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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2020

Public sitting

held on Friday 18 September 2020, at 3 p.m., at the Peace Palace,

President Yusuf presiding,

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)

VERBATIM RECORD

ANNÉE 2020

Audience publique

tenue le vendredi 18 septembre 2020, à 15 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

en l'affaire relative à des
Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. Etats-Unis d'Amérique)

COMPTE RENDU

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

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

M. Gautier, greffier

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The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the second round of oral argument of the United States of America on its preliminary objections. I would like to recall that in view of the hybrid nature of the hearing in this case, the following judges are present with me in the Great Hall of Justice: Vice-President Xue, Judges Tomka, Bennouna, Sebutinde, Crawford, Gevorgian, Salam and Iwasawa; while Judges Abraham, Cançado Trindade, Gaja, Bhandari and Robinson, as well as Judges *ad hoc* Brower and Momtaz, are present via video link. I shall now give the floor to Sir Daniel Bethlehem. You have the floor.

Sir Daniel BETHLEHEM:

THE SUBJECT-MATTER OF THE DISPUTE

I. Opening remarks

1. Mr. President, Madam Vice-President, Members of the Court, it is my task to start off the ***US*** reply. I will be followed by Ms Gahan and then Ms Grosh. They will, between them, address Iran's arguments on the US third country objection. Ms Grosh will also make some observations on Iran's submissions on the Article XX objections. I understand, Mr. President, that the Court has been informed that Professor Boisson de Chazournes is unable to be with us today. She will, though, be present for the hearing on Monday. Ms Grosh will be followed by the Agent of the United States, who will both make some concluding observations and read the ***US*** final submissions.

2. Mr. President, Members of the Court, my remarks will focus mostly on what Professor Lowe had to say on Wednesday, but also touch upon some wider points.

II. Iran's subject-matter argument

3. I start with a preliminary comment. In opening his submissions on Wednesday, Professor Lowe asserted as follows, he said: "To the extent that Iran alleges that the United States measures violate the Treaty of Amity, the Court has jurisdiction."[1] We profoundly disagree with this. The Court's jurisdiction cannot and does not turn simply on what Iran alleges. This goes to the

[1] CR 2020/11, p. 20, para. 8 (Lowe).

very heart of the subject-matter disagreement that is now before you. Counsel for Iran says that we are being tendentious and takes issue with our invocation of the Court's analytical approach in *Fisheries Jurisdiction*. He implies that we are concocting the "real subject-matter" rule**,** saying that we have not established what this rule is[2]**,** although he says, for good measure, that Iran's case *really really* is about the Treaty of Amity. I will address both elements in my submissions this afternoon. As is ever more apparent from Iran's pleadings, the JCPOA is the instrument that dares not speak its name, at least in Iran's voice.

4. Having said this, and in moving to the detail, let me acknowledge the seriousness of other aspects of Professor Lowe's submissions. We accept that there is a case for the Court to weigh. The issues on which the Parties are joined have an importance that goes beyond this dispute, having wider systemic implications for resort to compromissory clauses in treaties and for the judicial function in the face of the limitations of the instrumental dimension of the case before you. The fact that there is a dispute between the United States and Iran, however**,** and even if that dispute ***may have*** a legal dimension**,** does not make it a dispute that comes within the jurisdiction of the Court. The architecture of international dispute settlement rests on consent, whether conveyed through compromissory clauses in treaties or in optional clause declarations or through appearance. It is a fundamental responsibility of the Court to construe the claimed basis of consent. The question, therefore, is: to what did the United States give consent, through the medium of Article XXI, paragraph 2, of the Treaty of Amity?

5. Professor Lowe, in an attempt to characterize the US position as extreme, suggested that the US argument is that "only disputes that cover archetypal, paradigmatic complaints can be pursued under a treaty's compromissory clause"[3]. That is not our view. In our contention, disputes that are "very largely concerned with" an instrument other than the one whose jurisdictional basis is invoked, cannot properly be brought within the scope of the compromissory clause in a treaty.

6. This brings me to the serious point that Professor Lowe advances. He says that the US action is objectionable on many fronts, but that Iran has chosen to bring a narrow case, sensitive to the jurisdictional constraints of the Treaty of Amity. He suggests that**,** but for these

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[2] CR 2020/11, p. 21, para. 14 (Lowe).

[3] CR 2020/11, p. 22, para. 23 (Lowe).

jurisdictional constraints**,** Iran may have brought a wider case[4]. This contention comes against the backdrop of his earlier submissions invoking the *Immunities and Criminal Proceedings* case between Equatorial Guinea and France and other cases, through which he attempts to cast doubt on the US reliance on *Fisheries* Jurisdiction**.** ***H***e says that the relevant question is rather whether a given aspect of the dispute "is capable of falling within the provisions" of the treaty in question[5].

7. I say that the point is a serious one because there will clearly be circumstances in which a dispute that comes to the Court may have wide dimensions, including as may engage multiple treaties, with or without their own dispute settlement mechanisms. This is not uncommon. A 2001 dispute, for example, between the European Union and Chile about the conservation of swordfish stocks gave rise to both ITLOS and WTO proceedings[6]. There are many other examples. And it is no part of the ***US*** subject-matter objection to suggest that jurisdiction in such cases should *presumptively* rest with one forum and be rejected by another. Each case will fall to be assessed on its own particular facts.

8. The US objection is both more narrowly tailored than counsel for Iran would wish you to believe and turns entirely on the particular facts of this ***particular*** case.

9. Counsel for Iran asks from where does the United States pluck "this supposed 'real subject-matter' rule" and what is it?[7] He suggests that we are misreading *Fisheries Jurisdiction*, and this is "the only basis on which the United States tried to argue"[8]. Our response is straightforward. We plucked the "real subject-matter" rule from the Court's long-standing jurisprudence. I referenced a number of cases on Monday. Let me add to that list and expand upon the analysis.

10. Even in the cases invoked by Iran's counsel — for example, *Equatorial Guinea* v. *France* and *Ukraine* v. *Russia* — the Court's approach makes it abundantly clear that the

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[4] CR 2020/11, p. 25, paras. 34-37 (Lowe).

[5] CR 2020/11, p. 23, para. 24 (Lowe) (quoting *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 315, para. 69).

[6] See https://ec.europa.eu/commission/presscorner/detail/en/IP_01_116; https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm; https://www.itlos.org/en/cases/list-of-cases/case-no-7/.

[7] CR 2020/11, p. 21, para. 14 (Lowe).

[8] CR 2020/11, p. 21, para. 17 (Lowe).

subject-matter enquiry must precede a jurisdiction *ratione materiae* or similar enquiry[9]. Only once the real subject-matter of the dispute is identified, will the Court turn to the separate question of whether the subject-matter comes within the jurisdictional scope of the treaty in question. Counsel for Iran overlooked this element in his submissions on Wednesday. And what I described on Monday as a deep vein in the Court's jurisprudence on this issue goes much wider.

11. So, this is where the real subject-matter rule comes from. It is not a US construct. It is the Court's long-settled approach.

12. This brings me to the enquiry that the Court must make when it comes to determining the subject-matter of a dispute. I have two points to make.

13. The *first* point is that the real subject-matter determination is one that arises in cases that come to the Court both under Article 36 (1) and under Article 36 (2) of the Court's Statute. I cited *Fisheries Jurisdiction* on Monday because it is a case in which the Court's methodology was fully elaborated. But, as I have just noted by reference to *Equatorial Guinea* v. *France* and *Ukraine* v. *Russia*, exactly the same approach is evident in Article 36 (1) cases as well.

14. Professor Lowe sought to undermine the US reliance on *Fisheries Jurisdiction* by saying that what the Court was doing in that case was interpreting a reservation, as if that explanation is sufficient to distinguish that case from this. We do not think it is. What the Court did in *Fisheries Jurisdiction* was to construe a *jurisdictional clause* — an optional clause declaration. What the Court is required to do in this case is to construe a *jurisdictional clause* — a compromissory clause in a treaty. The exercise is the same in both circumstances.

