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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2020

Public sitting

held on Monday 14 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 lundi 14 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
		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
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 today and will meet in the coming days to hear by video link the oral arguments of the Parties on the preliminary objections raised by the United States of America 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)*. This afternoon, the Court will hear the first round of oral argument of the United States.

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Owing to the ongoing concerns and restrictions related to the COVID-19 pandemic, the Court has decided to hold these oral proceedings by video link, under Article 59, paragraph 2, of its Rules — a practice which the Court has followed since June 2020. The Court will continue to fulfil its mission through all the means at its disposal, pending the normalization of the public health situation.

The Court has made every effort and will make every effort during this hearing to ensure the smooth conduct of the hearing by video link. However, there are certain inherent difficulties with remote hearings and the connection by video link, as well as remote simultaneous interpretation. In the event that we experience a loss of audio or video input from the remote participants, I might have to interrupt the hearing briefly to allow the technical team to re-establish the connection.

So, in view of the hybrid nature of the hearing of today, I would like to recall that the following judges are present with me here, in the Great Hall of Justice: Vice-President Xue, Judges Tomka, Abraham, Bennouna, Sebutinde, Crawford, Gevorgian and Iwasawa; while Judges Cançado Trindade, Gaja, Bhandari and Salam, as well as Judges *ad hoc* Brower and Momtaz, are participating by video link in the hearing. However, for reasons duly made known to me, Judge Robinson is unable to sit with us today.

I would also like to recall that Judge Donoghue considered some time ago that she should not take part in the case and informed me of this decision, in accordance with Article 24, paragraph 1, of the Statute of the Court. The United States of America, pursuant to Article 37,

paragraph 1, of the Rules of Court, chose Mr. Charles Brower to sit as judge *ad hoc* in the case. Since the Court does not include upon the Bench a judge of Iranian nationality, the Islamic Republic of Iran exercised its right under Article 31 of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Djamchid Momtaz.

Mr. Brower and Mr. Momtaz were duly installed as Judges *ad hoc* on 27 August 2018, during the phase of the present case that was devoted to the Request for the indication of provisional measures submitted by the Islamic Republic of Iran.

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I shall now briefly set out the principal steps of the procedure in the case.

On 16 July 2018, the Islamic Republic of Iran filed in the Registry of the Court an Application instituting proceedings against the United States of America concerning alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of 15 August 1955. I shall hereinafter refer to that treaty as the "Treaty of Amity".

In its Application, to found the jurisdiction of the Court, the Islamic Republic of Iran invokes Article 36, paragraph 1, of the Statute of the Court and Article XXI of the Treaty of Amity.

On 16 July 2018, the Islamic Republic of Iran also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

By an Order of 3 October 2018, the Court indicated certain provisional measures addressed to the United States of America. In addition, both Parties were directed to refrain from any action which might aggravate or extend the dispute before the Court.

On 24 May 2019, the Islamic Republic of Iran filed its Memorial within the extended time-limits fixed by the President in his Order dated 8 April 2019.

On 23 August 2019, the United States of America submitted preliminary objections in relation to the case. Consequently, by an Order of 26 August 2019, the President of the Court fixed 23 December 2019 as the time-limit within which the Islamic Republic of Iran could present a written statement of its observations and submissions on the preliminary objections raised by the

United States. Iran filed such a written statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objections.

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Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the written proceedings and the documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, in accordance with the Court's practice, these pleadings and documents annexed will be placed on the Court's website from today.

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I would now like to welcome the delegations of the United States of America and of the Islamic Republic of Iran who will be participating in the hearing by video link. I note the remote attendance at the hearing of the Agents, Co-Agents, Deputy Agents, counsel and advocates of both Parties.

In accordance with the arrangements on the organization of the procedure decided by the Court, the hearings will comprise a first and second round of oral argument. The first round of oral argument will begin today with the statement of the United States, and will close on Wednesday 16 September 2020, following the Islamic Republic of Iran's first round of pleading. Each Party has been allocated a period of three hours for the first round. The second round of oral argument will begin on the afternoon of Friday 18 September 2020 and conclude on the afternoon of Monday 21 September 2020. Each Party will have a maximum of one hour and a half to present its reply. In this first sitting, the United States may, if required, avail itself of a short extension beyond 6 p.m. today, in view of the time taken up by the opening part of these oral proceedings.

I now give the floor to the Agent of the United States of America, Mr. Marik String. You have the floor, Sir.

Mr. STRING:

OVERVIEW

I. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, it is my honour to appear as Agent of the United States in these proceedings. I am joined by two colleagues from the US Department of State — Lisa Grosh and Kimberly Gahan — who will present portions of our argument, together with Sir Daniel Bethlehem and Professor Laurence Boisson de Chazournes.

2. I wish to express, on behalf of the United States, our sincere appreciation for the Court's efforts to adjust its mode of work in view of the COVID-19 pandemic, while taking into account principles of due process and equality. I offer my best wishes for the health and safety of the Court and its staff, as well as the delegations participating in these proceedings.

II. Overview of the broader context of Iran's case

3. I turn now to our task in this hearing, to underscore the reasons why Iran's Application requires dismissal at this preliminary stage. It is well known that the United States has long considered Iran's conduct to present a grave threat to US national security and the safety and security of US nationals and interests, as well as to the security of our regional allies. These concerns are well founded in Iran's persistent actions: its support for terrorism, including terrorist acts that have taken, or threaten to take, the lives of US nationals; its supply of weapons and training to militant groups, fuelling conflict throughout the Middle East; its arbitrary and unlawful detention of US and foreign nationals; its development and proliferation of ballistic missile technology; and, of central significance to this case, its efforts to advance a destabilizing nuclear programme.

4. There is a deep and continuing record of Iranian misconduct in these areas, as addressed in detail in the US written submission. And it is important to be clear that these concerns — long-standing though they may be — persist and remain as urgent and necessary to address as ever.

5. The United States has engaged on a number of different tracks over the years to counter the threats posed by Iran. It has worked alongside other States within international organizations, such as the International Atomic Energy Agency (IAEA), in response to Iran's repeated violations

of its nuclear safeguards obligations, which included the construction of undeclared nuclear facilities and the unreported importation, processing and enrichment of fissionable materials. It has pursued efforts in the Security Council, which — beginning in 2006 — adopted a series of resolutions imposing measures to restrict Iran's nuclear activities, its trade in sensitive nuclear materials and technology, its ballistic missile-related activities, and its import and export of arms. And of course, the United States — like other States, as well as the European Union — has adopted measures under its domestic law to deter and discourage Iran from advancing these activities, and to deny it the materials, resources and capabilities to carry them out. The United States has adjusted its approach over time in light of the evolution of the threats posed by Iran and the need to develop effective means of addressing them.

6. In 2015, a political arrangement known as the Joint Comprehensive Plan of Action, or JCPOA, was concluded. The basic bargain in the JCPOA was that Iran would take steps to constrain its nuclear programme and provide greater transparency into it, while the United States and others would provide for the lifting of what were identified expressly by all sides, including Iran and the United States, as "nuclear-related" sanctions measures. Other areas of threatening Iranian activities, and the measures adopted to counteract them, were not addressed by the JCPOA.

7. After more than two years of implementing the JCPOA, the United States' assessment of whether this arrangement was advancing, or instead undermining, US national security had changed. As this Court well knows, the United States announced on 8 May 2018 that it would no longer participate in the JCPOA, and would not continue the lifting of US nuclear-related sanctions measures, in view of the persistent national security threats posed by Iran and the inadequacy of the JCPOA to address them.

8. The United States summarized its reasons in a National Security Presidential Memorandum issued on the same date[1]. These reasons are also discussed at length in our written submission and accompanying annexes, so I will touch upon them just briefly now[2]. The broad range of non-nuclear threats posed by Iran had continued, and in some cases grown, during

[1] Presidential Memorandum, "Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon", 8 May 2018; Memorial of the Islamic Republic of Iran (MI), Ann. 31; judges' folder, tab 3.

[2] See e.g. Preliminary Objections of the United States of America (POUS), paras. 2.33-2.53.

US participation in the JCPOA. The United States assessed that, instead of leading to an overall reduction in the national security threats to the United States posed by Iran, the JCPOA — and in particular the lifting of nuclear-related sanctions — had the opposite effect, strengthening not only Iran's ability but also, crucially, its willingness to engage in other threatening activities outside the nuclear realm. The United States also explained its assessment that the JCPOA was not adequate in either the scope or duration of key commitments to address long-term concerns about Iran's nuclear activities, particularly given Iran's past deception regarding its nuclear programme and failures to co-operate as required with international inspectors. The United States concluded, in view of the totality of the threats posed by Iran, that it was in the national security interests of the United States to cease participation in the JCPOA.

9. The measures at issue in this case, which were reimposed as a consequence of that 8 May decision, reversed the US sanctions relief provided in the JCPOA. What Iran seeks in these proceedings is to obtain the Court's assistance to nullify the effect of the United States' decision to leave the JCPOA by giving Iran all the benefits that it would have received had the United States remained in the arrangement.

10. To accomplish this aim, Iran has resorted to an instrument that has nothing whatsoever to do with the JCPOA: the Treaty of Amity. It does so purely for purposes of trying to establish jurisdiction. The Treaty is well known to the Court, but the manner in which Iran is using it once again necessitates careful scrutiny. That scrutiny will show that this case should not proceed to the merits.

11. The measures that Iran challenges remain critical to the United States' efforts to address the national security threats posed by Iran, including the current threat posed by Iran's nuclear programme. The IAEA reported recent failures by Iran with respect to its nuclear safeguards obligations. Furthermore, Iran has engaged in enrichment and stockpiling of nuclear materials, as well as nuclear-related research and development activities, in clear failure to uphold its commitments under the JCPOA. Whatever Iran says about the reasons for its actions, they leave little room for doubt that depriving Iran of the means to further its destabilizing nuclear escalations is of continued and vital national security interest to the United States.

III. Developments since the last hearing

12. Against this backdrop, I would like to address two points that have arisen since the last hearing in this case in late August 2018. As the Court noted in its Judgment on preliminary objections in *Certain Iranian Assets*, on 3 October 2018, the United States gave notice to Iran of the Treaty of Amity's termination. The United States recognizes that the termination of the Treaty does not go to questions of jurisdiction, as Iran's Application was submitted before the termination. But it is not correct to assert, as Iran does, that the Treaty "remains in force" for the purposes of this case[3]. There can be no mistake about this: the Treaty of Amity is no longer in force.

13. Second, inasmuch as Iran has raised the point in its written submissions[4], I would like to affirm before the Court that the United States is acting fully in accordance with the Court's provisional measures Order. As the Court will know from the detailed US correspondence to the Court on this subject, the United States has taken significant steps since the issuance of the Order to ensure the effectiveness of all relevant humanitarian exceptions, exemptions and authorizations, and to ensure that the reimposition of measures at issue in this case has not posed an impediment to the exportation to Iran of the goods and services identified in the Order. That said, this hearing is not about the issuance or compliance with the provisional measures Order. The task in the coming days is, rather, to address the US preliminary objections.

IV. Overview of US objections

14. Mr. President, Members of the Court, I turn now to outline briefly the remainder of our presentations today.

15. First, Mr. Bethlehem will elaborate on the inescapable reality that the real issue in dispute concerns Iran's attempt to obtain from the Court the sanctions relief that was provided under the JCPOA, an issue that is well outside the Treaty of Amity.

16. Next, Ms Grosh will address the fundamental mismatch between the Treaty's provisions and the measures that Iran challenges. The Treaty's provisions address specific elements relating to the Parties' *bilateral* economic and consular relations. They do not address measures concerning

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[3] Written Statement of the Islamic Republic of Iran on the Preliminary Objections of the United States of America (WSI), para. 1.19.

[4] WSI, paras. 1.13-1.15.

trade and transactions between one party and a third country, or between their nationals and companies — what we refer to as "third country measures".

17. Next, Ms Gahan, building on Ms Grosh's submissions, will explain that the vast majority of the challenged measures are such third country measures. The Court should accordingly dismiss claims predicated on those measures for lack of jurisdiction.

18. Professor Boisson de Chazournes will conclude our submissions today by explaining why, in any event, in this case, and in accordance with Article 79 of the Rules of Court, the Article XX exceptions in the Treaty of Amity concerning measures relating to fissionable materials and measures that are necessary to protect the essential security interests of a party preclude Iran's claims from proceeding to the merits.

V. Conclusion

19. Mr. President, Members of the Court, the United States has deep respect for this Court's role in the peaceful settlement of disputes. We are here to argue our case. But Iran has brought to the Court a dispute whose subject-matter does not fall within the Treaty of Amity. Iran has done so in relation to issues of the utmost gravity from the perspective of US national security: namely, the need to address Iran's destabilizing nuclear programme, as well as its ballistic missile activities, support for terrorism and regional destabilization, and the arbitrary and unlawful detention of US nationals. Iran's efforts to shoehorn this dispute into a legal instrument not intended for the purpose run counter to the aim of resolving these issues and are entirely without merit. For all the reasons you will hear over the course of the day, we respectfully request dismissal of Iran's case.

20. Mr. President, may I now ask that you please call on Sir Daniel Bethlehem. Thank you.

The PRESIDENT: I thank the Agent of the United States for his statement and I now invite Sir Daniel Bethlehem to take the floor. You have the floor.

Sir Daniel BETHLEHEM:

FRAMING THE US CASE AND THE SUBJECT-MATTER OF THE DISPUTE

I. Opening remarks

1. Good afternoon, Mr. President, Madam Vice-President, Members of the Court. It is an honour to appear before you today representing the United States. I echo the words of the United States Agent in opening and express my appreciation as well to the Court and to the Registry for the efforts that have been made to manage the challenges of a remote hearing. Mr. President, Members of the Court, I do hope that the audio and video from London is of sufficient quality.

2. My task this afternoon is to do two things: *first*, to frame the US preliminary objections, and, *second*, to address the subject-matter of the dispute. There *is* a dispute between Iran and the United States. We do not contest this. It is not, however, a dispute that properly comes within the scope of the compromissory clause of the Treaty of Amity, even if Iran asserts touchpoints to the Treaty in an attempt to characterize the dispute in Treaty of Amity terms. The "real subject of the dispute", rather, lies elsewhere, to use the words of the Court in the *Fisheries Jurisdiction* case between Spain and Canada[5]. What Iran seeks in these proceedings — under the guise of the Treaty of Amity — is to unwind the US cessation of participation in the JCPOA, the Iran nuclear deal, and the reimposition of the economic measures that had been lifted pursuant to the JCPOA. As you will know from our written objections[6], the US decision to cease participation in the JCPOA was aimed at addressing concerns about Iran's conduct in the nuclear, ballistic missile, terrorism and human rights fields. Reduced to its essence, Iran's complaint before the Court is that the sanctions relief from which Iran had benefited under the JCPOA must be maintained, regardless of the US departure from the nuclear deal.

3. Iran, praying in aid the Court's prima facie finding of jurisdiction at the provisional measures phase of this case, says that acts may fall within the ambit of more than one instrument, and, even though it denies the JCPOA-imperative of its claim, it asserts that "[t]he fact that the

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[5] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-448, para. 29.

[6] POUS, paras. 2.33-2.53.

