INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
CERTAIN IRANIAN ASSETS

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

OBSERVATIONS AND SUBMISSIONS
ON THE U.S. PRELIMINARY OBJECTIONS
SUBMITTED BY THE ISLAMIC REPUBLIC OF IRAN

01 SEPTEMBER 2017

IN THE NAME OF GOD

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LIST OF ABBREVIATIONS AND ACRONYMS

1955 Treaty of Amity	1955 Treaty of Amity, Economic Relations, and Consular Rights
Cir.	Circuit
D.C.	District of Columbia
ed.	edition
e.g.	*exempli gratia*
et al.	*et alii*
FCN	Friendship, Commerce and Navigation
Fed. Reg.	Federal Register
fn.	footnote
FSIA	Foreign Sovereign Immunities Act of 1976
IA	Iran's Application
IAEA	International Atomic Energy Agency
Ibid.	*Ibidem*
ICC	International Criminal Court
I.C.J.	International Court of Justice
I.C.S.I.D.	International Center for Settlement of Investment Disputes
i.e.	*id est*
I.L.C.	International Law Commission
I.L.M.	International Legal Materials
IM	Iran's Memorial
IOS	Iran's Observations and Submissions on the U.S. Preliminary Objections
ITRSHRA	Iran Threat Reduction and Syria Human Rights Act of 2012
JCPOA	Joint Comprehensive Plan of Action
No.	*numero*
OFAC	Office of Foreign Assets Control
p.	page
para.	paragraph
paras.	paragraphs
P.C.I.J.	Permanent Court of International Justice
pp.	pages
s.	section
S.D.N.Y.	Southern District of New York
TSRA	Trade Sanctions Reform and Export Enhancement Act of 2000
U.N. doc.	United Nations documents
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States of America
U.S.C.	United States Code
USD	United States dollar

U.S. PO	United States' Preliminary Objections
v.	versus
VCLT	1969 Vienna Convention on the Law of Treaties
Vienna Convention	1969 Vienna Convention on the Law of Treaties
vol.	Volume
Y.I.L.C.	Yearbook of the International Law Commission

CHAPTER I.
INTRODUCTION

1.1 In these Observations and Submissions, Iran responds to the United States' preliminary objections to the admissibility of the entirety of Iran's claims and to the Court's jurisdiction over parts of those claims. At the outset, it is important to emphasise that these preliminary objections have been advanced by the United States notwithstanding the existence of agreement between the Parties on three key points: (a) the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran ("**1955 Treaty of Amity**") remains in force between the Parties;[1] (b) there is a dispute under Article XXI (2) of that Treaty; and (c) the relevant test for jurisdiction *ratione materiae* is as established in the Court's Judgment in *Oil Platforms*.[2] These points of agreement are important, not merely because they narrow the issues on which the Court must rule, but also because they nullify much of the case that the United States has elected to put forward at this jurisdictional phase.

1.2 As to the first key point of agreement between the Parties, the United States has not suggested that the operation of the Treaty has been suspended under the relevant rules of general international law, and nor could it.[3] It is therefore common ground that the United States continues to be bound to perform in good faith the full extent of the obligations it has voluntarily assumed under the Treaty. This includes its obligations with respect to the agreement, under Article XXI of the Treaty, to refer disputes concerning the interpretation or application of the Treaty to the Court.

1.3 Faced with this difficulty, the United States has elected to make its objections by reference to vague and misconceived assertions, such as that "Iran repudiated the

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1 U.S. Preliminary Objections, p. 50, para. 6.11.

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

3 The United States could have elected to terminate the Treaty in accordance with its terms or otherwise but it has not done so. Indeed, it has instead relied on the Treaty, including before the Iran-U.S. Claims Tribunal.

Treaty's goals of friendship and cooperation through its actions … and thereby fundamentally altered the bilateral relationship".[4] Regrettably, this is then used as an opportunity to make a legally-unfounded challenge to admissibility[5] that is, in turn, based on unsubstantiated, prejudicial and untrue allegations. The answer to the U.S. position is a simple one: the 1955 Treaty of Amity is – by common agreement – in force, and must be complied with. That legal fact cannot be bypassed by an entirely unsupported theory that it is an abuse of right for a State to assert its rights under a treaty where that State is alleged by a Respondent to have engaged in activities impermissible under other sources of international law (as to which, moreover, the Court has no jurisdiction to make determinations).

1.4 As to the second key point on which the Parties agree, the United States does not deny the existence of a dispute concerning the interpretation or application of the 1955 Treaty of Amity. Indeed, the statement of the U.S. Preliminary Objections confirms the existence of a dispute falling within Article XXI(2) of the Treaty, including as to the interpretation of its various provisions.

1.5 Despite this, the United States has inappropriately purported to rewrite the precise claims that Iran has set out in its Application and Memorial – in three main respects.

(a) the United States asserts that Iran "challenge[s] sanctions" adopted by the United States.[6] That is an incorrect characterisation of Iran's claims in the present case.

(b) the United States contends that Iran has submitted to the Court claims under customary international law. That is again incorrect. Iran challenges measures adopted by the United States only insofar as they breach the 1955 Treaty of Amity. Customary international law applies only insofar as the Treaty explicitly or implicitly refers to or requires reference to it.

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4 U.S. Preliminary Objections, p. 11, para. 2.7.

5 Summarised at U.S. Preliminary Objections, p. 4, para. 1.9.

6 U.S. Preliminary Objections, p. 52, para. 6.15.

(c) the United States asserts that Iran "attempts to embroil the Court in a broader strategic dispute".[7] That is, once again, an incorrect characterisation of Iran's case. Iran bases its claims solely on the 1955 Treaty of Amity: whether or not the present dispute is part of a broader dispute is irrelevant. By contrast, it is the United States that invokes and seeks to rely on "the deeply troubled history between Iran and the United States" and an alleged "litany of international transgressions" and "decades of offences".[8] This serves as an example of the fact, already noted above, that the U.S. Preliminary Objections centre on unsubstantiated, prejudicial and untrue allegations against Iran. Moreover, so far as concerns the U.S. objections to jurisdiction, these are focused solely upon the question of immunity, with a particular emphasis on the status of Bank Markazi, and ignore the other aspects of Iran's claims. There are, however, a number of Iran's claims that do not concern immunity and do not specifically concern the status of Bank Markazi.

1.6 As to the third key point of agreement, both Parties accept that the test for jurisdiction *ratione materiae* is as established by the Court in its Judgment in the *Oil Platforms* case, although they disagree on the correct application of this test. As explained further in Part II below, the United States raises three jurisdictional objections to parts of Iran's claims, and each falls to be dismissed on a straightforward application of the *Oil Platforms* test. In summary:

(a) The United States' first objection to jurisdiction is that Bank Markazi is not a "company" within the meaning of that term as used in the 1955 Treaty of Amity, and thus does not qualify for the substantive protections to which companies are entitled under Articles III, IV and V.

i. This objection depends on an inappropriate and confusing attempt to read into the Treaty a so-called 'functional test', whereby the notion of "companies" is, it appears, limited to entities engaged in what the United States characterises as 'commercial activities'. The U.S. interpretation is inconsistent with the definition of 'companies' for the purposes of the

[7] U.S. Preliminary Objections, p. 2, para. 1.4.

[8] *Ibid.*

Treaty, given in Article III(1), as confirmed by the *travaux préparatoires*, and must therefore be dismissed. Consistent with the *Oil Platforms* test, Iran's claims in relation to Bank Markazi are at least capable of falling within each of the aforementioned provisions of the Treaty, and are therefore within the Court's jurisdiction pursuant to Article XXI(2).

ii. It is also noted that the United States maintains that "Iran was a party to the *Peterson* enforcement proceedings" and that "Iran, through Bank Markazi, advanced arguments before the U.S. courts that are inconsistent with what Iran is saying to the Court in the present case about the status of Bank Markazi, issues of sovereign immunity, and the Treaty."[9] This merely highlights the continuing refusal of the United States to respect the separate juridical status of Bank Markazi. The continued assertion that Iran has failed to disclose material documents, which was the subject of the United States' (rejected) request for specific disclosure, remains misconceived. As Iran previously explained in its letter dated 12 April 2017, Iran was under no obligation to file the documents sought by the United States. In any event, the numerous documents from the *Peterson* proceedings which Iran did annex to its Memorial make plain the fact that Bank Markazi raised certain arguments before the U.S. courts. However, Bank Markazi is a separate juridical entity and its arguments are not automatically attributable to the State of Iran. Further, the Court will recall its decision of 19 April 2017, finding that "the United States of America has not sufficiently demonstrated the relevance of the documents in question for the purposes of any preliminary objections…". Yet, the United States continues to assert that Iran "failed to annex to its Memorial copies of the pleadings that allegedly support its assertions".[10] This is plainly incorrect and there is nothing in the U.S. Preliminary Objections that calls into question the Court's decision of 19 April 2017.[11]

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9 U.S. Preliminary Objections, pp. 1-2, para. 1.3.

10 U.S. Preliminary Objections, p. 3, para. 1.6.

11 Iran understands that the United States now has access to these documents, as a result of an order of a U.S. District Court made on the application of the United States.

(b) The United States' second objection to jurisdiction is that there is no entitlement to immunity for Bank Markazi under the Treaty.

i. The United States argues that none of Articles III(2), IV(1), IV(2), V(1), X(1) and XI(4) of the 1955 Treaty of Amity expressly grants rights in respect of immunity. This, however, is to make a selective and inapposite point on the interpretation of the Treaty. Rather than address the arguments as actually made by Iran in its Memorial, the United States wrongly asserts that Iran seeks to import the entire body of customary international law into the Treaty. Iran's position is that specific provisions of the 1955 Treaty of Amity impose a duty on the United States to apply certain specific rules of international law, including rules concerning State immunity, in its dealings with Iranian companies within the scope of the Treaty.

ii. The United States also contends that Bank Markazi cannot in any event be entitled to immunities in respect of its property interests if it is a "company" within the meaning of that term in the Treaty. Indeed, the United States seeks to portray this alleged incompatibility between the status of the Bank as a company and Iran's claim to immunity in respect of the Bank as a major inconsistency in Iran's case in relation to Bank Markazi. But there is no reason why a company cannot be entitled to immunities (or, to put it another way, why all entities entitled to benefit from the immunities of a State must be organised in non-corporate form if they are to retain that entitlement); and there is nothing in the Treaty to indicate otherwise.

iii. In addition to its defective interpretation of the definition of a "company" in the Treaty, the U.S. position wrongly conflates the treaty term "commerce" in Article X with the 'commercial exception' in the law of state immunity. In doing so, the United States disregards both the Court's findings in its Judgment in the *Oil Platforms* case as to the broad meaning of "commerce" in Article X, and the fact that various aspects of classic central banking activities are integrally related to commerce. Indeed, Bank Markazi is involved in all Iranian foreign trade, because it is *inter alia* the

provider, via Iranian commercial banks, of foreign currency including U.S. dollars.

iv. Consistent with the applicable test for this Court's jurisdiction, Iran's claims are at least capable of falling within each of the aforementioned provisions of the 1955 Treaty of Amity, and therefore within the Court's jurisdiction pursuant to Article XXI(2).

(c) The United States' third objection is that the Court has no jurisdiction over one of the measures at issue in the present case, Executive Order 13599.[12] It is said that this measure is excluded from the scope of the Treaty by operation of Article XX(1). The objection depends on an incorrect interpretation of Article XX(1) as imposing a jurisdictional condition. It is telling that the only support advanced for this proposition is a single decision of an investor-State arbitral tribunal, which was considering a differently worded treaty provision on a different subject matter. The U.S. position disregards both the ordinary meaning and context of Article XX(1), and the Court's finding in both the *Nicaragua* and *Oil Platforms* cases that Article XX(1) (and the equivalent provision in the *Nicaragua* case) merely affords a potential defence at the merits stage. It follows that the U.S. objection is not jurisdictional in nature, and even if it were otherwise it would also have to be dismissed since it is manifestly not of an exclusively preliminary character.

1.7 It follows from the above that each of the United States' three jurisdictional objections lacks any merit, and all are easily resolved by reference to the areas of agreement between the Parties and the Court's well-established jurisprudence on jurisdiction.

1.8 The U.S. objections to admissibility, already touched on above, are equally misconceived. The United States argues for the introduction of broad doctrines of 'abuse of right' and 'unclean hands', neither of which has ever been applied by the Court as a bar to a claim; nor are they established in international law. Allegations of abuse of right and unclean hands are not of a preliminary character; they go to the

[12] U.S. Executive Order 13599, 5 February 2012, 77 Fed. Reg. 6659 (IM, Annex 22).

merits. Further, the United States has failed to demonstrate that the test for abuse of right and unclean hands is satisfied in the present case.

1.9 As noted above, in its Preliminary Objections, the United States makes unsubstantiated, prejudicial and untrue allegations against Iran, on matters that are both irrelevant and outside the Court's jurisdiction. The United States alleges that "[f]or decades, Iran has sponsored and supported international terrorism, as well as taken destabilizing actions in contravention of nuclear non-proliferation, ballistic missile arms trafficking and counter-terrorism obligations".[13] Those allegations, which are denied,[14] are irrelevant. It appears that they have been put forward by the United States not as part of any legally grounded challenge to jurisdiction or admissibility, but rather as an attempt to have the Court see Iran in the worst possible (and quite inaccurate) light. For good measure, it is also noted that – as is again manifest – the U.S. objections to admissibility are not preliminary in nature since they raise complex questions of disputed fact that could only be determined (if at all) at the merits stage.

1.10 The subsequent sections of these Observations and Submissions are structured as follows.

- In **Part I** (**Chapter II**), Iran reaffirms the true nature and subject matter of its claims, as set out in Iran's Application and Memorial. In short, Iran's case is based entirely upon claims that the United States has been and is acting in violation of its obligations under the 1955 Treaty of Amity, and is thereby causing injury to Iran and to Iranian companies.

- In **Part II**, Iran addresses the three U.S. objections to jurisdiction. For the reasons summarised above, each of the objections is misconceived and falls to be dismissed on a straightforward application of the test for jurisdiction *ratione materiae* in *Oil Platforms*.[15]

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13 U.S. Preliminary Objections, p. 11, para. 3.1.

14 See *infra*, Appendix A to Chapter VIII.

15 See *supra*, pp. 3-6, para. 1.6.

- **Chapter III** introduces this Part, identifying *inter alia* the limited nature of the jurisdictional objections that the United States makes.

- **Chapter IV** responds to the U.S. objection that Bank Markazi is not a 'company', as defined in Article III(1), for the purposes of the Treaty.

- **Chapter V** responds to the U.S. 'immunity objection', addressing *inter alia* the U.S. criticism that Iran has failed to conduct a proper exercise in treaty interpretation and seeks inappropriately to apply customary international law.

- **Chapter VI** responds to the U.S. objection concerning the effect of Article XX(1) and Executive Order 13599.

- **Part III** responds to the United States' contention that the entirety of Iran's claim is inadmissible. Iran demonstrates that the United States can invoke no argument in support of its case based on the concepts of 'abuse of right' (**Chapter VII**) and 'unclean hands' (**Chapter VIII**).

- **Part IV** contains a brief statement of conclusions (**Chapter IX**), and these Observations and Submissions conclude with Iran's submissions in **Chapter X**.

PART I.

THE TRUE NATURE AND SUBJECT MATTER OF IRAN'S CLAIMS

CHAPTER II.
THE SUBJECT MATTER OF THE DISPUTE PENDING BEFORE THE COURT

2.1 Iran has brought to the Court a legal dispute concerning multiple and ongoing breaches of the 1955 Treaty of Amity committed by the United States and seeks to obtain from the Court a judgment on this matter. Its Application and Memorial are very clear in this regard.

2.2 However, the United States has chosen to argue that Iran pursues another objective. It contends that: "Iran does not seek resolution of a narrow legal dispute concerning the provisions" of the 1955 Treaty of Amity.[16] The essence of the U.S. preliminary objections to the admissibility of Iran's case is that the true nature of the dispute is different from what is presented in Iran's Application and Memorial. The United States uses the excuse of Iran supposedly "embroil[ing] the Court in a broader strategic dispute"[17] to put forward contextual and evidential 'foundations' to its preliminary objections that are inaccurate and have no direct connection to the actual dispute Iran has brought before the Court. In sum, the United States asks the Court to dismiss Iran's case as inadmissible not because of what it is, but because of what the United States would like it to be.

2.3 In this Chapter, Iran will demonstrate:

- in Section 1, that the subject matter of the dispute as defined by Iran is clear;
- in Section 2, that the United States mischaracterises the dispute; and

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16 U.S. Preliminary Objections, p. 2, para. 1.4.

17 *Ibid*.

- in Section 3, that the U.S. accusations against Iran developed in Chapter 3 of its Preliminary Objections are irrelevant to the dispute and that the Court is not in a position to address them.

SECTION 1.
THE SUBJECT MATTER OF THE DISPUTE AS DEFINED BY IRAN IS CLEAR

2.4 In its Application of 14 June 2016[18] and its Memorial of 1 February 2017[19] Iran has presented the precise claims upon which the Court is seised in the present proceedings. In substance, these claims are as follows:

- First, that the United States by its acts, and in particular its failure to recognise the separate juridical status of Iranian companies, including Bank Markazi, has breached its obligations to Iran, *inter alia*, under Article III(1) of the 1955 Treaty of Amity[20]. Article III(1) provides for the recognition by each Party of the juridical status of "companies" constituted under the applicable domestic law and regulations of the other Party.

- Secondly, that the United States, by its acts and in particular: (i) its unfair and discriminatory treatment of Iranian companies and their property, (ii) its failure to accord such companies and their property the most constant protection and security, (iii) its expropriation of these companies' properties and the deprivation of their freedom of access to the U.S. courts, and (iv) its failure to respect their right to acquire and dispose of property, breached its obligations to Iran, *inter alia*, under Articles III(2), IV(1), IV(2), V(1) and XI(4) of the 1955 Treaty of Amity.[21]

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18 Iran's Application, pp. 13-16, para. 32.

19 Iran's Memorial, pp. 64-117, paras. 4.1-6.20.

20 Iran's Memorial, p. 126, para. 8.1(a)(i).

21 Iran's Memorial, p. 126, para. 8.1(a)(ii).

- Thirdly, that the United States applied unlawful restrictions on the financial transfers of Iranian companies, including Bank Markazi, and interfered with the freedom of commerce between the territories of the Treaty Parties in breach, *inter alia*, of Articles VII(1) and X(1) of the Treaty.[22]

2.5 Iran's claims are directly related to a series of legislative, administrative and judicial acts undertaken by the United States that gradually deprived Iranian companies and their property (and interests in property) of the rights and protections guaranteed by the 1955 Treaty of Amity.[23] It is a dispute concerning "Certain Iranian Assets" and the U.S. treatment of Iranian companies and their economic interests.

SECTION 2.
THE UNITED STATES MISCHARACTERISES THE DISPUTE

2.6 In its Preliminary Objections, the United States argues, in substance, that the dispute brought by Iran is not properly presented. It seeks to substitute Iran's claims, including the factual aspects, with a distinct set of so-called "facts", that it identifies as the "contextual [and] evidential foundations" of its Preliminary Objections.[24] According to the United States, these "foundations" should be considered by the Court, and would provide sufficient grounds for it to decline to decide Iran's claims.

2.7 None of these so-called "foundations" falls within the scope of the dispute brought by Iran in its Application and Memorial. But the United States contends that the present dispute would encompass the whole of the Iran-U.S. relationship – including on the political and strategic levels – since 1979.

2.8 The United States proposes that the Court assesses the admissibility of Iran's claims according to the following theory:

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22 Iran's Memorial, p. 126, para. 8.1(a)(iii).

23 See also *infra* p. 13, para. 2.10 et s.

24 Part I of the U.S. Preliminary Objections, including Chapters 2, 3, 4 and 5.

(a) The dispute brought by Iran, – which has been given the case name "Certain Iranian Assets" by the Court – cannot be related to "certain Iranian assets", that is to say to a "narrow legal dispute concerning the provisions of a commercial treaty",[25] because the commercial relationship between the two States has come to a "protracted and fundamental rupture";[26]

(b) Since there is no commerce between the two States, any claim purportedly related to a "commercial and consular instrument of a narrow and well-known type"[27] such as the 1955 Treaty of Amity, must necessarily hide a broader case;[28] and

(c) Thus, the Court should assess the admissibility of Iran's claims not on their face, but in the light of the "broader strategic dispute"[29] – which the United States purports to describe in Part I of its Preliminary Objections.

2.9 This theory is misleading in all respects:

- In Subsection A, Iran explains that the United States cannot redefine the 1955 Treaty of Amity in order to restrict its scope in a manner contrary to what has been agreed by the Parties;

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25 U.S. Preliminary Objections, p. 2, para. 1.4.

26 U.S. Preliminary Objections, p. 4, para. 1.9.

27 U.S. Preliminary Objections, p. 3, para. 1.7.

28 *Ibid*. See also U.S. Preliminary Objections, p. 2, para. 1.5: "Iran seeks to use the Treaty as an opportunistic – though inapposite – vehicle for its claims, the core of which concerns not commercial entities, but the treatment of Iran itself or its Central Bank, and purported contraventions not of this Treaty's provisions, but of customary international law"; p. 47, para. 6.2: "A long-running strategic dispute cannot properly be permitted to masquerade in the costume of a commercial and consular treaty case"; p. 50, para. 6.10: "Iran may wish to regard the Treaty as a vehicle for waging this wider strategic dispute"; p. 50, para. 6.11: "Iran's claim in the present case does not constitute a bona fide invocation of the Treaty, and the Court accordingly should not assume jurisdiction in this case"; p. 53, para. 6.17: "the present dispute cannot be disguised as a transactional dispute that simply engages technical questions regarding the application of the Treaty to ongoing commercial or consular activity. Rather, Iran's claims concern various actions taken in the context of long-running antagonism between the parties. This dispute has nothing to do with the interests protected by the Treaty."

29 U.S. Preliminary Objections, p. 2, para. 1.4 and p. 47, para. 6.1.

- In Subsection B, Iran demonstrates that the United States cannot ignore that certain commercial and economic intercourse does exist between the territories of Iran and the United States; and

- In Subsection C, Iran shows that the United States cannot re-write the subject matter of the dispute.

A. The United States' misleading presentation of the 1955 Treaty of Amity

2.10 The United States admits that the 1955 Treaty of Amity "sought to facilitate a commercial, trade, and investment relationship"[30] – i.e. an economic relationship – with Iran. Nevertheless, the United States systematically seeks to limit the scope of this instrument[31] to "narrow" commercial intercourse and consular relations.[32] According to the United States, "[t]he activity that the Treaty was intended to govern [was] … normal and ongoing bilateral commercial and consular relations".[33]

2.11 As Iran will demonstrate, this is a misleading attempt to restrict the scope of the 1955 Treaty of Amity. The goal of the United States is obvious: the more limited the scope of the Treaty, the easier it is to contend that Iran's claims fall outside its scope. But this contention rests on a distortion of the terms and the object of the Treaty.

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30 U.S. Preliminary Objections, p. 8, para. 2.1.

31 U.S. Preliminary Objections, p. 3, para. 1.7 and U.S. Preliminary Objections, p. 55, para. 6.27.

32 For example, the United States presents the 1955 Treaty of Amity as simply a "commercial treaty" or a "commercial and consular treaty" on numerous occasions: its provisions are those of a "*commercial* treaty" (U.S. Preliminary Objections, p. 2 para. 1.4; p. 40, fn. 172; p. 80, para. 8.7; p. 90, para. 8.24; p. 94, para. 8.34 and p. 102, para. 9.15, emphasis added), it is a "*commercial* and consular instrument" (U.S. Preliminary Objections, p. 3, para. 1.7, emphasis added), "[t]he Treaty of Amity is a *Commercial* and Consular Agreement" (U.S. Preliminary Objections, p. 8, title of Chapter 2(A), emphasis added), "[t]he Treaty of Amity [is] one in a series of twenty-one post-World War II bilateral *commercial* and consular treaties" (U.S. Preliminary Objections, p. 8, para. 2.2, emphasis added), this dispute would be "a *commercial* and consular treaty case" (U.S. Preliminary Objections, p. 47, para. 6.2, emphasis added), the 1955 Treaty would be contemplating "*commercial* and consular activity" (U.S. Preliminary Objections, p. 48, para. 6.5 and p. 49, para. 6.7, emphasis added) and protecting interests arising from "a particular kind of activity – *commercial* and consular relations" (U.S. Preliminary Objections, p. 48, para. 6.6 and p. 81, para. 8.8, emphasis added).

33 U.S. Preliminary Objections, p. 47, para. 6.2.

Moreover, the notion of "commerce" in the Treaty is broader than what is asserted by the United States.

(a) The Scope of the Treaty

2.12 The High Contracting Parties defined the scope of the Treaty in its Preamble, stating that they were "desirous […] of encouraging mutually beneficial trade *and investments* and *closer economic intercourse generally* between their peoples."[34] The full title of the Treaty is the "Treaty of Amity, Economic Relations, and Consular Rights of 1955". As the Court observed in its 1996 Judgment in the *Oil Platforms* case:

> "47. It should also be noted that, in the original English version, the actual title of the Treaty of 1955 – contrary to that of most similar treaties concluded by the United States at that time, such as the Treaty of 1956 between the United States and Nicaragua – refers, besides 'Amity' and 'Consular Rights', not to 'Commerce' but, more broadly, to 'Economic Relations'."[35]

2.13 The Court went on to emphasise the broader scope of the Treaty as expressed in Article I:

> "…by incorporating into the body of the Treaty the form of words used in Article I, the two States intended to stress that peace and friendship constituted the precondition for a harmonious development *of their commercial, financial and consular relations* and that such a development would in turn reinforce that peace and that friendship. It follows that Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied."[36]

Curiously, the United States quotes this extract and emphasises the same words in italics.[37] Yet it insists that the Treaty is a purely commercial instrument[38] or a treaty

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34 Emphasis added.

35 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 819, para. 47.

36 *Ibid*., pp. 813-814, paras. 27-28 (emphasis added).