15. My *second* point concerns the content of the real subject-matter rule.

16. Professor Lowe, on Wednesday, sought to contrast "reasons" and "motives", saying that Iran has set out its Treaty of Amity *reasons* for bringing its case to the Court whereas the

[9] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 308, paras. 46-47 (noting the requirement), pp. 308-315, paras. 48-68 (addressing the subject-matter of the dispute) and pp. 317-334, paras. 74-138 (addressing jurisdiction *ratione materiae*); *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. *Russia), Preliminary Objections, Judgment of 8 November 2019*, paras. 23-32 (addressing the subject-matter of the dispute), paras. 39-64 (addressing jurisdiction *ratione materiae* under the ICSFT) paras. 79-97 (addressing jurisdiction *ratione materiae* under the CERD).

United States is asking the Court to hold Iran to its JCPOA *motives*[10]. I paraphrase, but that is the gist of his point.

17. With respect, we are not putting our subject-matter case in terms of Iran's *motives*. We are simply identifying the case that Iran in fact brought. I will come back to this point in a moment. Let me first of all go back to your case law.

18. In the *Jurisdictional Immunities* case between Germany and Italy, the Court was called upon to address its jurisdiction with regard to Italy's counter-claim. This was an Article 36 (1) case. The Court's reasoning in dismissing Italy's counter-claim for want of jurisdiction is instructive.

19. The issue was the Court's jurisdiction under the European Convention for the Peaceful Settlement of Disputes. In addressing the issue, the Court framed its legal analysis in the following terms:

> "in accordance with the Court's earlier case law, the facts and situations it must take into consideration are those with regard to which the dispute has arisen or, in other words, only those *which must be considered as being the source of the dispute, those which are its 'real cause' rather than those which are the source of the claimed rights*"[11].

20. I repeat this analysis — the Court must take into consideration *only the facts and situations that are the source of the dispute*, with regard to which the dispute has arisen, its "real cause", *and not those which are the source of the claimed rights*.

21. *This* is the US objection in these proceedings — that the Court must determine the subject-matter of the dispute with which Iran wishes to seise the Court by reference to the facts and situations that are the real cause of the dispute and *not* by reference to the source of Iran's claimed rights.

22. The Court, in *Germany* v. *Italy*, rooted this principle in its *Right of Passage* Judgment of 1960[12]. That in turn rooted the principle even more firmly in the jurisprudential record, indeed, in

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[10] CR 2020/11, p. 24, para. 30 (Lowe).

[11] *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 318, para. 23; emphasis added.

[12] *Jurisdictional Immunities of the State (Germany* v. *Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 318, para. 23, citing *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 35.

the Judgment of April 1939 in *Electricity Company of Sofia and Bulgaria*[13]. In adopting the PCIJ analysis, the Court, in *Right of Passage*, put the point as follows:

> "The facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the *Electricity Company of Sofia and Bulgaria*, only 'those which must be considered as being the source of the dispute', those which are its 'real cause' . . . *The Permanent Court thus drew a distinction between the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute. Only the latter are to be taken into account for the purpose of applying the Declaration accepting the jurisdiction of the Court.*"[14]

23. This, of course, was a "situations or facts" case, but the point is abundantly solid. The identification of the subject-matter of a dispute does *not* turn on the source of the rights that the Applicant claims. It turns on the source, the "real cause", of the dispute.

24. Mr. President, Members of the Court, I hope this addresses Professor Lowe's enquiry about "what this supposed 'real subject-matter' rule limiting the Court's jurisdiction is".

25. Iran's further argument is that, whatever the rule might be, Iran satisfies it — the dispute really, *really*, is about the Treaty of Amity. Let's see!

26. Heeding your words, Mr. President, I will not repeat what I said on Monday but simply recall some brief points and make one or two more.

27. Iran's Application, under the heading "Subject of the Dispute", put its case squarely in JCPOA terms. We heard nothing about paragraphs 1 and 2 of its Application from Iran on Wednesday. The Order requested from the Court in Iran's contemporaneous Request for provisional measures is similarly cast in JCPOA terms.

28. On this, and on the *petitum* of Iran's case, Iran's counsel, with a brevity that was no doubt intended to convey dismissive disdain, says that "[t]he US sanctions of which Iran complains are not co-extensive with what the United States calls the 'relief' it provided under the JCPOA"[15]. This is a curious statement, the meaning of which is not entirely clear. What is clear, however, is that, were you — *arguendo* — to uphold Iran's merits case in due course, and award the relief

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[13] *Electricity Company of Sofia and Bulgaria (Belgium* v. *Bulgaria), Preliminary Objection, 1939, P.C.I.J., Series A/B, No. 77*, p. 82.

[14] *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 35; emphasis added.

[15] CR 2020/11, p. 26, para. 38 (Lowe).

originally requested in Iran's Application, that would take you directly into JCPOA territory as it would purport to require the United States to reinstate the JCPOA sanctions relief that had followed from its participation in that arrangement. And ***any*** award of damages would purport to impose a penalty on the United States for conduct that it says it was entitled to take in consequence of its cessation of participation in the JCPOA. No matter what the contortions, Iran's case cannot escape the JCPOA.

29. Mr. President, Members of the Court, the contention that is the pivot of Iran's subject-matter argument is that it has a wider dispute with the United States concerning the so-called ***May 8*** measures but that it chose, by the "proper drafting" of its claim[16], to bring a narrower dispute that comports with the jurisdictional limitations of the Treaty of Amity. But that is not correct. Whether one looks at the subject-matter statement in Iran's Application or considers the reality of the requested *petitum*, this dispute is all JCPOA. Iran is not bringing a narrowly crafted Treaty of Amity dispute before the Court that is a smaller portion of its wider dispute about the ***May 8*** measures. The case that Iran brings to the Court *is* its ***May 8*** measures dispute — in other words, its JCPOA dispute. The Court's "very largely concerned with" language in *Fisheries Jurisdiction is* the appropriate yardstick by which you should determine the subject-matter of this dispute.

III. Concluding remarks

30. Mr. President, Members of the Court, I come to two brief concluding observations. The first concerns the exclusively preliminary character of the US objections.

31. We heard a great deal from Iran on Wednesday about what the Court could not decide at this stage of the proceedings because it does not have sufficient information; that, for example, on the ***US*** third country measures objection, it is all about the operation of the US measures.

32. But, Mr. President, Members of the Court, Iran has fully pleaded its merits case. We have its Memorial**.** ***W***e have its evidence. We know what it alleges about the operation of the US measures. We know what it says about the interpretation and application of Article XX (1) *(b)* and *(d)*.

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[16] CR 2020/11, p. 25, para. 37 (Lowe).

33. Iran is relying on a mix of silence, feigned complexity and a formalistic approach to *jurisprudence constante* in an attempt to drag the US objections into the merits. It should *not* be permitted to do so. On Article XX, the starting-point is the question: what is the purpose of the third category of preliminary objections in Article 79*bis* of the Court's Rules, so assiduously maintained by the Court over the past 48 years? The present case goes to the *raison d'être* of that category. In *Oil Platforms,* the Court came to Article XX *before* it addressed the substantive provisions of the Treaty. That was in effect a preliminary ruling. What the United States is asking in this case is that you address the issues in a preliminary *proceeding*.

34. On the issue of the United States' third country measures ***objection***: it is *not* the operation of the measures that requires your decision in these proceedings. It is whether the Treaty of Amity addresses — *as a matter of law* — trade or transactions between Iran and Iranian persons or entities, on the one hand, and third countries and third-country persons or entities, on the other. The issue is whether the scope of the Treaty is such that it can be taken to address any and all conduct that is said to have an effect on Iran. It cannot!