JCPOA may form part of the factual backdrop of the case does not preclude the dispute [from] falling within the ambit of the Treaty of Amity"[7]. We do not agree. Iran's contention overlooks a deep vein in the Court's jurisprudence which affirms that it is for the Court to determine the real issue in dispute between the Parties and that, in doing so, the Court cannot confine its enquiry to the self-serving manner in which an applicant has characterized both its assertion of jurisdiction and its case more widely. And I add that the Court has been ready to decline jurisdiction, as in the *Fisheries Jurisdiction* case, in circumstances in which it perceives that the applicant's asserted basis of jurisdiction *ratione materiae* does not comport with the real issue in dispute.

4. Mr. President, Members of the Court, I hope to persuade you of this proposition — and it is this that will occupy most of my submissions today. Before I turn to this issue, however, some initial observations are warranted to frame the US case more widely.

II. Framing the US preliminary objections

5. Mr. President, Members of the Court, let me state at the outset, for the avoidance of doubt, that the United States stands on its written objections. We do not resile from any element of those submissions. The fact that I or my colleagues do not restate in oral argument each point of objection contained in our written pleadings is simply an accommodation to time. For sake of formality, I incorporate here by reference all of the arguments advanced in our written pleadings.

6. As you will know from our written submissions, the United States has advanced objections under three headings. The United States Agent has given you the top line of each. Let me say a word or two more about these objections for purposes of addressing their exclusively preliminary character and what the United States asks from the Court.

7. The first set of objections, which I will develop, follow from what we say is the self-evident truth of Iran's case, namely, that the real issue in this case is Iran's endeavour to hold the United States to the sanctions relief of the Iran nuclear deal. This is not a case the beating heart of which is a dispute about the interpretation and application of the Treaty of Amity. This set of objections turns on the proper identification of the subject-matter of the dispute between the Parties, which Iran is attempting to shoehorn into the Treaty of Amity. These objections address the

[7] WSI, para. 1.3.

whole of Iran's case. If you are with us on either limb of these objections, jurisdiction or admissibility, Iran's case cannot proceed to the merits.

8. The second objection, sequentially, to be addressed by Ms Grosh and Ms Gahan, is in the alternative to the first. If you are against us on the question of the real issue in dispute, we contend that a significant proportion of Iran's claims in any event falls outside the scope of the Treaty of Amity, *ratione materiae*, on the basis that the measures complained of concern economic relations between Iran and *third countries*, or between their nationals and companies, which are beyond the ambit of the Treaty. The Court, in its *Oil Platforms* merits Judgment[8], interpreting the same Treaty, held that "indirect commerce" — that is, commercial transactions between Iran and third-country entities, even in the circumstances in which the goods may ultimately be destined for the United States — [that "indirect commerce"] did not come within the scope of Article X of the Treaty. In other words, the Treaty is concerned solely with *bilateral* commerce between Iran and the United States. Our third country measures objection builds on this finding. Measures concerning Iranian trade and transactions with third-country nationals and companies fall outside the scope of the Treaty.

9. The third set of objections, advanced in the alternative, arises under Article XX, paragraph 1, of the Treaty of Amity, the exceptions clause that will be very familiar to you. Iran says that the United States is being disrespectful of the Court even in raising these objections, referencing the Court's preliminary objections Judgment in the *Certain Iranian Assets* case.

10. This set of objections will be addressed by Professor Boisson de Chazournes, and I do not propose to trespass into her argument. I observe only that the objections that we advance in this case are *not* the objections that we advanced in the *Certain Iranian Assets* case. The Article XX objections in this case are *neither* objections to jurisdiction, *nor* objections to admissibility. They fall into the third category of preliminary objections, on which the Court has not so far had an opportunity to pronounce, namely, to quote the Rules of Court, objections "the decision upon which is requested before any further proceedings on the merits"[9]. For the reasons to be given by

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

[9] Rules of Court, Article 79*bis* (1).

Professor Boisson de Chazournes, we consider that the Article XX objections that we advance in this case are appropriate for decision at this preliminary stage of the proceedings. There is no disrespect to the Court, either intended or inadvertent.

11. Mr. President, Members of the Court, this brings me to the exclusively preliminary character of the US objections and what the United States is asking from the Court in these proceedings[10].

12. Iran devotes a good deal of attention in its Written Observations to the proposition that the objections advanced by the United States are not of an exclusively preliminary character and that they should accordingly be dismissed outright — or joined to the merits. To this end, Iran muddies the water with details of its merits arguments, both in an attempt to show that it has a Treaty of Amity claim and to persuade you that you cannot possibly reach a reliable conclusion against Iran at this stage of the proceedings.

13. There is nothing in this contention by Iran. What the United States asks of the Court in its first set of objections is no more than to identify the real issue in dispute in this case and to reach a conclusion that, despite Iran's attempts to cloak its case in Treaty of Amity terms, the dispute does not come properly within the scope of the compromissory clause of the Treaty.

14. On the US third country measures objection, the United States does not ask the Court to disaggregate Iran's merits claims. The focus of the US measures that Iran impugns will be readily discernible by the Court at this stage of the proceedings. The decision that is required at this stage is a generic decision — whether the measures that concern trade or transactions between Iran and third countries, or between their respective nationals and companies, can properly found a cause of action by Iran under the Treaty of Amity.

15. As for the United States' Article XX objections, the Court has before it all the facts necessary for a decision on these matters at this stage of the proceedings. The US argument, again, does not require you to disaggregate Iran's merits claims. Nothing more is required from the Parties to enable you to fully address these issues at this preliminary stage of the proceedings.

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[10] POUS, para. 4.17 *et seq.*

16. Mr. President, Members of the Court, the contention that preliminary objections do not possess an exclusively preliminary character is one that is easily advanced by an applicant that wishes above all to see its case survive to a hearing on the merits. It is a fallback position that can be spun as a victory. It is an entreaty to the Court to hear more from the claimant before dismissing the case for want of jurisdiction.

17. While the Court, in *Certain Iranian Assets*, joined to the merits the issue of whether Bank Markazi is a company, within the meaning of this term in the Treaty of Amity, it has generally been cautious about reaching a conclusion that a preliminary objection must be joined to the merits — for reasons of unnecessary delay and the efficiency and the economy of the proceedings. Where, as in this case, the Court has all the necessary facts to enable it to reach a decision at a preliminary stage, it is appropriate for it to do so.

III. The real subject-matter of the dispute

18. Mr. President, Members of the Court, I turn now to the main part of my argument, that the real subject-matter of the dispute between Iran and the United States is not one of the interpretation or application of the Treaty of Amity but is rather an endeavour by Iran to seek from the Court the reinstatement of the US sanctions relief that was afforded under the JCPOA.

19. As a preliminary matter, let me state the obvious. While Iran, *sub silentio*, hopes to secure from the Court the sanctions relief that it was afforded by the JCPOA, this case is not about the legality, or indeed the policy, of the US decision to cease participation in the JCPOA. The JCPOA is relevant context but it is not an instrument the interpretation or application of which comes within the Court's jurisdiction.

A. Iran's subject-matter case

20. Mr. President, Members of the Court, Iran's subject-matter case in favour of the Court's jurisdiction relies heavily on the Court's finding at the provisional measures phase of this case that, while acts may fall within the ambit of more than one legal instrument, this does not preclude a finding of prima facie jurisdiction under one of those instruments for purposes of the indication of provisional measures.

21. Mr. President, Members of the Court, let me say immediately that the United States does not, through its objection, purport to redefine the scope of Iran's claim. We are simply calling Iran's case as it is. It is an inescapable truth — that everyone participating in this hearing knows well, *in their inner voice, in their inner ear* — that the case that Iran has brought to the Court is all about seeking from the Court the sanctions relief that Iran had secured under the JCPOA. The 8 May measures that stand at the heart of the *petitum* of Iran's case were measures that were reimposed when the United States left the Iran nuclear deal. They are not new measures. They were in place for years before the conclusion of the JCPOA. But not once was there any attempt by Iran to bring these issues to the Court. What we have from Iran now, to use a footballing metaphor, is an attempt to do an end run around the JCPOA, and its mechanisms, by the invocation of the Treaty of Amity. While Iran asserts touchpoints to the Treaty, this cannot be enough to bring Iran's case properly within the Treaty's compromissory clause. Iran's asserted dispute over the interpretation and application of the Treaty is a façade. It is a device to secure the jurisdiction of the Court in circumstances in which the JCPOA demonstrably refrained from establishing such jurisdiction in respect of disputes regarding its terms.TAPE5

22. Mr. President, Members of the Court, I will turn in a moment to the Court's approach to the identification of the subject-matter of the dispute when this is in contention between the Parties. Before I do so, however, let me make one other observation about Iran's use of the Treaty of Amity.

23. For nearly four decades, until the United States issued its notice of termination of the Treaty in October 2018, the Treaty of Amity was essentially an empty vessel. The Court acknowledged this in its merits Judgment in the *Oil Platforms* case when addressing Iran's claims in that case under Article X, paragraph 1, of the Treaty in respect of oil. As the Court there said, there was "no commerce between the territories of Iran and the United States", and, accordingly, that the US action of which Iran complained "cannot therefore be said to have infringed the freedom of commerce . . . protected by Article X, paragraph 1, of the 1955 Treaty"[11].

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

24. The Treaty was not therefore, for forty years, a living instrument, addressing commerce between the two States. Indeed, for Iran, the Treaty was one clause only, its compromissory clause; and only its compromissory clause. It was a vessel into which Iran poured any grievance with the United States with which it wanted to seise the Court. This is the fourth case in which Iran has invoked the Treaty of Amity for purposes of bringing a non-commercial dispute against the United States — the *Aerial Incident* case[12], the *Oil Platforms* case, the *Certain Iranian Assets* case, and now this JCPOA case, masquerading under the guise of a Treaty of Amity complaint.

25. In the *Aerial Incident* case, ultimately discontinued by the agreement of the Parties, the United States observed that Iran's late stage invocation of the Treaty was strikingly inconsistent with Iran's attitude to the application of the Treaty to that point and that the Treaty was in any event wholly irrelevant to the dispute[13]. In *Oil Platforms*, while the Court affirmed its jurisdiction, it went on to dismiss Iran's claims on the merits on the ground that there was no commerce between the two States onto which the Treaty could fasten. In *Certain Iranian Assets*, the Court concluded that the Treaty provided no basis for Iran's immunity claims, and has left open, to be addressed in due course, all the other substantive objections and preliminary pleas advanced by the United States. And we are here now debating another attempt by Iran to use the compromissory clause of the Treaty as a vehicle to address grievances that are far removed from the Treaty.

B. The Court's approach to the identification of the real subject-matter of a dispute

26. Mr. President, Members of the Court, I turn to address the Court's approach to the identification of the subject-matter of a dispute, when this is in contention between the Parties. As I do so, I would like also to address the question of whether the broad-brush proposition on which Iran relies, that, as long as a claim can passably be asserted to come within the scope *ratione materiae* of the Treaty of Amity, this suffices to establish jurisdiction, notwithstanding that the true locus of the dispute lies elsewhere.

27. Mr. President, Members of the Court, your preliminary objections judgments are replete with examples of contested claims about the subject-matter of the dispute that the applicant has

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[12] *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America)*, Memorial of the Islamic Republic of Iran, 24 July 1990, pp. 130 *et seq.*

[13] *Ibid.*, pp. 213 *et seq.*; in particular, pp. 215 and 216.

brought to the Court. Given the principle that jurisdiction is a matter of consent, parties wishing to seise the Court are often tempted to massage their claim to jurisdiction.

28. So it was in the *Fisheries Jurisdiction (Spain* v. *Canada)* case.

29. The jurisdictional basis invoked by Spain in that case was the parties' optional clause declarations. The subject-matter contention arose because, while Spain characterized the dispute as one relating to Canada's lack of entitlement to exercise jurisdiction on the high seas, and the non-opposability to Spain of Canada's fisheries protection legislation, Canada maintained that the subject-matter of the dispute was fisheries protection in the north Atlantic area that was the subject of a reservation in its optional clause declaration. Spain, however, insisted that it was free to characterize the dispute that it wished the Court to resolve[14].

30. In addressing this subject-matter contention, the Court, drawing on earlier jurisprudence, expressed a number of principles that are pertinent to these proceedings[15]. These can be summarized in two propositions of by now well-settled law, as follows:

— *First*, while it is for the applicant to present the dispute with which it wishes to seise the Court, where there is a disagreement about "the real subject of the dispute", it is for the *Court* to determine the subject-matter of the dispute and, in doing so, the Court "cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by the claims of the Applicant"[16].

— *Second*, the subject-matter of the dispute falls to be determined "on an objective basis", and it is the "*duty*" of the Court "to isolate the real issue in the case and to identify the object of the claim"[17]. In so doing, "the Court will not confine itself to the formulation by the Applicant", but will also look at "diplomatic exchanges, public statements and other pertinent evidence"[18].

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[14] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 435, paras. 1-3; pp. 438-439, para. 14; pp. 446-447, paras. 23-28.

[15] *Ibid.*, pp. 447-450, paras. 29-35.

[16] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 29.

[17] *Ibid.*, p. 448, para. 30 (quoting *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30); emphasis added.

[18] *Ibid.*, pp. 448-449, paras. 30-31.

31. In the circumstances of the *Spain* v. *Canada* case then before it, the Court, applying these principles, went on to note that "[t]he filing of the Application was occasioned by specific acts of Canada which Spain contends violated its rights under international law . . . carried out on the basis of certain enactments and regulations adopted by Canada, which Spain regards as contrary to international law and not opposable to it"[19]. The Court thus identified the real subject-matter of the dispute, the proximate cause of the dispute, and went on to consider whether the Parties had conferred jurisdiction upon it in respect of that particular dispute[20].

32. On this latter question, the Court concluded that

> "the dispute between the Parties [as the Court had identified it] . . . had its origin in the amendments made by Canada to its coastal fisheries protection legislation and regulations and in the pursuit, boarding and seizure of the [fishing boat] *Estai* which resulted therefrom . . . [and that] the Court has no doubt that the said dispute is *very largely concerned* with these facts"[21].

On this basis, the Court went on to conclude that it had no jurisdiction in respect of the dispute referred by Spain to the Court.

33. Mr. President, Members of the Court, we will no doubt hear from Iran on Wednesday that this case is inapposite because it concerns the scope of the Court's jurisdiction under Article 36 (2) rather than under Article 36 (1) of the Statute of the Court. This, though, would be dancing on the head of a pin. The Court's analysis in *Fisheries Jurisdiction* is both apposite and sound with respect to jurisdictional issues more broadly[22]. And I note in particular the assessment in that case, when declining jurisdiction, that the fact that a dispute may have arguable touchpoints with the basis of jurisdiction invoked by the applicant is *not* sufficient to establish jurisdiction. This follows from the Court's "very largely concerned with" language that I cited earlier[23], from which it follows that it is not sufficient to enable an applicant to establish jurisdiction for it simply to assert that a case comes passably within the scope of the claimed basis of jurisdiction. *The duty to*

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[19] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 34.

[20] *Ibid.*, p. 450, para. 35.

[21] *Ibid.*, p. 467, para. 87; emphasis added.

[22] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 448-449, para. 29.

[23] Paragraph 32 above, citing to *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 467, para. 87.

determine the subject-matter of a dispute is distinct from the task of determining the scope of the Court's jurisdiction ratione materiae.

