targets that person *in fact*. This is confirmed by the practice of trade treaty law, under which "national treatment provision have been construed to ban any discriminatory internal measure as well as any internal measure that indirectly implies some sort of non-

173 Iran's Memorial, pp. 211-212, para. 7.2.

174 U.S. Preliminary Objections, p. 113, para. 7.51.

175 U.S. Preliminary Objections, p. 113, para. 7.51.

justified discrimination including alleged de facto discrimination".[176] In sum, every U.S. measure the direct effect (let alone the object) of which is to create disproportionate benefits for nationals over Iranian persons and companies in relation to their importation or exportation falls within the scope of Article IX(1).

3.85 Article IX(2) thus provides a broad rule of nondiscrimination for the persons engaged in international trade. In so far as the U.S. measures challenged by Iran[177] explicitly strike Iranian importers and exporters while their U.S. peers are left unharmed, they fall within the scope of this provision and, as a result, the U.S. jurisdictional objection concerning Article IX(2) should be rejected.

3.86 According to Article IX(3):

> "Neither High Contracting Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either High Contracting Party".

3.87 Iran explained in the Memorial that this provision must be read as prohibiting the United States from imposing any discriminatory measure, whether direct or indirect, that hinders or prevents any importer and exporter, whatever its nationality, of Iranian or U.S. products from obtaining marine insurance from U.S. or Iranian companies.[178]

3.88 The United States criticizes this interpretation as being contrary to the plain text of the provision. It asserts that "[i]n context, the phrase 'of either country' modifies 'importer or exporter of products'" so as to limit the applicability of Article IX(3) to importers or exporters of Iran or of the United States.[179]

3.89 This argument cannot be accepted. Not only is it a mere assertion, but the United States does not describe the context in which its purports to read the provision, and

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176 R. Vinuesa, "National Treatment, Principle" in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Online edition, para. 41.

177 Iran referred on p. 212, para. 7.3 of its Memorial to those U.S. measures which, in so far as their object or effect is to preclude Iranian nationals and companies from carrying out international trade, fall within Article IX(2) of the Treaty of Amity.

178 Iran's Memorial, pp. 212-213, paras. 7.4-7.6.

179 U.S. Preliminary Objections, p. 114, para. 7.53.

does not explain why the phrase "of either country" should refer to "importer or exporter of products" rather than to "products"; it also betrays the ordinary meaning of the terms in their context.

3.90 First, if the parties had intended to agree that the "importer or exporter" contemplated by this provision be exclusively the one "of either country", they would not have inserted "of products" right after "importer or exporter", since only products are likely to be covered by marine insurance. "Importation of products" in the context of the coverage by marine insurance is a redundancy unless "products" is qualified. There are numerous examples of "importation" or "exportation" standing alone in other provisions of the Treaty of Amity: see Articles VIII(1)(a), IX(1)(a), IX(2), XI(1)(a).

3.91 Second, the adjective "such", like "said", is used in English to "refer to its last antecedent".[180] "Such" presupposes a reference to an antecedent that has been previously qualified. Article IX(3), *in fine*, mentions "such products", meaning that the last occurrence of "products" must have been qualified. The only phrase likely to qualify "products" in Article IX(3) is "of either country", which in that case cannot equally qualify "importer or exporter". This last phrase thus remains unqualified and, as such, must be read as *any* importer or exporter.

3.92 This is confirmed by the French translation of this provision by the United Nations, which reads in relevant part: "*les importateurs ou les exportateurs de produits originaires de l'un ou l'autre pays*". It would make no sense to qualify "*importateurs ou exportateurs*" as "*originaires*" from a country; in the French translation, "*originaires*" is plainly referring to "*produits*".

3.93 The United States refers to the "intent of the provision" to support its interpretation – but the intent is actually of the United States itself as represented by the Sullivan Study.[181] But Article 31 of the Vienna Convention, which governs the process of

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180 D. Greenberg (ed.), *Stroud's dictionary of words and phrases*, Ninth edition, vol. 3, Sweet and Maxwell, London, 2016, p. 2496. See also Brian Garner (ed.), *Black's Law Dictionary*, Tenth edition, Thomson Reuters, St Paul, 2014, at p. 1661, defining "such" notably as "That or those; having just been mentioned".

181 *Ibid.*

interpretation of treaties, does not mention anything like the "intent of provisions", whatever it means, as relevant.

3.94 In sum, the interpretation of Article IX(3) proposed by the United States is inconsistent with the ordinary meaning of its terms. Article IX(3) must rather be read as providing that Iran (or the United States) cannot prohibit the provision by U.S. (or Iranian) companies of marine insurance to any persons importing or exporting U.S. or Iranian products.

3.95 The measures identified by Iran plainly fall within the scope of Article IX(3) correctly interpreted.[182] The *Oil Platforms* test is satisfied and the United States' jurisdictional objection with regard to this provision should be rejected.

SECTION 6.

IRAN'S CLAIMS UNDER ARTICLE X(1) OF THE TREATY OF AMITY

3.96 Article X(1) of the Treaty of Amity provides:

> "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

3.97 The United States contends that a claim for breach of this provision "must implicate direct trade between the territories of the United States and Iran, without any intermediate transactions involving third countries".[183] It recognises that there was ongoing commerce between the territories of the United States and Iran as of May 2018, and it is accepted that U.S. measures that, for example, cancelled licenses for the export of U.S. aircraft are caught by Article X(1).[184] However, the United States also contends that "third country measures" are excluded. The U.S. approach to Article X(1) is untenable in two important respects.

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182 Iran's Memorial, pp. 213-215, paras. 7.7-7.12.

183 See U.S. Preliminary Objections, p. 116, para. 7.61.

184 See U.S. Preliminary Objections, p. 116, para. 7.63.

3.98 First, it is wrong to say that trade that comprises intermediate transactions is necessarily excluded from the ambit of commerce between the territories of the two High Contracting Parties. As Iran explained in its Memorial, if transactions were from the outset intended to involve the delivery of a product between the territories of Iran and the United States through an intermediary in a third country, that would fall within the scope of Article X(1).[185] The United States has not engaged with this point.

3.99 Second, as follows from the above, and as also follows from the Court's past consideration of Article X(1), the question of whether or not a given measure interferes with the freedom of commerce between the territories of the two States is very fact-dependent. As the Court stated in the *Oil Platforms* case:

> "Any act which would impede that 'freedom' is thereby prohibited. Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and storage with a view to export."[186]

3.100 Precisely the same applies so far as concerns the "third country measures" in the present case. The "possibility must be entertained" (indeed, it is a certainty) that freedom of commerce between the two territories could be impeded as a result of acts that make it impossible for Iranian nationals or companies to pay for,[187] ship,[188] and insure[189] goods that they wish to acquire from the United States. If, for example, an Iranian company operating a hospital wishes to purchase medical supplies and equipment from a U.S. company and cannot do so because it cannot engage in the requisite international banking transaction due to the "third country measures", the relevant U.S. measure plainly impedes freedom of commerce between the territories of the two States. It is perplexing that it should be contended otherwise.

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185 Iran's Memorial, p. 217, para. 8.6, considering *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 207, para. 97.

186 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 819, para. 50, quoted in *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 201, para. 83. See also at p. 203, para. 89.

187 Iran's Memorial, p. 219, paras. 8.11-8.12.

188 Iran's Memorial, p. 220, para. 8.13.

189 Iran's Memorial, p. 221, para. 8.14.

3.101 The same basic point applies with respect to all commerce between the territories of the two States that was ongoing or in contemplation prior to introduction of the U.S. measures, and indeed the U.S. measures have rendered the required freedom of commerce wholly illusory. As was made plain by Iran in its Memorial, it was not then in a position to put forward an accurate and reasonably comprehensive picture of the extent of the interference with its right to freedom of commerce.[190] However, on the basis of the facts as already pleaded,[191] including with respect to "third country measures", Iran's claims do fall within Article X(1) and the U.S. objection *ratione materiae* should be rejected.

