INTERNATIONAL COURT OF JUSTICE

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

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

PRELIMINARY OBJECTIONS

SUBMITTED BY

THE UNITED STATES OF AMERICA

AUGUST 23, 2019

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION AND OVERVIEW 3

Section A: Procedural History 5

Section B: Overview of U.S. Objections 7

Section C: The Structure of These Preliminary Objections 9

PART I: FACTUAL AND LEGAL FOUNDATIONS FOR THE U.S. PRELIMINARY OBJECTIONS 10

CHAPTER 2: FACTUAL BACKGROUND 10

Section A: Pre-JCPOA Sanctions in Place to Address the Threats Posed by Iran, Including Iran's Flagrant Disregard of Its Nuclear-Related Obligations 10

Section B: Overview of the JCPOA 17

Section C: The Sanctions Consequences of the JCPOA and of the U.S. Decision to Cease Participation in the JCPOA 20

Section D: U.S. Decision to Cease Participation in the JCPOA 24

CHAPTER 3: THE TREATY OF AMITY 36

CHAPTER 4: APPLICABLE LEGAL FRAMEWORK 41

Section A: Objections Generally Must be Decided at the Preliminary Stage 41

Section B: The Court Lacks Jurisdiction Where Iran's Claims Do Not Fall within the Provisions of the Treaty of Amity 42

Section C: Even Where the Court Has Jurisdiction, It Should Decline to Adjudicate a Case in Certain Exceptional Circumstances 47

Section D: Other Objections of an Exclusively Preliminary Character Should be Decided at this Stage 48

PART II: U.S. PRELIMINARY OBJECTIONS 51

CHAPTER 5: THE DISPUTE IRAN BRINGS IS ABOUT THE JCPOA, NOT THE TREATY OF AMITY, AND SHOULD THEREFORE BE DISMISSED AS OUTSIDE THE COURT'S JURISDICTION OR, IN THE ALTERNATIVE, AS INADMISSIBLE 51

Section A: The Court Lacks Jurisdiction over the Subject Matter of this Case, Which Is Solely a Dispute Regarding the United States' Decision To Cease Participation in the JCPOA and Re-impose Nuclear-related Sanctions That Had Been Lifted Under the JCPOA 51

Section B: In the Alternative, the Court Should Decline to Exercise Jurisdiction in this Case Because Iran's Claims Amount to an Abuse of Process and Would Work an Injustice That Would Raise Serious Questions of Judicial Propriety 58

CHAPTER 6: EXCEPTIONS CONTAINED IN ARTICLE XX(1) OF THE TREATY STAND AS AN INSURMOUNTABLE BAR TO IRAN'S CLAIMS IN THIS CASE 68

Section A: The Exceptions in Article XX(1) Can and Should Be Addressed at a Preliminary Stage in this Case, Regardless of Whether They Affect the Court's Jurisdiction 70

Section B: The U.S. Measures Relate to Fissionable Materials (Article XX, paragraph (1)(b)) 76

Section C: The U.S. Measures Were Necessary to Protect the Essential Security Interests of the United States (Article XX, paragraph 1(d)) 82

CHAPTER 7: MEASURES CONCERNING TRADE OR TRANSACTIONS BETWEEN IRAN AND A THIRD COUNTRY OR BETWEEN THEIR NATIONALS AND COMPANIES ARE OUTSIDE THE SCOPE THE TREATY 94

Section A: The Vast Majority of the May 8 Measures are Third Country Measures 97

Section B: The Treaty of Amity Provides Protections with Respect to Certain Bilateral Commercial Activity between the United States and Iran, Not between Iran and Third Countries 103

CHAPTER 8: CONCLUDING OBSERVATIONS 118

SUBMISSIONS 120

CERTIFICATION 121

CHAPTER 1: INTRODUCTION AND OVERVIEW

1.1. For many years, the United States has found it necessary to deploy diplomatic, economic, legal, and other tools to respond to the grave threat the Islamic Republic of Iran ("Iran") poses to the safety and security of the United States, its nationals, its allies and partners, and the international community. Iran's advancement of a nuclear program that would give it the ability to quickly develop a nuclear weapon capability is one area of Iranian conduct presenting acute U.S. national security concerns and requiring all tools of U.S. diplomacy to address. But it is far from the only one. Other Iranian policies of profound concern to the United States and the international community include Iran's pursuit of ballistic missiles capable of carrying a nuclear warhead that endanger the United States and its allies; Iran's support for terrorist activities worldwide that threaten, and have taken, the lives of far too many U.S. nationals; Iran's arbitrary detention of U.S. citizens, including dual nationals; and Iran's political, financial, and material support to sow conflict and embolden destabilizing actors in the Middle East region and beyond.

1.2. On May 8, 2018, in view of the unrelenting and growing national security concerns with Iran's activities, as well as increasing concerns about shortcomings in the Joint Comprehensive Plan of Action or JCPOA, the United States announced that it would no longer participate in the JCPOA. As such, the United States would no longer continue to provide the sanctions relief outlined in the JCPOA. Nothing in the JCPOA precluded such action. Nor does anything in the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran ("Treaty of Amity" or "Treaty") preclude the re-imposition of the sanctions measures the United States had lifted under the JCPOA.

1.3. Stripped to its essentials, Iran's case before the Court is an attempt to unwind the United States' decision to cease participation in the JCPOA and to compel the United States to restore the sanctions relief that had been provided pursuant to and under a separate and non-legally binding instrument. This inescapable conclusion is highlighted by three fundamental considerations, all of which point to the need for the Court to make a preliminary finding dismissing Iran's case consistent with the U.S. objections set forth below.

1.4. First, Iran's claims challenge the sanctions measures *re*-imposed by the United States, underlining that these same measures had been in place prior to the July 14, 2015 date of the JCPOA, in some cases for years. The Treaty of Amity remained in place throughout. And yet

only upon the United States' exit from the JCPOA did Iran decide to bring proceedings to contest those re-imposed measures.

1.5. Second, Iran's provisional measures application to the Court in this case was sharply focused on attempting, through the medium of the provisional measures proceeding, to reverse the re-imposition of sanctions that had followed from the U.S. decision to cease participation in the non-legally binding JCPOA, and to thereby restore to Iran precisely the sanctions relief that the JCPOA had provided, this time through an order from this Court.

1.6. And third, notwithstanding Iran's pronouncement in its Memorial that its case is about the 1955 Treaty of Amity, and "nothing but" the Treaty of Amity,[1] the avowed focus of its merits claims are the sanctions measures that the United States re-imposed in consequence of its exit from the non-legally binding JCPOA. Equally important, these are measures that were put in place in response to acute and growing national security concerns with Iran's activities, and in an effort to cut off critical sources of funding to those activities, bringing them squarely within exceptions to the Treaty. Moreover, the vast majority of the measures Iran challenges in this case do not concern trade and transactions between the United States and Iran, or between their nationals and companies; rather, the measures concern trade and transactions between Iran and third countries, or their nationals and companies. This fact alone reveals the artifice of Iran's attempt to challenge such measures under a bilateral commercial treaty, and that artifice must be rejected.

1.7. In its provisional measures Order in this case, the Court concluded, for purposes of meeting the *prima facie* jurisdiction requirement for the indication of provisional measures, that "the fact that the dispute between the Parties arose in connection with and in the context of the decision of the United States to withdraw from the JCPOA does not in and of itself exclude the possibility that the dispute relates to the interpretation or application of the Treaty of Amity." The Court added that, "[i]n general terms, certain acts may fall within the ambit of more than one legal instrument and a dispute relating to those acts may relate to the 'interpretation or application' of more than one treaty or other instrument'" and that "[t]o the extent that the measures adopted by the United States following its decision to withdraw from the JCPOA might constitute violations of certain

[1] *See, e.g.*, Memorial of the Islamic Republic of Iran (hereinafter "Iran's Memorial"), para. 1.2. References to documents annexed to Iran's Memorial are rendered herein as "IM Annex __."

obligations under the 1955 Treaty, such measures relate to the interpretation or application of that instrument."[2]

1.8. The United States respects the Court's provisional measures Order and takes this opportunity to re-affirm that it is acting in accordance with the Order. That said, the focus of the present Preliminary Objections is to persuade the Court that the *prima facie* analysis that may have been appropriate at the provisional measures stage is not appropriate when the Court comes to consider its jurisdiction in this case more fully, and such a fuller assessment leads to a different result.

1.9. To this end, the United States advances in this submission, in accordance with Article 79(1) of the Rules of Court, two preliminary objections to jurisdiction, one preliminary objection to admissibility, and two preliminary objections warranting decision before proceedings on the merits. Each of the objections is exclusively preliminary in character and properly amenable to decision at a preliminary stage of proceedings. With the exception of one jurisdictional objection, each of the U.S. objections addresses Iran's case as a whole and would, if upheld, dispose of the entirety of Iran's case. The remaining objection, relating to the fact that Iran challenges measures that concern trade and transactions between Iran and third countries, covers the vast array of the measures of which Iran complains, but is not advanced with respect to one discrete category. It is, though, equally amenable to a finding by the Court at a preliminary stage.

Section A: Procedural History

1.10. Before providing an overview of the U.S. preliminary objections, it is useful to briefly recall the procedural history of these proceedings.

1.11. These proceedings were instituted on July 16, 2018 with the filing by Iran of an Application alleging that the re-imposition by the United States, on May 8, 2018, of sanctions measures relating to Iran in consequence of the U.S. withdrawal from the JCPOA ("May 8 Measures") constituted a breach of the Treaty of Amity. By its Application, Iran requested the Court to order the United States to terminate those measures.[3] As the basis for the jurisdiction of the Court, Iran invoked

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

[3] *See* Application Instituting Proceedings (hereinafter "Iran's Application"), para. 50.

Article XXI(2) of the Treaty. On the same date, Iran filed a Request for the indication of provisional measures, seeking an order requiring the United States to, among other things, suspend implementation and enforcement of all the May 8 Measures and allow for full implementation of transactions already licensed.[4]

1.12. On October 3, 2018, the Court issued an Order indicating provisional measures requiring the United States to remove, by means of its own choosing, any impediments arising from the May 8 Measures to the free export to the territory of Iran of medicines and medical devices, food stuffs and agricultural commodities, and certain goods and services necessary for the safety of civil aviation, as well as to ensure that licenses and necessary authorizations are granted and payments are not subject to restriction in relation to the foregoing.[5]

1.13. On May 24, 2019, Iran filed its Memorial. In that pleading, which stretched across almost 250 pages, barely ten sentences were devoted to the question of the Court's jurisdiction, the issue being dealt with largely by way of bare assertion, namely: "this dispute concerns the application of the Treaty of Amity, and in particular of Articles IV(1), IV(2), V(1), VII(1), VIII(1), VIII(2), IX(2), IX(3) and X(1), and violations of that Treaty by the USA. The dispute has not been satisfactorily adjusted by diplomacy. The High Contracting Parties have not agreed to settlement of the dispute by a means other than submission to the Court."[6]

1.14. In accordance with Article 79(1) of the Rules of Court, the United States submits these preliminary objections to the jurisdiction of the Court, to the admissibility of Iran's Application, and in respect of other issues that are of an exclusively preliminary character. Having regard to these objections, the United States respectfully requests that the Court dismiss Iran's case at this preliminary stage of the proceedings.

[4] *See* Provisional Measures, Order of 3 October 2018, para. 4.

[5] *Id*., para.102. Iran wrongfully asserts in its Memorial that the United States is failing to comply with the Provisional Measures Order. *See, e.g.*, Iran's Memorial, para. 1.27. The United States vigorously disputes this contention. However, this is not an issue to be considered at this preliminary objections stage. As the Court stated in its letter of 19 June 2019 (No. 152412), "any issues relating to the implementation of the provisional measures indicated by the Court may be addressed at a later juncture, if the case proceeds to the merits."

[6] Iran's Memorial, para.1.31.

Section B: Overview of U.S. Objections

1.15. As noted above, the United States advances two preliminary objections to jurisdiction, one objection to admissibility, and two objections that warrant decision before any proceedings on the merits, each objection being exclusively preliminary in character.[7]

1.16. The jurisdictional basis for this case invoked by Iran is Article XXI(2) of the Treaty of Amity. This Article provides, *inter alia*, for submission of disputes "as to the interpretation or application of the present Treaty" to the Court.[8] The first objection to jurisdiction, and an accompanying objection to admissibility, rest on the language and scope of Article XXI(2) of the Treaty, and the fact that the true subject matter of this case is a dispute as to the application of the JCPOA, an instrument entirely distinct from the Treaty of Amity, with no relationship thereto. A compromissory clause through which the Parties consent to the Court's jurisdiction in respect of disputes about the interpretation and application of one instrument cannot accord jurisdiction in respect of disputes over the application of another instrument. Iran's endeavor to bring to the Court this JCPOA dispute under the compromissory clause of the Treaty also amounts to an abuse of process in this case.

1.17. As a jurisdictional matter, Iran's case is a vehicle to try to restore to itself the entirety of the U.S. sanctions relief provided under the JCPOA. Iran cannot credibly characterize the subject matter of this dispute as a dispute about the interpretation or application of the Treaty of Amity.

1.18. The fundamental disconnect between the JCPOA relief Iran is seeking and the Treaty of Amity also renders Iran's Application inadmissible. Despite Iran's efforts to present its claims as legally distinct from a dispute concerning the JCPOA, adjudication of Iran's claims would inescapably entangle this Court in sensitive multilateral diplomatic matters concerning that political instrument, contrary to the JCPOA participants' deliberate design. Such an outcome would allow Iran to work an abuse of process.

[7] Should any portion of Iran's case be held over to the merits, the United States reserves all rights to raise additional objections to Iran's claims.

[8] Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. 3853, 284 U.N.T.S. 93 (hereinafter "Treaty of Amity") (IM Annex 1), Art. XXI, para. 2.

1.19. In the event the Court concludes, *quod non*, that notwithstanding the JCPOA origins and character of this case, it also engages the Treaty of Amity, the second and third objections are rooted in Article XX(1) of the Treaty. The United States contends that two separate exceptions in that article stand as a complete bar to the relief that Iran seeks and that these objections possess an "exclusively preliminary" character in the circumstances of this case. These are the exceptions in Article XX(1)(b), regarding "measures … relating to fissionable materials," and in Article X(1)(d), regarding "measures … necessary to protect [U.S.] essential security interests."

1.20. In respect of these objections, the United States is mindful of the Court's preliminary objections Judgment in the *Certain Iranian Assets* case in which it concluded that Article XX(1) of the Treaty of Amity did not go to the Court's jurisdiction, even though those exceptions may provide a substantive defense on the merits. While the United States respectfully questions that conclusion, the preliminary objections in this submission are not advanced as objections to the jurisdiction of the Court, but rather as objections that, in the language of Article 79(1) of the Court's Rules, "the decision upon which is requested before any further proceedings on the merits."

1.21. The United States submits that there are powerful reasons why, in this case, the Court can and should resolve the United States' objections relating to these exceptions as a preliminary matter. As detailed in Chapter 6, unlike in *Certain Iranian Assets*, the United States' objections under Article XX(1)(b) and (1)(d) each go to the entirety of Iran's case. Article XX(1) expressly excludes from the ambit of the Treaty's substantive obligations measures relating to fissionable materials and measures necessary to protect a Party's essential security interests. The measures that Iran challenges in this case are precisely such measures. Article XX(1) makes clear that where one of its exceptions is applicable, the United States has no obligations under the Treaty to refrain from taking such measures. The applicability of these exceptions is an inquiry that is severable and distinct from the merits of Iran's claims, and its resolution rests on a particular category of facts that the United States is making available to the Court. An early decision with respect to the applicability of these exceptions, rather than holding them to the merits stage, would clearly serve the interests of fairness, procedural economy, and the sound administration of justice.

1.22. The last of the U.S. preliminary objections is the third country measures objection to jurisdiction noted above. As the United States will demonstrate, the vast majority of the measures

Iran challenges fall outside the scope of the Treaty of Amity, a bilateral commercial and consular agreement that is aimed at fostering stability in commercial relations between the Parties, their companies, and their nationals. By contrast, the May 8 Measures that Iran challenges principally concern trade and transactions between Iran and third countries, or between their nationals and companies, not between Iran and the United States. The Treaty of Amity does not govern such measures and provides no obligations applicable to them. As such, where Iran's claims challenge third country measures, those claims fall outside the scope of the Treaty, and cannot be covered by its compromissory clause.

Section C: The Structure of These Preliminary Objections

1.23. This submission is organized in two Parts. **Part I**, which encompasses **Chapters 2 through 4**, provides the factual, contextual, and legal foundations for the U.S. preliminary objections. **Chapter 2** details the relevant factual background essential to understanding Iran's case and the U.S. preliminary objections, which includes the pre-JCPOA sanctions measures directed at Iran's nuclear program, the negotiation of the JCPOA and its limits, the U.S. decision to leave the JCPOA, and the full range of Iranian activities that threaten U.S. national security that led to that decision. **Chapter 3** addresses the Treaty of Amity, including its historical context, its object and purpose, and its inherent limits. **Chapter 4** briefly sets forth the jurisprudence applicable to the Court's inquiry at this preliminary objections stage.

1.24. **Part II** of this submission presents the U.S. preliminary objections, as established in **Chapters 5 through 7**. **Chapter 5** details the United States' contention that the subject matter of Iran's case is about the JCPOA and not the Treaty of Amity, and therefore falls outside the compromissory clause contained in Article XXI(2) of the Treaty, as well as the argument in the alternative that the Court should find Iran's claims inadmissible as an abuse of process. **Chapter 6** addresses the Article XX arguments, including the conclusion that these issues – at least for purposes of this case – possess an exclusively preliminary character. And **Chapter 7** explains that the vast majority of the measures Iran is challenging are third country measures that are outside the scope of the Treaty and its jurisdictional clause.

1.25. The pleading closes with **Chapter 8**, setting out some concluding observations, followed by the U.S. **Submissions**.

PART I: FACTUAL AND LEGAL FOUNDATIONS FOR THE U.S. PRELIMINARY OBJECTIONS

CHAPTER 2: FACTUAL BACKGROUND

2.1 In this case, Iran challenges a specific set of nuclear-related sanctions measures that the United States had lifted as part of its participation in the JCPOA and has now re-imposed, referred to herein as the May 8 Measures.[9] The re-imposition of these sanctions resulted from the U.S. decision to cease participation in the JCPOA, announced by the United States on May 8, 2018, on national security grounds (the "May 8 Decision").

2.2 This Chapter provides the critical factual context for Iran's claims in this case and the U.S. preliminary objections. Section A addresses pre-JCPOA sanctions measures put in place, both by the United States and others, in response to Iran's disregard of its nuclear-related obligations. Section B discusses the JCPOA, the diplomatic arrangement designed to address those nuclear issues, including its basic structure and key principles. Section C discusses the U.S. re-imposition of the nuclear-related sanctions that had been lifted as part of the JCPOA—the May 8 Measures. Section D outlines the national security considerations that drove the United States to decide to cease participation in the JCPOA and accordingly re-impose the May 8 Measures.

Section A: Pre-JCPOA Sanctions in Place to Address the Threats Posed by Iran, Including Iran's Flagrant Disregard of Its Nuclear-Related Obligations

2.3 Iran's failure to adhere to its nuclear non-proliferation obligations is well documented and beyond dispute. Beginning in June 2003 and continuing for many years thereafter, the International Atomic Energy Agency ("IAEA")[10] reported that Iran was failing to meet its

[9] Iran's own Memorial explains that it is focused on measures that "the U.S. had previously imposed, then lifted [] in connection with the implementation of the JCPOA." Iran's Memorial, para. 2.5; Iran's Application, para. 2. To the extent Iran's Memorial attempts to challenge "the promises of further measures as yet unimplemented in law," *see* Iran's Memorial at para.1.6, its claim must fail as impermissibly vague, as Iran fails to specify the precise nature of the claim or provide a succinct statement of the facts and grounds on which it is based, as required by Article 38(2) of the Court's Rules.

[10] The IAEA's functions include, in relevant part, the establishment and administration of "safeguards" designed to ensure that special fissionable and other materials, services, equipment, facilities, and information are not used in such a way as to further any military purpose, establishing control over the use of special fissionable materials received by it to ensure that these materials are used only for peaceful purposes. *See* Statute of the International Atomic Energy Agency, art. III, Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3 (US Annex 1). This mission is important, among other reasons, because the same uranium enrichment facilities and capabilities that are used to

obligations under its safeguards agreement pursuant to the Treaty on the Non-Proliferation of Nuclear Weapons (the "NPT Safeguards Agreement").[11] The range of issues included Iran's failure to disclose the construction of significant new nuclear facilities and engaging in highly sensitive activities at those facilities contrary to its reporting to the IAEA. For example, the IAEA found high-enriched uranium particles on certain centrifuge machines, strongly suggesting that Iran had engaged in uranium enrichment at that site and failed to disclose it or allow the IAEA to safeguard the material.[12] The IAEA also noted that Iran's failures to comply with its obligations had occurred "in a number of instances over an extended period of time."[13] As a result, the IAEA Board of Governors (the "IAEA Board") took a series of measures. In September 2005, the IAEA Board found Iran in "non-compliance" with the IAEA Statute based on Iran's "many failures and breaches" of its obligations to comply with its NPT Safeguards Agreement.[14]

2.4 In February 2006, the IAEA Board adopted a resolution requiring Iran to "re-establish full and sustained suspension of all enrichment-related and reprocessing activities, including research and development, to be verified by the Agency."[15] This resolution also requested the IAEA Director General take the rare step of reporting the case to the UN Security Council, along with steps the Board determined were required of Iran in order to resolve outstanding questions and build confidence on the question of whether Iran's nuclear program was exclusively peaceful.[16]

---

produce nuclear fuel for civilian power generation, for example, could in principle be used to produce enriched uranium for a nuclear weapon.

[11] S*ee* Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2003/40, at 7 (June 6, 2003) (US Annex 2).

[12] S*ee* Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2003/63, at 7 (Aug. 26, 2003) (US Annex 3).

[13] Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2003/75, at 9 (Nov. 10, 2003) (US Annex 4).

[14] *See* Int'l Atomic Energy Agency Bd. of Governors Res., *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2005/77, at 2, para. 1 (Sept. 24, 2005) (US Annex 5).

[15] Int'l Atomic Energy Agency Bd. of Governors Res., *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2006/14, at 2 paras. 1-2 (Feb. 4, 2006) (US Annex 7); *see also* Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2006/15, at 11 para. 53 (Feb. 27, 2006) (US Annex 6) (stating the IAEA could not "conclude that there are no undeclared nuclear materials or activities in Iran").

[16] *See* Int'l Atomic Energy Agency Board of Governors Resolution, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2006/14 at 2 paras. 1-2 (Feb. 4, 2006) (US Annex 7).

i. Action by the International Community and the UN Security Council

2.5 While these efforts were ongoing within the IAEA, several States undertook a diplomatic effort aimed at convincing Iran to comply with its nuclear-related obligations. This was advanced through "a two-pronged strategy of dialogue and pressure through sanctions," leading to "repeated efforts to undertake negotiations with Iran, which were unproductive due to Iran's reservations…and its failure to demonstrate any genuine will to negotiate in the following years."[17]

2.6 Following the IAEA's referral to the UN Security Council, the UN Security Council adopted resolution 1696 (2006), demanding that Iran "suspend all enrichment-related and reprocessing activities, including research and development."[18] In response to Iran's continuing refusal to cooperate with the IAEA or heed the Council's demand in resolution 1696, the Security Council imposed a series of binding prohibitions and restrictions through UN Security Council resolutions 1737 (2006), 1747 (2007), and 1803 (2008) aimed at addressing the threat to international peace and security posed by Iran's prohibited and deceptive nuclear-related activities.[19]

2.7 In 2009, the international community discovered that Iran had constructed a previously undisclosed enrichment facility at Qom without notifying the IAEA (until the fact became publicly known).[20] In response to this clandestine activity, as well as "the possible existence in Iran of past or current undisclosed activities related to the development of a nuclear payload for a missile,"[21]

---

[17] Laurent Fabius, "Inside the Iran Nuclear Deal: A French Perspective," Wash. Quarterly, Fall 2016 at 1, *available at* https://www.tandfonline.com/doi/pdf/10.1080/0163660X.2016.1232630?needAccess=true (US Annex 8).

[18] S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006) (US Annex 9).

[19] *See* Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2006/64 (Nov. 14, 2006) (US Annex 10); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006) (US Annex 11) (requiring, among other things, Iran to suspend all enrichment-related and reprocessing activities and stop work on all heavy water related projects, and all UN Member States to implement financial sanctions on designated individuals and entities directly associated with or providing support for Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007) (US Annex 12) (extending the financial sanctions in resolution 1737 to additional individuals and entities involved in Iran's nuclear or ballistic missile activities); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008) (US Annex 13) (among other things, expanding the list of designated individuals and entities subject to financial sanctions to include individuals and entities involved in Iran-related nuclear projects and contractors to the nuclear and missile programs.).

[20] *See* Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835 (2008) in the Islamic Republic of Iran*, IAEA Doc. GOV/2009/74, at 2-4, 7 (Nov. 16, 2009) (US Annex 14).

[21] Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1835*

the UN Security Council adopted resolution 1929 (2010), imposing additional non-proliferation and other prohibitions with respect to Iran, including significantly expanding the application of the asset freeze and travel ban to individuals and entities associated with the Islamic Revolutionary Guard Corps ("IRGC") and the Islamic Republic of Iran Shipping Lines ("IRISL") for their role in advancing Iran's nuclear program, as well as adding certain arms, missile, and shipping prohibitions.[22]

2.8 Iran's response was to continue to act in defiance of the international community. From 2006 through 2013, Iran undertook a series of nuclear activities in contravention of UN Security Council and IAEA Board resolutions, such as research and development on advanced centrifuges; continued enrichment of uranium progressing to ever-higher levels; continued construction of a proliferation-sensitive, heavy water reactor; and the operation of a heavy water production plant.[23] From 2008 to 2014, the IAEA reported on the possible existence of undisclosed nuclear-related activities in Iran involving military-related organizations, including "information indicat[ing] that Iran has carried out activities relevant to the development of a nuclear explosive device."[24] At the same time, in the face of these measures, Iran asserted that it would "not retreat one iota in its path to nuclear victory."[25]

ii. Enactment of Supportive, Parallel Sanctions Measures by the United States

2.9 In support of, and in parallel to, the multilateral effort, the United States put in place a number of sanctions measures. For example, in 2005, the President of the United States issued

(2008) in the Islamic Republic of Iran, IAEA Doc. GOV/2010/10, at 9 (Feb. 18, 2010) (US Annex 15).

[22] *See* S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010) (US Annex 16).

[23] *See* Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council Resolutions in the Islamic Republic of Iran*, IAEA Doc. GOV/2013/6 (Feb. 21, 2013) (US Annex 18).

[24] Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, IAEA Doc. GOV/2011/65 (Nov. 8, 2011) (US Annex 20). In November 2012, the IAEA Director General reported that the IAEA remained unable to "conclude that all nuclear material in Iran is in peaceful activities." Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran*, IAEA Doc. GOV/2012/55, at 9, 12 (Nov. 16, 2012) (US Annex 21); *see also* Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran*, IAEA Doc. GOV/2014/43 (Sept. 5, 2014) (US Annex 19).

[25] "Iran Vows Not to 'Retreat One Iota' in Nuclear Pursuit," CNN, Feb. 22, 2007 *available at* http://edition.cnn.com/2007/WORLD/meast/02/21/iran.nuclear/index.html (US Annex 17).

Executive Order (E.O.) 13382 authorizing actions to limit the financial resources available to proliferators of weapons of mass destruction and their supporters to impede their threatening conduct. This Order blocked the property of the Atomic Energy Organization of Iran as well as several Iranian entities involved in ballistic missile development, resulting in their placement on the Department of the Treasury's Specially Designated Nationals and Blocked Persons List ("SDN List").[26] Many of the Iran-related individuals or entities designated by the United States under this E.O. were also designated by the UN Security Council in the aforementioned Iran-related resolutions adopted under Chapter VII of the UN Charter.

2.10 As Iran continued to defy the international community and advance its nuclear program even in the face of the UN Security Council measures, the United States enacted several additional laws intended to address ongoing concerns with Iran's nuclear program, many of which were reinforced by parallel measures adopted by the European Union.

2.11 Of relevance to this case are the following statutes, which were aimed at responding to the increasingly dire situation with respect to Iran's nuclear program, and which contain measures later acknowledged to be nuclear-related by the JCPOA participants, including Iran, as well as other measures. In general, these sanctions measures were put in place to incentivize Iran to change its behavior and curtail the sources of revenue available to Iran to support its nuclear activities of concern. For more information on the relevant laws, see Annex 80:

- The *Iran Sanctions Act of 1996* ("ISA"):[27] enacted in furtherance of the United States policy "to deny Iran the ability to support acts of international terrorism and to fund the development and acquisition of weapons of mass destruction and the means to deliver them by limiting the development of Iran's ability to explore for, extract, refine, or transport by pipeline petroleum resources of Iran." ISA originally provided for sanctions consequences, *inter alia*, on persons who knowingly make an investment above a certain threshold related to Iran's petroleum resources. As noted below, ISA was amended by the Comprehensive Iran Sanctions, Accountability, and Divestment Act and then by the Iran Threat Reduction and Syria Human Rights Act of 2012 to provide expanded sanctions

[26] Exec. Order No. 13382, 70 Fed. Reg. 38567 (July 1, 2005) (US Annex 22).

[27] Iran and Libya Sanctions Act of 1996, 50 U.S.C. § 1701 note (1996) (US Annex 80).

authorities with respect to a range of activities involving Iran's energy sector, including Iran's petroleum resources, refined petroleum products, petrochemical products, and petroleum resources outside of Iran.

- The *Comprehensive Iran Sanctions, Accountability, and Divestment Act* ("CISADA") (2010):[28] enacted to address concerns about, *inter alia*, Iran's failure to comply with its nuclear-related obligations and disregard of IAEA and UN Security Council demands. As relevant for present purposes, it amended the ISA as noted above. In addition, CISADA established sanctions consequences with respect to foreign financial institutions that facilitate certain transactions for persons who were designated in connection with Iran's support for international terrorism or proliferation of weapons of mass destruction or their means of delivery.[29] (As discussed below, these latter provisions remained in place throughout the period of U.S. participation in the JCPOA, although certain persons that had been designated under the proliferation authorities were delisted under the JCPOA, which resulted in the CISADA provision no longer applying to them.)

- The *National Defense Authorization Act for Fiscal Year 2012* ("FY 2012 NDAA"), Section 1245:[30] enacted to curtail Iran's petroleum exports by focusing on the Central Bank of Iran, which was the primary financial conduit for such exports, and to address Iranian financial institutions' activities to evade U.S. and international sanctions. This section provides for sanctions consequences, *inter alia*, with respect to foreign financial institutions that engage in or facilitate

[28] Comprehensive Iran Sanctions, Accountability, and Divestment Act, 22 U.S.C. §§ 8501 *et seq.* (2010) (IM Annex 16). CISADA was addressed in the JCPOA in two places: with respect to those provisions in Section 102 that amended the Iran Sanctions Act, and Section 104(c)(2)(E)(ii)(I) with respect to transactions involving certain persons designated under particular non-proliferation and counter-terrorism authorities. For the first category, implementation of the sanctions relief was achieved by waiving the applicable provisions of ISA. Accordingly, CISADA itself was not independently cited in the waivers of statutory provisions or the re-imposition of the nuclear-related measures. For the second category, the sanctions relief was achieved by removing certain persons' designation under the relevant non-proliferation authority, such that the CISADA provision would no longer apply.

[29] Dep't of State, "Fact Sheet: Comprehensive Iran Sanctions, Accountability, and Divestment Act" (2011) *available at* https://2009-2017.state.gov/e/eb/esc/iransanctions/docs/160710.htm (US Annex 23).

[30] National Defense Authorization Act for Fiscal Year 2012 §1245, 22 U.S.C. 8513a (2011) (US Annex 80).

significant transactions involving the Central Bank of Iran and certain designated Iranian financial institutions as defined in that statute.

- The *Iran Threat Reduction and Syria Human Rights Act of 2012* ("TRA"):[31] enacted with the goal of inducing Iran to abandon efforts to acquire a nuclear weapons capability and finding that "the energy sector of Iran remains a zone of proliferation concern since the Government of Iran continues to divert substantial revenues derived from sales of petroleum resources to finance its illicit nuclear and missile activities"; provides for sanctions consequences, *inter alia*, by extending the ISA further, and also with respect to persons who engage in certain transactions involving insurance to the National Iranian Oil Company and National Iranian Tanker Company, and issuance of Iranian sovereign debt. In addition, TRA amended CISADA to provide authorities to take action with respect to foreign financial institutions engaged in certain proliferation activities of concern.