34. Mr. President, Members of the Court, the fact that Iran, in the present case, asserts touchpoints with the Treaty of Amity does not make this a Treaty of Amity dispute. Article XXI, paragraph 2, of the Treaty, its compromissory clause, does not give the Court jurisdiction in respect of any and all disputes that a party, through the wiles of creative lawyering, attempts to shoehorn into an interpretation or application matrix. *This stratagem raises, and such an outcome would raise even more, significant concerns about the abusive use of compromissory clauses in treaties.*

35. Mr. President, Members of the Court, the approach in the *Fisheries Jurisdiction* case built on its approach in the *Nuclear Tests* cases, in which the Court also considered that it was *duty-bound* "to isolate the real issue in the case and to identify the object of the claim". Having done so, the Court in that case reached the conclusion that the applicants' claim no longer had any object and that the Court accordingly was not called upon to give a decision on the applicant's claim[24]. The imperative to isolate the real issue in dispute for purposes of preliminary objections has also arisen in other cases, for example, to name but two, in *Obligation to Negotiate Access to the Pacific Ocean* — between Bolivia and Chile — and in the case concerning *Territorial and Maritime Dispute*, between Nicaragua and Colombia[25].

36. Mr. President, Members of the Court, there are two further points that warrant comment from me before I turn to the proof that is required to complete these submissions. The first is the point on which the Court's provisional measures Order turned, namely, that a dispute can arise under more than one instrument and that this does not in and of itself exclude jurisdiction under the Treaty of Amity. The second point is whether all that is required to establish jurisdiction under the Treaty of Amity is for Iran to assert that there is a passable case that its claims come within the scope *ratione materiae* of the Treaty. I can deal with both points briefly.

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[24] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 262 and 272, paras. 29 and 62; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 466 and 478, paras. 30 and 65.

[25] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, pp. 602-603, paras. 25-26; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II),* p. 848, para. 38.

37. The United States does not take issue with the Court's provisional measures appreciation that more than one instrument can be engaged by a dispute. We are, however, now at the point at which the Court's jurisdiction is *the* issue in dispute. Moreover, the case that presents itself is not one in which there are two instruments in play that address different aspects of the dispute. In the present case, the dispute — the entirety of the dispute; its very centre of gravity — is about Iran seeking to restore the sanctions relief it secured from the United States as part of the US JCPOA participation. But it is using the Treaty of Amity as the vehicle to do so. Mr. President, Members of the Court, *the two-instrument analysis* that the Court adopted at the provisional measures phase — while perhaps appropriate for purposes of assessing prima facie jurisdiction — *is not sufficient for purposes of a definitive determination of jurisdiction.* Rather, it is the Court's approach in the *Fisheries Jurisdiction* and other cases at the preliminary objections stage that is more apposite. The relevant enquiry, we submit, turns on a number of questions — all of which can be derived from the Court's jurisprudence in *Nuclear Tests*, in *Fisheries Jurisdiction*, in *Nicaragua* v. *Colombia* and in *Bolivia* v. *Chile*. These questions are as follows:

— *First*, what is the object of Iran's claim?

— *Second*, what occasioned Iran's Application?

— *Third*, what are the origins of the dispute that Iran brings to the Court?

— *Fourth*, with what is the dispute very largely concerned?

38. The answers to these questions are self-evident. The appropriate analysis at this stage of the proceedings is *not* a two-instrument analysis. The Court must address what this dispute is actually all about.

39. The question therefore is whether it is sufficient for Iran simply to assert touchpoints with the Treaty of Amity in order to bring its claims within the scope *ratione materiae* of the Treaty. In our submission, *it is not*. The controlling enquiry is what is the real subject-matter of the dispute? Where is the locus of the case? If it lies beyond the Treaty of Amity, the assertion of touchpoints with the Treaty cannot suffice to afford a court jurisdiction.

C. The JCPOA character of Iran's case

40. Mr. President, Members of the Court, I turn finally to the proof, that the locus of this case is indeed the JCPOA and not the Treaty of Amity.

41. In our written objections, you will find relevant factual context, both JCPOA related and wider. In the interests of time I do not repeat what we have said there but refer you to Chapters 2 and 5 of our Written Objections[26]. I incorporate all of this by reference into our oral submissions. Building on what was said there, I would like to develop the point further by reference to the Court's analytical matrix in *Fisheries Jurisdiction* and other cases.

42. It is clear from paragraphs 1 and 2 of Iran's Application, under the aptly titled heading of "Subject of the Dispute" — you will find these at tab 4, page 57, of your judges' folder — that what Iran is concerned with is the reimposition of what it terms "the 8 May sanctions" previously lifted in connection with the JCPOA. The point is explicit and unavoidable. The Application was filed on 16 July 2018 — two months after the United States ceased participation in the JCPOA on 8 May 2018 but before the reimposition of sanctions was due to take effect. The Request for provisional measures, submitted along with the Application, sought the suspension of the reimposition of all of those sanctions. You will find the key operative paragraphs of the Order that Iran requested from the Court by way of interim relief at tab 5, pages 61 and 62, of your judges' folder.

43. It is inescapable that the object of both Iran's Application and its Request for provisional measures was to restore the sanctions relief it had received under the JCPOA. The key *petitum* of Iran's Application is that the United States shall terminate the 8 May measures without delay. The headline provisional measure requested by Iran was that the United States shall ensure the suspension of the implementation of all the 8 May measures.

44. Mr. President, Members of the Court, the Court's enquiry in *Fisheries Jurisdiction* turned on the *object of the claim*, on *what occasioned the Application*, on *the origins of the dispute* brought to the Court, on *the gravamen of the dispute*. In the present case, it is all here, in Iran's Application and Request for provisional measures. The points can be ticked off like a checklist. *Every element — object, causative event, origin, gravamen — is rooted in the US cessation of*

[26] POUS, paras. 2.13-2.22 (overview of the JCPOA); 2.23-2.53 (the sanctions consequences of the JCPOA and the US decision to cease participation); and 5.3-5.18 (the JCPOA character of Iran's claim).

participation in the JCPOA. What Iran is seeking from the Court is sanctions relief under the Treaty of Amity that was the very core of the US participation in the JCPOA. The Treaty of Amity compromissory clause is the vehicle used by Iran, but the dispute is all JCPOA.

45. Mr. President, Members of the Court, there are other indicia, too, addressed in our written objections that affirm this appreciation[27], including Iran's Note Verbale of 11 June 2018, other diplomatic correspondence, Iran's Memorial, and more. The Note Verbale of 11 June 2018 is particularly telling. You will find this at tab 6, page 66, of your judges' folder[28]. This is a communication that Iran relies upon to meet the "not satisfactorily adjusted by diplomacy" requirement of Article XXI, paragraph 2, of the Treaty of Amity. Not only does the Note Verbale fail to make any express mention of the Treaty of Amity, but its opening assertion expresses Iran's "serious complaint over the unilateral and unlawful decision of the Government of the United States, made on 8 May 2018, 'to re-impose the United States sanctions lifted or waived in connection with the JCPOA'". These are Iran's words, plainly expressing the dispute in JCPOA, rather than in Treaty of Amity, terms.

46. The 11 June 2018 Note Verbale goes further. It explicitly recalls the correspondence from Iran's Foreign Minister to the Secretary-General of the United Nations of 10 May 2018, just two days after the US 8 May announcement of cessation of participation in the JCPOA. You will find this correspondence at tab 7 of your judges' folder[29]. That lengthy communication similarly makes no mention of the Treaty of Amity, addressing the dispute solely in JCPOA terms.

47. It is plain from these communications, as well as from other Iranian documents and statements: it is not just Iran's focus on the 8 May measures in its Application and Request for provisional measures that ties Iran's case to the JCPOA. It is that the *fons et origo* of Iran's case is to secure the sanctions relief that was consequent on the US participation in the JCPOA. This assessment is inescapable.

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[27] POUS, paras. 5.6-5.14.

[28] Note Verbale No. 381/289/4870056 from the Ministry of Foreign Affairs of the Islamic Republic of Iran to the Embassy of Switzerland (Interest Section of the United States) dated June 11 2018 (Application of the Islamic Republic of Iran (AI), Ann. 5), judges' folder, tab 6.

[29] Letter from M. Javad Zarif, Minister for Foreign Affairs of the Islamic Republic of Iran, to the United Nations (10 May 2018), UN doc. A/72/869-S/2018/453 (AI, Ann. 4), judges' folder, tab 7.

IV. Concluding observations

48. Mr. President, Members of the Court, I come to some brief concluding observations.

49. The United States has submitted two preliminary objections that turn on the JCPOA character of Iran's claim. The first is an objection to jurisdiction on the ground that, properly assessed, the subject-matter of the dispute does not come within the scope of the compromissory clause of the Treaty of Amity. In other words, that it is not a dispute that properly concerns the interpretation or application of the Treaty. I have addressed this in detail in these submissions and conclude simply with a request that the Court follow the approach that it laid down in *Fisheries Jurisdiction* and other cases and conclude that the real subject-matter of the dispute with which Iran proposes to seise the Court is "very largely concerned" with the JCPOA, and not with the Treaty of Amity, and that as such it falls outside the scope of the Treaty of Amity.

50. The second objection, advanced in the alternative, is an objection to admissibility, that the Court should decline to exercise jurisdiction on the ground that Iran's claims amount to an abuse of process. The reason for this is that Iran's claims seek to secure from the Court the US sanctions relief commitments under the JCPOA while leaving Iran unconstrained in respect of its own JCPOA commitments. This objection to admissibility is addressed fully in our written pleadings[30]. Time precludes me from addressing it further at this point. I accordingly simply reference our written pleadings and affirm that the United States maintains this objection for the reasons given in our written submissions.

51. Mr. President, Members of the Court, in the case of a dispute such as this — that attracts high political attention — there is a risk that the legal appreciation will be diverted by the perception of politics. Iran is counting on this. The inner voice of the law, though, is inescapable. The dispute arises from and concerns the JCPOA. That is its locus, that is its centre of gravity, that is its subject-matter. It is not a dispute about the interpretation or application of the Treaty of Amity. The United States requests that you heed the inner voice of the law.

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

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[30] POUS, paras. 5.19-5.39.

The PRESIDENT: I thank Sir Daniel Bethlehem for his presentation. I now give the floor to Ms Lisa Grosh. Ms Grosh, you have the floor.

Ms GROSH:

THE TREATY OF AMITY DOES NOT ENCOMPASS THIRD COUNTRY MEASURES

I. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, it is an honour for me to appear again before you on behalf of the United States. Before I begin, I note that I expect my submissions to last approximately 40 minutes. There is a convenient point for a break just over 15 minutes into my submissions to which I will alert you, but I defer to you, Mr. President, on the precise timing of the break.

2. My presentation today concerns the categorical mismatch between the measures that Iran has challenged in this case — that is the 8 May measures — and the scope of the Parties' obligations under the Treaty of Amity. The Treaty applies to trade and investment between the Parties. Yet, the vast majority of the measures that Iran challenges do *not* concern trade and transactions between Iran and the United States. Instead, they concern trade and transactions between Iran or Iranian companies and nationals, on the one hand, and third countries or third-country nationals and companies, on the other.

3. We refer to such measures that lack a bilateral commercial nexus between the United States and Iran as "third country measures" in our written submissions, and we will use that term again today[31].

4. The fundamental point I wish to make today is that the Treaty of Amity does not address trade and transactions between one party and a third country, or between their respective nationals and companies. Thus, any of Iran's claims that are predicated on third country measures, which are the vast majority of Iran's claims, are not within the ambit of the Court's jurisdiction and therefore should be dismissed.

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[31] POUS, para. 7.1.

5. My submissions today have three parts. *First*, I will briefly explain the nature of the US objection. *Second*, I will offer some overarching observations about the proper interpretation of the Treaty. And *third*, I will take you to each of the Treaty articles that Iran relies upon in order to demonstrate that they do not apply to third country measures. When I turn to that part of my submissions, you may want to turn to tab 1 of the judges' folder, which includes the Treaty of Amity, so that you can follow along as I discuss them. Following my submissions, Ms Gahan will show that all but a small subset of the measures that Iran challenges are indeed third country measures to which the Treaty of Amity does not apply.

II. The nature of the US objection

6. I will now begin with the nature of our objection and what we are asking the Court to consider in dismissing Iran's claims.

7. Mr. President, Members of the Court, my opening point is that the Court cannot take Iran's assertion of jurisdiction as Iran frames it. As the Court explained in *Oil Platforms*:

> "[T]he Court cannot limit itself to noting that one of the Parties maintains that . . . a dispute exists [as to the interpretation or application of the Treaty], and the other denies it. It 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, pursuant to Article XXI, paragraph 2."[32]

8. Thus, the Court's task does not end with interpreting the Treaty text at issue, but also extends to determining whether the challenged measures are actually within the scope of the Treaty.

9. As I will establish during the remainder of my presentation, none of the Treaty's provisions impose obligations with respect to third country measures. The Court should therefore conclude that Iran's claims based on measures in respect of trade and transactions between one party and a third country, or between their nationals and companies, do not relate to the

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[32] *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*, 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.

interpretation or application of the Treaty of Amity. As a result, Iran's claims do not fall within the scope of the compromissory clause, and therefore should be dismissed.

III. Observations on the proper interpretation of the Treaty

10. Mr. President, Members of the Court, I will now turn to some overarching observations about the proper interpretation of the Treaty of Amity, and I will *begin* with the history of this Treaty, which sheds a clear light on what the Parties agreed to in the Treaty.

11. *My first observation* is that, as the Court well knows, the Treaty of Amity was one of a number of friendship, commerce and navigation treaties — or FCN treaties — that the United States negotiated with friendly nations. The objective was to develop a series of bilateral agreements that established certain protections to facilitate the flow of trade and private investment between the United States and its treaty counterparts. Specifically, the programme was intended to "extend[] and moderniz[e] the treaty protection of American citizens, corporations, capital, trade and shipping abroad, with special emphasis on establishing conditions favorable to private investment"[33].

12. The origins of this programme, and indeed, statements by US officials concerning the Treaty of Amity at the time of its negotiation confirm the United States' intention that it have a bilateral focus. For example, in transmitting the Treaty to the President of the United States, the US Secretary of State explained that the Treaty "places economic relations between the United States and Iran on a *bilateral* . . . basis"[34]. The Secretary noted that, as with the other FCN treaties that preceded it, the Treaty "contains provisions relating to basic personal freedom, property rights, taxation, exchange regulation, rights to engage in business, treatment of imports and exports, navigation, and other matters affecting *the status and activities of citizens and*

[33] Memorandum from Willard Thorp, Assistant Sec'y for Economic Affairs, to Jack K. McFall, Assistant Sec'y for Legislative Affairs, 29 Dec. 1951; POUS, Ann. 87; judges' folder, tab 8. See also "Commercial Treaties with Iran, Nicaragua, and the Netherlands: Hearing Before the S. Comm. on Foreign Relations", 84th Cong. (1956), statement of Thorsten V. Kalijarvi, Deputy Sec'y of State for Economic Affairs, pp. 1-2; POUS, Ann. 88; judges' folder, tab 10.

[34] "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; judges' folder, tab 9 (emphasis added).

enterprises of one country within the territories of the other"[35]. Iran was certainly aware of these US goals and intentions when it negotiated and entered into the Treaty.