35. My concluding point is slightly ironic, but it highlights an important issue. Mr. Wordsworth, on Wednesday, was at pains to distinguish this case from *Certain Iranian Assets* and *Oil Platforms*, to make the point that**,** in *this* case**,** Iran's claims really do come within the scope of the Treaty of Amity. *This case*, he said, concerns targeted measures aimed at causing severe economic harm to Iran. But he expressed bafflement at the US characterization of the case as being of a genre similar to *Oil Platforms*[17], in which Iran also alleged that the United States caused severe economic harm to Iran[18]. Addressing *Certain Iranian Assets*, Mr. Wordsworth characterized the issue then before the Court as one of whether Article IV (1) and other provisions of the Treaty of Amity could "correctly be interpreted as encompassing *an exterior norm*, that is, the customary laws on sovereign immunities"[19].

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[17] CR 2020/11, p. 30, para. 12 (Wordsworth).

[18] *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Iran's Memorial (8 June 1993), pp. 1-2, para. 4; *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Iran's Reply and Defense to Counter-Claim (10 Mar. 1999), p. 82, para. 4.82.

[19] CR 2020/11, p. 30, para. 10 (Wordsworth); emphasis added.

36. This "exterior norm" analysis now advanced by Iran was not exactly how Iran put its pleadings in *Certain Iranian Assets*. In that case, Iran contended that the law on immunity was at the very heart of the exercise of treaty interpretation, giving content to the language of Article IV (1) of the Treaty, as well as other provisions. The Court, however, rejected that attempt to enlarge the scope of the Treaty.

37. In this case, now, Iran characterizes *Certain Iranian Assets* argument as one about "encompassing an exterior norm", but in contrast says that the present case is all about the protection against economic harm[20]. As we see it, however, Iran's contention in the two cases is cut from the same cloth. Iran was endeavouring, in *Certain Iranian Assets*, to enlarge the scope of the Treaty to include the issue of immunity. *In this case*, Iran is attempting to enlarge the scope of the Treaty to include any deliberate infliction of economic harm**,** regardless of whether the harm bears any connection to the trade and transactions between the parties to which the Treaty is addressed. With the greatest of respect to our friends opposite, that is about as "exterior" as you can possibly get.

38. Mr. President, Madam Vice-President, Members of the Court, that concludes my submissions. I thank you for your attention. Mr. President, may I ask you, please, to call upon Ms Gahan to continue the US submissions.

The PRESIDENT: I thank Sir Daniel Bethlehem for his statement. I now invite Ms Kimberly Gahan to take the floor. You have the floor, Madam.

Ms GAHAN: Thank you.

THE US THIRD COUNTRY MEASURES OBJECTION — PART 1

1. Mr. President, Madam Vice-President, Members of the Court, good afternoon. It is an honour to appear before you again on behalf of the United States. As the United States has made clear, there is a fundamental mismatch between the measures Iran has challenged in this case and the scope of the Parties' obligations under the Treaty of Amity[21]. Although Iran sought to dismiss

[20] CR 2020/11, p. 30, paras. 10-11 (Wordsworth).

[21] CR 2020/10, p. 34, para. 2 (Grosh).

or muddle the United States' third country measures objection on Wednesday, its arguments do not engage with the substance of the objection and do not withstand scrutiny.

2. I have four points to make today. *First*, I address the unwarranted confusion that Iran has sought to introduce over the term "third country measures". *Second*, I return to what the jurisdictional inquiry entails. *Third*, I demonstrate that, where Iran engages with the measures at issue, its examples are outside the objection or hypothetical. *Fourth*, I close with an examination of Iran's passing arguments under Articles V and X, which are unavailing.

3. I begin *first* with the concept of third country measures. The United States uses the term "third country measure" as a shorthand to refer to measures that concern trade and transactions between one Party and a third country, or between their nationals and companies, but lacking a bilateral commercial nexus[22]. In other words, measures that do not concern bilateral trade or transactions between Iran and the United States.

4. Iran has two rhetorical responses. The first is that the measures it challenges cannot be third country measures because statements of US officials reveal that the measures are sanctions *"on Iran"*, that target Iran, or that are aimed at having an effect on Iran[23]. This reply simply misses the mark. There is nothing about aims, or targets, in the concept; the relevant question is: *what are the commercial relations that are the subject of the measure*? Are they between Iran and the United States? Or are they not?

5. The answer, the United States has shown, is that for the vast majority of the 8 May measures — those other than the fourth category I described on Monday — they concern trade and transactions *not* between Iran and the United States. This fact should be very familiar to Iran, as the measures were the subject of intensive negotiation between Iran and the United States leading up to the JCPOA. The text of the JCPOA, to which Iran agreed — and the guidance explaining it, on which Iran was consulted — were clear: the lifting of US sanctions was directed at, and limited to, transactions involving non-US persons and Iran[24], but for the discrete category of licensing actions. Iran did not take issue with this fact on Wednesday, nor could it.

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[22] POUS, paras. 7.1, 7.3; CR 2020/10, p. 34, paras. 2-3 (Grosh); CR 2020/10, p. 48-49, para. 2 (Gahan).

[23] CR 2020/11, p. 27, paras. 2-3 (Wordsworth).

[24] CR 2020/10, p. 50-51, paras. 6-9 (Gahan).

6. Iran also challenges the objection by taking up terminology. It says that "third country measures" is not a concept with significance in international law[25], nor is the term found in US law, and that these types of measures are commonly referred to as "secondary sanctions". There is nothing of substance here. The reason why it is important to emphasize that these are third country measures is to underscore that the vast majority of the measures are not within the bilateral commercial scope of the Treaty.

7. Iran's terminological contention is little more than an effort to deflect attention from the fundamental and recurring defect in Iran's claims: that they are very largely predicated on measures that concern economic activity wholly outside the bilateral scope of the Treaty.

8. It is useful here to consider Mr. Wordsworth's reference to the French company, Total. He quoted a statement by the Total CEO to the effect that foreign companies face a "stark choice" between doing business with Iranian entities, and avoiding "secondary sanctions" consequences[26]. But Mr. Wordsworth did not address how or why this stark choice suffices to bring a claim within the scope of the Treaty. Is the contention that the Treaty of Amity provides protections for Iran's business with French companies? And that it prohibits the United States from actions of any type that would inhibit Iran's trade with France, or French nationals? If so, this is an assertion with no connection to the text and no identifiable limits. It does not withstand scrutiny. The Treaty of Amity does not address one Party's trade or transactions involving third countries, or third-country nationals and companies. Accordingly, Iran's claims based on measures that concern such trade and transactions with third countries cannot constitute a violation of the Treaty. And they cannot, therefore, come within the Treaty's compromissory clause. The Court can, and should, find that Iran's claims based on third country measures are outside the scope of the Treaty.

9. I turn now to my *second* point, the jurisdictional nature of this objection, and the appropriate inquiry for the Court. Professor Lowe sought to persuade the Court that it need not examine whether the Court has jurisdiction over the "wide-ranging bundle of United States *measures*"[27], but instead "whether it has jurisdiction over the *claims* made by Iran in this case"[28].

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[25] CR 2020/11, pp. 28-30, paras. 7, 11 (Wordsworth).

[26] CR 2020/11, p. 31, para. 15 (Wordsworth).

[27] CR 2020/11, p. 19, para. 8 (Lowe).

Professor Lowe then went on to say that, "[t]o the extent that Iran alleges that the United States measures violate the Treaty of Amity, the Court has jurisdiction"[29]. Mr. President, Members of the Court, as Mr. Bethlehem has already observed, this is not the test.

10. The test, rather, is that set out in *Oil Platforms*, as applied in numerous subsequent cases: the Court "must ascertain whether the violations of the Treaty . . . 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"[30].

11. And although Mr. Wordsworth cited this test, and called for "close inspection of the relevant Treaty provisions"[31], he, too, conveniently omitted that the test requires an examination of the acts giving rise to the asserted violation, to ascertain whether they fall within the Treaty[32]. In this case, Iran asserts a series of reimposed measures violate the Treaty. The Court must therefore look not only to the Treaty's provisions, but also to the measures. And yet Iran has urged you not to engage with the measures, in an effort to carry its case to the merits[33]. This is a familiar tactic, but one that should not dissuade you from upholding our jurisdictional objection.