- The *Iran Freedom and Counter-Proliferation Act of 2012* ("IFCA"):[32] enacted in response to Iran's continuing and escalating nuclear development and other destabilizing activities. This statute reflects the conclusion that "Iran's energy, shipping and shipbuilding sectors and Iran's ports are facilitating the Government of Iran's nuclear proliferation activities by providing revenue to support proliferation activities" and that the National Iranian Tanker Company is "a key element in the petroleum supply chain responsible for generating energy revenues that support the illicit nuclear program activities of the Government of Iran."[33] Accordingly, IFCA provides for sanctions consequences, *inter alia*, with respect to persons who engage in certain transactions involving Iran's energy, shipping, and shipbuilding sectors, the supply of certain metals and raw materials to Iran

[31] Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §§ 8701 et seq. (2012) (US Annex 80).

[32] Iran Freedom and Counter-Proliferation Act of 2012, 22 U.S.C. §§ 8801 et seq. (2013) (US Annex 80).

[33] *Id*. This conclusion about these sectors of Iran's economy echoed the UN Security Council observation in UN Security Council resolution 1929 (2010) that there is a "potential connection between Iran's energy sector revenues and the funding of its proliferation sensitive nuclear activities" and that Iran's national shipping company was key to Iran's petroleum supply chain. S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010) (US Annex 16).

used in the above-mentioned sectors, and insurance to such persons or persons designated under a series of authorities.

2.12 All of these measures were enacted as part of a concerted, sustained effort to convince Iran to respond to growing international concerns about the violations of its nuclear-related obligations and to constrict Iran's ability to advance its nuclear program.

Section B: Overview of the JCPOA

2.13 The multilateral approach involving sanctions pressure and diplomacy to address Iran's nuclear ambitions eventually led to the arrangement embodied in the JCPOA. As an initial step, on November 24, 2013, the five permanent members of the UN Security Council, Germany, and the European Union (collectively, "the E3/EU+3") and Iran entered into an interim nuclear deal, known as the Joint Plan of Action, which was designed to keep Iran's nuclear program from advancing while negotiations on a long-term comprehensive solution continued.[34] This interim plan also outlined basic principles for negotiations on a more comprehensive arrangement, which was to include—among other things—nuclear measures by Iran in exchange for the comprehensive lifting of "multilateral and national sanctions related to Iran's nuclear programme."[35] The Joint Plan of Action did not define what categories of national sanctions would be considered "nuclear-related," as that was left for the negotiations leading up to the JCPOA.

2.14 Approximately 18 months later, on July 14, 2015, the E3/EU+3 and Iran reached an arrangement—the JCPOA—to address the international community's longstanding concerns regarding Iran's nuclear program. On July 20, 2015, as envisioned by the JCPOA participants, the UN Security Council unanimously adopted resolution 2231, to provide for the UN sanctions relief contemplated under the JCPOA.[36] In this resolution, the UN Security Council endorsed the JCPOA, requested the IAEA to undertake verification and monitoring of Iran's nuclear commitments, provided for the termination and replacement of provisions of previous UN Security

[34] *See* The White House, "Fact Sheet: First Step Understandings Regarding the Islamic Republic of Iran's Nuclear Program" (Nov. 23, 2013) *available at* https://obamawhitehouse.archives.gov/the-press-office/2013/11/23/fact-sheet-first-step-understandings-regarding-islamic-republic-iran-s-n (US Annex 24).

[35] Joint Plan of Action (Nov. 24, 2013) *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jpoa.pdf (US Annex 25).

[36] S.C. Res. 2231, U.N. Doc. S/RES/2231 (July 20, 2015) (IM Annex 10).

Council resolutions regarding Iran upon satisfaction of certain conditions, and created a mechanism for the re-imposition of those measures in certain circumstances.

i. Basic Structure of the JCPOA

2.15 This detailed, highly technical multilateral instrument reflects a fundamental *quid pro quo*. Iran undertook nuclear-related commitments aimed at "ensur[ing] that Iran's nuclear programme will be exclusively peaceful."[37] In exchange for those nuclear-related commitments, Iran would receive "the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme."[38]

2.16 For its part, the United States committed to relieve particular nuclear-related sanctions measures directed toward activities by non-U.S. persons[39] with various sectors of Iran's economy, including the energy, financial and banking, shipping, metals, and automotive sectors. These sanctions relief commitments were implemented through the waiver of applicable statutory sanctions provisions, as well as the termination of certain Executive Order-based measures. The United States also committed to remove certain persons from the SDN List, or other similar sanctions lists. Finally, the United States undertook commitments with respect to certain licensing actions, including to license the import into the United States of Iranian-origin foodstuffs and carpets, to allow for foreign subsidiaries of U.S.-owned or controlled corporations to engage in certain transactions involving Iran, and to favorably consider, on a case-by-case basis, licenses for the export to Iran of commercial passenger aircraft and related spare parts and services for exclusively civil, commercial passenger aviation end-use.

2.17 Notably, the JCPOA did not provide for the suspension or removal of all multilateral or national sanctions with respect to Iran. Rather, as discussed below, the JCPOA sanctions commitments were expressly and carefully scoped to encompass "nuclear-related" sanctions

[37] Joint Comprehensive Plan of Action, July 14, 2015 (hereinafter "JCPOA"), Preface (IM Annex 10 (JCPOA is Annex A of UNSCR 2231)).

[38] *Id.* Preface; Main Text, para. v (emphasis added).

[39] *Id.* Annex II, n. 6 (IM Annex 10) ("The sanctions that the United States will cease to apply, and subsequently terminate, or modify to effectuate the termination of, pursuant to its commitment under Section 4 are those directed towards non-U.S. persons."). These sanctions applicable to transactions by non-U.S. persons with Iran are often called "secondary sanctions." *See, e.g.*, U.S. Dep't of State & U.S. Dep't of the Treasury, "Guidance Relating to the Lifting of Certain U.S. Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day" (Jan. 16, 2016) (IM Annex 24) ("hereinafter JCPOA Sanctions Implementation Guidance").

measures, and no more.[40] Where the United States had put in place sanctions measures to address non-nuclear issues of concern, such as Iran's support for international terrorism, its ballistic missile activities, its abuses of human rights, or its engagement with other sanctioned actors (such as the Government of Syria), those measures fell outside the scope of the sanctions relief under the JCPOA. In these areas, the United States preserved and affirmed its prerogative to enforce those sanctions when it reached the JCPOA and subsequently exercised that prerogative.[41]

ii. Dispute Resolution Under the JCPOA

2.18 The negotiators of the JCPOA carefully drafted not only the nature, scope, and duration of the commitments of the respective participants, but also the means by which the participants could take up disputes or questions of non-performance. The JCPOA was drafted to reflect the non-legally binding, political nature of the commitments thereunder. And notably, nothing in the JCPOA guaranteed Iran that the sanctions measures relieved would not be re-imposed. In fact, Iran's history of deception with respect to nuclear activities was among the reasons the JCPOA was designed to allow a participant to cease participation and re-impose the sanctions measures that had been lifted.

2.19 The JCPOA does not contain any recourse to judicial means to adjudicate a participant's decision to exit or otherwise enforce its commitments. Instead, the participants elected that the resolution of JCPOA disputes would take place solely in political channels, establishing a highly particular dispute resolution mechanism, as well as remedies for another participant's non-performance.

2.20 The JCPOA establishes a Joint Commission, which consists exclusively of the JCPOA participants and has responsibility for addressing disputes concerning allegations of non-

[40] For example, the EU left in place sanctions related to human rights and Iran, as well as restrictive measures relating to terrorism. *See* European External Action Serv., "Information Note on EU Sanctions to Be Lifted under the Joint Comprehensive Plan of Action," (Jan. 16, 2016) *available at* https://eeas.europa.eu/sites/eeas/files/sn10176-re01.en17.en17.pdf (US Annex 28).

[41] For example, in January 2016, the United States designated 11 entities and individuals involved in procurement on behalf of Iran's ballistic missile program. U.S. Dep't of the Treasury, "Treasury Sanctions Those Involved in Ballistic Missile Procurement for Iran" (Jan. 17, 2016) *available at* https://www.treasury.gov/press-center/press-releases/Pages/jl0322.aspx (US Annex 29). In April 2017, the United States designated the Tehran Prisons Organization and a senior official within Iran's State Prison Organization in connection with serious human rights abuses. U.S. Dep't of the Treasury, "Treasury Takes Action to Target Serious Human Rights Abuses in Iran" (Apr. 13, 2017), *available at* https://www.treasury.gov/press-center/press-releases/Pages/sm0043.aspx) (US Annex 30).

performance through a time-limited dispute resolution process.[42] Specifically, pursuant to paragraph 36 of the Main Text, if one participant believes that another participant is not meeting its commitments, the complaining participant may refer the issue to the Joint Commission for resolution. Such a referral initiates consideration by the Joint Commission for 15 days. If the issue is not resolved, it proceeds to consideration by the Ministers of Foreign Affairs of the participants for another 15 days. These short timeframes—15 days, followed by 15 days—may be adjusted only if all participants agree to an extension.[43]

2.21 Where the JCPOA provides for consideration of a dispute outside the Joint Commission or Ministers of the participants, it does so in a highly circumscribed manner. This limited avenue is the potential for referral in parallel with or in lieu of consideration by Ministers, and also subject to a 15-day time-limit—to an *ad hoc* "Advisory Board," which would consist of three members. This Board is expressly empowered to provide only a non-binding opinion.[44]

2.22 Finally, and significantly, the JCPOA dispute resolution mechanism anticipates a situation in which one side is dissatisfied with the outcome of the process. If a participant concludes that the issue is unresolved and amounts to "significant non-performance," the participant may "cease performing its commitments under this JCPOA in whole or in part, and/or to notify the United Nations Security Council that it believes the issue constitutes significant non-performance."[45] These are the remedies the participants negotiated, and no more.

Section C: The Sanctions Consequences of the JCPOA and of the U.S. Decision to Cease Participation in the JCPOA

i. The U.S. Nuclear-Related Sanctions Measures Relieved under the JCPOA

2.23 The JCPOA contained U.S. commitments to relieve a highly-particular subset of U.S. sanctions that relate to Iran—those that the JCPOA participants acknowledged, following extensive discussion and negotiation, were "nuclear-related"—as set forth in Sections 4 and 5 of Annex II to the JCPOA.[46] Three core features of the U.S. sanctions relief bear emphasis at the

[42] JCPOA, Preamble, para. ix (IM Annex 10).

[43] *Id.* Main Text, para. 36.

[44] *Id.*

[45] *Id.* Paragraph 37 of the Main Text of the JCPOA simply describes what follows if a participant decides to go to the UN Security Council.

[46] *Id.* Main Text, paras. 21-22 & Annex II.

outset: (1) the relief was generally directed toward non-U.S. persons, and existing prohibitions relating to transactions by U.S. persons with Iran remained largely the same as before the JCPOA; (2) non-U.S. persons could still be subject to sanctions authorities relating to Iran that were not impacted by the JCPOA; and (3) the relief did not encompass transactions with or activities involving persons who remained on the SDN List.[47]

2.24 The United States implemented these sanctions relief commitments through four categories of actions:

(1) waivers of specified statutory provisions;[48]

(2) revocation or amendment of specified Executive Orders through issuance of a new Executive Order, E.O. 13716;[49]

(3) removal of specified individuals and entities listed in the JCPOA (those persons listed on Attachment 3 to Annex II of the JCPOA) from the Department of the Treasury's SDN List (as well as other sanctions lists, as appropriate); [50] and

(4) taking certain licensing actions to (i) allow for the export, reexport, sale, lease or transfer of commercial passenger aircraft and related parts and services to Iran for exclusively civil, commercial passenger aviation end-use on a case-by-case basis; (ii) license non-U.S. entities that are owned or controlled by a U.S. person to engage in certain activities involving Iran; and (iii) license the importation into the United States of Iranian-origin carpets and foodstuffs, including pistachios and caviar.[51]

---

[47] *See* JCPOA Sanctions Implementation Guidance, *supra* n. 39 at 6-7 (Jan. 16, 2016) (IM Annex 24). *See also* JCPOA, Annex II, § 4 n. 6 (IM Annex 10) (stating that the sanctions that the U.S. would lift pursuant to its commitments "are those directed towards non-U.S. persons" and that "U.S. persons and U.S.-owned or –controlled foreign entities will continue to be generally prohibited from conducting transactions of the type permitted pursuant to the JCPOA, unless authorized to do so by [OFAC]"). This provision in the JCPOA further defined "non-U.S. person" for purposes of the sanctions relief as "any individual or entity, excluding (i) any United States citizen, permanent resident alien, entity organised under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States, and (ii) any entity owned or controlled by a U.S. person." *Id.*

[48] *See, e.g.*, U.S. Dep't of State, "Waiver Determinations and Findings" (Oct. 18, 2015) (IM Annex 23).

[49] Exec. Order No. 13716, 81 Fed. Reg. 3693 (Jan. 21, 2016) (US Annex 32).

[50] JCPOA Sanctions Implementation Guidance *supra* n. 39 at 6-7 (IM Annex 24).

[51] *See* U.S. Dep't of the Treasury, OFAC, Statement of Licensing Policy for Activities Related to the Export or Re-Export to Iran of Commercial Passenger Aircraft and Related Parts and Services (Jan. 16, 2016), *revoked* May 8, 2018 (IM Annex 26); U.S. Dep't of the Treasury, OFAC, General License H (Jan. 16, 2016), *revoked* June 27, 2018 (IM Annex 25); OFAC Rule Amending the Iranian Transactions and Sanctions Regulations, 81 Fed. Reg. 3330 (Jan.

2.25 For the most part, other than as noted in category (4) above, the U.S. sanctions relief under the JCPOA did not modify or relate to the bilateral sanctions measures applicable to transactions and trade by U.S. persons with Iran. Rather, the measures that were lifted were those "directed towards" non-U.S. persons, and in respect of transactions outside the United States or outside of the U.S. financial system.[52]

ii. U.S. Sanctions Not Impacted by the JCPOA

2.26 The careful scoping of the JCPOA sanctions relief left in place other U.S. sanctions measures. Most notably, with very limited exceptions, the JCPOA did not impact the bilateral measures that generally prohibit transactions involving U.S. persons or non-U.S. persons acting within U.S. jurisdiction (such as a U.S. branch of a foreign bank, or U.S.-incorporated subsidiaries of a foreign company) and Iran. These types of bilateral sanctions measures have been in place, in one form or another, since 1987.[53]

2.27 The key elements of those bilateral sanctions measures are reflected in a number of Executive Orders issued by the President of the United States in exercise of the authority to address threats to U.S. national security, foreign policy, or the economy.[54] The authorities establish prohibitions applicable to U.S. persons, including (i) general prohibitions on the import of Iranian-origin goods or services or the export to Iran of goods, technology, or services (including financial services and investment); (ii) the obligation to block all property and interests in property of the Government of Iran and Iranian financial institutions; and (iii) prohibitions on the activities of foreign entities owned or controlled by a U.S. person (i.e., foreign subsidiaries) if such activity is prohibited for U.S. persons.[55] Other than the limited fourth category referenced above in paragraph

21, 2016) (IM Annex 27); U.S. Dep't of the Treasury, OFAC, General License I (Mar. 24, 2016), *revoked* June 27, 2018 (IM Annex 29).

[52] *See* JCPOA, Annex II § 4 n.6 (IM Annex 10) & *supra* n.47.

[53] *See* Exec. Order No. 12613, 52 Fed. Reg. 41940 (Oct. 30, 1987) (prohibiting imports from Iran) (US Annex 34). This Executive Order was subsequently revoked by, and its provisions largely incorporated into, Executive Order 13059, 62 Fed. Reg. 44531 (Aug. 21, 1997) (US Annex 162).

[54] *See, e.g.*, International Emergency Economic Powers Act, 50 U.S.C. §§ 1701(a) *et seq.* (US Annex 36).

[55] The requirements of these Executive Orders have been implemented in a set of regulations administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), known as the Iranian Transactions and Sanctions Regulations (ITSR), 31 C.F.R. Pt. 560 (2019) (US Annex 35). In addition, certain requirements of these Executive Orders were subsequently codified into statutes. The prohibitions are applicable by their terms, unless subject to an exception (for example, detailed in U.S. regulations) or authorization issued by OFAC. As the United States explained in detail in connection with Iran's Request for Provisional Measures, there are a number of

2.24, U.S. participation in the JCPOA did not impact these bilateral sanctions measures with respect to Iran and therefore are not at issue in this case.

2.28 There were also a number of other non-nuclear related sanctions authorities that remained in place during the period of U.S. implementation of the JCPOA that relate to the broader array of security concerns about the threat that Iran poses. These authorities include general sanctions measures applicable to any State that engages in transfers of certain weapons of mass destruction, missile technologies, conventional weapons, and technologies related to enrichment of nuclear material. Sanctions measures also remained with respect to, *inter alia*, Iran's support for terrorism (including with respect to the IRGC), its ballistic missile activities, its human rights abuses and censorship activities, its support for persons committing human rights abuses in Syria, and its support for persons threatening peace and stability in Yemen.[56]

2.29 In sum, U.S. participation in the JCPOA only resulted in the lifting of a particular subset of U.S. sanctions with respect to Iran—namely, the sanctions directed towards non-U.S. persons that both the United States and Iran concluded were nuclear-related.

iii. The Re-Imposition of Previously Lifted Sanctions (May 8 Measures)

2.30 With the announcement of the May 8 Decision ceasing U.S. participation in the JCPOA, the President issued a National Security Presidential Memorandum directing the Secretaries of State and of the Treasury to prepare for the re-imposition of all U.S. sanctions that had been lifted or waived in connection with the JCPOA, to be accomplished no later than 180 days from the date of the Memorandum.[57] As a result, by November 5, 2018, all U.S. nuclear-related sanctions measures that had been lifted or waived under the JCPOA were re-instated. These are the measures at issue in this case, that is, the "May 8 Measures."

2.31 As with JCPOA implementation, these re-imposed measures fall into four general categories:

---

exceptions and authorizations in place applicable to, *inter alia*, transactions for the export to Iran of certain humanitarian goods such as medicine, medical devices, agricultural items, and foodstuffs. 31 C.F.R. §§ 560.530, 560.532, 560.533 (US Annex 35).

[56] JCPOA Sanctions Implementation Guidance, *supra* n. 39 at § VII.B (IM Annex 24).

[57] Presidential Memorandum, Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon, para. 3 (May 8, 2018) (IM Annex 31) (hereinafter "U.S. May 8 Memorandum").

(1) re-imposition of the provisions under U.S. statutes that had been waived pursuant to the JCPOA (Iran Sanctions Act, Iran Freedom and Counter-Proliferation Act, Iran Threat Reduction and Syria Human Rights Act, and Section 1245 of the FY 2012 National Defense Authorization Act);

(2) the reinstatement, through issuance of Executive Order 13846, of certain sanctions authorities established via Executive Orders that had been previously terminated or amended;[58]

(3) the re-listing of certain persons on the SDN List;[59] and

(4) the revocation of certain licensing actions.[60]

2.32 As discussed in Chapter 7, the main effect of the May 8 Measures was to reinstate sanctions consequences with respect to certain categories of transactions between non-U.S. persons and Iran.

Section D: U.S. Decision to Cease Participation in the JCPOA

2.33 It is well known that the JCPOA was exclusively focused on the nuclear issues: Iran's nuclear commitments in exchange for relief from nuclear-related international and national sanctions. It is also well known that the JCPOA did not address a number of other activities by Iran that were of grave concern to the United States and the international community. During the first two and a half years of JCPOA implementation, those activities of concern persisted and in

[58] Exec. Order No. 13846, 83 Fed. Reg. 38939 (Aug. 7, 2018) (US Annex 37). In addition, E.O. 13846 broadened the application of these authorities in certain discrete ways. *See* U.S. Dep't of the Treasury, "OFAC FAQs: Iran Sanctions," question 601, *available at* https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx (last visited August 7, 2019) (US Annex 151).

[59] JCPOA Annex II, § 4.8.1, att. 3; Annex V, § 17.3 (IM Annex 10). There may be some discrepancies between those persons removed from the SDN List in accordance with the JCPOA and those whose designations are re-instated, for example, where the relevant entity has ceased to exist.

[60] This included the revocation, following a wind-down period, of: (i) the JCPOA Statement of Licensing Policy (JCPOA SLP), under which U.S. and non-U.S. persons could request specific licenses to engage in transactions for the sale of commercial passenger aircraft and related parts and services to Iran for exclusively civil, commercial passenger aviation end-use, provided such transactions did not involve any person on the SDN List; (ii) specific licenses that were granted pursuant to the JCPOA SLP; (iii) a general license for transactions that were ordinarily incident to the negotiation and entry into contracts for activities eligible for authorization under the JCPOA SLP (General License I); (iv) a general license for certain activities involving Iran by foreign entities owned or controlled by a U.S. person (General License H); and (v) general licenses for the importation into the United States and dealings in certain Iranian-origin carpets and foodstuffs, as well as certain related letters of credit and brokering services (previously at 31 C.F.R. §§ 560.534 and 560.535) (IM Annexes 25-26, 27, 29). *See* U.S. Dep't of the Treasury, "Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)" 10-12 (2018) (US Annex 144) (hereinafter "Re-Imposition FAQs").

some cases expanded, while questions grew about the adequacy of the JCPOA to address Iran's nuclear activities.

2.34 The United States continued to monitor closely and raise publicly its concerns about Iran's destabilizing and troubling activity outside the scope of the JCPOA—such as its sponsorship of terrorism and support for armed groups in the region, its ballistic missile activity, and its human rights abuses, including its unjust detention of U.S. citizens. In April 2017, Secretary of State Tillerson expressed concerns about the threat posed by Iran's provocative actions in those other areas and communicated to the U.S. Congress that the President had directed a National Security Council-led interagency review of the JCPOA to evaluate whether the continued suspension of nuclear-related sanctions with respect to Iran pursuant to the JCPOA was in the national security interests of the United States.[61] In October 2017, President Trump announced that, following that review, the United States had concluded that the sanctions relief provided under the JCPOA was not "appropriate and proportionate" to the steps taken by Iran in relation to its nuclear program and announced a strategy "to address the full range of Iran's destructive actions."[62] Secretary Tillerson conveyed that decision to Congress, expressing concerns with the broad range of threats posed by Iranian activities, stating, "Outside the narrow parameters of the nuclear deal, moreover, Iran has not moderated, but rather accelerated its malign activities in the region and beyond, in ways that threaten our interests and our allies."[63] The United States made clear that in the face of those threats, absent substantial adjustments to the JCPOA itself or to address those concerns in some other way, the United States would soon cease its participation. Yet even after being publicly put on notice of the United States' security concerns, Iran's threatening activities did not cease. It continued its ballistic missile activity, its assistance to militant and terrorist groups in the Middle East, as well as its unjust detention of U.S. citizens.

2.35 Further, in April 2018, tens of thousands of pages of documents were brought to light regarding Iran's past secret nuclear weapons program, confirming that Iran had lied about the

[61] Letter from U.S. Sec'y of State Rex W. Tillerson to Hon. Paul D. Ryan, Speaker of the House of Representatives, H.R. Doc. No. 115-32 (Apr. 24, 2017) (US Annex 38).

[62] President Donald J. Trump, Remarks on Iran Strategy (Oct. 13, 2017) (US Annex 140).

[63] Letter from U.S. Sec'y of State Rex W. Tillerson to Congress (Oct.13, 2017) printed in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW at 787-88 (2017) (US Annex 39).

history of its nuclear weapons program to the IAEA and throughout the JCPOA negotiations.[64] This large trove of Iranian documents relating to nuclear weaponization activities, which Iran was apparently preserving during the pendency of the JCPOA, called into question whether Iran could be trusted to enrich or control nuclear material.[65]

2.36 On May 8, 2018, in recognition of, *inter alia*, Iran's continued campaign of regional destabilization, the threat that Iran's malign behavior continued to pose to the United States and the world, and the JCPOA's inability to address the totality of the concerns of the United States about Iran's behavior, the United States decided to cease its participation in the JCPOA and to re-impose the sanctions measures lifted in connection with the JCPOA.[66]

2.37 As the United States explained, the threats posed by Iran continued, and in some cases grew, during U.S. participation in the JCPOA. The lifting of sanctions and Iran's degree of re-integration into the global economy that the JCPOA permitted both enriched and emboldened Iran, and turned out to have the consequence of making Iran a more dangerous regional actor than before.[67] Iran's ballistic missile program continued to advance following the JCPOA, and Iran continued to arbitrarily detain U.S. citizens. Moreover, the JCPOA provided the Iranian regime increased economic resources and access to the international financial system, which in turn enabled it to continue to fund and provide illicit weapons and training to terrorist and militant groups, thereby destabilizing the region and threatening U.S. interests. In fact, in the years that the United States participated in the JCPOA, Iran's military budget grew by almost 40 percent.[68]

---

[64] Loveday Morris & Karen DeYoung, "Israel Says It Holds a Trove of Documents From Iran's Secret Nuclear Archives," Wash. Post, Apr. 30, 2018 *available at* https://www.washingtonpost.com/world/israel-says-it-holds-a-trove-of-documents-from-irans-secret-nuclear-weapons-archive/2018/04/30/16865450-4c8d-11e8-85c1-9326c4511033_story.html?utm_term=.1639dd4ead05 (US Annex 41).

[65] Press Statement from Sec'y of State Michael R. Pompeo (Apr. 30, 2018) *available at* https://www.state.gov/iran-atomic-archive/ (US Annex 42).

[66] U.S. May 8 Memorandum, *supra* n. 57 at para. 3 (IM Annex 31). *See also* President Donald J. Trump, Text of a Letter from the President to the Speaker of the House of Representatives and the President of the Senate (Aug. 6, 2018) (US Annex 43).

[67] Christopher A. Ford, Assistant Sec'y of State for the Bureau of Int'l Security and Nonproliferation, Remarks at the DACOR Bacon House, Moving American Policy Forward in the Aftermath of the Iran Nuclear Deal (July 25, 2018) *available at* https://www.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/moving-american-policy-forward-in-the-aftermath-of-the-iran-nuclear-deal/ (US Annex 45) (hereinafter "Remarks of Christopher A. Ford").

[68] President Donald J. Trump, Remarks on the Joint Comprehensive Plan of Action (May 8, 2018) *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/ (US Annex 141).

Iran's activities in Yemen, Iraq, and Syria have escalated the conflicts in those countries and provided support to groups that attack U.S. service members, as well as U.S. allies and partners.[69] As discussed below, these destabilize the region and pose grave security threats to the United States, its nationals, and its interests. It also bears noting that the United States is not alone in its assessment about the threat Iran poses. In a Joint Statement issued on May 8, 2018, the heads of government of France, Germany, and the United Kingdom noted their agreement that "other major issues of concern need to be addressed," including "shared concerns about Iran's ballistic missile program and destabilising regional activities, especially in Syria, Iraq and Yemen."[70] We discuss each of these security threats in turn.

i. Iranian Support to Terrorist Activities and Groups as well as to Other Regional Armed Groups

2.38 Beginning with the seizure of the U.S. embassy in Tehran and taking of U.S. personnel hostage in 1979, Iran has persisted in instigating and sponsoring acts of international terrorism against the United States and its nationals, as well as nationals of many other countries. Iranian officials have issued death threats and publicly called for acts of terrorism, and Iran has admitted to funding and supporting terrorist entities, which have in turn acknowledged that assistance as fundamental to sustaining their operations. Iran's support for terrorism is widely acknowledged. UN bodies have demanded that Iran "cease forthwith any involvement in or toleration of murder and State sponsored terrorism against Iranians living abroad and the nationals of other States,"[71] and reaffirmed that "[g]overnments are accountable for assassinations and attacks by their agents against persons in the territory of another State, as well as for the incitement, approval or willful condoning of such acts."[72] As both Iran and its proxies have publicly confirmed, Iran has for decades provided financial and other support for the acts of terrorist organizations in contravention

[69] Remarks of Christopher A. Ford, *supra* n. 67 (US Annex 45).

[70] Joint Statement from Prime Minister May, Chancellor Merkel and President Macron Following President Trump's statement on Iran, (May 8, 2018) *available at* https://www.gov.uk/government/news/joint-statement-from-prime-minister-may-chancellor-merkel-and-president-macron-following-president-trumps-statement-on-iran (US Annex 46).

[71] U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Report of the Sub-Comm. on Prevention of Discrimination and Protection of Minorities, at 55, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (Oct. 28, 1994) (US Annex 49).

[72] U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Supplement No. 3, U.N. Doc. E/1996/23, E/CN.4/1996/177, *Situation of human rights in the Islamic Republic of Iran*, at 274 (1996) (US Annex 50).

of international law, which requires all States to "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts."[73]

2.39 In the view of the United States, Iran remains the leading state sponsor of terror and has continued its direct support to terrorist proxies throughout the region. Iran has established a highly organized State apparatus, maintained and controlled at the highest levels of its government, to undertake acts of terror as a tool of its foreign policy. This includes Iran's support to Hezbollah's activities in Lebanon and Syria, as well as to Iraqi Shi'ite militias who were responsible for the deaths of hundreds of Americans in Iraq and were then deployed in Syria to fight for the Assad regime. Iran's support of terrorist proxies is intended to destabilize regional governments, including those allied with the United States.[74]

2.40 Iran has made no secret of its continued support for Hezbollah,[75] which includes providing the majority of financial support and training for Hezbollah. In a June 2016 speech, the leader of Hezbollah, Hassan Nasrallah, confirmed Iran's direct and exclusive sponsorship of the group, stating "[w]e are open about the fact that Hezbollah's budget, its income, its expenses, everything it eats and drinks, its weapons and rockets, come from the Islamic Republic of Iran."[76] The United States assesses that Iran has continually supplied Hezbollah with thousands of rockets, missiles, and small arms, in violation of UN Security Council resolutions 1701 (2006) and 2231 (2015), and indeed the UN Secretary General expressed concern that Iran had supplied Hezbollah with weapons and missiles, notwithstanding applicable UN Security Council resolutions.[77]

---

[73] S.C. Res. 1373, para. 2(a), U.N. Doc. S/RES/1373 (Sept. 28, 2001) (US Annex 51).

[74] *Hearing on Understanding the Role of Sanctions Under the Iran Deal: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs* 104th Cong. (2016) (statement of the Hon. Juan C. Zarate, Chairman and Co-Founder of the Financial Integrity Network) (US Annex 52). Nor is Iran's assistance limited to Hezbollah. Commanders of the Taliban have confirmed that Iranian officials paid them to attend training courses in Iran devoted to teaching them how to attack NATO troops and convoys, including with IEDs. "Captured Taliban Commander: 'I received Iranian Training,' RadioFreeEurope/RadioLiberty, Aug. 23, 2011 (US Annex 57); "Iranians Train Taliban to Use Roadside Bombs: Report," The Nation Pakistan, Mar. 21, 2010 (US Annex 56).

[75] *See generally* Matthew Levitt, "The Origins of Hezbollah," The Atlantic, Oct. 23, 2013 (US Annex 54).

[76] "In first, Hezbollah confirms all financial support comes from Iran," Al Arabiya English, June 25, 2016 (US Annex 55).

[77] U.N. Secretary-General, *Second Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015)* para. 8, U.N. Doc. S/2016/1136 (Dec. 30, 2016) (US Annex 58). Recently, it has also been revealed that in 2015 individuals linked to Hezbollah had hidden tons of explosive materials in London in a secret bomb factory; these individuals were arrested by the UK government. This incident occurred shortly after Iran committed to the JCPOA. *See also* Ben Riley-Smith, "Iran-linked terrorists caught stockpiling explosives in north-

2.41 Iran's support to other armed groups in the region has also continued unabated. For example on February 4, 2019, the Council of the EU voiced its concerns over Iran's provision of military, financial, and political support to non-state actors in Syria and Lebanon, as well as Iran's non-compliance with the UN arms embargo on the Houthis in Yemen.[78] In the wake of the JCPOA, international naval forces interdicted Iranian arms shipments likely headed to Houthi rebels in Yemen in contravention of UN Security Council resolutions.[79] The UN Secretary General expressed concern over the reported seizure of an arms shipment in the Gulf of Oman in March 2016, which the United States concluded had originated in Iran and was likely bound for Yemen.[80] The UN Panel of Experts on Yemen has corroborated Iran's provision of lethal aid to the Houthis in Yemen, which has exacerbated an already dire humanitarian situation. For example, the Panel "has identified missile remnants, related military equipment and military unmanned aerial vehicles that are of Iranian origin and were brought into Yemen after the imposition of the [UN] targeted arms embargo" on the Houthis.[81] Indeed, the Panel has found that Iran is in non-compliance with the targeted UN arms embargo on the Houthis in Yemen due to Iran's failure to take the necessary measures to prevent the transfer of short-range ballistic missiles, storage tanks for missiles, and unmanned aerial vehicles to the then Houthi-Saleh alliance.[82] Yemen also disclosed "'multiple reports of similar interceptions document[ing] the seizure of considerable quantities of weapons and ammunition' that, in the assessment of Yemen, included 'Iranian-made anti-tank missiles, assault rifles, Dragunov sniper rifles, AK-47s, spare barrels, mortar tubes, and hundreds of rocket-propelled grenades, and RBG launchers.'"[83] The destabilization caused by the

west London," The Telegraph, June 9, 2019, *available at* https://www.telegraph.co.uk/news/2019/06/09/iran-linked-terrorists-caught-stockpiling-explosives-north-west/ (US Annex 53).