37 U.S. Preliminary Objections, p. 48, para. 6.6; see also pp. 9-10, para. 2.4; pp. 42-43 para. 5.8 and p. 81, fn. 327.

38 *Ibid.*, p. 2, para. 1.4; pp. 80-81, para. 8.7; p. 102, para. 9.15 and p. 40, fn. 172.

intending to control the commercial and/or consular relations between the Parties,[39] carefully avoiding the word "financial" and only in two instances conceding, probably inadvertently, that it could concern "commercial *and economic relations*".[40]

2.14 Contrary to the U.S. assertions, the Treaty is not only about *commercial* and consular relations; it is, more generally, about broader *economic* and consular relations, among others.

(b) The notion of 'commerce' or 'commercial relationship'

2.15 In any event, even if the Treaty was restricted to "commercial" affairs – *quod non* –, the word 'commerce' as used in the Treaty would, by itself, cover the subject matter of the present dispute. Here again, it is significant that the United States, while quoting at length other less relevant passages of the 1996 *Oil Platforms* Judgment, omits to draw the attention of the Court to the most pertinent paragraphs. It is thus appropriate to set those passages out in full. Responding to the argument that "the interpretation according to which the word 'commerce' in Article X, paragraph 1, is restricted to acts of purchase and sale", the Court explained:

> "In the view of the Court, there is nothing to indicate that the parties to the Treaty intended to use the word 'commerce' in any sense different from that which it generally bears. The word 'commerce' is not restricted in ordinary usage to the mere act of purchase and sale; it has connotations that extend beyond mere purchase and sale to include 'the whole of the transactions, arrangements, etc., therein involved' (*Oxford English Dictionary,* 1989, Vol. 3, p. 552).
>
> In legal language, likewise, this term is not restricted to mere purchase and sale because it can refer to 'not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and transportation of persons as well as of goods, both by land and sea" (*Black's Law Dictionary,* 1990, p. 269).
>
> Similarly, the expression 'international commerce' designates, in its true sense, 'all transactions of import and export, relationships of exchange, purchase, sale, transport, and financial operations between nations' and sometimes even 'all economic, political, intellectual relations between States and between their nationals' (*Dictionnaire de la terminologie du droit international* (produced

[39] *Ibid.*, p. 47, para. 6.1; p. 47, para. 6.2 (twice); pp. 47-48, para. 6.3; p. 48, para. 6.5; pp. 48-49, para. 6.6; p. 49, para. 6.7; p. 48, para. 6.8; p. 53, para. 6.17; pp. 55-56, para. 6.27 and p. 81, para. 8.8.

[40] *Ibid.*, p. 52, para. 6.14 or p. 53, para. 6.18 (emphasis added).

under the authority of President Basdevant), 1960, p. 126 *[translation by the Registry]*).

Thus, whether the word 'commerce' is taken in its ordinary sense or in its legal meaning, at the domestic or international level, it has a broader meaning than the mere reference to purchase and sale.

46. Treaties dealing with trade and commerce cover a vast range of matters ancillary to trade and commerce, such as shipping, transit of goods and persons, the right to establish and operate businesses, protection from molestation, freedom of communication, acquisition and tenure of property. Furthermore, in his Report entitled 'Progressive Development of the Law of International Trade', the Secretary-General of the United Nations cites, among a number of items falling within the scope of the Law of International Trade, the conduct of business activities pertaining to international trade, insurance, transportation, and other matters (United Nations, *Official Records of the General Assembly, Twenty first Session, Annexes*, Agenda item 88, doc. A/6396; also in *Basic Documents on International Trade Law*, Chia-Jui Cheng (ed.), 2nd rev. ed., p. 3).

The Court notes that the Treaty of 1955 also deals, in its general articles, with a wide variety of matters ancillary to trade and commerce.

[…]

48. The Court also notes that, in the decision in the *Oscar Chinn* case (*P.C.I.J., Series A/B, No. 63*, p. 65), […] the Permanent Court observed:

'Freedom of trade, as established by the Convention, consists in the right – in principle unrestricted – to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries." (*Ibid.*, p. 84.)

[…]

49. The Court concludes from all of the foregoing that it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general – not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce."[41]

2.16 Indeed, a similar point was made by the United States itself, as early as 1956, when the U.S. Department of State, in a hearing before the U.S. Senate Committee on Foreign Relations, noted that the 1955 Treaty concluded with Iran was part of a "program of negotiating treaties for commerce *and* trade".[42] At the time of the signing

[41] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 818-819, paras. 45-49.

[42] U.S. PO, Annex 7, p. 3 (emphasis added).

of the Treaty, the U.S. position was that commerce and trade were to be distinguished and both were included within the scope of the 1955 Treaty.

2.17 It follows that the U.S. attempts to limit the scope of the Treaty to only commercial relations, and to limit the meaning of commerce to "acts of purchase and sale", are unavailing.

B. The economic relations between Iran and the United States

2.18 It is erroneous for the United States to assert that there is no commerce and even no "economic intercourse" between Iran and the United States.[43] Despite the political and legal difficulties between the two States, there are certain ongoing economic relations. The United States is fully aware of these economic relations, having authorised the underlying transactions and exchanges.

(a) The materiality of the economic relations between Iran and the United States

2.19 Contrary to the impression the United States tries to convey in its Preliminary Objections, economic relations between the two States have never stopped. According to the U.S. Census Bureau, in the last ten years the direct trade between the two States amounted to more than USD 3 billion, with U.S. exports to Iran accounting for 85% of these exchanges.[44] The following graph shows, in cumulated and adjusted for inflation values, the levels of direct exports from the United States to Iran over the period ranging from January 2010 to April 2017.

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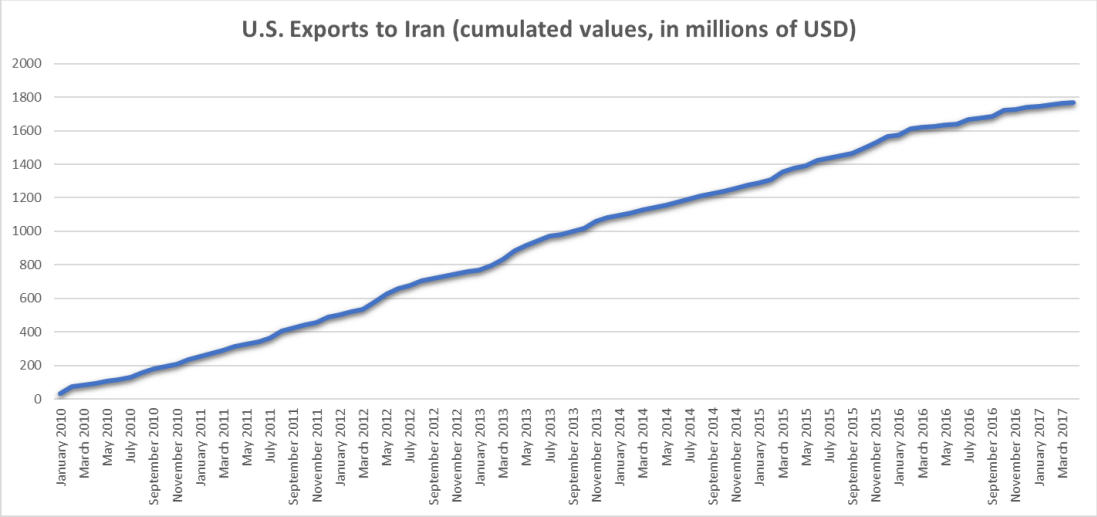
43 U.S. Preliminary Objections, p. 4, para. 1.9.

44 U.S. Census Bureau, "Trade in Goods with Iran", available as of 22 January 2017 (IM, Annex 97). The data from the U.S. Census Bureau account for the actual direct trade export to and import from Iran over the concern period. These figures do not yet account for the economic consequences of some of the commercial deals secured since the conclusion of the JCPOA and the subsequent partial lifting of the sanctions regime; see *infra*, p. 20, para. 2.25.



2.20 The Iranian customs reports confirm the existence of a flow of limited but actual commercial exchanges between the two territories:

> "Importation trend from the United States of America [hereafter "US"] had regularly been witnessing as a whole incremental growth during the period from 21st March 2011 up to 18th February 2017 … During the eleven months of the current year [Iranian Calendar for 2016-2017], the US rating, among the major transacting countries has promoted to 25th ranking …
>
> Our country exportation to the US, after successive decreases in the years 2013 and 2014 witnessed growth and remarkably increased by 4,689% in weight and 1,982% in USD value, reached to the figures of 351 tons and MUSD10.00 in 2015. … During the eleven months of the current year, too, this increasing trend continued, having indicated a growth of 1,640% in the weight and 2,784% in the USD value."[45]

2.21 It is therefore nonsense for the United States to claim in its Preliminary Objections that there is "a longstanding absence of normal commercial … relations between the Parties"[46] and that "there are no meaningful commercial … relations between the United States and Iran".[47] Recent examples of "meaningful" economic relations between Iran and the United States include the following:

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45 I.R. Iran Customs Administration, *Report on Commercial Transactions with the United States of America*, 2017 (IOS, Annex 57), p. 4.

46 U.S. Preliminary Objections, p. 50, para. 6.1.

47 U.S. Preliminary Objections, p. 52, para. 6.8.

(a) In April 2017, the agreement by Boeing to provide thirty B737 aircraft to the Iranian airline company Aseman Airlines,[48] soon to be expanded to another thirty planes, for an estimated value of USD 6 billion;[49]

(b) In December 2016, the agreement, again by Boeing, to provide eighty aircraft to the Iranian airline company Iran Air for an estimated value of USD 16.6 billion;[50] and

(c) In April 2016, the purchase by the U.S. Department of Energy of 32 tonnes of heavy water from Iran, for a total value of USD 8.6 million.[51]

2.22 Other evidences, such as the establishment in 2015 of a United States-Iran Chamber of Commerce based in Washington D.C.[52] and the agreements related to the provision of telecommunication services between Iranian and American companies,[53] confirm that there is actual and "meaningful" economic intercourse between Iran and the United States.

(b) The involvement of the United States in maintaining limited yet actual economic relations with Iran

2.23 The abovementioned economic exchanges did not take place against the will of the U.S. government, but with its express consent. Clearly, the United States considers the interests of its own nationals and companies as a sufficient motive to pursue economic relations with Iran.

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48 "Boeing Co. says it signed new $3 billion deal with Iranian airline", *AP*, 4 April 2017 (IOS, Annex 43).

49 "Iranian airline finalizes deal to purchase 60 Boeing planes", *AP*, 10 June 2017 (IOS, Annex 50).

50 "Boeing seals $16,6 billion deal with Iran Air", *AP*, 11 December 2016 (IOS, Annex 41).

51 "U.S. to buy heavy water from Iran's nuclear program", *Reuters*, 22 April 2016 (IOS, Annex 40)

52 "Iran, U.S. to open joint Chamber of Commerce: Report", *Agence France Presse*, 27 November 2013 (IOS, Annex 35).

53 For example, in 2011, U.S. claimants were allowed to attach and distribute the funds owed to the Telecommunications Company of Iran by a U.S. telecommunication company as a result from "a bilateral telecommunications carrier relationship" that relies on "a periodic settlement and offset process to determine the net payer and payee", *Estate of Michael Heiser v. Islamic Republic of Iran*, U.S. District Court, District of Columbia, 10 August 2011, 807 F Supp. 2d 9 (IM, Annex 50).

2.24 As early as 2010, the U.S. Office of Foreign Assets Control ("**OFAC**") had granted nearly 10,000 licenses to entities willing to sell and export goods to Iran.[54] The assessment of the licenses confirms the liberal policy that this office of the U.S. Treasury adopts when considering a request to trade with Iran.[55] While most of these licenses were granted under the exceptions provided for in the Trade Sanctions Reform and Export Enhancement Act of 2000 (the "**TSRA**"),[56] which only authorises the export of food products, agricultural commodities and medical supplies for humanitarian purposes, these exceptions were often understood very broadly.[57]

2.25 The adoption of the Joint Comprehensive Plan of Action (the "**JCPOA"**) on 18 October 2015 and the delivery of the final report of the International Atomic Energy Agency ("**IAEA**")[58] – which concluded that there was an absence of any "credible indications of activities in Iran relevant to the development of a nuclear explosive device after 2009"[59] – resulted in a significant increase in economic exchanges between the United States and Iran, despite U.S. efforts to undermine the effect of the JCPOA. In addition to the general licenses for the exportation of "agricultural commodities", "medicine and medical supplies" to Iran,[60] the U.S. government adopted a range of trade licences opening up the commerce between the two States in several areas, including:

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54 Z. Goldfarb, "Firms licensed to do business in countries on U.S. terror list", *The Washington Post*, 24 December 2010 (IOS, Annex 31).

55 J. Becker, "Licenses Granted to U.S. Companies Run the Gamut", in *New York Times*, 24 December 2010 (IOS, Annex 30).

56 Trade Sanctions Reform and Export Enhancement Act of 2000, Title IX of Public Law 106 387 (October 28, 2000) (IOS, Annex 2).

57 J. Becker, "U.S. Approved Business with Blacklisted Nations", in *New York Times*, 23 December 2010 (IOS, Annex 29); this author explains that among the licenses granted for humanitarian purposes under the TSRA, the OFAC authorised the export to Iran of "cigarettes, Wrigley's gum, Louisiana hot sauce, weight-loss remedies, body-building supplements and sports rehabilitation equipment".

58 "Final Assessment on Past and Present Outstanding Issues regarding Iran's Nuclear Programme", IAEA, 2 December 2015, GOV/2015/68.

59 *Ibid.*, p. 15, para. 87.

60 31 CFR, Section 560.530 (as of 01 July 2016) (IOS, Annex 6).

(a) On 30 May 2013, even before the JCPOA, the authorisation to export or re-export to Iran, from the United States or by a U.S. person, fee-based internet communication services;[61]

(b) On 21 January 2016, the authorisation to import into the United States, from Iran or a third country, certain foodstuffs and carpets of Iranian origin;[62] and

(c) On 24 March 2016, the authorisation to export or re-export to Iran, by a U.S. person, commercial passenger aircraft and related parts and services.[63]

2.26 Again, the issuance of these general trade licences has been motivated by U.S. interests. The General Licence I authorising the export to Iran of U.S. aircraft was issued shortly before Boeing entered into sales agreements with two of the three main Iranian airlines companies.[64] Regardless of the reasons behind the export licences, it is a fallacy for the United States to claim that economic relations between Iran and the United States have undergone a "protracted and fundamental rupture".[65] At the 2017 World Economic Forum, Iran's Foreign Minister confirmed that "[w]e are open to economic relations even with the United States. So, while we have our political differences with the United States, we are not closed to economic relations, as the deal we signed with Boeing indicates".[66]

2.27 In sum, there are undoubtedly certain economic relations between the two Parties and it is uncontroversial that these economic relations fall within the scope of the 1955 Treaty of Amity. And this is precisely the test defined by the Court in the *Oil Platforms*

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61 OFAC General License D (authorizing the exportation and reexportation to persons in Iran of certain services, software, and hardware incident to the exchange of personal communication, subject to certain limitations), effective on May 30, 2013 (IOS, Annex 3).

62 OFAC Final Rule (adding to the Iran Transactions and Sanctions Regulations general licenses authorizing the importation into the United States of, and dealings in, certain Iranian-origin foodstuffs and carpets and related transactions), effective on January 21, 2016 (IOS, Annex 4).

63 OFAC General License I (authorizing certain transactions related to the negotiation of, and entry into, contingent contracts for activities eligible for authorization under the statement of licensing policy for activities related to the export or re-export to Iran of commercial passenger aircraft and related parts and services), dated March 24, 2016 (IOS, Annex 5).

64 See *supra*, pp. 18-19, para. 2.21.

65 U.S. Preliminary Objections, p. 4, para. 1.9.

66 "Iran Open to Business Ties with US", *Financial Tribune*, 19 January 2017 (IOS, Annex 42).

case to determine whether it has jurisdiction over the present subject matter, namely to "ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2."[67] As explained in Judge Higgins' Separate Opinion:

> "32. There has been some suggestion that 'plausibility' provides another test for determination of whether the Court has jurisdiction. It was said in the *Ambatielos* case that the Court must determine whether the arguments of the applicant State
>
> 'in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on a Treaty' (*I.C.J. Reports 1953*, p. 18; emphasis added).
>
> 'Plausibility' was not the test to warrant a conclusion that the claim might be based on the Treaty. The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by Iran to be true and in that light to interpret Articles 1, IV and X for jurisdictional purposes - that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them."[68]

2.28 This test is generally accepted[69] and is easily passed in the present case.

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67 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 810, para. 16. See also, *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 113, Judge Abraham's Separate Opinion, p. 140, para. 9.

68 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, Separate Opinion of Judge Higgins, p. 856, para. 32; see also pp. 857-58, para. 34.

69 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), *I.C.J. Reports 1996*, p. 615, para. 30; See also: *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), I.C.J. Reports 2016*, p. 22, para. 54; *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 137, para. 38; I.C.S.I.D., Award, 8 February 2005, *Plama Consortium Limited v. Bulgaria*, I.C.S.I.D. Case No. ARB/03/24, para. 119; I.C.S.I.D., Decision on Annulment, 5 September 2007, *Industria Nacional de Alimentos, SA and Indalsa Peru´, SA v. Republic of Peru*, I.C.S.I.D. Case No ARB/03/4, paras. 117-19; UNCITRAL, Interim Award, 1 December 2008, *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, PCA Case No 34877, paras. 103, 105 and 109-10; I.C.S.I.D., Award, 10 February 2012, *SGS Société Générale de Surveillance SA v. Republic of Paraguay*, I.C.S.I.D. Case No ARB/07/29, paras. 47-8 and 50-3.

C. The subject matter of the dispute cannot be re-written by the United States

2.29 As stated above,[70] the United States purports to re-write Iran's case to obfuscate the nature of the dispute.[71] But, as a matter of law, a Respondent cannot re-write the Applicant's case in order to raise irrelevant objections to its admissibility. As stated by the Court, a Respondent cannot "impose on the Applicant any claim it chooses, at the risk of infringing the Applicant's rights and of compromising the proper administration of justice."[72] In proceedings before the Court, disputes are defined by the terms of the Application. In the *Fisheries Jurisdiction* case, the Court stated that:

> "There is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court".[73]

In the *Obligation to negotiate an Access to the Sea* case, the Court further noted that:

> "To identify the subject-matter of the dispute, the Court bases itself on the application, as well as the written and oral pleadings of the parties. In particular, it takes account of the facts that the applicant identifies as the basis for its claim (see *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports* 1974, p. 263, para. 30; *Nuclear Tests (New Zealand v. France),* Judgment, *I.C.J. Reports* 1974, p. 467, para. 31; *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court*, Judgment, *I.C.J. Reports* 1998, p. 449, para. 31; pp. 449-450, para. 33)."[74]

2.30 In the present case, the subject matter of the dispute as defined by Iran's Application and Memorial is straightforward, and cannot reasonably be interpreted as encompassing what the United States labels the "broader strategic dispute".[75] It is a dispute about the interpretation and application of the 1955 Treaty of Amity,[76] which

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70 See *supra*, p. 9, para. 2.2.

71 U.S. Preliminary Objections, p. 2, para. 1.4.

72 *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia), Counter claims, I.C.J. Reports 1997*, pp. 257-58, para. 31.

73 *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 447, para. 29.

74 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, pp. 602-603, para. 26.

75 U.S. Preliminary Objections, p. 2, para. 1.4.

76 See *supra*, pp. 10-11, paras. 2.4-2.5.

is undoubtedly in force between the Parties.[77] It is related to "Certain Iranian Assets", as the Court has named the case, and the treatment of Iranian companies and their economic interests by the United States.

2.31 Iran also observes that the United States misinterprets its claims despite their clarity. For instance, the United States alleges that "[a]t the core of Iran's case is its claims that many of the U.S. measures at issue offend customary international law principles of sovereign immunity. Under almost every article of the Treaty it invokes, Iran complains that rules of State immunity have been disregarded in connection with terrorism-related litigation in U.S. courts".[78] The core of Iran's claims – and, in fact, the whole of its case – is the conduct, attributable to the United States, that qualifies as violations of provisions of the 1955 Treaty of Amity. None of Iran's claims concerns a violation of customary international law as such. Rather, the Treaty contains a series of protections which, by reference to their terms, require respect for certain rights that have their source in customary international law.

2.32 It follows that the U.S. re-writing of the subject matter of the dispute and misinterpretation of Iran's claims could hardly be seen as a *bona fide* reading of Iran's case and should be rejected.

SECTION 3.
THE U.S. ACCUSATIONS AGAINST IRAN ARE IRRELEVANT TO THE DISPUTE AND THE COURT IS NOT IN A POSITION TO MAKE FINDINGS IN RELATION TO THEM

2.33 In its Application[79] and Memorial[80] Iran has presented the factual and legal grounds of its claims, which are both related to the economic relationship between Iran and the United States.

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77 See *infra* pp. 77-78, paras. 7.8-7.10.

78 U.S. Preliminary Objections, p. 78, para. 8.1.

79 Iran's Application, pp. 2-12, paras. 6-31 and pp. 13-16, para. 32.

80 Iran's Memorial, pp. 15-44, paras. 2.1-2.64 and pp. 45-63, paras 3.1-3.54.

2.34 Neither the nature of the Iranian grounds nor their accuracy is the source of the U.S. objections to the admissibility of the case. To the contrary, the United States acknowledges that the 1955 Treaty of Amity is in force between the Parties[81] and admits that for deciding on the "unclean hands" objection, the Court should "accept as true Iran's allegations as to the measures taken by the United States".[82] The United States does not even claim that the facts upon which Iran's case is based are of such a nature that they cannot give rise to the claims Iran has brought before the Court. Rather, the United States bases its admissibility objections on a distinct set of so-called "facts"[83] which may be summarised as a threefold list of alleged wrongful acts that the United States purports to attribute to Iran: acts of terrorism,[84] violation of nuclear non-proliferation obligations,[85] and violation of ballistic missile and arms trafficking obligations.[86]

2.35 Iran strongly contests these accusations.[87] But the point that has to be made in the context of these proceedings on preliminary objections is that these accusations are wholly irrelevant to the dispute before the Court. None of these accusations are said to fall within the scope of the Treaty's provisions relied on by Iran in this case.

2.36 Not only are the U.S. accusations against Iran outside the scope of the dispute, but the Court is not in a position to make any finding upon them. Indeed, despite the repeated attempts of the United States to present its contentions as "facts"[88] or "factual records",[89] that would be "indisputable",[90] the so-called "contextual [and] evidential foundations" of its admissibility objections are mere – and baseless – *accusations* against Iran. The United States requests the Court to determine (a) that a series of

81 U.S. Preliminary Objections, p. 50, para. 6.11.

82 U.S. Preliminary Objections, p. 59, para. 6.34.

83 U.S. Preliminary Objections, p. 33, para. 3.43.

84 U.S. Preliminary Objections, pp. 12- 24, paras. 3.5-3.30.

85 U.S. Preliminary Objections, pp. 24-27, paras. 3.32-3.37.

86 U.S. Preliminary Objections, pp. 27-29, paras. 3.37-3.40.

87 See *infra*, Appendix A to Chapter VIII.

88 U.S. Preliminary Objections, p. 30, para. 3.43.

89 U.S. Preliminary Objections, p. 30, para. 3.43.

90 U.S. Preliminary Objections, p. 54, para. 6.26.

alleged acts are established as facts and as internationally wrongful, (b) that such acts are attributable to Iran (in other words, that Iran is internationally responsible for those wrongful acts), and (c) that such alleged international responsibility constitutes sufficient grounds for depriving Iran of its right, under the Treaty, to bring the present case to the Court. Such an ill-founded strategy cannot succeed, and goes beyond the limits of the preliminary objections phase of proceedings.

2.37 It follows that the unsubstantiated accusations made at length in Part I of the U.S. Preliminary Objections are irrelevant, outside the subject matter of the dispute submitted to the Court by Iran, and in any event not susceptible to any finding by the Court. They should therefore be disregarded in full.

PART II.

THE U.S. OBJECTIONS TO JURISDICTION

CHAPTER III.
THE COURT HAS JURISDICTION OVER ALL OF THE CLAIMS SUBMITTED BY IRAN

SECTION 1.
INTRODUCTION

3.1 Applying the test for jurisdiction *ratione materiae* as established in the Court's Judgment in the *Oil Platforms* case, the Court "must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2."[91] The key question is whether, assuming the facts as pleaded by Iran, the breaches alleged are "capable" of falling within the scope of the provisions of the Treaty relied upon.[92]

3.2 In its Preliminary Objections, the United States advances three separate objections to the Court's jurisdiction *ratione materiae* over parts of Iran's claims. Each of the U.S. objections is misconceived and should be dismissed.

3.3 The first objection, to which Iran responds in Chapter IV below, is that Bank Markazi is not a "company" for the purpose of Articles III, IV and V (the "company objection").

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

92 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 819-820, paras. 50-52. See also *Legality of Use of Force (Yugoslavia v. Italy), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 490, para. 25.

3.4 The second objection, to which Iran responds in Chapter V below, is that the U.S. abrogation of jurisdictional immunities and immunities from enforcement is not capable of constituting a breach of Articles III(2), IV(1), IV(2) and/or X(1) of the Treaty (the "immunity objection").[93] The United States has denied to Iran and to Iranian State-owned companies, including Bank Markazi, the immunity before the U.S. courts that is protected under the 1955 Treaty of Amity and to which they are entitled as a matter of international law and were formerly entitled as a matter of U.S. law. The United States does not deny such acts, but instead objects that Iran has submitted to the Court claims outside the scope of Article XXI(2) of the Treaty.

3.5 The third objection, to which Iran responds in Chapter VI below, is that Article XX(1) excludes the applicability of the 1955 Treaty of Amity to (only) one of the U.S. measures which Iran alleges constitutes a breach of the Treaty, namely Executive Order 13599 (the "Article XX objection").

SECTION 2.
THE LIMITED NATURE OF THE U.S. JURISDICTIONAL OBJECTIONS

3.6 Before turning to the details of the U.S. objections to jurisdiction, it is important to emphasise that these objections concern only limited parts of Iran's claims. It is unnecessary for Iran to address those aspects of its claim to which no objection has been made, and which may therefore proceed without delay to a determination on the merits.