13. My *second observation* is to stress the bilateral focus of the Treaty itself.

14. The starting-point is the Treaty's text. As I will demonstrate when I take you to each of the articles in issue, that text speaks to the bilateral nature of the Treaty. By contrast, the Treaty has very little to say about the Parties' respective economic relations with third countries and what it does say is telling. I have two points to make in this regard.

15. *First*, the Treaty's express engagement with issues concerning third countries is limited to various clauses that provide most-favoured-nation treatment for nationals and companies of the Parties. For example, the final sentence of Article V, paragraph 1, provides that the treatment accorded with respect to the subjects covered by the article "shall in no event be less favorable than that accorded nationals and companies of any third country"[36]. The Treaty's most-favoured-nation clauses acknowledge the existence of the Parties' economic relations with third countries. But crucially, the Treaty does not impose any obligations concerning those relations, whether with respect to their preservation, protection or encouragement. Put another way, the Treaty is concerned with the Parties' economic intercourse with third countries but only in so far as it serves as a benchmark for the treatment that the Treaty obligates the Parties to accord in their interactions with one another.

16. *Second*, Iran does not identify any provision in the Treaty of Amity — not one — that expressly applies to measures concerning one party's trade and transactions with a third country or its nationals and companies. Nor could it, because the Treaty contains no such provision. Iran has therefore sought to obscure the nature of the challenged measures and to stretch the Treaty's articles in ways that are incompatible with the ordinary meaning of the Treaty's text, read in context and in light of the Treaty's object and purpose, which I will come to shortly.

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[35] "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; judges' folder, tab 9 (emphasis added). See also "Commercial Treaties with Iran, Nicaragua, and the Netherlands: Hearing Before the S. Comm. on Foreign Relations", 84th Cong. (1956), statement of Thorsten V. Kalijarvi, Deputy Sec'y of State for Economic Affairs, p. 1; POUS, Ann. 88; judges' folder, tab 10.

[36] Treaty of Amity, Art. V, para. 1.

17. My *third observation* is to recall what the Court has already said about the Treaty and its bilateral character. I will begin with the Court's apt summary of the Treaty's obligations from the provisional measures Order in this case. There, the Court stated that the Treaty of Amity "contains rules providing for *freedom of trade and commerce between the United States and Iran*, including specific rules prohibiting restrictions on the import and export of products originating from the two countries, as well as rules relating to the payment and transfer of funds between them"[37].

18. The Court has also spoken about the object and purpose of the Treaty and confirmed its bilateral nature. Specifically, in *Oil Platforms* and again in *Certain Iranian Assets*, the Court correctly concluded that, as memorialized in the Treaty's preamble, its object was to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally *between their peoples*, and [to] regulat[e] consular relations"[38]. Thus, the Treaty has a fundamentally bilateral character that is incompatible with Iran's attempt to sweep third country measures within its scope.

19. My *fourth observation* concerns Iran's criticism of the concept of third country measures.

20. Iran first complains that the term is an invention of the United States[39]. But this gets Iran nowhere. As I have explained, the phrase "third country measures" is simply a term that the United States uses for ease of reference to describe Iran's claims. It identifies and describes a specific category of measures — those concerning trade and transactions between one party and a third country or its nationals and companies — that is outside the scope of the Treaty's obligations. Indeed, as you will hear from Ms Gahan, a central feature of the lifting of US sanctions under the JCPOA was that it was generally directed toward transactions between Iran and other foreign nationals. Thus, the concept that we described in shorthand as third country measures should be entirely familiar to Iran and should be helpful to the Court in evaluating Iran's claims.

21. Iran also complains that the phrase "third country measures" is somehow misleading because all of the measures target Iran and Iranian nationals and companies[40]. This, again, gets Iran

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[37] *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, I.C.J. Reports 2018 (II)*, pp. 635-636, para. 43; emphasis added.

[38] *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 28, para. 57 (emphasis added); *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 813, para. 27.

[39] WSI, para. 3.3.

[40] WSI, para. 3.3.

nowhere. In Iran's view, the types of actors and nature of the commerce to which the measures apply are of little importance, whereas the intent behind them is paramount. The United States submits that it is essential to carefully consider the fit between the Treaty's provisions and the types of measures at issue, as I will do in the next section of my presentation.

22. Mr. President, I have now come to a natural break in my submissions and will turn to a new point. This might be a convenient place for a break, but I defer to you and will await your instruction as to whether a break is appropriate at this point.

The PRESIDENT: I thank you, Ms Grosh. I think that this is indeed a convenient moment for a break. The Court will take a 10-minute break. The sitting is adjourned. I ask you all not to disconnect your connections, audio and video connections. Thank you.

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

The PRESIDENT: Please be seated. The sitting is resumed. Ms Grosh, you may now continue with your statement. You have the floor.

Ms GROSH: Thank you, Mr. President.

IV. Discussion of particular Articles

23. Mr. President, Members of the Court, having made these general observations regarding the Treaty, I will now turn to the individual Articles that Iran relies upon in order to demonstrate why Iran's claims are beyond the jurisdiction of the Court. As I will show, Iran is simply wrong about the Treaty's coverage of third country measures. None of the Treaty provisions that Iran has invoked provides protection with respect to trade and transactions between one Party and third countries, or their respective nationals and companies. The Court should not fill this silence by creating new obligations that the Parties have not assumed. The Parties' willingness to restrain their sovereign powers in certain specific ways under the Treaty in order to foster bilateral trade and investment should not be taken as a commitment to forego any measure that would have a negative

economic impact on the other Party, including measures Iran appears to concede were not contemplated by the Treaty drafters[41].

A. Article IV (1)

24. I turn first to Article IV, paragraph 1. Iran hangs much on this provision, suggesting that because some provisions of the Treaty contain "territorial limitations", the "context" of the Treaty of Amity requires that provisions without such language must be interpreted as applying without any apparent limitation, including to third country measures[42]. But neither the text nor the context of Article IV supports Iran's argument and the negotiating history of the Treaty refutes it.

25. Article IV, paragraph 1, requires that each Party "accord fair and equitable treatment to nationals and companies of" the other Party and to their property and enterprises[43]. The text and context of the Treaty make plain that these requirements apply with respect to treatment accorded by the United States to Iranian nationals and companies engaged in commerce with the United States. There is nothing in the text that speaks to third country measures.

26. Article IV, by its terms, provides protections for those nationals or companies of one Party that have acquired property or established an enterprise in the other Party's territory, or are otherwise engaged in commerce with the other Party. As Judge Higgins explained in her separate opinion in *Oil Platforms*, the language used in Article IV is "the language of foreign investment protection", and so this Article must be understood in that context[44]. As an investment protection provision, the obligations described in Article IV (1) are, and again to quote Judge Higgins, "obligations of the United States to Iranian nationals, their property and their enterprises, within the territory of the United States; and vice versa"[45].

27. The context of Article IV confirms this interpretation. Each of the protections and obligations set forth in Articles III through XI relate to an aspect of bilateral economic activity

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[41] WSI, para. 3.6 (*chapeau*).

[42] WSI, paras. 3.6 *(b)*, 3.21.

[43] Treaty of Amity, Art. IV, para. 1.

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

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

between the Parties, such as investment by a national of one country in the territory of the other — this is in Articles III through VII — and cross-border trade between the two countries — this is in Articles VIII through XI. Article IV is situated, and must be read, in this context. The omission of an explicit reference to a Party's "territory" — from one paragraph of one Article of this part of the Treaty — is not a significant basis from which to infer an obligation to accord certain "treatment" to nationals or companies of the other Party *not* engaged in commerce with the United States.

28. The negotiating history of the Treaty confirms the intention of the Parties to provide certain protections to one another's nationals and companies only in the context of those nationals' or companies' bilateral trade and investment with the other Party. For example, unlike other FCN treaties, this Treaty requires national treatment only for businesses that a Party's nationals and companies "are permitted to establish or acquire" in the territory of the other Party[46], but does not prohibit measures a Party might take to screen new companies from entering into the host State and establishing a business there.

29. This is a key point. Indeed, the Secretary of State explained in his letter transmitting the Treaty of Amity to the United States Senate: "The 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."[47] When questioned by a member of the US Senate about this passage in the transmittal letter, a State Department official confirmed this limitation on the Treaty's scope and noted that it was requested by Iran:

> "[W]ith most countries we are able to provide for no screening of American enterprise as it comes in. This is the best provision that we can get with a country such as Iran, where we guarantee that the Americans, once they are in, will not be discriminated against.
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> The omission of entry provisions in this case came about because of the fear on the part of Iranian officials that to specify entry rights in any treaty would facilitate

[46] Treaty of Amity, Art. IV, para. 4.

[47] 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, judges' folder, tab 9. See also "Commercial Treaties with Iran, Nicaragua, and the Netherlands: Hearing Before the Senate Committee on Foreign Relations", 84th Cong. (1956), statement of Thorsten V. Kalijarvi, Deputy Secretary of State for Economic Affairs, pp. 2-3, POUS, Ann. 88, judges' folder, tab 10.

> economic penetration by neighboring countries that would create a danger to national independence."[48]

30. As these contemporaneous comments show, these provisions, and the obligations set out therein, were carefully circumscribed. The Parties understood and agreed that the Treaty did not prohibit them from "screening" the other Party's companies. Each Party was therefore free to bar the other Party's companies from entering or establishing new enterprises in its territory, for any reason or no reason. Yet such screening measures intentionally target a company of the other Party that has not entered into commerce with the host State, and would therefore be barred under Iran's proffered reading of Article IV, paragraph 1. Iran is simply wrong to suggest that the Treaty has such a broad scope.

31. Iran appears to suggest that Article IV should nonetheless be read as including an implicit prohibition on "infliction of . . . deliberate economic harm" on nationals or companies of the other Party, without regard to the nature of the measures and whether they relate to bilateral commerce between the Treaty Parties[49].

32. However, Iran's argument is without merit. First, as I have explained, it is without any support in the text. The Treaty of Amity says nothing about "deliberate economic harm", or any similar vague and broad construct of Iran's making. What the Treaty does say is specific and focused: for example, in Article III, that the Parties shall allow nationals and companies of the other Party access to their domestic courts; in Article IV, paragraph 2, that they shall not take property without a public purpose and just compensation; and in Articles VI and VII, that they shall accord most-favoured-nation treatment with respect to payment of taxes and customs duties.

33. By contrast, the Treaty does not address, and thus leaves open to the Parties to take, any number of actions that may have significant economic consequences for nationals and companies of the other Party. For example, as I have already mentioned, the Treaty does not preclude a Party from barring companies of the other Party from establishing an enterprise in its territory[50]; it does not restrict the Parties from imposing tariffs on imports from the other Party (subject to the

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[48] "Commercial Treaties with Iran, Nicaragua, and the Netherlands: Hearing Before the Senate Committee on Foreign Relations", 84th Cong. (1956), p. 20, POUS, Ann. 88, judges' folder, tab 10. See also *ibid.*, pp. 3, 18.

[49] WSI, para. 3.6 *(c)*.

[50] "Commercial Treaties with Iran, Nicaragua, and the Netherlands: Hearing Before the S. Comm. on Foreign Relations", 84th Cong. (1956), p. 20; POUS, Ann. 88; judges' folder, tab 10. See also *id.* pp. 3, 18.

most-favoured-nation limitations)[51]; and it expressly reserves the right to give advantages to certain trading partners[52].

34. Iran is doing nothing more in its submissions than running an argument of the type that the Court rejected in *Oil Platforms*, when it distinguished "the broad category of unfriendly acts" from "acts tending to defeat the object and purpose of the Treaty", and the Court declined to infer from the Treaty a general obligation to refrain from deliberately "unfriendly acts"[53]. As in *Oil Platforms*, the Court here should decline Iran's invitation to read into the silences of the Treaty such an open-ended, novel and subjective obligation, unsupported by the text.

B. Articles IV (2) and V (1)

35. Mr. President, Members of the Court, I will now turn to Article IV, paragraph 2, and Article V, paragraph 1. In contrast to Article IV, paragraph 1, both of these provisions include a territorial limitation, as Iran acknowledges[54]. And in addition to that restriction, they also include specific language that limits the obligations assumed by each Party to their treatment of nationals and companies of the other. Specifically, Article IV, paragraph 2, requires each Party to provide "the most constant protection and security" to "[p]roperty of nationals and companies of [the other] High Contracting Party" in its territory, and requires that "[s]uch property" not be taken except for a public purpose and with just compensation[55]. Article V, paragraph 1, requires each Party to permit nationals and companies of the other Party, within its territory, to acquire and dispose of property, on terms no less favourable than nationals or companies of any third country[56].

36. Nothing in this text speaks to a party's sovereign right to take measures with respect to third-country nationals and companies. Nor does it prescribe limitations on measures that relate to the property and interests of Iranian nationals and companies outside the territory of the United States. On the contrary, this express limitation means that any alleged harm to Iranian

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[51] Treaty of Amity, Art. XXII, para. 2.

[52] Treaty of Amity, Art. VIII, para. 6.

[53] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28, quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 137, para. 273.

[54] WSI, paras. 3.30, 3.35.

[55] Treaty of Amity, Art. IV, para. 2.

[56] Treaty of Amity, Art. V, para. 1.

property interests outside the United States — including with respect to financial transactions with third-country companies — is by definition outside the scope of this Article. Our written submission sets forth in additional detail the reasons why Iran's claims under those provisions are outside the scope of the Treaty[57].

C. Article X (1)

37. I turn next to Article X, paragraph 1, which also has a clear territorial restriction. This paragraph states that "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation"[58]. Iran argues that the challenged measures "obstruct" freedom of commerce, and that

> "it can make no difference at all whether the obstruction to freedom of commerce is in the form of . . . the withdrawal by the United States of a licence permitting a U.S. company to sell products . . . to an Iranian company, or . . . 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"[59].

38. Now, critically, both of Iran's hypothetical scenarios involve a measure that affects a transaction *between a US company and an Iranian company*. Permit me to repeat this point. The scenarios that Iran has cited to rebut the US interpretation of Article X, paragraph 1, assume the *very element* that is lacking in a "third country measure": namely, a transaction involving a US company or national and an Iranian company or national. And so, Iran's scenarios fail to grapple with the fundamental defect in its claim and the fundamental basis for this preliminary objection. As we have made clear in our written pleadings, and as Ms Gahan will address in the submissions that follow, the United States does not advance the third country measures objection with respect to a discrete category of the 8 May measures — those that involve the revocation of licensing actions that had allowed for certain forms of US-Iran commercial transactions. But the United States does advance the objection with respect to the vast majority of the measures that Iran impugns.

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[57] POUS, para. 7.34.

[58] Treaty of Amity, Art. X, para. 1.

[59] WSI, para. 3.5.

39. Permit me to recall, as well, Sir Daniel's reference to the Court's conclusion in *Oil Platforms* that Article X, paragraph 1, does not include any obligations in respect of "indirect" commerce in any case[60]. As the Court explained, "commerce between Iran and an intermediate purchaser" of oil — even oil destined for resale by another intermediary of a buyer — "is not 'commerce' between Iran and the United States"[61]. Accordingly, a measure that affects a potential Iranian transaction with such a third-party intermediary "cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the . . . Treaty"[62]. This is equally true where the "intermediate" transaction between Iran and a third-country national involves the purchase of financial and insurance services, rather than the sale of oil.