[78] Press Release of the Council of the European Union, Iran: Council adopts conclusions (Feb. 4, 2019), *available at* https://www.consilium.europa.eu/en/press/press-releases/2019/02/04/iran-council-adopts-conclusions/ (US Annex 59).

[79] *Hearing on Understanding the Role of Sanctions Under the Iran Deal Before the Senate Comm. on Banking, Housing, and Urban Affairs,* 114th Cong. (2016) (statement of the Hon. Juan C. Zarate, Chairman and Co-Founder of the Financial Integrity Network) (US Annex 52); U.N. Panel of Experts on Yemen, *Final Report of the Panel of Experts on Yemen*, at 2 and para. 79 U.N. Doc. S/2018/594 (Jan. 26, 2018) (US Annex 61).

[80] U.N. Secretary-General, *First Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015)* at paras. 8 and 20, U.N. Doc. S/2016/589 (July 12, 2016) (US Annex 60).

[81] U.N. Panel of Experts on Yemen, *Final Report of the Panel of Experts on Yemen*, at 2, U.N. Doc. S/2018/594 (Jan. 26, 2018) (US Annex 61).

[82] *Id.*

[83] U.N. Secretary-General, *Third Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015)*, para. 33, U.N. Doc. S/2017/515 (June 20, 2017) (US Annex 62).

conflict in Yemen is a threat to the region, and has allowed the Islamic State of Iraq and Syria (ISIS) in Yemen and Al-Qaeda in the Arabian Peninsula to operate without constraint, threatening the security of the region and of the United States.

2.42 Iran has also continued its support to various Iraqi Shia terrorist groups, including Kata'ib Hizballah, a U.S.-designated foreign terrorist organization that has a history of attacks against Iraqi, U.S., and Coalition targets in Iraq and has also worked to bolster the Assad regime in Syria.[84] Indeed, the U.S. Department of Defense estimates that 603 U.S. personnel have been killed in Iraq by Iranian-backed militias, which represents approximately 17 percent of all U.S. personnel deaths in Operation Iraqi Freedom.[85] Iranian forces have also directly backed militia operations in Syria with armored vehicles, artillery, and drones.[86] Additionally, the IRGC continued to send thousands of fighters into Syria to support the Assad regime, perpetuating a conflict that has displaced more than 6 million Syrians, greatly destabilizing the region, and had allowed for ISIS to gain a footing there.[87]

ii. Iran's Ballistic Missile Program

2.43 Another national security concern that contributed to the U.S. decision to cease participation in the JCPOA is Iran's continued development and testing of ballistic missiles that are capable of delivering a nuclear warhead.[88] Iran's attempts to develop increasingly advanced ballistic missile systems are a longstanding and continued threat to U.S., regional, and international security. The IAEA has also reported on possible connections between Iran's past nuclear and

[84] U.S. Dep't. of State, *Country Reports on Terrorism* 2016, Chapter Three: Iran (July 2017) (US Annex 63).

[85] *See* Kyle Rempfer, "Iran killed more US troops in Iraq than previously known, Pentagon says," Military Times, Apr. 4, 2019, *available at* https://www.militarytimes.com/news/your-military/2019/04/04/iran-killed-more-us-troops-in-iraq-than-previously-known-pentagon-says/ (US Annex 163).

[86] U.S. Dept. of State, *Country Reports on Terrorism* 2016, Chapter Three: Iran (July 2017) (US Annex 63).

[87] Michael R. Pompeo, U.S. Sec'y of State, "After the Deal: A New Iran Strategy," Remarks at the Heritage Foundation, (May 21, 2018), *available at* https://www.state.gov/after-the-deal-a-new-iran-strategy/ (US Annex 139) (hereinafter "Pompeo Iran Strategy Remarks").

[88] *See e.g.*, Barbara Starr, Nicole Gaouette & Veronica Stracqualursi, "Iran Test-Fires Medium-Range Ballistic Missile, US Official Says," CNN, July 26, 2019, *available at* https://www.cnn.com/2019/07/26/politics/iran-test-fires-ballistic-missile/index.html (US Annex 64); Louis Charbonneau, "U.S. Confirms Iran Tested Nuclear-Capable Ballistic Missile," Reuters, Oct. 16, 2015, *available at* https://www.reuters.com/article/us-iran-missiles-usa-idUSKCN0SA20Z20151016 (US Annex 65).

missile-related activities.[89] Even in 2016, shortly after reaching the JCPOA, Iran conducted repeated dangerous and provocative ballistic missile tests.[90]

2.44 The UN Security Council has continually maintained restrictions on the transfer to Iran of ballistic-missile-related items and conventional arms as well as a prohibition on the transfer from Iran of arms or related materiel. The Security Council has also called on Iran to refrain from undertaking certain activities related to ballistic missiles.[91] There is good reason for this. Under UN Security Council resolution 1929 (2010), Iran was prohibited from launching ballistic missiles but did so anyway.[92] Resolution 2231 (2015) replaced resolution 1929 and called on Iran not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology.[93] However, since the JCPOA and the adoption of resolution 2231, Iran continues to prioritize its missile development, as evidenced through its unabating conduct of ballistic missile launches. Several of these launches were to test systems that incorporate technologies applicable to ballistic missiles designed to be capable of delivering nuclear weapons. Examples of recent launches include Iran's March 2016 launches of the Qiam short-range ballistic missile and Shahab-3 medium range ballistic missile (MRBM). In January 2017, Iran tested a Khorramshahr MRBM, which was brought to the attention of the UN Security Council by France, Germany, the UK, and the United States.[94] The same group of countries raised their concerns publicly about these continued activities, and alerted the Council to the July 2017 launch by Iran of the Simorgh space launch vehicle, using technology

[89] *See, e.g.*, Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, para. 16, IAEA Doc. GOV/2007/48 (Aug. 30, 2007) (US Annex 66); Int'l Atomic Energy Agency Director General, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions 1737 (2006) and 1747 (2007) in the Islamic Republic of Iran*, paras. 35, 37, 39-40, and 54, IAEA Doc. GOV/2008/4 (Feb. 22, 2008) (US Annex 67).

[90] U.N. Secretary-General, *First Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015)* at paras. 8 and 20, U.N. Doc. S/2016/589 (July 12, 2016) (US Annex 60).

[91] S.C. Res. 2231, Annex B, paras. 3-5, 6(b), U.N. Doc. S/RES/2231 (July 20, 2015) (IM Annex 10).

[92] S.C. Res. 1929, para. 9, U.N. Doc. S/RES/1929 (June 9, 2010) (US Annex 16); U.N. Panel of Experts Assisting the 1737 Iran Sanctions Committee, *Final Report of the Panel of Experts Established Pursuant to Resolution 1929* (2010), at 3, U.N. Doc. S/2012/395 (July 12, 2012) (US Annex 68).

[93] S.C. Res. 2231, para. 7(a) and Annex B, para. 3, U.N. Doc. S/RES/2231 (July 20, 2015) (IM Annex 10).

[94] *Third Six-Month Report of the Facilitator on the Implementation of Security Council Resolution 2231 (2015*), at paras. 16-17, U.N. Doc. S/2017/537 (June 22, 2017) (US Annex 69).

of ballistic missiles inherently capable of delivering nuclear weapons.[95] The UN Secretary General in 2016 expressed concern and called upon Iran "to refrain from conducting such launches."[96]

2.45 Other States have also issued their own statements regarding even more recent testing by Iran of ballistic missiles as provocative, destabilizing and inconsistent with resolution 2231.[97] Yet, Iran has continued its ballistic missile activity and has stated that it conducts as many as 50 missile tests a year.[98] A senior Iranian military official recently stated that Iran wants to increase its missiles' range.[99]

iii. Iran's Human Rights Abuses Including Unjust Detention of U.S. Citizens

2.46 Iran's abhorrent human rights record is well known and well documented.[100] For purposes of these proceedings, it is particularly relevant that Iran's unjust and targeted efforts to detain U.S. citizens and other dual or foreign (non-Iranian) nationals and deprive them of fair trial guarantees have posed a direct threat to the security of U.S. citizens. In September 2018, Human Rights Watch documented the arrests of fourteen dual or foreign nationals by the IRGC Intelligence

[95] U.N. Secretary General, *Fourth Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015)*, at paras. 21 and 25 U.N. Doc S/2017/1030 (Dec. 8, 2017) (also discussing a July 28, 2017 joint statement by France, Germany, the United Kingdom, and the United States on the launch by Iran of ballistic missiles at targets in Syria, as well as to Iran's flight test of a MRBM in July 2017) (US Annex 40).

[96] U.N. Secretary General, *First Report of the Secretary-General on the Implementation of Security Council Resolution 2231 (2015)*, at para. 8, U.N. Doc. S/2016/589 (July 12, 2016) (US Annex 60).

[97] "France Says Iran Ballistic Test Provocative and Destabilizing," Reuters, Dec. 3, 2018, *available at* https://www.reuters.com/article/us-iran-nuclear-france/france-says-iran-ballistic-test-provocative-and-destabilizing-idUSKBN1O21UR (US Annex 70); Statement of the French Ministry of Foreign Affairs, Iran-Iranian Rocket Launch on January 15, 2019 (Jan. 16, 2019), *available at* https://www.diplomatie.gouv.fr/en/country-files/iran/events/article/iranian-rocket-launch-on-january-15-2019-16-01-19 (US Annex 71); Letter from the Permanent Representative of France, Germany, and the United Kingdom to the U.N. Secretary-General, U.N. Doc. S/2019/177 (Feb. 20, 2019) (US Annex 72).

[98] Babak Dehghanpisheh, "Iran Confirms Missile Test in Defiance of U.S.," Reuters, Dec. 11, 2018, *available at* https://www.reuters.com/article/us-iran-security-missiles/iran-confirms-missile-test-in-defiance-of-u-s-idUSKBN1OA0U7 (US Annex 73).

[99] "Iran Wants To Expand Missile Range Despite U.S. Opposition," U.S. News & World Report, Dec. 4, 2018, *available at* https://www.usnews.com/news/world/articles/2018-12-04/iran-wants-to-expand-missile-range-despite-us-ire (US Annex 74).

[100] *See, e.g.*, U.N. Special Rapporteur on the Situation of Human Rights in Iran, *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran*, U.N. Doc. A/HRC/40/67 (Jan. 30, 2019) (US Annex 75). Other recent UN reports on the situation of human rights in Iran can be found online at https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/IRIndex.aspx.

Organization since 2014.[101] The dual nationals, often U.S.-Iranian dual nationals, were charged with cooperating with a "hostile state" without substantiating evidence. According to Human Rights Watch, "[a]uthorities perceived these individuals shared an ability to facilitate relationships between Iran and Western entities outside the control of Iranian security agencies."[102] Dual nationals, like other persons in Iran, faced a variety of fair trial guarantee violations, including lack of prompt access to a lawyer of their choosing and abbreviated trials during which they were not allowed to defend themselves.[103] Additionally, during the period that the United States participated in the JCPOA, Iran arbitrarily detained several U.S. citizens, including the two illustrative examples discussed below.

2.47 In October 2015, Siamak Namazi, a dual U.S.-Iranian citizen who was visiting Iran for business, was arrested for alleged espionage.[104] Baquer Namazi, Siamak's father, also a dual national of Iran and the United States, was arrested in February 2016 following repeated attempts to visit his son.[105] After facing months of interrogations without access to legal counsel, both were put on trial in October 2016. Reportedly, their trial hearings only lasted two hours, and the two defendants were not allowed to present any evidence or call witnesses, and thus were unable to challenge any charges or evidence meaningfully.[106] Both men were reportedly sentenced to ten years in prison on the charges of "collusion with an enemy State."[107] Both men reportedly have been subjected to harsh conditions of confinement, apparently resulting in serious health

[101] Human Rights Watch, *Iran: Targeting of Dual Citizens, Foreigners – Prolonged Detention, Absence of Due Process* (Sept. 26, 2018), *available at* https://www.hrw.org/news/2018/09/26/iran-targeting-dual-citizens-foreigners (US Annex 76).

[102] *Id.*

[103] U.S. Dep't of State, *2018 Country Reports on Human Rights Practices: Iran* (Mar. 13, 2019), *available a*t https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/iran/ (US Annex 77).

[104] U.N. Human Rights Council, *Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Ninth Session, 21-25 August 2017: Opinion No. 49/2017 Concerning Siamak Namazi and Mohammed Baquer Namazi (Islamic Republic of Iran)*, paras. 6-11, U.N. Doc. A/HRC/WGAD/2017/49 (Sept. 22, 2017) (US Annex 78).

[105] *Id.* paras. 12-21.

[106] *Id.* paras. 22-24.

[107] *Id.* para. 25.

problems.[108] The UN Working Group on Arbitrary Detention has found the detentions of both Namazis to be arbitrary.[109]

2.48 In August 2016, Xiyue Wang, a doctoral student at Princeton University in the United States, was arrested in Iran, where he had been conducting research for his dissertation on the history of the Qajar dynasty.[110] In July 2017, Iranian state media reported that a Revolutionary Court had sentenced Wang to ten years in prison on charges of "cooperating with an enemy state."[111] In August 2018, the UN Working Group on Arbitrary Detention said Wang's detention was arbitrary and "motivated by the fact that he is a United States citizen," and considers the appropriate remedy would be to release Wang immediately.[112]

2.49 The UN Working Group on Arbitrary Detention "has repeatedly found a practice in the Islamic Republic of Iran of targeting foreign nationals for detention" and considers the cases of Wang and the Namazis to be part of that pattern.[113] More broadly, it has found numerous arrests and detentions of foreign and dual nationals by Iran were arbitrary, and that Iranian authorities targeted people based on their "national or social origin" as dual nationals or foreign nationals.[114] This pattern of unjust and arbitrary detention of U.S. citizens by Iran continued unabated during the time the U.S. participated in the JCPOA.

---

[108] *Id.* paras. 29-32.

[109] *Id.* para. 51.

[110] Human Rights Watch, *Iran: Targeting of Dual Citizens, Foreigners Prolonged Detention, Absence of Due Process* (Sept. 26, 2018), *available at* https://www.hrw.org/news/2018/09/26/iran-targeting-dual-citizens-foreigners (US Annex 76).

[111] *Id*.

[112] U.N. Human Rights Council, *Opinions Adopted by the Working Group on Arbitrary Detention at its Eighty-Second session, 20–24, August 2018: Opinion No. 52/2018 Concerning Xiyue Wang (Islamic Republic of Iran)*, paras. 71, 81, and 91, U.N. Doc. A/HRC/WGAD/2018/52 (Sept. 21, 2018) (US Annex 79).

[113] *Id.*; U.N. Human Rights Council, *Opinions Adopted by the Working Group on Arbitrary Detention at its Seventy-Ninth Session, 21-25 August 2017: Opinion No. 49/2017 Concerning Siamak Namazi and Mohammed Baquer Namazi (Islamic Republic of Iran)*, paras. 43-44, U.N. Doc. A/HRC/WGAD/2017/49 (Sept. 22, 2017) (US Annex 78).

[114] Human Rights Watch, *Iran: Targeting of Dual Citizens, Foreigners – Prolonged Detention, Absence of Due Process* (Sept. 26, 2018), *available at* https://www.hrw.org/news/2018/09/26/iran-targeting-dual-citizens-foreigners (US Annex 76).

iv. The shortcomings in the JCPOA

2.50 To the national security concerns addressed in the previous subsections must be added the serious questions that remained about the adequacy of the JCPOA to address Iran's nuclear activities after the JCPOA was reached.

2.51 This includes the fact that the JCPOA was time-limited, and contained sunset provisions in critical areas.[115] These questions were heightened by two Iranian violations of the JCPOA's heavy water stockpile limit.[116] In addition, Iran publicly declared it would deny the IAEA access to its military sites, raising significant concerns with respect to Iran's implementation of transparency and verification commitments under the JCPOA.[117] And, as described in paragraph 2.35, it became clear that Iran had failed to tell the truth about its past nuclear weapons program during its negotiations with the United States and the other JCPOA participants.

2.52 Ensuring that Iran does not have a pathway to a nuclear weapon was and remains a key component of addressing all the threats that Iran poses.

v. Conclusion

2.53 The U.S. decision to cease participation in the JCPOA was made at the highest levels of the United States government, driven by these overriding national security considerations, in light of the totality of the threats posed by Iran. These considerations include Iran's support for terrorist and militant groups in the region, Iran's ballistic missile activity in defiance of UN Security Council resolution 2231, Iran's unjust and arbitrary detention of U.S. citizens, the escalation of such threats during U.S. participation in the JCPOA, and the JCPOA's limitations in addressing Iran's nuclear threats. The United States ceased its participation in the JCPOA and accordingly re-imposed the May 8 Measures in response to these threats against the United States, its citizens, and its interests. The dispute Iran brings to the Court in this case solely concerns this U.S. decision – a dispute far removed from the Treaty of Amity.

[115] Remarks of Christopher A. Ford, *supra* n. 67 (US Annex 45).

[116] U.S. May 8 Memorandum *supra* n. 57 (IM Annex 31).

[117] *Id.*

CHAPTER 3: THE TREATY OF AMITY

3.1 The Treaty of Amity is well known to this Court. Nevertheless, because it is the sole basis on which Iran has sought to found jurisdiction in this Court for this case, it is both appropriate and important to undertake a discussion of the Treaty, its object and purpose, and its limits.

3.2 The United States and Iran signed the Treaty of Amity on August 15, 1955, in the context of friendly relations between the two Parties and with the hope of further strengthening commercial and consular relations. This broad objective is reflected in the Preamble to the Treaty, which states that the Parties envisioned the Treaty as "encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations."[118] By its terms, the Treaty advances this objective by providing protections for each Party's nationals and companies in respect of their ordinary commercial and investment activities within the territory of, or in trade between, the two Parties.

3.3 The Treaty of Amity was part of a series of post-World War II bilateral commercial and consular treaties between the United States and other friendly nations.[119] The U.S. commercial treaty program was one of the longest-running diplomatic initiatives of the United States. Early U.S. commercial treaties were primarily focused on simply establishing basic trade relations between two countries.[120] In the post-World War II era, the United States sought to update and modernize those early commercial agreements in certain respects, in what became known as treaties of Friendship, Commerce and Navigation ("FCN treaties"). These treaties were aimed at facilitating commerce with, and safeguarding U.S. investment in, nations with which the United States had positive relations.[121] They operated on a reciprocal basis, providing protections to the

[118] Treaty of Amity, Preamble (IM Annex 1). *See also Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections Judgment, I.C.J. Reports 1996*, p. 803 at p. 813, para. 27.

[119] The Treaty of Amity was described in 1958 as an "abridged edition" of the standard U.S. friendship, commerce, and navigation treaty. Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 807 (1958) (US Annex 82).

[120] *See generally* Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 57-58 (1958) (US Annex 83); KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENTS TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 57-60 (2017) (US Annex 84).

[121] *See generally* Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 57-58 (1958) (US Annex 83); Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230-31 (1956) (US Annex 85) (stating that the FCN treaties "acquired in time a familiar and distinctive form and character, as a normal medium through which to provide extensively for the rights of each country's citizens, their property and other interests, in the territories of the other, and for rules to mutually govern their trade and shipping"). Herman Walker served as a State Department

treaty counterpart in respect of its commerce with, and investment in, the United States. In 1951, Assistant Secretary of State Willard Thorp described the FCN treaties as part of a "program of extending and modernizing the treaty protection of American citizens, corporations, capital, trade and shipping abroad, with special emphasis on establishing conditions favorable to private investment."[122] Similarly, in 1952, Deputy Assistant Secretary of State Harold F. Linder explained that the post-war FCN treaties were aimed at mitigating the risks to U.S. investors overseas by "establish[ing] mutually agreed standards of treatment for the citizens and enterprises of one country within the territories of another."[123]

3.4 As discussed in more detail in Chapter 7, the Treaty enumerates a variety of protections applicable to nationals and companies of one Party in the context of their engagement in commercial and investment activities in the territory of the other Party, or in respect of transactions with the other Party or its nationals or companies. In transmitting the Treaty of Amity to the President of the United States, and then to the U.S. Senate for advice and consent, the U.S. Secretary of State explained that the Treaty, like other FCN treaties that preceded it, "contains provisions relating to basic personal freedom, property rights, taxation, exchange regulation, rights to engage in business, treatment of imports and exports, navigation, and other matters affecting the status and activities of citizens and enterprises of one country *within the territories of the other*."[124]

official between 1946 and 1962, and has been described as the "architect of the modern FCN treaty." *See* Wolfgang Saxon, "Herman Walker, 83, Professor and U.S. Foreign Officer, Dies," N.Y. Times, May 13, 1994, at B8 (US Annex 86).

[122] Memorandum from Willard Thorp, Assistant Sec'y for Economic Affairs, to Jack K. McFall, Assistant Sec'y for Legislative Affairs (Dec. 29, 1951) (US Annex 87). *See also Commercial Treaties with Iran, Nicaragua, and the Netherlands: Hearing Before the S. Comm. on Foreign Relations*, 84th Cong. 1-2 (1956) (statement of Thorsten V. Kalijarvi, Deputy Sec'y of State for Economic Affairs) (US Annex 88) (explaining that the Treaty of Amity, as well as FCN treaties with Nicaragua and the Netherlands, were negotiated in furtherance of Congress's directive in the Mutual Security Act of 1954 for the President to "accelerate a program of negotiating treaties for commerce and trade . . . which shall include provisions to encourage and facilitate the flow of private investment to nations participating in programs under this act").

[123] *Treaties of Friendship, Commerce and Navigation Between the United Sates and Colombia, Israel, Ethiopia, Italy, Denmark, and Greece: Hearing Before the Subcomm. of the S. Comm. On Foreign Relations*, 82d Cong. 4 (1952) (statement of Harold F. Linder, Deputy Assistant Sec'y for Economic Affairs) (US Annex 89).

[124] Message from the President of the United States Transmitting a Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, signed at Tehran on August 15, 1955 (Jan. 12, 1956) (emphasis added) (US Annex 90).

3.5 The overriding bilateral focus of the Treaty is evident throughout its provisions. To offer a few examples drawing upon the provisions of the Treaty whose principal aim is commercial (rather than consular):

- Article II is concerned with the rights of nationals of either Party to enter and remain in the territories of the other Party for purposes of engaging in trade and commerce, and to conduct certain activities and receive certain protections within the territories of the other Party;
- Article III is concerned with the recognition of juridical status of companies, and access to courts of companies and nationals, within the territories of the other Party;
- Article IV is concerned with the treatment of nationals and companies of one Party—including the protection of property—and is principally framed in terms of measures within the territories of the Parties;
- Article V is concerned with certain additional protections in respect of property, including the disposal of property and basic intellectual property rights, within the territories of the other Party;
- Article VI is concerned with taxation of the nationals and companies of one Party within the territories of the other Party;
- Article VII is concerned with restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other Party;
- Article VIII is concerned with treatment regarding products of one Party destined for import or export to the territory of the other Party;
- Article IX is concerned with each Party's administration of its customs regulations and procedures in respect of the other, which is quintessentially about the treatment of one Party's importers in the territory of the other Party; and
- Article X is concerned with the freedom of commerce and navigation between the territories of the two Parties and of the rights of vessels of one Party to have access to ports, places and waters of the other Party.

These provisions underscore that the Treaty is scoped so that its protections would apply to the companies and nationals of one Party in their activities in the territory of, or in some cases transactions with nationals of, the other treaty Party.

3.6 This textual and historical detail confirms an important limitation of the Treaty: it was not intended to, and does not, impose obligations on the Parties as relates to either Party's commerce with or between third countries and their nationals. This category of activities—one Party's commerce with or between third countries and their nationals—is plainly outside the scope of the Treaty's protections, as well as its object and purpose of fostering commercial relations *between* the Parties.

3.7 Indeed, to the extent the Parties' actions vis-à-vis third countries are addressed in the Treaty at all, it is only through provisions that provide no less favorable treatment to the other Treaty Party.[125] In other words, the Treaty does not regulate what choices one Party makes with respect to third parties, but (with respect to certain paragraphs of the Treaty) provides that to the extent those choices accord a benefit or advantage to a third country, that Party must provide no less favorable treatment to the other Treaty Party.[126]

3.8 The Treaty contains additional, and critical, limitations in Article XX(1). This provision sets out exceptions to the Treaty's obligations, in their entirety, for measures that fall into certain categories. Of particular relevance to this case are two such categories. Paragraph 1(b) provides that the Treaty shall not preclude the application of measures "relating to fissionable materials, the radio-active byproducts thereof, or the sources thereof." And Paragraph 1(d) provides that the Treaty shall not preclude the application of measures "necessary to protect [a Party's] essential security interests." Identical or very similar exceptions are contained in other U.S. FCN treaties negotiated during this same time period and reflect an agreement by the Parties that such measures would not be subject to the obligations established in the Treaty's substantive provisions.[127]

---

[125] *See* Treaty of Amity, arts. II(1), III(2), IV(4), V(1), VI(1), VII(3), VIII(1)-(3), IX(2), X(3)-(4), XI(2), XIII(1) (IM Annex 1).

[126] There is documentation from the negotiating history of the Treaty of Amity and in scholarly articles suggesting that even this feature of the Treaty was of concern to Iran, which sought to ensure that the Treaty would not be used by third countries to achieve greater rights in a non-reciprocal way, nor that the Treaty would open it up to "economic penetration" by a third country. *See* KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENTS TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 311 (2017) (citing sources) (US Annex 84).

[127] *See* CHARLES H. SULLIVAN, U.S. DEP'T OF STATE, STANDARD DRAFT TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION: ANALYSIS AND BACKGROUND (1981) (hereinafter "SULLIVAN STUDY") at 306 (US Annex 111) (describing these as "general exceptions" from the provisions of the treaty generally, explaining that the article contains "a group of exceptions, varied in character, that have become customary in international instruments dealing with establishment and trade matters," which include "the most essential exceptions, as for example, for national security").

3.9 Finally, any discussion of the Treaty of Amity would not be complete without reiterating that the Parties entered into this Treaty in a period of, and in expectation of furthering, amicable bilateral relations—commercial, consular, and otherwise. Yet the foundation for such relations was dramatically ruptured when the Iranian government endorsed and supported the sacking of the U.S. Embassy in Tehran and held U.S. diplomatic personnel and others hostage.[128] Iran repudiated the Treaty's goals through its actions surrounding the taking of the U.S. Embassy in Tehran, thereby fundamentally altering the bilateral relationship. The friendly bilateral relationship underpinning the Treaty of Amity thus came to an abrupt halt on November 4, 1979. While the possibility existed following the release of the U.S. hostages for the Parties to resume some relationship—even if not to the previous extent—on the basis of the Algiers Accords and the principles enshrined in the Treaty, regrettably, Iran persisted on a path of destabilizing and violent conduct directed at the United States and others which it continues to this day.

3.10 On October 3, 2018, the United States announced it was terminating the 1955 Treaty of Amity and notified Iran of the decision via diplomatic note, formalizing the reality of what had already become very clear—that the policies and actions of the Government of the Islamic Republic of Iran over years, including its material, financial, and other support for attacks and other hostile actions against United States persons, officials, and property, had produced a situation incompatible with a friendship, commerce, and navigation treaty between the United States and Iran.[129]

[128] *See United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports* 1980, p. 3 at pp. 12-15, paras. 17-27; pp.33-34, paras. 70-71; p. 35, para 74; and p. 40, para 87.

[129] *See* Michael R. Pompeo, U.S. Sec'y of State, Remarks to the Media (Oct. 3, 2018), *available at* https://www.state.gov/remarks-to-the-media-3/ (US Annex 91). Indeed, this announcement came shortly after the United States had ordered the temporary relocation of U.S. government personnel from the U.S. consulate in Basra, Iraq following attacks on the consulate and U.S. embassy in Baghdad by Iranian-backed militias. *See id.*

CHAPTER 4: APPLICABLE LEGAL FRAMEWORK

4.1 The United States makes these preliminary objections pursuant to Article 79(1) of the Rules of Court ("Rules"). Article 79(1) provides that the respondent may request a decision on preliminary objections "before any further proceedings on the merits," and that such objections may go to the jurisdiction of the Court, the admissibility of the application, or any "other objection the decision upon which is requested before any further proceedings on the merits." This Chapter sets out the legal basis for the U.S. objections to be decided at this preliminary phase. Then, it reviews the jurisprudential foundations for the Court's inquiries into its jurisdiction, the admissibility of the application, and the preliminary examination of the applicability of Article XX(1) of the Treaty of Amity.

Section A: Objections Generally Must be Decided at the Preliminary Stage

4.2 The Court has established that it must decide a respondent's preliminary objections before proceeding to the merits of a case if those objections have an exclusively preliminary character. Objections have an exclusively preliminary character if the Court has all of the facts needed to decide the question and answering the objection would not determine the dispute or some element thereof on the merits.[130]

4.3 The presumption in favor of ruling immediately on a preliminary objection is consistent with the revisions the Court made in 1972 to what is now Article 79 of its Rules.[131] These revisions were intended to advance the goals of procedural economy and the sound administration of justice, by avoiding "unnecessary prolongation of proceedings at the jurisdictional stage,"[132] or having issues "extensively discussed in a first round at the preliminary stage …com[ing] up for discussion

[130] *See, e.g., Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 832 at p. 852, para. 51.

[131] *See* Christian Tomuschat, *Article 36, in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, p. 712, at pp. 792-793 (Andreas Zimmermann & Christian J. Tams, eds., 3d ed. 2019) (US Annex 92).

[132] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986,* p. 14 at pp. 30-31, para. 41; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 9 at pp. 27-28, para. 49.

a second time."[133] The revisions were also designed to prevent delays such as occurred in the *Barcelona Traction* case, which was dismissed on the basis that the applicant lacked standing six years after the respondent's objection to the applicant's standing was joined to the merits.[134] They were also responsive to feedback from State representatives to the UN General Assembly's Sixth (Legal) Committee who suggested that "the Court should be encouraged to take a decision on preliminary objections as quickly as possible and to refrain from joining them to the merits unless it was strictly essential."[135]

4.4 The United States has provided, in this submission, all of the facts necessary for the Court to decide immediately the preliminary objections raised herein, as called for by Article 79. Moreover, resolving these objections would not require adjudication of the merits of the dispute or any aspect thereof.[136] Therefore, the U.S. objections have an exclusively preliminary character and should be resolved at this stage.

Section B: The Court Lacks Jurisdiction Where Iran's Claims Do Not Fall within the Provisions of the Treaty of Amity

4.5 The Court has consistently recalled the fundamental principle that no State may be subject to its jurisdiction without consent.[137] When a compromissory clause in a treaty provides for the Court's jurisdiction, "that jurisdiction exists only in respect of the parties to the treaty who are

---

[133] Christian Tomuschat, *Article 36, in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, p. 712, at p. 793 (Andreas Zimmermann & Christian J. Tams, eds., 3d ed. 2019) (US Annex 92).

[134] *See Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment of 13 February 2019,* Joint Separate Opinion of Judges Tomka and Crawford, para. 4; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 at pp. 46-47; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, I.C.J. Reports 1970*, p. 3 at p. 51, para. 102.

[135] Report of the Sixth Committee, *Review of the Role of the International Court of Justice*, U.N. Doc. A/8568 (Dec. 10, 1971), at p.21, para. 47 (US Annex 93), as referenced in *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019,* Joint Separate Opinion of Judges Tomka and Crawford, para. 5.

[136] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 592, Declaration of Judge Bennouna, p. 2.

[137] *See, e.g., Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018,* para. 42; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6 at p. 32, para. 65 and p. 39, para. 88.

bound by that clause and within the limits set out therein."[138] Iran cites the compromissory clause of the Treaty of Amity, Article XXI, paragraph (2), as the basis for the Court's jurisdiction over its claims.[139] Article XXI(2) states that "[a]ny dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

4.6 As the first step in its jurisdictional inquiry, the Court must "determine on an objective basis the subject matter of the dispute between the parties by isolating the real issue in the case and identifying the object of the claim."[140] In doing so, the Court examines the Application as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the applicant,[141] who is required to indicate the subject matter of the dispute in the Application.[142] As explained further in Chapter 5, it is clear from Iran's Application and Memorial that the real issue in the case is the U.S. decision to cease participating in the JCPOA and thereby re-impose the nuclear-related sanctions that it had lifted under that arrangement, and that the object of Iran's claim is restoration of the sanctions relief it had enjoyed while the United States was participating in the JCPOA. Thus the subject matter of the dispute exclusively pertains to the JCPOA and does not, as Iran asserts, relate to the interpretation or application of the Treaty of Amity; the Court should find that it lacks jurisdiction over Iran's claims on that basis alone.

4.7 Should the Court disagree that the real issue in this case and the object of Iran's claims exclusively pertain to the JCPOA, it would continue its jurisdictional analysis by examining whether it has jurisdiction under the provisions of the Treaty of Amity. As the Court explained in *Certain Iranian Assets* and similarly in *Oil Platforms*, the Court "must ascertain whether the acts

---

[138] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6 at p. 32, para. 65.

[139] Iran's Memorial, para. 1.28.

[140] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, para. 48; *accord Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602 at pp. 602-603, para. 26; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007)*, p.832 at p. 848, para. 38.