12. Finally, I observe simply, as the point should be uncontroversial: the fact that the US third country measures objection does not address the entirety of Iran's claims does not mean that the Court can hold the whole of Iran's case over to the merits. Rather, the Court must undertake a "detailed analysis"[34] to determine whether Iran's claims based on the measures put in issue do or do not come within the Treaty's provisions.

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[28] CR 2020/11, pp. 19-20, para. 8 (Lowe).

[29] CR 2020/11, p. 20, para. 8 (Lowe).

[30] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* p. 810, para. 16. See also *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I),* p. 23, para. 36; *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 of 8 November 2019*, para. 57.

[31] CR 2020/11, p. 29, para. 9 (Wordsworth).

[32] See *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 23, para. 36.

[33] CR 2020/11, p. 19, para. 8 (Lowe); CR 2020/11, p. 30, para. 11 (Wordsworth).

[34] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, separate opinion of Judge Higgins, pp. 855-856, paras. 29-31.

13. Moving to my *third* point regarding the examples given by Iran: where Iran does discuss the measures, it does so in two ways. The first, tellingly, is by reference to examples that fall in the category of measures that relates to the revocation of certain licensing actions. This, however, is precisely the category for which the United States is not advancing the third country measures objection. We have been clear on this point[35]. As such, the examples given by Iran can have no impact on the US third country measures objection.

14. This is the case in particular for Iran's mention of the US$16 billion sale of Boeing aircraft that was cancelled[36], or the sale by Airbus of US-origin aircraft requiring a licence[37], both of which arise as a result of licence revocations in this category. Similarly, the example of a Chinese subsidiary of a US company terminating its participation in an Iranian oil refinery project[38] also appears to arise from the revocation of a licence that authorized certain activities by foreign subsidiaries that were owned or controlled by US persons[39]. These examples are not covered by the US objection and do nothing to refute it.

15. Before I continue, allow me to make clear that, contrary to what you heard from Mr. Wordsworth, the United States has nowhere "accepted" that Article X, paragraph 1, or any other Articles of the Treaty, apply to claims based on the revocation of certain licensing actions[40]. The United States reserved in our written submissions the right to argue, in further proceedings should there be any, that some or all of Iran's claims in this category are also outside the scope of the Treaty[41]. We simply are not asking for a preliminary ruling on this issue.

16. The second way in which Iran purports to engage with the measures is to refer to hypotheticals. Iran seeks to counter the United States' submissions showing that the 8 May measures are directed toward transactions involving non-US persons by suggesting that the Court cannot be confident they would, in all instances, be so limited[42]. But as the United States has

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[35] CR 2020/10, p. 56, para. 25 (Gahan); POUS, para. 7.9.

[36] CR 2020/11, p. 39, para. 41 (Wordsworth).

[37] CR 2020/11, p. 40, para. 43 *(b)* (Wordsworth).

[38] CR 2020/11, p. 38, para. 38 (Wordsworth).

[39] POUS, para. 7.9 and fn. 300.

[40] CR 2020/11, p. 39, para. 41 (Wordsworth).

[41] POUS, para. 7.9 and fn. 301.

[42] CR 2020/11, p. 20, para. 10 (Lowe); CR 2020/11, p. 39, para. 39 (Wordsworth).

shown, the vast majority of the 8 May measures have no bilateral commercial nexus. Iran has nothing to respond to this fact but conjecture. Such a response is not a proper basis for joinder to the merits.

17. This brings me to the *fourth* and concluding part of my submissions, on Iran's arguments on Article V and Article X (1) of the Treaty, which Iran addressed in only the most cursory manner on Wednesday. I begin with Article V. Iran acknowledges that this article contains protections in respect of property "within the territories" of either High Contracting Party. Rightly so. And yet it vaguely asserts that, where property cannot be acquired because a foreign bank refuses to process a transaction, Article V still applies. There is no mention of which of the 8 May measures, in Iran's view, leads to this result. And the sole reference in its Memorial relates to the category that is outside the United States' objection — the revocation of licences that authorized contracts for sale of US-origin aircraft and equipment between Boeing and several Iranian airlines[43]. Iran's response simply does not engage the third country measures objection that the United States has in fact put forward.

18. I close with Article X, paragraph 1. Iran does not take issue with the principle, set forth in *Oil Platforms*, that Article X (1) is limited to measures that interfere with freedom of commerce and navigation "between the territories of Iran and the United States"[44]. Rather, it argues that it is *possible* that a third country measure could *indirectly* interfere with such commerce and that the question is "highly fact dependent"[45].

19. Yet Iran's argument, here again, fails to identify a third country measure that falls within Article X, paragraph 1. Iran offered new hypothetical examples, one involving an Iranian airline's purchase of spare parts from a US manufacturer through the manufacturer's European subsidiary, and another involving the purchase by Iran of an Airbus product containing a percentage of US components[46]. Both scenarios involve sale of US aviation parts, directly or as component of a European final product, to an Iranian purchaser. To the extent the 8 May measures are implicated,

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[43] MI, paras. 4.118-4.119.

[44] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003,* p. 207, para. 98.

[45] CR 2020/11, p. 40, para. 43 (Wordsworth).

[46] CR 2020/11, p. 40, para. 43 (Wordsworth).

the relevant measure would be the revocation of certain licensing actions, which again fall in the category that is not included in this objection.

20. Iran's second example is also inapposite because it is the scenario that the Court in *Oil Platforms* rejected as not involving commerce "between" the Parties. Like *Oil Platforms*, where Iranian oil was refined or processed in a third country for sale on the global market, including to the United States, Iran's scenario contemplates the sale of a finished product by a third country supplier that incorporates US goods or technology to Iran[47]. This, the Court has made clear, is not commerce "between the territories" of the United States and Iran within the meaning of Article X, paragraph 1[48].

21. Finally, Iran reiterated on Wednesday that it "make[s] no difference . . . whether an obstruction to freedom of commerce is in the form of" the cancellation of a licence or a "sanction on a third State bank"[49]. And puzzlingly, Iran tried to suggest that Ms Grosh's response constituted a significant concession. There is nothing to this contention. Ms Grosh observed that both of Iran's examples involved a transaction that relates to underlying trade *between an Iranian company and a US company*. Ms Grosh also noted that, as I just reiterated, our third country measures objection only covers measures that concern trade and transactions between one Party and a third country, or between their nationals and companies, with no bilateral commercial nexus between Iran and the United States. The scenarios Iran posits, however, have nothing to say about transactions between Iran and third countries. The point is that Iran's examples are not relevant to our preliminary objection — but we do not concede that they would be within the scope of the Treaty, much less violate it.

22. Mr. President, Members of the Court, that concludes my submissions. I thank you for your attention. Mr. President, may I ask that you please call on Ms Grosh to continue the United States' submissions.

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[47] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 207, para. 97.

[48] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 207, para. 97.

[49] CR 2020/11, p. 41, para. 45 (Wordsworth).

The PRESIDENT: I thank Ms Gahan for her statement. I shall now give the floor to Ms Lisa Grosh. You have the floor, Madam.

Ms GROSH:

THE US THIRD COUNTRY MEASURES OBJECTION (PART 2) AND ARTICLE XX

I. Introduction

1. Mr. President, Madam Vice-President, and Members of the Court, it is an honour to appear again before you on behalf of the United States.

2. I have substantial ground to cover, so I will keep my introductory remarks short. My submissions today have two parts. *First*, I will show that Iran's interpretations of Articles IV, VII, VIII and IX are not based on proper readings of the text. Instead, Iran's interpretations are implausibly broad and, in many cases, convoluted and dependent on reading individual clauses in isolation. *Second*, I will respond to Iran's arguments on Article XX, demonstrating both that the US objections may be decided at this preliminary stage and that the Court should decide them in favour of the United States.