D. Articles VIII and IX

40. I now turn to Articles VIII and IX, which pertain to the treatment that each Party must accord to its exports to and imports from the other Party. Paragraph 1 of Article VIII by its plain terms requires the United States to accord most-favoured-nation treatment to Iranian products imported into the United States "from whatever place and by whatever type of carrier arriving", and to US "products destined for exportation to" Iran[63]. In addition, Article VIII, paragraph 2, prohibits discriminatory restrictions on the US importation of Iranian products, or the export of US products to Iran[64]. On their face, these provisions apply to direct trade in goods between the United States and Iran. There is nothing in the text to indicate that they were intended to apply to trade between the Treaty parties and other nations. Indeed, these paragraphs bear a marked similarity to Articles I (1) and XIII (1) of the General Agreement on Tariffs and Trade of 1947, which apply to measures taken by a GATT contracting party at its own border (and, in the case of the most-favoured-nation provisions, internal to its own territory).

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[60] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 204-208, paras. 90-99.

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

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

[63] Treaty of Amity, Art. VIII, para. 1.

[64] Treaty of Amity, Art. VIII, para. 2.

41. Iran astonishingly argues that Article VIII should be read as prescribing obligations with respect to either Party's import and export of goods to or from *any* country, unless the text permits no other reading. Appropriately, Iran acknowledges that the first sentence of paragraph 1 is limited to "Iranian products imported into the United States"[65]. But Iran insists on isolating this phrase from the paragraph — and sentence — in which it appears, and so argues that "products destined for exportation" in that same sentence should be read to include products of third countries[66]; that the second sentence of paragraph 1 applies "the same rule" of treatment to payments for *all* imports and exports, without qualification[67]; and that paragraph 2 should be read to prohibit a party from "impos[ing] restrictions or prohibitions" on the other Party's imports from or exports to third countries[68]. The text of the Article simply does not support this argument.

42. The Article contains no reference to trade with third-party countries or their products, and the Article's context does not support Iran's expansive reading. *First*, Iran's reading is internally inconsistent. There is simply no plausible reason to read the Treaty as applying what it expressly calls "the same rule"[69] to a Party's trade with the entire world in sentence 2, while expressly excluding the other Party's exports to third countries — only — from the rule in sentence 1. *Second*, Iran fails to explain why either Party would have undertaken any commitment with respect to imports and exports of the other Party in which it was not involved, and does not provide any evidence that the negotiators intended or agreed to do so.

43. The United States' reading of this provision requires no such contortions. The first sentence of paragraph 1 is expressly consistent with the scope of the rest of Article VIII, and with the bilateral economic focus of the Treaty as a whole. It creates obligations only with respect to Iranian products exported to the United States, and US products exported to Iran.

44. Article IX, which also deals with importation and exportation, must be read in the same bilateral context. Iran asserts claims only under paragraph 2, which requires national and most-favoured-nation treatment "with respect to all matters relating to importation and

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[65] WSI, para. 3.57 *(a)*.

[66] WSI, para. 3.60 *(b)*.

[67] WSI, para. 3.63.

[68] WSI, para. 3.57 *(b)*.

[69] Treaty of Amity, Art. VIII, para. 1.

exportation", and paragraph 3, which prohibits discriminatory measures that prevent an "importer or exporter of products of either country from obtaining marine insurance" from US insurers[70]. But the bilateral scope of this Article is clarified by paragraph 1, which opens, "[i]n the administration of *its customs regulations and procedures*"[71]. A Party's customs procedures apply, of course, only to imports and exports crossing its own borders, and not to the other Party's trade with a third country. This confirms that the scope of Article IX is — like the Treaty in general and its import/export provisions in particular — limited to bilateral trade between the United States and Iran.

E. Article VII (1)

45. The same reasoning demonstrates that third country measures do not engage Article VII of the Treaty. Article VII limits the Parties' ability to place restrictions on transfers of funds from its territory to that of the other Party. Specifically, paragraph 1 of this Article prohibits "restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party"[72]. As with the Articles I have discussed so far, this Article contains no language suggesting that it is concerned with transfers between a third country and a Party.

46. The context of the provision confirms the bilateral nature of this Article. In addition to the overall bilateral focus of the Treaty, the language of this Article in particular indicates that Article VII is a limitation on the Parties' use of restrictions on transfers to prevent the flow of foreign exchange out of its territory, a common provision in the United States' and other countries' FCN treaties[73]. The exceptions to this requirement in paragraph 1 — permitting restrictions where necessary to ensure availability of foreign exchange or as approved by the International Monetary Fund —, and the express references in paragraphs 2 and 3 to a Party's obligation if it "applies exchange restrictions", both confirm that the scope of this Article relates to a Party's restricting

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[70] Treaty of Amity, Art. IX, paras. 2 and 3. See WSI, para. 3.94.

[71] Treaty of Amity, Art. IX, para. 1; emphasis added.

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

[73] See Charles H. Sullivan, US Department of State, "Standard Draft Treaty of Friendship, Commerce and Navigation: Analysis and Background" (1981), pp. 22-24, MI, Ann. 4, judges' folder, tab 11. See also Herman Walker, Jr., "The Post-war Commercial Treaty Program of the United States", 73 *Pol. Sci. Q.* 57, 62 & No. 9 (1958), POUS, Ann. 83.

outflows of currency, not to all transfers of funds worldwide. As it does with Articles VIII and IX, Iran derives its interpretation by first isolating an individual sentence — or here, half a sentence — from its surrounding context and then insisting on the broadest possible reading of those free-standing words. Iran's approach is wholly inconsistent with the customary law rules of treaty interpretation.

V. Conclusion

47. Mr. President, Members of the Court, that brings to an end my submissions. As I have explained, third country measures are not the subject of any obligations under the individual Treaty articles invoked by Iran, and so they are not within the jurisdiction of the Court.

48. Mr. President, may I ask that you now call on Ms Gahan, who will continue the United States' submissions on this objection by addressing the 8 May measures.

The PRESIDENT: I thank Ms Grosh for her statement. I now give the floor to Ms Kimberly Gahan. You have the floor.

Ms GAHAN: Thank you.

THE MAJORITY OF IRAN'S CLAIMS ARE BASED ON THIRD COUNTRY MEASURES

1. Mr. President, Madam Vice-President, Members of the Court, good afternoon. It is an honour to appear before you on behalf of the United States. As my colleague, Ms Grosh, has explained, the Treaty of Amity is an instrument of limited scope, governing bilateral economic and consular relations between Iran and the United States. She has demonstrated that the Treaty does not contain obligations with respect to what we refer to as "third country measures".

2. Building on that foundation, my presentation will demonstrate that the measures Iran challenges in this case — that is, the 8 May measures — overwhelmingly are such third country measures. They principally concern trade and transactions between Iran and the nationals and companies of third countries — with no bilateral commercial nexus between Iran and the United States. As explained in our written submission, the 8 May measures can be summarized by

reference to four categories[74]. The first two categories—the reimposition of statutory provisions and the reinstatement of executive order provisions — are broadly similar, in that their reimposition establishes the risk of sanctions consequences for non-US persons who choose to engage in trade or transactions with Iran, its nationals and companies. The third category is the return to the Department of the Treasury's List of Specially Designated Nationals (SDN) of individuals and entities that had been removed under the JCPOA. The main impact of relisting Iranian persons was, once again, that it created sanctions risk for non-US persons that choose to engage in certain transactions with them — that is, transactions that are not part of bilateral US-Iran commerce. The fourth category is different, in that it encompasses the revocation of licensing actions in discrete areas of bilateral trade addressed by the JCPOA. The United States is not advancing the third country measures objection to this category, although it is encompassed by our other objections[75].

3. Because the first three categories, which comprise the vast majority of the 8 May measures, are third country measures, they are not governed by the Treaty, and Iran's claims based on such measures must be dismissed.

4. Mr. President, Members of the Court, my presentation proceeds in three parts. *First*, I will provide background on the 8 May measures, which are the sanctions measures the United States had lifted under the JCPOA and subsequently reimposed. By definition, they exclude measures that remained in place throughout the US implementation of the JCPOA, such as prohibitions on US persons engaging in transactions or dealings with Iran. *Second*, I will address the 8 May measures in greater detail, and explain that the first three categories concern trade and transactions between one Party and a third country, or between their nationals and companies. *Third*, I will return to the relevance of this analysis for these proceedings. Because the Treaty does not contain obligations with respect to trade and transactions between one Party and the nationals and companies of a third country, Iran's claims that rest on such measures fall outside the scope of the Treaty and must be dismissed for lack of jurisdiction.

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[74] POUS, para. 7.9.

[75] POUS, para. 7.9.

I. Background on the 8 May measures

5. I will turn now to the measures at issue. As the Court well knows, Iran challenges the measures that the United States had lifted as part of its implementation of the JCPOA in 2016, and subsequently reimposed as a result of its decision on 8 May 2018 to no longer participate in the JCPOA[76].

6. I begin with the scope of the sanctions lifting, which will help to ensure a clear understanding of what was reimposed. A central feature of the JCPOA was that the US sanctions being lifted were generally directed toward non-US persons — in other words, to transactions involving Iran and other foreign nationals. This limitation is first and foremost clear on the face of the JCPOA. Annex II of the JCPOA, which is at tab 2 of your folders, provides that the sanctions that the United States would lift "are those directed toward non-U.S. persons"[77]. This limitation is equally clear in the public guidance explaining the arrangement, which — notably — was issued following consultation with Iran[78]. That guidance, which is at tab 12 of your folders, stated that, other than the discrete category of licensing actions, "none of the sanctions-related commitments outlined in this guidance apply to U.S. persons"[79]. And finally, this limitation is clear in the terms of the waivers that constituted a key aspect of the sanctions lifting, which I will return to later[80].

7. This brings me to a related point, which is that the bilateral sanctions measures prohibiting transactions by US persons with Iran remained largely unaffected by the JCPOA. In other words, they were not lifted under the JCPOA and therefore were not reimposed when the United States ceased participation in the JCPOA. They remained in place throughout, and importantly, Iran has not put them in issue in this case.

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[76] AI, para. 2; see also MI, paras. 1.13, 2.5.

[77] Joint Comprehensive Plan of Action, July 14, 2015 (JCPOA), Annex II, Sec. 4 n. 6 (MI, Ann. 10), judges' folder, tab 2.

[78] See JCPOA, para. 27 (MI, Ann. 10).

[79] See US Department of State and US Department of the Treasury, "Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day," p. 5 (16 Jan. 2016), MI, Ann. 24 ("JCPOA Sanctions Implementation Guidance"), judges' folder, tab 12. See also US Department of State and US Department of the Treasury, "Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day," p. 5 (6 Jan. 2016; updated 15 Dec. 2016), POUS, Ann. 150 ("FAQs on Lifting Sanctions"), judges' folder, tab 13.

[80] See US Department of State, "Waiver Determinations and Findings" (18 Oct. 2015), MI, Ann. 23, judges' folder, tab 15.

8. As the Court is aware and indeed took into account in *Oil Platforms*, the United States has long had in place such bilateral measures[81]. These bilateral measures generally prohibit exports and imports between the two countries, the provision of services and investment between them, and transactions through the US financial system involving Iran[82]. The JCPOA was clear that these bilateral measures were not being lifted. Annex II of the JCPOA, again at tab 2 of your folders, affirmed that US persons "will continue to be generally prohibited from conducting transactions of the type permitted pursuant to this JCPOA"[83]. The applicable public guidance, again which is at tab 12 of your folders, stated: "U.S. persons, including U.S. companies, continue to be broadly prohibited from engaging in transactions or dealings with Iran and the Government of Iran unless such activities are exempt from regulation or authorized."[84]

9. This fundamental point was well understood by all participants in the arrangement, including Iran. And it is critical to understanding and evaluating Iran's claims in this case. Because the JCPOA provided for the lifting of US sanctions with respect to transactions involving non-US persons and Iran, the reimposition of those measures — that is, the 8 May measures — had equivalent scope. Thus, other than one discrete category, the 8 May measures that Iran seeks to challenge in this case do not address trade and transactions between Iran and the United States, or between their nationals and companies. Iran's claims based on the 8 May measures must be assessed against the Treaty's provisions with this fundamental limitation in mind.

II. The 8 May measures are principally third country measures

10. This brings me to the *second* part of my presentation, examining the 8 May measures more closely. Although Iran's written observations attempt to create the impression that its claims are so complex and fact-specific that the Court cannot rule on them at this preliminary stage, in fact the 8 May measures share many common characteristics and are readily amenable to consideration at a categorical level. I will now address in further detail the four categories noted earlier.

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[81] See Iranian Transactions and Sanctions Regulations (ITSR), 31 C.F.R. Sec. 560 (2019), POUS, Ann. 35. See also *Oil Platforms (Iran* v. *United States), Judgment, I.C.J. Reports 2003*, pp. 205-207, paras. 93-98.

[82] See ITSR, 31 C.F.R. Secs. 560.201, 560.204, 560.206 (2019), POUS, Ann. 35.

[83] JCPOA, Annex II, Sec. 4 n. 6, MI, Ann. 10, judges' folder, tab 2.

[84] See JCPOA Sanctions Implementation Guidance, p. 5, MI, Ann. 24, judges' folder, tab 12. See also FAQs on Lifting Sanctions, p. 5, POUS, Ann. 150, judges' folder, tab 13.

A. Reinstatement of statutory provisions

11. The first category of 8 May measures is the reimposition of provisions under US statutory laws that were waived pursuant to the JCPOA. These measures generally establish the risk of certain consequences — such as asset blocking or the prohibition on maintenance of correspondent accounts in the United States — for non-US persons if they choose to engage in certain types of transactions with Iran[85].

12. An example in this first category is Section 1245 of the National Defense Authorization Act for Fiscal Year 2012, which is at tab 14 of your folders. Absent a waiver, this section calls for certain prohibitions to be applied to foreign financial institutions who knowingly conduct or facilitate a significant financial transaction with Bank Markazi or other designated Iranian banks[86].

13. The JCPOA waiver for this provision, which is at tab 15 of your folders, covered only transactions by foreign financial institutions[87]. The result was that such foreign financial institutions did not face sanctions risk under this provision if they engaged in transactions with Bank Markazi. But the waiver did not authorize the underlying transaction to involve a US person, or exports and imports between Iran and the United States, or processing through the US financial system. These remained separately prohibited, as they had before the JCPOA[88].

14. When the United States ceased participating in the JCPOA, it revoked this waiver. To keep with the example of Bank Markazi, the result was that, as before the JCPOA, Section 1245 applied to foreign financial institutions that chose to engage in certain transactions with it[89]. In other words, if such transactions occur, the risk of sanctions consequences would fall upon the third-country bank. But importantly, the reimposition of this provision created sanctions risk with respect to the same types of transactions that were previously subject to the waiver — that is,

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[85] See Statutory Sanctions of Relevance to the Case, POUS, Ann. 80.

[86] National Defense Authorization Act for Fiscal Year 2012, Pub. Law 112-81, Div. A, Title XII, Sec. 1245 (d) (1), 22 U.S.C. 8513a (d) (1) (2011), POUS, Ann. 80, judges' folder, tab 14.

[87] US Department of State, "Waiver Determinations and Findings," p. 4 (18 Oct. 2015, MI, Ann. 23, judges' folder, tab 15).

[88] See JCPOA Sanctions Implementation Guidance, pp. 47-48, MI, Ann. 24, judges' folder, tab 12. See also FAQs on Lifting Sanctions, p. 55, POUS, Ann. 150, judges' folder, tab 13.