[141] *See Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, para. 48; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 602 at pp. 602-603, para. 26; *see also Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p.832 at p. 848, para. 38.

[142] Rules of the Court, Article 38(1).

of which Iran complains fall within the provisions of the Treaty of Amity and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain."[143] Drawing from Judge Higgins' articulation of the standard in her separate opinion in *Oil Platforms*, "[t]he Court can only determine whether there is a dispute regarding the interpretation and application of the 1955 Treaty, falling within Article XXI(2), by interpreting the articles which are said by Iran to have been violated" by the United States' re-imposition of sanctions.[144]

4.8 The analysis to determine whether a claim "falls within the provisions of the Treaty of Amity" is fundamentally different from the *prima facie* jurisdictional test the Court applied when deciding to indicate provisional measures under Article 41 of its Statute. At the provisional measures stage, the Court need only decide "whether the acts complained of by the Applicant are prima facie capable of falling within the provisions of" the instrument invoked by the Party as conferring jurisdiction and whether, therefore, the dispute is one that the Court "could have jurisdiction *ratione materiae* to entertain."[145] The Court "need not satisfy itself in a definitive manner that it has jurisdiction as regard the merits of the case" in order to indicate provisional measures.[146] Notably, at the provisional measures stage the Court does not yet have the benefit of briefing by the Parties as to the nature of the asserted claims, scope of the relevant treaty provisions invoked as the basis for jurisdiction, and any other applicable rules regarding the *seisin* of the Court in order to satisfy itself definitively that it has jurisdiction.

4.9 The analysis here must necessarily be more exacting than the analysis undertaken in the context of the provisional measures request. At the preliminary objections stage, the Court must determine whether it has jurisdiction under Article 36 of its Statute. Article 36 jurisdiction is "entirely different from the special provisions of Article 41," and is based on "the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the

---

[143] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 36*; accord Oil Platforms (Islamic Republic of Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 809-810, para. 16.

[144] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 855, para. 29 (Separate Opinion of Judge Higgins).

[145] Provisional Measures, Order of 3 October 2018, para. 30 (emphasis added); *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016,* p. 1148 at p. 1155, para. 31.

[146] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018,* para. 14; *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017,* p. 231 at p. 236, para. 15.

Parties."[147] The Court must now "bring a detailed analysis to bear,"[148] requiring the Court to examine, one by one, "each of the provisions on which Iran relies, in order to ascertain whether it permits [Iran's claims] to be considered as falling within the scope *ratione materiae* of the Treaty of Amity."[149] The more rigorous jurisdictional analysis under Article 36 of the Court's Statute may well lead the Court to find that it lacks jurisdiction over a case or otherwise should not hear a case in which it had previously found prima facie jurisdiction and indicated provisional measures.[150] Here there are also sound reasons for the Court to decline jurisdiction that were not put in issue at the provisional measures stage.[151]

4.10 In undertaking its jurisdictional analysis, the Court will interpret the Treaty according to customary international law as reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[152] Under those rules, the Treaty of Amity "must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Under Article 32, recourse may be had to supplementary means of interpretation such as the preparatory work and the circumstances in which the treaty was concluded."[153] The Court has recognized that the object and purpose of the Treaty of Amity is not

---

[147] *Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952,* p. 93 at p. 103.

[148] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 803 at pp. 855-856, paras. 29-31 (Separate Opinion of Judge Higgins).

[149] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019,* para. 52; *accord Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 803 at pp. 809-810, para. 16.

[150] *See, Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection, Judgment, I.C.J. Reports* 1952, p. 93 at pp. 102-103, 114; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974,* p. 253 at p. 255 para. 5 and p. 271-272 paras. 59 and 61*; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011,* p. 70 at p. 76, para. 7, p. 124 at para. 192 and p. 140 at paras. 184-186.

[151] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 168, para. 86 (Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donohue and Judge *ad hoc* Gaja).

[152] *See, e.g., Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 803 at p. 812, para. 23.

[153] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 803 at p. 812, para. 23; *see also Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019,* para. 70; *Immunities and Criminal Proceedings (Equatorial Guinea v. France*), *Preliminary Objections, Judgment of 6 June 2018,* para. 91; *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 279 at p. 318, para. 100.

to "regulate peaceful and friendly relations between the two States in a general sense."[154] Rather, the object and purpose of this Treaty, as stated in the preamble, is "encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and regulating consular relations."[155] As explained in Chapter 3, the Treaty advances this objective by providing protections for each Party's nationals and companies in respect of their ordinary commercial and investment activities within the territory of, or in trade between, the two Parties. It is only after interpreting each invoked Treaty provision in accordance with these rules that the Court can determine whether the acts of which Iran complains do or do not fall within that provision.

4.11 The Court's rigorous analysis helps to ensure that a Party is not subject to proceedings to which it has not consented. As discussed above, where, as here, the Applicant cites a compromissory clause in a treaty as the basis for the Court's jurisdiction, that jurisdiction exists only in respect of that treaty and within the limits set out therein. And in determining whether the Applicant's claims fall within the scope of the treaty, the Court must look to the object and purpose of the treaty, as well as conduct a careful interpretation of the invoked treaty provisions. In addition, the Court has found on multiple occasions that it cannot read into a treaty other rules, such as rules of customary international law, not provided for by that treaty.[156] In Chapter 7, the United States will demonstrate that the articles of the Treaty of Amity cited by Iran, read in context and in light of the Treaty's object and purpose, neither address nor incorporate into the Treaty rights and obligations with respect to measures that concern Iran's trade with third countries or their nationals. Accordingly, the Court lacks jurisdiction over such claims.

[154] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 814, para. 28.

[155] Treaty of Amity, Preamble (IM Annex I); *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019,* para. 57.

[156] *See, e.g., Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019,* paras. 57-58, 65, 70, 74, 79; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 814, para. 28; *Immunities and Criminal Proceedings (Equatorial Guinea v. France*), *Preliminary Objections, Judgment of 6 June 2018,* para. 96.

Section C: Even Where the Court Has Jurisdiction, It Should Decline to Adjudicate a Case in Certain Exceptional Circumstances

4.12 Separate from questions that go to jurisdiction, it is well established that there are certain circumstances in which the Court should decline, at the preliminary objections stage, to adjudicate a case.[157] This authority to decline to adjudicate a claim "derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[158] It is part of the Court's "judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules."[159]

4.13 The Court has accepted that one of the bases on which it may decline to adjudicate a claim is abuse of process.[160] Abuse of process "goes to the procedure before a court or tribunal and can be considered at the preliminary phase of . . . proceedings."[161] While the Court will only reject a claim on the ground of abuse of process in "exceptional circumstances" where there is "clear evidence that the applicant's conduct amounts to an abuse of process,"[162] such circumstances are present here. As will be explained in Chapter 5, Iran's attempt to seize the Court with claims that exclusively relate to the application of the JCPOA under the guise of a dispute about the Treaty of Amity amounts to an abuse of process and renders Iran's Application inadmissible.

4.14 In addition to abuse of process, the Court's function "is circumscribed by inherent limitations, which are none the less imperative because they may be difficult to catalogue, and may

---

[157] *See., e.g., Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100 at p. 123, para. 48; *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*, p. 412 at p. 456, para. 120.

[158] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253 at pp. 259-60, para. 23.

[159] *Legality of Use of Force (Serbia and Montenegro v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports* 2004, p. 1307 at pp. 1361-1362, para. 10 (Separate Opinion of Judge Higgins).

[160] *See, e.g., Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 103; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, para. 150.

[161] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, para. 150.

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

not frequently present themselves as a conclusive bar to adjudication in a concrete case."[163] For example, the Court may decline to hear a case where doing so would protect the integrity of the Court's judicial function.[164] As explained in *Northern Cameroons*, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore."[165]

4.15 Judge Fitzmaurice recognized in his Separate Opinion in *Northern Cameroons* that one potentially significant consideration that could give rise to a decision to decline to exercise jurisdiction is "what the Court is requested to do about [a claim], having regard to the surrounding circumstances."[166] In this case, as explained further in Chapter 5, further adjudication of Iran's claim would deeply entangle the Court in questions regarding the mechanics, architecture, and enforcement of the JCPOA, a multilateral political arrangement, in a manner that could compromise the judicial integrity of this Court.

4.16 As Judge Higgins stated, "[t]he real question" when considering the exercise of the Court's inherent authority to decline to hear a case, is "whether the circumstances are such that it is reasonable, necessary and appropriate for the Court to strike the case off the List as an exercise of inherent power to protect the integrity of the judicial process."[167] The United States will demonstrate in Chapter 5 that the surrounding circumstances in this case present such exceptional instances in which it is appropriate for the Court to exercise its inherent power and dismiss Iran's claims.

Section D: Other Objections of an Exclusively Preliminary Character Should be Decided at this Stage

4.17 Finally, Article 79 of the Rules allows for objections beyond those that go to jurisdiction or admissibility. The 1972 revision to Article 79 of the Rules made explicit the existence of a third category of objection that concerns any "other objection the decision upon which is requested

---

[163] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963,* p. 15 at p. 30.

[164] *Id.* at p. 29.

[165] *Id*.

[166] *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C. J. Reports 1963,* p. 15 at p. 106 (Separate Opinion of Judge Fitzmaurice).

[167] *Legality of Use of Force (Serbia and Montenegro v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports* 2004, p. 1307 at p. 1362, para.12 (Separate Opinion of Judge Higgins).

before any further proceedings on the merits." Since then, the Court has recognized on several occasions that objections need not fall in either of the first two categories. For example, the Court stated in *Nuclear Tests* that "while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters."[168] And, in *Lockerbie,* it further confirmed that "its field of application *ratione materiae* is thus not limited solely to objections regarding jurisdiction or admissibility."[169] Thus, an objection need not be classified as an objection to jurisdiction or admissibility for the Court to rule on it, so long as the objection has an exclusively preliminary character.

4.18 As discussed in Chapter 6, the United States is not asking the Court in this case to revisit whether the exceptions in Article XX are jurisdictional in nature. Rather, the United States submits that its objections under Article XX, paragraphs 1(b) and 1(d) in this case possess an exclusively preliminary character. As will be discussed in Chapter 6, Article XX(1) expressly provides that the Treaty does not preclude certain measures. Whether the measures at issue fall into the exceptions invoked in Article XX(1)—as measures relating to nuclear materials or measures necessary to protect a Party's essential security interests—is a determination that can and should be made on the facts before the Court and without deciding the merits, or other elements thereof, of the case. This is particularly true in the specific context of this case, where two independent exceptions cover the entirety of Iran's case. Accordingly, the United States Article XX(1) objections are exclusively preliminary in character and must be decided at this stage of the proceedings.

* * *

4.19 It is thus clear that, before proceeding to the merits phase, the Court must address the United States' preliminary objections. This will necessarily entail determining whether the subject matter of the dispute is one as to the interpretation or application of the Treaty of Amity, whether

[168] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253 at p. 259, para. 22.

[169] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 9 at p. 26, para. 47; *see also Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 832 at p. 851, para. 49.

each of Iran's claims "do[es] or do[es] 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."[170] It must also consider whether, even if it does have jurisdiction, it should nevertheless decline jurisdiction to prevent an abuse of process or otherwise preserve the integrity of its judicial function. And, it must resolve the U.S. objections on the basis of the exceptions found in Article XX of the Treaty of Amity. The Court may complete all of these inquiries on the basis of the facts provided by the Parties in these submissions and without engaging with the merits of Iran's claims.

[170] *Immunities and Criminal Proceedings, Equatorial Guinea v. France, Preliminary Objection, Judgment of 6 June 2018,* para. 46, *quoting Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 810, para. 16.

PART II: U.S. PRELIMINARY OBJECTIONS

CHAPTER 5: THE DISPUTE IRAN BRINGS IS ABOUT THE JCPOA, NOT THE TREATY OF AMITY, AND SHOULD THEREFORE BE DISMISSED AS OUTSIDE THE COURT'S JURISDICTION OR, IN THE ALTERNATIVE, AS INADMISSIBLE

5.1 Iran's case derives exclusively from the JCPOA, and is manifestly not a dispute about the Treaty of Amity. Section A explains that the Court lacks jurisdiction over this case because its subject matter relates exclusively to the application of the JCPOA, and not to the interpretation and application of the Treaty of Amity. Specifically, the real issue in this case is the United States' decision to cease participation in the JCPOA and thereby re-impose nuclear-related sanctions with respect to Iran. This is amply demonstrated by Iran's presentation of its claims, and is further confirmed by the relief Iran asks this Court to provide, which, if granted, would nullify the U.S. decision to cease participation in the JCPOA.

5.2 Section B explains that even if the Court were to conclude it has jurisdiction, it nonetheless should find Iran's claims inadmissible on the grounds that they amount to an abuse of process and that entertaining them would raise serious questions of judicial propriety. Again, this is because the case is really about, and inextricably bound up in, the JCPOA, with the Treaty of Amity merely a device. Moreover, granting the relief sought by Iran would provide it with an illegitimate advantage and would work an injustice, effectively converting the multilateral bargain struck under the non-legally binding JCPOA into an order directing the United States, and *only* the United States, to perform political commitments it had before it ceased participating in the JCPOA. For these reasons, the Court should decline to entertain Iran's claims and dismiss this case.

Section A: The Court Lacks Jurisdiction over the Subject Matter of this Case, Which Is Solely a Dispute Regarding the United States' Decision To Cease Participation in the JCPOA and Re-impose Nuclear-related Sanctions That Had Been Lifted Under the JCPOA

5.3 The sole basis on which Iran seeks to found jurisdiction in this case is Article XXI(2) of the Treaty of Amity, which applies by its terms only to a "dispute between the High Contracting

Parties as to the interpretation or application of the present Treaty."[171] Iran, however, does not bring to this Court a dispute as to the interpretation or application of the Treaty of Amity, regardless of its assertions to the contrary. Instead, the real issue in the case is the U.S. decision to cease participation in the JCPOA, which resulted in the United States' re-imposition of sanctions it had lifted under the JCPOA, and the object of Iran's claim is restoration of the sanctions relief provided by the United States when it was a participant in the JCPOA. The present dispute exclusively pertains to those JCPOA decisions, and is outside the Court's jurisdiction.

5.4 To be clear at the outset, the United States does not assert that the mere fact that the dispute arises in connection with the U.S. decision to cease participation in the JCPOA itself precludes the Court from finding jurisdiction over Iran's claims under the Treaty of Amity. [172] Nor does the United States argue that jurisdiction under the Treaty is precluded simply because the dispute with which Iran has sought to seize this Court is part of a broader context that includes the JCPOA.[173] Rather, the United States submits that the very subject matter of Iran's claims in this case—the dispute itself—relates exclusively to the JCPOA, and not the Treaty of Amity.

5.5 As discussed in Chapter 4, at this stage, the first jurisdictional question is not whether Iran's claims are "capable of falling within the material scope of the 1955 Treaty" on a *prima facie* basis, but instead whether its claims do, in fact, relate to the interpretation and application of the Treaty. The Court has long recognized that this inquiry implicates its "duty to isolate the real issue in the case and to identify the object of the claim."[174] The real issue in this case, as explained below, is the United States' decision to cease its participation in the JCPOA, thus re-imposing the nuclear-related sanctions it had lifted under that arrangement. And the real object of Iran's Application is to nullify that decision by obtaining restoration of that sanctions relief. Iran's attempt to cloak the dispute in the guise of claims relating to the Treaty of Amity must be rejected.

---

[171] Treaty of Amity, art. XXI(2) (IM Annex 1).

[172] *Cf.* Provisional Measures, Order of 3 October 2018, para. 38.

[173] *Cf. e.g., U.S. Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, I.C.J. Reports 1980*, p. 3 at pp. 19-20, paras. 36-37.

[174] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253 at p. 262, para. 29. *See also Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, at p. 17, para. 48 (stating that "it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim").

i. The Present Dispute Is About the United States' Decision To Cease Participation in the JCPOA and Iran's Attempt To Nullify the Practical Consequences Thereof

5.6 This case is about—and is inextricably bound up in—the JCPOA. Iran has made this plain from the start, beginning with its diplomatic note dated June 11, 2018 by which it claims to have "notified the USA of the existence of a dispute" that it has now brought to this Court.[175] That note is unambiguous: it complains of the purportedly "unlawful decision of the Government of the United States, made on 8 May 2018, 'to re-impose the United States sanctions lifted or waived in connection with the JCPOA.'"[176] Indeed, that note does not even mention the Treaty of Amity. The core of Iran's case is equally apparent in its diplomatic note dated June 19, 2018, which states that Iran "hereby notifies the Government of the United States that its decision of 8 May 2018 and the re-imposition of sanctions constitute a breach of international obligations of the United States and in particular those contained in the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of America."[177] Both notes focus unequivocally on—and only on—the United States' May 8 Decision to cease participation in the JCPOA and accordingly to re-impose U.S. nuclear-related sanctions that had been lifted under the JCPOA.

5.7 Iran's own presentation of the issues in its written submissions further confirms that the JCPOA is the subject matter of this dispute. Iran's Memorial states that this case is "uniquely concerned" with "the measures announced in the 8 May Decision"[178]—that is, the United States' re-imposition of U.S. nuclear-related sanctions that had been lifted under the JCPOA. Iran's Application further declares that this case "exclusively concerns the internationally wrongful acts of the USA resulting from its decision to re-impose in full effect and enforce the 8 May sanctions that the USA previously decided to lift in connection with the Joint Comprehensive Plan of Action (the 'JCPOA'), and the announcement that further sanctions will be imposed."[179] Similarly, in its

[175] Iran's Application, para. 7 and n. 3.

[176] Note Verbale No. 381/289/4870056 from the Ministry of Foreign Affairs of the Islamic Republic of Iran to the Embassy of Switzerland (Interest Section of the United States) dated June 11, 2018 (emphasis added) (IM Annex 342).

[177] Iran's Application, para. 7 and n. 4. Note Verbale No. 381/210/4875065 from the Ministry of Foreign Affairs of the Islamic Republic of Iran to the Embassy of Switzerland (Interest Section of the United States) dated June 19, 2018 (IM Annex 343).

[178] Iran's Memorial, para. 1.13 (emphasis added).

[179] Iran's Application, para. 2 (emphasis added).

Request for the Indication of Provisional Measures, Iran reaffirms that its claims arise from "the re-imposition and announced aggravation by the USA of a comprehensive set of so-called 'sanctions' and restrictive measures … resulting from the US Decision of 8 May 2018."[180] With respect to these statements made in Iran's first submissions in this case, the Court should take the Applicant at its word.

5.8 Nevertheless, Iran insists, in the first breaths of its Memorial, that its case concerns "nothing but" the Treaty of Amity.[181] Such attempted disavowals are belied not only by Iran's earlier characterizations of its case, but also by the facts Iran alleges and the relief Iran seeks.

5.9 First, Iran's Application clearly demonstrates that the dispute is about the U.S. decision to cease participation in the JCPOA and cease providing the relief from U.S. sanctions under it. Iran's factual accounting in the Application centers on the May 8 Decision.[182] Iran's Memorial follows the same narrative arc: the reaching of the JCPOA, the U.S. decision to exit the JCPOA and re-impose the nuclear-related sanctions that had been lifted under it, and the consequences that allegedly have resulted from them.[183] Iran's Application also attacks the U.S. rationale for re-imposing the nuclear-related sanctions that had been lifted under the JCPOA as "misconceived."[184] The point here is simply that Iran's focus in its Application and Memorial makes plain that the real issue is the U.S. decision to cease participation in the JCPOA and that the object of Iran's claim is to restore the sanctions lifting the United States provided before its exit.

5.10 Second, the relief Iran seeks confirms that it has invoked the Treaty of Amity in an effort to restore to itself the bargain struck under the JCPOA, an entirely separate, non-binding arrangement. In its submissions, Iran asks this Court to order the United States to terminate the nuclear-related sanctions the United States re-imposed pursuant to the May 8 Decision.[185] While

[180] Iran's Request for the Indication of Provisional Measures, para. 2.

[181] Iran's Memorial, para. 1.2. *See also Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States)*, Verbatim Record of the Public Sitting of the I.C.J. Held on Aug. 27, 2018, p. 30, para. 6 (Professor Pellet on behalf of Iran) (asserting that the JCPOA is merely the "context" in which the challenged U.S. sanctions were lifted and then re-imposed).

[182] *See* Iran's Application, paras. 9-28.

[183] *See* Iran's Memorial, paras. 2.5-2.114; 3.1-3.150 (repeatedly defining the relevant time period for purposes of assessing the alleged consequences of the complained-of measures as post-May 8, 2018 through use of phrases like "before 8 May 2018," "since 8 May 2018," "after 8 May 2018," and "from 8 May 2018").

[184] Iran's Application, para. 14.

[185] *Id.*, para. 50(b). *See also* Iran's Memorial, p. 245, para. b.

Iran attempts to convince the Court that its case is nevertheless about the Treaty of Amity, the Court must take into account the inescapable fact that the relief Iran seeks is the restoration of the very sanctions relief provided by the United States as part of its participation in the JCPOA. In other words, Iran asks the Court, purportedly as a remedy under the Treaty, to order the United States to perform the commitments with respect to U.S. sanctions that it implemented when it participated in the JCPOA. That is an extraordinary proposition. There is no way for the Court to order such relief for Iran without nullifying the United States' decision to cease participation in the JCPOA.

5.11 Without explanation or analysis, Iran brought its claims regarding the alleged wrongfulness under the Treaty of Amity of the specified measures only when such measures were *re-imposed* as a result of the U.S. exit from the JCPOA—despite the fact that they had been in force prior to the JCPOA being reached, and in some cases for decades, and despite the fact that Iran offers no evidence that it asserted that the same measures violated the Treaty during the lengthy period in which they were a central subject of the intensive JCPOA negotiations. [186]

5.12 This bears repeating: the U.S. sanctions measures of which Iran complains preexisted the JCPOA, yet Iran did not pursue any challenge to the imposition of those measures leading up to and during the negotiation of the JCPOA under the Treaty of Amity. And Iran, in its Application and Memorial, does not assert that imposition of the sanctions measures *ab initio* violated the Treaty. Rather, the claims with which it seeks to seize this Court "uniquely concern" the sanctions measures only when re-imposed, in implementation of the U.S. decision to cease participation in the JCPOA.[187]

5.13 The scope of Iran's claims is telling in another way as well. As described in Chapter 2, the JCPOA did not provide for the suspension or removal of existing multilateral and national sanctions related to other, non-nuclear issues, such as Iran's support for international terrorism, its ballistic missile activities, its abuses of human rights, or its support for the Assad regime.[188] Similarly, the United States had no commitment under the JCPOA to refrain from imposing additional sanctions in response to those or other malign or destabilizing non-nuclear actions by

[186] *See* Chapter 2 at paras. 2.9-2.12.

[187] Iran's Memorial, para. 1.13.

[188] *See* Chapter 2 at paras. 2.17, 2.28.

Iran. Iran's Application submits to this Court claims challenging the *re*-imposition of a heavily-negotiated, highly-curated set of U.S. sanctions measures specified in Annex II of the JCPOA. This, too, makes apparent that, through this case, Iran is attempting to enlist the Court in an effort to nullify the United States' decision to cease participation in the JCPOA, by ordering the United States to implement its sanctions authorities to provide the JCPOA sanctions relief.

5.14 In its Application, Iran not only asks the Court effectively to undo the United States' decision to cease participation in the JCPOA, but also suggests that Iran is somehow entitled under the JCPOA to the sanctions relief. [189] No such legal entitlement exists, and even if it did, as explained in the section that follows, the Court would have no jurisdiction to enforce the JCPOA. The JCPOA did not create any legally binding obligation on the United States to continue as a participant, much less to continue the nuclear-related sanctions relief it contemplated. This critical fact seems to be the root source of Iran's present dissatisfaction. But as deep as that dissatisfaction might be, it is not sufficient to transform the real dispute in this case into one arising under the Treaty of Amity.

ii. The Real Instrument in Dispute, the JCPOA, Is Distinct from the Treaty of Amity and Provides No Jurisdiction to this Court

5.15 As discussed in Chapter 2, the E3/EU+3 negotiated the JCPOA with Iran in an attempt to address the international community's serious concerns regarding the nature of Iran's nuclear program. At the heart of this complex, multilateral instrument is a basic *quid pro quo*: Iran undertook commitments to scale back its nuclear program and allow for certain verification measures, in exchange for the lifting by the E3/EU+3 of specific nuclear-related sanctions.

5.16 The JCPOA, which was reached in 2015, bears no relation to the 1955 Treaty of Amity, and the issues it addressed fall well outside the Treaty. The JCPOA was reached among multiple participants beyond the United States and Iran. It was negotiated in a different historical and geopolitical context than the Treaty, as a political arrangement among its participants drafted in exceptional technical detail in regard to the core matters of concern: the nuclear restrictions on Iran and the nuclear-related sanctions measures. And as explained above, it is this instrument, not the Treaty, that is at the heart of the dispute Iran presents to this Court.

[189] *See* Iran's Application, paras. 14-17.

5.17 It is undisputed that the JCPOA provides no jurisdiction to this Court. And while the Court accurately observed that the JCPOA does not contain an express clause forgoing resort to this Court, the text, structure, and context of the JCPOA reveal that it was intended to exclude such a possibility. Indeed, the JCPOA contemplates exactly the kind of situation that has now arisen—namely, that a participant has ceased implementing some or all of the commitments—and its participants established specific avenues to address such a situation. As explained in Chapter 2, the JCPOA's dispute resolution mechanism, set out in paragraph 36 of the JCPOA Main Text, provides for disputes that arise under it to be addressed and resolved through political channels. It provides only a limited allowance for consideration by an outside "advisory" panel on a strictly non-binding basis and subject to rapid timeframes, underscoring the intention of the participants to have a swift, responsive mechanism given the gravity of the international peace and security issues at stake.[190] Additionally, the JCPOA dispute mechanism expressly anticipates a situation in which one side is dissatisfied with the outcome of the process. Here again, it does not provide for adjudicative rights. Rather, if a participant concludes that the issue is unresolved and amounts to "significant non-performance," the JCPOA permits the participant to "cease performing its commitments under this JCPOA in whole or in part, and/or to notify the United Nations Security Council that it believes the issue constitutes significant non-performance."[191] These are the remedies the participants contemplated if the dispute mechanism did not resolve the issue. Recourse to this Court is not one of them. These elements make evident that the JCPOA was drafted to ensure that disputes concerning its implementation would be addressed through political channels among participants, rather than through adjudication before any court.

5.18 The United States submits that the real issue in this case is the U.S. decision to cease participating in the JCPOA and the object of Iran's claim is restoration of the sanctions relief implemented by the United States when it was a participating in the JCPOA. Because the present dispute pertains exclusively to the application of the JCPOA, and because the JCPOA in text and structure necessarily excludes consent to the jurisdiction of this Court for resolution of such a dispute, this Court lacks jurisdiction over Iran's claims. This is not, in other words, a case of overlapping instruments. Iran has repackaged a dispute about the JCPOA, in respect of which the

[190] *See* Chapter 2 at paras. 2.18-2.22.

[191] JCPOA, Main Text, para. 36 (IM Annex 10). Paragraph 37 of the Main Text of the JCPOA simply describes what follows if a participant decides to go to the UN Security Council.

jurisdiction of the Court was intentionally excluded and never expected by its multiple participants, as a dispute under the bilateral Treaty of Amity. The Court should reject Iran's attempt to employ such an artifice.

Section B: In the Alternative, the Court Should Decline to Exercise Jurisdiction in this Case Because Iran's Claims Amount to an Abuse of Process and Would Work an Injustice That Would Raise Serious Questions of Judicial Propriety

5.19 Apart from and without prejudice to the United States' objections to the Court's jurisdiction under Article XXI(2) of the Treaty set forth herein, the Court should find Iran's claims inadmissible. In particular, the Court should exercise its inherent authority to decline to entertain Iran's claims on the grounds that they amount to an abuse of process and would engage the Court in a role at odds with its judicial function. Iran has invoked the Treaty in a case involving a dispute that solely concerns the application of the JCPOA and, in doing so, seeks to obtain the entirety of the United States' non-binding JCPOA sanctions commitments through an order of this Court, while at the same time remaining free to *cease* the performance of key commitments *it* has under the JCPOA. Such an outcome would work a substantial injustice. In addition, Iran's claims will draw this Court down a path that leads inevitably to deep entanglement with the mechanics, architecture, and enforcement of the JCPOA, a multilateral political arrangement, in a manner that could call into question the judicial integrity of this Court. Finally, if the Court were to entangle itself in these issues, it could have significant repercussions well outside the Treaty, making efforts to address complex and sensitive disputes through political arrangements more difficult if the risks of international adjudication are uncertain.

i. The Court Has the Inherent Power to Regulate Its Own Proceedings in the Interests of Justice and in Order to Safeguard the Integrity of the Court, Including to Dismiss a Case on the Grounds of Abuse of Process

5.20 There is no question that the Court has the authority to decline to exercise jurisdiction. This Court has recognized that it has the inherent power to regulate its own proceedings in the interests of justice and to safeguard its integrity, which includes the authority to dismiss contentious proceedings in appropriate circumstances even if it were to find it had jurisdiction over an applicant's claims.[192]

[192] *See* Chapter 4 at paras. 4.12-4.16.

5.21 One circumstance in which the Court may exercise this inherent power is if the applicant's conduct amounts to an abuse of process. This Court has recognized on several occasions that abuse of process is relevant in assessing the admissibility of an application.[193] Abuse of process has been described as "a special application of the prohibition of abuse of rights."[194] In essence, it entails the abuse of a right to access a court.[195] Such an abuse may occur through a variety of acts, including the act of filing a case with a court.[196]

5.22 What constitutes an abuse of process is not susceptible to a comprehensive definition in the abstract and instead turns on the specific facts and circumstances of a case.[197] Professor Kolb writes that abuse of process includes the use of judicial procedures for, among other things, the purpose of "obtaining an illegitimate advantage."[198] It is worth recalling in this regard that Iran's Deputy Foreign Minister stated that the purpose of Iran's case was not to seek favorable judicial resolution of the dispute, but rather "to show the legitimacy of the Islamic Republic of Iran to the international community" and bring "political and psychological pressure on the United States."[199] Although abuse of process is often considered to have a close relationship with the principle of good faith,[200] it does not necessarily require an inquiry into whether the relevant actor acted, or is

---

[193] *See Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, paras. 107-115; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgement of 6 June 2018*, paras. 139-152; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 at p. 255, para. 38; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991*, p. 53 at p. 63, paras. 26-27.

[194] Robert Kolb, *General Principles of Procedural Law*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 963, 998 (Andreas Zimmermann & Christian J. Tams eds., 3d ed. 2019) (US Annex 95).

[195] *See* Yuka Fukunaga, *Abuse of Process under International Law and Investment Arbitration*, 33 ICSID REV. 181, 184 (2018) (US Annex 96); Robert Kolb, *General Principles of Procedural Law*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 963, 998 (Andreas Zimmermann & Christian J. Tams eds., 3d ed. 2019) (stating that abuse of process "consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established") (US Annex 95).

[196] *See* Yuka Fukunaga, *Abuse of Process under International Law and Investment Arbitration*, 33 ICSID REV. 181, 184 (2018) (US Annex 96).

[197] *See* Robert Kolb, *General Principles of Procedural Law*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 963, 999 (Andreas Zimmermann & Christian J. Tams eds., 3d ed. 2019) ("The concept of abuse of procedure cannot be caught completely in the abstract, since it can relate to a variety of different situations.") (US Annex 95).

[198] *Id.* at 998.

[199] "Complaint Against US To Prove Iran's Legitimacy; Hague's Ruling Not Binding," Mehr News Agency (Tehran), Aug. 29, 2018 (quoting remarks of Iranian Deputy Foreign Minister Abbas Araghchi) (US Annex 94).

[200] *See, e.g.*, Robert Kolb, *General Principles of Procedural Law*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 963, 998-99 (Andreas Zimmermann & Christian J. Tams eds., 3d ed. 2019) (US Annex 95).

acting, in good or bad faith. As France recently put it before the Court, "[a]buse of rights and abuse of process are both objective notions that can be inferred from the circumstances without it being necessary to make a value judgment on the intentions of those who commit them. The test is not good faith or bad, but whether or not the seisin of a court is reasonable in view of the full circumstances of the case."[201]

5.23 Abuse of process is not the only basis on which the Court may exercise its inherent power to dismiss an application even if it were to find it has jurisdiction. The Court has acknowledged that it "may be difficult to catalogue" *ex ante* all of the types of cases that may implicate the need for the Court to exercise its inherent power "to safeguard the [Court's] judicial function."[202] This reflects a recognition that it is not possible to delimit in advance all circumstances in which the Court should employ its inherent authority to decline to exercise jurisdiction, thereby supporting that any such examination requires a case-by-case inquiry into the specific circumstances of an applicant's claims.