II. The Treaty's articles do not apply to third country measures

A. Article IV (1)

3. Turning to the first part of my submissions, I will begin with Article IV, paragraph 1, on which Iran spent much of its opening presentation.

4. The essence of Iran's argument is that the challenged measures are intended to inflict harm to Iranian economic activities, and that therefore Iran's claims based on them categorically fall within the Treaty's scope. Iran argues that such measures, even if outside the context of bilateral commercial relations, breach Article IV, paragraph 1[50]. Iran's argument invites the Court to ignore the content, scope and application of the measures, and instead to look only to their intent. That is the only test Iran offers[51].

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[50] CR 2020/11, p. 31, para. 14 (Wordsworth).

[51] CR 2020/11, p. 33, para. 21 (Wordsworth).

5. But neither Article IV, paragraph 1, nor any other provision of the Treaty, includes such an open-ended prohibition on causing economic harm to any national or company of the other Party. Nothing in the text of Article IV compels, or even suggests, that this paragraph be given such a broad reading. And the negotiating history directly refutes it.

6. While Iran's counsel was quick to dismiss statements and clarifications provided contemporaneously by US officials concerning "screening" of investments as a "non-sequitur", he failed to grapple with its significance[52]. Such statements provide important insights into the Treaty's character and many of its provisions. Here, they confirm that the United States understood the protections in Article IV, paragraph 1, to be limited in application to nationals and companies of one Party engaged in business with nationals and companies of the other Party. To give but one example, in describing the Treaty to the President, the US Secretary of State explained that

> "[t]he commitments stipulated, primarily in article IV, in regard to the general conduct of business enterprises relate largely to the assurance of nondiscriminatory treatment *once such enterprises are established* and do not deal with rights of entry and establishment"[53].

7. Iran does not dispute this history, and Mr. Wordsworth recognized that a screening mechanism could be "a form of . . . targeting" that harms an Iranian company[54]. But he did not engage with the significance of this fact, which is fatal to Iran's all-encompassing interpretation of Article IV, paragraph 1. The Parties' decision not to incorporate rights of entry, and instead to allow for a Party to screen — and potentially refuse entry to — businesses of the other Party, is illuminating. It shows that the Parties crafted the Treaty's individual provisions with care and did not intend the kind of sweeping provisions that Iran is arguing for. And screening is not the *only* example of a measure with economic implications that the Treaty nonetheless permits, as we have already noted[55]. Each of these permitted measures is flatly inconsistent with Iran's reading of Article IV, paragraph 1, that would prohibit all measures that inflict deliberate economic harm on

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[52] CR 2020/11, pp. 36-37, para. 33 (Wordsworth).

[53] Message from the Secretary of State Transmitting a Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed at Tehran on August 15, 1955 (23 Dec. 1955), POUS, Ann. 90, emphasis added; judges' folder, tab 9. See also Commercial Treaties with Iran, Nicaragua, and the Netherlands: Hearing Before the Senate Committee on Foreign Relations, 84th Congress 2-3, p. 20 (1956), POUS, Ann. 88, emphasis added; judges' folder, tab 10.

[54] CR 2020/11, p. 36, para. 33 (Wordsworth).

[55] CR 2020/10, pp. 42-43, para. 33 (Grosh).

an Iranian national or company, regardless of whether the national or company is engaged in investment or any other economic activity in the United States.

8. Neither the text, nor the context, nor the contemporaneous evidence supports such a reading. Nor has Iran identified any precedent for applying the "fair and equitable treatment" standard — that is, the language of investment protection treaties — to measures taken by one State in respect of transactions exclusively between nationals of two different countries without a nexus to trade or investment in the State taking the measure.

9. Instead, Iran presses two alternative reasons why Article IV (1) *must* be given an expansive reading. First, Iran argues:

> "The infliction of deliberate economic harm on Iran and Iranian nationals and companies . . . is anathema to the objective of peace and friendship, and the Article IV (1) protections, interpreted in light of that objective, could not conceivably be restricted in the way that the United States now wishes"[56].

10. But this is the same argument Iran made that the Court rejected in *Oil Platforms*. Specifically, Iran argued in its Reply and Defence to [the US] Counter-Claim that

> "the creation of obstacles to freedom of commerce between the territories of the two High Contracting Parties, by the use of force in breach of customary international law embodied in the U.N. Charter, rides roughshod over the objective of peace and friendship of the Treaty of Amity and constitutes a flagrant violation of Article X (1)"[57].

11. But the Court concluded otherwise. The Court found that attacks by the United States on the oil platforms in question — while clearly unfriendly, and perhaps detrimental to so-called "indirect commerce" with Iran — did not breach Article X, paragraph 1, of the Treaty, because "indirect commerce" was "not 'commerce' between Iran and the United States" and was therefore outside that provision's scope[58]. Importantly, the Court reached this conclusion by examining the text and the context of Article X itself, rejecting Iran's attempt to use Article I to force a broader reading than the Treaty allowed.

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[56] CR 2020/11, p. 35, para. 30 (Wordsworth).

[57] *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Iran's Reply and Defence to Counter-Claim (10 Mar. 1999), p. 129, para. 6.72.

[58] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 207, paras. 97-98.

12. Mr. President, Members of the Court, the same reasoning compels the conclusion that Article IV, paragraph 1, did not enact a general prohibition on deliberately causing economic harm to any national or company of the other Party.

13. Second, Iran suggests that Article IV, paragraph 1, should be given a broad construction because, it asserts, it was seen as "playing a gap-filling role", and so "to suggest a general policy of liberal, rather than of narrow, construction"[59]. Even if that were a fair reading of the historical evidence, however, it would not turn Article IV, paragraph 1, into an empty vessel to be filled with any obligation Iran would like to have applied. To discover in Article IV a general prohibition on "deliberate economic harm" would be an act of invention and expansion, not one of gap-filling.

B. Article IV (2)

14. I will now turn to Article IV, paragraph 2. As both Parties agree, the first sentence of Article IV, paragraph 2, concerning "most constant protection and security", is expressly limited to the territories of the Parties. Iran argues, however, that the paragraph's second sentence, concerning the taking of property, is worldwide in scope, because it does not repeat the words "within the territories of the other High Contracting Party" from the first sentence[60].

15. The flaw in Iran's argument is obvious — the limited scope of Article IV, paragraph 2's second sentence is inherent in the power it seeks to constrain. The provision limits the Parties' exercise of their power to expropriate property to certain specific circumstances, namely where the taking is for a public purpose and accompanied by payment of just compensation. A State, however, has no power to expropriate property located in territories over which another State is sovereign. Thus, even if Article IV's expropriation provision lacks an express territorial limitation, such a limitation is implicit.

C. Article VII

16. I turn now to Article VII, paragraph 1. The US submissions explained that, read in its context, this paragraph imposes no obligation with respect to measures by a Party that could restrict the transfer of funds between the other Party and a third ***country***. The text and context of

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[59] CR 2020/11, p. 37, para. 34 (Wordsworth).

[60] CR 2020/11, p. 38, paras. 36-37 (Wordsworth).

Article VII, paragraph 1, relate to restrictions on transfers of currency into and out of a Party's territory, and do not contain any indication that it is intended to apply to transfers more broadly.

17. On Wednesday, Iran proffered two arguments, both relying on a comparison with provisions in other treaties of commerce, for reading this obligation more broadly. The first purports to assert a comparison with a later-in-time treaty involving neither Iran nor the United States, and thus is clearly inapposite to this case[61].

18. Iran also notes that the phrase, "as well as between the territories of such other Party and any third country", appears in six US treaties of similar vintage to the Treaty of Amity[62] and Iran argues that, although this language unambiguously does not appear in the Treaty of Amity, it should be read as if it does[63].

19. There are two reasons why the Court should reject Iran's argument.

20. *First*, and most obviously: these are different treaties, reflecting different negotiations. The possibility that the Parties could have negotiated an obligation applying to such transfers more widely, as was done in the other treaties, actually refutes Iran's assertion here.