3.7 The United States does not challenge Iran's claim based on Article III(1) of the 1955 Treaty of Amity with respect to the recognition of juridical personality of Iranian companies except for the definition of "company" to the extent that the term applies to Bank Markazi. As to Article III(2), the United States has made no objection to Iran's claims regarding breaches of the entitlement of Iranian companies (including State-owned companies): (a) to rely in the U.S. courts upon the Treaty for recognition by the courts of the juridical personality of Iranian companies (including State-owned

[93] U.S. Preliminary Objections, p. 80, para. 8.6 and p. 95, para. 8.36.

companies), and to be granted such recognition, a right that is also granted separate protection under Article III(1) as discussed above; (b) not to be held liable for, and not to be ordered to pay, damages in respect of allegedly wrongful acts of the Iranian State in proceedings to which the Iranian companies were not parties; (c) to put forward a defence by reference to the law and facts as at the time or times of alleged wrongdoing, unaffected by retroactive and/or targeted or discriminatory legislation; and (d) to be treated no less favourably than companies of any third country.[94]

3.8 As to Article IV(1) of the Treaty, there are important aspects of Iran's interpretation of this provision that are not challenged:

(a) The United States does not challenge Iran's interpretation of the entitlement of Iranian companies, as well as their property and enterprises, to treatment in accordance with the fair and equitable standard, which prohibits conduct by the United States that: (i) is arbitrary, grossly unfair, unjust or idiosyncratic; and/or (ii) is discriminatory; and/or (iii) involves a lack of due process leading to an outcome which offends judicial property; and/or (iv) defeats the legitimate expectations of Iranian nationals and companies.[95]

(b) Nor does the United States deny that the language used in Article IV(1) demonstrates the Parties' intention that the prohibition be broad in scope.[96] Leaving aside the question of immunities, the United States also does not expressly dispute the proposition that an important consideration for the purposes of the fair and equitable standard is whether the measures at issue are consistent with principles of customary international law, or by contrast, at odds with the practice of other States (i.e. where no or virtually no other States have adopted equivalent measures).[97]

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94 The U.S. breaches are set out in Iran's Memorial at pp. 83-86, paras. 5.14-5.18.

95 See Iran's Memorial, pp. 87-93, paras. 5.22 to 5.36. The only element of Iran's interpretation set out in these paragraphs that the United States (implicitly) challenges is the contention in para. 5.36 that the legitimate expectations of all Iranian companies included that the principles of sovereign immunity under international law would be respected.

96 See Iran's Memorial, pp. 93-94, paras. 5.37-5.38.

97 Iran's Memorial, p. 94, para. 5.39.

(c) The United States does not dispute Iran's interpretation of the obligation to ensure that the lawful contractual rights of Iranian nationals and companies are afforded effective means of enforcement, in conformity with applicable laws, as providing for broader protection than the prohibition on denial of justice alone.[98]

3.9 The U.S. objection to the Court's jurisdiction to determine the alleged breach of Article V(1) is limited to its contention that Bank Markazi is not a "company" for the purposes of the protections under the Treaty.[99] The United States does not challenge Iran's interpretation of Article V(1).[100] Further, it is common ground that the effect of the U.S. measures at issue in this case has been to deprive Bank Markazi of the right to dispose of its property as it sees fit.

3.10 The United States has made no objection to the Court's jurisdiction over Iran's claims under Article VII of the Treaty. Further, as Iran understands it, the U.S. objection so far as concerns Article X(1) of the Treaty is confined to an objection to jurisdiction over the so-called "sovereign immunity-related claims".[101]

SECTION 3.
GENERAL POINTS ON INTERPRETATION

3.11 In order to determine whether the breaches alleged are "capable" of falling within the scope of the provisions of the 1955 Treaty of Amity that Iran relies on, the relevant provisions must be interpreted. Iran has already identified and interpreted the Treaty provisions on which it relies in its Memorial, and it re-visits the relevant provisions in the remaining Chapters of this Part II. In its Preliminary Objections, the United States has nonetheless contended that Iran failed in its Memorial to conduct a proper treaty interpretation analysis.[102] In particular, it asserts that Iran inappropriately seeks to

98 Iran's Memorial, p. 95, paras. 5.40 to 5.41.

99 U.S. Preliminary Objections, Chapter 9.

100 See Iran's Memorial, p. 108, paras. 5.73 to 5.74.

101 U.S. Preliminary Objections, p. 95, para. 8.36.

102 U.S. Preliminary Objections, p. 40, para. 5.4 and p. 44, para. 5.12.

apply customary international law, rather than the Treaty.[103] These criticisms are ill-founded. Iran makes three general points on interpretation.

3.12 First, while Iran agrees with the U.S. statement that "the Court cannot found its jurisdiction on "an impressionistic basis" and it "must bring a detailed analysis to bear" when it interprets the articles of the Treaty that are said to have been violated",[104] it is equally true that the Court cannot decline jurisdiction on an "impressionistic basis". Yet that is what the United States asks the Court to do in Chapters 1 to 4 of its Preliminary Objections. As noted in Chapters I and II above, those Chapters in the U.S. Preliminary Objections do not address the specific dispute or even the 1955 Treaty of Amity, but rather make prejudicial and speculative allegations on matters outside the Court's jurisdiction.[105]

3.13 The "detailed analysis" that the United States calls for must include consideration of the entirety of the general rule codified in Article 31 of the Vienna Convention on the Law of Treaties (the "**Vienna Convention**" or "**VCLT**"), including Article 31(3)(c) (as to which see further Chapter V below). As the I.L.C. explained in its Commentary to the Vienna Convention, the provisions of the Article form a single, closely integrated rule.[106]

3.14 Secondly, much of the U.S. criticism of the exercise of interpretation in Iran's Memorial is merely a reflection of its discomfiture with the ordinary meaning of the Treaty provisions on which Iran relies. For example, as Iran set out in its Memorial, and as is addressed in greater detail in Chapters IV and V below, certain provisions of the Treaty specifically require, pursuant to their ordinary meaning and applying all the well-established principles of interpretation, reference to and compliance with certain specific international law rules, including rules on the separate juridical status of companies and the law of sovereign immunity.

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103 U.S. Preliminary Objections, pp. 40-41, paras. 5.4-5.5.

104 U.S. Preliminary Objections, p. 42, para. 5.7.

105 See Chapter 1, paras. 1.5(c) and 1.9, and Chapter 2, paras. 2.33-2.37 *supra*.

106 Report of the I.L.C. on the Work of the Second Part of its Seventeenth Session (U.N. Doc. 1/6309/Rev.I), *in Y.I.L.C. 1966, vol. II*, p. 220.

3.15 Thirdly, Iran notes that the United States is silent regarding the well-established principle of effectiveness (*effet utile*) that Iran relied on in its Memorial.[107] This principle requires interpreting the Treaty so as to give its provisions their fullest weight and effect and in such a way that a reason and meaning can be attributed to every part of the text.[108] Interpreting a provision by reference to the relevant rules of international law is one method of giving that provision a meaningful effect. Further, as a separate matter, meaningful effect must be given to the express terms of Article IV(2) of the Treaty, which requires reference to rules of international law by way of *renvoi*.

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[107] Iran's Memorial, p. 88, para. 5.24. It is recognised by the Court e.g. in *Territorial Dispute (Libyan Arab Jamahiriya v Chad), Judgment, I.C.J. Reports 1994*, p. 23, para. 47.

[108] Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur (U.N. Doc. A/CN.4/167 and Add. 1-3), *in Y.I.L.C. 1964, vol. II*, p. 55, para. 12.

CHAPTER IV.
THE U.S. OBJECTION TO THE TREATY'S APPLICATION TO BANK MARKAZI AS A "COMPANY"

4.1 In Chapter 9 of its Preliminary Objections, the United States contends that "Bank Markazi Cannot Claim Protections as a 'Company' Under the Treaty".[109] It argues that: "Iran paradoxically claims that its Central Bank, Bank Markazi, is both a sovereign entity entitled to immunity and a 'company' entitled to the protections set out in Articles III, IV, and V of the Treaty".[110]

4.2 The United States further argues that a "company" within the meaning of the Treaty depends on the functions it performs,[111] which would not include sovereign functions.[112] The United States asserts that: "[a]rticles III, IV, and V provide assurances to "companies" or "nationals and companies" of the other High Contracting Party in their performance of private and commercial activities. These articles do *not* supply rules governing the treatment to be accorded to High Contracting Parties themselves or to their State entities carrying out sovereign functions".[113] The United States concludes that since Bank Markazi is a central bank and carries out sovereign functions – and was acting as such when it was submitted to the United States' treatment complained of by Iran, Iran's claims with respect to Bank Markazi are not related to a "company" protected by Articles III, IV and V of the Treaty.

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109 U.S. Preliminary Objections, p. 99, Title of Section B.

110 U.S. Preliminary Objections, p. 95-96, para. 9.1. It is not "paradoxical" that a central bank can also be a company. The central banks of States including Belgium, Greece, Ireland, Italy, The Netherlands, Singapore, South Africa, Switzerland and Turkey, are constituted as companies in their domestic legal systems. The National Bank of Belgium is a public limited liability company; the Bank of Greece is incorporated as a société anonyme; the Bank of Ireland is a public limited company; Banca d'Italia, the Italian central bank, is a company limited by shares; *De Nederlandsche Bank*, Dutch central bank, is a public limited company; the Monetary Authority of Singapore is established as a corporation as understood in the Companies Act; the South African Reserve Bank is a joint stock company; the Swiss National Bank is a special statute joint-stock company governed by special provisions of federal law; the Central Bank of the Republic of Turkey is established as a joint stock company.

111 U.S. Preliminary Objections, p. 100, para. 9.11.

112 *Ibid.*

113 U.S. Preliminary Objections, p. 96, para. 9.2.

4.3 The U.S. "company objection" is presented as a preliminary objection to the jurisdiction of the Court. With respect to it, Iran submits:

- First, that should the Court admit that this is a preliminary objection to its jurisdiction, it shall be rejected because the United States' interpretation of the notion of "company" under the Treaty is erroneous;

- Secondly, that this so-called preliminary objection does not possess a preliminary character.

SECTION 1.

THE UNITED STATES' INTERPRETATION OF THE NOTION OF "COMPANY" UNDER THE TREATY IS ERRONEOUS

4.4 The United States agrees with Iran that the term "companies" in Article III(1) of the 1955 Treaty of Amity is broadly defined and includes both privately- and publicly-owned entities.[114] The United States also acknowledges that Bank Markazi "[has] juridical status as an entity".[115]

4.5 However, the United States denies that the term "companies" extends to State-owned companies carrying out sovereign functions. It argues that "[t]he term "companies" is not naturally read to include [central banks and other governmental bodies]",[116] and that the "context, object, purpose, and negotiating history" of the Treaty lead to the conclusion that "the functional understanding is the only way to make sense of the Treaty's provisions".[117]

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114 U.S. Preliminary Objections, p. 103-104, para. 9.18.

115 U.S. Preliminary Objections, p. 98, para. 9.6. Although the United States denies Bank Markazi's status as a company due to its sovereign functions, under Section 28 U.S. Code § 1603, entities like central banks can certainly have a separate corporate status. It provides that "[a]n 'agency or instrumentality of a foreign state' means any entity … (1) which is a separate legal person, corporate or otherwise … and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof".

116 U.S. Preliminary Objections, p. 100, para. 9.11.

117 *Ibid.*

4.6 As will be demonstrated below, this analysis is erroneous in all respects and must be rejected.

A. The "natural reading" argument

4.7 The United States' purported "natural reading" argument is unclear. It seems to suggest an interpretation of the term "companies" in Article III(1),[118] but also an interpretation of "the obligations contained in Articles III, IV, and V", arguing that these obligations "must be read naturally and in their proper context".[119]

4.8 By contrast, the ordinary meaning of the terms of the Treaty leaves no doubt on two points: (a) the "obligations contained in Articles III, IV, and V", *explicitly* apply to "companies", with no qualification;[120] and (b) Article III(1) *expressly* states that "[as] used in the present Treaty, 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." Thus, under a "natural reading" of the Treaty, the proper interpretation of the term "companies" as used in the Treaty must necessarily be carried out with reference to Article III(1).

4.9 With respect to Article III(1), the United States' argument amounts to nothing more than an assertion that the definition of "companies" does not include Bank Markazi.[121] This contention is not supported by the ordinary meaning of the plain text of Article III(1), which attests that the High Contracting Parties intended and agreed that the definition of "companies" has a broad scope.[122] Contrary to the U.S. contention,[123]

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118 *Ibid*.

119 U.S. Preliminary Objections, p. 104, para. 9.19.

120 The provisions also apply to "nationals", the interpretation of which is not in dispute between the Parties.

121 U.S. Preliminary Objections, p. 100, para. 9.11.

122 See *supra*, p. 34, para. 4.4.

123 U.S. Preliminary Objections, pp. 98-99, para. 9.7. According to Setser: "business activities is made synonymous with 'activity for profit' in Article VII of the Treaty with Israel, and with 'activity for gain' in a number of other Treaties."; Setser, 55 AM. SOC. INT'L L. PROC. at 99 (U.S. PO, Annex 229).

the term "companies" is not limited to "commercial" entities,[124] nor to entities engaged in "business activities"; Article III(1) *explicitly* includes entities "whether or not for pecuniary profit".[125]

B. The "contextual" argument

4.10 The United States asserts that when read in its context, the term "companies" as defined in Article III(1) necessarily refers to entities "in their performance of private and commercial activities".[126] It also contends that "[w]here State entities are concerned, Article XI […] provides indispensable context for interpreting the Treaty's treatment obligations, including those set out in Articles III, IV, and V",[127] which would lead to the conclusion that entities carrying out sovereign functions are not "companies" under the Treaty.[128] Neither of these two contentions is capable of withstanding scrutiny.

4.11 As to the first contention, so far as context is concerned, not a single word in the Treaty can be read or construed as limiting the meaning of the term "companies" in Articles III, IV and V to entities carrying out certain functions, or suggesting that the Treaty protections that these provisions contain are reserved to companies engaged in certain specified activities.

4.12 Indeed, the text of the 1955 Treaty of Amity[129] demonstrates that where the Treaty Parties intended to qualify or limit the substantive Treaty protections to certain specific activities, they did so expressly:

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124 U.S. Preliminary Objections, p. 2, para 1.5.

125 In the same sense, see also Article VI(1): "In the case of nationals of either High Contracting Party residing within the territories of the other High Contracting Party, and of nationals and companies of either High Contracting Party engaged in trade or other gainful pursuit or in non-profit activities therein, such payments and requirements shall not be more burdensome than those borne by nationals and companies of such other High Contracting Party."

126 U.S. Preliminary Objections, p. 96, para. 9.2.

127 U.S. Preliminary Objections, pp. 101-102, para. 9.14.

128 U.S. Preliminary Objections, p. 102, para. 9.15.

129 IM, Annex 1.

- Article II(1) specifies that the Treaty Parties must permit "nationals" of the other Party to enter and remain in their territory "for the purpose of carrying on trade between their own country and the territories of such other High Contracting Party and engaging in related commercial activities";

- Article II(2) specifies that the Treaty Parties must permit "nationals" of the other Party to carry out "philanthropic, educational and scientific activities", so long as these "activities are not contrary to public order, safety or morals";

- Article VI(1) concerns taxes, fees, charges, applicable to nationals and companies of the other Parties, "engaged in trade or other gainful pursuit or in non-profit activities";

- Article XI(4) contains a waiver of immunities which is expressly limited to "enterprises" engaged in "commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party"; and

- Article XX(2) expressly states that the Treaty "does not accord any rights to engage in political activities."

4.13 By contrast, where the Parties did not intend to qualify or limit the Treaty protections to certain activities, they used the generic term "activities" without any qualification:

- Article III(1), when providing that "companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party", uses in the second sentence the generic term of "activities" ("rights … to engage in the activities for which they are organized.");

- Article III(2) provides that companies "not engaged in activities within the country shall enjoy the right of such access [to the courts of justice and administrative agencies] without any requirement of registration or domestication." This is directly in contradiction with the U.S. claim that "companies" is a term that should be defined according to the activities or functions that an entity carries out. Indeed, even entities constituted under

Iranian laws not engaged in any activities within the United States territory are eligible for the protections under Article III(2) of the Treaty;

- Article IV(4) refers, with respect to "companies", to "their activities" without qualification; and

- Article V(1) refers to companies' "conduct of activities pursuant to the present Treaty".

4.14 As to the second contention, the United States develops a long interpretative theory based on Article XI(4) which it argues sheds light on the interpretation of the term "companies" as used in the Treaty.[130] These arguments may be summarised as follows:

(a) "State-owned enterprises acting in the marketplace alongside private companies – and only those enterprises … would enjoy … treaty rights, but … should not occupy a privileged position by virtue of their government ownership";[131] and

(b) Article XI(4) has been designed to ensure that *these* enterprises have no privileged position compared to U.S. companies. Accordingly "the immunity waiver provision (Article XI(4)) sought to 'ensure that state-owned enterprises with a claim to treaty rights would not be able to escape the liabilities to which private United States enterprises in competition with them were subject'."[132]

4.15 This theory is at best dubious since it is not clear why, and how, Article XI(4) has any relevance for the contextual interpretation of the term "companies" as defined and used in the Treaty. Article XI(4) has a very limited scope, addressing "enterprises" that are engaged in "commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party". By contrast, Articles III, IV, and V have a much wider scope, encompassing any kind of activities carried out by companies, including "not for pecuniary profit". Moreover, none of the documents discussing the scope of application of Article XI(4) relied upon by the United States

130 U.S. Preliminary Objections, pp. 101-103, paras. 9.13-9.17.

131 U.S. Preliminary Objections, p. 101, para. 9.13.

132 *Ibid.*

discusses the term "companies", or refers to the term as used in Article III, IV or V of the 1955 Treaty of Amity or of similar FCN Treaties.

4.16 Furthermore, the reasoning of the United States is flawed. It asserts that the Treaty rights provided for in Articles III, IV and V are supposed to be granted only to public companies understood as "State-owned enterprises *acting in the marketplace*".[133] But if this was the case, Article XI(4) would *not* specify that such public enterprises cannot claim immunity "if" they engage "in commercial, industrial, shipping or other business activities", because they would already be supposed to be engaged in this kind of activities. Thus, contrary to the United States' contention, if Article XI(4) were relevant for the interpretation of Article III(1), it would merely confirm that the term "companies" under the Treaty is not limited to entities engaged in commercial or business activities, but encompasses entities established under the laws and regulations of the Parties, whatever the nature of their activities or functions.

4.17 Put simply, the correct position with respect to the articulation between Articles III(1) and XI(4) is as follows:

(a) Article III(1) requires the recognition of the juridical status of the "companies" constituted under the applicable laws and regulations of either High Contracting Party, which include various kinds of entities whether privately or publicly owned.

(b) Article XI(4) provides a special rule regarding State-owned enterprises, which are entitled to treaty rights because they are "companies" as defined in Article III(1). These companies enjoy treaty rights including protection of immunities when they are entitled to immunities. It is only if and to the extent that they engage in "commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party" that they cannot claim immunities, while still enjoying the other Treaty protections.

4.18 Thus, "companies", as broadly defined by Article III(1), which do not engage in "commercial, industrial, shipping or other business activities within the territories of

[133] *Ibid.* (emphasis added).

the other High Contracting Party", are indeed "insulated from the obligations of Article XI[(4)], including the waiver of immunity, but simultaneously considered 'compan[ies]' entitled to protection under the Treaty's treatment articles".[134] Contrary to the U.S. contention, this situation does not disrupt "the careful equilibrium sought by the Treaty drafters" which,[135] according to the United States,[136] was to guarantee that national and foreign companies act on the same basis when they are in competition. Indeed, the treatment reserved to a company which is not in competition with U.S. companies and therefore not submitted to Article XI(4), has strictly no effect on the said equilibrium.

C. The "Treaty's objective" argument

4.19 Insofar as the "Treaty's objective" is concerned, the United States, quite apart from a reference to Article XI(4),[137] makes two specific points that Iran responds to in turn below.

4.20 First, the United States asserts that "[w]hen government entities carry out sovereign functions, rather than operating as commercial enterprises, the very nature of such functions means that they cannot be acting like private companies. They are instead operating in a realm that is not the subject of a commercial treaty. Articles III, IV, and V do not set out rules governing how the Parties will treat traditional central banking activities of the other Party any more than they can be understood to regulate activities relating to government agencies carrying out foreign assistance or military activities."[138]

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134 U.S. Preliminary Objections, p. 103, para. 9.17.

135 *Ibid.*

136 U.S. Preliminary Objections, pp. 101-102, paras. 9.13-9.14.

137 U.S. Preliminary Objections, p. 101, para 9.13. The United States seems to refer to Article XI(4) both as an element of context and for discussing the objectives of the Treaty. Iran has responded to these arguments rather as elements of context.

138 U.S. Preliminary Objections, p. 102, para. 9.15.

4.21 The U.S. argument is underpinned by two assumptions, both of which are incorrect. Contrary to the U.S. position:

(a) The 1955 Treaty is *not* merely a "commercial" treaty.[139] The term "commercial" does not even appear in the Preamble to the Treaty, which records its object; and

(b) An entity carrying out sovereign functions may at the same time, in certain respects, act exactly in the same manner as a private company. Moreover, so far as central banks are concerned, their activities are not limited to activities analogous to those "relating to government agencies carrying out foreign assistance or military activities", assuming for the sake of argument that such comparison may have relevance. Indeed, among other activities, a central bank assists private companies in their businesses, participates in commercial activities for its own purposes and facilitates commercial relations carried out by private or public entities in an international context.[140]

4.22 Secondly, the United States refers to an extract from the Judgment on Preliminary Objections in *Oil Platforms* which reads as follows:

> "The whole of these provisions is aimed at the way in which the natural persons and legal entities in question are, in the exercise of their private or professional activities, to be treated by the State concerned. In other words, these detailed provisions concern the treatment by each party of the nationals and companies of the other party, as well as their property and enterprises. Such treaty provisions do not cover the actions carried out in this case by the United States against Iran."[141]

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139 See *supra*, pp. 13-14, paras. 2.12-2.14.

140 For example, the Bank of England explains the role it plays with respect to payments as follows: "Payments play a key role in the smooth functioning of the economy. The Bank of England acts as a settlement agent for banks and others who are members of several payment systems. This includes payments settled in real-time that relate to CHAPS and CREST. On an average day we settle around £500 billion worth of payments between banks, almost a third of the UK's annual GDP. These transactions span, or back, almost every payment in the UK economy – from salaries to company invoices, from car purchases to coffee sales, from pensions to investment flows. We also settle the net interbank transfers for several retail and card systems. In other words, we provide a safe, risk-free means for banks to transfer money to each other. This reduces the risk for everyone involved in these kinds of transactions, and promotes financial stability." See bankingandpayments.aspx.

141 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 816, para. 36.

The United States infers from this quotation that "State entities exercising sovereign functions were never intended to fall within the "private and professional activities" scope of the Treaty's "nationals and companies" provisions".[142]

4.23 The United States rightly points out that the above pronouncement concerns only Article IV(1), rather than Article III or the entirety of the Treaty protections afforded to "companies",[143] but fails to mention that in this passage the Court merely answered Iran's argument that "it falls to the Court to evaluate the lawfulness of the armed actions of the United States in relation to" Article IV(1) of the Treaty.[144] In its ruling, the Court limited itself to addressing which type of "treatment" Article IV(1) is intended to regulate, that is, "the treatment of the nationals and companies of the other party", rather than armed actions carried out by a State against the other. In the current case, Iran does not complain of armed action carried out by the United States against Bank Markazi, and the United States has made no attempt to explain – because it simply cannot explain – how its treatment of Bank Markazi might be properly analogised to armed actions against Iran.

4.24 In any event, the United States is incorrect to contend that a State-owned company like Bank Markazi does not carry out "professional activities". The banking activities of a central bank are "professional activities". Bank Markazi is plainly engaged in acts pertaining to or integrally related to "commerce".[145] Moreover, buying and selling securities in the context of open market operations are economic activities in nature, carried out by private companies as well as by central banks, and pertain to "professional activities".

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142 U.S. Preliminary Objections, pp. 102-103, para. 9.16.

143 *Ibid.*

144 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 815-816, para. 33.

145 See Articles 11 and 13 of the Monetary and Banking Act of Iran (approved on 9 July 1972, with subsequent amendments as of 3 March 2016) (IM, Annex 73).

D. The "negotiating history" argument

4.25 The U.S. recollection of the negotiating history does not reflect accurately the relevant points.[146] They are as follows.

4.26 The question whether State-owned entities should be considered "companies" within the meaning of the Treaty was discussed by the Treaty Parties. Iran initially proposed to insert the words "privately owned" before the word "corporations" in draft Article III of an early version of the text.[147] The United States explained that Iran's proposal was not acceptable, for the reasons explained below, and Iran accepted to withdraw its proposal and to adopt the broader definition which appears in the final text of Article III(1).

4.27 The position of the U.S. Department of State was expressed during a meeting on 16 November 1954:

> "in commenting upon this matter the Department of State expressed the belief that there might have been some misunderstanding of the purpose of the paragraph. The provision is intended to confer no right upon corporations to operate in Iran, but merely to provide their recognition as corporate entities, principally in order that they may prosecute or defend their rights in courts as corporate entities. In this sense, paragraph 1 is related to paragraph 2 of the Article. Under the draft treaty no United States corporation may engage in business in Iran except as permitted by Iran. The corporate status should be recognized to assure the right of foreign corporate entities – those which sell goods or furnish other services to Iran, as well as those permitted to operate in Iran – to free access to courts in order to collect debts, protect patent rights, enforce contracts, etc. The Department has enquired as to whether the Iranian representatives might reconsider their suggestion in light of this explanation."[148]

4.28 The United States subsequently emphasized that, under the proposed treaty, no foreign company was to be recognised as having a right to engage in activities in the country of the other Party except as permitted by such Party. In a telegram from the U.S. Department of State to the U.S. Embassy in Tehran, dated 13 December 1954,

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146 U.S. Preliminary Objections, p. 103-104, para. 9.18.