5.24 Judge Higgins made a similar point in her separate opinion in the *Legality of Use of Force* case. Examining cases in which the Court had dismissed an applicant's claims based on an "exercise of its inherent powers," Judge Higgins noted that those instances "do not constitute [the] exclusive categories within which the Court has to fall if it wishes to exercise its inherent powers in the absence of discontinuance."[203] In reference to the Court's inherent powers, she wrote that they derive from the Court's "judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules."[204] The real question then, as Judge Higgins stated, is not "whether the present circumstances are exactly identical to the few examples where the Court itself has removed a case from the List (examples which will, in their turn, have been 'new' at the relevant time and not

[201] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Verbatim Record of the Public Sitting of the I.C.J. Held on Feb. 19, 2018, p. 37, para. 4 (Professor Pellet on behalf of France) (ICJ translation).

[202] *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 15 at p. 30.

[203] *Legality of Use of Force (Serbia and Montenegro v. United Kingdom), Preliminary Objections, Judgement, I.C.J. Reports 2004*, p. 1307 at p. 1361, para. 9 (Separate Opinion of Judge Higgins) (further stating that "[t]here is nothing in the case law that so suggests" that the circumstances in which the Court can exercise its inherent powers is so limited, noting that "it is hard to know what might be the legal source of a right to remove cases from the List provided only that this would be limited to these two examples").

[204] *Id.* at pp. 1361-62, para. 10.

falling into any previously established category)," but rather "whether the circumstances are such that it is reasonable, necessary and appropriate for the Court to strike the case off the List as an exercise of inherent power to protect the integrity of the judicial process."[205]

5.25 When considering objections of abuse of process, the Court has said it would reject an applicant's claim founded on valid title of jurisdiction "only in exceptional circumstances" based on "clear evidence that the applicant's conduct amounts to an abuse of process."[206] As Judge Fitzmaurice wrote, one potentially significant consideration that could give rise to such a decision to exercise this inherent authority is "what the Court is requested to do about [a claim], having regard to the surrounding circumstances."[207] The United States submits that, apart from the critical fact that there is no valid title of jurisdiction in this case, the surrounding circumstances in this case are exceptional such that the Court can and should exercise its inherent power and dismiss Iran's claims.

ii. Iran's Claims Seek to Bind the United States to Non-Binding Commitments It Had Before It Left the JCPOA, Without Iran Being Subject to Corresponding Binding Obligations with Respect to Its Nuclear Program

5.26 As explained in the preceding Section, the dispute that Iran brings to this Court exclusively concerns the application of the JCPOA. Iran's filing of its Application and effort to bring claims under the guise of a dispute about the Treaty of Amity is manifestly unreasonable in view of the full circumstances of the case, and amounts to an abuse of process. Setting aside Iran's own descriptions of its case,[208] Iran's claims seek to compel the United States to provide Iran with sanctions relief that was part of a clear *quid pro quo* under the JCPOA: Iran's implementation of restrictions on its nuclear program in exchange for the lifting of specific nuclear-related

[205] *Id*., para. 12.

[206] *Jadhav (India v. Pakistan), Judgment of 17 July 2019*, para. 49 (citing *Certain Iranian Assets (Iran v. United States), Preliminary Objections, Judgment of 13 February 2019*, para. 113; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment of 6 June 2018*, p. 336, para. 150).

[207] *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 15 at p. 106 (Separate Opinion of Judge Fitzmaurice).

[208] *See supra* paras. 5.3 & 5.8. Iran argues that only *its* framing of its claims as purported violations of the Treaty of Amity is relevant in reaching a conclusion on jurisdiction and admissibility. However, it is the Court, and not the applicant, that determines the true object of an applicant's claims. *See, e.g.*, *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253 at p. 263, para. 30.

sanctions.[209] As explained further below, allowing Iran to obtain the benefits of that intentionally non-binding arrangement through an order of this Court would raise serious questions of judicial propriety. That is all the more true where, as in this case, Iran is not legally bound to perform its JCPOA commitments. (Indeed, Iran has ceased the performance of key commitments and indicated it is likely to cease performing more.)[210] It also would condone an abuse of process, as Iran's *seisin* of the Court would work an injustice and allow Iran to seek an illegitimate advantage through an application brought under the Treaty of Amity. In these exceptional circumstances, the Court should rule Iran's claims inadmissible.

5.27 As is plain by the structure and terms of the JCPOA, the JCPOA participants struck a delicate balance on political and technical terms in an attempt to address a serious threat to global security. Two of the JCPOA's design elements in particular contributed to the participants' ability to reach an arrangement, both of which have been described above: (*i*) its *non-legally* binding form, and (*ii*) the dispute resolution procedure that established clear expectations regarding how the participants intended to address non-performance of JCPOA commitments, including remedies for the same.

5.28 First, and consistent with the participants' deliberate intent, the JCPOA was drafted to reflect the non-legally binding nature of the participants' commitments. The importance of this choice of a non-binding form to the JCPOA cannot be overstated; it facilitated an expedient and expeditious resolution that could clear various international political hurdles and also address important domestic legal and political considerations.[211] States' choice between a binding and a

[209] Iran itself recognizes, as it must, that this *quid pro quo* was at the heart of the deal. *See Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States),* Verbatim Record of the Public Sitting of the I.C.J. Held on Aug. 27, 2018, p. 21, para. 10 (Mr. Mohebi on behalf of Iran) ("Iran agreed to the JCPOA because it was a workable compromise between, on the one hand, the lifting of the 'nuclear-related' sanctions that were negatively affecting the Iranian economy and society and, on the other hand, stronger commitments and oversight requested by some States, notably the United States, over Iran's civilian nuclear programme.").

[210] *See* Letter from Hassan Rouhani, President of the Islamic Republic of Iran, to the Heads of State of the Remaining JCPOA Participants (May 8, 2019) (US Annex 101).

[211] *See, e.g., Negotiations with Iran: Blocking or Paving Tehran's Path to Nuclear Weapons? Hearing Before the H. Comm. on Foreign Affairs*, 114th Cong. 39 (2015) (statement of Antony Blinken, Deputy Sec'y of State, U.S. Dep't of State) ("[H]aving a nonbinding agreement allows us to have the flexibility we need if necessary to snap back sanctions immediately, not wait for international partners to agree or not agree.") (US Annex 97).

non-binding form for any international arrangement is one of the most fundamental decisions that is made.[212]

5.29 By design, the JCPOA took a non-legally binding form. As such, without diminishing the seriousness of political commitments that may be reflected in non-binding arrangements such as the JCPOA, the JCPOA did *not* provide Iran with a legal guarantee against the re-imposition of the sanctions measures it addressed.

5.30 Second, the negotiators of the JCPOA carefully drafted not only the nature, scope, and duration of the commitments of the respective participants, but also the mechanisms for a participant to address another's non-performance of its JCPOA commitments. Indeed, in light of the difficult history of the Iranian nuclear issue, the JCPOA participants, including Iran, anticipated the possibility of disputes arising under the arrangement regarding the performance of JCPOA commitments—and developed a dispute resolution mechanism for addressing those situations. As described above, in providing for them, the participants did not manifest any consent to the jurisdiction of this Court, electing instead for the resolution of issues relating to the performance of JCPOA commitments in purely political channels and for remedies based on the reciprocal nature of the commitments.

5.31 Iran has pursued dispute resolution under the JCPOA's framework in connection with the United States' May 8 Decision, and it has availed itself—and is still actively availing itself—of remedies contemplated under the JCPOA. It is doing so in connection with the same acts of which it complains to this Court: the United States' re-imposition of the nuclear-related sanctions previously lifted under the JCPOA. In May 2018, Iran called for a meeting of the Joint Commission in view of the United States' May 8 Decision, invoking paragraph 36 of the Main Text and asserting that the U.S. actions constituted "significant non-performance" of the JCPOA.[213] The Joint Commission then met at both the political directors' and ministerial levels,

---

[212] *See* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 587 (2005) (US Annex 98); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579, 591-594 (2005) (examining why States sometimes choose non-binding arrangements over international agreements and identifying "flexibility" and "domestic issues" as the "two most salient" reasons) (US Annex 99).

[213] Letter from M. Javad Zarif, Minister of Foreign Affairs of the Islamic Republic of Iran, to the United Nations (May 10, 2018), U.N. Doc. A/72/869-S/2018/453 (US Annex 100). *See also* Letter from M. Javad Zarif, Minister of Foreign Affairs of the Islamic Republic of Iran, to Federica Mogherini, EU High Representative for Foreign Affairs and Security Policy (May 8, 2019) (US Annex 102) (noting that Iran "invoked paragraph 36 of the JCPOA in response to primarily U.S. grave violations and failures to comply with its undertakings under the agreement, most

but the issue, in Iran's view, remained unresolved.[214] Although Iran chose to pursue further negotiations with the remaining JCPOA participants, ultimately, Iranian President Hassan Rouhani announced that Iran would cease performing certain of its commitments under the JCPOA in response to the United States' exit and re-imposition of nuclear-related sanctions.[215]

5.32 In that announcement and related statements, Iran has made evident that it is ceasing the performance of key JCPOA commitments in response to the United States leaving the arrangement, and that it is seeking to justify its actions under the dispute resolution provisions of the JCPOA.[216] Nonetheless, through this case, Iran seeks to create an additional dispute resolution path—to this Court via the Treaty of Amity—where one was never envisioned by or acceptable to the JCPOA participants.

5.33 The JCPOA participants in no way intended or envisioned that Iran would be able to procure a binding order of a court, much less this Court, against any one of them to perform non-binding commitments in the JCPOA. The fact that Iran does not frame the relief it seeks as

---

notably after the unlawful unilateral withdrawal from the JCPOA"); Letter from Hassan Rouhani, President of the Islamic Republic of Iran, to the Heads of State of the Remaining JCPOA Participants (May 8, 2019) (US Annex 101) (noting that Iran had "invoked the mechanism envisioned in Paragraph 36 of the JCPOA" in response to the United States' decision to cease participating in the JCPOA).

[214] Letter from M. Javad Zarif, Minister of Foreign Affairs of the Islamic Republic of Iran, to Federica Mogherini, EU High Representative for Foreign Affairs and Security Policy (May 8, 2019) (US Annex 102) (asserting that the "significant non-performance" of which Iran complained had "remained unresolved" after "several meetings of the JCPOA Joint Commission").

[215] Hassan Rouhani, President of the Islamic Republic of Iran, Remarks at Cabinet Meeting (May 8, 2019), *available at* president.ir/en/109589 (US Annex 103). *See also* Letter from M. Javad Zarif, Minister of Foreign Affairs of the Islamic Republic of Iran, to Federica Mogherini, EU High Representative for Foreign Affairs and Security Policy (May 8, 2019) (US Annex 102) (stating that "Iran, in exercise of its rights under paragraphs 26 and 36 of the JCPOA, has decided 'to cease performing its commitments in part' as of today"). The May 8, 2019 letter states that Iran immediately would cease performing its JCPOA commitments to keep its uranium stockpile under 300 kilograms, as well as not to exceed 130 metric tons of heavy water. *Id.* The letter also states that Iran would cease performing additional JCPOA commitments within 60 days if the remaining JCPOA participants did not meet Iran's demands "to restore the lost balance of the deal following the US withdrawal," referencing Iran's commitments not to enrich uranium beyond 3.67 percent and to modify its Arak heavy water reactor. *Id.*

[216] Iran has been unequivocal that it believes it has formally invoked and pursued the JCPOA's dispute resolution mechanism set out in paragraph 36 of the arrangement. *See, e.g.*, Javad Zarif (@JZarif), TWITTER (July 10, 2019, 4:30 AM), https://twitter.com/JZarif/status/1148917515256500225 (attaching a chart entitled "How Iran Exhausted the Procedure of Dispute Resolution Mechanism (As Set out in Paragraph 36 of the JCPOA)") (US Annex 104);; Javad Zarif (@JZarif), TWITTER (July 1, 2019, 10:43 AM), https://twitter.com/JZarif/status/1145749802975711233 (stating in an explanation of Iran's cessation of performance of certain key nuclear commitments it has under the JCPOA, "We triggered & exhausted para 36 after US withdrawal") (US Annex 106); Javad Zarif (@JZarif), TWITTER (July 7, 2019, 2:55 AM), https://twitter.com/JZarif/status/1147806420936658944 (US Annex 105); Iran, Non Paper: Iran's Decision to Exercise Its Rights Under Paragraphs 26 and 36 of the JCPOA (May 2019) (US Annex 107) (un-published paper circulated diplomatically by Iran). *See also* Statement by the Supreme National Security Council of the Islamic Republic of Iran (May 8, 2019) (US Annex 108).

enforcement of the JCPOA, or compelling a U.S. return to the JCPOA, is of no moment. The effect of the order it requests from this Court would be the same. And allowing Iran's case to proceed to the merits—when the JCPOA participants manifested their deliberate intent to have these sensitive issues addressed through political, not legal, means—could well upend predictability in other efforts to address complex, contemporary transnational problems through political arrangements, with consequences that are not easily foreseeable.

5.34 The illegitimate advantage that would be obtained and the injustice that would result if Iran's case were to proceed is especially apparent when one considers what could happen were the Court to grant Iran the relief it seeks. Doing so would mean Iran would obtain the lifting of a very specific set of U.S. nuclear-related sanctions—those that formed the heart of the bargain in the JCPOA—under the authority of an order of this Court. This would place Iran in a legal position that nobody, not even Iran prior to the JCPOA, ever envisioned or intended. It would in effect allow Iran to convert, through a sort of alchemy involving the Treaty of Amity, commitments made by the United States under a non-binding multilateral arrangement that it has since exited into an order of this Court. Iran's filing and continued prosecution of its Application seeking such relief in these circumstances amounts to an abuse of process, and granting such relief would work an injustice that would place the Court in a role at odds with its inherently judicial function.

5.35 Moreover, on Iran's logic, it could use this Court to force the United States to provide it with the *quid* of sanctions relief under the JCPOA without any assurance, and certainly no legally binding assurance, that Iran would give the *quo* of the JCPOA—performance of its nuclear commitments under the JCPOA. Indeed, Iran has requested an order from this Court with respect to the sanctions measures without regard to the restrictions on its nuclear program under the arrangement or, indeed, whether Iran could also *decide to leave the JCPOA entirely*. Simply stating this paradoxical possibility makes manifest Iran's misuse of this Court and the exceptional circumstances of this case.

5.36 The scenario outlined above is not merely theoretical following Iran's announcement a few months ago that it is ceasing performance of key nuclear commitments under the JCPOA.[217] Iran's Application seeks an order that would bind the United States to lift or otherwise terminate the

[217] Hassan Rouhani, President of the Islamic Republic of Iran, Remarks at Cabinet Meeting (May 8, 2019), *available at* president.ir/en/109589 (US Annex 103).

sanctions re-imposed when the United States left the JCPOA—effectively restoring to Iran the benefit of U.S. participation—while Iran has repeatedly proclaimed its intention not to adhere to its nuclear-related commitments under the arrangement.[218] Iran has made no assurances to this Court or otherwise that it would return to compliance—and thereafter remain in compliance—with those commitments if the Court were to grant the relief it seeks. But in any event, those assurances would be insufficient: Iran would be free to act contrary to them, while the United States, if ordered to provide Iran with the sanctions relief it seeks, would be directed to deliver benefits of the JCPOA to Iran.

5.37 There should be no mistake: the United States is not asking the Court to transform Iran's commitments under the JCPOA into legally-binding obligations, nor would the Court have jurisdiction or competence to do so. Rather, the point is that entertaining this case would give rise to the very real prospect of Iran obtaining a legal judgment against the United States to provide the *quid* under the JCPOA without Iran itself giving the *quo*. That prospect alone would not contribute to a resolution of the very serious national security concerns underlying the dispute between the United States and Iran, all the more so at a time when the full extent of Iran's non-performance of its nuclear commitments under the JCPOA remains to be seen and Iran is raising the specter of even more escalatory measures such as withdrawal from the NPT.[219]

5.38 Iran's Application puts the Court in a position that the Court should not countenance. Allowing Iran to pursue its claim would amount to allowing Iran to seek the benefits of a bargain it never struck, namely relief from U.S. nuclear-related sanctions in the form of an order of this Court without itself being legally bound to adhere to its nuclear commitments under the JCPOA. In light of the illegitimate advantage it would obtain in these circumstances, Iran's Application amounts to an abuse of process.

5.39 In these exceptional circumstances, the Court's exercise of jurisdiction would not only fail to resolve the real dispute between the parties and the underlying concerns animating it, but risks

[218] *See, e.g., id.*; Letter from M. Javad Zarif, Minister of Foreign Affairs of the Islamic Republic of Iran, to Federica Mogherini, EU High Representative for Foreign Affairs and Security Policy (May 8, 2019) (US Annex 102); Letter from Hassan Rouhani, President of the Islamic Republic of Iran, to the Heads of State of the Remaining JCPOA Participants (May 8, 2019) (US Annex 101); Statement by the Supreme National Security Council of the Islamic Republic of Iran (May 8, 2019), *available at* http://www.president.ir/en/109588 (US Annex 108).

[219] *See* Letter from Hassan Rouhani, President of the Islamic Republic of Iran, to the Heads of State of the Remaining JCPOA Participants (May 8, 2019) (US Annex 102).

aggravating it. All of this makes manifest the significant grounds for the Court to rule that Iran's Application based on the Treaty of Amity—regarding claims that exclusively concern U.S. actions in connection with the JCPOA—is inadmissible.

CHAPTER 6: EXCEPTIONS CONTAINED IN ARTICLE XX(1) OF THE TREATY STAND AS AN INSURMOUNTABLE BAR TO IRAN'S CLAIMS IN THIS CASE

6.1 Iran's case fails and should be dismissed at the preliminary objections stage for another reason. The entirety of Iran's case is clearly encompassed by two independent exceptions memorialized in the Treaty that exclude certain measures from the ambit of the Treaty. Through those exceptions, Iran expressly agreed that this commercial and consular treaty would not preclude measures relating to fissionable materials nor measures necessary to protect a Party's essential security interests—precisely the types of national security measures that Iran seeks to challenge in this case. Iran endorsed in the JCPOA text that all the sanctions measures at issue in this case are "nuclear-related;" they were imposed over many years as part of a multilateral effort to respond to Iran's illicit nuclear program. And the United States' decision to cease participation in the JCPOA, resulting in the re-imposition of these measures, was taken to address grave and growing concerns not only about Iran's nuclear program but also about other threats posed by Iran to the national security of the United States. Iran's contention that the exceptions in Article XX(1) are "irrelevant" to this case is unsustainable. The bargain Iran struck in the Treaty was one that explicitly reserved to both States their sovereign rights to apply exactly these kinds of measures, and Iran's search for relief in this case directly conflicts with this important limitation in the Treaty.

6.2 The text of Article XX, paragraph 1, of the Treaty is clear:

> The present Treaty ***shall not preclude the application of measures***:
>
> (a) regulating the importation or exportation of gold or silver;
>
> (b) ***relating to fissionable materials, the radio-active byproducts thereof, or the sources thereof***;
>
> (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***.

6.3 Although the Court recently decided in *Certain Iranian Assets* to defer the United States' objection under Article XX(1) in that case to the merits phase, there are powerful reasons why, in this case, the Court can and should resolve the United States' objections relating to these exceptions as a preliminary matter. Unlike in *Certain Iranian Assets,* in this case the United States' objections under Article XX(1) go to the entirety of Iran's case. Here, all of Iran's claims involve

sanctions measures adopted for core national security reasons, in areas the Treaty expressly carved out of the field of application of the Treaty's substantive articles. Article XX(1) makes clear that the United States is not prevented under the Treaty from taking such measures. As set out in detail in this Chapter, two independent exceptions in that Article provide a straightforward path to the dismissal of all of Iran's claims.

6.4 The applicability of these exceptions is a discrete inquiry severable from the merits of Iran's claims, and it involves a limited universe of facts that the United States is making available to the Court. An early decision would further the purpose of the exceptions, which recognized the imperative of States retaining freedom of action in these highly sensitive areas of national security not appropriately constrained by a commercial and consular treaty. Moreover, a decision on these objections now would clearly serve the interests of fairness, procedural economy, and the sound administration of justice. Iran has raised claims under ***nine*** different provisions of the Treaty. Consideration of the United States' objections under Article XX(1) at this preliminary stage would avoid unnecessary, costly, and lengthy proceedings in this Court involving detailed factual and interpretive questions under each of those provisions.

6.5 As Section A of this Chapter explains, whether the exceptions in Article XX(1) are understood to constrain the Court's jurisdiction or not, the Court's Rules provide for a decision on their applicability at this stage if the U.S. objections possess an exclusively preliminary character. That is the case here, where the objections go to the entirety of the claims brought by Iran and can be addressed based on a discrete set of facts and without conducting an inquiry into the merits of the interpretation or application of the substantive Treaty articles Iran invokes in relation to the measures at issue. As discussed in Section B, the U.S. measures clearly relate to nuclear materials and are encompassed by the exception for measures relating to "fissionable materials" in Article XX, paragraph 1(b). In addition, as discussed in Section C, the sanctions measures Iran is challenging are necessary to protect the United States' essential security interests within the meaning of the exception in Article XX, paragraph 1(d). Either one of these exceptions provides a basis for summarily dismissing Iran's case at this stage in the proceedings.

Section A: The Exceptions in Article XX(1) Can and Should Be Addressed at a Preliminary Stage in this Case, Regardless of Whether They Affect the Court's Jurisdiction

i. An Objection Need Not Be Jurisdictional to Possess an Exclusively Preliminary Character

6.6 At the outset, it is important to emphasize that the United States is not advancing the argument in this pleading that its objections under Article XX(1) are objections to the Court's *jurisdiction*. Although the jurisdictional character of Article XX(1) has been the subject of extensive recent pleadings before the Court at the provisional measures phase of the present case and in the *Certain Iranian Assets* case, the United States' objections to Iran's claims under this provision of the Treaty, as advanced here, do not turn on whether the provision is understood to constrain the Court's jurisdiction.[220] Article 79(1) of the Court's Rules specifically authorizes preliminary objections that are based on defects in an applicant's case that do not go to jurisdiction or admissibility but that nonetheless warrant decision on a preliminary basis, before further proceedings on the merits.

6.7 As discussed in Chapter 4, the text of Article 79 of the Court's Rules specifically provides that preliminary objections are not limited to objections regarding jurisdiction or admissibility.[221] Article 79 expressly permits a Respondent to raise any "other objection the decision upon which is requested before any further proceedings on the merits."[222] Moreover, following the Court's revision of its rules in 1972, the Court may reserve its consideration of a preliminary objection for

[220] For the sake of clarity, while the United States is not asking the Court to revisit the jurisdictional question, the United States nevertheless maintains its view that measures covered by any of the exceptions in Article XX(1) are excluded from the scope of the Treaty and accordingly the Court's jurisdiction. *See* U.S. Preliminary Objections, *Certain Iranian Assets*, para. 7.5; *Certain Iranian Assets*, Verbatim Record of the Public Sitting of the I.C.J. Held on Oct. 8, 2018 at 11-14 (Mr. Daley for the United States); *Alleged Violations*, Verbatim Records of the Public Sitting of the I.C.J. Held on August 28, 2018 at 33-37 (Ms. Grosh for the United States). The Court has characterized the exceptions in Article XX(1) differently – not as constraints on its jurisdiction but rather as providing a potential "defense on the merits." *Alleged Violations*, Provisional Measures Order para. 41; *Certain Iranian Assets*, Preliminary Objections Judgment, pp. 19-20 at paras. 45-47; *see also Certain Iranian Assets*, Separate Opinion of Judge *ad hoc* Brower at p. 4, para. 9. The United States respectfully disagrees but is not pressing this point for purposes of these Preliminary Objections.

[221] *See also Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgement, I.C.J. Reports 1998*, p. 9 at p. 26, para. 47 (holding that Article 79's "field of application *ratione materiae* is thus not limited solely to objections regarding jurisdiction or admissibility").

[222] *See also Territorial and Maritime Dispute (Nicaragua v. Colombia) Preliminary Objections Judgment, I.C.J. Reports 2007* p. 832 at p. 850, para. 47.

the merits phase only where that objection lacks "an exclusively preliminary character."[223] The purpose of the revision of the Rules was to address the problem of issues "extensively discussed in a first round at the preliminary stage of the proceedings com[ing] up for discussion a second time."[224] As the Court acknowledged in *Military and Paramilitary Activities (Nicaragua v. United States)*, the revised version of Article 79 "qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately."[225] Furthermore, an objection does not lack an exclusively preliminary character simply because it "touch[es] upon certain aspects of the merits of the case;" such an objection should be decided in the preliminary phase unless "the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits."[226]

6.8 Under this framework, even if the exceptions in Article XX(1) are labeled defenses "on the merits," the Court can and must resolve their applicability at this threshold stage if the nature of the inquiry has an exclusively preliminary character. This requires a careful analysis of the objection in the circumstances of the case; the Court's jurisprudence makes clear that these are not determinations that are susceptible to categorical conclusions.[227] The Court has not previously addressed whether objections under Article XX(1) can be so characterized—either in its recent Judgment on the United States' preliminary objections in *Certain Iranian Assets* or at the preliminary objections phase in *Military and Paramilitary Activities* or *Oil Platforms*, the only

[223] Article 79 of the Court's Rules; Christian Tomuschat, *Article 36, in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, p. 712, at p. 793 (Andreas Zimmermann & Christian J. Tams, eds., 3d ed. 2019) (US Annex 92).

[224] Christian Tomuschat, *Article 36, in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, p. 712 at p. 793 (US Annex 92); *Certain Iranian Assets*, Joint Separate Opinion of Judges Tomka and Crawford at p. 2-3, paras. 6-7 (explaining that the revision of the rules was "intended to be substantive: it was not a mere matter of drafting," and noting Judge Jiménez de Aréchaga's extra-curial commentary that the revision excluded the Court taking "the easy way out which was represented by the neutral, and in some cases diplomatic answer of a joinder but which really constituted a postponement of any decision").

[225] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986* p. 14 at p. 31 para 41.

[226] *Territorial and Maritime Dispute (Nicaragua v. Colombia) Preliminary Objections Judgment, I.C.J. Reports 2007* p. 832 at p. 852 para. 51.

[227] *See* Malcolm N. Shaw, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015 VOL. II (5th ed. 2015) 906-07 (US Annex 95) (describing the flexibility with which the Court approaches the question of whether an objection is preliminary or a defense on the merits and citing cases in which the same type of objection as found to have a preliminary character in one circumstance but found to be a defense that should be held to the merits phase in another).

other cases in which the Court has considered this or a similar exceptions article in a friendship, commerce, and navigation treaty.

ii. In the Circumstances of this Case, the United States' Objections under Article XX(1) Possess an Exclusively Preliminary Character

6.9 The applicability of the exceptions in Article XX(1) should be resolved at a preliminary stage in this case for several reasons.

6.10 First, there is the nature of the exceptions and the fact that they encompass all of Iran's claims in this case. There is no dispute that if one of the exceptions in Article XX(1) applies to a given measure, the measure is not precluded by the Treaty. As the Court explained in describing a comparable article of the U.S.-Nicaragua FCN Treaty in *Military and Paramilitary Activities,* the article "contains a power for each of the parties to derogate from the other provisions of the Treaty."[228] If the measures Iran is challenging in this case fall within one or both of the identified categories described in Article XX(1), then those measures are not constrained by the Treaty and further proceedings are unwarranted. The Court would have no need to construe the provisions of the Treaty invoked by Iran as the basis for the alleged breach, because the claims would be defeated without resolving those interpretive questions. In other words, by the terms of the Treaty, the exception unquestionably stands as an insurmountable bar to relief, and the claims must be dismissed.[229] Where, as here, an exception encompasses all of the applicant's claims, an early decision serves the interests of fairness to the parties, procedural economy, and the sound

[228] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986* p. 14 at p. 117, para 225.

[229] Although in paragraph 69 of its Order of October 3, 2018 on Iran's request for provisional measures, the Court expressed the view that "Iran's rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, cannot plausibly be considered to give rise to the invocation of Article XX, paragraph 1, subparagraphs (b) or (d)," it provided no explanation of the basis for that conclusion, nor did it cite to any supporting materials. The exceptions in Article XX(1) in the text of the Treaty are framed broadly and do not indicate that any categories of measures are *per se* excluded from the exceptions categories. As the Court recognized in *Military and Paramilitary Activities*, even a total embargo on all trade with a country like the one the United States imposed on Nicaragua in 1985 would not be precluded if the measure were encompassed by one of the exceptions contained in the analogous article of the U.S.-Nicaragua FCN. *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986* p. 14 at pp. 140-141, para 280. If the Court was suggesting that it considers the Treaty of Amity to contain implicit limitations on the types of measures encompassed by Article XX's exceptions, it did not indicate what support there would be for that reading or what the contours of the limitations would be, given that security concerns about a foreign country's activities could arise even in the civil aviation and humanitarian sectors, depending on the facts and circumstances. In any event, as discussed earlier in Chapter 2, the U.S. measures at issue contain exemptions and authorizations aimed at facilitating such transactions.

administration of justice that animated the revision of the Court's Rules in 1972. Deciding the objection at this stage would provide a straightforward path to resolving the case and avoiding lengthy proceedings on a broad range of additional issues.[230]

6.11 Second, the Court's own jurisprudence confirms that the applicability of these types of exceptions can be resolved first, prior to the assessment of any questions about the merits of claims under the substantive articles of the Treaty. The Court's decision in *Oil Platforms* demonstrates that this is an available ordering of analysis with respect to this Treaty. In its merits judgment in *Oil Platforms*, the Court considered the essential security exception first, prior to its consideration of whether the measures violated a substantive provision of the Treaty. In that case, the United States did not advance a preliminary objection based on Article XX(1), but when the Court analyzed the United States' invocation of the essential security exception in the merits proceedings, the Court did so before it turned to any questions about the merits of Iran's claims. The Court acknowledged that the *Military and Paramilitary Activities* decision had dealt first with the substantive provisions of the relevant FCN before turning to the exceptions article of that treaty. However, the Court explained that it did not consider that order of analysis to have been "dictated by the economy of the Treaty; it was rather an instance of the Court's 'freedom to select the ground upon which it will base its judgment,'" and that there were "particular considerations" in that case warranting the approach of addressing Article XX first.[231] In this case, there are similarly "particular considerations" that make this a sensible ordering of analysis.

---

[230] *See e.g., Nuclear Tests (New Zealand v. France), Judgement, I.C.J. Reports 1974*, p. 457 at p. 483, para. 22 (separate opinion of Judge Petrén) at 304-05 ("The main motive for the revision of the provisions of the Rules … was to avoid the situation in which the Court, having reserved its position with regard to a preliminary question, orders lengthy proceedings on the substantive aspects of a case only to find at the end that the answer to that preliminary question has rendered such proceedings superfluous. . . . If the preliminary question is relatively simple, whereas consideration of the merits would give rise to lengthy and complicated proceedings, the Court should settle the preliminary question at once.")

[231] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003* p. 161 at p. 180, paras. 35-37. The Court and other adjudicators confronted with similar exceptions articles have taken the same approach and considered the exception's applicability prior to addressing the merits of claims under other provisions of the relevant agreement. *See, e.g., Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226 at p. 249, para 50 (considering whether an exception that applied to the convention as a whole applied prior to an assessment of whether any substantive obligations under the convention were breached, explaining "The issues concerning the interpretation and application of Article VIII of the Convention are central to the present case and will be examined first."); *see also WTO Panel Report, Russia – Measures Concerning Traffic in Transit*, Section 7.4 ("Order of Analysis") (US Annex 110)(addressing Russia's essential security argument under Article XXI(b)(iii) of the GATT 1994 before reaching the merits of any of Ukraine's claims).

6.12 Third, the nature of the Court's inquiry into the applicability of Article XX(1)'s exceptions is defined by the terms of the exceptions and entirely separate from any inquiry that would be undertaken into the merits of claims under the substantive articles of the Treaty. The facts necessary to resolve the exceptions inquiry are also distinct from the information that would go to the merits of Iran's claims and can be presented at an early stage of proceedings. As discussed in greater detail in Section B, the only question under Article XX, paragraph 1(b), is whether the sanctions are measures "relating to fissionable materials, the radioactive byproducts thereof, or the sources thereof," a question about the measures at issue that can be swiftly resolved by reference to the text of the JCPOA. As discussed in greater detail in Section C below, the only question for the Court under Article XX, paragraph 1(d), is whether the May 8 Measures were necessary to protect the United States' essential security interests, and the United States' own determination in this regard is to be given substantial deference by the Court.

6.13 To the extent the inquiry into the Article XX(1) exceptions raises questions of treaty interpretation or involves basic facts relating to the underlying measures, those issues can be resolved based on the facts presented at this phase of the proceedings, without prejudging Iran's claims, or even elements of Iran's claims, under the substantive articles of the Treaty it has invoked. The exceptions inquiry does not require resolving whether the specific measures at issue violated any purported obligations with respect to Iranian nationals or companies under substantive articles of the Treaty —for example, the minimum standard of treatment for property of an alien in the host state under Article IV(2), or protections relating to the disposition of property under Article V(1). And the wide discretion afforded to the invoking State under these national security exceptions further distinguishes them from other "defenses on the merits," where the nature of the Court's review would be quite different.