[89] See US Department of the Treasury, "Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)" p. 3 (8 May 2018; updated 6 Aug. 2018), POUS, Ann. 144 ("Re-Imposition FAQs").

transactions by foreign financial institutions involving Bank Markazi and third-country nationals and companies without the involvement of US persons, goods or services, or financial institutions.

15. The example I just spoke to relates to a statutory provision that explicitly applies only to "foreign financial institutions". But even where the underlying provision is not, on its face, so limited to "foreign" persons, the JCPOA sanctions lifting — and therefore the subsequent re-imposition of the measure — was directed toward, and applied by its terms, to non-US persons. As noted earlier, this fact is evident from the text of the JCPOA[90]. It is established in the terms of the waivers themselves[91]. And it is made clear in public guidance that the United States issued in connection with the implementation of the JCPOA[92]. Iran itself has acknowledged this fact, noting that the revocation of the waivers "re-instat[ed] the application to non-U.S. persons of the statutory authorities providing nuclear-related sanctions"[93]. Mr. President, Members of the Court, there is no bilateral commercial nexus here.

B. Executive Order 13846

16. The second category of 8 May measures is the issuance of Executive Order 13846, which reinstated certain measures that had been terminated under the JCPOA. Like the previous category, the measures in this category generally establish the risk of certain consequences for foreign persons if they choose to engage in certain types of transactions with Iran. Here again, the 8 May measures can be understood by reference to what had been terminated in the JCPOA. The JCPOA made clear that the measures to be terminated, including certain executive orders in force at the time, were "those directed towards non-U.S. persons"[94].

17. Executive Order 13846 reinstated these terminated provisions[95]. For example, Section 3 *(a)* (ii) of this order, which is at tab 16 of your folder, allows for the imposition of

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[90] JCPOA, Annex II, Sec. 4, n. 6, MI, Ann. 10, judges' folder, tab 2.

[91] US Department of State, "Waiver Determinations and Findings" (18 Oct. 2015), MI, Ann. 23, judges' folder, tab 15. See also POUS, para. 7.11 & n. 305.

[92] JCPOA Sanctions Implementation Guidance, p. 5, MI, Ann. 24, judges' folder, tab 12. See also FAQs on Lifting Sanctions, p. 5, POUS, Ann. 150, judges' folder, tab 13.

[93] MI, para. 2.61.

[94] JCPOA, Ann. II, Sec. 4, No. 6, MI, Ann. 10, judges' folder, tab 2.

[95] See Executive Order 13846, 83 Fed. Reg. 38939 (6 Aug. 2018), POUS, Ann. 37, judges' folder, tab 16. See also US Department of the Treasury, "OFAC FAQs: Iran Sanctions", question 597, POUS, Ann. 151.

sanctions on persons that engage in a significant transaction for, among other things, the purchase, acquisition and sale of petroleum or petroleum products from Iran[96]. As with the first category, even where the provisions of the executive order refer more broadly to "persons" as is the case in Section 3, the lifting of sanctions under the JCPOA was directed toward non-US persons[97], and therefore the reinstatement in Executive Order 13846 was also directed toward non-US persons. Here again, the viability of Iran's claims that are based on the executive order provisions must be assessed against the Treaty's provisions with this fundamental limitation in mind.

C. Returning persons to the list of specially designated nationals and blocked persons

18. I turn next to the third category of 8 May measures, which is the return of individuals and entities to the US Department of the Treasury's List of Specially Designated Nationals, or SDN List. The significance of being on this list is that any property or interests in property of the person within US jurisdiction must be frozen, or "blocked", and US persons are generally prohibited from engaging in transactions with the listed person. Under the JCPOA, the United States removed a number of individuals and entities from this list — both Iranian nationals and third-country nationals[98]. The main impact of these removals at the time of the JCPOA was on economic activity between Iran and third-country nationals. As explained in public guidance, the result was that "non-U.S. persons . . . are no longer subject to secondary sanctions for engaging in transactions with the individuals and entities" that were delisted[99].

19. In implementing the 8 May decisions, the United States took the necessary actions to return such persons to the list. However, for Iranian persons returned to the list, the primary impact of these relistings was that third-country nationals and companies would face sanctions risk for engaging in certain transactions with the relisted Iranian person[100].

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[96] Executive Order 13846, 83 Fed. Reg. 38939, Sec. 3 *(a)* (ii) (6 Aug. 2018), POUS, Ann. 37, judges' folder, tab 16.

[97] JCPOA, Ann. II, Sec. 4, No. 6, MI, Ann. 10, judges' folder, tab 2.

[98] JCPOA, Ann. II, Sec. 4.8.1 and attachment 3; Ann. V, Sec. 17.3, MI, Ann. 10, judges' folder, tab 2. See JCPOA Sanctions Implementation Guidance, pp. 5-6, MI, Ann. 24, judges' folder, tab 12.

[99] See JCPOA Sanctions Implementation Guidance, p. 34, MI, Ann. 24, judges' folder, tab 12.

[100] See POUS, paras. 7.15, 7.16.

20. The effect of this action can be understood by reference to measures that remained in place following the original removal from this list. Removal would ordinarily mean that any assets of those persons in US jurisdiction would be "unblocked", and that the person would be able to engage in transactions with US persons, including through the US financial system. But for Iranian persons, this removal from the list under the JCPOA was fundamentally different for two reasons.

21. First, for persons who meet the definitions of "Government of Iran" or "Iranian financial institution", their assets remained blocked because of other, non-nuclear related sanctions measures that remained in place, and accordingly, their names were moved to a separate list[101].

22. The National Iranian Oil Company presents one example. It was removed from the Department of the Treasury's SDN List under the JCPOA[102]. But its assets subject to US jurisdiction were not unblocked, and it remained generally unable to engage in transactions with US persons or through the US financial system. Rather, the National Iranian Oil Company was placed on the separate list, which maintained the blocking of its assets but allowed for non-US persons to transact with it without sanctions risk[103].

23. As a result, for the National Iranian Oil Company, as well as for other persons who were determined to meet the definitions of "Government of Iran" or "Iranian financial institution", the return to the Department of the Treasury's SDN List as part of the 8 May measures had no impact on their assets subject to US jurisdiction, or on their ability generally to engage in transactions with US persons[104]. Their assets were blocked before the JCPOA, remained blocked during the JCPOA, and generally remain blocked today.

24. The second reason why removal from the Department of the Treasury's SDN List for Iranian persons was different, and of little to no effect on trade or transactions involving the United States, is because of the bilateral measures that predated the JCPOA and remained in place throughout. Pursuant to these bilateral measures, US persons, including US banks, continued to be

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[101] See JCPOA Sanctions Implementation Guidance, pp. 35-36, MI, Ann. 24, judges' folder, tab 12. See also Executive Order 13599, 77 Fed. Reg. 6659 (5 Feb. 2012), POUS, Ann. 153.

[102] JCPOA, Ann. II, Sec. 4.8.1 and attachment 3; Ann. V, Sec. 17.3, MI, Ann. 10, judges' folder, tab 2.

[103] See JCPOA Sanctions Implementation Guidance, pp. 35-36 (MI, Ann. 24), judges' folder, tab 12. See also Executive Order 13599, 77 Fed. Reg. 6659 (5 Feb. 2012), POUS, Ann. 153.

[104] See US Department of the Treasury, "Publication of Updates to OFAC's Specially Designated Nationals and Blocked Persons List and 13599 List Removals" (2018), POUS, Ann. 152 (returning Bank Markazi to the SDN List).

generally prohibited from engaging in transactions with Iran, Iranian companies and persons residing in Iran[105]. For example, the United States removed an Iranian company called the Cement Industry Investment and Development Company from this list[106]. But even after that removal, bilateral sanctions measures continued to generally prohibit US persons from engaging in trade or transactions with the company, absent an applicable exemption or authorization, such as for humanitarian-related goods[107]. Accordingly, the return of this company to the list as part of the 8 May measures had little or no impact on its ability to have property in the United States, or to engage in trade or transactions with the United States[108]. Instead, once again, the primary impact of this action was in regards to economic activity involving third-country nationals and companies who faced additional sanctions risk for doing business with relisted Iranian persons. Lastly, with respect to the non-Iranian, third-country nationals and companies returned to the list as part of the 8 May measures, any assets blocked were those of the third-country national or company. The transactions that were prohibited as a result were between the United States and the relisted third-country company or national. The Treaty's provisions manifestly do not create rules applicable to these third-country nationals and companies. Here again, Iran's claims based on those relistings are third country measures, not covered by the Treaty's provisions.

D. Revocation of licensing actions

25. The fourth category of 8 May measures consists of the revocation of certain licensing actions related to civil aviation, foreign entities owned or controlled by US persons, and Iranian-origin carpets and foodstuffs[109]. For example, as part of the 8 May measures, the

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[105] See ITSR, 31 C.F.R. Sec. 560 (2019), POUS, Ann. 35. See also "FAQs on Lifting Sanctions", p. 5, POUS, Ann. 150, judges' folder, tab 13.

[106] JCPOA, Ann. II, Sec. 4.8.1 and attachment 3; Ann. V, Sec. 17.3, MI, Ann. 10, judges' folder, tab 2.

[107] See ITSR, 31 C.F.R. Sec. 560 (2019), POUS, Ann. 35.

[108] See US Department of the Treasury, "Publication of Updates to OFAC's Specially Designated Nationals and Blocked Persons List and 13599 List Removals" (2018), POUS, Ann. 152, (returning Bank Markazi to the SDN List).

[109] See JCPOA, Ann. II, Sec. 5.1, judges' folder, tab 2. See also US Department of the Treasury, General License H (16 Jan. 2016, revoked as of 27 June 2018), MI, Ann. 25, judges' folder, tab 2; see also US Department of the Treasury, "Statement of licensing policy for activities related to the export or re-export to Iran of commercial passenger aircraft and related parts and services" (16 Jan. 2016, revoked as of 8 May 2018), MI, Ann. 26; see also US Department of the Treasury, "Final Rule amending the Iranian Transactions and Sanctions Regulations" (21 Jan. 2016), 81 Fed. Reg. 3330, MI, Ann. 27; see also US Department of the Treasury, General License I (24 Mar. 2016), revoked as of 27 June 2018), MI, Ann. 29. See also Re-Imposition FAQs, pp. 10-11, POUS, Ann. 144. See also US Department of the Treasury, "May 2018 Guidance on Reimposing Certain Sanctions with Respect to Iran" (2018), POUS, Ann. 146.

United States revoked certain licences authorizing contracts for the sale to Iran of US origin aircraft, as well as associated transactions[110]. Unlike the first three categories, the fourth category consists of actions that affected limited areas of bilateral trade and transactions between Iran and the United States, or their nationals and companies. For this reason, the United States is not advancing the third country measures objection to the revocation of licensing actions.

III. Claims that rest on third country measures fall outside the Treaty

26. Mr. President, Members of the Court, this brings me to the *third* part of my presentation. Having outlined these categories to assist in understanding the 8 May measures, it becomes clear that — with the exception of the fourth category — the measures at issue concern trade and transactions between Iran and third countries, or between their nationals and companies. As Ms Grosh has addressed, the Treaty of Amity does not contain obligations for the Parties with respect to those commercial relations, which lack a bilateral commercial nexus between the United States and Iran.

27. Iran appears to acknowledge the non-bilateral nature of these measures in its Observations but attempts to dismiss the significance of this fact[111]. But the distinction between bilateral and third country measures is neither an invention of the United States, as Iran asserts, nor can it be brushed aside when assessing Iran's claims under the Treaty. As I have explained, it was a prominent and fundamental limitation on the lifting of US sanctions measures under the JCPOA and was understood as such by Iran at the time[112]. It is therefore a central feature of the reimposition of those measures. This defining characteristic of the 8 May measures is critically relevant — and ultimately fatal — to the viability of Iran's challenge to these measures under particular Treaty of Amity provisions.

28. Iran's claims that are founded on third country measures are outside the scope of the Treaty. Accordingly, Iran's challenge to such measures does not concern the interpretation or

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[110] See Re-Imposition FAQs, pp. 10-11, POUS, Ann. 144.

[111] WSI, paras. 1.23, 3.3-3.5.

[112] See JCPOA, Ann. II, Sec. 4 n. 6, MI, Ann. 10, judges' folder, tab 2. See also JCPOA Sanctions Implementation Guidance, pp. 6-7, MI, Ann. 24, judges' folder, tab 12.

application of the Treaty of Amity within the meaning of Article XXI, paragraph 2, and must be dismissed for lack of jurisdiction.

29. The Court can and should decide these issues at the preliminary objections stage.

30. For the avoidance of doubt, I note that, if the Court agrees that Iran's claims with respect to third country measures are outside the scope of the Treaty and dismisses those claims, this would *not* affect the ability of persons or entities to export to Iran humanitarian-related goods, or goods and services necessary for the safety of civil aviation. Consistent with the long-standing exceptions, authorizations, and safety of flight licensing policy in place, both US and non-US persons would continue to be able to export to Iran humanitarian-related goods that are the focus of the Court's provisional measures Order, including medicines, medical devices, foodstuffs and agricultural products, as well as goods and services licensed as necessary for the safety of civil aviation[113]. These exceptions, authorizations and licensing actions would not be affected in any way by the dismissal of Iran's claims.

IV. Conclusion

31. Mr. President, Members of the Court, I would like to leave you with the following concluding observations. *First*, this case concerns the measures that the United States had lifted as part of its implementation of the JCPOA, and subsequently reimposed. *Second*, the vast majority of those measures concern trade and transactions between Iran and the nationals and companies of third countries — not between Iran and the United States. This fundamental limitation on the lifting of sanctions under the JCPOA, understood as such by Iran at the time, is therefore a defining and inescapable characteristic of their reimposition. *Third*, as Ms Grosh has shown, the Treaty addresses bilateral economic and consular relations between Iran and the United States, and only bilateral relations. In the Court's own words, it sets out "rules providing for freedom of trade and

[113] See *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, pp. 194-195, paras. 69-70, p. 197, para. 75, p. 204, paras. 90-91, p. 207, para. 98. See e.g. National Defense Authorization Act for Fiscal Year 2012, Pub. Law 112-81, Div. A, Title XII, Sec. 1245 *(d)* (2), 22 U.S.C. 8513a *(d)* (2) (2011), POUS, Ann. 80, judges' folder, tab 14. See Statutory Sanctions of Relevance to the Case, POUS, Ann. 80. See also ITSR, 31 C.F.R., Secs. 560.530, 560.532, 560.533 (2019), POUS, Ann. 35. See also ITSR, 31 C.F.R. Sec. 560.528 (2019), POUS, Ann. 35.

commerce between the United States and Iran"[114]. Yet the 8 May measures overwhelmingly concern trade and transactions between Iran and third countries, with no bilateral commercial nexus. The Treaty provides no obligations applicable to such third country measures, and Iran's challenge to them falls outside the scope of the Treaty.

32. Accordingly, we ask the Court to conclude that any of Iran's claims that are predicated on third country measures are outside the scope of the Treaty and are therefore dismissed for lack of jurisdiction. A finding to this effect would result in the dismissal of Iran's claims that are based on measures in the first three categories I have described in my presentation.

33. Mr. President, Members of the Court, that concludes my submission. I thank you for your attention. Mr. President, may I ask that you please call on Professor Boisson de Chazournes to conclude the United States' first-round submissions.