[190] Iran's Memorial, p. 221, para. 8.15.

[191] Iran's Memorial, pp. 216-221, paras. 8.8-8.14.

PART II.
THE U.S. OBJECTIONS TO ADMISSIBILITY

CHAPTER IV.
ABSENCE OF ABUSE OF PROCESS OR QUESTIONS OF JUDICIAL PROPRIETY

4.1 The United States tries to have the Court discard the case altogether by asserting that Iran's claims would not be fit for adjudication, since adjudging them would both represent an abuse of process and be incompatible with judicial propriety. According to the United States, "this is because the case is really about, and inextricably bound up in, the JCPOA, with the Treaty of Amity merely a device".[192]

4.2 On its face, this objection is fabricated and improper in nature:

a. It is fabricated because it falls outside of the realm of Iran's Application, which concerns the Treaty of Amity and U.S. breaches of its obligations under the Treaty. The admissibility of Iran's case can only be appraised in relation to the actual subject-matter of the dispute, and not by reference to a subject-matter artificially designed by the United States to serve an argument on inadmissibility;

b. It is improper because it is designed to bar an Applicant who comes with a dispute over which the Court has jurisdiction *ratione materiae* and which regards treaty violations from having this dispute resolved, by raising an argument based on a separate and unrelated agreement. The jurisdiction of the Court is a predicate to the review of a claim of abuse of process: it is only because Iran has "established a valid title of jurisdiction"[193] that the Court may consider this preliminary objection. The United States, therefore, claims that having found that "the acts of which Iran complains fall within the provisions

192 U.S. Preliminary Objections, p. 51, para. 5.2.

193 *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, p. 42, para. 150.

of the Treaty of Amity and [that], as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2, thereof",[194] the Court should nonetheless refuse to hear this dispute on the merits because of its alleged relationship with the JCPOA, an agreement which is unrelated to the Treaty of Amity and which is plainly not the legal basis of the present case.

4.3 This objection is also frivolous because it misinterprets or ignores basic principles governing the notions of abuse of process and judicial propriety. The United States contends that the Court, if it were to hear Iran's case on the merits, would face three consequences: (i) it could give an "illegitimate advantage"[195] to Iran under the JCPOA, (ii) it would get entangled with the "mechanics, architecture and enforcement"[196] of the JCPOA and (iii) its decision could have significant repercussions outside the Treaty of Amity, by undermining the political efforts that resulted in the JCPOA. Supposedly, these three consequences would either show that Iran is engaged in an abuse of process, or raise questions of judicial propriety, or do both.

4.4 Iran will briefly demonstrate in this Chapter that none of these purported consequences could constitute – even if they were to materialise, *quod non* – grounds to bar the Court from exercising its judicial functions and resolving the present dispute:

a. in Section 1, Iran will prove that by filing its Application instituting these proceedings, it did not commit any abuse of process; and

b. in Section 2, Iran will show that by hearing and adjudging its claims, the Court will not be at odds with its judicial function; indeed, it would be fulfilling it.

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194 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 36.

195 U.S. Preliminary Objections, p. 51, para. 5.2; p. 59, para. 5.22; p. 62, para. 5.26; p. 65, para. 5.34; and p. 66, para. 5.38.

196 U.S. Preliminary Objections, p. 48, para. 4.15 and p. 58, para. 5.19.

SECTION 1.

IRAN'S LEGITIMATE CLAIMS DO NOT CONSTITUTE AN ABUSE OF PROCESS

4.5 The position of Iran has not varied from the one it expressed during the preliminary objections phase of the *Certain Iranian Assets* case: to properly submit a dispute to the Court under a jurisdictional provision that is in force, and in a case in which the claims are related to treaty breaches, cannot, as a matter of principle, be considered an abuse of process. To assert otherwise would jeopardize the very principle of the peaceful settlement of disputes through judicial settlement, enshrined in Article 33(1) of the UN Charter.

4.6 The United States seeks to avoid answering to this fundamental flaw in its argument on "abuse of process" by claiming that "[w]hat constitutes an abuse of process is not susceptible to a comprehensive definition in the abstract".[197] It then dedicates lengthy passages describing the two circumstances that, from its point of view and without any legal foundation, would characterize an abuse of process in the present case.

4.7 The Court has, however, addressed the notion and conditions of the abuse of process (A.). According to its jurisprudence, the Court would refuse only in extreme or "exceptional" circumstances to entertain a claim on which it has jurisdiction on the ground of abuse of process. Iran's claims do not in any way meet this requirement (B.).

A. The requirement of exceptional circumstances for qualifying an abuse of process

4.8 In several cases, the Court has had to consider arguments based on abuse of process.[198] In no case, however, has the Court found the existence of such an abuse. The United

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197 U.S. Preliminary Objections, p. 59, para. 5.22.

198 *Ambatielos case (merits: obligation to arbitrate), Judgment of May 19th, 1953: I.C.J. Reports, 1953,* pp. 22-23; *Case concerning right of passage over Indian territory (Preliminary Objections), Judgment of November 26th, 1957: I.C.J. Reports 1957,* pp. 147-148; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, pp. 23-24; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* pp. 91-92, paras. 51-56, and pp. 105-106, para. 94; *Arbitral Award of 31 July 1989,*

States made claims of abuse of process in two previous cases: first, in *Military and Paramilitary Activities*, in which it opposed in vain the Nicaraguan Application on the ground that the proceeding was futile and motivated by the intention to engage in political propaganda;[199] second, in *Certain Iranian Assets*, when the United States raised a preliminary objection on grounds similar to those alleged in this case. It asked the Court to consider Iran's claims as amounting to an abuse of process because, *inter alia*, Iran was allegedly seeking to embroil the Court in a broader strategic dispute and its claims were allegedly subverting the purposes of the Treaty.[200] The Court rejected these contentions, as it did in all other cases in which abuse of process has been argued.

4.9 The threshold for an abuse of process is very high. It has been clarified by the Court in *Immunities and Criminal Proceedings*:

> "… the Court does not consider that [the applicant], having established a valid title of jurisdiction, should be barred at the threshold without clear evidence that its conduct could amount to an abuse of process. (…) It is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process".[201]

4.10 In *Certain Iranian Assets*, adding to its dictum in *Immunities and Criminal Proceedings*,[202] the Court concluded that there has to be clear evidence that the Applicant's conduct amounts to an abuse of process.[203] These conditions were not met in that case, since:

Judgment, I.C.J. Reports 1991, p. 63, paras. 26-27, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, paras. 37-38; *Aerial Incident of 10 August 1990 (Pakistan v. India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 30, para. 40; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, pp. 37-38, para. 44.

199 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, pp. 178-179, paras 21-25.

200 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgement of 13 February 2019*, p. 38, paras 107-109.

201 *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, p. 42, para. 150.

202 *Ibid.*

203 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgement of 13 February 2019*, p. 35, para 113; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, p. 42, para. 150; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 38.