6.14 Accordingly, this case is easily contrasted with those in which the Court has found an objection to lack an exclusively preliminary character. For example, in the *Lockerbie* cases, the United States argued that Libya's claims under the Montreal Convention had been rendered moot by subsequently adopted UN Security Council resolutions. There, the Court acknowledged that, while the objection amounted to a defense on the merits, this was not in itself a bar to deciding it at a preliminary phase, provided it had an exclusively preliminary character. However, the Court concluded that, in the circumstances before it, the objection was "inextricably interwoven" with the merits, as resolving the objection would require "a decision establishing that the rights claimed

by Libya under the Montreal Convention are incompatible with its obligations under the UN Security Council resolutions" as well as a decision that the obligations under the resolutions would prevail. On that basis, the Court decided that the objection did not have an exclusively preliminary character and therefore could not be decided as a preliminary objection.[232]

6.15 Here, by contrast, the inquiry under Article XX(1) by definition is *not* "inextricably interwoven" with the merits of claims under the Treaty's substantive articles. Unlike the situation in *Lockerbie*, no inquiry into Iran's rights under the substantive articles it has invoked is necessary in order to resolve whether the measures fall within the exceptions in Article XX, paragraphs 1(b) or (d). Indeed, the whole point of Article XX(1) is to provide circumstances in which obligations established elsewhere in the Treaty will not apply. As a result, the objection stands on its own and would not benefit from merits briefing.[233]

6.16 Fourth, resolution of the U.S. objections under Article XX(1) at the outset of this case, before proceeding to any merits phase, aligns with the purpose of the exceptions in preserving the United States' national security prerogatives. This is especially the case where, as here, the exceptions have been invoked with respect to all of the measures that the applicant challenges. As discussed in Chapter 3, the exceptions in Article XX(1) were included to ensure that the obligations established by the Treaty, which relate to commerce and private investment between the nationals and companies of the Parties and in their territories, would not impede the Parties' ability to take measures necessary to address and protect important and sensitive interests relating to national security. Through the exceptions article, the Parties were expressly agreeing that the Treaty would *not* govern such measures and were excluding them from the scope of the obligations in the Treaty. By doing so expressly in the Treaty text, they preserved their sovereign rights to take such measures. As discussed in greater detail in Sections B and C below, restrictions relating to nuclear materials and economic sanctions adopted for reasons of national security are just the type of measures that were contemplated. Disputes about matters that fall into these categories were to be resolved outside of the Treaty. Iran's effort to drag the United States into complex, drawn out

[232] *See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 115, at p. 131-34, paras. 45-50.

[233] *See, e.g., Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,*p. 832 at p. 852, para. 51; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgement, ICJ Rep. 2015* p. 592 at p.610, para. 53.

litigation under articles of the Treaty that simply do not govern the matters at hand is squarely at odds with the freedom of sovereign action the exceptions article expressly preserved for the United States.

6.17 Finally, Iran should not be permitted to defeat these preliminary objections simply by refusing to engage with them. It would be wholly inconsistent with principles of equity and procedural economy for an applicant's refusal to engage with the substance of an exclusively preliminary objection to be considered a basis for holding that issue over to the merits. Where, as here, an objection has been properly presented and substantiated, and the applicant has an opportunity to respond to the points that have been raised, the Court should consider the evidence before it and resolve it immediately—even if the applicant refuses to provide a substantive response. This is especially so where, as here, the respondent State has invoked national security exceptions providing that the Treaty "shall not preclude" specifically the types of measures challenged.

Section B: The U.S. Measures Relate to Fissionable Materials (Article XX, paragraph (1)(b))

6.18 All of the measures at issue are sanctions that the participants in the JCPOA, including Iran, explicitly categorized as "nuclear-related," meaning they were imposed in relation to Iran's nuclear program. Per the terms of Article XX(1)(b), the Treaty of Amity does not impose any substantive obligations on the Parties with respect to measures "relating to fissionable materials, the radioactive by-products thereof, or the sources thereof." As such, Article XX(1)(b) bars Iran's claims, and they should be dismissed.

i. Article XX, Paragraph 1(b) Categorically Excludes Measures Relating to Nuclear Materials

6.19 When the text of Article XX(1)(b) is read in its context and in light of the object and purpose of the Treaty, it is evident that the Treaty categorically excludes from its scope a range of measures related to nuclear materials. By its terms, this freestanding exception excludes all measures "relating to fissionable materials, the radioactive by-products thereof, or the sources thereof."

6.20 Contrary to Iran's contention that the exception is a narrow one limited to measures directly regulating trade in such materials,[234] the text and context for the provision confirms that paragraph (1)(b) excludes the application of a range of measures "relating to" those materials. The Treaty's use of the phrase "relating to" clearly provides for a more flexible, broader reach for the Parties to act than other language in the same article. For example, a comparison of paragraph (1)(b)'s language excepting measures "*relating to* fissionable materials" stands in contrast to the exception in paragraph (1)(a), which excludes only measures regulating the "*importation or exportation of* gold or silver." This textual distinction reveals that paragraph (1)(b) clearly extends beyond import and export restrictions on fissionable materials and the radioactive by-products and sources thereof. Similarly, paragraph 1(b) extends beyond measures "regulating" these materials, as is evident from the selection of the words "relating to" in contrast to the term "regulating" in both paragraphs (1)(a) and (c). The flexibly worded text of paragraph (1)(b) defies Iran's cramped reading and leaves considerable space for a full range of measures developed and adopted to control and prevent proliferation of sensitive nuclear materials.

6.21 Iran resists this interpretation, asserting that to interpret paragraph 1(b) to exclude measures "relating to nuclear activity broadly speaking," would deprive the Treaty of its object and purpose.[235] This is a sweeping contention without any support or analysis. Nothing about the object and purpose of the Treaty suggests that paragraph 1(b) means anything other than what its plain language says. The Treaty's object is the "encouraging [of] mutually beneficial trade and investments and closer economic intercourse generally between [the Parties'] peoples," as well as regulating consular relations between the two States.[236] But the Treaty was not intended to constrain either Party with respect to the indisputably sensitive and complex issues relating to the use, application, or proliferation of fissionable materials, nor with respect to other categories of security-related measures excluded by Article XX(1).

6.22 Historical context supports the United States' understanding of the language of paragraph 1(b). Charles Sullivan's study of FCN treaties, a study Iran has also referred to in its submissions, explains that the fissionable materials exception was derived from a similar exception in the

[234] Iran's Memorial, paras. 9.11, 9.18.

[235] Iran's Memorial paras. 9.15-9.16.

[236] *See Case Concerning Oil Platforms (Iran v. United States), Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 803 at p. 813, para. 27.

proposed charter of the International Trade Organization (ITO) and Article XXI(b)(i) of the GATT.[237] Like FCN treaties, the ITO Charter contained a broad range of commitments relating to economic relations, employment, and trade, and the fissionable materials exception, among other national security exceptions, is contained in a "General Exceptions" article to the entirety of the Charter's substantive provisions.[238] The fundamental importance of this exception in preserving States' discretion to take a broad range of economic measures where such sensitive materials are concerned was also discussed in ratification debates relating to FCN treaties before the U.S. Congress.[239] In the wake of World War II, matters relating to nuclear materials were a paramount national security concern and were under active discussion and negotiation, in other fora and under other instruments. The United States had only recently enacted the Atomic Energy Act to regulate and control fissionable materials, and it was engaging in international efforts to establish the International Atomic Energy Agency and negotiate civil nuclear cooperation agreements with allies. These efforts continued to develop and bear fruit over years, including for example in the conclusion of the Nuclear Nonproliferation Treaty and establishment of the Nuclear Suppliers' Group.[240] The fissionable materials exception in U.S. FCN treaties ensured that the United States' commercial treaty commitments would not impede its efforts in this emerging and extremely sensitive field. The use of the expansive phrase "relating to" makes sense in this context, as it allowed for flexibility as new measures were developed, beyond measures regulating direct

[237] SULLIVAN STUDY at 306 (US Annex 111).

[238] The fissionable materials and other national security-related exceptions had originally been included among a different set of exceptions that modified only the Charter's provisions relating to trade, but the United States proposed moving the security exceptions to an article providing general exceptions to the Charter as a whole, to which other States agreed, with the final draft reflecting the distinct and special character of these security-based exceptions. *See* Second Session of the Prep. Comm. Of the U.N. Conf. on Trade and Employment, May 6, 1947 (E/PC/T/W/23)(U.S. Delegation) at p. 5 (US Annex 112) (proposing that this among other exceptions "be removed from Article 37, which relates only to Chapter V, and that a new Article be inserted at an appropriate place toward the end of the Charter which would make these items general exceptions to the entire Charter.").

[239] *See Hearing on the Proposed Treaty of Friendship, Commerce and Navigation between the United States and Italian Republic*, 80th Cong. 2d Sess. (April 30, 1948) at p. 22 (Statement of William Thorp) (US Annex 113) (explaining that the provision was not included in the 1948 FCN treaty between the United States and the Republic of China, which was negotiated before the Atomic Energy Commission was organized and "before there was any branch in the government that had determined the importance of a provision of this kind").

[240] *See, e.g.*, Jonathan B. Schwartz, *Controlling Nuclear Proliferation: Legal Strategies of the United States*, 20 LAW & POL'Y INT'L BUS. 1, 2 (1988) (US Annex 114).

trade in fissionable materials themselves,[241] to prevent illicit uses of nuclear materials in a foreign country, including measures aimed at denying resources to proliferation-sensitive activities.[242]

6.23 In practice, economic sanctions have become a central non-proliferation tool. During and after the negotiation of its FCN treaties, the United States developed a range of sanctions measures under numerous statutory and regulatory authorities to counter such threats and create leverage for negotiations to address them. For example, under U.S. law, foreign states that violate IAEA safeguard agreements or engage in proliferation activities of concern are subject not only to restrictions on exports of nuclear materials but also to conditions on foreign assistance, import and export restrictions, U.S. opposition to loans by international financial institutions, as well as blocking sanctions that deny target entities access to the U.S. financial system.[243] All of these types of measures fall well outside the field of bilateral commercial treaties and fit comfortably within the basic "relating to" test established by paragraph 1(b) of the Treaty.

ii. The Sanctions at Issue are Encompassed by Article XX(1)(b)

6.24 To decide that Article XX(1)(b) stands as a bar to Iran's claims in this case, the Court need look no further than Iran's basic request for relief and the text of the JCPOA. Iran has been clear that this case is "uniquely concerned" with the May 8 Measures, meaning those measures that the United States had lifted in connection with the JCPOA and then re-imposed in connection with the May 8 Decision. Iran is asking the Court to restore to it the JCPOA sanctions relief, by ordering

[241] The Sullivan Study notes that the reference to "radioactive by-products" was included "to make the coverage more complete and more consistent in terminology with the provisions of the Atomic Energy Act of 1946 (60 Stat. 755) and subsequent legislation on this subject." SULLIVAN STUDY at 306 (US Annex 111).

[242] *See, e.g.,* R.R.WILSON, US COMMERCIAL TREATIES AND INTERNATIONAL LAW 153-54 (1960) (US Annex 115) (noting that this exception could come into play in relation to equipment used in mining activities); *see also* General Agreement on Tariffs and Trade, Summary Record of the 22nd Meeting, GATT/CP.3/SR.22 (June 8, 1949) (US Annex 117) and General Agreement on Tariffs and Trade, Statement by John W. Evans, Vice Chairman of the Delegation of the United States, GATT/CP.3/38 (June 2, 1949) (US Annex 116) (relying on the similar fissionable materials exception contained in the GATT in relation to restrictions on the export of mining drills that had been sought for coal mining but could have be used in the extraction of uranium).

[243] For example, the AECA contains a range of sanctions that apply to States that violate IAEA safeguards or non-nuclear weapon states that detonate a nuclear explosive device or engage in certain other conduct of concern. The Export-Import Bank Act denies eligibility for guarantees, insurance, or credit, and the Foreign Assistance Act restricts assistance, on similar grounds. *See* Jonathan B. Schwartz, *Controlling Nuclear Proliferation: Legal Strategies of the United States*, 20 LAW & POL'Y INT'L BUS. 1, 51-55 (1988) (US Annex 114).

the United States to cease implementing those sanctions authorities addressed under the JCPOA.[244] All of these are measures "relating to" nuclear materials within the meaning of paragraph 1(b), and Iran should not now be permitted to re-categorize the measures so as to circumvent the clear carve-out it agreed to in that paragraph of the Treaty.

6.25 All of the measures at issue are listed in Annex II to the JCPOA and were categorized by the JCPOA participants, including Iran, to be "national sanctions related to Iran's nuclear programme" and defined as such.[245] Indeed, the relationship between the sanctions and Iran's nuclear program was a foundational issue for both Iran and the United States (as well as other JCPOA participants) throughout the extensive negotiations, as it was the metric by which the scope of sanctions relief was negotiated, and was a predicate for those sanctions being lifted. In striking the interim nuclear deal, known as the Joint Plan of Action or JPOA, Iran, the United States, and its partners established the basic framework that Iran's implementation of nuclear-related measures would "produce the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions *related to Iran's nuclear program*."[246] Similarly, at a pivotal stage in the JCPOA negotiations, when the parties established the parameters for the final arrangement, a Joint EU-Iran Statement characterized this key part of the framework as: "the United States will cease the application of all nuclear-related secondary economic and financial sanctions."[247] As reflected in the final JCPOA text, with respect to U.S. sanctions, the United States committed to "cease the application, and will continue to do so, in accordance with this JCPOA of the sanctions specified in Annex II to take effect simultaneously with the IAEA-verified

[244] *See, e.g.*, Iran's Memorial para. 1.13 (explaining that this case is "uniquely concerned" with the May 8 measures); Iran's Memorial para 2.5 ("The U.S. had previously imposed, then lifted, these measures in connection with the implementation of the JCPOA.").

[245] JCPOA, Preamble, para. V, Main Text, para. 24; Section 4 of Annex II (IM Annex 10) ("The United States commits to cease the application of, and to seek such legislative action as may be appropriate to terminate, or modify to effectuate the termination of, all nuclear-related sanctions as specified in Sections 4.1-4.9 below, and to termination Executive Orders 13574, 13590, 13622, and 13645, and Section 5-7 and 15 of Executive Order 13628, in accordance with Annex V."); *see also* Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif, (July 14, 2015) (US Annex 118) ("The [JCPOA] includes Iran's own long-term plan with agreed limitations on Iran's nuclear program, and will produce the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programmme, including steps on access in areas of trade, technology, finance and energy.").

[246] JCPOA Preamble (IM Annex 10).

[247] Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif (Apr. 2, 2015) (*available at* https://www.vox.com/2015/4/2/8336723/iran-nuclear-deal-transcript. (US Annex 119).

implementation of the agreed nuclear-related measures by Iran as specified in Annex V,"[248] with Annex II specifying "a full and complete list of all nuclear-related sanctions or restrictive measures."[249]

6.26 As discussed in Chapter 2, the United States has had a range of sanctions measures in place addressed to specific threats posed by Iran, but the sanctions measures at issue here are those that were imposed by the United States in response to Iran's repeated failures to comply with its nuclear non-proliferation obligations and its continued advancement of illicit nuclear activities. These measures sought to deny Iran the resources and funding to accelerate its nuclear ambitions or develop a nuclear weapon. It was these, and only these, sanctions that the United States committed to relieve in the JCPOA,[250] and it is these, and only these, measures that Iran is seeking, through this case, to require the United States to remove.

6.27 While Iran tries to argue that the "object" of the sanctions that were relieved in the JCPOA does not relate to fissionable materials, even Iran acknowledges that "the JCPOA lifted sanctions whose motivation was related to an alleged Iranian military nuclear programme."[251] As discussed earlier, paragraph 1(b) is not limited to measures that directly apply to or regulate nuclear materials themselves, but rather provides an exception for measures "relating to" such materials. The fact that the sanctions were ultimately *re-imposed* for both nuclear and non-nuclear related reasons, as discussed below, is unremarkable. States often employ measures to accomplish more than one objective, and this fact does not vitiate the link between the measures and Iran's nuclear program.

[248] JCPOA, Main Text, para 21 (IM Annex 10).

[249] *Id.*, para. 24.

[250] Like the EU commitments with respect to its sanctions measures, the U.S. commitment was expressly without prejudice to sanctions that applied under other legal authorities. Annex II, n. 14 (IM Annex 10) ("Unless specifically provided otherwise, the sanctions lifting described in this Section does not apply to transactions that involve persons on the SDN List and is without prejudice to sanctions that may apply under legal provisions other than those cited in Section 4"); *see also* n. 4 (relating to EU measures) ("Unless specifically provided otherwise, the sanctions lifting described in this Section does not apply to transactions that involve persons still subject to restrictive measures and is without prejudice to sanctions that may apply under legal provisions other than those referred to in Section 1"). As Secretary Kerry stated publicly on July 14, 2015 "what we are announcing today is an agreement addressing the threat posed by Iran's nuclear program – period – just the nuclear program… As such, a number of U.S. sanctions will remain in place, including those related to terrorism, human rights, and ballistic missiles." U.S. Dep't of State, "Press Availability on Nuclear Deal with Iran" (July 15, 2015), *available at* https://2009-2017.state.gov/secretary/remarks/2015/07/244885.htm (US Annex 120).

[251] Iran's Memorial para. 9.21.

6.28 The relationship between the measures at issue in this case and Iran's nuclear program was memorialized in the JCPOA and establishes the parameters of the relief Iran seeks in this case. Iran cannot now redraw those lines to argue otherwise. The nuclear-related sanctions at issue are measures that fit within the Treaty's categorical exception "relating to fissionable materials, the radio-active by products thereof, or the sources thereof," and Iran's case should be dismissed on that basis.

Section C: The U.S. Measures Were Necessary to Protect the Essential Security Interests of the United States (Article XX, paragraph 1(d))

6.29 Article XX contains an additional, and independent, bar to Iran's case in the essential security exception found in paragraph 1(d). Iran's cursory discussion of this exception in its Memorial, waving it away as "irrelevant" and claiming that there is no "reality" to the United States' invocation of the exception—defies belief. It is Iran that appears to have lost sight of reality. Since 1979, the Iranian regime has had a policy of hostility towards the United States. The proposition that the Treaty of Amity's essential security exception would not be relevant to the sanctions measures at issue in this case strains all credibility.

6.30 The nuclear-related sanctions that the United States committed to relieve under the JCPOA in 2015 were a powerful set of measures imposed over a period of years in connection with a multilateral effort to constrain the resources and sources of funding for Iran's nuclear program. By May 2018, the United States concluded that lifting those sanctions was generating resources that could be spent on Iran's pursuit of ballistic missiles and other destabilizing activities in the region and also created a substantial gap in the tools available to the United States to address the broad range of threats (nuclear-related and others) that Iran continued to pose to the United States and its nationals.[252] The United States ultimately determined that the re-imposition of these measures was necessary to protect its essential security interests in countering those threats, which included not only Iran's nuclear ambitions, but also its development of ballistic missiles, its support for international terrorism, its escalating campaign of regional destabilization, and its arbitrary detention of U.S. nationals. The United States' decision to employ this fuller set of sanctions tools in an effort to counter Iran's threats and ultimately leverage a resolution is a core national security decision. These are measures the Parties expressly agreed through Article

[252] Pompeo Iran Strategy Remarks *supra* n. 87 (US Annex 139).

XX(1)(d) would not be precluded by the Treaty, and the United States' decision in this regard warrants substantial deference from the Court. Iran's request for relief in this case squarely conflicts with rights reserved to the United States under this exception, and the Court should reject Iran's claims for this reason as well.

i. The Essential Security Interests Exception in Paragraph 1(d) Provides Wide Latitude for Action to Address National Security Concerns

6.31 By its terms, Article XX(1)(d) provides that the Treaty "shall not preclude the application of measures …necessary to protect [a Party's] essential security interests." The breadth of this exception, as well as the wide discretion it confers on the State invoking the clause, is clear from its text and confirmed by its context, the object and purpose of the Treaty, as well as supplementary means of interpretation.

6.32 As the Court acknowledged in its Judgment on the merits in *Military and Paramilitary Activities*, the concept of "essential security interests" is broad; it "certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past."[253] For example, unlike the other exceptions in Article XX(1), the essential security interests exception is not limited to a specific type of threat or material, nor does it require that excepted measures be in furtherance of a Party's obligations for the maintenance or restoration of international peace and security. Thus, while the first clause of paragraph 1(d) would encompass implementation of UN Security Council sanctions or other obligations imposed under Chapter VII of the United Nations Charter,[254] the separate essential security clause provides an independent basis for measures to be excluded from the Treaty. As such, by its clear terms, this provision encompasses measures that are not paired with action by the Security Council or another multilateral effort and that may not rise to the level of matters that the Security Council has determined to be threats to international peace and security.

6.33 With regard to the meaning of the term "necessary," the determination of the State taking the measures to protect its essential security interests is to be afforded substantial deference. The negotiating history of this and other FCN treaties confirms that the purpose of the exception was

[253] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 117, para. 224.

[254] *See id.* at p. 116 para. 223.

to ensure that the Treaty did not constrain national security decisions or assessments about what tools to use to respond to national security threats. For example, when Iran proposed a revision to Article II(1) of the Treaty during the negotiations in order to provide the Parties with latitude with respect to internal safety regulations, the State Department noted that "[s]ecurity interests" were already "provided for in [Article] XX-1-d," and that the "Treaty fully recognizes [the] ***paramount right*** [of the] state [to] take measures to protect itself and public safety."[255] Iran apparently agreed, as it assented to the final Treaty text without its proposed amendment. The Sullivan Study similarly notes the "*broad freedom of action* extended to each treaty partner by the essential security reservation," which it describes as preserving the rights of the Parties to depart from the Treaty's substantive obligations in appropriate circumstances.[256]

6.34 The exception thus reserves each State's sovereign right to decide on the measures it deems most appropriate to address such national security threats, and the exception was intended to apply so long as it was invoked by a State in good faith. For example, in the context of a 1953 ratification debate, Senator Hickenlooper emphasized "[t]hese treaties have been formulated in such manner as to avoid any interference with or qualifications of the right of the United States to apply such security measures as it may find necessary … Each of the treaties … contains a general reservation making it clear that nothing in the treaty shall be deemed to affect the right of either party to apply measures 'necessary to protect its essential security interests.'"[257] In the course of negotiating the U.S.-Germany FCN treaty, which was under discussion at the same time as the Treaty of Amity with Iran, the United States assured Germany that

> the language had been drafted in such a manner as to leave a wide area of discretion to both parties in order to allow for necessary action over an indefinite future. . . . [The U.S. negotiators then] stressed the words "necessary" and "essential" had been added to emphasize that the reservation was not be invoked in a frivolous manner.[258]

[255] Telegram No. 1561 from U.S. Dep't of State to U.S. Embassy Tehran (Feb. 15, 1955) (emphasis added) (US Annex 121).

[256] SULLIVAN STUDY at 308 (US Annex 111); *see also* Dispatch No. 238 from the U.S. Embassy in The Hague to U.S. Dep't of State at 2 (Sept. 15, 1954) (US Annex 122) (emphasizing that "the presence in the Treaty of an ample security reservation is, however, deemed essential by the United States").

[257] *Hearing before the Senate on the Treaty of Friendship, Commerce and Navigation between the United States of America and Israel,* 99th Cong. (July 21, 1953) (US Annex 123).

[258] Dispatch No. 2254 from U.S. High Commission, Bonn to U.S. Dep't of State, at 1-2 (Feb. 17, 1954) (US Annex 124) (emphasis added).

The United States further noted that "national as well as international courts would probably give very heavy weight to arguments presented by the government invoking the reservation and would have difficulty in finding a justiciable issue."[259]

6.35 The fact that the Treaty excluded, rather than included, essential security measures from the scope of its substantive obligations was also critical to the United States' understanding and acceptance of the compromissory clause in the FCN treaties, which first appeared in the 1948 FCN treaty between the United States and the Republic of China. As the State Department explained in a ratification debate:

> The compromissory clause . . . is limited to questions of the interpretation or application of this treaty; i.e., it is a special not a general compromissory clause. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations. Much of the general subject matter and in some cases almost identical language has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are, therefore, to a considerable extent established and well known. Furthermore, certain important subjects, notably immigration, traffic in military supplies, and the 'essential interests of the country in time of national emergency' are specifically excepted from the purview of the Treaty.[260]

6.36 To be sure, as the Court has previously observed, the text of the essential security clause does not expressly specify that measures are to be excepted whenever the relevant Party "considers" a course of action to be necessary for the protection of its essential security interests —as is the case with the similar provision in the GATT.[261] Nevertheless the exception has long

---

[259] *Id.* at 3.

[260] *Hearing Before a Subcomm. of the S. Comm. on Foreign Relations on a Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Republic of China*, 80th Cong. 2d Sess., p. 30 (26 Apr. 1948) (statement of Charles Bohlen, Dep't of State) (US Annex 125).

[261] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, I.C.J. Reports* 1986, p. 14, at p. 116, para. 222 and p. 141, para. 282; *see also* Certain Iranian Assets, Separate Opinion of Judge *ad hoc* Brower at p. 4, paras. 9-10 (distinguishing the text of Article XX from the essential security exception in the GATT). Although the United States is not advancing the contention here in light of the Court's prior rulings, it should note for the record that that the United States has viewed essential security exceptions to be self-judging in nature even where they lack such language, while recognizing that each party would expect the provisions to be applied by the other in good faith. Notably, the documents accompanying explicitly self-judging bilateral investment treaties have indicated that the change of language did not represent a policy change, but merely "makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith." *See, e.g.*, Message from the President of the United States Transmitting the Treaty between the Government of the

been understood to afford the invoking State wide latitude and discretion to make sovereign decisions about what is necessary to protect its own national security interests, consistent with the purpose of the exception and its negotiating history. The Court confirmed this in *Djibouti v. France*, where it held up the Treaty of Amity, and the very similar U.S.-Nicaragua FCN, as examples of treaties with essential security clauses that grant "wide discretion" to an invoking State that has acted in good faith. [262]

6.37 Finally, it is important to underscore that economic measures enacted to address national security concerns, such as property restrictions and sanctions, were expressly contemplated as among the kinds of actions that would be excepted by the essential security clause. Such measures are core national security tools that have been used over decades as a way to respond to security threats and to provide leverage for the negotiated resolution of intractable national security problems. As Robert Wilson observed,

> In the past the question has sometimes arisen of whether action in the form of sanctions, such as those against Italy in 1935-36 would be violative of commercial treaty commitments which the sanctionist states might have with the state against which they directed sanctions. Post World-War-II commercial treaties of the United States make clear that they are not to preclude the application of measures by either party necessary to fulfill its obligations for the maintenance or restoration of international peace and security. Accompanying this is a clause to permit a party's applying measures 'necessary to protect its essential security interests.'[263]

Thus, in response to a question from the U.S. Senate in 1948 in the context of ratification of the U.S.-Italy FCN treaty, the State Department explained that measures taken pursuant to the Trading with the Enemy Act—a U.S. statute that like more recent U.S. sanctions authorities provides the

---

United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment with Annex and Protocol, Signed, at Washington on September 29, 1999 (Apr. 24, 2000), Letter of Submittal, Article 14 (Measures Not Precluded), annexed to U.S.-Bahrain Bilateral Investment Treaty (US Annex 126).

[262] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Judgment, I.C.J. Reports 2008*, p. 177 at p. 229, para. 145 ("[W]hile it is correct, as France claims, that the terms of Article 2 [of the treaty at issue in the case] provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties [citations omitted]; *for the competence of the Court in the face of provisions giving wide discretion*," citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 116, para. 222: *Case Concerning Oil Platforms (Iran v. United States), Judgment, I.C.J. Reports 2003*, p. 161, p. 183 at para. 43 (emphasis added)).

[263] R.R. WILSON, U.S. COMMERCIAL TREATIES AND INTERNATIONAL LAW 22-23 (1960) (US Annex 127).

President with authority to freeze the property under U.S. jurisdiction of foreign persons designated for sanctions—would be covered by the essential security exception, and therefore preserved as a viable tool for the United States notwithstanding the treaty.[264] Similarly, during negotiations with Germany, the United States said (in response to a question from Germany) that an export ban on strategic materials would come within the essential security clause.[265] In negotiations with the Netherlands, U.S. negotiators "stressed that there must not be the slightest implication that the United States is committing itself to abandon any of the present security controls, even though it is unlikely that these controls are actually inconsistent with any of the provisions of the Treaty as regards U.S.-Netherlands relations."[266] And in practice, the United States has never understood FCN treaties to constrain its ability to select the sanctions measures it considers necessary to address national security threats.

ii. The May 8 Measures Are Necessary to Protect the United States' Essential Security Interests

6.38 The basis for the United States' invocation of the essential security exception in relation to the re-imposition of the sanctions that were lifted under the JCPOA is well-documented. Iran has refused to engage with this argument, dedicating only a handful of paragraphs of its Memorial to summary assertions that the risks to U.S. security were "imaginary" and that the measures were not necessary. Iran's transparent attempt to avoid this fundamental defect in its case lacks all credibility. Iran's ongoing record of violent and destabilizing acts manifestly substantiates the threat Iran poses to U.S. security interests and the United States' conclusion that re-imposition of the nuclear-related sanctions was necessary. The United States has more than established that this was not—as Iran would like the Court to believe—a decision that was made capriciously or without a sound factual basis.

---

[264] *Hearing Before the S. Comm. on Foreign Relations on Proposed Treaty of Friendship, Commerce and Navigation between the United States and the Italian Republic*, 80th Cong. 2d Sess., at 3 (Apr. 30, 1948) (US Annex 113) (response from State Dep't to question from Senator Thomas of Utah).

[265] Dispatch No. 2254 from U.S. High Commission, Bonn to U.S. Dep't of State, at 2 (Feb. 17, 1954) (US Annex 124).

[266] Dispatch No. 238 from the U.S. Embassy in The Hague to the U.S. Dep't of State (Sept. 15, 1954) (US Annex 122).

6.39 Iran makes no effort to dispute that the measures were necessary to protect the United States' essential security interests when they were originally adopted. As discussed in greater detail in Chapter 2, the sanctions measures that Iran challenges were in place long before the JCPOA. In fact, relevant Executive Orders, including the one issued on August 6, 2018 to re-impose certain of these sanctions, rely on a 1995 declaration of a national emergency based on the finding that "the actions and policies of the Government of Iran constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."[267] The U.S. measures aimed to supplement and reinforce a broad range of sanctions the international community imposed on trade with Iran and particular Iranian actors in response to Iran's failures to comply with its nuclear non-proliferation obligations, including IAEA reporting on "information indicat[ing] that Iran has carried out activities relevant to the development of a nuclear explosive device."[268] Like the measures adopted by the UN Security Council, the United States built up a framework of restrictions that were designed to cut off resources and revenue streams that Iran could use for its illicit nuclear activities in an effort to use economic leverage to prevent Iran from acquiring a nuclear weapons capability. Where Iran's activities of concern continued even following the imposition of more stringent non-proliferation related restrictions by the UN Security Council, the United States deemed it essential to adopt additional measures under U.S. law, for example, to address specific sectors of the Iranian economy such as the energy sector, shipping, and shipbuilding sectors that were "facilitating the Government of Iran's nuclear proliferation activities by providing revenue to support proliferation activities."[269] The European Union and other countries similarly expanded on the UN restrictions when adopting measures at the national level. And ultimately, these sanctions proved to be critical in pushing Iran to come to the negotiating table.

6.40 Even at the time the JCPOA was concluded, the United States acknowledged enduring concerns about the threat Iran posed to U.S. national security interests, and the decision to lift nuclear-related sanctions reflected a close weighing of those risks. As Ambassador Samantha

[267] Executive Order 13846, 83 Fed. Reg. 38939 (Aug. 6, 2018) (US Annex 37); *see also* Executive Order 12957, 60 Fed. Reg. 14615 (March 15, 1995) (US Annex 128).

[268] *See* Chapter 2 at 2.8 & n. 25 (detailing IAEA reports from 2008 to 2014).

[269] Iran Freedom and Counter-Proliferation Act of 2012, 22 U.S.C. §§ 8803 (2013) (US Annex 80); *see also* Chapter 2 at paras. 2.9-2.12 (detailing additional U.S. sanctions authorities adopted to deny Iran funding for its illicit nuclear activities).

Power, the U.S. Permanent Representative to the United Nations, observed at the time Security Council resolution 2231 was adopted:

> [t]his nuclear deal doesn't change our profound concern about . . . the instability Iran fuels beyond its nuclear program from its support for terrorist proxies, to its repeated threats against Israel, to its other destabilizing activities in the region. That is why the United States will . . . maintain our own sanctions related to Iran's support for terrorism, its ballistic missiles program and its human rights violations. And this deal will in no way diminish the United States' outrage over the unjust detention of U.S. citizens by the Government of Iran.[270]

President Obama, on the day the JCPOA was implemented, acknowledged these enduring concerns with Iran, noting:

> We remain steadfast in opposing Iran's destabilizing behavior elsewhere, including its threats against Israel and our Gulf partners, and its support for violent proxies in places like Syria and Yemen. We still have sanctions on Iran for its violations of human rights, for its support of terrorism, and for its ballistic missile program . . . We're not going to waver in the defense of our security or that of our allies and partners.[271]

The United States was vocal and clear that the full range of Iran's destabilizing activities continued to be "at odds with U.S. interests, and pose[d] fundamental threats to the region and beyond."[272]

6.41 Iran is well aware of the limits to the JCPOA and the fact that it did not address certain security issues of longstanding concern to the United States and the international community. Iran was also well aware that the sunset provisions and limitations on inspections were heavily debated and the cause for consternation by many in the United States. In light of these facts, Iran's assertion in the Memorial that the United States "took for granted" that its security interests were preserved as long as Iran met its nuclear commitments under the JCPOA,[273] cannot be taken seriously. And

---

[270] U.N.S.C., 7488th Meeting, U.N. Doc. S/PV.6442 (July 20, 2015) at 3 (Explanation of Vote by Ambassador Samantha Power of the United States of America) (US Annex 129).