The PRESIDENT: I thank Ms Gahan for her presentation. Je donne à présent la parole à Mme la professeure Laurence Boisson de Chazournes. Vous avez la parole.

Mme BOISSON DE CHAZOURNES :

LES MESURES EN CAUSE SONT COUVERTES PAR L'ARTICLE XX, PARAGRAPHE 1, ALINEAS *B)* ET *D)*

1. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs les juges, c'est pour moi un grand honneur de me présenter devant votre Cour au nom des Etats-Unis. Il m'incombe aujourd'hui de développer plus avant les deux exceptions des Etats-Unis se fondant sur l'article XX, paragraphe 1, alinéas *b)* et *d)*, du traité d'amitié. Ces exceptions, qui ne sont ni des exceptions d'incompétence de la Cour, ni des exceptions d'irrecevabilité de la requête, entrent dans ce que le Règlement de la Cour qualifie de «toute autre exception sur laquelle le défendeur demande une décision avant que la procédure sur le fond se poursuive»[115].

2. Comme mes collègues l'ont expliqué, le traité d'amitié est un instrument de portée restreinte régissant les relations économiques et consulaires bilatérales entre l'Iran et les

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[114] *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, I.C.J. Reports 2018 (II)*, pp. 635-636, para. 43.

[115] Règlement de la Cour, art. 79*bis*, par. 1.

Etats-Unis. En intégrant l'article XX, les Parties étaient convenues que le traité ne ferait pas obstacle à l'application de mesures concernant les substances fissiles ou nécessaires à la protection des intérêts vitaux sur le plan de la sécurité. C'est pourtant exactement ce type de mesures que l'Iran conteste devant la Cour de céans. Les Etats-Unis sont conscients que la Cour a déjà abordé l'article XX à plusieurs reprises, notamment dans sa récente décision sur les exceptions préliminaires dans l'affaire relative à *Certains actifs iraniens*. Mais les arguments et les questions dont vous êtes saisis aujourd'hui ne sont pas les mêmes que dans les affaires précédentes. Les Etats-Unis ne demandent pas à la Cour de réexaminer sa conclusion concernant la caractérisation de l'article XX en exception d'incompétence. Ce que les Etats-Unis demandent, c'est que votre juridiction examine attentivement, au vu des circonstances de l'affaire, le caractère exclusivement préliminaire des exceptions qu'ils soulèvent au titre de l'article XX.

3. Mesdames et Messieurs les juges, je procéderai en quatre temps. Je démontrerai tout d'abord que les exceptions préliminaires américaines en vertu de l'article XX du traité constituent des exceptions au titre de la «troisième catégorie» prévue à l'article 79*bis* du Règlement de la Cour. Dans un second temps, je soulignerai les circonstances de l'affaire qui justifient une décision à ce stade préliminaire, à savoir que l'article XX exclut la totalité des demandes iraniennes. Ces exceptions peuvent être décidées avant et séparément de toute question de violation des dispositions du traité, et cela, sur la base des faits déjà présentés à la Cour. Dans un troisième temps, je montrerai que les mesures américaines en cause dans cette affaire, et dont les deux Parties sont convenues qu'elles étaient «liées au nucléaire» dans le texte du plan d'action conjoint, tombent sous le coup de l'exception relative aux substances fissiles prévue à l'article XX, paragraphe 1, alinéa *b)*. Enfin, j'exposerai que les mesures contestées étaient nécessaires «à la protection des intérêts vitaux [des Etats-Unis] sur le plan de la sécurité», et qu'elles relèvent donc directement de l'exception prévue à l'article XX, paragraphe 1, alinéa *d)*, du traité.

I. L'article XX relève de la «troisième catégorie» d'exceptions prévue par le Règlement de la Cour

4. Monsieur le président, l'article 79*bis* du Règlement de la Cour ne limite pas les exceptions aux seules questions de compétence et de recevabilité[116]. Il prévoit également une troisième catégorie d'exceptions, à savoir «toute autre exception sur laquelle le défendeur demande une décision avant que la procédure sur le fond se poursuive». Ce langage sans équivoque est inclus dans le Règlement de la Cour depuis 1972. Malgré les multiples révisions, y compris celle récente d'octobre 2019, ce langage est demeuré inchangé. Cela est révélateur de la reconnaissance sur une longue durée du fait que toutes les exceptions n'entrent pas nécessairement dans les deux premières catégories. C'est ce qu'a également reconnu la Cour dans l'affaire *Lockerbie* lorsqu'elle précise que «[le] champ d'application *ratione materiae* [de l'article 79] n'est donc pas limité aux seules exceptions d'incompétence ou d'irrecevabilité»[117]. Les exceptions américaines au titre de l'article XX entrent pleinement dans cette troisième catégorie et ne peuvent pas être écartées au motif qu'elles ne constituent pas des exceptions d'incompétence.

5. Qui plus est, bien que la Cour n'ait pas retenu les exceptions d'incompétence soulevées par les Etats-Unis au titre de l'article XX dans l'affaire relative à *Certains actifs iraniens*, elle ne s'est pas prononcée sur l'article XX pris comme exception de la troisième catégorie de l'article 79*bis,* ni même n'a examiné l'alinéa *b)* relatif aux substances fissiles. Par ailleurs, la qualification qui fut faite de l'article XX comme défense au fond n'exclut pas que, dans la présente affaire, celui-ci présente un caractère exclusivement préliminaire. Enfin, contrairement à ce que l'Iran allègue, la Cour n'a pas non plus tranché les exceptions préliminaires au titre de l'article XX dans l'ordonnance en indication de mesures conservatoires du 3 octobre 2018[118]. Ainsi que l'a rappelé la Cour dans son ordonnance,

> «la décision rendue … ne préjuge en rien la question de sa compétence pour connaître du fond de l'affaire, ni aucune question relative à la recevabilité de la requête ou au

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[116] Exposé écrit de la République islamique d'Iran (EEI), par. 5.5-5.17.

[117] *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 131, par. 46.

[118] EEI, par. 5.18-5.20.

fond lui-même. Elle laisse intact le droit des Gouvernements … de faire valoir leurs moyens à cet égard.»[119]

II. A ce stade préliminaire, les circonstances de l'affaire militent pour une décision sur l'article XX

6. Mesdames et Messieurs les juges, comme je l'ai indiqué, les circonstances de l'affaire justifient une décision à ce stade préliminaire sur les exceptions américaines soulevées au titre de l'article XX. Il en est ainsi pour trois raisons.

7. Tout d'abord, il appert que l'ensemble des demandes iraniennes peuvent être écartées en application des alinéas *b)* ou *d)* du paragraphe 1 de l'article XX. Les principes d'équité et d'économie judiciaire commandent une décision à ce stade. Pour reprendre les termes de la Cour, l'article XX «définit un nombre limité de cas dans lesquels, nonobstant les dispositions du traité, les Parties peuvent appliquer certaines mesures»[120]. Si ces cas sont présents, c'est-à-dire si une ou plusieurs exceptions de l'article XX s'appliquent et concernent toutes les demandes du demandeur, la tâche de la Cour s'arrête là. Lorsqu'une exception couvre l'ensemble d'une affaire, il est à la fois équitable et conforme à l'intention des parties d'en disposer au stade préliminaire chaque fois que cela est possible. Cela permet d'éviter de coûteuses et lourdes procédures au fond.

8. En second lieu, les exceptions américaines au titre de l'article XX sont entièrement dissociables du reste de l'affaire. Elles n'impliquent qu'une simple analyse, qui peut être effectuée sur la base des informations dont dispose déjà la Cour, et ce, sans que celle-ci n'ait à décider du bien-fondé des allégations iraniennes de violation du traité.

9. A cet égard, il ressort de la jurisprudence de la Cour que l'article XX peut être traité avant tout examen des griefs de violation du demandeur. Cette façon de procéder a été suivie dans l'affaire des *Plates-formes pétrolières*, où la Cour a jugé approprié de commencer par traiter de l'exception de la protection des intérêts vitaux sur le plan de la sécurité avant d'examiner le bien-fondé des allégations de l'Iran[121].

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[119] *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 3 octobre 2018, C.I.J. Recueil 2018 (II)*, p. 652, par. 101.

[120] *Ibid.*, p. 635, par. 42.

[121] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt*, *C.I.J. Recueil 2003*, p. 180, par. 37.

10. En troisième lieu, il n'y a besoin d'aucun autre développement pour que la Cour détermine si les exceptions de l'article XX s'appliquent. La question de savoir si les mesures américaines concernent les substances fissiles aux fins de l'alinéa *b)* peut être résolue en se référant au sens ordinaire du texte du traité d'amitié et aux vues publiquement exprimées par les deux Parties, telles que reflétées dans le texte du JCPOA. La question de savoir si les mesures du 8 mai sont nécessaires à la protection des intérêts vitaux des Etats-Unis sur le plan de la sécurité aux fins de l'alinéa *d)* peut également être tranchée en se référant aux faits présentés dans le cadre de cette phase de la procédure. Les exposés écrits des Etats-Unis détaillent les préoccupations majeures des Etats-Unis relatives à leurs intérêts vitaux sur le plan de la sécurité. Ces préoccupations, à la base des mesures du 8 mai, requièrent une grande déférence.

11. Pour toutes ces raisons, les exceptions américaines ont un caractère exclusivement préliminaire et, conformément à l'article 79*ter*, elles doivent être décidées à ce stade de la procédure[122].

12. Mesdames et Messieurs les juges, avant de détailler plus avant ces exceptions, je voudrais préciser que, contrairement à ce qu'affirme l'Iran, une exception ne peut être écartée simplement parce qu'elle «touche au fond»[123]. Un tel standard, rarement atteignable, va à l'encontre de la logique du Règlement de la Cour et de la fonction attribuée à la procédure des exceptions préliminaires[124].

13. La question pertinente, ainsi que l'a identifiée la Cour de céans dans l'affaire du *Différend territorial et maritime*, est plutôt celle de savoir «si le fait de répondre à l'exception préliminaire équivaudrait à trancher le différend, ou certains de ses éléments, au fond»[125]. Autrement dit, dans le cas d'espèce, la question est de savoir si, pour trancher les exceptions

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[122] Règlement de la Cour, art. 79*ter*, par. 4 ; voir, par exemple, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 30-31, par. 41 ; *Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (I)*, opinion individuelle commune de MM. les juges Tomka et Crawford, p. 47-48, par. 4-7 ; exceptions préliminaires des Etats-Unis d'Amérique (EPEU), par. 4.3.

[123] EEI, par. 5.5.

[124] Voir notamment *Certains intérêts allemands en Haute-Silésie polonaise, compétence, arrêt n° 6, 1925, C.P.J.I. série A n° 6*, p. 15.

[125] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 852, par. 51 ; voir également *Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (I)*, p. 40, par. 96.

américaines, la Cour doit examiner la portée des obligations des Etats-Unis au titre de chacune des neuf dispositions du traité que l'Iran invoque, et déterminer si, au vu des éléments factuels, l'une des mesures américaines est incompatible avec ces obligations[126]. Mesdames et Messieurs les juges, comme je vous l'ai déjà indiqué, une telle analyse n'est pas nécessaire en l'espèce. Pour trancher les exceptions préliminaires au titre de l'article XX, il suffit pour la Cour d'interpréter ledit article XX et les éléments factuels fournis par les Etats-Unis concernant la justification des mesures prises en vertu de celui-ci. Ajoutons que, bien que n'ayant pas trait à la compétence de la Cour, les exceptions américaines sont, en termes de séparabilité du fond, analogues aux exceptions préliminaires se fondant sur les réserves. Dans les deux cas, il revient à la Cour d'interpréter le langage de l'exception ou de la réserve en prenant en compte les faits pertinents pour déterminer si elle s'applique. Votre juridiction peut le faire sans s'immiscer dans le fond des demandes du demandeur[127].

14. L'article 79*ter* du Règlement de la Cour a été conçu dans une optique de bonne administration de la justice et d'équité, pour éviter de soumettre les parties à une procédure au fond longue et coûteuse alors que la haute juridiction possède tous les éléments pour disposer de l'affaire à un stade préliminaire[128]. C'est précisément le scénario de la présente affaire. Il n'est en effet pas nécessaire que la Cour soumette les Parties à une procédure au fond impliquant d'examiner la portée et la violation potentielle d'une multitude de dispositions du traité pour finalement constater que l'affaire doit être rejetée en vertu de l'article XX, sur la base des éléments présentés devant vous à ce stade préliminaire.

15. Prenons un autre exemple pour souligner ce point. Je vous invite, pour ce faire, à prendre l'article XX, à l'onglet n° 1 du dossier de plaidoiries. Imaginez que les Etats-Unis imposent une mesure interdisant l'importation d'or ou d'argent en provenance d'Iran, une mesure qui, en vertu de l'article XX, paragraphe 1, alinéa *a)*, n'est pas non plus prohibée par le traité. La Cour

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[126] Voir *Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (I)*, opinion individuelle commune de MM. les juges Tomka et Crawford, p. 51, par. 11.

[127] Voir, par exemple, *Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili), exception préliminaire, arrêt, C.I.J. Recueil 2015 (II)*, p. 610, par. 53.

[128] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 30-31, par. 41 ; *Certains actifs iraniens (République islamique d'Iran c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 2019 (I)*, opinion individuelle commune de MM. les juges Tomka et Crawford, p. 47-48, par. 4.7 ; EPEU, par. 4.3.

soumettrait-elle les Parties à un exposé complet sur le fond afin de disposer de la requête du simple fait que l'Iran invoque une violation d'une disposition telle celle, par exemple, de la nation la plus favorisée ? Comme dans le cas présent, le traité requiert qu'une décision soit rendue à ce stade de la procédure.

16. Retenir les exceptions américaines va également dans le sens de l'objectif de l'article XX qui, comme je m'apprête à vous le démontrer, visait clairement à garantir que les parties ne se voient pas empêchées de traiter de sujets sensibles tels que ceux relatifs aux substances fissiles ou à la protection des intérêts vitaux sur le plan de la sécurité.

III. Les mesures en cause sont couvertes par l'article XX, paragraphe 1, alinéa *b)*

17. J'en viens donc maintenant à l'applicabilité des deux exceptions de l'article XX dans la présente affaire en commençant par l'exception relative aux substances fissiles. Les Etats-Unis soutiennent que les demandes iraniennes doivent être rejetées dans leur intégralité en ce que les mesures contestées relèvent du champ d'application de l'article XX, paragraphe 1, alinéa *b)*. Cette disposition figure dans le dossier de plaidoiries, sous l'onglet n° 1. Elle dispose que le traité «ne fera pas obstacle à l'application de mesures : … Concernant les substances fissiles, les sous-produits radioactifs desdites substances et les matières qui sont la source de substances fissiles». Correctement lue, cette exception couvre les mesures relatives au cycle complet du combustible nucléaire, ainsi que d'autres mesures liées à la non-prolifération nucléaire. Il en découle que les demandes à l'encontre de mesures de ce type doivent être écartées au motif que celles-ci ne peuvent constituer une violation du traité. C'est particulièrement le cas dans la présente affaire. L'Iran a reconnu à maintes reprises que les mesures en question sont «liées au nucléaire». La Cour dispose donc de tous les éléments nécessaires pour conclure que l'article XX, paragraphe 1, alinéa *b)*, s'applique aux mesures contestées.