21. *Second*, Iran's observation that this treaty was generally described as a "shorter and simpler" version of other treaties goes nowhere, because it is plain that the obligation in the other treaties is demonstrably different, in multiple respects, from Article VII, paragraph 1, of the Treaty of Amity. The Treaty of Amity states that *"[n]either . . . Party shall apply restrictions"*[64]. This is a broad restriction, whereas the cited paragraph of the other treaties imposes a far more limited obligation: to "accord[] national treatment and most-favoured-nation treatment with respect to

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[61] CR 2020/11, p. 43-44, para. 9 (Thouvenin).

[62] CR 2020/11, pp. 44-45, paras. 12-13 (Thouvenin). E.g. Treaty of Friendship, Commerce and Navigation between Denmark and the United States of America, signed on 1 Oct. 1951, Art. XII (1), Iran's judges' folder, tab 7; Treaty of Friendship, Commerce and Navigation between the Republic of Korea and the United States of America, signed on 28 Nov. 1956, Art. XII (1), Iran's judges' folder, tab 8; Treaty of Friendship and Commerce between Pakistan and the United States of America, signed on 12 Nov. 1959, Art. XII (1), Iran's judges' folder, tab 9; Treaty of Friendship and Commerce and Navigation between Greece and the United States of America, signed 3 Aug. 1951, Art. XV (1), Iran's judges' folder, tab 10; Treaty of Friendship and Commerce and Navigation between Israel and the United States of America signed 23 Aug. 1951, Art. XII (3), Iran's judges' folder, tab 11.

[63] CR 2020/11, pp. 46-47, para. 18 (Thouvenin).

[64] Treaty of Amity, Art. VII, para. 1.

payments, remittances and transfers"[65]. Plainly, something different was negotiated, and there is no reason whatsoever to assume that the same territorial scope should apply to the two very different obligations.

22. And finally, though there is not time to develop this point, I note that in passing in any case, the MFN provisions of those other treaties — which when examined closely, clearly impose obligations only as to transfers from one Party to third countries and do not impose obligations with respect to transfers from *the other Party* to third countries — would not reach the actions Iran raises in this case, which exclusively relate to fund transfers between Iran and third countries[66].

D. Articles VIII and IX

23. Iran touched only briefly on Articles VIII and IX and, accordingly, I will do the same.

24. Turning first to Article VIII, Iran's pleading failed to engage several of the points I made on Monday[67]. Instead, Professor Thouvenin simply repeated Iran's implausible contention that while the imports clause in the first sentence of Article VIII, paragraph 1[68], covers, with respect to each Party, only imports of the other Party's products, the exports clause[69] encompasses *any* export to either Party, even if such export did not originate in, pass through, or otherwise concern the other Party[70].

25. Professor Thouvenin also repeated Iran's argument that the second sentence of Article VIII, paragraph 1 — which speaks about transfers of payments for "imports and exports" — applies not only to *all* exports to either Party but also to *all* imports from either Party[71].

26. The text and context refute Iran's arguments.

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[65] E.g. Treaty of Friendship, Commerce and Navigation between Denmark and the United States of America, signed on 1 Oct. 1951, Art. XII (1), Iran's judges' folder, tab 7; Treaty of Friendship, Commerce and Navigation between the Republic of Korea and the United States of America, signed on 28 Nov. 1956, Art. XII (1), Iran's judges' folder, tab 8.

[66] CR 2020/11, p. 48, para. 22 (Thouvenin), "l'Iran maintient que *toutes* les mesures qu'il a contestées comme étant des violations de l'article VII, paragraphe 1, sont précisément des restrictions concernant les paiements, remises et transferts de fonds à destination ou en provenance *de son territoire*"; emphasis added.

[67] CR 2020/10, pp. 45-46, paras. 40, 42-43 (Grosh).

[68] Treaty of Amity, Art. VIII, para. 1: "products of the other High Contracting Party, from whatever place and by whatever type of carrier arriving".

[69] Treaty of Amity, Art. VIII, para. 1: "products destined for exportation to the territories of . . . [the] other High Contracting Party, by whatever route and by whatever type of carrier".

[70] CR 2020/11, pp. 49-50, paras. 28, 31 (Thouvenin).

[71] CR 2020/11, pp. 50-51, paras. 32-33 (Thouvenin).

27. As to the text, if the Parties intended "products destined for exportation" in the first sentence of Article VIII, paragraph 1, to encompass products shipped to Iran from a third country, it makes no sense to refer to such products as "exports". Such products are not "exported" from the perspective of either Party to the Treaty — they are imported to Iran, while from the US perspective they are neither imported nor exported. It is simply not plausible that the Treaty would refer to them as "exportation". Rather, "imports" and "exports" in this paragraph must be identified from the perspective of the Party according the treatment. Thus, Article VIII requires the United States to accord most-favoured-nation status to (i) Iranian products imported into the United States; and (ii) products destined for exportation from the United States to the territory of Iran; and to the international transfer of payments for those two categories of products only.

28. As to the context, Iran's argument requires the Court to conclude that there is an inconsistency in scope as between the two clauses of the first sentence of Article VIII, paragraph 1, and also as between the two sentences of the paragraph. Iran's position seems to be that because the individual clauses of paragraph 1 are susceptible to its favoured interpretation when pulled apart and read in isolation, this is the interpretation that the Court must adopt. But that is not how treaty interpretation works.

29. The clauses of Article VIII, paragraph 1, must be read in context. By contrast to Iran's interpretation, the US reading of Article VIII, paragraph 1, is that both sentences apply solely to imports and exports *between the two Parties*. This approach results in a consistent and logical scope across the whole provision.

30. Turning then to Article IX, Iran again pursues a reading of paragraphs 2 and 3 that divorces them entirely from their context. For example, Iran asks the Court to ignore the first paragraph of the Article — which signals the Article's focus on matters related to the administration of the Parties' "customs regulations and procedures" — in interpreting the second and third on the grounds that it is not a *chapeau*[72]. But Article 31 of the Vienna Convention on the Law of Treaties nowhere limits context to so-called "*chapeaux*", and thus, regardless of whether it

[72] CR 2020/11, pp. 53-54, paras. 45-46 (Thouvenin).

is a *chapeau*, the first paragraph is an essential part of the context for interpreting the Article's other paragraphs and cannot be ignored[73].

31. Finally, the purported inconsistency that Professor Thouvenin identified between the United States' interpretation of Article IX, paragraph 3, and its interpretation of the Treaty's other Articles is nothing of the kind. Contrary to Professor Thouvenin's assertion, the United States has not conceded, in its Preliminary Objections or elsewhere, that Article IX, paragraph 3, applies to «les importateurs iraniens de produits originaires de pays tiers»[74]. Rather, as the United States made clear in its Preliminary Objections, Article IX, paragraph 3, applies to "the marine insurance marketplace for imports and exports *between* Iran and the United States"[75].

32. Mr. President, Members of the Court, in sum, the references to importation and exportation in Article IX — consistent with Article VIII and, indeed, consistent with Article X, paragraph 1 — should be interpreted to refer to trade *between* the Parties, not to trade between each of the Parties and the rest of the world.

III. Article XX

33. Mr. President, Members of the Court, I will now turn to address Iran's remarks on Article XX.

34. While we have been clear that the United States puts forth its Article XX objections under the "third category" provided for in Article 79*bis* of the Court's rules, Professor Pellet suggests that this category is also solely jurisdictional[76]. Such a reading deprives of meaning Article 79's explicit inclusion of a third category, beyond jurisdiction or admissibility. As the Court recognized in *Nuclear Tests*, certain objections are "of such a nature as to require examination in priority to" the merits of the Applicant's claims[77]. The US objections based on Article XX are of such a nature.

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[73] See also e.g. *Certain Iranian Assets (Iran* v. *United States), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 28, para. 58.