[271] President Barack Obama, "Statement by the President on Iran," (Jan. 17, 2016) *available at* https://obamawhitehouse.archives.gov/the-press-office/2016/01/17/statement-president-iran (US Annex 130); *see also* U.S. Dep't of the Treasury, Sec'y Jacob J. Lew, "Statement by Treasury Sec'y Jacob J. Lew on Reaching Implementation Day under the Joint Comprehensive Plan of Action Regarding Iran's Nuclear Program" (Jan. 16, 2016), *available at* https://www.treasury.gov/press-center/press-releases/Pages/jl0321.aspx (US Annex 131), ("As we have said all along, while the JCPOA addresses the nuclear issues, it does not resolve other areas where Iran's behavior remains unacceptable. We will continue to target sanctionable activities outside of the JCPOA – including those related to Iran's support for terrorism, regional destabilization, human rights abuses, and ballistic missile development.")

[272] *Iran's Recent Actions and Implementation of the JCPOA: Hearing Before the S. Foreign Relations Comm.*, 114th Cong. (Apr. 5, 2016) (statement of Under Sec'y of State Thomas A. Shannon) (US Annex 47).

[273] Iran's Memorial para 9.31.

while the Court need not and should not attempt to assess whether the U.S. evaluation of the threats to its security interests was accurate or justified the particulars of the U.S. response, there is well-documented support for this evaluation that led to the U.S. decision to re-impose the sanctions measures on May 8, as detailed in this submission.

6.42 After obtaining the benefits of the bargain that was struck in the JCPOA, Iran's malign activities persisted and in some cases expanded. As Chapter 2 details, Iran advanced its ballistic missile program, testing the technology for missiles that could eventually carry nuclear weapons in defiance of UN Security Council resolution 2231.[274] Iran continued its long record of providing material and financial support for terrorist groups that threaten U.S. interests, and there is evidence that such groups were emboldened in their renewed activities targeting Western interests.[275] As Secretary Pompeo emphasized, Iran used resources that became available to it not to boost the economic fortunes of its people but to "fuel proxy wars across the Middle East and lin[e] the pockets of the Islamic Revolutionary Guard Corps, Hizballah, Hamas, and the Houthis."[276] Hassan Nasrallah's public remarks in June 2016 acknowledging Iran's sponsorship of Hezbollah, including its provision of the group's weapons and rockets in direct violation of UN Security Council resolutions, is just one disturbing example, detailed in Chapter 2. Iran continued to arbitrarily detain U.S. nationals in Iran.[277] And Iran escalated its destabilizing activities in Syria

[274] *See* Chapter 2 at 2.43-2.45; *see also* Third Report of the Secretary General on the implementation of Security Council resolution 2231, U.N. Doc. S/2017/515 (June 20, 2017), paras. 16-17 (US Annex 62); Fourth Report of the Secretary General on the implementation of Security Council resolution 2231, U.N. Doc. S/2017/1030 (Dec. 8, 2017), paras. 20-26 (US Annex 40).

[275] *See* Chapter 2 at 2.38-2.42; *see also* Borzou Daragahi, "Iranian-Backed Militias Set Sights on U.S. Forces," Foreign Policy, April 16, 2018, *available at* https://foreignpolicy.com/2018/04/16/iranian-backed-militias-set-sights-on-u-s-forces/ (US Annex 132); Matthew Levitt, "Iran's Deadly Diplomats," CTC Sentinel, Aug. 2018, *available at* https://www.washingtoninstitute.org/policy-analysis/view/irans-deadly-diplomats (US Annex 133); U.S. Dept. of State, *Country Reports on Terrorism* 2016, Chapter Three: Iran (July 2017) (US Annex 63).

[276] Pompeo Iran Strategy Remarks, *supra* n. 87 (US Annex 139).

[277] *See* Chapter 2 at paras. 2.46-2.49; U.N. Special Rapporteur on the Situation of Human Rights in Iran, *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran*, U.N. Doc. A/HRC/34/65 (Mar. 17, 2017) (US Annex 143).

and Yemen.[278] The United States actively and publicly raised its concerns about these activities, including in the UN Security Council.[279]

6.43 The JCPOA had not only opened up additional sources of revenue for the Iranian regime to fuel its threatening activities, but was also limiting the United States' ability to respond by constraining the sanctions-related options available. In this context, the United States came to the conclusion that the sanctions relief under the JCPOA was in fact contributing to the Iranian national security threat, and that re-imposing the substantial tranche of sanctions measures that had been lifted in the JCPOA was necessary.

6.44 This core national security decision was made at the highest levels of the U.S. Government, following a National-Security-Council-led review of the United States' policy toward Iran that commenced over a year earlier, and following regular communications with Congress.[280] The essential security rationale for the United States' cessation of participation in the JCPOA was outlined in the National Security Presidential Memorandum of May 8. The Memorandum begins by making clear that the decisions it contains are an issue of "the safety and security of the United States and the American people."[281] It then describes in detail a range of Iranian malign activities that together form the basis for the President's decision, including Iran's support for terrorism and its assistance to terrorism organizations that specifically target Americans; Iran's aggressive development of missiles; and the arbitrary detention of U.S. citizens in Iran.[282] It is well known that the JCPOA did not address these deeply troubling aspects of Iran's behavior. The

[278] *See* Chapter 2 at paras. 2.41-2.42; *see also* Michael Eisenstat, "Managing Escalation Dynamics with Iran in Syria – and Beyond," Washington Institute, July 5, 2017, *available at* https://www.washingtoninstitute.org/policy-analysis/view/managing-escalation-dynamics-with-iran-in-syria-and-beyond (US Annex 134); U.N. Panel of Experts on Yemen, *Final Report of the Panel of Experts on Yemen*, at 2, U.N. Doc. S/2018/594 (Jan. 26, 2018) (US Annex 61).

[279] *See*, *e.g.*, Joint Statement by France, Germany, the United Kingdom and the United States, Feb. 27, 2018 (US Annex 135) (highlighting concerns about Iran's violations of the arms embargo established in UNSCR 2216); U.S. Ambassador Nikki Haley, Remarks to the Security Council (Aug. 2, 2017) (raising concerns about Iranian transfers of weapons to terrorists) (US Annex 136); U.S. Ambassador Nikki Haley, Remarks to the Security Council (June 29, 2017) (US Annex 137) (raising concerns about Iran's violations of UNSCR 2213 and noting shortcomings of the JCPOA); U.S. Ambassador Nikki Haley, Remarks to the Security Council (May 9, 2017) (US Annex 138) (looking forward to deepened cooperation with the EU to counter Iran's destabilizing activities).

[280] *See* Chapter 2 at para. 2.34 (referencing remarks by President Trump and Secretary Tillerson's communication with Congress).

[281] U.S. May 8 Memorandum *supra* n. 57 (IM Annex 31).

[282] *Id.*

Memorandum was clear that Iran had escalated its destabilizing activities since the JCPOA's implementation, and that "Iran's behavior threatens the national interest of the United States."[283]

6.45 The United States' decision was also related to flaws in the nuclear deal itself.[284] The Memorandum was clear in its assessment that the JCPOA did not sufficiently address concerns about Iran's nuclear program, and that additional steps were necessary to "deny[] Iran all paths to a nuclear weapon."[285] The United States has expressed deep concerns about the fact that the JCPOA failed to permanently address Iranian nuclear proliferation threats, because it included "sunset clauses that, in just a few years, will eliminate key restrictions on Iran's nuclear program," including in particular on its enrichment capacity.[286] In light of these concerns, and the fact that the JCPOA had not addressed the many other serious security-related concerns, the United States decided to re-impose the nuclear-related sanctions that were lifted under the JCPOA.

6.46 Thus, the decision to re-impose these measures in May 2018 was predicated on an assessment that it was necessary to be able to re-employ what were critical sanctions tools to address the grave and growing national security threats posed by the Iranian regime to the United States and U.S. nationals, including not only Iran's nuclear ambitions, but also its financing of terrorism, including against U.S. nationals, and its proliferation of missiles and destabilizing activities in the region.[287] As discussed in greater detail in Chapter 2, the measures target key revenue streams of the Iranian government, focusing on specific sectors of the Iranian economy from which the Iranian regime derives funds to support its military activities and other destabilizing activities, as well as support to Iranians that have already been designated for sanctions. These were also the tools that were effective in bringing Iran to the negotiating table previously, and therefore that had the potential for returning Iran to the negotiating table to address the full range of its activities of concern. These are precisely the kind of measures that fall within

[283] *Id.* at 2, *see also* Pompeo Iran Strategy Remarks, *supra* n. 87 (US Annex 139).

[284] U.S. May 8 Memorandum *supra* n. 57 at 2 (IM Annex 31).

[285] *Id.*

[286] President Donald J. Trump, Remarks on Iran Strategy (Oct. 13, 2017) (US Annex 140); *see also, e.g.,* President Donald J. Trump, Remarks on the Joint Comprehensive Plan of Action (May 8, 2018) *available at* https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/ (US Annex 141); Pompeo Iran Strategy Remarks, *supra* n. 87 (US Annex 139); Remarks of Christopher A. Ford, *supra* n. 67 (US Annex 45).

[287] *See* Pompeo Iran Strategy Remarks, *supra* n. 87 (US Annex 139).

the broad discretion of the United States to assess as necessary to address the security threats raised by Iran's conduct.

6.47 Iran's Memorial barely engages with these points, many of which the United States put forward at the provisional measures stage. Instead, Iran tries to paint a narrative that bears no relationship to the record—asserting that the United States "took for granted … that its security was preserved as long as Iran" respected its JCPOA commitments, and then on May 8, 2018, all of a sudden, the United States invoked an "imaginary risk" to its security when it decided to cease participation in the JCPOA and re-impose sanctions.[288] But this account is belied by the facts and evidence that the United States has submitted, which demonstrate the factors and activities of genuine concern to the United States essential security interests that informed the United States' decision to re-impose the sanctions that were lifted in the JCPOA. That Iran disagrees with the United States' decision is beside the point for purposes of the inquiry under paragraph 1(d). The purpose of the exception in Article XX(1)(d) is to remove these disputes from the framework of the Treaty. In recognition of the highly sensitive nature of national security issues for a State, the exception provides wide discretion for a State to evaluate and determine what measures are necessary to protect those essential interests. The United States has more than demonstrated that the measures at issue here are encompassed by paragraph 1(d) and accordingly not precluded by the Treaty.

* * *

6.48 For the foregoing reasons, Iran's case should be dismissed because all of the measures it is challenging relate to "fissionable materials" and were measures "necessary to protect [the U.S.] essential security interests," and accordingly fall squarely within exceptions contained in Article XX, paragraph 1. The applicability of these exceptions is a straightforward inquiry that is distinct from the merits of Iran's claims and involves a limited set of information that is available to the Court. The Court can and should resolve these objections as a threshold matter, which would serve the interests of fairness, procedural economy, and the sound administration of justice.

[288] Iran's Memorial paras. 9.31-9.32.

CHAPTER 7: MEASURES CONCERNING TRADE OR TRANSACTIONS BETWEEN IRAN AND A THIRD COUNTRY OR BETWEEN THEIR NATIONALS AND COMPANIES ARE OUTSIDE THE SCOPE THE TREATY

7.1 In addition to the aforementioned objections, which go to the entirety of Iran's case, the vast majority of Iran's claims do not concern the interpretation or application of the Treaty of Amity, and thus must be dismissed as outside this Court's jurisdiction. The measures that Iran has placed at issue in this case—the May 8 Measures—overwhelmingly concern trade or transactions between Iran (or Iranian nationals and companies) and third countries (or third country nationals and companies). For purposes of this filing, the United States will refer to such measures that concern trade or transactions between Iran (or Iranian nationals and companies) and third countries (or third country nationals and companies), or that otherwise fall outside the bilateral commercial relationship between the United States and Iran—as "third country measures." Put simply, the measures about which Iran complains are overwhelmingly third country measures. The Treaty does not extend to third country measures, and therefore where Iran's claims rest on such measures, they must be dismissed for lack of jurisdiction.

7.2 The third country measures stand in contrast to bilateral measures. The United States recalls that it maintains a range of bilateral sanctions measures with respect to Iran, which generally prohibit U.S. persons from engaging in transactions with Iran or individuals or entities in Iran, and prohibit the use of the U.S. financial system for transactions involving Iran. Yet with the exception of a discrete category of licensing actions discussed below, these bilateral sanctions measures were not affected by U.S. participation in the JCPOA, and remained in place throughout the period of U.S. implementation of the JCPOA, prior to May 8, 2018. Those bilateral sanctions measures were never lifted, and therefore do not form part of the "re-imposed" May 8 Measures that form the basis of Iran's claims.

7.3 As detailed in Chapter 3, the Treaty of Amity sets out certain obligations with respect to the bilateral commercial and consular relationship between the United States and Iran, *i.e*. "rules providing for freedom of trade and commerce between *the United States and Iran*, including specific rules prohibiting restrictions on the import and export of products originating *from the two countries*, as well as rules relating to the payment and transfer of funds *between them*."[289] The

[289] Provisional Measures, Order of 3 October 2018, para. 43 (emphases added).

Treaty was not intended to, and does not, impose obligations on the United States concerning trade or transactions between Iran and a third country or between their nationals and companies.[290] It follows that, where the May 8 Measures are third country measures—in that they do not concern trade or transactions between Iran and the United States, or between Iranian nationals and companies and U.S. nationals and companies—they do not fall within the provisions of the Treaty, and the Treaty does not provide any obligations applicable to them. Iran's claims based on such third country measures must be dismissed at a preliminary stage for lack of jurisdiction.

7.4 Article XXI(2) of the Treaty provides jurisdiction only for disputes "as to the interpretation or application of the [Treaty], not satisfactorily adjusted by diplomacy." Thus, the Court "must ascertain whether the acts of which Iran complains fall within the provisions of the Treaty of Amity and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2, thereof."[291]

7.5 The question is whether, as outlined in Chapter 4, the measures Iran places in issue fall within the jurisdiction of the Court by application of the Treaty articles invoked by Iran.[292] The Court "must bring a detailed analysis to bear" when it interprets the articles of the Treaty on which Iran bases its claims. It cannot found its jurisdiction on "an impressionistic basis."[293]

---

[290] Likewise, the Treaty does not impose obligations concerning trade or transactions between the United States (or U.S. nationals and companies) and third countries (or their nationals and companies).

[291] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 36 (citing *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 809-810, para. 16)); *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 at p. 14, paras. 48-52; *see also Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6 at p. 32, para. 65.

[292] *E.g., Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 52 (describing the Court's task as examining "each of the provisions on which Iran relies, in order to ascertain whether it permits the [measures placed in issue] to be considered as falling within the scope *ratione materiae* of the [Treaty]"). This task also is entirely consistent with the Court's ruling in the Provisional Measures stage, where the Court carefully noted that some measures taken by the United States with respect to Iran "*might* be regarded as relating to certain rights and obligations of the Parties to that Treaty" and provided only bilateral measures as examples of those measures. Provisional Measures, Order of 3 October 2018, paras. 43, 67.

[293] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 855, para. 29 (Separate Opinion of Judge Higgins); *see also Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100 at p. 115-123, paras. 31-46 (resolving Colombia's objection to the Court's jurisdiction *ratione temporis* through a thorough review of the text of the relevant article of the Bogota Pact, in light of its context and the object and purpose of the Pact, as well as the Parties' practice and a review of the *travaux preparatoires*).

7.6 Consistent with that approach, in the preliminary objections phase of *Certain Iranian Assets*, the Court assessed Iran's claims against the text of the Treaty and considered the particular language of each Article cited by Iran in light of the Treaty's object and purpose to determine whether the claimed violations fell within the scope of the Treaty.[294] Similarly, in *Oil Platforms*, the Court assessed Iran's claims against the text of the Treaty provisions invoked in light of the object, purpose, context, and history, including in connection with similar FCN treaties concluded by the United States during the same time period. The Court explained that the object and purpose of the Treaty of Amity "was not to regulate peaceful and friendly relations between the two States in a general sense," but to manage the relationship with respect to "'the specific fields provided for in the Treaty.'"[295] Further examining the scope of the articles invoked by Iran in this light, the Court held that claims under Article IV(1) in relation to the use of force against certain Iranian oil platforms had to be rejected as outside its jurisdiction because that provision did not "lay down any norms applicable to this particular case," and thus could not "form the basis of the Court's jurisdiction."[296] Hence, the Court has recognized that, as a preliminary matter, it must dismiss claims that would require expanding the scope of the Parties' agreement or importing additional legal rules into a treaty where the treaty text, context, and practice of the Parties do not support such a reading.

7.7 The same result is warranted here. The Court should rule that Iran's claims based on third country measures are outside the scope of the Treaty, and consequently outside the Court's jurisdiction. Section A of this Chapter will explain that the vast majority of the May 8 Measures are third country measures. Section B will demonstrate that the Treaty of Amity provides

---

[294] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February* 2019, para. 52 ("The Court will examine below each of the provisions on which Iran relies, in order to ascertain whether it permits the question of sovereign immunities to be consider as falling within the scope *ratione materiae* of the Treaty of Amity."); *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 812, para. 23; s*ee also Immunities and Criminal Proceedings (Equatorial Guinea v. France*), *Preliminary Objections, Judgment of 6 June 2018,* para. 91.

[295] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 814, para. 28 (quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, p. 14 at p. 137, para. 273, in discussing the object and purpose of the Treaty of Friendship of 1956 between the United States and Nicaragua).

[296] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 813, para. 36.

protections only with respect to certain bilateral commercial activity between the United States and Iran, and does not lay down norms applicable to third country measures.

Section A: The Vast Majority of the May 8 Measures are Third Country Measures

7.8 Iran's claim is "uniquely concerned" with the May 8 Measures, those sanctions measures re-imposed by the United States that had been lifted in connection with U.S. participation in the JCPOA.[297] The vast majority of the May 8 Measures concern trade or transactions between Iran or Iranian nationals and companies and third countries or their nationals and companies,[298] and thus are third country measures.[299]

7.9 The May 8 Measures fall into four categories: (i) the re-imposition of certain sanctions provisions under U.S. statutes that had been waived pursuant to the JCPOA; (ii) the reinstatement, through issuance of Executive Order 13846, of certain sanctions authorities that were previously terminated; (iii) the reinstatement of certain persons to the Department of the Treasury's SDN List; and (iv) the revocation of certain licensing actions related to carpets, foodstuffs, commercial passenger aircraft and parts, and activities of U.S-owned or –controlled foreign entities.[300] The first three categories, which comprise the vast majority of the May 8 Measures, are third country

[297] Iran's Memorial, para. 1.13.

[298] In some cases, the May 8 Measures concern trade or transactions between the United States or U.S. nationals and companies and third countries or their nationals and companies. For example, U.S. persons may be required to block the property and interests in property of non-U.S., non-Iranian persons who were added to the SDN List in connection with the May 8 Measures. Because such measures concern the United States or U.S. nationals and companies and third countries or their nationals and companies, they are also third country measures.

[299] The extent to which the May 8 Measures are third country measures is evident from Iran's own submissions. Iran's Memorial contains extensive description of the alleged impacts of the May 8 Measures on third country nationals and companies, including "non-U.S. nationals," "non-U.S. financial institutions," "foreign suppliers," "foreign banks," and "any person, of whatever nationality." *See* Iran's Memorial, paras. 2.31, 2.22, 1.12, 2.38, 2.18.

[300] The measures in this fourth category are the actions the United States took to revoke or rescind, following a wind-down period: (i) the JCPOA Statement of Licensing Policy (JCPOA SLP), under which U.S. and non-U.S. persons could request specific licenses to engage in transactions for the sale of commercial passenger aircraft and related parts and services to Iran for exclusively civil, commercial passenger aviation end-use, provided such transactions did not involve any person on the SDN List; (ii) specific licenses that were granted pursuant to the JCPOA SLP; (iii) a general license for transactions that were ordinarily incident to the negotiation and entry into contracts for activities eligible for authorization under the JCPOA SLP (General License I); (iv) a general license for certain activities involving Iran by foreign entities owned or controlled by a U.S. person (General License H); and (v) general licenses for the importation into the United States and dealings in certain Iranian-origin carpets and foodstuffs, as well as certain related letters of credit and brokering services (previously at 31 C.F.R. §§ 560.534 and 560.535) (IM Annexes 25-26, 27, 29). *See* Re-imposition FAQs, *supra* n. 60 at 10-12 (US Annex 144). *See also* U.S. Dep't of the Treasury, "May 2018 Guidance on Re-imposing Certain Sanctions with Respect to Iran" (2018) (US Annex 146).

measures. The United States is not advancing a preliminary objection under the arguments outlined in this Chapter with respect to the fourth category of measures, and therefore that category is not discussed in detail in this Chapter.[301]

i. Statutory Provisions

7.10 The first category of May 8 Measures is the revocation of the waivers of the statutory sanctions provisions specified in Sections 4.1 to 4.7 of Annex II of the JCPOA.[302] The applicable statutory provisions are:[303]

- Provisions of the Iran Sanctions Act that provide for sanctions consequences with respect to persons that engage in certain transactions involving Iran's energy sector.
- Provisions of the Iran Freedom and Counter-Proliferation Act that provide for sanctions consequences with respect to persons, including foreign financial institutions, that engage in certain transactions involving Iran's energy, shipping, and shipbuilding sectors, the supply of certain metals and raw materials to Iran, and insurance.
- Provisions of the Iran Threat Reduction and Syria Human Rights Act that provide for sanctions consequences with respect to persons that engage in certain transactions involving insurance and Iranian sovereign debt.
- Provisions of the National Defense Authorization Act for Fiscal Year 2012 that provide for sanctions consequences with respect to foreign financial institutions that conduct or facilitate certain transactions with the Central Bank of Iran and designated Iranian financial institutions.

[301] The United States reserves the right to argue that some or all of Iran's claims based on the revocation of particular licensing actions are outside the scope of the Treaty.

[302] At the same time the JCPOA waivers were revoked, the United States issued new waivers to allow for a "wind-down" period to close operations in or business involving Iran conducted pursuant to the sanctions waivers issued during the U.S. participation in the JCPOA. This wind-down period ended as of August 7, 2018 with respect to some activities, and November 5, 2018 with respect to other activities. *See* Re-imposition FAQs, *supra* n. 60 at 1-3 (US Annex 144).

[303] *See* JCPOA, Annex II, § 4.1-4.7 (IM Annex 10). *See also* Statutory Sanctions of Relevance to the Case (US Annex 80). Note that the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA), which Iran references in its Memorial, is not included in this list. Although section 104(c)(2)(E)(ii)(I) of that Act was referenced in section 4.1.1 of Annex II of the JCPOA, the United States' commitment was to make inapplicable that provision to certain persons, which was implemented by removing them from the SDN List. Accordingly, that provision was not waived, and remained in effect throughout the period when the United States was participating in the JCPOA. *See* JCPOA Sanctions Implementation Guidance, *supra* n. 39 at 13 (IM Annex 24).

7.11 These re-imposed statutory provisions are third country measures. It is important to emphasize that even where certain of the statutes could apply on their face to "persons" broadly (suggesting that they could apply sanctions consequences to U.S. persons as well as non-U.S. persons),[304] the May 8 Measures do not extend so far. The waivers that were revoked as a result of the May 8 Decision were directed toward, and applied by their terms to, non-U.S. persons.[305] This was in keeping with the terms of JCPOA, which was explicit that aside from a few limited exceptions (in the fourth category), U.S. sanctions would only be lifted or waived to the extent they apply to non-U.S. persons.[306] The fact that the sanctions relief was limited to non-U.S. persons was further confirmed in public guidance and "frequently asked questions" documents issued by the United States in connection with JCPOA implementation (following consultation with Iran, as provided in the JCPOA),[307] which stated: "With the exception of [the fourth category of measures], none of the sanctions-related commitments outlined in this guidance apply to U.S. persons," and "U.S. persons, including U.S. companies, continue to be broadly prohibited from engaging in transactions or dealings with Iran and the Government of Iran unless such activities are exempt from regulation or authorized by OFAC."[308] Because these statutory provisions were not lifted with respect to U.S. persons during the JCPOA period, they likewise were not re-imposed with respect to U.S. persons on May 8, 2018. Iran also recognizes this fact, stating that revocation

[304] Some of the applicable statutory provisions apply, by their terms, only to foreign financial institutions that engage in certain transactions relating to Iran. *See* National Defense Authorization Act for Fiscal Year 2012, Section 1245(d)(1), Pub. L. No. 112-239, 126 Stat. 2006; Iran Freedom and Counter-Proliferation Act, 22 U.S.C. §§ 8803(d)(2), 8803(h)(2), 8804(c), 8806(a) (2012). *See* Statutory Sanctions of Relevance to the Case (US Annex 80).

[305] *See* U.S. Dep't of State, "Waiver Determinations and Findings" (2015) (IM Annex 23). The waivers contained two limited provisions, with respect to the Iran Freedom and Counter-Proliferation Act, applicable to transactions involving U.S. persons, insofar as was necessary to implement the civil aviation licensing actions. Measures related to the export to Iran of commercial passenger aircraft and related parts and services come within the fourth category of May 8 Measures, and are not described in detail in this section.

[306] JCPOA, Annex II, § 4, n.6 (IM Annex 10) ("The sanctions that the United States will cease to apply… pursuant to its commitment under Section 4 are those directed towards non-U.S. persons."). The JCPOA also clarified that "U.S. persons and U.S.-owned or -controlled foreign entities will continue to be generally prohibited from conducting transactions of the type permitted pursuant to this JCPOA, unless authorised to do so by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC)." *Id.*

[307] JCPOA, Main Text para. 27 (IM Annex 10) (committing the United States "to consult with Iran regarding the content of such guidelines and statements" about the lifting of sanctions); *see also id.*, Annex V para. 13.

[308] *See* JCPOA Sanctions Implementation Guidance, *supra* n. 39 at 5 (IM Annex 24). *See also* U.S. Dep't of State & U.S. Dep't of the Treasury, "Frequently Asked Questions Related to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day" 5 (2016) (US Annex 150) (hereinafter "FAQs on Lifting Sanctions") ("The U.S. domestic trade embargo on Iran remains in place. Even after Implementation Day, with limited exceptions, U.S. persons–including U.S. companies–continue to be broadly prohibited from engaging in transactions or dealings with Iran or its government.").

of the waivers "re-instat[ed] *the application to non-U.S. persons* of the statutory authorities providing nuclear-related sanctions."[309] Thus, the re-imposition of statutory sanctions that formed part of the May 8 Measures was only in regard to the application of those provisions to non-U.S. persons.[310] Because these measures concern trade and transactions between Iran or Iranian persons and third countries or their persons, they are third country measures.

ii. Executive Order (E.O.) 13846

7.12 The second category of May 8 Measures is the issuance of E.O. 13846, which reinstated certain earlier E.O. authorities that had been terminated or amended in connection with implementation of the JCPOA.[311] E.O. 13846 provided authority for the U.S. Secretary of the Treasury and the U.S. Secretary of State to impose sanctions consequences with respect to certain transactions involving Iran's energy, shipping, shipbuilding, and automotive sectors, dealings with certain Iranian persons on the SDN List, Iran's acquisition of U.S. dollar bank notes or precious metals, and dealings in Iranian rials.[312]

7.13 The E.O.-based sanctions that were lifted, and were then re-imposed through E.O. 13846 as part of the May 8 Measures, "are those directed towards non-U.S. persons."[313] Like the statutory provisions discussed above, although some of the E.O. provisions could apply on their face to "persons" broadly, their fundamental aim and effect is to establish sanctions consequences for non-

[309] Iran's Memorial, para. 2.61 (emphasis added).

[310] In addition, the possibility that these statutory provisions would be applied to transactions with U.S. persons is more theoretical than practical, because U.S. persons are already generally prohibited by the bilateral sanctions measures from engaging in the transactions that would give rise to these consequences (i.e., virtually all dealings with Iran and or individuals or entities in Iran).

[311] To implement its commitments under the JCPOA with respect to Executive Orders, President Obama issued a new Executive Order, E.O. 13716. That E.O. revoked or amended provisions of E.O.s 13574, 13590, 13622, 13628, and 13645. *See* JCPOA, Annex II, § 4; Annex V, § 17.4 (IM Annex 10).

[312] In addition, E.O. 13846 broadened the application of these authorities in certain discrete ways. For example, sections 4 and 5 contain an updated list of options that could be imposed once a person is determined to have engaged in sanctionable conduct. This modification is principally about what consequence may be imposed, but not the circumstances in which it would be imposed. In addition, section 2(a)(ii) extends the authority to impose sanctions on foreign financial institutions determined to have knowingly conducted or facilitated any significant financial transaction to persons who provide support on behalf of certain blocked persons. *See* Executive Order 13846 (US Annex 37). *See also* U.S. Dep't of the Treasury, "OFAC FAQs: Iran Sanctions," question 601, *available at* https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx (last visited August 7, 2019) (US Annex 151).

[313] JCPOA, Annex II, § 4, n.6 (IM Annex 10) ("The sanctions that the United States will cease to apply… pursuant to its commitment under Section 4 are those directed towards non-U.S. persons.").

U.S. persons with respect to transactions that do not involve a U.S. person or transactions through the U.S. financial system.[314] Indeed, separate from E.O. 13846, transactions involving U.S. persons or the U.S. financial system were already subject to broad prohibitions under the bilateral sanctions measures. In this respect, the provisions of E.O. 13846 are third country measures, because like the statutory provisions, these measures are directed toward and thus concern trade and transactions between Iran and a third country (or between their persons).

iii. Returning Persons to the SDN List

7.14 The third category of May 8 Measures is the return of certain persons and property to the Department of the Treasury's SDN List. As part of implementation of the JCPOA sanctions relief, the United States removed over 400 individuals and entities, as well as several hundred vessels and aircraft, from the SDN List.[315] And in implementing the May 8 Decision to cease implementation of the JCPOA, the United States took the necessary actions to return such persons, vessels, and aircraft to the SDN List.[316] These actions, announced as part of the May 8 Decision and completed by November 5, 2018, form part of the May 8 Measures that Iran challenges.

7.15 The persons who were returned to the SDN List as part of the May 8 Measures fall into three groups: (i) entities or individuals who meet the definition of "Government of Iran" or "Iranian financial institution" under U.S. law; (ii) Iranian entities or individuals ordinarily resident in Iran not covered in the preceding category; and (iii) entities or individuals from third countries. With respect to the first group, to the extent Iran's claims are based on the re-listing of persons meeting the definition of "Government of Iran" or "Iranian financial institution,"[317] neither the JCPOA nor the May 8 Measures had any effect on the blocking of property or interests in property of such persons. Indeed, such persons identified as "Government of Iran" or "Iranian financial institution" remained on a separate list, the E.O. 13599 List, during the period of U.S. participation in the

[314] In addition, like the statutory provisions, there are specific sections of E.O. 13846 that expressly only apply to "foreign financial institutions" in connection with their transactions with or involving Iran. *See* Executive Order 13846, 83 Fed. Reg. 38939, 38940 (Aug. 6, 2018) (US Annex 37).

[315] JCPOA, Annex II, § 4.8.1 & attachment 3; Annex V, § 17.3 (IM Annex 10). In some cases, persons or property were also removed from other lists maintained by the U.S. Department of the Treasury. *See* FAQs on Lifting Sanctions, *supra* n. 308 at 4 (US Annex 150).

[316] *See* U.S. Dep't of the Treasury, "Publication of Updates to OFAC's Specially Designated Nationals and Blocked Persons List and 13599 List Removals" (2018) (US Annex 152). There are some limited instances where persons were not re-listed, for example if the relevant entity ceased to exist.

[317] *See* 31 C.F.R. §§ 560.304, 560.324 (US Annex 35).