147 Letter of the U.S. Embassy in Tehran to the U.S. Department of State, dated 16 October 1954, p. 3 (IM, Annex 2).

148 Aide Memoire of the U.S. Embassy in Tehran, dated 20 November 1954, p. 2 (IM, Annex 3).

the firm position of the United States, as stated by the Secretary of State John Foster Dulles, was that:

> "to define companies for all treaty purposes as private companies establishes precedent of questionable effect on interests both countries view trend many countries toward state enterprises. Iran appears recognize this in proposing separate agreement assuring rights their public corporations in US. Latter device advertises intent discriminate against third country public corporations and unacceptable here for obvious lack mutuality.
>
> DEPT has considered most carefully various aspects matter in effort find acceptable means accommodate Iran in purpose their proposal. Following possibly helpful. Insert new sentence after first sentence paragraph one: QUOTE it is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized UNQUOTE.
>
> […]
>
> EMB may present aide memoire to effect not intent US proposals require either party admit enterprises of other, including public corporations, but that purpose establish reasonable standards treatment those enterprises a party may admit by own decision."[149]

4.29 Thus, the *travaux*, and in particular the U.S. explanation for rejecting any qualification to the definition of "companies", as accepted by Iran, confirm that the Treaty Parties did not intend to limit the protections of the Treaty to entities carrying out certain commercial or business activities or functions. The United States made perfectly clear that the definition of "companies" and the recognition of their juridical status, which permits them, among other things, to claim in courts the protections granted by the Treaty, has no relation with "the activities for which they are organized". It follows that the Treaty Parties understood and agreed that the nature of activities or functions of entities constituted under the laws of the other Party are wholly irrelevant to their qualification as "companies" for the purpose of the Treaty.

4.30 In conclusion, Iran submits that the U.S. objection that Bank Markazi is not a "company" under the Treaty should be rejected. Bank Markazi, a separate juridical entity with legal personality constituted under the applicable laws and regulations of Iran, is plainly a "company" as broadly defined by the 1955 Treaty of Amity. Since the Treaty obligations under Articles III, IV and V are for the benefit of "companies"

[149] Telegram of the U.S. Department of State to the U.S. Embassy in Tehran, dated 13 December 1954 (IM, Annex 5).

including Bank Markazi, the U.S. treatment of the Bank is at least capable of constituting a breach of these obligations, and therefore falls within the Court's jurisdiction pursuant to Article XXI(2).

SECTION 2.
THE "COMPANY OBJECTION" DOES NOT POSSESS A PRELIMINARY CHARACTER

4.31 As demonstrated above, the Court should reject the U.S. objection because Bank Markazi is a company under a *bona fide* interpretation of the term "companies" under the Treaty.

4.32 Additionally, Iran submits that the U.S. objection does not have a preliminary character.

4.33 Indeed, quite apart from the argument that a central bank cannot, as a matter of principle, be a "company" under the treaty because it carries out sovereign functions, the U.S. contention seems to be that Bank Markazi cannot be protected by the Treaty in *this* case because in relation to the facts relevant to Iran's claims it did not perform "private and commercial activities"[150], "private or professional activities",[151] or "business" activities,[152] and was not "engaged in commerce".[153]

4.34 However, Bank Markazi's activities, including in relation to the facts relevant to Iran's claims, are plainly "professional", and even on the U.S. "functional understanding" approach they are economic in nature. Some of Bank Markazi's activities are also performed by private companies (e.g. concluding contracts; owning property; buying securities), and they pertain to commerce.

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150 U.S. Preliminary Objections, p. 96, paras. 9.2.

151 U.S. Preliminary Objections, pp. 102-103, para. 9.16.

152 U.S. Preliminary Objections, p. 104, para. 9.20.

153 U.S. Preliminary Objections, p. 96, para. 9.2; pp. 102-103, para. 9.16 and p. 104, para. 9.20.

4.35 Therefore, insofar as the U.S. objection requires the Court to make determinations about the nature of the activities of Bank Markazi in relation to the factual basis of Iran's claims, that objection concerns matters which can only be determined at the merits stage, and is not preliminary in character.[154]

[154] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 462-463, para. 136; p. 463, para. 139; and p. 465, para. 143.

CHAPTER V.
THE U.S. "IMMUNITY OBJECTION" IS MISCONCEIVED AND MUST BE REJECTED

SECTION 1.
INTRODUCTION

5.1 The U.S. "immunity objection" is premised on a selective exercise in treaty interpretation, which focuses on the absence of express reference to immunities and fails to engage with the arguments of treaty interpretation that Iran advanced in its Memorial. The totality of the U.S. objection is expressed as follows: "None of the articles of the Treaty Iran relies upon … namely, Articles III(2), IV(1), IV(2), X(1), and XI(4) – say anything about providing sovereign immunity protections".[155] In support of its position, the United States contends that FCN treaties, including the 1955 Treaty of Amity, "are not, and were never intended to be, vehicles for codifying sovereign immunity protections enjoyed by States or other State entities; these questions were left to be regulated by other rules existing separate from these treaties".[156]

5.2 The U.S. "immunity objection" is misconceived. The test for whether the Court has jurisdiction over Iran's relevant claims is not to ask whether the *entire* Treaty (much less any other treaty or FCN treaties generally) is a vehicle for codifying the law of sovereign immunity. The correct approach is to assess whether the proper interpretation or application of the provisions of the Treaty require consideration of compliance with the law of immunity, whether because the express wording of the Treaty's articles requires reference to those rules by way of *renvoi*, or for the purpose of interpretation according to all of the well-established rules of treaty interpretation.

5.3 The United States has failed to engage with Iran's position that the *very nature* of the protections established by these provisions of the Treaty requires consideration of

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155 U.S. Preliminary Objections, p. 80, para. 8.6. See also, to the same effect, pp. 93-94, para. 8.32.

156 U.S. Preliminary Objections, p. 80, para. 8.5. See also p. 79, para. 8.2.

rules of customary international law on immunity (as well as the U.S. laws on immunity).[157] In light of that position, it is plain that Iran's claims are at least capable of falling within these provisions, properly interpreted, and therefore within the Court's jurisdiction pursuant to Article XXI(2) of the 1955 Treaty of Amity.

5.4 The key point on the rules of interpretation on which the Parties disagree, and which accordingly requires elaboration in this Chapter, concerns the rule codified in Article 31(3)(c) of the Vienna Convention. The United States asserts that Iran is using Article 31(3)(c) "to rewrite the Treaty" and to "import international law unrelated to the Treaty provisions being interpreted".[158] In that respect, Iran makes the following five general points:

(a) The rule codified in Article 31(3)(c) of the Vienna Convention requires that any relevant rules of international law applicable in the relations between the parties be taken into account, as is evident from the use of the mandatory term "s*hall*".

(b) The phrase "*any* relevant rules of international law" implicitly refers to the "sources of international law" which appear in Article 38(1) of the Statute of the I.C.J.[159] As the I.L.C. Study Group on Fragmentation observed, application of the rule may therefore require reference to any relevant treaty provisions, rules of customary international law and/or general principles of international law.[160]

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157 Iran's Memorial, Chapter V.

158 U.S. Preliminary Objections, pp. 93-95, paras 8.30-8.35.

159 See e.g. *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, I.C.S.I.D. Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 87: "The relevant rules of international law cover all sources of international law." The ordinary meaning of the phrase "relevant rules of international law" is confirmed by the *travaux préparatoires* to the Vienna Convention: Sixth report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur (U.N. Doc. A/CN.4/186 and Add. 1-7), *in Y.I.L.C. 1966, vol. II*, p. 97, para. 10.

160 I.L.C., Conclusions of the work of the Study group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (U.N. Doc. A/CN.4/L.702, 18 July 2006), *in Y.I.L.C. 2006, vol. II, part 2*, p. 180, para. 18: "Article 31(3)(c) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law." See also e.g. *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, I.C.S.I.D. Case No. ARB/10/7 (Professor Piero Bernardini, Professor James Crawford, Mr Gary Born), Award, 8 July 2016, para. 317.

(c) The rule codified in Article 31(3)(c) of the Vienna Convention requires that "any *relevant*" rules of international law which are applicable are taken into account. The U.S. assertion that "relevant" is defined as "concern[ing] the subject matter of the provision at issue" is applied in an inappropriately narrow manner.[161]

i. Since the rule codified in the Vienna Convention does not specify any conditions of relevance, the term "relevant" is to be given its ordinary broad meaning. Had the drafters intended to confine recourse to such rules of international law "relating to the same subject matter" as the treaty being interpreted, they would have used that narrower formulation which appears in Article 30 of the Convention.[162]

ii. The Court has confirmed that a rule of international law will be "relevant" if it has a "certain bearing" on interpretation.[163] Similarly, the I.L.C. Study Group on Fragmentation referred to rules "bearing upon those same facts as the treaty under interpretation."[164]

iii. Contrary to the U.S. suggestion,[165] Gardiner does not support its narrow reading. He explains: "It seems reasonable to take the ordinary meaning of 'relevant' rules of international law as referring to those touching the same subject matter as the treaty provision or provisions being interpreted or which in any way affect that interpretation." [166]

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161 U.S. Preliminary Objections, p. 44, para. 5.12.

162 Article 30 concerns the application of successive treaties relating to the same subject-matter.

163 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 219, para 114. See also *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161, Separate Opinion of Judge Simma, p. 330, para. 9: "The Court…thus accepts, and rightly so, the principle according to which the provisions of any treaty have to be interpreted and applied in light of the treaty law applicable between the parties as well as of the rules of general international law 'surrounding' the treaty."

164 Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law – Report of the Study Group of the I.L.C., U.N. Doc. A/CN.4/L.682 (13 April 2006), para 416.

165 U.S. Preliminary Objections, p. 44, para. 5.12.

166 R. Gardiner, *Treaty Interpretation* (OUP 2015), p. 299.

(d) As to the phrase "applicable in the relations between the parties", the term "parties" refers to the contracting parties to the treaty being interpreted, in accordance with the definition of "party" in Article 2(1)(g) of the Vienna Convention.[167]

(e) The ordinary meaning of the phrase "applicable in the relations between the parties" encompasses situations in which the relevant international law rule is in force between the States Parties to the treaty being interpreted. As the I.L.C. commentary explains that Article 31(3)(c) was intended to "state only the broad principle and not attempt to define its results".[168]

5.5 The Court has applied the rule in Article 31(3)(c) in numerous cases.[169] In the *Namibia* Advisory Opinion, for example, the Court interpreted the concept of "sacred trust" by reference to the Charter of the United Nations and customary international law, observing that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation".[170] In the *Oil Platforms* case, the United States pursued a substantially similar argument to the one in the present case, proposing an unduly restrictive role for Article 31(3)(c). The Court rejected that argument.[171]

5.6 Contrary to the U.S. contention,[172] the Court did not "affirm[] the narrow purpose of VCLT Article 31(3)(c) in *Pulp Mills*". The *Pulp Mills* case is materially different because in that case, as the United States notes, Argentina argued that "the 'referral

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167 Article 2(1)(g), Vienna Convention: ""party" means a State which has consented to be bound by the treaty and for which the treaty is in force". See also R. Gardiner, *Treaty Interpretation*, pp. 310-317.

168 Third Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur (U.N. Doc. A/CN.4/167 and Add. 1-3), *in Y.I.L.C. 1964, vol. II*, p. 61.

169 See e.g. *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, pp. 34-35, para. 80, *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18 and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), Judgment, I.C.J. Reports 2008*, p. 219, paras 112-114.

170 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53.

171 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 817, paras. 41-43.

172 U.S. Preliminary Objections, pp. 45-46, para. 5.15.

clauses' contained in these articles [of the 1975 Statute between Argentina and Uruguay] make it possible to incorporate and apply obligations arising from other treaties and international agreements binding on the Parties".[173] The Court rejected that argument based on the specific language of the purported "referral clause",[174] rather than adopting a narrow interpretation of Article 31(3)(c). Indeed, that provision is not even mentioned in the Judgment.

5.7 The U.S. contentions that certain of Iran's claims are premised on a defective treaty interpretation analysis and amount to an attempt to apply customary international law rather than the 1955 Treaty of Amity, are without basis. In its Memorial, and in these Observations and Submissions, Iran applies the well-established principles of treaty interpretation referred to above, to the provisions of the Treaty upon which it relies.

5.8 In the remainder of this Chapter, Iran addresses the provisions of the Treaty put in issue by this aspect of the U.S. objection to jurisdiction (sections 2 to 5), before responding to the U.S. position that the Treaty was negotiated and concluded in isolation from the law of sovereign immunity (section 6).

SECTION 2.
ARTICLE III(2) OF THE TREATY OF AMITY

5.9 The U.S. abrogation of Bank Markazi's entitlement to freedom of access to the U.S. courts, and in particular its right to put forward and to be granted immunity defences, is at least capable of falling within Article III(2), and is therefore within the Court's jurisdiction pursuant to Article XXI(2).

5.10 In its Memorial, Iran explained that Article III(2) is comprised of two elements, both of which apply to "companies" without qualification. The first element entitles Iranian companies to a comprehensive and unqualified right to freedom of access to the courts

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173 *Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports 2010*, p. 43, para 56 and p. 45, para 61.

174 *Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports 2010*, pp. 45-46, paras. 62-63.

of justice and administrative agencies of the United States.[175] The second element requires that such access must be allowed, "in any event", on terms no less favourable than those applicable to companies of the United States or of any third country. Iran also explained that its right to freedom of access to the U.S. courts for its companies and nationals "in all degrees of jurisdiction" and "both in defence and pursuit of" the rights of the given company or national "to the end that prompt and impartial justice be done" under Article III(2) of the 1955 Treaty of Amity includes, on its ordinary meaning, the entitlement to raise applicable rights to immunity and to be granted applicable immunities from jurisdiction and enforcement.[176]

5.11 The United States accepts that Article III(2) requires access for Iranian companies to the U.S. judiciary.[177] However, the United States contends that Article III(2) excludes any right for Iranian companies (including Iranian State-owned companies) to raise and to be granted applicable immunities from jurisdiction and enforcement.[178] In raising this objection, the United States has failed to engage with Iran's submissions regarding the proper interpretation of the text of the provision. Indeed, the United States has not challenged Iran's position that Article III(2) grants "the most comprehensive" and unqualified right of freedom of access to the U.S. courts.[179] Instead, the United States confines its objection to the absence of any *express* reference to immunities.[180] That is a selective approach to treaty interpretation which should be rejected.[181] There is nothing whatsoever in Article III(2) to suggest that only certain forms of access or certain pleas are protected. The question, for present purposes, is whether Iran's claim that access to the U.S. judiciary is being denied to

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175 Iran's case on Article III(2) of the 1955 Treaty is as set out at Iran's Memorial, Chap V(1), paras. 5.2 to 5.18.

176 Iran's Memorial, p. 79, para. 5.5 and pp. 85-86, paras. 5.17-5.18.

177 U.S. Preliminary Objections, p. 80, para. 8.6 and pp. 93-94, para. 8.32.

178 U.S. Preliminary Objections, p. 95, para. 8.36: "Iran cannot rely on Article[] III(2)…as a basis for jurisdiction over sovereign immunity-related claims."

179 Iran's Memorial, p. 79, para. 5.4.

180 U.S. Preliminary Objections, p. 80, para. 8.6: Article III(2) does not "say anything about providing sovereign immunity protections".

181 See further Section 1 *supra*.

Iranian companies (through *inter alia* a denial of immunity) is capable of falling within Article III(2). Plainly it is.

5.12 Additionally, the United States has mischaracterised Iran's argument that Article XI(4) of the Treaty forms part of the context and confirms that the Parties did not intend to waive immunities for activities *jure imperii*.[182] The United States contends that this provision is a "key element of the Treaty's effort to level the playing field between State enterprises and their private counterparts engaged in activities in the specific fields governed by the Treaty".[183] As to this, there is some common ground between the Parties as to the aim of Article XI(4), as follows from Iran's Memorial.[184] However, the United States then contends that Article XI(4) "in no way indicates that the Treaty was also intended to be a source of affirmative sovereign immunity rights".[185] This is to confuse the issue. It is not Iran's case that the 1955 Treaty of Amity is a source of sovereign immunity rights in that it aims to be a code on sovereign immunity. Rather, the Treaty contains an important series of protections which, by reference to their own terms, may protect rights to immunities that have their source in customary international law (and U.S. law).

5.13 The United States seeks to rely on Iran's pleadings in domestic proceedings before U.S. courts to the effect that Article XI(4) did not waive the immunity of the State itself as compared to its "enterprises" as support for the separate proposition that Iran did not believe that Article XI(4) had *any* effect on immunity.[186] However, once again, the United States mischaracterises Iran's position. It is disingenuous to expect Iran to argue that Article XI(4) constitutes a general waiver of sovereign immunity – a position contrary to the text, context and object and purpose of the Treaty as well as Iran's legal position. Iran's argument is different and straightforward – that Article XI(4) places no limit on the right to rely on immunity in respect of acts *jure*

182 U.S. Preliminary Objections, Chapter 8, section C.

183 U.S. Preliminary Objections, p. 82, para. 8.10.

184 Iran's Memorial, p. 80, para. 5.8.

185 U.S. Preliminary Objections, p. 82, para. 8.10 and pp. 87-89, paras. 8.21 to 8.23.

186 U.S. Preliminary Objections, para. 8.23, and see e.g. U.S. PO Annex 230, at 31.

imperii and confirms by strong implication the existence of a Treaty obligation that such immunity must be upheld.[187]

5.14 While Iran maintains that Article XI(4) imposes an implied obligation to grant immunities for activities *jure imperii*, the relevance of that provision for the purposes of the interpretation of Article III(2) does not depend on the existence of such an implied obligation.[188]

5.15 Nor do the U.S. arguments on Iran's alleged practice regarding Article XI(4) have any bearing on the interpretation of Article III(2). In this respect, the United States claims that Iran and certain Iranian State entities have "passed up numerous opportunities in litigation before U.S. courts to claim sovereign immunity as a Treaty right".[189] It refers to two cases, one diplomatic note, and Iranian parliamentary debates. Each of these will be addressed briefly in turn.

5.16 First, as to the 5th Circuit proceeding in 1979-81 concerning a contract action against Iran, its Social Security Organization and the Ministry of Health and Welfare:[190]

(a) In the case, Iran emphasised that the Treaty did not apply to the Government of Iran but only to its enterprises, but this was said in relation to Article XI(4), not Articles X or III(2) which were not in issue in the domestic proceedings.

(b) Iran argued that the Treaty did not constitute a *general* waiver of sovereign immunity – a position that Iran maintains in this case.[191] The simple and correct point that Iran was making in its pleadings before the U.S. court was that Article XI(4) "cannot be seen as removing sovereign immunity from <u>all</u> government agencies that have any contact with the territories of the other state,

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187 See Iran's Memorial, para. 5.8.

188 See Iran's Memorial, p. 83, para. 5.13: "Related to this, the U.S. legislative, executive and judicial measures have also breached the implied obligation under Article XI(4) of the 1955 Treaty of Amity so far as concerns acts *jure imperii* and/or where State of Iran and Iranian State-owned companies did not engage in commercial activities within the United States."

189 U.S. Preliminary Objections, Chapter 8, section B, paras. 8.2 and 8.13.

190 U.S. Preliminary Objections, pp. 84-85, paras. 8.14 to 8.16.

191 U.S. Preliminary Objections, p. 84, para 8.14; U.S. PO Annex 228 at 35.

but only those government "enterprises" in competition with domestic enterprise and operated for a profit."[192]

(c) The United States seeks to infer from the fact that Iran's arguments before the U.S. courts were based on the U.S. Foreign Sovereign Immunities Act ("**FSIA**"), rather than the 1955 Treaty, a concession that the Treaty did not provide the basis for Iran's invocation of immunity. No such concession may be inferred. Iran's reliance on the FSIA provisions on waiver, the commercial activity exception, prejudgment attachment, and immunity from execution of funds and assets[193] makes perfect sense in a proceeding before a U.S. court. The fact that the FSIA provided the "governing framework"[194] for questions of immunity under U.S. law before U.S. courts does not exclude the relevance of the Treaty's provisions on immunity under international law in international proceedings.

(d) In any event, this is a proceeding from over 35 years ago, taking place in the difficult period directly following the Revolution, when Iran was involved in over 400 cases and had difficulties in getting appropriate instructions to those representing it in the United States.

5.17 Secondly, as to the enforcement proceedings before the 2nd Circuit in the *Peterson* case, the United States claims that Bank Markazi cast its arguments in terms of the FSIA rather than the Treaty of Amity.[195] The stance adopted by Bank Markazi is of no assistance to the United States:

(a) First, the Defendant in that case was not Iran but Bank Markazi, a separate entity conducting its own litigation.

(b) Second, as stated just above, it was appropriate for Bank Markazi to invoke the FSIA in U.S. domestic proceedings.

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192 U.S. PO, Annex 228, p. 33, emphasis in original. The same point is made in U.S. PO, Annex 230 at p. 30.

193 U.S. PO, Annex 228, pp. 13-14, 36-42, 44.

194 U.S. Preliminary Objections, p. 85, para. 8.16.

195 U.S. Preliminary Objections, pp. 85-86, para. 8.17.

(c) Third, the United States incorrectly contends that the fact that Bank Markazi "did *not* allege a breach [of the Treaty] based on the lower court's denial of Iran's claim that the assets enjoyed sovereign immunity" means that the Bank (and Iran) believed that sovereign immunity did not arise under the Treaty.[196] In fact, Bank Markazi's pleading explains that 22 USC § 8772 (in the "Iran Threat Reduction and Syria Human Rights Act of 2012" – "**ITRSHRA**"):

> "includes particularized language providing that it applies "notwithstanding any other provision of law, *including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law[.]*" 22 U.S.C. § 8772(a)(1) (emphasis added). Thus, Congress was quite specific about which "provision[s] of law" it intended to abrogate in § 8772 – yet Congress failed to include any reference whatsoever to the Treaty in § 8772."[197]

It is thus unsurprising that Bank Markazi did not plead that the sovereign immunity arose under the Treaty. It was pleading within the specific meaning, and for the limited purpose, of the 'notwithstanding clause' in 22 USC § 8772.[198]

5.18 Thirdly, the United States seeks to rely on the absence of any explicit reference to the Treaty in the 1998 Iranian Diplomatic Note objecting to initial judgments entered against Iran.[199] The purpose of this short (1.5) page note is not to provide a comprehensive legal argument but succinctly and urgently to convey Iran's protest against the U.S. actions. In any event, the note expressly states that Iran's property "enjoys immunity under international treaty obligations of the United States".

5.19 Finally, the United States claims that the Iranian parliamentary debates on legislation stripping the United States of immunity contain no explicit reference to the measures "as a response to perceived violations of the Treaty".[200] The absence of express reference to the Treaty is irrelevant. It was not in issue in the parliamentary debates.

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196 U.S. Preliminary Objections, pp. 86-87, para. 8.18 (emphasis in original).

197 U.S. PO, Annex 233, p. 43.

198 U.S. Preliminary Objections, p. 86, para. 8.18, fn. 348. In any event, the proposition that the 1955 Treaty does not concern state immunity in particular is to be distinguished from a concession that it does not concern state immunity at all.

199 U.S. Preliminary Objections, p. 86, para. 8.17 citing IM, Annex 89.

200 U.S. Preliminary Objections, p. 86, para. 8.17.

If anything, these debates suggest that the Iranian legislation was intended as a counter-measure in response to the U.S. violations, which indeed it was.[201]

5.20 The above instances do not come close to establishing relevant subsequent practice. Indeed, subsequent practice is only relevant if it gives rise to an "*agreement* between the parties regarding the interpretation of the treaty or the application of its provisions".[202] The instances cited by the United States do not demonstrate any "agreement" between the Treaty Parties that the 1955 Treaty of Amity does not contain protections which, by reference to their terms, may protect rights to immunities under customary international law. As a leading commentator observes: "The interpretative value of subsequent practice, which by definition is not a formal, textual agreement, is wholly dependent on the practice being concordant, the agreement being that of all parties and the resultant interpretation being a single autonomous one".[203] Moreover, the United States cites Iranian practice rejecting an interpretation of the treaty as a *general waiver* of immunity, which is different to practice showing Iran did not consider immunity to arise *at all* under the Treaty.

5.21 On a proper interpretation of Article III(2), the U.S. abrogation of Bank Markazi's right to put forward, and to be granted, immunity defences which the United States does not deny it would otherwise enjoy (like the central banks of third states) as a matter of U.S. law, and to which it is entitled under customary international law, is at least capable of falling within that provision.[204] This interpretation is supported by reference to the *travaux*, which shows that the Treaty Parties agreed that the definition of "companies" extends to state-owned companies,[205] such that issues of immunity might arise and be subject to the limited waiver in Article XI(4). Accordingly, the Court has jurisdiction *ratione materiae* to determine this aspect of Iran's claim pursuant to Article XXI(2).

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201 See e.g. U.S. PO, Annex 167, p. 2 & U.S. PO, Annex 168, p. 2.

202 Article 31(3)(b) VCLT (emphasis added).

203 R. Gardiner, *Treaty Interpretation* (OUP 2015), p. 268.

204 Iran's Memorial, pp. 81-83, paras. 5.12 to 5.13. Contrary to the U.S. contention, at fn. 371 of its Preliminary Objections, the appropriate comparison under Article III(2) is to the treatment of foreign central banks. See further Iran's Memorial, p. 85, para. 5.17.

205 See pp. 43-44, paras. 4.26 to 4.29 *supra*. See also Iran's Memorial, pp. 65-66, para. 4.5.

SECTION 3.

ARTICLE IV(1) OF THE TREATY OF AMITY

5.22 The U.S. (undisputed) abrogation of immunities to which Bank Markazi is entitled is at least capable of constituting a breach of the entitlement of Iranian companies to fair and equitable treatment, and/or freedom from unreasonable or discriminatory treatment that would impair legally acquired rights and interests, under Article IV(1). The alleged breach therefore falls within the Court's jurisdiction pursuant to Article XXI(2).