[74] CR 2020/11, p. 53, para. 43 (Thouvenin).

[75] POUS, para. 7.55; emphasis in original.

[76] CR 2020/11, p. 60, para. 19 (Pellet).

[77] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Report 1974*, p. 259, para. 22; Rules of Court, Article 79*bis* (1).

35. The Court can decide whether Article XX (1) *(b)* or *(d)* applies without deciding or even examining the merits of Iran's claims under the various Treaty of Amity provisions that Iran invokes. The Court need only to interpret Article XX, together with the facts we have provided regarding the rationale for and content of the measures. These facts are distinct from those going to whether the United States has breached the Treaty provisions that Iran invokes. To illustrate, facts and arguments as to whether the US measures failed to accord fair and equitable treatment to Iranian companies and nationals under Article IV (1) of the Treaty have no place in the assessment that the measures, collectively, relate to fissionable materials and thus fall under Article XX (1) *(b)*. Because the Article XX inquiry is severable from the merits of Iran's claims, it can be decided prior to addressing any questions of breach, as the Court did in *Oil Platforms*[78].

36. The outcome in *Lockerbie* is not dictated here[79]. In that case, the Court had to examine Libya's Montreal Convention rights in order to determine whether those rights were incompatible with its obligations under Security Council resolutions and therefore moot[80]. The United States' Article XX objections are not so interwoven with the merits. There is no need to determine if the United States has breached the various Treaty of Amity articles that Iran has invoked to decide the applicability of Article XX.

37. Iran seeks to persuade the Court that it must dismiss the US objections because it found that Article XX of the Treaty of Amity is a defence on the merits in prior cases. However, in responding to the United States' hypothetical example of an objection under subparagraph *(a)* of Article XX (1), regarding the importation or exportation of gold or silver, Professor Pellet conceded that there may be a scenario in which the Court would rule on Article XX without putting the Parties to a merits proceeding[81]. Mr. President, Members of the Court, we have here just such a scenario. The unique facts and circumstances of this case, which we have presented in our written and oral arguments, warrant deciding the US third category objections at this preliminary objections stage.

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[78] CR 2011/10, p. 62, para. 9 (Boisson de Chazournes).

[79] CR 2020/11, p. 62, para. 23 (Pellet).

[80] See *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*, pp. 131-134, paras. 45-50.

[81] CR 2020/11, p. 63, para. 25 (Pellet).

38. Turning to Article XX (1) *(b)*, I have two points to make. First, Iran questions whether measures that are "nuclear related" fall within the exception for measures that "relat[e] to fissionable materials, the radio-active by-products thereof, or the sources thereof"[82]. Of course they do. Fissionable materials are those substances that can generate nuclear energy. Measures relating to nuclear energy development or use and to the circumstances in which they occur — including to ensure nuclear energy is used only for peaceful purposes — comfortably can be said to *relate to fissionable materials.*

39. The historical context supports this reading. When the Treaty was drafted, it was informed by existing US law relating to fissionable materials, namely the Atomic Energy Act of 1946. This early US policy on the control of fissionable materials to facilitate peaceful uses of nuclear energy, was "subject at all times to the paramount objective of assuring the common defense and security"[83]. Reading the fissionable materials exception in this historical context confirms what its text makes plain: that it was drafted flexibly to encompass measures relating to a range of potential measures that could protect against the use of nuclear energy for destructive purposes[84].

40. This leads me to my second point about this exception: the Court has before it all of the relevant facts it needs to resolve this objection, and therefore it can and must do so[85]. The question of whether the measures "relate to fissionable materials" may be resolved by reference to the text of the JCPOA. In that arrangement, the United States and Iran described all of the lifted — and now reimposed — measures as "nuclear-related." Iran remained conspicuously silent through its three-hour presentation about this central fact. This case concerns those *same* measures. There are not mysterious missing facts, and nothing to await merits proceedings.

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[82] CR 2020/11, p. 63, para. 25 (Pellet).

[83] Atomic Energy Act (1946) (AEA), ch. 724, 60 Stat. 755-75, §§ 1(a) (codified as amended at 42 U.S.C. § 2011-2296).

[84] See *ibid.*: "any legislation will necessarily be subject to revision from time to time" to face the changes in technology and threats.

[85] Rules of the Court, Article 79*ter* (3); See e.g. *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; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I),* joint separate opinion of Judges Tomka and Crawford, pp. 47-48, paras. 4-7; POUS, para. 4.3.

41. Iran is wrong to suggest that the Court would need to additionally assess whether the United States' assessment of Iranian nuclear activity is well founded[86]. This invents a requirement that appears nowhere in Article XX (1) *(b)*, which clearly states that the Treaty obligations "shall not preclude the application of measures . . . relating to fissionable materials" *full stop*. Indeed, the fissionable materials exception was drafted as a stand-alone provision, independent from the essential security exception[87]. The United States has therefore provided all of the facts and argument needed to resolve the Article XX (1) *(b)* objection before reaching the merits of Iran's claims.

42. Let me conclude by turning now to Article XX (1) *(d)* to respond briefly to Iran's suggestion that we are seeking a carte blanche for any conduct through this essential security exception. The United States is not arguing that Article XX (1) *(d)* is self-judging or that the Court has no role to play. Rather, we assert that the State asserting the necessity of a measure to protect its essential security interests should be afforded substantial deference, taking into account its perspective and circumstances[88].

43. Iran would have you believe that there is a large universe of facts relevant to the essential security objection that has not been presented[89]. To the contrary, whether the 8 May measures were necessary to protect US essential security interests for the purposes of Article XX (1) *(d)* can be resolved by reference to the facts already put before the Court. In short, the challenged measures targeted Iran's support for a range of grave threats to US security — ballistic missiles, terrorism, regional destabilization and, of course, Iran's nuclear ambitions. What additional information could Iran possibly have about the United States' reasons for imposing the challenged measures, that the United States has not already presented to the Court? Iran's decision to disregard these facts in

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[86] CR 2020/11, p. 63, para. 27 (Pellet).

[87] CR 2020/10, p. 66, para. 20 (Boisson de Chazournes).

[88] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145, citing *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 *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 183, para. 43; see also Charles H. Sullivan, US Department of State, Standard Draft Treaty of Friendship, Commerce and Navigation: Analysis and Background 308 (1981), POUS, Ann. 111: Article XX (1) *(d)* affords States "broad freedom of action", judges' folder, tab 18; Telegram No. 1561 from US Department of State to US Embassy Tehran (15 Feb. 1955), POUS, Ann. 121: "Treaty fully recognizes paramount right state take measures to protect itself and public safety": judges' folder, tab 19.

[89] CR 2020/11, p. 64, para. 29 (Pellet).

these proceedings is not a basis for delaying this issue to the merits phase. Once again, the Court has the information to reach a well-founded conclusion that Article XX (1) *(d)* was properly invoked, and, consistent with Article 79*ter*, it should decide the objection now[90].

IV. Conclusion

44. Mr. President, Members of the Court, thank you for your attention. That brings to an end my submissions. I ask that you now call on Mr. String, who will conclude the United States' rebuttal submissions.

The PRESIDENT: I thank Ms Grosh for her statement. I will now give the floor to the Agent of the United States, Mr. Marik String. You have the floor, sir.

Mr. String. If you can hear me, we cannot hear you. There is an audio issue. Now, it should be right. Please, please start again.

Mr. STRING:

CLOSING OBSERVATIONS AND FINAL SUBMISSIONS

1. Mr. President, Madam Vice-President, Members of the Court, I have the honour to conclude our presentations on behalf of the United States.

2. I do not propose to summarize our preliminary objections. Over the course of Monday and today, my colleagues have fully explained the basis for each of them and why Iran's responses cannot withstand scrutiny. And of course, our written submission and the materials submitted to the Court provide both further detail on our arguments as well as all the factual support required to find in favour of our objections.