> "The Court has already observed that the Treaty of Amity was in force between the Parties on the date of the filing of Iran's Application, … and that the Treaty includes a compromissory clause in Article XXI providing for its jurisdiction. The Court does not consider that in the present case there are exceptional circumstances which would warrant rejecting Iran's claims on the ground of abuse of process".[204]

4.11 The same reasoning applies here.

B. The consequences alleged by the United States as manifesting an abuse of process do not constitute exceptional circumstances

4.12 The two consequences that the United States contends are concrete signs of an abuse of process – namely, the decision sought by Iran in the present case and the political implications that may result from it – are tainted by an obvious flaw: these are normal consequences that can be expected from any treaty dispute between two contracting parties and cannot in any way be considered to be "exceptional circumstances".

i. Seeking the application and enforcement of a valid international agreement cannot be considered as an injustice or an undue advantage

4.13 The main argument of the United States is as follows: "Iran's claims seek to compel the United States to provide Iran with sanctions relief that was part of a clear *quid pro quo* under the JCPOA: Iran's implementation of restrictions on its nuclear program in exchange for the lifting of specific nuclear-related sanctions".[205] Since the United States considers that these commitments were not legally binding under the JCPOA, it adds: "the point is that entertaining this case would give rise to the very real prospect of Iran obtaining a legal judgment against the United States to provide the *quid* … without Iran itself giving the *quo*".[206]

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[204] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgement of 13 February 2019*, p. 35, para. 114; see also *Jadhav Case (India v. Pakistan), Judgment of 17 July 2019*, p. 16, para. 49.

[205] U.S. Preliminary Objections, p. 61, para. 5.26.

[206] U.S. Preliminary Objections, p. 66, para. 5.37.

4.14 The U.S. argument contains two separate contentions: first, that Iran's application would amount to "the use of judicial procedures for … the purpose of 'obtaining an illegitimate advantage'";[207] and second, that by artificially bringing a case on the Treaty of Amity, Iran would actually be seeking to obtain a decision on the JCPOA, a different matter that is to be addressed "through political, not legal means".[208]

4.15 The Court has already considered that such contentions, whether founded or not – and they are plainly unfounded *in casu* – cannot constitute an abuse of process by the applicant. In the *Border and Transborder Armed Actions* case, the Court:

a. on the one hand, answered the Honduran contention that Nicaragua was attempting to use the Court "as a means of exerting political pressure on the other Central American States" by observing that:

> "The Court, as a judicial organ, is however only concerned to establish, first that the dispute before it, is a legal dispute, in the sense of a dispute capable of being settled by principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that jurisdiction is not fettered by any circumstance rendering the applicable inadmissible. The purpose of recourse to the Court is the peaceful settlement of such disputes; the Court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement."[209]

b. and, on the other hand, responded to the accusation of artificiality of the Nicaraguan request, which allegedly dealt with only part of a "general conflict existing in Central America", by underlining that:

> "The Court is not unaware of the difficulties that may arise where particular aspects of a complex general situation are brought before a Court for a separate decision. Nevertheless, as the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran*, 'no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of the one aspect of a dispute

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207 U.S. Preliminary Objections, p. 59, para. 5.22.

208 U.S. Preliminary Objections, p. 65, para 5.33.

209 *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 1988*, p. 91, para. 52.

merely because that dispute has other aspects, however important' (*I.C.J. Reports 1980*, p. 19, para. 36)".[210]

4.16 The United States also fails to meet the factual test – the evidence of "exceptional circumstances" – that is required under the Court's case law for there to be an abuse of process.[211] It alleges that, in the present case, exceptional circumstances lie in the "illegitimate advantage that would be obtained and the injustice that would result if Iran's case were to proceed".[212] But it is impossible for a right recognized to Iran as a result of the present proceedings to be "illegitimate":[213] Iran's right would only derive from the Treaty concluded between the Parties, as upheld and applied by the Court.

4.17 The U.S. argument would also amount to barring access to judicial recourse to any applicant alleging violations of a treaty or of another obligation of international law if, by deciding on such dispute, the seised judicial body could be at risk of influencing the execution of another international instrument. Such a definition of the abuse of process would render inadmissible multiple claims that rely on alleged breaches of treaty's obligations or customary international law, since deciding on such alleged breaches by a party will often have implications on the execution by that party of other international obligations.

ii. The political implications of an international adjudication are not a relevant ground for an abuse of process

4.18 The United States also claims that if the Court were to decide on Iran's claims, "it could have significant repercussions well outside the Treaty",[214] since "allowing Iran's case to proceed to the merits—when the JCPOA participants manifested their deliberate intent to have these sensitive issues addressed through political, not legal,

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210 *Ibid*., p. 92, para. 54.

211 See p. 63, paras. 4.9-4.10 above.

212 U.S. Preliminary Objections, p. 65, para. 5.34.

213 U.S. Preliminary Objections, p. 51, para. 5.2; p. 59, para. 5.22; p. 62, para. 5.26; p. 65, para. 5.34; and p. 66, para. 5.38.

214 U.S. Preliminary Objections, p. 58, para. 5.19.

means—could well upend predictability in other efforts to address complex, contemporary transnational problems through political arrangements".[215]

4.19 Notwithstanding the irony of having the United States speaking about predictability in connection with the JCPOA, the core of this argument is a complete denial of legal certainty in public international law. Iran and the United States concluded the Treaty of Amity in order to secure their mutual rights and obligations. To assert that Iran cannot bring a claim regarding breaches of these mutual rights and obligations because of the mere possibility that this could limit the possibility of political arrangements in "not easily foreseeable"[216] future matters is neither tenable nor serious.

4.20 Indeed, the fact that a dispute regarding the interpretation or application of an international agreement may have political implications is irrelevant to the adjudication of such dispute.

4.21 The Court's case law in this regard is constant. It suffices to recall that the Court settled this matter in 1980 as follows:

> "never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes."[217]

This same position has been confirmed in *Military and Paramilitary Activities*:

> "It must be remembered that, as the Corfu Channel case (…) shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force"[218].

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215 U.S. Preliminary Objections, p. 65, para. 5.33.

216 *Ibid.*.

217 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), I.C.J. Reports 1980*, p. 20, para. 37.

218 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 96.

4.22 There is no basis for departing from this well-established position, which protects the legal certainty to be expected from international treaties such as the Treaty of Amity. The supposed political consequences of the decision to be rendered on Iran's claims cannot constitute an "exceptional circumstance" constituting an abuse of process.

SECTION 2.
IN EXERCISING ITS JURISDICTION IN THIS CASE, THE COURT WILL NOT COMPROMISE THE INTEGRITY OF ITS JUDICIAL PROCESS

4.23 The United States contends that there is another ground for challenging the admissibility of Iranian claims: the fact that some of the consequences that the United States attaches to these claims would put the Court at odds with its judicial function.[219] This claim is no less unfounded than the claim of abuse of process.

4.24 The United States makes no effort to define what would be covered by the notion of judicial propriety and the conditions under which it could convince the Court to declare a case inadmissible. The United States justifies its lack of explanation by referring to the Court in *Northern Cameroons*, in which it stated that: "it is not possible to delimit in advance all circumstances in which the Court should employ its inherent authority to decline to exercise jurisdiction".[220] But the fact that it is not possible "to catalogue"[221] all the situations which may be covered by a legal concept does not discharge the burden of the party invoking the argument from proving its content and the particular conditions under which it can be applied to the other party.

4.25 The United States simply asserts that circumstances or consequences of the present proceeding are threats to the integrity of the judicial process of the Court. This position is not serious and deprives the U.S. argument of any legal basis.

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219 U.S. Preliminary Objections, p. 58, para. 5.19 and p. 65, para. 5.34.

220 U.S. Preliminary Objections, p. 60, para. 5.23.

221 *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 30.

4.26 Iran will nonetheless demonstrate that (A.) contrary to the U.S. assertions, the concept of judicial propriety can be defined, both in terms of content and scope, and (B.) that none of the circumstances claimed by the United States to be at odds with the judicial function of the Court raises actual questions of judicial propriety.