5.23 In its Memorial, Iran has shown that the U.S. acts constitute numerous breaches of Article IV(1).

5.24 As to the first protection contained within Article IV(1), fair and equitable treatment:

(a) The U.S. acts are arbitrary, grossly unfair, unjust and idiosyncratic.[206] The U.S. abrogation of the immunities to which Bank Markazi is entitled, and which protect its property, are both egregious and inconsistent with the practice of all other States (save for Canada).[207]

(b) The U.S. acts are discriminatory.[208] Bank Markazi has been singled out (along with other Iranian companies) and denied the generally available and elementary immunity defence afforded to the property of a central bank from enforcement. The discriminatory nature of the U.S. measures is emphasised by the fact that they are contrary to customary international law and are not mirrored generally in the practices of other States,[209] and that U.S. legislation (Section 502 of the ITRSHRA) has gone so far as to target Bank Markazi

206 Iran's Memorial, pp. 96-97, para. 5.44.

207 See Iran's Memorial, Chapter III, Section 2(A)(a)(ii), p. 55, para. 3.29.

208 Iran's Memorial, pp. 97-98, para. 5.45.

209 See Iran, Memorial, Chapter III, Section 2(A)(a)(ii), p. 55, paras. 3.29 to 3.30.

specifically and individually in the *Peterson* case, removing available defences under U.S. law with retroactive effect.[210]

(c) The unreasonable and discriminatory nature of the U.S. measures is emphasised by their being inconsistent with customary international law and the practices of other States (including the United States prior to the changes to the FSIA at issue in this case),[211] and the very specific targeting that U.S. legislation has effected (including with retroactive effect). The impairment of Bank Markazi's legally acquired rights is manifest, since it has been deprived of massive sums in which it has a legal or beneficial interest.

(d) The U.S. acts involve a lack of due process leading to an outcome which offends judicial propriety and/or have resulted in a denial of justice so far as concerns Bank Markazi.[212] Through legislative and executive fiat, Bank Markazi has been denied the right (i) to raise and (ii) be granted an immunity defence.

(e) The U.S. acts have defeated and continue to defeat the legitimate expectations of Bank Markazi that it and its property would not be specifically targeted through the enactment of legislation having discriminatory and/or retroactive effect and that, in light of the obligations assumed by the Parties to the 1955 Treaty, applicable principles of sovereign immunity under international law would be respected.[213]

5.25 Contrary to the U.S. position,[214] Iran's claims under Article IV(1) are limited to breaches of entitlements owed to Iranian companies (including State-owned companies).[215] In determining those claims, and in particular the alleged breach of fair

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210 *Bank Markazi v. Peterson et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016), joint dissenting opinion of Roberts CJ and Sotomayor J, at pp. 7-8 (IM, Annex 66).

211 Iran's Memorial, Chapter II, Section 1, p. 16, para. 2.4.

212 Iran's Memorial, p. 98, para. 5.46.

213 Iran's Memorial, pp. 98-99, para. 5.47.

214 U.S. Preliminary Objections, p. 93, para. 8.30, fn. 368 and p. 100, para. 9.11, fn. 394.

215 Iran's Memorial, p. 96, para. 5.43: "*As to the first protection contained within Article IV(1)*, the obligation at all time to accord fair and equitable treatment to (*inter alia*) Iranian companies and their property and enterprises, the acts of the USA have, and continue to, cut across each of the elements of

and equitable treatment, the Court must consider the relevant factual and legal context i.e. the U.S. abrogation of sovereign immunities.[216]

5.26 Rather than engaging with Iran's arguments regarding the interpretation of Article IV(1), as in relation to Article III(2), the U.S. objection is limited to the observation that the *express* terms of Article IV(1) do "not say anything about providing sovereign immunity".[217] That adds nothing. The question (for now) is whether the terms of Article IV(1) may be engaged, not whether the words "sovereign immunity" are expressly referred to in that provision. The United States also observes that in its Judgment in the *Oil Platforms* case the Court found that this provision did not "lay down any norms applicable to th[at] particular case", and therefore did not form a basis of jurisdiction.[218] That specific finding is not relevant in the present case and does not support the U.S. objection to jurisdiction.

SECTION 4.
ARTICLE IV(2) OF THE TREATY OF AMITY

5.27 The U.S. abrogation of immunities to which Bank Markazi is entitled is at least capable of constituting a breach of the right to the most constant protection and security under Article IV(2), and therefore falls within the Court's jurisdiction pursuant to Article XXI(2).

5.28 As Iran explained in its Memorial, the first limb of Article IV(2) entitles Iranian companies to the right to most constant protection and security of their property "in no case less than that required by international law".[219]

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identified in paragraph 5.26 *supra*, and have thereby breached this first limb of Article IV(1)." See also pp. 98-99, para. 5.47.

216 See Iran's Memorial, pp. 96-97, para. 5.44(a) and (d).

217 U.S. Preliminary Objections, p. 80, para. 8.6.

218 U.S. Preliminary Objections, pp. 42-43, para. 5.8 citing *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 816, para. 36.

219 Iran's Memorial, pp. 100-102, paras. 5.52 to 5.57.

5.29 The United States does not deny that the protection required under Article IV(2) extends to legal as well as physical protection.[220] Indeed, the U.S. agreement on this issue is established by its submissions before the Chamber in the *ELSI* case with respect to Article V(1) of the 1948 Italy-United States FCN Treaty.[221]

5.30 Rather than engaging with the Iran's arguments regarding the interpretation of Article IV(2), again, the U.S. objection is limited to the observation that the *express* terms of Article IV(2) do "not say anything about providing sovereign immunity".[222] However, the ordinary meaning of the entitlement to the most constant protection and security "in no case less than that required by international law" under Article IV(2) requires reference to, and compliance with, rules of customary international law as they exist from time to time, including the law of immunity. Accordingly, those rules of customary international law are incorporated by reference and are directly applicable as the "floor" of protection afforded by Article IV(2) of the Treaty.

5.31 In a similar way to the terms of Article IV(2), the *renvoi* to "other rules of international law " in Article 2(3) of the U.N. Convention on the Law of the Sea[223] was found by the Annex VII tribunal in the *Chagos Islands* case to impose an obligation on parties to exercise sovereignty in the territorial sea subject to the general rules of international law.[224] Accordingly, the tribunal held that "general international law requires the United Kingdom to act in good faith in its relations with Mauritius, including with respect to undertakings".[225] The *renvoi* was not interpreted as being restricted in a manner equivalent to that now sought by the United States.

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220 See Iran's Memorial, p. 101, para. 5.57 citing *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 66, para. 111, applying Article V(1) of the 1948 Italy-United States FCN Treaty. Compare, U.S. Preliminary Objections, pp. 90-92, paras. 8.25-8.29, which address only the question whether Article IV(2) requires compliance with the law of state immunity.

221 *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, pp. 65-66, para. 109 recording the U.S. submission that "the Respondent violated its obligations [to afford constant protection and security] when it unreasonably delayed ruling on the lawfulness of the requisition for 16 months".

222 U.S. Preliminary Objections, p. 80, para. 8.6.

223 Article 2(3) reads: "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law".

224 *Chagos Marine Protected Area Arbitration (The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland),* Award, 18 March 2015, paras. 514-516.

225 *Ibid*. para. 517.

5.32 The undisputed seizure of the security entitlements of Bank Markazi to the amount of amount of USD 1.895 billion in the *Peterson* proceedings[226] is at least capable of constituting a breach of Bank Markazi's entitlement to the most constant protection and security for its property under Article IV(2) of the Treaty. Such breach includes the denial to Bank Markazi of protection as required by international law in the form of immunities from enforcement so far as concerns its property, as well as the denial to Bank Markazi of any form of legal defence so far as concerns protection of its property in the *Peterson* case (see the impact of Section 502 of the ITRSHRA).[227] Accordingly, the Court has jurisdiction over this aspect of Iran's claim pursuant to Article XXI(2) of the Treaty.

SECTION 5.

ARTICLE X(1) OF THE TREATY OF AMITY: BREACH BY THE UNITED STATES OF IRAN'S ENTITLEMENT TO FREEDOM OF COMMERCE BETWEEN THE TERRITORIES OF IRAN AND THE UNITED STATES

5.33 The U.S. abrogation of immunities to which Bank Markazi is entitled is likewise at least capable of constituting a breach of the right to freedom of commerce between the territories of Iran and the United States under Article X(1). Thus it also falls within the Court's jurisdiction pursuant to Article XXI(2).

5.34 It is common ground that Article X(1) is to be interpreted as per the Court's Judgment in the *Oil Platforms* case.[228] As Iran explained in its Memorial: (a) the meaning of "commerce" "includes commercial activities in general" as well as "ancillary activities integrally related to commerce";[229] (b) any act capable of impeding

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226 *Peterson et al. v. Islamic Republic of Iran et al.*, U.S. District Court, Southern District of New York, 28 February 2013, 2013 U.S. Dist. LEXIS 40470 (*S.D.N.Y. 2013*) (IM, Annex 58), confirmed by *Peterson et al. v. Islamic Republic of Iran et al.*, U.S. Court of Appeals, Second Circuit, 9 July 2014, *758 F.3d 185* (2nd Cir. 2014) (IM, Annex 62) and, subsequently, by *Bank Markazi v. Peterson et al.*, U.S. Supreme Court, 20 April 2016, 578 U.S. 1 (2016) (IM, Annex 66).

227 Iran's Memorial, p. 103, para. 5.60.

228 U.S. Preliminary Objections, p. 94, para. 8.34.

229 Iran's Memorial, p. 113, para. 6.13. In this connection, Iran notes that the United States accepts the "integrally related" test: see U.S. Preliminary Objections, p. 94, para. 8.34.

"freedom of commerce" falls within Article X(1);[230] and (c) the provision protects freedom of commerce "[b]etween the territories of the two High Contracting Parties".[231]

5.35 While the United States reiterates its basic point that Article X(1) does not "say anything about providing sovereign immunity protections",[232] it does not dispute Iran's interpretation of "freedom of commerce" as a "broad concept".[233] The Court's Judgment in the *Oil Platforms* case demonstrates that the absence of express language could not be decisive. Notwithstanding the absence of any express definition of "commerce", the Court has held that that term is not to be interpreted narrowly as "the immediate act of purchase and sale", but also encompasses "the ancillary activities integrally related to commerce".[234]

5.36 The entitlement to sovereign immunities of the State of Iran, and the entitlement of central bank immunities of Bank Markazi, are "integrally related" to "freedom of commerce" between the territories of the Treaty Parties.[235] The U.S. rejection of this proposition rests on its narrow reading of the two concepts of "freedom of commerce" and "sovereign acts" as mutually exclusive.[236] The U.S. interpretation wrongly conflates the broad concept of "freedom of commerce" in the 1955 Treaty of Amity with the entirely separate and narrower concept of acts *jure gestionis* (which it characterises as "commercial or private acts") in the law of state immunity.

5.37 In its Memorial, Iran explained that "[t]he essential duty of a central bank is to serve as the guardian and regulator of the monetary system and currency of that State both

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230 Iran's Memorial, p. 113, para. 6.14.

231 Iran's Memorial, p. 113, para. 6.15.

232 U.S. Preliminary Objections, para. 8.6.

233 Iran's Memorial, p. 114, para. 6.16.

234 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 819, para. 49. See *supra*, pp. 15-17, paras. 2.15-2.17.

235 See p. 42, para. 4.24 *supra*.

236 U.S. Preliminary Objections, p. 94, para. 8.34: "Iran fails to explain how a commercial treaty provision relating to freedom of *commerce*…can coherently be understood to create obligations relating to the circumstances in which the Parties will afford sovereign immunity protections to each other's *sovereign* acts."

internally and internationally. Central banks therefore play a key role in the exercise of a State's monetary sovereignty."[237] As the tribunal in *Gold Looted by Germany from Rome in 1943* observed, the performance of central banking activities "affects the economic prosperity of the entire community".[238] The United States accepts that "the Treaty of Amity does expressly address central banking activities, in Article VII concerning the application of exchange restrictions".[239] In this connection, Article VII(3) explicitly recognises that such central banking activities may "influence … the commerce, transport or investment of capital".[240] Such central banking activities are clearly in the exercise of sovereign authority irrespective of whether the central bank is a "company" within the definition of Article III(1).

5.38 In the case of Bank Markazi, which is a "company", it is common ground between the Parties that Iran's Monetary and Banking Act 1972 provides that Bank Markazi "shall have the task of formulating and implementing monetary and credit policies on the basis of the general economic policy of the State", and that the "objectives of the Central Bank of the Islamic Republic of Iran are to maintain the value of the currency and the equilibrium in the balance of payments, to facilitate trade transactions, and to assist the economic growth of the country."[241] Indeed, as noted in Chapter I above, Bank Markazi *inter alia* provides foreign exchange with respect to Iranian foreign trade and hence it has a role to play so far as concerns the USD multi-billion purchases by Iranian companies of new Boeing aircraft and other commercial transactions permitted under U.S. existing laws and regulations. It follows that the U.S. interference with the functions of a central bank such as Bank Markazi through the abrogation of immunities to which it is entitled are at the very least capable of

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237 Iran's Memorial, p. 53, para. 3.24.

238 See e.g. *Gold Looted by Germany from Rome in 1943 (USA/France/UK/Italy),* Award of 20 February 1953, 20 *I.L.R.* 441, p. 474: "Even when they take the form of purely private financial establishments, or semi-private, the banks invested with the exclusive privilege of issuing bank-notes recognized as legal tender and valid for payments, discharge a function which affects the economic prosperity of the entire community, since they have to regularize all money transactions. When creating them, the State aimed less at drawing profits from their activity than at making the whole national community share the advantages of monetary stability."

239 U.S. Preliminary Objections, p. 102, para. 9.15, fn. 404.

240 See also Article VIII(5) of the 1955 Treaty.

241 Monetary and Banking Act, Article 10(a) and (b) (IM Annex 73) quoted at U.S. Preliminary Objections, pp. 97-98, para. 9.5. See also Iran's Memorial, pp. 66-67, para. 4.7.

interfering with the "freedom of commerce" between the territories of the Parties to the same extent as the blockading of a harbour or the blowing up of an oil platform, but in fact rather more so.[242]

SECTION 6.
RESPONSE TO THE U.S. CONTENTION THAT THE 1955 TREATY OF AMITY WAS NOT INTENDED TO CODIFY THE LAW OF SOVEREIGN IMMUNITY

5.39 Finally, as a separate matter, Iran will respond to the U.S. contention that FCN treaties, including the 1955 Treaty of Amity, "are not, and were never intended to be, vehicles for codifying sovereign immunity protections enjoyed by States or other State entities; these questions were left to be regulated by other rules existing separate from these treaties".[243] As explained above, this is not the correct test for present purposes. Nor is it correct in fact.

5.40 The Treaty Parties envisaged that issues of immunity would arise within the scope of the protections under the Treaty, subject to the limited waiver in Article XI(4). That indeed is evident from the text of Article XI(4). As noted in Chapter IV above, the term "companies" as defined in Article III(1) encompasses any kind of corporate entity, including those wholly or partly owned or controlled by the State, and without regard to the nature of their activities. It covers government instrumentalities and agencies that enjoy separate juridical status and immunity for acts in the exercise of sovereign authority.

5.41 In principle, any type of company may be directed or empowered by the State to perform certain sovereign functions. For example, private companies may be directed or empowered to take custody of prisoners in prisons, or to perform certain police functions on railways. Immunity may attach to the performance of those functions, and the State has a right to have its immunity respected when bodies that it has directed

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242 In this connection, as to the scale of the U.S. interference with "freedom of commerce", Iran recalls that in the *Peterson* proceedings also the U.S. courts have seized and turned over the 'blocked assets' of Bank Markazi of USD 1.895 billion in security entitlements.

243 U.S. Preliminary Objections, p. 80, para. 8.5. See also p. 79, para. 8.2.

or empowered to act on its behalf do so act. But state-owned/controlled companies are more likely to be acting in the exercise of sovereign authority and to benefit from State immunity.

5.42 The United States asserts that the reference to consular immunities in the Treaty implies that other immunities are not included in the Treaty's scope.[244] However, the express reference to some types of immunity (consular) and certain aspects of sovereign immunity (waiver under Article IX(4)) merely shows that rules of international law on immunity were envisaged as properly arising under in the Treaty. Nowhere does the Treaty state or imply that no issues of immunity other than those expressly mentioned may be considered. Rather, issues of immunity fall to be considered and resolved like any other rules of international law relevant to the Treaty (as well as by reference to U.S. law where this is applicable by virtue of the most favoured nation provision in Article III(2)). In this respect, the drafters expressly referred to other rules of international law, for example through the language of Article IV(2), discussed above.

5.43 For the United States, the "object and purpose" of the Treaty "does not logically relate to" sovereign immunity. It is said to be concerned with commercial and consular relations.[245] But the quotation from *Oil Platforms* relied on by the United States confirms the broad scope of the Treaty, and likewise the fact that the Treaty is concerned with "access to courts and arbitration" and "safeguards for the nationals and companies of each of the contracting parties as well as their property and enterprises", both of which are, according to the test applied by the Court in *Oil Platforms*, "integrally related" to the law of immunity.[246] The question for present purposes is whether the protections under the Treaty are capable of engaging the rules on immunity. Plainly they are.

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244 U.S. Preliminary Objections, p. 5, para. 1.14 and pp. 80-81, para. 8.7.

245 U.S. Preliminary Objections, p. 81, para. 8.8 quoting *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 813, para. 27.

246 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 813, para. 27. See *supra*, pp. 62-63, paras. 5.34-5.35.

5.44 Contrary to the U.S. suggestion, it is not Iran's case that the Treaty should be interpreted as "incorporating … all of the provisions of international law" concerning peaceful and friendly relations between the two States.[247] Rather, the Treaty is to be interpreted, *inter alia*, by reference to its terms, including any *renvoi*, and taking into account those relevant rules of international law that are applicable between the Treaty Parties.[248]

5.45 In its Judgment in the *Oil Platforms* case, the Court did not limit the Treaty's object and purpose to commercial and consular relations, but recognised that the Treaty was intended to foster the "harmonious development of their commercial, financial and consular relations" that would in turn reinforce friendly relations between the Treaty Parties.[249] Rules that facilitate such harmonious development include the rules of immunity allocating jurisdiction between the Treaty Parties and protecting acts in the exercise of sovereign authority from foreign judicial scrutiny. Rules on other aspects of international law, such as rules on maritime delimitation for example, are not relevant to such relations between the Treaty Parties.

5.46 The United States claims that, in 1955, there was a diversity of views regarding the absolute or restrictive theories of sovereign immunity so the Treaty text would have to be specific to confirm what view the Treaty Parties saw as operative between them.[250] However, three years prior to the adoption of the 1955 Treaty, the United States made clear its position in the Tate Letter of 1952.[251] Moreover, the Treaty text was specific as to the restrictive doctrine in Article XI(4), which is identical to Article XVIII(3) in the U.S. Standard Draft FCN Treaty. As the Sullivan Study observes, "Article XVIII(3) was, of course, a clear application of the restrictive theory and in harmony with the Tate letter".[252]

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247 See U.S. Preliminary Objections, p. 81, para. 8.9.

248 See *supra*, pp. 31-32, paras. 3.13-3.15 and pp. 47-51, paras. 5.2-5.7.

249 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 814, para. 28.

250 U.S. Preliminary Objections, pp. 82-83, para. 8.11.

251 U.S. PO Annex 225.

252 C. Sullivan, "Treaty of Friendship, Commerce and Navigation, Standard Draft", U.S. Department of State (1962), pp. 271-272 (IM, Annex 20).

5.47 The United States argues that the *travaux* do not include any statements indicating that the Treaty would affect the immunity of the State or afford immunity to State-owned companies.[253] It relies exclusively on three cables between the U.S. Embassy in Tehran and the U.S. State Department.[254] These cables are merely a snapshot in time of a complex negotiating process, and cannot be relied upon as definitive evidence of the Parties' intentions.

[253] U.S. Preliminary Objections, p. 83, para. 8.12.

[254] IM, Annex 2; U.S. PO, Annexes 226-227.

CHAPTER VI.
ARTICLE XX(1) OF THE 1955 TREATY OF AMITY DOES NOT EXCLUDE THE MATTERS SPECIFIED THEREIN FROM THE JURISDICTION OF THE COURT

6.1 The U.S. objection regarding Article XX(1) of the 1955 Treaty of Amity is limited to only one aspect of Iran's claims, namely the alleged breaches occasioned by the adoption and implementation of Executive Order 13599.[255] The United States contends that, pursuant to Article XX(1)(c) and/or (d), "Executive Order 13599 is placed firmly outside the four corners of the Treaty and hence outside the Court's jurisdiction".[256] This objection is misconceived, since it lacks a textual basis and is inconsistent with the Court's case law. It should also be dismissed. Properly construed, Article XX(1) of the Treaty provides for a potential defence on the merits by excusing conduct which would otherwise amount to a breach: it does not exclude such matters from the scope of the Treaty.

6.2 As the Court observed in its Judgment in the *Oil Platforms* case, the starting point is that "the Treaty of 1955 contains no provision expressly excluding certain matters from the jurisdiction of the Court".[257] Instead, Article XX (1) provides, so far as relevant:

> "The present Treaty shall not preclude the application of measures:
>
> ...
>
> (c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; and
>
> (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

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255 U.S. Preliminary Objections, pp. 4-5, para. 1.12; p. 62, para. 7.1 and pp. 65-78, paras. 7.10-7.37.

256 U.S. Preliminary Objections, p. 78, para. 7.37.

257 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 811, para. 20.

6.3 It is trite that the Court must interpret the actual provision before it. Article XX(1) does not state that the consequence of 'non-preclusion' is that the Treaty is inapplicable to the measures specified therein.

6.4 The U.S. interpretation of Article XX(1) is without textual basis. The ordinary meaning of the phrase "[t]he present Treaty shall not preclude the application of measures" is not that the matters specified are excluded from the scope of the Treaty, but that the adoption of such measures will not constitute a breach of the Treaty (if, as determined at the merits phase, the measures do indeed fall within Article XX(1)). The ordinary meaning of the term "preclude" means to "make impossible".[258] Thus, Article XX(1) simply provides that the Treaty does not "make impossible" a Party's application of measures specified in subparagraphs (c) or (d). Article XX(1) does not identify the consequences which arise when a Party does apply such measures. However, by way of analogy, the term "preclude" reflects the language of circumstances precluding wrongfulness under general international law, i.e. the existence of a defence rather than a jurisdictional limitation. The ordinary meaning is supported by the context, including the absence of any reference to Article XX in Article XXI(2), which delimits the Court's jurisdiction.

6.5 Further, the U.S. interpretation of Article XX(1) is inconsistent with the Court's case law. The Court has already examined the effect of Article XX(1) in its Judgment in the *Oil Platforms* case, and held that "Article XX, paragraph 1 (d), does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise."[259] In reaching this finding, the Court affirmed its earlier interpretation of the identically worded clause included in the United States-Nicaragua Treaty of Friendship, Commerce and Navigation 1956 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*:[260]

> "*Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes*

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258 "Preclude" in *Oxford English Dictionary*, Oxford: O.U.P., 7th ed., 2012.

259 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 811, para. 20.

260 *Ibid.*, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222 and p. 136, para. 271.

> *the interpretation and application of that article from the jurisdiction of the Court* as contemplated in Article XXIV. *That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception*, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action 'which it considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such."[261]
>
> "Article XXI of the Treaty provides that "the present Treaty shall not preclude the application of" such measures. *The question thus arises whether Article XXI…affords a defence to a claim*…"[262]

6.6 In light of the Court's finding set out above, the United States is wrong to assert that the *Nicaragua* Judgment "did not bar consideration of the equivalent clause as a jurisdictional objection…[and] did not explicitly engage with the question of whether a measure, once found to fall within an exception, could be excluded from the Court's jurisdiction".[263] The most straightforward analysis, and the one supported by the ordinary meaning and context of Article XX, is that where the provision applies it affords a defence to conduct that would otherwise amount to a breach of the Treaty.

6.7 Further, the U.S. objection by reference to Article XX could not, in any event, be regarded as having an exclusively preliminary character within the meaning of Article 79, paragraph 7, of the Rules of Court. It is clear from the Court's judgments in both *Nicaragua* and *Oil Platforms* that the issue of the interpretation and application of Article XX (1) of the 1955 Treaty does not possess an exclusively preliminary character but is inherently tied to the merits.[264] In *Nicaragua*, the Court held that:

> "Since Article XXI of the 1956 Treaty contains a power for each of the parties to derogate from the other provisions of the Treaty, *the possibility of invoking*

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261 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222 (emphasis added).

262 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 136, para. 271 (emphasis added).

263 U.S. Preliminary Objections, p. 64, para. 7.8.

264 For this reason, the U.S. contention that its objection based on Article XX(1)(d) may be recast as some "other objection the decision upon which is requested before any further proceedings on the merits" is misconceived: see U.S. Preliminary Objections, p. 65, para. 7.9.

> *the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty*. The appraisal of the conduct of the United States in the light of these relevant provisions of the Treaty pertains to the application of the law rather than to its interpretation, and the Court will therefore undertake this in the context of its general evaluation of the facts established in relation to the applicable law."[265]

6.8 The U.S. argument rests, not on the text of Article XX(1), but on a single decision from the many cases in investor-State arbitration, in which the tribunal was considering a very different provision.[266] The decision of the tribunal in *EnCana v. Ecuador* is of no assistance to the United States. The United States has failed to draw to the Court's attention to either the text of the specific provision at issue in that case or the tribunal's key reasoning. Article XII(1) of the Canada-Ecuador BIT 1996 provides that "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures."[267] Based on the ordinary meaning of this specific provision, the tribunal found that it lacked jurisdiction over taxation measures other than those specified as exceptions.[268] However, that cannot assist the United States as the wording of the provision at issue in the *EnCana* case is markedly different to that of Article XX(1) of the 1955 Treaty of Amity.

6.9 Indeed, wording close to that at issue in the *EnCana* case may be found elsewhere in the Treaty. Reference may be made, for example to Article XVI(2), which provides that the protection afforded by "[t]he preceding paragraph shall not apply in respect of" the matters specified. This shows that where the Parties intended to exclude matters from the scope of the Treaty, as one would expect, they did so expressly. By

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265 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 225 (emphasis added).