18. Remarquons d'entrée que l'alinéa *b)* de l'article XX, paragraphe 1, n'a encore jamais été abordé par la Cour de céans. L'exception est formulée de manière à englober une série de mesures «concernant» les substances fissiles, leurs sources ou leurs sous-produits. Cette exception ne précise pas la forme que doit prendre une mesure pour entrer dans son champ d'application. Contrairement à ce que l'Iran prétend, rien dans son texte ne limite cette disposition aux mesures

concernant l'importation et l'exportation de substances fissiles, ou aux transactions directes de ces substances. Le choix des Parties de retenir l'expression «concernant» indique que cette disposition a une portée plus étendue, tant dans la forme que dans le fond, que celle que veut lui donner l'Iran dans cette procédure.

19. Le contexte le confirme. L'exception relative aux substances fissiles est formulée de manière plus large que les exceptions prévues aux alinéas *a)* et *c)*, qui font toutes deux spécifiquement référence à des mesures «réglementant» certaines activités, à savoir l'importation ou l'exportation d'or ou d'argent et le commerce des armes. La différence entre l'utilisation du terme «réglementant» figurant aux alinéas *a)* et *c)* et celle du terme «concernant» à l'alinéa *b)* est significative et doit être respectée. Il en découle que l'alinéa *b)* autorise une série de mesures visant à contrôler ou à dissuader la prolifération nucléaire, au-delà de leur seule réglementation.

20. Le contexte historique vient également conforter cette lecture. L'exception relative aux substances fissiles est une disposition standard des traités d'amitié, de commerce et de navigation négociés par les Etats-Unis à la suite de la création de la commission américaine de l'énergie atomique[129]. L'exception tire son origine de dispositions similaires qui avaient été incluses dans la Charte de La Havane pour l'Organisation internationale du commerce et dans l'Accord général sur les tarifs douaniers et le commerce. Cependant, d'importantes différences existent entre le libellé de ces instruments et celui des traités d'amitié, de commerce et de navigation, comme vous pouvez l'observer en vous référant aux onglets n^{os} 1 et 17 du dossier de plaidoiries. Ainsi, l'exception de l'article XX, paragraphe 1, alinéa *b)*, du traité d'amitié est autonome, contrairement à l'article XXI *b)* i) du GATT où l'exception pour les substances fissiles figure en tant que clause finale de l'exception concernant la protection des intérêts essentiels de sécurité. L'article XX, paragraphe 1, du traité d'amitié retient en effet deux catégories distinctes : d'un côté, l'exception concernant les substances fissiles ; de l'autre, celle relative à la protection des intérêts vitaux sur le plan de la sécurité. Ces différences étaient destinées à permettre une très large application de

[129] Voir «Hearing on the Proposed Treaty of Friendship, Commerce and Navigation between the United States and Italian Republic», 80th Cong. 2^{d} Sess., p. 22 (30 avril 1948) (déclaration de William Thorpe) (EPEU, annexe 113) (expliquant que la disposition est apparue pour la première fois dans l'accord Etats-Unis-Italie et n'avait pas été incluse dans le traité de commerce et de navigation entre les Etats-Unis et la République de Chine parce que celui-ci avait été négocié avant que la commission américaine de l'énergie atomique ne soit organisée et «avant qu'une branche du gouvernement n'eût déterminé l'importance d'une disposition de ce type»).

l'exception relative aux substances fissiles dans le cadre des traités d'amitié. Cette large application de l'exception est renforcée par l'utilisation du terme «concernant»[130].

21. En outre, dans le contexte de l'après-guerre, la politique américaine en matière de réglementation nucléaire et de non-prolifération nucléaire était en constante évolution. Le libellé de l'exception relative aux substances fissiles reflète cet état de fait en permettant aux Etats non seulement de s'adapter à ces évolutions, mais aussi de recourir à toute une palette de moyens pour gérer la dissémination de la technologie nucléaire à des fins exclusivement pacifiques.

22. Aussi, l'argument de l'Iran selon lequel une lecture large de l'article XX, paragraphe 1, alinéa *b)*, serait contraire à l'objet et au but du traité ne tient pas. Le traité a été conclu pour renforcer les relations économiques et consulaires entre les deux pays[131]. Les garanties qu'il prévoit portent sur le commerce et les investissements et n'avaient pas pour but de restreindre l'une ou l'autre des parties en ce qui concerne les questions indiscutablement délicates, complexes et évolutives que sont celles des utilisations de l'énergie nucléaire à des fins civiles pacifiques ou militaires.

23. Monsieur le président, Mesdames et Messieurs les juges, je vais à présent examiner la manière dont les mesures en question dans la présente affaire s'inscrivent dans le cadre de l'article XX, paragraphe 1, alinéa *b)*. Comme cela a été rappelé par mes collègues, les mesures du 8 mai sont les mesures américaines qui avaient été levées dans le cadre du JCPOA puis réimposées. Le plan d'action conjoint, dont les extraits pertinents figurent dans le dossier de plaidoirie sous l'onglet n° 2, prévoyait en effet la levée des sanctions «liées au nucléaire», c'est-à-dire les mesures mises en place afin de répondre aux préoccupations selon lesquelles le programme nucléaire iranien n'était pas exclusivement pacifique. Le texte du plan d'action conjoint atteste bien que toutes les parties, y compris l'Iran, considéraient que les mesures devant être levées étaient celles concernant le programme nucléaire iranien, mesures dites «liées au nucléaire». Ainsi, le texte du

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[130] Voir onglet n° 18 du dossier de plaidoiries, Charles H. Sullivan, *U.S. Dep't of State, Standard Draft Treaty of Friendship, Commerce and Navigation: Analysis and Background* (1981) (L'étude Sullivan), p. 306 (EPEU, annexe 111) (décrivant l'exception relative aux substances fissiles comme «dérivant» de l'article 99, paragraphe 1, alinéa *b)* du projet de charte de l'OIC et de l'article XXI *b)* i) du GATT).

[131] Voir *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 813-814, par. 27 (décrivant l'objet du traité comme «d'encourager les échanges et les investissements mutuellement profitables et l'établissement de relations économiques plus étroites» ainsi que «de régler les relations consulaires» entre les deux Etats).

JCPOA indique clairement que celui-ci «entraînera la levée de toutes les sanctions … *relatives au programme nucléaire de l'Iran*» et confirme également que les mesures détaillées de l'annexe II représentent «une liste complète et détaillée de toutes les sanctions et mesures restrictives *liées aux activités nucléaires*»[132]. Il est difficile d'imaginer comment les participants au JCPOA, l'Iran y compris, pourraient avoir été plus explicites sur le fait que les sanctions levées étaient liées au nucléaire. Et dans son mémoire, l'Iran a bien reconnu que «le plan d'action a levé des sanctions qui avaient été motivées par l'existence d'un prétendu programme militaire nucléaire iranien»[133].

24. Compte tenu de la qualification explicite et sans ambiguïté des mesures contestées comme étant des mesures «liées au nucléaire», qualification, du reste, que l'Iran a acceptée à maintes reprises, l'Iran ne peut pas se dédire maintenant dans le but d'éviter l'application de l'article XX, paragraphe 1, alinéa *b)*. Une seule conclusion s'impose donc : les mesures du 8 mai sont des mesures «concernant les substances fissiles, les sous-produits radioactifs desdites substances et les matières qui sont la source de substances fissiles». Ces mesures ne sont donc pas prohibées par le traité et les demandes de l'Iran doivent être rejetées.

IV. Les mesures en cause sont couvertes par l'article XX, paragraphe 1, alinéa *d)*

25. Mesdames et Messieurs les juges, les Etats-Unis soutiennent que le traité fournit une deuxième base indépendante pour rejeter l'intégralité des demandes iraniennes. Les Etats-Unis estiment en effet que les mesures contestées relèvent pleinement de l'exception concernant la protection de leurs intérêts vitaux en matière de sécurité. Cette exception, dont le texte figure sous l'onglet n° 1 du dossier de plaidoiries, dispose que le traité «ne fera pas obstacle à l'application de mesures : … nécessaires … à la protection des intérêts vitaux [d'une] Haute Partie contractante sur le plan de la sécurité». Comme détaillé dans les écritures des Etats-Unis, la nature de cette exception et le pouvoir d'appréciation qu'elle confère à l'Etat qui l'invoque sont clairs. La Cour a d'ailleurs précédemment observé que le sens de «la notion d'intérêts vitaux en matière de sécurité

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[132] Voir onglet n° 2 du dossier de plaidoiries, Joint Comprehensive Plan of Action (JCPOA), préambule, par. 4 (mémoire de la République islamique d'Iran (MI), annexe 10) (les italiques sont de nous) ; JCPOA, par. 24 (les italiques sont de nous) ; voir aussi JCPOA, annexe II, art. 4.

[133] MI, par. 9.21 ; voir aussi par. 1.13 (indiquant que «l'unique objet de la présente affaire» est «la décision du 8 mai ») ; par. 2.5 («Les États-Unis avaient imposé ces mesures par le passé, puis les avaient levées dans le cadre de la mise en œuvre du plan d'action.»).

déborde certainement la notion d'agression armée et a reçu dans l'histoire des interprétations fort extensives»[134].

26. A nouveau, le contexte confirme que l'exception concernant la protection des intérêts vitaux sur le plan de la sécurité englobe un large éventail de mesures. Cette exception n'est pas limitée à une menace ou à des domaines *a priori* spécifiés comme le sont les exceptions pour l'or et l'argent, les armes ou les substances fissiles. En outre, cette exception est distincte de la première partie de l'article XX, paragraphe 1, alinéa *d)*, relative à l'exécution par une partie de ses obligations au titre du chapitre VII de la Charte des Nations Unies[135].

27. L'objectif de l'exception concernant la protection des intérêts vitaux sur le plan de la sécurité dans ce traité et dans les traités similaires était de garantir que les dispositions conventionnelles n'entravent pas les décisions ou les actions tombant dans le champ d'application de cette exception. A cet égard, l'étude de Charles Sullivan sur les traités d'amitié, de commerce et de navigation, étude à laquelle l'Iran fait d'ailleurs également référence dans ses écritures, souligne «[la] large liberté d'action accordée à chaque partie au traité par la réserve des intérêts essentiels de sécurité». L'historique des négociations de ce traité montre que les Etats-Unis et l'Iran partageaient pleinement ce point de vue[136].

28. Par ailleurs, l'Etat qui avance que des mesures sont «nécessaires» à la protection de ses intérêts vitaux sur le plan de la sécurité doit se voir accorder une grande déférence[137]. Les Etats-Unis ne soutiennent pas que la Cour n'est pas compétente pour examiner si l'article XX, paragraphe 1, alinéa *d)*, a été correctement invoqué. Ils soulignent simplement que dans l'exercice de sa compétence, la Cour doit reconnaître à l'Etat «[un] très large pouvoir discrétionnaire» pour identifier «ses intérêts vitaux sur le plan de la sécurité» et les mesures «nécessaires» pour assurer

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[134] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 117, par. 224.

[135] *Ibid.*, p. 116, par. 223.

[136] Voir onglet nº 18 du dossier de plaidoiries, «L'étude Sullivan», p. 308 (EPEU, annexe 111) ; voir également, onglet nº 19 du dossier de plaidoiries, télégramme nº 1561 du département d'Etat des Etats-Unis à l'ambassade des Etats-Unis à Téhéran (15 février 1955) (EPEU, annexe 121).

[137] *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt, C.I.J. Recueil 2008*, p. 229, par. 145 (citant *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 116, par. 222 et *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt*, *C.I.J. Recueil 2003*, p. 183, par. 43).

leur protection[138]. Autrement dit, en traitant de cette exception, la Cour doit inscrire son analyse dans la perspective et les circonstances propres à la partie qui l'invoque.

29. Mesdames et Messieurs les juges, je vais à présent examiner la manière dont les mesures du 8 mai que l'Iran conteste s'inscrivent dans le cadre de l'article XX, paragraphe 1, alinéa *d)*. Les raisons pour lesquelles les Etats-Unis ont invoqué cette exception pour les mesures du 8 mai sont abondamment documentées dans ses écritures. Je renvoie donc la Cour à celles-ci ainsi qu'aux annexes et aux sources auxquelles il est fait référence. Comme l'a précisé l'agent des Etats-Unis, la décision américaine du 8 mai 2018 de cesser de participer au JCPOA était fondée sur une évaluation de sécurité nationale selon laquelle il était nécessaire de prendre cette décision pour faire face aux graves menaces issues du soutien de l'Iran au terrorisme et à la déstabilisation régionale, et liées à ses activités en matière de missiles balistiques et ambitions nucléaires. La conséquence directe de la décision du 8 mai a été la réimposition des mesures qui avaient été levées dans le cadre du JCPOA et que les Etats-Unis ont jugées nécessaires afin de faire face à la menace croissante que représente l'Iran pour sa sécurité nationale. Bien qu'avant le plan d'action conjoint, ces mesures visaient principalement à faire face à la menace posée par le programme nucléaire iranien, leur réimposition reflète la nécessité d'utiliser ces outils essentiels pour répondre à l'ensemble des préoccupations des Etats-Unis à l'égard de l'Iran en matière de sécurité nationale. Aujourd'hui, les Etats-Unis considèrent que l'Iran continue de présenter une grave menace pour leur sécurité nationale, celle de leurs ressortissants et, plus largement, pour la paix et la sécurité.

30. L'Iran fait fausse route en affirmant que l'exception concernant la protection des intérêts vitaux sur le plan de la sécurité exige que la Cour procède à une analyse factuelle approfondie lors de la procédure au fond[139]. La Cour possède tous les éléments nécessaires pour trancher l'exception. En outre, celle-ci n'a pas à examiner le bien-fondé des allégations iraniennes de violation du traité. Au contraire, la Cour doit seulement examiner si les mesures du 8 mai ont été prises pour faire face à des activités préoccupantes pour les intérêts vitaux des Etats-Unis sur le plan de la sécurité, en faisant preuve de déférence à l'endroit de la détermination américaine de leur nécessité. L'Iran ne discute que très peu de l'applicabilité de l'article XX, paragraphe 1, alinéa *d)*,

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[138] *Ibid.*

[139] MI, par. 5.27, 5.31.

au motif qu'il s'agirait d'une défense au fond et que les Etats-Unis n'ont agi que sur la base d'un risque illusoire. Il suffit de regarder les écritures pour voir que ce dernier point ne tient pas. Par ailleurs, ce refus d'entrer en matière ne devrait pas bénéficier à l'Iran. La Cour dispose de tous les éléments factuels et juridiques pour conclure que l'article XX, paragraphe 1, alinéa *d)*, s'applique aux mesures contestées.

31. Monsieur le président, les exceptions préliminaires soulevées par les Etats-Unis au titre de l'article XX appellent dès à présent une décision de la Cour, conformément à l'article 79*bis* de son Règlement. Ceci conclut ma plaidoirie et les plaidoiries des Etats-Unis pour ce premier tour. Il me reste, Monsieur le président, Mesdames et Messieurs les juges, à vous remercier de votre bienveillante attention.

The PRESIDENT: I thank Professor Boisson de Chazournes. Your statement brings to an end today's sitting. Oral argument on the preliminary objections raised by the United States of America will resume on Wednesday 16 September 2020 at 3 p.m., for the Islamic Republic of Iran's first round of pleading. The sitting is adjourned.

The Court rose at 6.20 p.m.

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