A. The inherent limitations on the Court's judicial functions remain exceptional

4.27 As stated in article 38 of its Statute, the function of the Court is:

> "to decide in accordance with international law such disputes as are submitted to it".[222]

4.28 This judicial function is essential in any legal order. Indeed, as recalled by Judge Bustamante in his Dissenting Opinion in the *Northern Cameroons* case:

> "The judicial guarantee is, in truth, one of the most important pillars of modern society. It means the primacy of law over other factors: interests, negligence, abuse or force. It gives force to the principle of responsibility as a regulating element in social and international conduct. It can prevent further transgressions in the future. In short, it constitutes a manifold guarantee the purpose of which is to state the law when it requires to be stated (…)."[223]

4.29 Therefore, to make good an argument that by hearing a case, the Court would not, in fact, be exercising its judicial function, the circumstances at issue must be of such a nature that they are capable of preventing or hindering the capacity of the Court to address the specific legal and factual subject-matter that it is requested to adjudicate. According to Professor Hubert Thierry, the case law of the Court gives sufficient indications to identify when its judicial functions could be called into question by the filing of an application or the hearing of the dispute:

> " … the judicial function of the Court is not concerned when the Court is not called upon to rule on the law (a duty outside of the judicial function), when the dispute is irrelevant (the judicial function then having nothing to exercise)

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222 Statute of the International Court of Justice, article 38.

223 *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, I.C.J. Reports 1963*, Dissenting Opinion of Judge Bustamante.

or finally when this function cannot be performed without being distorted (conditions incompatible with the performance of the function) ."[224]

4.30 None of these factors is relevant in this case in which the Court is requested to rule on treaty violations, where it has upheld its jurisdiction *ratione materiae* to hear this dispute, and where none of Iran's claims falls outside the judicial function of the Court.

B. Deciding on Iran's claims will not jeopardize the Court's judicial function

4.31 According to the United States, two of the three consequences that it attaches to Iran's claims could call into question the judicial integrity of the Court:

a. first, the "deep entanglement" with the JCPOA in which the Court could end up if it were to hear these claims;[225] and

b. second, the risk of giving Iran an "illegitimate advantage" if its claims were to be upheld.[226]

4.32 However, neither of these two vague assertions could qualify as an appropriate ground to request the Court to strike out the present case in order to protect the integrity of its judicial process.

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224 H. Thierry, « L'arrêt de la Cour internationale de Justice dans l'affaire du Cameroun septentrional (Cameroun c. Royaume-Uni), Exceptions préliminaires, arrêt du 2 décembre 1963 », *AFDI*, vol. 10, 1964, p. 315; translation of :

> « *la fonction judiciaire de la Cour n'est pas en jeu lorsque celle-ci n'est pas appelée à dire le droit (tâche étrangère à la fonction), lorsque le différend est sans objet (la fonction judiciaire n'ayant alors rien sur quoi s'exercer) ou enfin lorsque cette fonction ne peut être accomplie sans être dénaturée (conditions incompatibles avec l'exercice de la fonction)* »

225 U.S. Preliminary Objections, p. 58, para. 5.19.

226 U.S. Preliminary Objections, p. 65, para. 5.34.

i. Seised with a dispute on the Treaty of Amity, nothing in the factual background of this case could limit the integrity of the Court's judicial process

4.33 As repeatedly recalled by Iran,[227] this case is about the Treaty of Amity and the breaches by the United States of its obligations under this Treaty. None of the claims made by Iran in its Application and its Memorial requires the Court to make any legal finding regarding the JCPOA. Therefore, there is no reason for the Court to find itself in any kind of "deep entanglement with the mechanics, architecture, and enforcement of the JCPOA",[228] as a predicate to hearing and adjudging the claims raised by Iran.

4.34 Moreover, the fact that part of the factual background of this case is related to the JCPOA and the U.S. decision to withdraw from it can in no way place the Court at odds with its judicial function. The case law of the Court has identified the situations in which its judicial function could be called in question, none of which apply to the U.S. allegation of a possible "deep entanglement" of the Court with the JCPOA:

a. In the *Northern Cameroons* case, the Court considered that it "would not … be a proper discharge of its duties" to hear a case on the merits when "circumstances … render any adjudication devoid of purpose".[229] But, in the present case, the adjudication sought by Iran has a very concrete purpose, which is not related to the JCPOA: the identification of breaches to the Treaty of Amity, the termination of the measures that were implemented pursuant to or in connection with the 8 May Decision, the guarantee of non-repetition by the United States of its violations of the Treaty of Amity, and the award of appropriate remedies for *restitutio in integrum*.[230]

b. In the *Free Zones* case, it was on the ground that some of the claims, depending on the interplay of economic interests, were "outside the sphere in which a Court of Justice, concerned with the application of rules of law, can help in the solution

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227 See in particular paras. 1.3–1.5 and Chapter II, Section 1 above.

228 U.S. Preliminary Objections, p. 58, para. 5.19.

229 *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 27.

230 Iran's Memorial, "Submissions", p. 245.

of disputes between two States"[231], that the Court decided not to give effect to these claims. Likewise, in the *Haya de la Torre* case, the Court considered that it was not part of its judicial function to make a "choice … that could not be based on legal considerations, but only on considerations of practicability or of political expediency".[232] But such a possibility is not in question here, and the United States does not even contend it. The Application filed by Iran in the present case deals with questions based on legal considerations: namely, whether the United States, by reimposing nuclear-related sanctions after the 8 May 2018, has breached its legal obligations under a valid international treaty, the Treaty of Amity.

c. Finally, in the *Free Zones* case, the necessary independence of the Court in its decision-making process led it to refuse to "be compelled to choose between constructions determined beforehand [by the Parties] none of which may correspond to the opinion at which it may arrive"[233] or to give a judgment "which would be dependent for its validity on the subsequent approval of the Parties".[234] Again, such a hypothesis can be ruled out in the present case. Regardless of the U.S. focus on the JCPOA, neither Party contends that the Court could be limited as to the decision it could reach by reference to the need for it to retain its independence.

4.35 Thus, the supposed "deep entanglement" of the Court in the JCPOA does not raise any question of judicial propriety.

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231 *Case of the Free Zones of the Upper Savoy and the District of Gex, Merits, Judgment of 7 June 1932, P.C.I.J. Series A/B, No 46*, p. 162.

232 *Haya de la Torre Case, Judgment of June 13th, 1951 : I.C.J. Reports 1951*, p. 79.

233 *Case of the Free Zones of the Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J. Series A, No 22*, p. 15.

234 *Case of the Free Zones of the Upper Savoy and the District of Gex, Merits, Judgment of 7 June 1932, P.C.I.J. Series A/B, No 46*, p. 161.

ii. Alleged political consequences cannot be a bar to the Court's judicial function

4.36 The United States also asserts that because it considers as "illegitimate" the so-called "advantage"[235] to be gained by Iran from the present proceedings – that is, the lifting of the measures resulting from the 8 May Decision – then for the Court to be "granting such relief" would put it "in a position at odds with its inherently judicial function".[236]

4.37 Obviously, this thesis cannot be supported by any of the three aforementioned sets of circumstances in which questions of judicial propriety arise, according to the case law of the Court:[237]

a. First, it would be absurd to claim that the fact that the Court may "grant[] such relief"[238] as sought in Iran's Application, would render the present proceedings devoid of purpose: the granting of such relief is precisely the purpose of the adjudication sought by Iran;

b. Second, for the Court to "grant[] such relief"[239], all it needs to do and all it is asked to do by Iran, is to say what the law is with respect to the Treaty of Amity and nothing else;

c. And finally, it not because the Court will be "granting such relief"[240] that it will not have acted as an independent judicial body, deciding impartially over the respective claims of each Party; the fact that the United States may be in a proactive disagreement with the decision that is to be rendered by the Court,

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235 U.S. Preliminary Objections, p. 65, para. 5.34.