3. Instead, I would like to address two issues that are central to this proceeding, but that Iran has neglected, or on which it is mistaken. The first point concerns something that Iran said almost nothing about on Wednesday and that is at the heart of the matter: why the United States ceased participation in the JCPOA on 8 May 2018 and what that means for this case. The second point

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[90] Rules of the Court, Article 79*ter* (3); see e.g. *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; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, joint separate opinion of Judges Tomka and Crawford, pp. 47-48, paras. 4-7; POUS, para. 4.3.

concerns something that Iran did mention, but on which we appear to have a profoundly different perspective: the proper application of international law in this case.

4. Mr. President, Members of the Court, on the first issue, on Monday I described in some detail the history of our grave security concerns with Iran's conduct over many years[91]. I recalled the US assessment of Iran's conduct during our implementation of the JCPOA that underlay the decision to reimpose the sanctions that had been lifted pursuant to that arrangement[92]. And I explained that our concerns about the threats that Iran poses to our security, and to international peace more generally, remain very much alive today[93].

5. Iran's Agent and counsel said virtually nothing about these points. Iran said nothing about the years of IAEA Board of Governors resolutions and Director General reports, years of United Nations Security Council attention and measures, and years of multilateral diplomacy and domestic measures in many States directed at addressing the problem of Iran's nuclear programme, all motivated by serious and credible concerns about that programme[94].

6. And, Iran said nothing about the US concerns regarding the shortcomings of the JCPOA, both in the nuclear realm and in its ability to address Iran's threatening conduct more broadly. Iran has failed to engage with the United States' submissions on these issues, such as the evidence of Iran's support for acts of terrorism, including attacks that have taken, or threaten to take, the lives of US nationals; its fomenting of conflict throughout the Middle East; its arbitrary and unlawful detention of US and other countries' nationals; its development and proliferation of ballistic missile technology; and its provocative nuclear activities, including its repeated violations of its nuclear safeguards obligations[95].

7. Perhaps, Iran is worried about acknowledging these facts in view of the first US objection that this case is all about the JCPOA. Or perhaps, Iran hoped not to have to respond to the

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[91] CR 2020/10, pp. 15-16, paras. 3-6 (String).

[92] CR 2020/10, pp. 16-17, paras. 7-8 (String).

[93] CR 2020/10, p. 17, para. 11 (String).

[94] See POUS, paras. 2.3-2.14. For more recent expressions of international concern since the US written submission was filed, see also, for example, Int'l Atomic Energy Agency Board of Governors Resolution, *NPT Safeguards Agreement with the Islamic Republic of Iran*, IAEA doc. GOV/2020/30, p. 4, paras. 11-12 (5 June 2020); and Int'l Atomic Energy Agency Board of Governors Resolution, *NPT Safeguards Agreement with the Islamic Republic of Iran*, IAEA doc. GOV/2020/34, pp. 1-2, paras. 2-4 (19 June 2020).

[95] POUS, paras. 2.3-2.49.

substance of our Article XX preliminary objection. That refusal to engage with the evidence the United States has provided, however, is unavailing and should not be allowed to benefit Iran.

8. Whatever the reason, Iran's reticence does not change the facts about those threats and the US concerns about Iran's conduct. And contrary to Iran's claims, we have provided ample information about those threats, the US concerns and the basis for the US decision of 8 May 2018.

9. Nor does Iran's silence change the inescapable fact that this case is an attempt to reverse the consequences of the US decision to leave the JCPOA — and the reimposition of the measures that were lifted under it. But Iran seeks to do so without any action to address the well-documented, long-standing and persistent national security concerns of the United States regarding the broad range of Iranian conduct.

10. I would also like to take this opportunity to respond clearly and emphatically to one of Iran's claims on Wednesday, namely, the assertion that the aim of the United States is to harm the Iranian population[96]. We have absolutely no desire to cause suffering for the Iranian people. We have continuously expressed support for and solidarity with the Iranian people, including in light of the suffering caused by their own Government's malfeasance. Consistent with the long-standing policy of the United States to ensure that the focus of sanctions pressure is directed at the Iranian régime, and not the Iranian people, we are continuing our efforts to ensure the effectiveness of our humanitarian exceptions, exemptions and authorizations. These efforts, and our support for the people of Iran, will continue irrespective of the Court's disposition of our preliminary objections[97].

11. Mr. President, Members of the Court, I turn to my second point, namely the Parties' differing conceptions of the application of international law in these proceedings, in two key aspects — one procedural and one substantive.

12. As I stated in my opening presentation, the United States comes to this proceeding with deep respect for the role of the Court in the peaceful settlement of disputes. The Court's Statute and Rules afford both Parties to a case with due process, the opportunity to defend their interests and equality of treatment. They also provide the Court with a framework to ensure the orderly administration of justice.

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[96] CR 2020/11, p. 13, paras. 4-5; p. 16, para. 13 (Oloumiyazdi).

[97] CR 2020/10, p. 58, para. 30 (Gahan).

13. It was unfortunate, therefore, to hear Iran allege that by relying on this framework for settlement of disputes and the sound administration of justice, the United States is resorting to "dilatory tactics"[98]. Nothing could be further from the truth. The United States has exercised its fundamental procedural right to advance three sets of preliminary objections, and has supported each of them with considered arguments — precisely as Article 79*bis*, paragraph 2, of the Court's Rules requires. The United States, as I said on Monday, has appeared before the Court to explain why this case should proceed no further, just as countless States have done before us, in the interest of allowing the preliminary objections stage of the proceedings to serve its intended role. If anything, it is Iran's repeated assertions that the facts will "fall for consideration at the merits phase"[99], and its unwillingness to engage on all questions of law *and fact*, and to adduce all relevant evidence[100], that should be regarded with scepticism.

14. There is also a substantive issue, Mr. President, that requires comment here, namely Iran's urging that the Court should "stand alongside international law" against what it calls "the continuous disregard of the rule of law" by the United States[101].

15. Mr. President, Members of the Court, the United States welcomes an analysis by the Court of this case under the rules of international law, in particular the applicable rules of treaty interpretation. For the reasons that Ms Grosh and Ms Gahan have set out in detail, it is the US interpretation of the Treaty of Amity that comports with those rules. It is not the United States that is asking you to be swayed by the political perceptions of the day. The United States is committed to respect for international law in the interpretation of the treaty provisions at issue in these proceedings and has come before this Court to advocate its position on how that law and those provisions should be understood. The question of whether an asserted dispute comes within the scope of the compromissory clause of a treaty is an issue that requires exacting scrutiny by this Court, and that is what we call for in these proceedings.

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[98] CR 2020/11, p. 17, para. 16 (Oloumiyazdi).

[99] CR 2020/11, p. 40, para. 44 (Wordsworth).

[100] Cf. Rules of Court, Article 79*ter* (3).

[101] CR 2020/11, p. 18, para. 17 (Oloumiyazdi).

16. Mr. President, Members of the Court, that brings me to the end of my second point. Before I conclude my presentation, please allow me to express my appreciation, on behalf of the United States, to you and to the Registry for the extensive efforts undertaken to enable the successful conduct of these proceedings, and let me also thank the interpreters and technical consultants for their tireless support to the Court and to both delegations.

17. Mr. President, Members of the Court, in accordance with Article 60, paragraph 2, of the Rules of Court, I now present to you the final submissions of the United States.

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

(a) Dismiss Iran's claims in their entirety as outside the Court's jurisdiction.

(b) Dismiss Iran's claims in their entirety as inadmissible.

(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.

(e) Dismiss as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on third country measures.

19. Mr. President, Members of the Court, this concludes the submissions of the United States on its preliminary objections. I thank you once again for your kind attention.

The PRESIDENT: I thank the Agent of the United States. The Court takes note of the final submissions which you have just read on behalf of your Government. The Court will meet again on Monday 21 September 2020 at 3 p.m., to hear the second round of oral argument of the Islamic Republic of Iran. The sitting is adjourned.

The Court rose at 4.30 p.m.