266 U.S. Preliminary Objections, p. 63, para. 7.5, citing *EnCana Corp v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3481 (Professor James Crawford, President; Mr. Horacio Grigera Naón; Mr Christopher Thomas), Award, 3 February 2006, paras. 130-149 (U.S. PO, Annex 195).

267 Canada-Ecuador Agreement for the Promotion and Reciprocal Protection of Investments, signed 29 April 1996, in force 6 June 1997, 2027 UNTS I-34972, cited in *EnCana Corp v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3481, Award, 3 February 2006, para. 108 and Appendix II (U.S. PO, Annex 195).

268 *EnCana v. Ecuador*, para. 110: "the jurisdictional provision of the BIT lacks application also, since subject to the enumerated exceptions, *nothing* in the BIT applies to taxation measures and this includes Article XIII." See also para. 149, concluding that the tax measure at issue was "excluded from the scope of the BIT by Article III".

contrast, Article XX(1) does not provide for the inapplicability of the substantive obligations of the Treaty. The context of Article XX(1) therefore provides additional support, if it were needed, for the interpretation of Article XX(1) advanced by Iran and adopted by the Court in the *Oil Platforms* case.

6.10 The U.S. attempt to recharacterise its earlier position before the Court in the *Oil Platforms* case is equally puzzling. As the Court recorded in its judgment, the United States accepted that "consideration of the interpretation and application of Article XX, paragraph (1)(d), was a merits issue".[269] The United States now contends that this concession was made without conceding that Article XX(1)(d) "could never pose a jurisdictional question".[270] It is unnecessary for the Court to scrutinise the scope of the U.S. concession in the *Oil Platforms* case.[271] The simple point is that, if the United States had believed that Article XX(1)(d) afforded a sound basis for a preliminary objection to jurisdiction, it would have advanced/maintained that argument. It is undisputed that the United States did not do so.[272]

6.11 The U.S. position is, therefore, inconsistent with both the terms of the 1955 Treaty of Amity as well as the Court's earlier case law. In essence, the United States inappropriately invites the Court to read Article XX(1) as if it stated: "Nothing in the

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269 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 811, para. 20, quoting Verbatim Record of the Public Sitting of the I.C.J. Held on Sept. 23, 1996, at 35-36, *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Mr. Crook for the United States). See also Verbatim Record of the Public Sitting of the I.C.J. Held on 17 September 1996, at 32-33, *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Mr. Crook for the United States): "Article XX (1) (d)…excludes certain matters from the operation of the Treaty…Today, the core question is the Court's jurisdiction. In this connection, the interpretation and application of Article XX (1) (d) are not now at issue…the significance of Article XX (1) (d) is not at the heart of our position concerning this Court's lack of jurisdiction…it is not necessary for the Court to address the specific arguments regarding the construction and application of Article XX (1) (d), unless there should be a future merits phase".

270 U.S. Preliminary Objections, pp. 63-64, para. 7.6.

271 Iran notes, however, that the U.S. suggestion that the right to rely on Article XX(1)(d) as a preliminary objection was somehow reserved at the merits stage is not supported by the record: see U.S. Preliminary Objections, pp. 63-64, para. 7.6, citing Rejoinder Submitted by the United States of America (Mar. 23, 2001), para. 4.02, *Oil Platforms (Islamic Republic of Iran v. United States of America)*. In its Rejoinder, the United States adopted the same position as during the Preliminary Objections phase, stating that Article XX(1)(d) concerns measures "not prohibited" by the Treaty (Rejoinder, para. 4.03) and affords "a complete defence" (para. 4.04).

272 U.S. Preliminary Objections, pp. 63-64, para. 7.6: "In the *Oil Platforms* case, the United States left the invocation of the Article XX(1)(d) "essential security" clause to the merits phase…".

present Treaty shall apply to the following measures". In doing so, the United States has failed to appreciate the Court's reasoning in *Nicaragua* on this very point.

6.12 For all of the above reasons, the U.S. reliance on Article XX(1) as the basis for a preliminary objection to the Court's jurisdiction is misconceived and should be dismissed.

PART III.

THE U.S. OBJECTIONS TO ADMISSIBILITY ARE UNFOUNDED

CHAPTER VII.
ABSENCE OF ABUSE OF RIGHT

7.1 By contrast with the U.S. objections to jurisdiction, its "objections to admissibility go to the admissibility of the Application as a whole…" and, "[g]iven the overarching character of the objections to admissibility, [they] are set out first."[273] They are based on two grounds:

- Iran's abuse of the Treaty; and
- Iran's unclean hands.

In the present Chapter, Iran responds to the first of these objections while the second objection on admissibility will be addressed in Chapter VIII.

7.2 The United States summarises its first objection to the admissibility of Iran's Application as follows:

> "The first objection contends that Iran's reliance on the Treaty to found the Court's jurisdiction in this case constitutes an abuse of right. The Treaty was predicated upon, and was designed to govern, normal and ongoing commercial and consular relations between the United States and Iran – a state of affairs that has not existed for nearly four decades. Iran's claims in the present case arise in the context of a protracted and fundamental rupture in relations, during which time there has been no general economic intercourse between Iran and the United States, and no consular relations. Iran has nonetheless attempted to cloak its allegations in the commercial language of the Treaty, but its claims do not genuinely attempt to vindicate any interest protected by the Treaty's provisions. To allow Iran to found jurisdiction on the Treaty in these circumstances would sanction an abuse of right and undermine the integrity of the Court's judicial function."[274]

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[273] U.S. Preliminary Objections, pp. 3-4, para. 1.8.

[274] *Ibid.*, p. 4, para. 1.9.

7.3 The U.S. objection is comprised of multiple contentions.

7.4 First, the United States alleges that "Iran may wish to regard the Treaty as a vehicle for waging this wider strategic dispute. But to permit Iran to do so in the present case would subvert the purpose of the Treaty and misappropriate the Court's judicial function."[275]

7.5 The Court settled this matter in 1980, in the dispute that was brought by the United States against Iran, and subsequently reiterated its position in *Nicaragua v. United States*:

> "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.
>
> […N]ever has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes."[276]

7.6 Despite this crystal-clear holding, the United States again tried to raise the same argument in the *Lockerbie Case*.[277] The Court stated that:

> "23. The United States does not deny that, as such, the facts of the case could fall within the terms of the Montreal Convention. However, it emphasizes that, in the present case, from the time Libya invoked the Montreal Convention, the United States has claimed that it was not relevant because it was not a question of 'bilateral differences' but one of 'a threat to international peace and security resulting from State-sponsored terrorism'.
>
> 24. Consequently, the Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A

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275 *Ibid.*, p. 50, para. 6.10.

276 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, pp. 439-440, para. 105 quoting from *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), I.C.J. Reports 1980*, p. 19, para. 36, and p. 20, para. 37.

277 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 92.

> dispute thus exists between the Parties as to the legal regime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court."[278]

Contrary to the U.S. allegations, the Court's jurisdiction is not limited to "transactional dispute[s]" concerning "technical questions".[279] Iran does not deny that the limited, but not anodyne, legal dispute it has submitted to the Court could be linked to a larger political conflict between itself and the United States; nevertheless, the resolution of this specific dispute would contribute to realising the aims of the 1955 Treaty of Amity and may not justifiably be disregarded simply because it is part of or related to a broader dispute.

7.7 Iran's position is therefore that the United States cannot re-write Iran's claims – which are related to certain Iranian assets – nor reformulate, in its Preliminary Objections, the subject matter of the dispute as set out in the Application and Memorial.[280] What must be assessed at this stage of the proceedings is the admissibility of the case as it has been presented by Iran. Therefore, the so-called "broader strategic dispute" mentioned by the United States is simply irrelevant.

7.8 Secondly, the United States alleges that "[t]he situation that exists between the Parties today is far removed from that contemplated by the Parties in 1955 and crystallized in the text of the Treaty."[281] The United States asserts that the fundamental conditions underlying the Treaty no longer exist between the Parties. Not only this is erroneous,[282] but the United States is also responsible for this situation through its violations of various provisions of the Treaty.[283] Moreover, it is the Court that shall adjudge whether or not any fundamental conditions underlying the Treaty subsist.

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278 *Ibid*, p. 123, paras. 23 and 24. See also e.g. *Obligation to Negotiate an Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objections, Judgment, I.C.J. Reports 2015*, p. 604, para. 32.

279 U.S. Preliminary Objections, p. 53, para. 6.17.

280 See *supra*, pp. 23-24, paras. 2.29-2.32.

281 U.S. Preliminary Objections, pp. 47-48, para. 6.3.

282 See *supra*, pp. 17-19, paras. 2.18-2.22 and *infra* Section 3.

283 See *supra*, pp. 10-11, paras. 2.4-2.5.

7.9 Therefore, even if the facts were as alleged by the United States (which is denied), the present situation cannot be used as a pretext for declaring that the Treaty is inapplicable. According to the well-known adage, which is also rooted in the most elementary common sense, *nemo auditur propriam turpitudinem allegans*. As was stated by the Permanent Court of International Justice:

> "It is […] a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him."[284]

7.10 This principle forms the foundation of the limitations concerning the possibility of invoking an impossibility of performance (Article 61 VCLT) or a fundamental change of circumstances (Article 62 VCLT) for suspending the operation of a treaty – which is precisely what the United States seeks to do:

- Article 61, paragraph 2:

> "Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."[285]

- Article 62, paragraph 2:

> "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
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> […]

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[284] *Factory at Chorzów, Jurisdiction,* Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31; Dissenting Opinions of Judges Read and Azevedo, *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950,* pp. 244, 252-254; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 67, para. 110.

[285] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 47, para. 94: "The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject."

> *(b)* If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."[286]

And, of course, neither may a party to a treaty invoke its own breach to suspend the operation of that treaty.[287]

7.11 Iran notes that the United States invokes various justifications for its non-compliance with the provisions of the Treaty. But, at this stage, the Court is not called upon to decide on the legality of the U.S. conduct. Moreover, as the Court noted in *Nicaragua*:

> "If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."[288]

Therefore, the very fact that the United States attempts to excuse its non-compliance with the Treaty confirms the continuing existence of the obligations contained therein.

7.12 According to the United States, "Iran's claims in this case constitute an abuse of the rights afforded by the Treaty, and Iran's assertion of jurisdiction based on the Treaty should therefore be rejected as inadmissible. Iran's claims are abusive in the circumstances of the present case because they subvert the purposes of the Treaty."[289]

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[286] Paragraph 3 of Article 62 VCLT reads as follows: "3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty." In its Judgment of 25 September 1997, the Court stressed that "[t]he negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases." (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, pp. 64-65, para. 104.). The I.C.J. has also stated that "Article 62 of the Vienna Convention on the Law of Treaties […] may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances (*Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 18, para. 36).

[287] See Article 60 VCLT (*Termination or suspension of the operation of a treaty as a consequence of its breach*) which reads as follows: "A material breach of a bilateral treaty by one of the parties entitles *the other* to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part" (emphasis added).

[288] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 98, para. 186.

[289] U.S. Preliminary Objections, p. 50, para. 6.12.

7.13 As demonstrated above,[290] the dispute between the United States and Iran brought before the Court falls within the scope of the Treaty. Even if one accepts the United States' very broad definition according to which an "[a]buse of right occurs where, *inter alia*, a party exercises a right in a manner that is not 'genuinely in pursuit of those interests which the right is destined to protect,[291] or where a party exercises a treaty right or power for an improper purpose[292]",[293] it must be noted that this principle has never been applied as a bar to a claim in an inter-State dispute. In the paragraphs below, Iran explains that the Court has made it clear that this can only be a defence on the merits (Section A). Therefore, the only authorities advanced by the United States in which a tribunal or court decided on the inadmissibility of a claim concern investor-State disputes which were fundamentally different from the present case (Section B). In any event, nothing in Iran's claim constitutes an abuse of right (Section C).

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290 See *supra*, pp. 14-15, paras. 2.12-2.15; p. 21, para. 2.27 and pp. 2.30-2.31, paras. 23-24.

291 U.S. Preliminary Objections, p. 51, fn. 211: "BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 131-32 (1953) ("It follows from th[e] interdependence of rights and obligations that rights must be reasonably exercised. The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be acquired by treaty or by general international law.")."

292 U.S. Preliminary Objections, p. 51, fn. 212: "*E.g.*, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 7, 78-79, ¶ 142 (Sept. 25) (stating that the principle of good faith "implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized."); *Mutual Assistance in Criminal Matters*, 2008 I.C.J. at 279, ¶ 6 (Declaration of Judge Keith) ("I now consider the reasons given by the judge in her *soit-transmis* against the principles of good faith, abuse of rights and *détournement de pouvoir*. Those principles require the State agency in question to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors."); *Miroļubovs & autres c. Lettonie*, Req. No. 798/05, Arrêt, ¶ 62 (Eur. Ct. H.R., Dec. 15, 2009) (US Annex 174) ("*La Cour considère donc que la notion d' 'abus', au sens de l'article 35 § 3 de la Convention, doit être comprise dans son sens ordinaire retenu par la théorie générale du droit – à savoir le fait, par le titulaire d'un droit, de le mettre en oeuvre en dehors de sa finalité d'une manière préjudiciable.*" ["The Court therefore considers that the concept of 'abuse', within the meaning of Article 35 § 3 of the Convention, must be understood in the ordinary meaning of the general theory of law - namely, the fact, by the holder of a right, to implement it outside of its purpose in a prejudicial manner]); Emmanuel Gaillard, *Abuse of Process in International Arbitration*, 32 I.C.S.I.D. REV. 17, 36 (2017) (U.S. PO, Annex 175) (explaining that the "abuse of process principle could ... allow for the dismissal of claims initiated for purposes ulterior to the resolution of a genuine dispute").".

293 U.S. Preliminary Objections, pp. 50-51, para. 6.13.

SECTION 1.

ABSENCE OF PRECEDENT IN INTER-STATE DISPUTES

7.14 As the Court will be aware, the I.C.J. has never dismissed claims or counter-claims based on an abuse of rights objection.[294]

7.15 Furthermore, the authorities invoked by the United States in support of its allegation that "[t]he obligation to act in good faith entails the correlative principle – widely recognized by international tribunals – that rights shall not be abused",[295] themselves confirm that abuse of rights has never been accepted by the Court as an inadmissibility objection:

(a) The *Rights of Nationals of the United States in Morocco* case concerned the general finding on the merits – that "[t]he power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith" – and has no bearing on preliminary objections.[296]

(b) Similarly, the reference to 'abuse' in the case of the *Free Zones of Upper Savoy and the District of Gex* was not concerned with admissibility or jurisdiction, but as a "reservation" to the power to impose taxes.[297] In that same Judgment, the Court emphasised that "an abuse cannot be presumed by the Court".[298]

(c) In the *Case concerning Certain German Interests in Polish Upper Silesia (Merits)*:

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294 *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 63, para. 26; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 622, para. 46; *Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 30, para. 40; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007*, p. 9, para. 21.

295 U.S. Preliminary Objections, pp. 50-51, para. 6.13.

296 *Case concerning rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 212.

297 P.C.I.J., Judgment, 7 June 1932, *Free Zones of Upper Savoy and the District of Gex, Series A/B*, No. 46, p. 167.

298 *Ibid.*

i. the 'abuse of right' concept was invoked not as a preliminary objection, but rather as giving rise to an alleged treaty violation, with the Court stating that "only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty";[299]

ii. the P.C.I.J. concluded that "such misuse has not taken place in the present case"[300] because there were insufficient grounds for regarding the relevant acts as anything "other than a genuine transaction", rather than one "designed to procure…an illicit advantage and to deprive the other of an advantage to which he was entitled" or "calculated to prejudice Poland's rights";[301] and

iii. this reasoning supports Iran's claim since there is no suggestion that the establishment of the relevant Iranian companies or any continuing commerce is not genuine.

7.16 As noted by the Court in the *Fisheries Jurisdiction* cases:

> "If, as contended by Iceland, there have been any fundamental changes in fishing techniques in the waters around Iceland, *those changes might be relevant for the decision on the merits of the dispute*, and the Court might need to examine the contention at that stage, together with any other arguments that Iceland might advance in support of the validity of the extension of its fisheries jurisdiction beyond what was agreed to in the 1961 Exchange of Notes. *But the alleged changes could not affect in the least the obligation to submit to the Court's jurisdiction, which is the only issue at the present stage of the proceedings*. It follows that the apprehended dangers for the vital interests of Iceland, resulting from changes in fishing techniques, cannot constitute a fundamental change with respect to the lapse or subsistence of the compromissory clause establishing the Court's jurisdiction."[302]

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299 P.C.I.J., Judgment, 25 May 1926, *Certain German Interests in Polish Upper Silesia (Merits), Series A*, No. 07, p. 30.

300 *Ibid.*

301 *Ibid.*, pp. 37-38.

302 *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 21, para. 40 and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Jurisdiction of the Court, Judgments, I.C.J. Reports 1973*, p. 64, para. 40 (emphasis added).

SECTION 2.

IRRELEVANCE OF THE INVESTOR-STATE PRECEDENTS INVOKED BY THE UNITED STATES

7.17 The United States relies on two investment cases, *Churchill Mining* v. *Indonesia* and *Philip Morris* v. *Australia*, in order to assert that "[w]here the initiation of a legal proceeding is founded on an abuse of rights, the claims in that proceeding are inadmissible."[303]

7.18 In the first case, *Churchill Mining* v. *Indonesia*, the Tribunal observed that "the claims are based on documents forged to implement a fraud aimed at obtaining mining rights", and that "[t]he inadmissibility applies to all the claims raised in this arbitration, because the entire EKCP project is an illegal enterprise affected by multiple forgeries and all claims relate to the EKCP."[304] In the second case, *Philip Morris* v. *Australia*, the UNCITRAL tribunal accepted the abuse of rights argument on the ground that the investor, a private person, had abused its juridical personality.[305]

7.19 It will be obvious that such situations cannot occur in inter-State cases. Moreover, in contrast with what occurs in the context of relations between an investor and a State, in inter-State relations the situation where disputes arise is governed by Articles 2(3) and 33 of the U.N. Charter. The Parties to the dispute are under an obligation of peaceful settlement of disputes, which includes, as one of the means, "judicial settlement". Performance of the obligation to settle peacefully a dispute by judicial settlement, cannot amount to an abuse of rights. To the contrary, refusing to implement the provision of a treaty in force which provides for the submission of

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303 U.S. Preliminary Objections, pp. 50-51, para. 6.13.

304 I.C.S.I.D., Award, 6 December 2016, *Churchill Mining PLC and Planet Mining Pty Ltd* v. *Republic of Indonesia*, I.C.S.I.D. Case No. ARB/12/14 and 12/40, p. 191, paras. 528-529.

305 UNCITRAL, Award on Jurisdiction and Admissibility, 17 December 2015, *Philip Morris Asia Limited* v. *The Commonwealth of Australia*, PCA Case No. 2012-12, p. 185, para. 588. See also: I.C.S.I.D., Decision on Jurisdiction, 29 April 2004, *Tokios Tokeles v. Ukraine*, I.C.S.I.D. Case No. ARB/02/18, paras. 54-56; I.C.S.I.D., Award, 2 October 2006, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, I.C.S.I.D. Case No. ARB/03/16, para. 359; I.C.S.I.D., Award, 29 July 2008, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, I.C.S.I.D. Case No. ARB/05/16, para. 206; I.C.S.I.D., Award, 22 June 2017, *Capital Financial Holdings Luxembourg SA v. Republic of Cameroon*, I.C.S.I.D. Case No. ARB/15/18, p. 74, para. 360.

"[a]ny dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy", if not an abuse of right is, no doubt, a mere and obvious breach of this provision.

SECTION 3.

IRAN DOES NOT ABUSE ITS RIGHTS UNDER THE TREATY NOR THE JUDICIAL FUNCTION OF THE COURT

7.20 Notably, the United States offers not the slightest argument in support of its contention that Iran's Application in the present case amounts to an abuse of rights or of procedure. The U.S. position is comprised of pure assertion and wishful thinking, stated in only four paragraphs, which Iran examines briefly in turn below.

7.21 The U.S. first argument is:

> "6.14 Iran's claims in this case do not concern disputes arising in the course of ordinary and friendly economic or consular activity, for the simple reason that, as noted above, such activity currently does not exist between the parties. Iran's effort to funnel the claims it seeks to pursue in the present case into the language of the Treaty thus constitutes an abuse of rights."[306]

7.22 As to this first argument:

(a) As shown previously,[307] it is not true that the 'activities' envisaged by the Treaty Parties no longer exist;

(b) The Treaty has been invoked before U.S. courts and they have not considered that such reliance constitutes an abuse of right;[308] thus, there is no reason why it would be different when the issue arises before the I.C.J.;

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306 U.S. Preliminary Objections, p. 52, para. 6.14.

307 See *supra*, pp. 17-19, paras. 2.19-2.22.

308 *Bennett et al. v. The Islamic Republic of Iran et al*., U.S. Court of Appeals, Ninth Circuit, 22 February 2016, 817 F.3d 1131, as amended 14 June 2016, 825 F.3d 949 (9th Cir. 2016), pp. 21-22 (IM, Annex 64); *Peterson et al. v. Islamic Republic of Iran et al.*, U.S. Court of Appeals, Second Circuit, 9 July 2014, 758 F.3d 185 (2nd Cir. 2014), p. 7 (IM, Annex 62); see also *Peterson et al. v. Islamic Republic of Iran et al.*, U.S. District Court, Southern District of New York, 28 February 2013, [2013 U.S. Dist. LEXIS 40470] (S.D.N.Y. 2013), p. 52 (IM, Annex 58); *Weinstein et al. v. Islamic Republic of Iran et al.*, U.S. Court of Appeals, Second Circuit, 15 June 2010, 609 F.3d 43 (2d Cir. 2010), pp. 20-23 (IM, Annex 47).

(c) The United States is responsible for the current level of activities regulated by the Treaty;

(d) The United States has made no effort to substantiate its assertion that Iran funnels "the claims it seeks to pursue in the present case into the language of the Treaty."

7.23 Already in its 1980 Judgment in the case of the *United States Diplomatic and Consular staff in Tehran,* the Court considered that:

> "although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran."[309]

This was also the situation when the Court decided in the *Oil Platforms* case in proceedings which began in 1992, i.e. after the date at which the U.S. alleges any commercial relations between the Treaty Parties ceased. In its 1996 Judgment on the preliminary objections raised by the United States in that case, the Court pointed out

> "to begin with, that the Parties do not contest that the Treaty of 1955 was in force at the date of the filing of the Application of Iran and is moreover still in force. The Court recalls that it had decided in 1980 that the Treaty of 1955 was applicable at that time (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980,* p. 28, para. 54); none of the circumstances brought to its knowledge in the present case would cause it now to depart from that view."[310]

7.24 There is no reason why the Court would today consider that Iran is abusing its right to act under the 1955 Treaty of Amity, while it was not the case in 1992. And the Court's celebrated *dictum* in its 1980 Judgment holds true more than ever:

> "It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court

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

310 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 809, para. 15.

> under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed."[311]

7.25 While it is true that, because of the U.S. conduct, the implementation of the Treaty is far from satisfactory, contrary to U.S. assertions, some economic relations between the Parties have always existed on a limited scale and in limited fields.

7.26 Moreover, the Treaty has been relied on before U.S. courts and applied by them, including in certain of the proceedings that are at the crux of the present case. No U.S. courts have ever gone so far as to contend that the Iranian companies abused their rights by calling for the application of the Treaty. To the contrary, in *Peterson case*, the U.S. Court of Appeals (Second Circuit) (wrongly) concluded:

> "In sum, turnover of the blocked assets under § 8772 is entirely consistent with the United States' obligations under the Treaty of Amity. And, assuming arguendo that it is not, § 8772 would have to be read to abrogate any inconsistent provisions in the Treaty."[312]

7.27 Secondly, the United States alleges:

> "6.15 The claims that Iran raises in this case, by their own terms, do not concern interests arising out of the kind of activity that the Treaty was designed to protect. For instance, Iran challenges sanctions imposed by the United States, which, in concert with other U.S. and multilateral actions, target Iran's pursuit of ballistic missile capability and its support for and facilitation of terrorism, including through the provision of arms.[313] Iran also challenges various legislative measures taken by the United States under which individuals may obtain reparation for injury and death caused by acts of terrorism carried out by or with the support of State officials, employees, or agents.[314]"[315]

7.28 As to this argument:

(a) Iran challenges certain measures adopted by the United States, only insofar as they breach the 1955 Treaty of Amity. While the U.S. measures also breach

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

312 *Peterson et al. v. Islamic Republic of Iran et al.*, U.S. Court of Appeals, Second Circuit, 9 July 2014, 758 F.3d 185 (2nd Cir. 2014), p. 7 (IM, Annex 62); see also *supra*, p. 84, fn. 308.

313 U.S. Preliminary Objections, p. 52, fn. 214: "See *supra* Chapter 4, Sec. A."

314 U.S. Preliminary Objections, p. 52, fn. 215: "See *id.*"

315 U.S. Preliminary Objections, p. 52, para. 6.15.

international law in many other respects, this is not within the scope of the dispute Iran has placed before the Court;

(b) In this case, Iran challenges in particular the U.S. violation of the rights and protections that Iranian companies are entitled to under the 1955 Treaty, including the failure to recognise their juridical status and to grant their freedom of access to the U.S. courts in defence and pursuit of their rights;[316]

(c) As explained in greater detail below,[317] the United States has failed to provide any evidence to establish, in accordance with any internationally recognised standards or procedures, the attribution to Iran of the actions referred to in its Preliminary Objections. And Iran formally reiterates that it condemns and has always condemned terrorism in all its forms and manifestations.[318]

7.29 According to the U.S. third argument:

> "6.16 In this respect, Iran's claims concerning sovereign immunity are particularly egregious. Prior to initiating this claim, Iran had repeatedly *resisted* the notion that the sole provision of the Treaty that addresses sovereign immunity – the waiver of immunity contained in Article XI(4) – reaches Iran or any Iranian State entities that are not 'enterprises' within the meaning of that provision.[319] And in the *Peterson* enforcement proceeding itself, Bank Markazi went so far as to argue that the Treaty of Amity was *not* a 'provision of law relating to sovereign immunity.'[320] Nevertheless, Iran now asserts that the Treaty *requires* the extension of '[g]enerally applicable immunities' under customary international law to Iran and Iranian entities.[321] This attempt to rewrite the Treaty to suit Iran's present needs violates basic principles of good

316 Iran, Memorial, p. 12, para. 1.30, pp. 70-77, paras. 4.18-4.36, pp. 81-87, paras. 5.11-5.21, pp. 87-100, paras. 5.22-5.51, pp. 102-103, paras. 5.58-5.60, pp. 106-107, paras. 5.69-5.71 and p. 109, paras. 5.75-5.76.