236 *Ibid.*

237 *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 27; *Case of the Free Zones of the Upper Savoy and the District of Gex, Merits, Judgment of 7 June 1932, P.C.I.J. Series A/B, No 46*, p. 161; *Haya de la Torre, Judgment of June 13th, 1951 : I.C.J. Reports 1951*, p. 79; *Case of the Free Zones of the Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J. Series A, No 22*, p. 15; see also above para. 4.34.

238 U.S. Preliminary Objections, p. 65, para. 5.34.

239 *Ibid.*

240 *Ibid.*

does not imply, fortunately, that the Court is not in a position to guarantee the independence of its judicial function.

4.38 And if the U.S. thesis relies on the unprecedented assumption that to safeguard its judicial functions, the Court should also refrain from adjudicating a case if one of the parties complains that it will be disadvantaged in a completely separate context, then the United States is not only going against the Court's case law but also against the very notion of judicial propriety.

4.39 Indeed, the Court has never refused to adjudicate a case due to the implications its decision could have on a separate proceeding brought before a different forum. As the Court highlighted in the *Diplomatic and Consular Staff* case:

> "[t]he reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute".[241]

For instance, in the *Military and Paramilitary Activities* case, the Court answered the claim made by the United States that the matter brought before the Court was "essentially one for the Security Council", by ruling that it was "of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued *pari passu*".[242]

4.40 But even more strikingly, the United States is asking the Court to make a choice, regarding the admissibility of Iran's claims, based not on legal considerations but "on considerations of practicability or of political expediency".[243] Yet, for the Court not to be saying what the law is, but to be making a decision based on political considerations, would place it at odds with its judicial function. In short, the rights that Iran seeks to uphold through the adjudication of its claims in the present proceedings do not raise any question of judicial propriety.

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241 *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 22, para. 40.

242 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua c. United States of America), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 1984*, p. 433, para. 93.

243 *Haya de la Torre Case, Judgment of June 13th, 1951: I.C.J Reports 1951*, p. 79.

4.41 The U.S. claims of abuse of process and incompatibility with judicial propriety are therefore not only fabricated and improper, they are also frivolous and unfounded. Iran brought the present case with the sole intent of having its rights under the Treaty of Amity preserved since these rights have been and still are being breached by the sanctions re-imposed by the United States, and have resulted in dire consequences for the Iranian population and economy.

4.42 The United States relies on the very difficulties it has created, following its decision to withdraw from the JCPOA, to deprive Iran of the recourse it has, under the Treaty of Amity, to have this critical dispute concerning violations of this international instrument, heard by the Court. But as the Court declared in the *Diplomatic and Consular Staff* case:

> "It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed."[244]

[244] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 28, para. 54.

CHAPTER V.

THE DEFENCES LISTED IN ARTICLE XX(1) OF THE TREATY OF AMITY CAN ONLY BE ADDRESSED AT THE MERITS STAGE

5.1 In its Submissions (c) and (d),

> "the United States of America requests that the Court:
>
> (c) Dismiss Iran's claims in their entirety as precluded by Article XX, paragraph 1(b) of the Treaty of Amity.
>
> (d) Dismiss Iran's claims in their entirety as precluded by Article XX, paragraph 1(d) of the Treaty of Amity."

In this respect, the United States alleges that "Iran's case fails and should be dismissed at the preliminary objections stage"[245] and that, "[a]lthough the Court recently decided in *Certain Iranian Assets* to defer the United States' objection under Article XX(1) in that case to the merits phase, there are powerful reasons why, in this case, the Court can and should resolve the United States' objections relating to these exceptions as a preliminary matter."[246] This position is hardly compatible with the U.S. statement that "[i]n respect of these objections, the United States is mindful of the Court's preliminary objections Judgment in the *Certain Iranian Assets* case in which it concluded that Article XX(1) of the Treaty of Amity did not go to the Court's jurisdiction, even though those exceptions may provide a substantive defense on the merits."[247]

5.2 As the same causes are producing the same effects, there is no more reason for the Court to accept this objection in this case than there was in the *Certain Iranian Assets* case. The argument on Article XX(1) has already been made by the United States in the Preliminary Objections phase of that case,[248] and denied by the Court in terms that

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245 U.S. Preliminary Objections, p. 68, para. 6.1.

246 *Ibid.*, p. 68, para. 6.3.

247 *Ibid.*, p. 8, para. 1.20.

248 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, U.S. Preliminary Objections, pp. 64-65, para. 7.9; CR 2018/29, pp. 19-22, paras. 56-74 (Mr. Daley).

leave no room for a reiteration of the argument in the current phase of this case. The U.S. argument in *Certain Iranian Assets* was recorded (in material part) as follows:

> "In addition, according to the United States, even if the Court were to find that Article XX, paragraph 1, of the Treaty could not sustain an objection to jurisdiction, this would nonetheless not bar it from considering any other objection under that article as a preliminary matter, without any consideration of the merits. The United States thus argues that its first objection is an objection upon which the Court should render a decision before any further proceedings on the merits, in accordance with Article 79, paragraph 1, of the Rules of Court."[249]

5.3 In its Judgment of 13 February 2019 concerning *Certain Iranian Assets*, the Court considered "that subparagraphs *(c)* and *(d)* of Article XX, paragraph 1, [of the Treaty of Amity] do not restrict its jurisdiction but merely afford the Parties a defence on the merits."[250] It therefore unanimously rejected the first preliminary objection raised in that case by the United States, which was based on these provisions and which relied on the same elements of Article then 79(1), now 79bis(1) of the Rules of Court as the United States now invokes.[251] The Court's reasoning also fully applies to subparagraph *(b)* of Article XX(1), which is invoked in conjunction with sub-paragraph *(d)* by the United States in the present case. Yet, the United States contends that subparagraphs *(b)* and *(d)* of Article XX(1) are "exceptions" severable from the merits of Iran's claims and possess an exclusively preliminary character.[252]

5.4 In view of the Court's repeated and unambiguous position, Iran will abstain from discussing the arguments made by the United States in this respect: it will answer them at the appropriate time, that is at the merits phase, together with the other United States' arguments on the merits.

5.5 Fundamentally, objections under Article 79bis(1)[253] of the Rules of Court must be jurisdictional and *exclusively* preliminary in nature in that they must not touch upon

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249 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgement of 13 February 2019*, p. 18, para. 41.

250 *Ibid*., p. 20, para. 47.

251 *Ibid*., p. 37, para. 126(1) (*dispositif*).

252 U.S. Preliminary Objections, p. 69, paras. 6.4-6.5.

253 The U.S. objections are based on former Art. 79(1) of the Rules of Court, as existing when the Preliminary Objections were drafted.

the merits (A.). Iran will show in the present Chapter that the Article XX(1) objections invoked by the United States, are not jurisdictional (B.) and do not have an exclusively preliminary character since they form an integral part of the substance of the case (C.).

SECTION 1.
PRELIMINARY OBJECTIONS MUST NOT TOUCH UPON THE MERITS

5.6 The United States suggests that there is a rule according to which "Objections Generally Must be Decided at the Preliminary Stage."[254] This proposition is much too wide and too categorical. The United States is more realistic when it acknowledges that "the Court must decide a respondent's preliminary objections before proceeding to the merits of a case if those objections have an *exclusively* preliminary character."[255] In other words, *preliminary* objections generally must be decided at a preliminary stage with the exception provided for in Article 79ter(4) of the Rules of Court.

5.7 Iran agrees with the position that "[o]bjections have an exclusively preliminary character if the Court has all of the facts needed to decide the question and answering the objection would not determine the dispute or some element thereof on the merits."[256] However, it must be noted that both conditions must be fulfilled and the second condition clearly implies that, in order to be dealt with preliminarily, an objection must be jurisdictional in nature without touching upon the substance of the merits of the case. If not, it would suffice for the respondent to present a defence on any substantive component of the case to obtain a preliminary ruling concerning the merits of its case.

5.8 In effect, there is an inescapable internal contradiction in the U.S. argument: a state cannot, at one and the same time, allege that an objection is not jurisdictional (*lato sensu*) and that it does not concern the merits. Article 79bis of the Rules clarifies and implements the provisions of Article 36(6) of the Statute of the Court concerning

254 U.S. Preliminary Objections, Chapter 4, Section A.

255 U.S. Preliminary Objections, p. 41, para. 4.2 (emphasis added).

256 *Ibid*. referring to *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 852, para. 51.

disputes "as to whether the Court *has jurisdiction*". The opposition between jurisdiction and admissibility on the one hand and merits on the other hand is made clear by the Rules themselves:

a. Article 79, paragraph 1, provides that the Court may, on its own initiative, decide "that questions *concerning its jurisdiction or the admissibility of the application* shall be determined separately" and paragraph 2 of that provision is also limited to "pleadings *concerning jurisdiction or admissibility*";

b. Article 79bis, paragraph 1, suggests that preliminary objections cannot bear upon the merits since it provides for a suspension of the proceedings on the merits; and

c. paragraph 3 of Article 79bis reinforces this interpretation.

5.9 The United States refers to the history of the Rules, as well as to two past cases of the Court, in support of its thesis.[257]

5.10 Concerning the case law, the United States only mentions the Court's judgments in *Nicaragua* and in *Lockerbie*. Both contradict its thesis.

5.11 The United States only quotes a very short extract of the Court's 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, which, isolated from its context is rather obscure. While it is said that the approach retained by Article 79 (now 79bis) of the Rules "tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage",[258] it is also noted that this provision equates preliminary objections with "the jurisdictional stage", and hence this provides no information as to what constitutes unnecessarily prolonging the proceedings. The context – which deserves to be quoted at some length – sheds light

[257] U.S. Preliminary Objections, pp. 41-42, para. 4.3.

[258] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41.

on the Court's view. After recalling the reasons for re-drafting Article 79 of the Rules, the Court explained:

> "41. While the variety of issues raised by preliminary objections cannot possibly be foreseen, practice has shown that there are certain kinds of preliminary objections which can be disposed of by the Court at an early stage *without examination of the merits*. Above all, it is clear that *a question of jurisdiction is one which requires decision at the preliminary stage of the proceedings*. The new rule [embodied in Art. 79, para. 1] presents one clear advantage: that it qualifies certain objections as preliminary, making it quite clear that *when they are exclusively of that character* they will have to be decided upon immediately, *but if they are not, especially when the character of the objections is not exclusively preliminary* because they contain both preliminary aspects and other aspects relating to the merits, *they will have to be dealt with at the stage of the merits*."[259]

It is only after this explanation that the Court concluded: "This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage."[260] Such an explanation shows that a preliminary objection on the one hand must be related to the jurisdiction of the Court and, on the other hand, can only be granted if it does not touch upon the merits.[261]

5.12 In the *Genocide* case (*Croatia v. Serbia)*, the Court recalled that such a position was to be followed even when only some aspects of the objection touch upon the merits:

> "The Court notes that Croatia has asked the Court simply to reject the third objection, though in relation to one matter it suggests that the point should be examined at the merits stage […]. The Court recalls that it is required by Article 79, paragraph 7, of the 1978 Rules of Court [now Article 79ter (4)] either to 'uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character'; and that this last course may be indicated, *inter alia*, when an objection contains 'both preliminary aspects and other aspects relating to the merits' (*Military and Paramilitary Activities in and against Nicaragua*

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259 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 30-31, para. 41.

260 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41.

261 The Joint Separate Opinion by Judges Tomka and Crawford in the *Certain Iranian Assets* case is in the same direction (*Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections*); see in particular pp. 4-5, para. 11.

> *(Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41)."[262]

5.13 The *Lockerbie* case, which is examined in greater detail below,[263] is a further illustration of that same position. In that case, the Court noted that it had

> "no doubt that Libya's rights on the merits would not only be affected by a decision not to proceed to judgment on the merits, at this stage in the proceedings, but would constitute, in many respects, the very subject-matter of that decision. The objection raised by the United States on that point has the character of a defence on the merits."[264]

Similarly, in the present case, Iran's rights on the merits would constitute the very subject-matter of a decision, on the basis of a finding regarding the application of the defences listed in Article XX(1) of the Treaty of Amity, not to proceed to judgment on the merits. It is clearly not an issue of the jurisdiction of the Court but of the existence of the rights invoked under the Treaty – which is the very subject-matter of the case.

5.14 Relying on the Court's pronouncement in case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the United States also argues that "an objection does not lack an exclusively preliminary character simply because it 'touch[es] upon certain aspects of the merits of the case'."[265] However, the point at issue in that case went to jurisdiction, as explained by the Court:

> "Moreover, the Court has already found that the question of whether the 1928 Treaty and the 1930 Protocol settled the matters in dispute does not constitute the subject-matter of the dispute on the merits. It is rather a preliminary question to be decided in order to ascertain *whether the Court has jurisdiction* (see paragraph 40 above)."[266]

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262 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 460-461, para. 132.

263 See paras. 5.27 and 5.32.

264 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 134, para. 49 (see also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 29, para. 50).

265 U.S. Preliminary Objections, p. 71, para. 6.7.

266 *Territorial and Maritime Dispute (Nicaragua v. Colombia) Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 852, para. 51 (emphasis added).

The Court's pronouncement in *Nicaragua v. Colombia* has no application to the case at hand, not least because the United States has admitted that "it is not advancing the argument in this pleading that its objections under Article XX(1) are objections to the Court's *jurisdiction*".[267]

5.15 Iran does not dispute that, when a truly and exclusively *preliminary* objection is in a position to be adjudged, it must be decided at the Preliminary Objections stage. But it has to have this character. The *travaux préparatoires* cited by the United States do not say anything contrary. The position of the Swiss delegation during the review of the role of the Court in 1971 reflects the general feeling that led to the reform of the Rules in 1972:

> "323. […] The ideal solution is, no doubt, for objections to be ruled upon rapidly during a preliminary stage of the proceedings, but, as a study of the Court's practice shows, extremely delicate and important legal questions that are the main issue in a case are sometimes raised in the form of preliminary objections and it is frequently quite impossible to rule upon them without examining the merits.
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> 324. […] The joinder of preliminary objections to the merits will thus reflect 'the interests of the good administration of justice', which are the decisive factor for the Court in the matter.[…] Even so, the choice of the decisive argument may require an over-all view of the case that can only be gained from a hearing of the merits. The joinder of the objection to the merits cannot, therefore, be expected to restrict the Court in the choice of the reasons for its decision."[268]

5.16 In the recent case *Ukraine v. Russian Federation*, the Court confirmed that it will not enter into substantive issues at the jurisdiction stage:

> "58. At the present stage of the proceedings, an examination by the Court of the alleged wrongful acts or of the plausibility of the claims is not generally warranted. The Court's task, as reflected in Article 79 of the Rules of Court of 14 April 1978 as amended on 1 February 2001, is to consider the questions of law and fact that are relevant to the objection to its jurisdiction."[269]

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267 U.S. Preliminary Objections, para. 7.9 (emphasis added).