317 See *infra* Appendix A, pp. 102-105, paras. A.10 to A.15.

318 See *infra* Appendix A, p. 105, para. A.15.

319 U.S. Preliminary Objections, p. 52, fn. 216: "*See infra* Chapter 8, Sec. B."

320 U.S. Preliminary Objections, p. 52, fn. 217: "Brief for Defendant-Appellant Bank Markazi at 45, *Deborah Peterson, et al. v. Islamic Republic of Iran, et al.* (No. 13-2952) (2d Cir. Nov. 19, 2013) (U.S. PO Annex 233)."

321 U.S. Preliminary Objections, p. 52, fn. 218: "*E.g.*, IM, ¶ 5.44(a)."

faith[322] and serves only to demonstrate the abusive manner in which Iran seeks to manipulate the Treaty in disregard of its object and purpose."[323]

7.30 As to this argument:

(a) As shown in Chapter V above, Article IV(2) of the Treaty expressly requires a *renvoi* to international law which includes the law of sovereign immunities;[324]

(b) Contrary to the U.S. contention, Iran has never alleged the contrary. As recalled in Chapter V above, Iran has already explained, in its Response to the U.S. request for production of documents, that "Bank Markazi is a separate juridical entity, and like the United States, Iran 'does not have independent access to these documents because it is not a party to the proceeding' in the U.S. courts."[325] Thus, Bank Markazi's pleadings before the U.S. courts cannot be attributed to Iran. In any case, as explained above, Bank Markazi was pleading within the specific meaning, and for the limited purpose, of the 'notwithstanding clause' in 22 USC § 8772.[326]

(c) The U.S. approach is misconceived. The correct test, as defined in *Oil Platforms*, is whether the U.S. abrogation of immunities is capable of "fall[ing] within the provisions of the Treaty".[327]

7.31 As for the fourth "argument" advanced by the United States in support of its claim of abuse of rights – namely that the "present dispute cannot be disguised as a transactional dispute that simply engages technical questions regarding the application

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322 U.S. Preliminary Objections, p. 52, fn. 219: "*See, e.g.*, CHENG at 141 ('It is a principle of good faith that 'a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another.')".

323 U.S. Preliminary Objections, p. 52, para. 6.16.

324 See *supra*, p. 61, paras. 5.30-5.31.

325 Iran's Response of 12 April 2017 to U.S. Request for production of document of 30 March 2017, p. 2.

326 See *supra*, p. 55, para. 5.17(c).

327 *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, p. 810, para. 18.

of the Treaty to ongoing commercial or consular activity"[328] – has already been addressed above.[329]

7.32 Concerning the judicial function of the Court, Iran notes that the sole authority relied on by the United States is *Northern Cameroons*.[330] However, this case is of no assistance to the U.S. objection because, as the United States recognises, "the issue was the interpretation of a treaty that was no longer in force":[331]

> "Throughout these proceedings the contention of the Republic of Cameroon has been that all it seeks is a declaratory judgment of the Court that prior to the termination of the Trusteeship Agreement with respect to the Northern Cameroons, the United Kingdom had breached the provisions of the Agreement, and that, if its Application were admissible and the Court had jurisdiction to proceed to the merits, such a declaratory judgment is not only one the Court could make but one that it should make."[332]

7.33 It is indeed difficult to understand why and how making an application before the I.C.J. in accordance with the compromissory clause of a treaty "of amity, economic relations, and consular rights", invoking a number of substantive provisions of this treaty, the application of which is obviously at least plausible, could be capable of constituting an abuse of rights or of process. Properly submitting a dispute to the Court under a jurisdictional provision that is in force, and in a case in which the claims are related to treaty breaches, cannot, as a matter of principle, be considered an abuse of litigation. And deciding on those claims is precisely within the function of the Court which is "to decide in accordance with international law such disputes as are submitted to it."

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328 U.S. Preliminary Objections, p. 53, para. 6.17.

329 See *supra*, p. 76, para. 7.6.

330 U.S. Preliminary Objections, p. 54, para. 6.22.

331 *Ibid.*

332 *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 36.

CHAPTER VIII.
THE "CLEAN HANDS" THEORY IS IRRELEVANT OR INAPPLICABLE TO IRAN'S CLAIMS BEFORE THE COURT

8.1 According to the United States' own summary of its 'unclean hands' objection to the admissibility of Iran's Application:

> "Iran's unclean hands should preclude the Court from proceeding with this case. Iran's allegations against the United States are focused on U.S. measures that engage the legal and political responsibility of Iran as a sponsor of terrorism directed at the United States, its nationals, and others over the past forty years, as well as its persistent violations of counter-terrorism, weapons proliferation, and arms trafficking obligations. Iran comes to the Court with unclean hands, and the Court should decline to exercise any such jurisdiction it may have, given that the U.S. measures that Iran now seeks to impugn were taken in response to Iran's own conduct."[333]

8.2 It is not Iran's intention to enter into a sterile and lengthy dispute on these allegations; they are, in any event, irrelevant to the resolution of the present case. Suffice it to note that, by making these accusations against Iran, the United States adopts the tactic of seeking to denigrate an opponent and ignore that opponent's case. The United States cannot, however, by introducing such allegations, distract attention from the actual dispute which Iran has placed before the Court.

8.3 Iran is confident that the Court will not allow the United States to turn the opportunity offered by the Court's legal procedures into a propaganda exercise. Iran does not intend to reply to the substance of these unfounded allegations, which it considers to be both irrelevant and outside the jurisdiction of the Court, as it has been explained in these Observations.[334] Therefore, Iran has decided to make a few general comments in a brief Appendix to the present Chapter.[335]

8.4 This Appendix briefly places the U.S. accusations of terrorism in context by showing their use by the U.S. to achieve its foreign policy goals, and to destabilise foreign

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333 U.S. Preliminary Objections, p. 4, para. 1.10.

334 See *supra*, Chapter II, Section 3.

335 See *infra* Appendix A to Chapter VIII, U.S. Allegations are unfounded.

governments.[336] The political instrumentalisation of the concept of 'State-sponsored terrorism' is one of the reasons which has prevented and is still preventing States from being able to agree on a definition of 'terrorism' in international law, even despite the limited progress made in the specific field of international criminal law.[337]

8.5 In the past four decades, the U.S. has pursued a strategy of misinformation by systematically accusing Iran of various terrorist attacks. Even when Iran has been deeply struck by terrorist attacks in Tehran, the United States suggested that Iran was responsible for these attacks and imposed new sanctions against Iran for its alleged support of terrorism.[338]

8.6 Iran rejects categorically, as it has always done, all of these allegations. It recalls that it has been the victim of various terrorist attacks and that its leaders have clearly condemned terrorism in all its forms.[339]

8.7 While the U.S. accusations against Iran are ill-founded, they could, in any event, not be a bar to the admissibility of Iran's Application.

8.8 Although the doctrine of "clean hands" has sometimes been relied on by parties before international courts or tribunals, after extensive research, Iran has not found a single case of a State-to-State claim being dismissed on that ground. The I.C.J. has systematically dismissed objections to admissibility based on this doctrine.[340] And it is revealing that, for example, the Court did not rely on the extremely miscellaneous

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336 See *infra* Appendix A, p. 99, paras. A.2-A.4.

337 See *infra* Appendix A, pp. 100-102, paras. A.5-A.9.

338 See *infra* Appendix A, pp. 102-104, paras. A.10-A.14.

339 See *infra* Appendix A, pp. 105-107, paras. A.15-A.20.

340 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 134, para. 268; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 73, para. 133; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, Judge Van den Wyngaert, Dissenting Opinion of, pp. 160-162, para. 35; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, pp. 177-178, paras. 28-30; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 163, para. 63; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 38, paras. 45-47; I.C.J., Judgment, 2 February 2017, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, p. 45, paras. 139-143.

materials cited by Judge Schwebel in his Dissent in *Nicaragua v. United States*[341] and did not refer to the doctrine of clean hands in its 1984 Judgment. It is indeed noticeable that, while Judge Schwebel relied heavily on the Opinion of Judge Hudson in the *Diversion of Water from the Meuse* – which dealt not with the clean hands principle but, more generally, with the principle of equity –, Judge Schwebel's dissent overlooks the latter's *caveat* according to which:

> "The general principle is one of which an international tribunal should make a *very sparing application*. It is certainly not to be thought that a complete fulfillment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty."[342]

8.9 The doctrine was discussed at some length during the proceedings in the *Barcelona Traction* case[343] but, clearly, its cursory dismissal by Professor Rolin, co-agent for Belgium,[344] satisfied the Court, as the point was not referred to at all in the Judgment.[345]

8.10 In *Certain Phosphate Lands,* Australia argued that Nauru's Application was precluded by its bad faith, but the Court considered:

> "that the Application by Nauru has been properly submitted in the framework of the remedies open to it. At the present stage, the Court is not called upon to weigh the possible consequences of the conduct of Nauru with respect to the merits of the case. It need merely note that such conduct does not amount to an abuse of process. Australia's objection on this point must also be rejected."[346]

8.11 In the *Avena* case, the Court examined "the objection of the United States that the claim of Mexico is inadmissible in that Mexico should not be allowed to invoke

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341 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, Judge Schwebel, Dissenting Opinion, *I.C.J. Reports 1986*, pp. 393-394.

342 P.C.I.J., Judgment, 28 June 1937, *Diversion of Water from the Meuse*, *Series A/B*, No. 70, p. 77 (emphasis added).

343 *I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, CR 1964/2, *vol. III*, p. 680-681 (Reuter).

344 *I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New Application: 1962)*, CR 1964/1, *vol. II*, p. 336-338 (Rolin).

345 *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6.

346 *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 38.

against the United States standards that Mexico does not follow in its own practice."[347]

And it concluded:

> "47. The Court would recall that it is in any event essential to have in mind the nature of the Vienna Convention [on Consular Relations]. It lays down certain standards to be observed by all States parties, with a view to the 'unimpeded conduct of consular relations', which, as the Court observed in 1979, is important in present-day international law "in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States" (*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, Order of 15 December 1979*, *I.C.J. Reports 1979*, pp. 19-20, para. 40). Even if it were shown, therefore, that Mexico's practice as regards the application of Article 36 was not beyond reproach, this would not constitute a ground of objection to the admissibility of Mexico's claim. The fifth objection of the United States to admissibility cannot therefore be upheld."[348]

The situation in the present case is similar: whatever allegations are made against Iran, this would not constitute a ground of objection to the admissibility of Iran's claim.

8.12 The Court once again adopted a similar solution in its 2003 Judgment in *Oil Platforms*. In that case, the United States had not suggested that the clean hands issues were issues of admissibility, appropriate to be enquired into before any examination of the merits; and it had not asked the Court to find Iran's claim inadmissible, but had rather argued "that Iran's conduct is such that it 'precludes it from any right to the relief it seeks from this Court', or that it 'should not be permitted to recover on its claim'."[349] The Court noted

> "that in order to make that finding it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period – which it has also to do in order to rule on the Iranian claim and the United States counter-claim."

And it concluded:

> "30. At this stage of its judgment, therefore, the Court does not need to deal with the request of the United States to dismiss Iran's claim and refuse the relief that it seeks on the basis of the conduct attributed to Iran. The Court will now

347 *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 38, para. 45. See also *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, pp. 488-489, paras. 61-63.

348 *Ibid.*, pp. 484-485, paras. 47.

349 *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 177, para. 29.

proceed to the consideration of the claims made by Iran and the defences put forward by the United States."[350]

8.13 This review of the inter-State case-law is largely consistent with the usual position in investment cases, as summarised by the Arbitral Tribunal in the *Yukos* case:

> "1358. The Tribunal is not persuaded that there exists a "general principle of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the I.C.J. Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called "unclean hands."
>
> 1359. General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law. […]
>
> 1362. However, as Claimants point out, despite what appears to have been an extensive review of jurisprudence, Respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of "unclean hands" in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim.
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> 1363. The Tribunal therefore concludes that "unclean hands" does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case." [351]

8.14 The case-law of the Iran-U.S. Claims Tribunal is not more positive in using the clean hands doctrine. The United States refers to the jurisprudence of that Tribunal in order to show that "Iran itself has relied on the doctrine";[352] but it omits to mention that, in all three cases it relies upon, the Tribunal refused to apply the doctrine:

- In *Aryeh*, the Tribunal stated that no basis supported the Respondent's contentions "that the claim should be barred on the basis of the theories of clean hands, estoppel, misrepresentation, good faith or state responsibility";[353]

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350 *Ibid.*, pp. 177-178, paras. 29-30.

351 Final Award, 10 July 2014, *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227, pp. 431-432, paras. 1358-1363.

352 U.S. Preliminary Objections, p. 58, para. 6.32.

353 *Moussa Aryeh v. The Islamic Republic of Iran*, Award No. 583-266-3, 25 September 1997, 33 *Iran-U.S. C.T.R.* 368, p. 387, para. 62 (U.S. PO, Annex 187).

- In *Karubian*, the Tribunal rejected "the Claimant's contention that the Respondent should be estopped from arguing that he illegally purchased real property in Iran as a dual national";[354] and

- In *Mohtadi* it found that "the issue of the Claimant's enjoyment of real property rights in a manner inconsistent with Iranian Law does not fall to be decided. The Tribunal therefore finds it unnecessary to consider this issue".[355]

Moreover, it must be noted that, in all three cases, the conduct of the claimant as a private person was at stake. Had the Tribunal accepted the argument based on the clean hands doctrine, this would have only confirmed that that doctrine may be used in relation to diplomatic protection or similar situations, but certainly not with regard to precluding a State from bringing a case of its own.

8.15 More than fifty years ago, in a landmark article, Professor Jean Salmon considered an autonomous clean hands doctrine to be "useless" ("*inutile*" in French) and unfounded.[356] Similarly, Professor Charles Rousseau opined that "it is not possible to consider the 'clean hands' theory as an institution of general customary law."[357] This position was cited with approval by the I.L.C. Special Rapporteur on State Responsibility, Professor James Crawford, who accepted that "the conclusion reached by Charles Rousseau seems still to be valid;"[358] For his part, the Special Rapporteur on Diplomatic Protection, Professor John Dugard, maintained that "the clean hands

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354 *Rouhollah Karubian v. The Government of the Islamic Republic of Iran*, Award No. 569-419-2, 6 March 1996, 32 *Iran-U.S. C.T.R.* 3, p. 38, para. 153 (U.S. PO, Annex 189).

355 *Jahangir Mohtadi and Jila Mohtadi v. The Government of the Islamic Republic of Iran*, Award No. 573-271-3, 2 December 1996, 32 *Iran-U.S. C.T.R.* 124, p. 155, para. 92 (U.S. PO, Annex 188).

356 J. Salmon, "Des mains propres comme conditions de recevabilité des réclamations internationales", *Annuaire français du droit international*, Vol. 10, 1964, p. 265.

357 Translation given in A/CN.4/498/Add.2, *Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur*, Fifty-first session of the I.L.C., 3 May-23 July 1999, para. 331, fn. 654; original in French: C. Rousseau, *Droit international public, Tome V. Les rapports conflictuels*, 5th ed. (Paris, Sirey, 1983), para. 170.

358 *Ibid*., para. 334.

doctrine has no special place in claims involving diplomatic protection."[359] and this position was endorsed by the Commission.[360]

8.16 As it has been clearly put by the Tribunal in the *Guyana* v. *Suriname* case:

> "No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries to the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely[361] and, when it has been invoked, its expression has come in many forms. The I.C.J. has on numerous occasions declined to consider the application of the doctrine,[362] and has never relied on it to bar admissibility of a claim or recovery. […T]he use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent."[363]

8.17 In any event, there is no need to engage in a futile factual discussion: the procedural use that the United States attempts to make of the clean hands doctrine in order to convince the Court to dismiss the case *in limine* cannot prevail.

8.18 The doctrine of clean hands has nothing to do with the admissibility of an application. And, when, as in this case, "immediate" injury has been caused to a State by the internationally wrongful act of another State, there can be no question of a court or tribunal being prevented from considering the former's claim on the pretext that the claimant State itself has allegedly committed a breach of international law to the detriment of the latter. Accepting such a theory would serve to legitimise the right of all to take the law into their own hands, something which the possibility of judicial

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359 A/CN.4/546, *Sixth Report on Diplomatic Protection by John Dugard, Special Rapporteur*, Fifty-seventh session of the ILC, 2 May-3 June and 4 July-5 August 2005, para. 9.

360 See Report of the International Law Commission, 53rd session, 2001, *General Assembly Official Records*, 56th session, Supplement No. 10, A/56/10, p. 173.

361 Annex VII Tribunal, Award, 17 September 2007, *Guyana v. Suriname*, PCA Case No. 2004-04, p. 135, fn. 476: "James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 162 (2002)."

362 *Ibid.*, fn. 477: "*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 63; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161, para. 100; *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 279: in this case Belgium raised the question of clean hands in its preliminary objections (Preliminary Objections of the Kingdom of Belgium, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, (5 July 2000), available at http://www.icj-cij.org/docket/files/105/8340.pdf), but the Court did not address the argument in its judgment."

363 *Ibid.*, p. 135-136, para. 418.

settlement is specifically intended to avoid, and would lead to the progressive degradation of international order. As Professor Jean Salmon wrote at the end of his detailed study of international jurisprudence in this field, which was referred to earlier:[364] in such cases, "*les arbitres n'ont jamais déclaré la demande irrecevable. Accueillir l'irrecevabilité dans cette hypothèse aurait eu pour conséquence de reconnaître la légalité des représailles.*"[365]

8.19 Moreover, to the extent that "unclean hands" may exist as a doctrine of international law, it only applies where the claimant is engaged in "precisely similar action, similar in fact and similar in law" as that which it complains of as amounting to a violation by the Respondent.[366] The Claimant's conduct must relate to the same reciprocal obligation on which it bases its claim. In *Guyana v. Suriname*, the Tribunal rejected Suriname's unclean hands argument (both as to admissibility and as to merits), *inter alia*, on the ground that: "Guyana's Third Submission claims that Suriname violated its obligation not to resort to the use or threat of force, while Suriname bases its clean hands argument on Guyana's alleged violation of a different obligation relating to its authorization of drilling activities in disputed waters. Therefore, there is no question of Guyana itself violating a reciprocal obligation on which it then seeks to rely."[367]

8.20 The U.S. objection does not satisfy this requirement. Indeed, the United States has not even claimed that the accusations upon which it bases its assertion that Iran has unclean hands amount to an ongoing violation of Iran's obligations under the Treaty

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364 See para. 8.15 *supra*.

365 ["The arbitrators never declared an application to be inadmissible. To accept the inadmissibility in this case would have meant recognizing the legality of the reprisals"] "Des mains propres comme condition de recevabilité", *A.F.D.I.*, 1964, p. 259.

366 See Annex VII Tribunal, Award, 17 September 2007, *Guyana v. Suriname*, PCA Case No. 2004-04, pp. 137-138, paras. 420-421 citing *Diversion of Water from the Meuse*, Individual Opinion of Judge Hudson, p. 78, para. 325.

367 *Ibid.*, p. 138, para. 421. See also Judge Schwebel's Dissent in *Nicaragua*, relying on the Opinion of Judge Hudson and reasoning that Nicaragua "had deprived itself of the necessary *locus standi*" to bring its claims, as it was guilty of illegal conduct resulting in "deaths and widespread destruction" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, Judge Schwebel, Dissenting Opinion, *I.C.J. Reports 1986*, respectively p. 394, para. 272 and p. 392, para. 268) or the I.C.S.I.D. tribunal's Decision on Jurisdiction, in *Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh et al*, rejecting "unclean hands" defence because, *inter alia*, "there is no relation of reciprocity between the relief which the Claimant now seeks in this arbitration and the acts in the past which the Respondents characterise as involving unclean hands". (Decision on Jurisdiction, 19 August 2013, I.C.S.I.D. Case No. ARB/10/11 and ARB/10/18, para. 483).

of Amity. There is no allegation that Iran has violated a reciprocal obligation on which it then seeks to rely. Instead, the United States alleges that "[i]n addition to its sponsorship of terrorism, Iran engaged in a years-long pattern of conduct in violation of its obligations under the NPT and the resulting restrictions imposed under UN Security Council resolutions."[368]

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8.21 Whatever the (very limited) use of the clean hands doctrine in investor-State case-law, in any event, it does not apply to State-to-State cases, in which one party is never justified in availing itself of an internationally wrongful act by the other in order to seek to prevent an international court or tribunal from rendering a judgment. *A fortiori*, a claim based on the clean hands doctrine cannot be envisaged as a bar to the admissibility of an Application putting a case before the Court, with the effect of encouraging recourse to counter-measures. Furthermore, the fact that Iran might have allegedly violated some of its obligations under the Treaty – *quod non* – cannot bar it from using this procedural right: determining the responsibilities of the United States for the breaches of the 1955 Treaty of Amity is the very purpose of the recourse to the I.C.J. on the basis of Article XXI of the Treaty.

[368] U.S. Preliminary Objections, p. 24, para. 3.31.

APPENDIX A.

THE U.S. ALLEGATIONS ARE UNFOUNDED

A.1 As explained above,[369] Iran refuses to enter in the United States' game which only seeks to tarnish the image of Iran and distract attention away from the actual dispute at issue, which Iran has submitted to the Court. Only a few general points on these allegations will be made in the present Appendix.

A. Accusations of terrorism as part of U.S. foreign policy goals

A.2 The U.S. allegations emanate from the hostile policy that it adopted soon after the overthrow in 1979 of the Shah's regime. That regime had been brought to power by the U.S.-planned and -backed coup against the national Iranian government in 1953,[370] and was one of the closest allies of the United States in the region. This new policy led the United States to make every effort to coerce and intimidate the new Iranian Government by any direct or indirect means.

A.3 In line with this policy, in January 1984 the United States placed Iran on the State Department's list of States "sponsoring terrorism", at a time when the new Iranian Government had been defending its country against numerous bombings and assassinations by U.S.-sponsored terrorist groups, as well as against aggression from Saddam Hussein with U.S. extensive diplomatic, financial, intelligence and training support, during Iraq's war against Iran.

A.4 The accusation made by the United States against other States concerning the 'sponsoring of terrorism' is made in order to advance U.S. foreign policy goals. The United States uses the word "terrorism" as a convenient label to attack its opponents. Indeed, the accusation is a nebulous and self-serving allegation, and particularly so in

369 See *supra*, p. 90, para. 8.2.

370 See the documents recently declassified by the CIA in August 2013 (*National Security Archive*, "CIA Confirms Role in 1953 Iran Coup", 19 August 2013 (IOS, Annex 34)) and June 2017 (*National Security Archive*, "Iran 1953: State Department Finally Releases Updated Official History of Mosaddeq Coup", 15 June 2017 (IOS, Annex 54)).

the absence of any agreed definition in international law of the concept of 'terrorism' as such.

B. Absence of definition of 'terrorism'

A.5 The U.S. Government itself agreed, in its 1997 report, *Patterns of Global Terrorism*, that "[n]o one definition of terrorism has gained universal acceptance".[371] This situation has not changed, despite the increased willingness of States to come together to build a common understanding of grave offences that are condemned by all States and to develop a detailed body of international criminal law, backed by international institutions, culminating in the adoption of the Statute of the International Criminal Court ("**ICC**"). These developments have still not produced either an agreed general definition of terrorism, or the inclusion of 'terrorism' among the offences over which the ICC has jurisdiction.

A.6 One of the main reasons behind the lack of consensus between States is the exclusion of national liberation wars or self-determination struggles from the scope of the definition of terrorism. These divergences prevented the adoption of the *Draft Comprehensive Global Convention on Terrorism*. Only sectoral conventions have been adopted and they define very particular acts of terrorism. The one broader convention which has been adopted, the *International Convention for the Suppression of the Financing of Terrorism*, still does not define terrorism but adopts its own definition of terrorist acts, in part by a *renvoi* to previous conventions. The I.C.J. had very recently the opportunity to recall that, as far as international law is concerned, 'support of terrorism' is not a political incantation but should involve a definition, fulfil particular conditions, and be proved by facts:

> "75. In the present case, the acts to which Ukraine refers (see paragraph 66 above) have given rise to the death and injury of a large number of civilians. However, in order to determine whether the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the other elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge noted above (see

[371] U.S. Department of State, *Patterns of Global Terrorism:* 1997, *Department of State Publication 10535,* Introduction, p. 3 (IOS, Annex 56).

paragraph 74), and the element of purpose specified in Article 2, paragraph 1 (b), are present. At this stage of the proceedings, Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present."[372]

A.7 Neither is there a definition of terrorism or even of a terrorist act in customary international law. In 2003, a U.S. Court of Appeal declared "that customary international law currently does not provide for the prosecution of 'terrorist' acts under the universality principle, in part due to the failure of States to achieve anything like consensus on the definition of terrorism."[373]

A.8 Beyond difficulties with a general definition of terrorism, there has also been an acute controversy over the notion of 'State terrorism'. 'Terrorism' was not included, for example, as a State crime in the list contained in Article 19(3) of the ILC Draft Articles on State Responsibility as adopted on first reading in 1996.[374] It should also be noted that 'terrorism' was dropped from the I.L.C.'s Draft Code of Crimes against the Peace and Security of Mankind (1996).[375] In the I.L.C.'s 1994 Draft Statute for an International Criminal Court, various 'treaty crimes' dealing with specific terrorist offences *(e.g.* crimes against civil aviation, ships and internationally protected persons) were included, but there was no recognition of a customary law crime of international 'terrorism' as such.[376] Nor, despite several proposals, was such a crime inserted in the Rome Statute of the International Criminal Court: on the contrary, the treaty provisions (Article 5) dealing with 'terrorism' were deleted, with the support of the United States. During the recent Review Conference in Kampala in 2010, the Netherlands proposed to add the crime of terrorism under Article 5, but this was not followed by a majority

372 I.C.J., Order, 19 April 2017, *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)*, Provisional Measures, p. 26, para. 75.