268 UNGA, Report of the Secretary General, "Review of the Role of the International Court of Justice", 15 September 1971, A/8382, paras. 323-324 (IOS, Annex 1). See also the position of the United States, *ibid.*, para. 322.

269 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment*, p. 28, para. 58.

5.17 It results both from the Court's case law, and from the drafting history of Article 79 (now 79[bis]) of the Rules, that the Court should deal with an objection at the preliminary stage only if it is a bar on the exercise of its jurisdiction. As set out by former Article 79 (paragraph 4) of the Rules of Court as adopted on 14 April 1978 (now Article 79[ter]), if the Court finds that an objection "*does not possess, in the circumstances of the case, an exclusively preliminary character*" – that is, if it touches upon the substance – it will deal with it at the merits stage.[270]

SECTION 2.
THE DEFENCES LISTED IN ARTICLE XX(1) OF THE TREATY OF AMITY TOUCH UPON THE MERITS

5.18 In its 2019 Judgment concerning *Certain Iranian Assets*, the Court confirmed the firm position it had taken *prima facie* in its Order of 3 October 2018 on Iran's request for provisional measures in the present case as to the substantial character of the defences listed in Article XX of the Treaty of Amity:[271]

> "45. The Court recalls that it previously had occasion to observe in its Judgment on the preliminary objection in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (*Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20) and more recently in its Order indicating provisional measures in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)* (*Provisional Measures, Order of 3 October 2018*, para. 41) that the Treaty of Amity contains no provision expressly excluding certain matters from its jurisdiction. Referring to its decision in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222, and p. 136, para. 271), the Court considered that Article XX, paragraph 1, subparagraph *(d)*, '[did] not restrict its jurisdiction' in that case 'but [was] confined to affording the Parties a possible defence on the merits to be used should the occasion arise' (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*

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270 Emphasis added. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1984*, pp. 425-426, para. 76; or *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 456-457, para. 120.

271 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018*, p. 12, paras. 41-42.

> *(II)*, p. 811, para. 20). The Court sees no reason in the present case to depart from its earlier findings.
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> 46. In the Court's opinion, this same interpretation also applies to Article XX, paragraph 1, subparagraph *(c)*, of the Treaty since, in this regard, there are no relevant grounds on which to distinguish it from Article XX, paragraph 1, subparagraph *(d)*.
>
> 47. The Court concludes from the foregoing that subparagraphs *(c)* and *(d)* of Article XX, paragraph 1, do not restrict its jurisdiction but merely afford the Parties a defence on the merits.
>
> The first objection to jurisdiction raised by the United States must therefore be rejected."[272]

5.19 In that case, the Court saw "no reason […] to depart from its earlier findings", and no reason to decide otherwise exists in the present case. And, "[i]t would require compelling reasons for the Court to depart from the conclusions reached in those previous decisions."[273]

5.20 While it is of course "true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case [,…t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases."[274] There is indeed no reason to depart from the Court's position regarding the nature of the defences listed in Article XX(1) of the Treaty of Amity as explained above.

5.21 In an attempt to overcome this impasse, the United States is developing a contrived and unsubstantiated theory that it already unsuccessfully submitted to the Court in the *Certain Iranian Assets* case.[275] This is all the more inappropriate because it is not only a repetition of an argument about the abstract interpretation of a legal rule, but also

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[272] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, paras. 45-47.

[273] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2008*, p. 429, para. 54.

[274] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28. See also e.g., *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, pp. 171-172, para. 14; or *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 360, para. 28.

[275] See above paras. 5.1-5.2.

the parties are the same, the provision to be interpreted is the same, the argument is the same and in large part, at least inasmuch as security is at stake, the contentions are comparable.

5.22 At one and the same time, the United States claims that it "is not asking the Court in this case to revisit whether the exceptions in Article XX are jurisdictional in nature"; but it also "submits that its objections under Article XX, paragraphs 1(b) and 1(d), in this case possess an exclusively preliminary character."[276] In doing so, the United States is locking itself into a contradiction: in order to circumvent the Court's firmly established position, it claims that its objections do not concern its jurisdiction but are nevertheless "preliminary in nature"; but an objection can only seek to prevent the exercise by the Court of its jurisdiction.

SECTION 3.

THE U.S. "OBJECTIONS" UNDER ARTICLE XX(1) ARE NOT "OBJECTION(S) THE DECISION UPON WHICH IS REQUESTED BEFORE ANY FURTHER PROCEEDINGS ON THE MERITS" IN THE SENSE OF ARTICLE 79BIS(1) OF THE RULES OF COURT

5.23 According to the United States:

> "Article 79(1) of the Court's Rules specifically authorizes preliminary objections that are based on defects in an applicant's case that do not go to jurisdiction or admissibility but that nonetheless warrant decision on a preliminary basis, before further proceedings on the merits."[277]

5.24 In support of this position, it relies on *Rosenne's Law and Practice of the International Court,* which highlights that deciding whether an objection has an exclusively preliminary character "requires a careful analysis of the objection in the circumstances of the case", and that "the Court's jurisprudence makes clear that these are not determinations that are susceptible to categorical conclusions."[278] This is indeed true so far as concerns the first proposition, whilst the second proposition reinforces the need for careful analysis. But such an analysis can only show that the circumstances

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276 U.S. Preliminary Objections, p. 49, para. 4.18; see also fn 220 at page 70.

277 U.S. Preliminary Objections, p. 70, para. 6.6.

278 U.S. Preliminary Objections, p. 71, para. 6.8.

of the current case are such that the U.S. objections do not possess a preliminary character, and can only be examined at the merits phase.

5.25 At the beginning of the very same page cited by the United States from *Rosenne's*, it is explained that:

> "As a rough rule of thumb, it is probable that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of the case depend, or when to decide the objection would require decision on what, in the particular case, are substantive aspects of the merits, the plea is not an objection but a defence to the merits."[279]

5.26 The United States' first reason in support of its argument that its third and fourth objections have an exclusively preliminary character is that the "exceptions" in Article XX(1) of the Treaty would "encompass all of Iran's claims in this case."[280] It is difficult to understand why the fact that an "exception"[281] covers all the applicant's submissions by any means changes the nature of the defence in question; the Court's reasoning in this respect[282] is not altered in any way.

5.27 The United States claims that "[w]here, as here, an exception encompasses all of the applicant's claims, an early decision serves the interests of fairness to the parties, procedural economy, and the sound administration of justice that animated the revision of the Court's Rules in 1972."[283] But this precisely is a *claim* which Iran refutes. Iran's position is that none of the U.S. measures taken in application of the 8 May Decision is covered by the defences contained in Article XX(1). To decide on this opposition of views would require an extensive factual analysis of the measures and their alleged justification. This analysis can only be made at the merits phase, and seeking to raise this question at the current jurisdictional phase is unwarranted and

279 Malcolm N. Shaw, *Rosenne's Law and Practice of the International Court 1920-2015*, Vol. II, 2015, 5th ed., p. 906.

280 U.S. Preliminary Objections, p. 72, para. 6.10.

281 Keeping in mind that Article XX(1) does not contain any exception but "defences on the merits".

282 *Supra*, par. 5.18.