373 *United States of America v. Yousef et al.*, Court of Appeals, Second Circuit, 4 April 2003, 327 F.3d 56, p. 39 (IOS, Annex 7).

374 U.N. Doc. No A/51/10 (1996). See also Skubiszewski, K., "The Definition of Terrorism", 19 *IYHR* (1989), p. 47.

375 U.N. Doc. A/CN.4/L.532, 8 July 1996.

376 *Yearbook of the International Law Commission*, 1994, Vol. II, Part 2, pp. 26-69.

of the participants. It is interesting to note that in its proposal the Netherlands recognised "the absence of a generally acceptable definition of terrorism."[377]

A.9 Finally, it should be noted that the resolutions of the Security Council do not attempt to define terrorism in general: rather, they assert an international interest in suppressing "acts of international terrorism in all its forms which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States."[378] These resolutions are not based on any legal definition of terrorism, but fall within the sphere of the discretion and appreciation allowed to the Security Council under the Charter. Two points only need to be made about them.

(a) First, as already noted, no such Security Council resolutions have been passed with respect to Iran – not one single resolution, in more than 35 years since the new Iranian Government replaced the regime of the Shah.

(b) Second, neither the Security Council resolutions themselves, nor any other international norms, give the slightest support to the idea that any individual State has the right to determine unilaterally that acts anywhere in the world constitute "terrorist acts" and to use that unilateral determination in order to justify conduct on its part which is otherwise unlawful. In short, the resolutions provide no basis whatever on which the United States could take international law into its own hands with impunity.

C. U.S. erroneous accusations against Iran as a State sponsoring terrorism

A.10 In the past four decades, the United States has employed every means at its disposal to weaken and slander Iran, falsely depicting Iran as a "State sponsoring terrorism" and engaging in other destabilizing acts. For many years, there has been a concerted misinformation campaign in the political vocabulary of U.S. officials, and consequently in the U.S. media, to make the name of Iran synonymous with terrorism, with Iranian leaders being portrayed as sponsors of terrorism. This misinformation has become so

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377 Assembly of States Parties, eighth session, *Report of the Bureau on the Review Conference – Addendu*m, 10 November 2009, ICC-ASP/8/43/Add.1, Annex IV, p. 13.

378 United Nations Security Council Resolution 1044, 31 January 1996, preambular para. 1.

deeply engrained that no matter where terrorism is committed, as far as the United States is concerned, Iran will be portrayed as responsible. For instance, in 1996 the then U.S. Secretary of Defence accused Iran of being involved in the Khobar Tower bombing:[379] but later the Saudi Arabian Government, after completing its investigation, concluded that "there was no foreign role in this explosion" and that the bombing "took place at Saudi hands".[380]

A.11 Following the hideous terrorist attacks in Tehran on 7 June 2017, U.S. President Donald Trump went as far as suggesting that Iran brought them upon itself.[381] The very same day that Iran was struck by these deadly terrorist attacks, the U.S. Senate voted new sanctions against Iran because of an alleged support of terrorism.[382]

A.12 Iran rejects categorically the U.S. accusation of sponsoring terrorism. It considers the designation of Iran as a sponsor of terrorism to be unfounded and internationally wrong. The process of unilaterally designating other countries as "State-sponsors of terrorism" is opaque, applying double standards driven by U.S. political and financial interests even in cases where there is evidence clearly pointing to the "clandestine financial and logistic support" by allies to the United States.[383] It is interesting to note that Cuba has been recently removed from the list of "State sponsors of terrorism" after it resumed its diplomatic relations with the United States. This was also the case of Iraq, when the United States established relation with Saddam Hussein's regime in 1984. The recent crisis between the Arab States in the Persian Gulf is also interesting in this respect. Two weeks after the U.S. President came to Saudi Arabia, this State and other countries in the region accused Qatar of being a supporter of terrorism; and this was endorsed by

379 S. Robinson, "Gingrich in call to arms against Iran terror bases", *The Daily Telegraph*, 5 August 1996 (IOS, Annex 22).

380 "Riyadh accepts for first time that bombers of US base were Saudi", *Agence France Press*, 21 May 1998 (IOS, Annex 25).

381 See e.g. J. Cook, "Trump Suggests Iran Brought Deadly Terrorist Attacks Upon Itself", *www.huffingtonpost.com*, 7 June 2017 (IOS, Annex 46) or I. Tharoor, "Terror in Iran reveals the hypocrisy of Trump and his allies", *The Washington Post*, 8 June 2017 (IOS, Annex 48).

382 See Z. Jilani, R. Grim, "Bucking Bernie Sanders, Democrats Move Forward on Iran Sanctions After Terror Attack in Tehran", *The Intercept*, 7 June 2017 (IOS, Annex 47) or R. Shabad, "Senate passes measure to expand sanctions on Iran and Russia", *www.cbsnews.com*, 15 June 2017 (IOS, Annex 55).

383 F. Zakaria, "How Saudi Arabia Played Donald Trump", *The Washington Post*, 25 May 2017 (IOS, Annex 45).

the U.S. President who declared that "[t]he nation of Qatar, unfortunately, has historically been a funder of terrorism at a very high level."[384] A few days later, this did not prevent the United States selling weapons, including jet fighters, to Qatar, while U.S. diplomacy was taking back these accusations.[385]

A.13 The United States has failed to provide any evidence to establish, in accordance with any internationally recognised standards or procedures, the attributability to Iran of the actions referred to in its Preliminary Objections, including the alleged actions attributed to militant groups such as Hezbollah or Hamas. Furthermore, contrary to the U.S. claims, these organizations are not the proxy of Iran or any other governments which support them. Rather, they are militant groups which have been defending their country against foreign invasion and occupation. Hezbollah is a highly popular and independent political party in Lebanon, with a number of seats in the cabinet of ministers and parliament. Hamas, too, is a political party in occupied Palestine, which was elected by Gaza's people to run the government.

A.14 Under the U.S. approach to designating these groups as 'terrorists', the U.S. Government itself can be considered as a 'State sponsor of terrorism' because it has been involved in the creation or support of militant groups – for example in the 1980s, when it supported groups which fought against the Soviet Union's occupation in Afghanistan.[386] It has been admitted that the United States supported the foundation of terrorist organizations such as Al-Qaeda and ISIS (the so called Islamic State of Iraq and Sham). Ms. Hillary Clinton, former U.S. Secretary of State, testified before the Congress that: "[t]he people we are fighting today we founded 20 years ago".[387] The

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384 See e.g. N. Gaouette, D. Merica & R. Browne, "Trump: Qatar must stop funding terrorism", *CNN*, 10 June 2017 (IOS, Annex 51) or D. Smith & S. Siddiqui, "Gulf crisis: Trump escalates row by accusing Qatar of sponsoring terror", *The Guardian*, 9 June 2017 (IOS, Annex 49).

385 See e.g. P. Beaumont, "US signs deal to supply F-15 jets to Qatar after Trump terror claims", *The Guardian*, 15 June 2017 (IOS, Annex 52) or R. Browne, "Amid diplomatic crisis Pentagon agrees $12 billion jet deal with Qatar", *CNN*, 15 June 2017 (IOS, Annex 53).

386 See S. Galster, "The September 11th Sourcebooks – Vol. II: Afghanistan: Lessons from the Last War – Afghanistan: The Making of U.S. Policy, 1973-1990", *The National Security Archive*, 9 October 2001 (IOS, Annex 26).

387 See "Hillary Clinton speaks out about US links with Taliban", *SouthAsiaNews* available at www.youtube.com/watch?v=X2CE0fyz4ys (last visited 16 August 2017).

current U.S. President pointed out several times during his presidential campaign that "Obama and Hillary Clinton created ISIS".[388]

D. Iran as a victim of terrorist activities and other hostile acts

A.15 Iran has always condemned terrorism in all its forms and manifestations and has done so at the highest level.[389] Indeed, Iran has been itself a major victim of terrorist activities conducted by groups supported mainly by the United States after the revolution. By way of example more than 17,000 Iranian civilians and officials have been killed by the Mujahedin Khalgh Organization of Iran ("**MKO**") and the National Council of Resistance ("**NCR**"), through bombings and assassinations. Members and supporters of MKO and NCR have been very active in the United States and had access to U.S. officials. Representatives of those groups have continuously contacted U.S. Senators and Congressmen and met with U.S. Executive officials.[390]

A.16 In 1998, the Taliban killed ten Iranian diplomats in Afghanistan at the siege of the Iranian consulate in Mazar-i-Sharif. Between 2010 and 2012, five Iranian nuclear scientists were assassinated by terrorist groups. During the past several years, terrorist groups have killed many civilians and security personnel in one south-eastern Iranian

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388 See R. LoBianco & E. Landers, "Trump: Clinton, Obama 'created ISIS'", *CNN*, 3 January 2016 (IOS, Annex 38) or K. Ng, "Donald Trump says Barack Obama and Hillary Clinton 'created ISIS'", *The Independent*, 3 January 2016 (IOS, Annex 39).

389 See G. A. Nader, "Interview with President Ali Akbar Hashemi Rafsanjani", *Middle East Insight*, July-August 1995, Vol. XI, No.5, p. 10 (IOS, Annex 19); "Transcript of interview with Mohammad Khatami, Former President of the Islamic Republic of Iran", *CNN*, 7 January 1998, p. 8 (IOS, Annex 23). See also Statement by H.E. Dr. Kamal Kharrazi, Minister for Foreign Affairs of the Islamic Republic of Iran, before the Fifty-Second Session of the United Nations General Assembly, New York, 22 September 1997 (IOS, Annex 8); Statement by H.E. Seyed Mohammad Khatami, Former President of the Islamic Republic of Iran, 21 September 1998 (IOS, Annex 9); Statement by H.E. Dr. Hassan Rohani, President of the Islamic Republic of Iran, before the Sixty-Eight Session of the United Nations General Assembly, New York, 24 September 2013, p. 3 (IOS, Annex 10).

390 See e.g., *Mojahed, MKO Bulletin*, Issue No. 295, Feb-March 1993 (IOS, Annex 15); *Mojahed, MKO Bulletin*, issue No. 294, Dec. 1992 (IOS, Annex 14); *Mojahed, MKO Bulletin*, Issue No. 298, May 1993 (IOS, Annex 18); *Mojahed, MKO Bulletin*, Exclusive Issue, Autumn 1991 (IOS, Annex 12); *Mojahed, MKO Bulletin*, Issue No. 297, April 1993 (IOS, Annex 17); see also S. M. Hersh, "Our Men in Iran", *The New Yorker*, 5 April 2012 (IOS, Annex 32); Daniel Chaitin, "Sen. John McCain meets with Iranian dissidents relocated to Albania", *Washington Examiner*, 15 April 2017 (IOS, Annex 44).

province (Sistan and Baluchistan) alone. More recently, the terrorist attack in Tehran of 7 June 2017 (claimed by ISIS) killed 18 and injured over 45 civilians.

A.17 The United States also accuses Iran of engaging "in a years-long pattern of conduct in violation of its obligations under the NPT and the resulting restrictions imposed under UNSC resolutions".[391] The U.S. description of the issue is disingenuous, and fails to take into account many other intervening issues with respect to Iran's peaceful nuclear program which cannot be discussed here. Indeed, all Iran's nuclear installations and all nuclear materials have been under the IAEA's constant and strict inspections. The UN Security Council has never declared Iran to be in violation of the NPT, and the IAEA has never reported that nuclear materials were used for non-peaceful purposes.

A.18 In sum, the main underlying reason for the dispute – which is not before the Court – was the United States' policy after 1979 with respect to Iran's peaceful program to cut off the supply of enriched uranium fuel and other materials by IAEA's members for Iran's nuclear research reactors and to deprive Iran of its inalienable rights under the NPT and IAEA agreements.[392] The dispute was resolved through the JCPOA, which *inter alia* reaffirmed Iran's rights under the said agreements, though U.S. Government or U.S. Congress have continued their policy of imposing sanctions against Iran or Iranian nationals and companies. It is regrettable that these matters have been placed before the Court for inappropriate, prejudicial purposes.

A.19 Similarly, the United States' other accusations against Iran emanate either from a U.S. hostile approach toward Iran or are taken out of their appropriate context. Iran does not intend to belabour the Court with these issues, which are irrelevant to any correctly brought objection to jurisdiction or admissibility, but reserves its right to respond to them in the later stages of proceeding if necessary. It is sufficient here to emphasise that it is Iran's view that it is the United States that has destabilised the Middle East by its inappropriate policies and actions. This *inter alia* includes occupation of Iraq in 2003

391 See U.S. Preliminary Objections, p. 24, para. 3.31.

392 The U.S. officials were publicly questioning Iran's need for nuclear power since it has so much oil whereas the United States had encouraged Iran in 1970th to develop nuclear energy because Iran eventually run out of oil (R. Erlich, "U.S. Tells Iran: Become a Nuclear Power", *Foreign Policy in Focus*, 28 November 2007) (IOS, Annex 27).

which destabilised that country and paved the way for emerging terrorist groups such as ISIS.[393]

A.20 Finally, to put matters in a proper context, Iran should also refer briefly here to a number of other hostile actions that the United States has taken against Iran after the overthrow of the U.S. backed Shah's regime in 1979 including: (a) General Robert E. Hyser's mission to Iran in January 1979 for a last-resort coup d'état prior to the revolution; (b) the U.S. unsuccessful military operation in Tabas desert on 24 April 1980 (the so-called 'Operation Eagle Claw'); (c) the Nojeh coup plot on 9 July 1980 to overthrow the newly established Islamic Republic of Iran; (d) the support of Saddam Hussein's aggression against Iran by different means;[394] (e) the attack and destruction of certain Iranian Naval units and several offshore oil installations in the Persian Gulf;[395] (f) the shooting down of an Iranian civil aircraft over the Persian Gulf, killing all 300 passengers on board;[396] and (g) the interfering in Iran by allocating funds for covert operations, *threatening Iran with military attack, and stating publicly its support for a regime change in Iran.*[397]

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393 I. Tharoor, "Iraq's Crisis: Don't Forget the 2003 U.S. Invasion", *The Washington Post*, 5 April 2014 (IOS, Annex 36); D. Rohde, "The Iraq Takeaway: American Ground Invasions Destabilize the Middle East", *The Atlantic*, 20 March 2013 (IOS, Annex 33); D. Hussain, "ISIS: The 'Unintended Consequences' of the US-led War on Iraq", *Foreign Policy Journal*, 23 March 2015 (IOS, Annex 37).

394 This included restricting flow of arms to Iran, replacing Iraq with Iran on the State sponsor of terrorism list in 1984, supplying Iraq with materials and data in its illicit chemical and ballistic missile attacks against Iranian military and civil targets, providing Iraq with financial, intelligence and diplomatic help. See e.g., U.S. House of Representatives, Report on Banking Committee's Investigation of the Atlanta Branch BNL, Congressional Record, 102nd Congress (1991-1992), 2 March 1992 (IOS, Annex 1); C. W. Weinberger, *Fighting for Peace*, Warner Books, 1990, p. 358; H. Kissinger, "Clinton and the World", *News Week*, 1 February 1993, p. 12 (IOS, Annex 16); K. R. Timmerman, "Europe's Arms Pipeline to Iran", *The Nation*, Vol. 245, 18 July 1987, p. 47 (IOS, Annex 11); CRS Report for Congress, "Terrorism: Middle Eastern Groups and State Sponsors", 9 August 1995 (IOS, Annex 20); M. Waas & D. Frantz, "Abuses in US Aid to Iraqis Ignored", *Los Angeles Times*, 22 March 1992 (IOS, Annex 13); R. Wright, "Some See Hypocrisy in U.S. Stand on Iraq Arms Mideast: Officials say American intelligence aided Baghdad's use of chemical weapons against Iran in 80s", *Los Angeles Times*, 16 February 1998 (IOS, Annex 24); see also M. Phythian, *Arming Iraq: How the US and Britain Secretly Built Saddam's War Machine*, North Western University Press, Boston, p. 37; E. Sciolino, *The Outlaw State: Saddam Hossein's Quest for Power and the Gulf Crises*, John Wiley & Sons, New York 1991, p. 166.

395 See *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161.

396 I.C.J., Case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America).*

397 See e.g., R. Smith & T. Lippman, "White House Agrees to Bill Allowing Covert Action Against Iran", *The Washington Post*, 22 December 1995 (IOS, Annex 21); "Obama says on Iran all options on the table", *Reuters*, 21 April 2009 (IOS, Annex 28); "Tillerson says U.S. Iran policy is "peaceful transition

PART IV.

CONCLUSIONS

CHAPTER IX.
CONCLUDING OBSERVATIONS

9.1 This chapter briefly recalls the main legal arguments made in the U.S. Preliminary Objections, and Iran's main responses to them. It does so without prejudice to the detailed responses set out in the preceding chapters of these Observations and Submissions.

9.2 The United States has filed a wide-ranging document, based largely upon irrelevant, unsupported allegations and criticisms of Iran, in support of its preliminary objections. The U.S. Preliminary Objections rest on four legal propositions which the United States requests that the Court adopt, and which are set out in the Submissions at pp. 107-108 of that document.

U.S. proposition 1: all Iran's claims are inadmissible

9.3 First, the United States submits that all Iran's claims are inadmissible. It says that the fundamental conditions underlying the Treaty of Amity no longer exist between the Parties.[398] But Iran has pointed out that the United States has not terminated the Treaty,[399] and that certain economic relations (a concept wider than commercial relations)[400] between the United States and Iran continue.[401]

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of that government", *www.msn.com*, 21 June 2017 available at www.msn.com/en-ca/lifestyle/smart-living/tillerson-says-us-iran-policy-is-peaceful-transition-of-that-government/vp-BBCXUa8 (last visited 16 August 2017).

398 U.S. Preliminary Objections, pp. 47-50, paras. 6.3-6.11.

399 See *supra*, pp. 1-2, paras. 1.2-1.4.

400 See *supra*, pp. 14-17, paras. 2.12-2.17.

401 See *supra*, pp. 17-22, paras. 2.18-2.28.

9.4 The United States says that Iran's claims are abusive and must be deemed inadmissible,[402] and that exercising jurisdiction in this case would undermine the integrity of the Court's judicial function.[403] Iran has recalled the Court's earlier discussions of such arguments,[404] and noted that the United States does not explain how it can be 'abusive' to put forward claims of specific breaches of specific provisions of the Treaty.[405]

9.5 The United States says that Iran has "unclean hands, soiled by decades of support for terrorism and other destabilizing actions in violation of international law" and that this renders its claims inadmissible.[406] Putting aside the irrelevant and unsupported allegations made by the United States, Iran has submitted that the 'clean hands' doctrine has nothing to do with the admissibility of an application and no role in State-to-State cases. Iran has also reviewed the jurisprudence on the doctrine, pointing out that the doctrine has never been applied by the Court to render an application inadmissible.[407]

U.S. proposition 2: U.S. measures that block or freeze assets of the Iranian government or Iranian financial institutions (as defined in Executive Order 13599) are outside the Court's jurisdiction

9.6 Next, the United States seeks the dismissal of all Iranian claims that U.S. measures blocking or freezing assets of the Iranian government or Iranian financial institutions violate the Treaty. The argument is linked specifically to U.S. Executive Order 13599. The U.S. argument is that those measures are excluded from the Court's jurisdiction by Article XX(1) of the Treaty.[408]

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402 U.S. Preliminary Objections, pp. 50-53, paras. 6.12 – 6.18.

403 U.S. Preliminary Objections, pp. 53-54, paras. 6.19-6.23.

404 See *supra*, pp. 76-82, paras. 7.4-7.16.

405 See *supra*, pp. 83-88, paras. 7.20-7.31.

406 U.S. Preliminary Objections, pp. 54-61, paras. 6.25-6.38.

407 See *supra*, pp. 90-98, paras. 8.1-8.21.

408 U.S. Preliminary Objections, Chapter 7.

9.7 Iran has recalled the Court's examination of Article XX(1) in the *Oil Platforms* case, and submitted that where that provision applies it affords a defence on the merits to conduct that would otherwise amount to a breach of the Treaty, but does not restrict the jurisdiction of the Court.[409] Further, the question of the scope of Article XX(1) is in any event not of an exclusively preliminary character within the meaning of Article 79(7) of the Rules of the Court.[410] In addition, Iran has noted that this U.S. objection touches only one aspect of Iran's case, and has no bearing on other aspects of Iran's Application.[411]

U.S. proposition 3: all claims, brought under any provision of the Treaty of Amity, that are predicated on the United States' purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian State-owned entities, are outside the Court's jurisdiction.

9.8 The next U.S. submission asserts that all claims predicated on an entitlement to sovereign immunity are outside the Court's jurisdiction, because they do not fall within the provisions of the Treaty.[412]

9.9 Iran has submitted that the question is not whether the entire Treaty is a vehicle for codifying the law on sovereign immunity but whether specific provisions of the Treaty require consideration of compliance with the law on immunity.[413] Iran has pointed to several such provisions:

(a) Article III(2) ('freedom of access to the courts … both in defense and pursuit of their rights…');[414]

409 See *supra*, pp. 69-71, paras. 6.1-6.6.

410 See *supra*, pp. 71-73, paras. 6.7-6.11.

411 See *supra*, pp. 28-30, paras. 3.6-3.10.

412 U.S. Preliminary Objections, Chapter 8.

413 See *supra*, pp. 47-51, paras. 5.1-5.8 and pp. 65-68, paras. 5.39-5.47.

414 See *supra*, pp. 51-57, paras. 5.9-5.21.

(b) Article IV(1) (fair and equitable treatment; freedom from unreasonable or discriminatory treatment that would impair legally acquired rights and interests);[415]

(c) Article IV(2) (right to 'most constant protection and security' of property 'in no case less than that required by international law');[416]

(d) Article V(1) (right to lease, purchase, acquire and dispose of property);[417]

(e) Article VII(1) (right to make payments, remittances and transfers of funds);[418] and

(d) Article X(1) (freedom of commerce and navigation).

9.10 Iran submits that all of these provisions are on their face evidently capable of being violated by the denial of rights to immunities before U.S. courts.

U.S. proposition 4: all claims of purported violations of Articles III, IV, or V of the Treaty that are predicated on treatment accorded to the Government of Iran or to Bank Markazi are outside the Court's jurisdiction.

9.11 The United States submits, finally, that the Government of Iran and Bank Markazi are not entitled to protection under the Treaty.[419] It says that Bank Markazi is a "sovereign entity exercising sovereign functions",[420] and therefore cannot be a "company" under the Treaty, benefitting from Treaty protections.[421]

9.12 Iran has pointed out that the Treaty itself defines (in Article III(1)) the "companies" to which it applies, and does so in terms that include Bank Markazi and other Iranian

415 See *supra*, pp. 58-60, paras. 5.22-5.26.

416 See *supra*, pp. 60-62, paras. 5.27-5.32.

417 Iran, Memorial, pp. 108-109, paras. 5.72-5.76.

418 Iran, Memorial, pp. 110-112, paras. 6.2-6.9.

419 U.S. Preliminary Objections, Chapter 9.

420 U.S. Preliminary Objections, pp. 97-99, paras. 9.4-9.8.

421 U.S. Preliminary Objections, pp. 99-104, paras. 9.9-9.19.

companies affected by the U.S. measures at issue in this case. This interpretation is borne out by the ordinary meaning of the Treaty provisions in their context, and confirmed by examination of the *travaux préparatoires*, in accordance with the Vienna Convention rules on treaty interpretation.[422] It is not uncommon for Central Banks to be incorporated as companies under domestic laws.[423] Furthermore, Iran has noted that the reliance by the United States on the functions carried out by Bank Markazi necessarily requires an investigation into the facts, and cannot be a question of a preliminary character.[424]

The limited nature of the U.S. jurisdictional objections

9.13 Iran has also pointed out that the United States' preliminary objections to the jurisdiction of the Court (unlike the objections to admissibility) are directed only at particular parts of Iran's Application.

9.14 As Iran has noted, the United States does not question the Court's jurisdiction over claims based on Article III of the Treaty (recognition of juridical status of companies and freedom of access to courts), except in respect of one company, Bank Markazi.[425] The same is true in respect of Article IV and V of the Treaty.[426] The United States similarly makes no objection to the Court's jurisdiction over Iran's claims in respect of a breach of Article VII of the Treaty, or (sovereign immunity- related claims apart) in respect of a breach of Article X(1).

9.15 For these reasons, and the further reasons and explanations given in the preceding chapters, Iran requests the Court to dismiss all of the U.S. preliminary objections and to proceed to a hearing on Iran's Application.

422 See *supra*, pp. 34-44, paras. 4.4-4.30.

423 See *supra*, p. 33, fn. 110.

424 See *supra*, pp. 45-46, paras. 4.31-4.35.

425 See *supra*, p. 28, para. 3.7.

426 See *supra*, pp. 29-30, paras. 3.8-3.9.

CHAPTER X.
SUBMISSIONS

10.1 For the reasons given above, the Islamic Republic of Iran requests that the Court:

(a) Dismiss the preliminary objections submitted by the United States in its submission dated 1 May 2017, and

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

Respectfully submitted,

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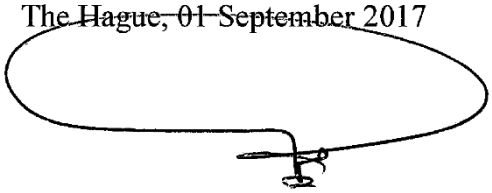
Co-Agent of the Government of the
Islamic Republic of Iran

CERTIFICATION

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

The Hague, 01 September 2017



M. H. Zahedin Labbaf

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Islamic Republic of Iran

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