283 U.S. Preliminary Objections, pp. 72-73, para. 6.10.

improper for the current phase of proceedings. As the Court recalled in the *Lockerbie* cases, Article 79 (now Article 79[bis]) of the Rules

> "presents one clear advantage: that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. *This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage*."[284]

5.28 As the Court recalled in the *Croatia v. Serbia Genocide* case:

> "The provision introduced into the Rules of Court in 1972, and constituting Article 79, paragraph 7, of the Rules adopted on 14 April 1978, was drafted, as the Court indicated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, to make it clear that when preliminary objections are exclusively preliminary, they have to be decided upon immediately, 'but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits' (*Merits, Judgment, I.C.J. Reports 1986*, p. 31, para. 41; see also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, I.C.J. Reports 1998*, pp. 27-29.)"[285]

5.29 The second U.S. argument is that its objection has an exclusively preliminary character because, in *Oil Platforms*, the Court analysed Article XX(1) before other articles of the Treaty.[286] Yet this proves nothing since that analysis was in any event made only *at the merits phase*. Contrary to what it asserts in its Preliminary Objections in the present case,[287] the United States had already raised that same objection at the

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284 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 28, para. 49 (citing from *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Judgment, I.C.J. Reports 1986*, p. 31, para. 41) (emphasis added). See also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 133, para. 48.

285 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 459-460, para. 128.

286 U.S. Preliminary Objections, p. 73, para. 6.11.

287 *Ibid.*

preliminary phase and the Court had dismissed it by 14 votes to 2,[288] after taking "the view that Article XX, paragraph 1 *(d)*, does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise."[289] Furthermore, as the United States recognises,[290] in the *Military and Paramilitary Activities* case, the Court also dealt with the matter at the merits phase, but in a different order. In any event, what matters is not the order in which the arguments are examined, but the fact that they were rejected in the judgments on preliminary objections and later addressed in the judgments on the merits.

5.30 The third U.S. argument is that its objection has an exclusively preliminary character because "the facts necessary to resolve the exceptions inquiry are also distinct from the information that would go to the merits of Iran's claims and can be presented at an early stage of proceedings."[291] Iran squarely disagrees. To the contrary, this is one of the main reasons why the U.S. objections do not have an exclusively preliminary character.

5.31 The facts and arguments raised by the United States in support of its objection (that it did not violate the Treaty because Iran's behaviour would justify its potential non-compliance with the Treaty) are substantially the same facts and arguments on which the merits of this case depend.

5.32 To decide on the U.S. objections, the Court would have to go in detail through the complex and various U.S. measures resulting from the 8 May Decision in order to analyse if these measures, in whole or in part, fall within the defences provided for in Article XX(1). The factual analysis that the United States is asking the Court to undertake now is exactly the same as would have to be carried out at the merits phase

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288 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 821, para. 55(1) (*dispositif*).

289 *Ibid.*, p. 811, para. 20.

290 U.S. Preliminary Objections, p. 73, para. 6.11.

291 U.S. Preliminary Objections, p. 74, para. 6.12.

if Article XX is raised as a defence by the United States. The situation is therefore identical to that prevailing in *Lockerbie*.[292]

5.33 Furthermore, it is not because a State wishes to discuss the facts necessary to decide on a defence at the preliminary objections phase that this defence somehow acquires a preliminary character. Otherwise, a defendant would always be able to obtain a decision on the merits at the preliminary objections phase: it would suffice that it sets out its factual and legal arguments at this stage to make "preliminary" any substantial aspect of the case in order to obtain a suspension of the proceedings and a decision on its case without a full discussion of all its components. And, of course, it cannot rely on such a pretext to compel an applicant to enter into the merits at the preliminary objections stage.

5.34 The fourth U.S. argument is that its objection has an exclusively preliminary character because "resolution of the U.S. objections under Article XX(1) at the outset of this case, before proceeding to any merits phase, aligns with the purpose of the exceptions in preserving the United States' national security prerogatives."[293] Once again the United States is acting on the assumption that Article XX(1) is not a "substantive article"[294] (as opposed to a "procedural article") in contradistinction with the Court's firm and repeated view.

5.35 The United States' litigation strategy consists in attempting to obtain a decision from the Court on the core of the dispute Iran submitted to it without allowing the Court to assess in any detail the existence of any alleged threat to the United States' essential security interests and to rule on the necessity and proportionality of the contested measures. Iran is confident that the Court will not allow such a manoeuvre to succeed and will dismiss the U.S. objections based on Article XX(1) of the Treaty because they are not of a preliminary nature.

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292 See the quotation at para. 5.12 above.

293 U.S. Preliminary Objections, p. 75, para. 6.16.

294 *Ibid*.; see also, paras. 6.3, 6.5, 6.11, 6.12, 6.13, 6.15 or 6.18 denying to Article XX(1) the character of a substantive provision.

PART III.
CONCLUSIONS

CHAPTER VI.
CONCLUDING OBSERVATIONS

6.1 Iran complains in this case of violations of its rights under the Treaty of Amity. It points to specific provisions of the Treaty and to specific violations. The measures of which Iran complains have been explicitly described by the U.S. Government as measures intended to inflict very serious harm on Iran, the Iranian people, and the Iranian economy. They have caused, and continue to cause, irreversible harm. There is no room for any credible doubt about these points. There is self-evidently a dispute over the interpretation and application of the Treaty that has been submitted to the Court in accordance with the terms of the compromissory clause in the Treaty. And yet, even as the injuries deliberately inflicted on Iran and its people increase day by day as a result of the U.S. violations of the Treaty provisions, the United States purports to believe that there is no dispute under the Treaty for the Court to hear.

6.2 The foregoing chapters have set out Iran's response to the Preliminary Objections. The United States' central argument is that this is a case about the JCPOA 'dressed up' as a case about the Treaty of Amity. That is patently not true. Iran's claims allege breaches of the Treaty of Amity, and only of the Treaty of Amity. The alleged breaches are tied to specific provisions of the Treaty. They are set out in detail in Iran's written pleadings, although the factual basis of the case continues to develop as the United States progressively extends and tightens its measures and the range of its assault on the Iranian economy, the Iranian people, and the Iranian State.

6.3 The United States has tried to recast this argument in different forms. It has tried to invoke the provisions of Article XX(1) of the Treaty of Amity at the jurisdictional stage, even though the Court has made clear – on repeated occasions involving the same parties, the same Treaty and indeed the very same provision – that Article XX(1) takes effect as a substantive defence on the merits. The United States attempts to contrive a theory that its objection is non-jurisdictional but also preliminary in nature

and encompassing all of Iran's claims. The objections would require detailed and complex factual analysis based on submissions by both Parties – an exercise that is unsuitable and improper at this preliminary phase.

6.4 The United States has tried to invoke an argument based on 'abuse of process' without any justification. There is no argument as to why it is abusive for Iran to rely on the compromissory clause in the Treaty of Amity to seek the enforcement of its rights under the Treaty. The fact that Iran refuses to remain passive in the face of the violation of its Treaty rights may displease the United States and interfere with U.S. plans for the Iranian economy: but it cannot possibly be said to be an abuse of right or an abuse of the processes of the Court. The United States' objection is no more than a pretext for an attempt to discredit Iran before the Court and to avoid or delay the day when the United States will have to offer a defence of its violations of the Treaty of Amity.

CHAPTER VII.
SUBMISSIONS

7.1 In consideration of the foregoing, Iran respectfully requests that the Court:

a. reject and dismiss the Preliminary Objections of the United States of America; and

b. adjudge and declare:

i. that the Court has jurisdiction over the entirety of the claims presented by Iran; and

ii. that Iran's claims are admissible.

Respectfully submitted,

M. H. Zahedin Labbaf
Co-Agent of the Government of the
Islamic Republic of Iran

CERTIFICATION

I, the undersigned, M. H. Zahedin Labbaf, Co-Agent of the Islamic Republic of Iran, hereby certify that the copies of these Observations and Submissions and the documents annexed in the Volume of Annexes are true copies and conform to the original documents and that the translations into English are accurate translations.

The Hague, 23 December 2019

M. H. Zahedin Labbaf

Co-Agent of the Government of the

Islamic Republic of Iran

LIST OF ANNEXES

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