JCPOA. Their property and interests in property subject to U.S. jurisdiction remained blocked, and U.S. persons remained broadly prohibited from engaging in transactions or dealings with them unless exempt by regulation or otherwise authorized by OFAC.[318] Accordingly, the return of persons who were on the E.O. 13599 List to the SDN List as a result of the May 8 Decision did not effectuate a new blocking of the property or interests in property of those persons; it simply changed the mechanism for providing notice of such prior blocking. Instead, the main effect was for *third country nationals and companies*, as the re-listing gave rise to sanctions consequences for persons who knowingly provide significant goods, services, or support to Iranian persons on the SDN List.[319]

7.16 With respect to the second group—Iranian entities and individuals ordinarily resident in Iran that were returned to the SDN List as part of the May 8 Measures—U.S. persons (and non-U.S. persons acting within U.S. jurisdiction) were already generally prohibited from dealing with them by bilateral sanctions measures that remained in place during U.S. participation in the JCPOA.[320] Those measures prohibit transactions between U.S. persons and Iran or individuals or entities in Iran, including the export of goods or services to, or import of goods or services from Iran, absent an applicable exemption or authorization.[321] As a result, the re-listings that occurred

[318] *See* JCPOA Sanctions Implementation Guidance, *supra* n. 39 at 35 (IM Annex 24) ("[I]ndividuals and entities meeting the definition of the Government of Iran or an Iranian financial institution, as those terms are defined in sections 560.304 and 560.324 of the ITSR, remain persons whose property and interests in property are blocked pursuant to E.O. 13599 and section 560.211 of the ITSR. As a result, U.S. persons continue to be broadly prohibited from engaging in transactions or dealings with these individuals and entities unless such transactions or dealings are exempt from regulation or authorized by OFAC."). *See also* Executive Order 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012) (US Annex 153).

[319] *See* Iran Freedom and Counter-Proliferation Act, 22 U.S.C. § 8803(c)(1) (US Annex 80). This consequence was also noted in public guidance issued by the United States in connection with its implementation of its commitments under the JCPOA. *See, e.g.*, JCPOA Sanctions Implementation Guidance, *supra* n. 39 at 34 (IM Annex 24) (explaining that as a result of moving persons to the E.O. 13599 List from the SDN List, "non-U.S. persons are no longer subject to secondary sanctions for engaging in transactions with the individuals and entities set out in Attachment 3 to Annex II of the JCPOA, including the CBI and other Iranian financial institutions, provided that the transactions do not involve … individuals or entities who remain or are placed on the SDN List").

[320] As discussed in Chapter 2, these bilateral sanctions measures are largely set forth in the Department of the Treasury's Iran Transaction and Sanctions Regulations (ITSR) at 31 C.F.R. § 560 (US Annex 35). *See* FAQs on Lifting Sanctions, *supra* n. 308 at 5 (US Annex 150) ("The U.S. domestic trade embargo on Iran remains in place. Even after Implementation Day, with limited exceptions, U.S. persons–including U.S. companies–continue to be broadly prohibited from engaging in transactions or dealings with Iran or its government.").

[321] As noted by the United States previously, there are broad authorizations in place regarding transactions involving U.S. persons, or U.S.-origin goods, for the export or re-export of medicines, medical devices (including certain related software and services), agricultural commodities, and foodstuffs to Iran as well as related financial and brokering transactions. *See* 31 C.F.R. §§ 560.530, 560.532, 560.533 (US Annex 35).

as part of the May 8 Measures had limited practical consequence in terms of the ability of such persons to conduct trade and transactions with the United States and U.S. persons—the inquiry relevant for purposes of the Treaty. Instead, as above, the main effect is for *third country nationals and companies*, as the re-listings gave rise to sanctions consequences for persons who knowingly provide significant goods, services, or support to Iranian persons on the SDN List.

7.17 With respect to the third group, consisting of third country persons (individuals and entities) returned to the SDN List as part of the May 8 Measures, U.S. persons would not generally have been prohibited from dealing with them before they were listed, at least insofar as those dealings were not conducted for or on behalf of Iran. Upon their re-listing, U.S. persons were required to block their property or interests in property within U.S. jurisdiction, and were prohibited from engaging in virtually all transactions and dealings with them, unless otherwise exempt or authorized. However, the Treaty provides for obligations only in respect of trade and transactions between the Parties and their nationals and companies; as such, the addition of any such third country persons to the SDN List falls outside the scope of the Treaty.

Section B: The Treaty of Amity Provides Protections with Respect to Certain Bilateral Commercial Activity between the United States and Iran, Not between Iran and Third Countries

7.18 As detailed in Chapter 3, the Treaty of Amity sets out certain obligations with respect to the bilateral commercial relationship between the United States and Iran. This Court has recognized that these consist of "rules providing for freedom of trade and commerce *between the United States and Iran*, including specific rules prohibiting restrictions on the import and export of products originating *from the two countries*, as well as rules relating to the payment and transfer of funds *between them*."[322] Yet Iran does not, because it cannot, identify any provision in the Treaty that imposes an obligation on the United States to either take or refrain from taking actions concerning trade or transactions between Iran and a third country or between their nationals and companies. Such third country measures are outside the scope of the Treaty.

[322] Provisional Measures, Order of 3 October 2018, para. 43 (emphases added).

7.19 This Section proceeds by first examining the terms of the Treaty, in their context and in light of the Treaty's object and purpose, and then considering the individual Articles cited by Iran in relation to third country measures.

i. The Treaty Governs Certain Bilateral Commercial Activity Between Iran and the United States

7.20 The terms of the Treaty, interpreted in their context and in light of the Treaty's object and purpose, show that the Treaty provides particular protections for bilateral commercial relations between Iran and the United States.

7.21 As an initial matter, there is nothing in the terms of the Treaty cited by Iran that creates obligations for the United States with respect to trade or transactions concerning third countries or third country nationals and companies. As detailed in Chapter 3, the Treaty's preamble reflects its object and purpose, which is to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations."[323] Thus, it is unsurprising that the Treaty does not apply to Iran's trade or transactions with third countries, given that it is concerned with the commercial and consular relations *between* Iran and the United States. To the extent third countries are addressed in the Treaty at all, it is done so only for purposes of comparison—*i.e.*, in provisions that provide no less favorable treatment to the other Treaty Party, as compared to third countries. Those provisions do not regulate what choices either Party makes with respect to third parties, but (with respect to certain paragraphs of the Treaty) provide that to the extent those choices accord a benefit or advantage to a third country, that Party must provide no less favorable treatment to the other Treaty Party.[324]

7.22 To the extent the meaning of the Treaty remains ambiguous or obscure, supplementary means of interpretation confirm that it was not intended to regulate the Parties' activity concerning trade or transactions with third countries or third country nationals and companies. As detailed in

[323] Treaty of Amity, Preamble (IM Annex 1); *see also Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019*, para. 57 (finding the Preamble language instructive in considering whether sovereign immunities fell within the scope of the Treaty); *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 813, para. 27 (finding the Preamble language instructive in considering the scope of Article I of the Treaty).

[324] The practice of the Parties also supports the conclusion that measures concerning trade or transactions with third countries or third country nationals and companies do not fall within the ambit of the Treaty. The United States has long maintained such measures, but Iran has never pursued a legal claim under the Treaty until this case.

Chapter 3, the U.S. FCN treaties negotiated during the post-World War II era were in furtherance of a directive from the U.S. Congress, reflected in the Mutual Security Act, for the President to "accelerate a program of negotiating treaties for commerce and trade … to encourage and facilitate the flow of private investment to nations participating in programs under this act."[325] The rights FCN treaties sought to protect were rights of American individuals and companies—primarily private companies—to engage in commercial activities with and in treaty partner states, and to afford individuals and companies of the treaty partner the same protections in the United States.[326]

7.23 Scholars' writings on the historical purpose of FCN treaties affirm this understanding. Herman Walker, Jr. explained that the reticence of U.S. drafters to extend greater protections to foreign corporations "may have been in part attributable to a fear lest such commitments could become a cloak under cover of which rights would be gained by interests of third countries […]. The recent treaties signed by the United States, at any rate, indicate that this possibility of a 'free ride' by third-country interests is one to be guarded against…."[327] As Walker concludes, the FCN treaties "acquired in time a familiar and distinctive form and character, as a normal medium through which to provide extensively for the rights of each country's citizens, their property and

[325] *Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearing Before the S. Comm. on Foreign Relations*, 84th Cong. 1-2 (1956) (statement of Thorsten V. Kalijarvi, Deputy Assistant Sec'y of State for Economic Affairs) (1956) (quotations omitted) (US Annex 88); *see also Message from the President of the United States Transmitting a Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, Signed at Tehran on August 15, 1955*, 84th Cong. 2 (1956) (US Annex 90) ("This treaty places economic relations between the United States and Iran on a bilateral treaty basis . . .").

[326] *Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearing Before the S. Comm. on Foreign Relations*, 84th Cong. 1-2 (1956) (statement of Thorsten V. Kalijarvi, Deputy Assistant Sec'y of State for Economic Affairs) (US Annex 88) (describing the "principal immediate incentive in the negotiation of these treaties" as "the desire to help create conditions favorable to foreign private investment" and "a particularly desirable effect of the treaties" as "to strengthen the hands of the [United States] Government for the protection of the interests of American citizens abroad in many fields of activity"); *Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearing Before the S. Comm. on Foreign Relations*, 84th Cong. 1-2 (1956) (comments of the committee on foreign law of the Association of the Bar of the City of New York entered into the record) ("Such treaties are in the interest of American commercial and investing interests, although since treaties with sovereign nations are involved, they are necessarily cast in a reciprocal form.") (US Annex 88).

[327] Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 388 (1956) (US Annex 156); *see also* H.P. Connell, *United States Protection of Private Foreign Investment through Treaties of Friendship, Commerce and Navigation*, 9 ARCHIV DES VOLKERRECHTS 256, 258 (1961) (noting that FCN treaties are designed to resolve a conflict "between two basic principles, that of the sovereignty of a state *over all that is within its territory*, and the principle of respect for private property belonging to nationals *of another state*") (emphasis added) (US Annex 157).

other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping."[328]

7.24 By contrast, there is nothing in the negotiating history to support Iran's claims that the Treaty creates obligations on the United States with regard to trade or transactions by Iran or its nationals and companies with third countries or their nationals and companies.

ii. None of the Treaty Articles Cited by Iran Extend to Third Country Measures

7.25 Consistent with the text and context of the Treaty as a whole, none of the individual Treaty articles cited by Iran extends protections with respect to third country measures—that is, trade or transactions between Iran or its persons and third countries or their persons. To the contrary, each provision confines the obligation at issue to the bilateral commercial context, consistent with the nature of the particular obligation. While Iran cites particular measures under each of these Articles, Iran wholly fails to develop a basis that demonstrates that the Article reaches the identified May 8 Measures.

a. Third Country Measures are Outside the Scope of Article IV(1), Article IV(2), and Article V(1)

7.26 Article IV(1), Article IV(2), and Article V(1) generally provide for particular treatment to be accorded to Iranian nationals and companies. These provisions do not set out any obligations with respect to third countries or third country nationals and companies. Moreover, Article IV(2) and Article V(1) are expressly limited to conduct that occurs within the territory of the United States.[329]

7.27 Article IV(1) provides:

> Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying

[328] Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 230 (1956) (US Annex 158).

[329] The United States notes that this submission focuses on particular requirements of the Treaty's Articles that are appropriate for this preliminary objections stage. Failure to address a particular aspect of these Articles should not be interpreted as agreement with Iran's position on the substantive content of the Article, nor as prejudicing the United States' position with respect to possible additional arguments in future presentations to the Court. For example, nothing in this submission should be construed as endorsing Iran's overly broad view of the territorial reach of Article IV(1).

> unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.[330]

7.28 Article IV(2) provides:

> Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.[331]

7.29 Article V(1) provides:

> Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party: (a) to lease, for suitable periods of time, real property needed for their residence or for the conduct of activities pursuant to the present Treaty; (b) to purchase or otherwise acquire personal property of all kinds; and (c) to dispose of property of all kinds by sale, testament or otherwise. The treatment accorded in these respects shall in no event be less favorable than that accorded nationals and companies of any third country.[332]

7.30 First, the U.S. obligations to provide protections in each of these provisions are limited to nationals and companies of Iran, or, for certain portions, the property of those nationals and companies. As a baseline matter, to present a claim with respect to Article IV(1), Iran must establish that the United States accorded treatment or applied unreasonable or discriminatory measures to Iranian nationals and companies or to their property or enterprises.[333] Article V(1), similarly provides that the "treatment accorded" by the United States to nationals and companies

[330] Treaty of Amity, art. IV(1) (IM Annex 1).

[331] *Id.* art. IV(2).

[332] *Id.* art. V(1).

[333] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 816, para. 36 (concluding that, with respect to Article IV(1), "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").

of Iran must meet certain requirements.[334] Article IV(2) uses a slightly different formulation—the obligation requires that the property of nationals and companies of Iran "receive" the most constant protection and security.[335]

7.31 In each case, to present a claim under these provisions, Iran must establish that the complained-of measures *accorded treatment to* Iranian nationals and companies themselves (or their property in the case of Article IV(2)). Measures that provide for treatment of the nationals and companies of third countries, or of those third country nationals' and companies' property in the United States—*i.e.*, third country measures —manifestly do not accord treatment to *Iranian* nationals and companies.

7.32 Second, the plain text of Article IV(2) and Article V(1) both expressly include a territorial limitation. In Article IV(2), the provision specifies that it applies only insofar as the property at issue is located "within the territories of the United States."[336] Indeed, in *Certain Iranian Assets*, the Court described the content of this location as applying to "'nationals' and 'companies' of one Party engaging in economic activities within the territory of the other."[337]

7.33 Article V(1) is similarly limited to nationals and companies of Iran located "within the territories" of the United States. The text of this paragraph uses the same limiting phrase as Article IV(2), and thus should be interpreted in the same fashion, consistent with its application to the protection of real and personal property. Iran appears to concede as much in its Memorial, noting that the obligation is for "Iranian nationals and companies . . . to purchase or acquire property *in the U.S.*"[338]

---

[334] Iran's Memorial, para. 4.42 (describing the obligation as directed at "Iranian nationals and companies").

[335] *Id.*, para. 4.34 (describing the protection as for "the property of Iranian nationals and companies").

[336] Treaty of Amity, art. IV(2) (IM Annex 1) (emphasis added).

[337] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment of 13 February 2019,* para. 57; s*ee also Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803 at p. 816, para. 35 (acknowledging that the text of this paragraph contains a territorial limitation). Scholarly sources and negotiating history of similar FCN provisions provides yet additional support. The 1948 U.S. FCN treaty with the Republic of China, which contains identical language in this provision, "referred, as had the treaties of the inter-war period, to 'the most constant protection and security' to be accorded nationals of one party in the territory of the other […]." Robert Wilson, *Property Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT'L L. 83, 100 (1951) (US Annex 159). In addition, Wilson noted that "each of the general commercial treaties which the United States has signed since 1923 specifies 'the most constant protection' for property of one party's nationals in the other's territory." *Id.* at 103.

[338] Iran's Memorial, para. 4.42.

7.34 In its filings in this case, Iran identifies the following sanctions measures as alleged breaches of these provisions: (i) certain statutory provisions under the Iran Freedom and Counter-Proliferation Act, the Iran Threat Reduction and Syria Human Rights Act, and the National Defense Authorization Act for Fiscal Year 2012; (ii) certain provisions of E.O. 13846; (iii) the re-listing of certain persons on the SDN List; and (iv) the revocation of certain licenses.[339] Yet as discussed in more detail above, the May 8 Measures encompass these statutory provisions only with respect to transactions involving non-U.S. persons. Likewise, the sanctions measures in E.O. 13846 apply to transactions between Iran and non-U.S. persons, outside the United States. To the extent persons who were returned to the SDN List are Iranian entities or individuals ordinarily resident in Iran, U.S. persons already were broadly prohibited from engaging in virtually all transactions and dealings with them, including via the U.S. financial system. The bilateral sanctions measures prohibited these dealings already, unless otherwise exempt or authorized. To the extent persons who were returned to the SDN List are third country persons, the affected property is that of a third country national or company, and the affected transactions are between the United States and third countries, not between the United States and Iran.

7.35 In sum, where Iran's claims under Article IV(1), Article IV(2), and Article V(1) are based on third country measures, the Court should dismiss them as outside the scope of those articles.

b. Third Country Measures are Outside the Scope of Article VII(1)

7.36 Next, Iran incorrectly claims violations of Article VII(1) predicated on United States measures that affect payments "to or from" a third country, rather than "to or from" the territory of Iran.

7.37 Article VII(1) provides, in full:

> Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.[340]

[339] *Id.*, paras. 4.45-4.91.

[340] Treaty of Amity, art. VII(1) (IM Annex 1).

7.38 What Iran challenges are alleged "restrictions [applied by the United States] on the making of payments, remittances, and other transfers of funds *to or* from the territor[y] of [Iran]."[341] At a minimum, to assert a claim under this provision, Iran would need to establish that the purported restriction it challenges pertains to the making of payments, remittances, or other transfers of funds where the payment, remittance, or transfer enters or exits the territory of Iran. Thus, where a measure is directed towards a transfer that occurs between two bank accounts, neither of which is located inside the territory of Iran, the threshold requirements for presenting a challenge under Article VII(1) are not met, and there can be no violation of Article VII(1).

7.39 Iran identifies the following measures as alleged breaches of this Article: (i) certain statutory provisions under the Iran Threat Reduction and Syria Human Rights Act and the National Defense Authorization Act for Fiscal Year 2012; (ii) certain financial and currency provisions of E.O. 13846; and (iii) the re-listing of certain persons on the SDN List.[342] As noted above, the May 8 Measures encompass these statutory provisions only with respect to transactions involving non-U.S. persons. With the exception of one discrete category regarding licensing actions, the May 8 Measures did not affect the baseline rule, which was retained throughout the period of U.S. participation in the JCPOA, that transactions with Iran, Iranian entities, and individuals ordinarily resident in Iran were prohibited from transiting the U.S. financial system. The relevant sanctions provisions in E.O. 13846 apply to transactions between Iran and non-U.S. persons, including foreign financial institutions, outside the United States, regardless of whether the affected transaction was to or from the territory of Iran. To the extent persons who were returned to the SDN List are individuals or entities in Iran, those persons were already generally prohibited by the bilateral sanctions measures from making payments to or from the United States, or payments that transit the U.S. financial system, except where specifically authorized. To the extent persons who were added to the SDN List are third country persons, the affected property is that of the third country person, and the affected transaction is between the United States and the third country.

7.40 In sum, where Iran's claims under Article VII(1) are based on third country measures or measures that do not apply restrictions "to or from the territories" of Iran, the Court should dismiss them as outside the scope of that article.

---

[341] *Id.* (emphasis added).

[342] Iran's Memorial, paras. 5.15-5.35.

c. Third Country Measures are Outside the Scope of Article VIII(1) and Article VIII(2)

7.41 Iran also claims breaches of Article VIII(1) and Article VIII(2), which provide certain obligations related to the importation and exportation of products to or from the other High Contracting Party.

7.42 Article VIII(1) provides:

> Each High Contracting Party shall accord to products of the other High Contracting Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other High Contracting Party, by whatever route and by whatever type of carrier, treatment no less favorable than that accorded like products of or destined for exportation to any third country, in all matters relating to: (a) duties, other charges, regulations and formalities, on or in connection with importation and exportation; and (b) internal taxation, sale, distribution, storage and use. The same rule shall apply with respect to the international transfer of payments for imports and exports.[343]

7.43 Article VIII(2) provides:

> Neither High Contracting Party shall impose restrictions or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the territories of the other High Contracting Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited.[344]

7.44 As an initial matter, Iran appears to acknowledge that the products encompassed within both provisions are only those that are either (a) products of Iran destined for import to the territory of the United States, or (b) products of the United States destined for export to the territory of Iran.[345] This means that Iran's claim with respect to Article VIII by definition excludes the May 8 Measures that do not govern imports of Iranian products into the United States or exports from the United States to Iran. And this exclusion necessarily encompasses all of the May 8 Measures except those in the fourth category, addressing the revocation of certain licenses related to carpets,

[343] Treaty of Amity, art. VIII(1) (IM Annex 1).

[344] *Id.*, art. VIII(2) (IM Annex 1).

[345] Iran's Memorial, para. 6.6 ("Under Article VIII(1), (a) and (b), the United States must accord to Iranian products destined to be imported to the United States… and to any product destined to be exported to the territory of Iran . . ."); *id*. para. 6.16 (describing Article VIII, paragraph (2) of the Treaty as affecting U.S. restrictions or prohibitions "on importations from Iran and exportations to Iran").

foodstuffs, and commercial passenger aircraft and parts, which is not included within the preliminary objection outlined in this Chapter by the United States.

7.45 The final sentence of Article VIII(1) is equally limited. It states: "The same rule shall apply with respect to the international transfer of payments for imports and exports." Read in context, "imports and exports" in this sentence refers to the imports and exports described in the preceding sentence, for which the "same rule" applies, *i.e.*, products of Iran imported to the United States or exports of the United States destined for Iran.[346]

7.46 Yet, by insisting that "imports and exports" in the final sentence "is not limited to imports or exports between the territories of the Parties,"[347] Iran seeks to expand the scope of this provision to include imports or exports between Iran and any country, anywhere in the world. Iran's proposed interpretation of that sentence, when read in light of its immediate context, does not withstand scrutiny. It would have the unsustainable result of reading "the same rule" in this sentence to apply to products that *are not* the same products as those to which the previous sentence in the paragraph applies, namely imports and exports *from and to the territories of* the Parties. Iran's theory would also have the phrase "imports and exports" in the final sentence take on a different meaning than "importation" and "exportation" in the previous sentence within the same paragraph. When properly interpreted in its context, it is clear that the obligation in the final sentence is intended to protect an importer and exporter of goods moving between the territories of the Parties who wishes to transfer funds to pay for the transaction.[348]

7.47 Iran's Memorial is vague about which measures Iran claims are breaches of these provisions, referring to such formulations as "virtually all the U.S. measures described in Chapter II."[349] The most specific allegations appear to relate to the revocation of certain licenses.[350] Iran

[346] The standard draft of the Friendship, Commerce, and Navigation Treaty uses the same phrase "international transfer of payments for imports or exports," but includes the phrase in a single, longer sentence that comprises the entire paragraph. This placement further demonstrates that the "imports and exports" referenced in the final sentence of Article VIII(1) are those "imports and exports" described in the preceding sentence. SULLIVAN STUDY at 229-230 (US Annex 160).

[347] Iran's Memorial, para. 6.8.

[348] *See* SULLIVAN STUDY at 230 (US Annex 160) (explaining that whereas the article on exchange restrictions was designed to protect nationals and companies who wished to transfer funds *from* the other treaty partner, this article protected those who wished to transfer funds from their own country *to* the treaty partner).

[349] Iran's Memorial, para. 6.20.

[350] *Id.*, para. 6.10.

also notes, as a claimed breach, restrictions and prohibitions "in other countries and exportations of products from third countries to Iran."[351] This argument is not sustainable under the terms of the Treaty, and Iran's vagueness cannot mask the fundamental flaw of its claims.

7.48 Where Iran's claims under Article VIII(1) and Article VIII(2) are based on third country measures, or do not otherwise concern imports of Iranian products into the United States or exports of products from the United States destined for Iran, the Court should dismiss them as outside the scope of those articles.

d. Third Country Measures are Outside the Scope of Article IX (2) and Article IX(3)

7.49 Iran further claims violations of Article IX(2) and Article IX(3), which describe obligations to accord certain treatment to nationals and companies of the other High Contracting Party with respect to matters relating to importation and exportation and measures affecting the ability of companies to obtain marine insurance.

7.50 First, Iran claims a breach of Article IX(2), which provides:

> Nationals and companies of either High Contracting Party shall be accorded treatment no less favorable than that accorded nationals and companies of the other High Contracting Party, or of any third country, with respect to all matters relating to importation and exportation.[352]

7.51 As Iran notes, this obligation is with respect to treatment *accorded to* nationals and companies of Iran in relation to importation and exportation.[353] Iran, therefore, must present a claim based on United States measures that accorded treatment to *Iranian* nationals and companies, not nationals and companies of third countries, in relation to importation and exportation. Measures that do not relate to importation into the United States and exportation from the United States, and measures that provide for treatment of the nationals and companies of third countries, or of those third country nationals' and companies' property in the United States or in the hands of U.S. persons, are outside the clear terms of this Article.

[351] *Id.*, para. 6.21.

[352] Treaty of Amity, art. IX(2) (IM Annex 1).

[353] Iran's Memorial, para. 7.2 (stating that Article IX(2) "requires the Parties *to accord to the* other Party's nationals and companies treatment") (emphasis added).

7.52 Next, Iran claims a breach of Article IX(3), which provides:

> Neither High Contracting Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either High Contracting Party.[354]

7.53 A straightforward reading of this text limits its applicability to importers or exporters of Iran or of the United States. In context, the phrase "of either country" modifies "importer or exporter of products." Thus, a claim based on this provision can only be advanced insofar as the national or company who is importing or exporting products is of either Iran or the United States.

7.54 This interpretation is consistent with the intent of the provision "to provide equality of competitive opportunity [for marine insurers] in bilateral relations *between the treaty partners*."[355] As the Sullivan Study explains, the Association of Marine Underwriters of the United States sought the provision to prevent discriminatory measures in treaty partners that required their purchasers or sellers assuming the risk in a shipment to purchase insurance with a domestic company.[356]

7.55 Iran asks the Court to extend the scope of this provision to include any importer or exporter, wherever located, who engages in trade of goods of either Party, regardless of the nationality of the importer or exporter, the origin of the imports, or the destination of the export.[357] Such an interpretation is not only contrary to the plain text of the provision, but also illogical. It purports to require that Iran and the United States open the marine insurance marketplace to an innumerable and ever-changing number of third country importers and exporters, without any reciprocity from those third countries. Such an interpretation goes far beyond the intent of the provision to affect the marine insurance marketplace for imports and exports *between* Iran and the United States.

7.56 Iran identifies the following measures as alleged breaches of these provisions: (i) certain statutory provisions under the Iran Freedom and Counter-Proliferation Act; and (ii) certain provisions of E.O. 13846.[358] As noted above, the May 8 Measures encompass these statutory

---

[354] Treaty of Amity, art. IX(3) (IM Annex 1).

[355] SULLIVAN STUDY at 267-268 (emphasis added) (US Annex 161).

[356] *Id.*

[357] Iran's Memorial incorrectly states that the terms importer or exporter are "not qualified" and therefore extend to "any importer or exporter, notwithstanding their nationality or the country from which or toward which they operate." Iran's Memorial, para. 7.5.

[358] *Id.*, paras. 7.8-7.12.

provisions only with respect to transactions involving non-U.S. persons. Likewise, the sanctions in E.O. 13846 apply to transactions between Iran and non-U.S. persons, outside the United States.

7.57 Because Iran's claims under Articles IX(2) and Article IX (3) are based on third country measures, the Court should dismiss them as outside the scope of those articles.

e. Third Country Measures are Outside the Scope of Article X(1)

7.58 Finally, Iran claims violations under Article X(1), which provides for freedom of commerce and navigation between the territories of Iran and the United States.

7.59 Article X(1) provides: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."[359]

7.60 As the Court noted in *Oil Platforms*, to the extent Article X(1) confers any substantive rights and protections, Article X(I) contains an "important territorial limitation."[360] By its express terms, its scope is limited to commerce *between the territories* of Iran and the United States. As such, the Article encompasses only trade in goods directly between the territory of Iran and the territory of the United States, not goods that are subject to intermediate transactions with third countries. In *Oil Platforms*, the Court elaborated on this restriction, explaining that the determinative factor in the analysis is the nature of the commercial transactions relating to the product.[361] With respect to the oil exports at issue in *Oil Platforms*, the Court stated:

> What Iran regards as 'indirect' commerce in oil between itself and the United States involved a series of commercial transactions: a sale by Iran of crude oil to a customer in Western Europe, or some third country other than the United States; possibly a series of intermediate transactions; and ultimately the sale of petroleum products to a customer in the United States. This is not 'commerce' between Iran and the United States but commerce between Iran and an intermediate purchaser; and 'commerce' between an intermediate seller and the United States.[362]

---

[359] Treaty of Amity, art. X(1) (IM Annex 1).

[360] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161 at p. 214, para. 119 (Judgment of Nov. 6, 2003).

[361] The Court squarely rejected an analysis that would focus on whether the product in question retained "an Iranian character" or whether it could be designated as an Iranian product according to international trade law criteria. *Id.* at p. 206, para. 96.

[362] *Id.* at p. 207, para. 97. Contrary to Iran's contention in its Memorial, the Court's analysis was based on a straightforward reading of the text of Article X(I), which does not consider the initial exporter's intention or prediction as to a product's ultimate destination. *Cf.* Iran's Memorial para. 8.6.

7.61 In other words, the Court was clear that it would disaggregate transactions that involved a series of steps with third country persons, to examine those only relating to oil sales directly between Iran and the United States. The same principle applies in this case, namely, the territorial limitation in Article X(I) requires that, in order to fall within its scope, Iran's claims must implicate direct trade between the territories of the United States and Iran, without any intermediate transactions involving third countries.

7.62 Iran, however, appears to try to assert under Article X(1) protection from all May 8 Measures simply because those measures could affect Iran's global commercial activities or competitiveness.[363] This approach is unsustainable under the Treaty and this Court's jurisprudence. As discussed above, the vast majority of the May 8 Measures are third country measures, and do not concern commerce between the territories of Iran and the United States. At the same time, Iran's Memorial acknowledges that there are only certain, narrow categories of the May 8 Measures that might conceivably relate to direct trade between the two countries—those in the fourth category of May 8 Measures. Iran's Memorial includes a separate section titled "The revocation of authorizations under U.S. sanctions regarding Iran whereby the scope of permissible *direct trade between the two countries* had been expanded."[364] Under the category of "direct trade between the two countries," Iran identifies May 8 Measures only in the fourth category relating to (i) the export or re-export to Iran of commercial passenger aircraft and related parts and services and (ii) importation into the United States of Iranian-origin carpets and foodstuffs.[365] As Iran appears to recognize, the remainder of the May 8 Measures—the re-imposition of specified statutory sanctions, the issuance of E.O. 13846, and the re-listing of persons on the SDN List—manifestly do not relate to direct trade between the United States and Iran.

7.63 Yet at the same time, Iran cites the following measures as alleged breaches of this Article, with almost no explanation as to how they relate to direct trade between the United States and Iran: (i) certain statutory provisions under the Iran Freedom and Counter-Proliferation Act, the Iran Threat Reduction and Syria Human Rights Act, and the National Defense Authorization Act for Fiscal Year 2012; (ii) certain provisions of E.O. 13846; and (iii) the revocation of certain licenses

[363] Iran's Memorial para. 8.8 ("As follows from the above, the U.S. measures outlined in Chapter II operate as a separate and additional barrier to commerce and thereby breach Article X(1).").

[364] *Id.*, p. 34 (emphasis added).

[365] *Id.*, para. 2.41.

related to carpets, foodstuffs, and commercial passenger aircraft.[366] The May 8 Measures encompass these statutory provisions only in relation to transactions involving non-U.S. persons. And the sanctions authorities in E.O. 13846 apply to transactions between Iran and non-U.S. persons, outside the United States. This leaves only the revocation of certain licenses as potentially related to direct trade between the United States and Iran.

7.64 Where Iran's claims are based on third country measures, the Court should dismiss them as outside the scope of Article X(1).

* * *

7.65 In its challenge to all of the May 8 Measures, Iran advances a fundamentally flawed theory that the Treaty creates obligations on the United States vis-à-vis Iran in respect of trade and transactions with third countries. This argument, if accepted by the Court, would have no obvious limit, and is fundamentally at odds with the very concept of a bilateral treaty intended to foster commercial relations between the Parties. The Treaty, properly interpreted as described in this Chapter, does not support Iran's assertions. Simply put, the Treaty does not establish a guarantee that the United States will refrain from actions that impact Iran's commerce with third countries. Rather, the Treaty provides a set of specific protections for certain bilateral commercial activity, consistent both with its stated object and purpose to encourage bilateral commerce "between their peoples" and with the textual formulations of the substantive obligations. Thus, with respect to third country measures, *i.e.,* those measures that concern trade or transactions between Iran or Iranian nationals and companies and third countries or their nationals and companies, the United States submits that the May 8 Measures do not fall within the provisions of the Treaty. Resolution of this objection does not intrude upon issues that go to the merits of Iran's claims, nor does it turn on the facts relating to Iran's claims in particular contexts, whether such facts would sustain a violation of the purported rules laid down by the Treaty, or whether any defenses would be available. The Court should dismiss such claims at this preliminary stage for lack of jurisdiction.

[366] *Id.*, paras. 8.8-8.13.

CHAPTER 8: CONCLUDING OBSERVATIONS

8.1 There can be no doubt that this case has nothing whatsoever to do with the Treaty of Amity but is merely an effort to undo the United States' decision to cease participation in the JCPOA by asking this Court to order the United States to restore the sanctions relief that had been provided pursuant to the JCPOA. This is an outcome to which Iran has no right under the JCPOA, and that is incompatible with the sovereign prerogatives the JCPOA participants reserved to themselves in that instrument.

8.2 Even were the Court to move past the inherent artifice of Iran's case, the May 8 Measures Iran brings to the Court are fully covered by two express exceptions in Article XX of the Treaty. They are, as Iran expressly accepted in the JCPOA, "nuclear-related" sanctions measures and are therefore excluded from the substantive obligations of the Treaty by paragraph 1(b) of Article XX. Moreover, the May 8 Measures were re-imposed in response to the amply-documented national security concerns of the United States regarding the full range of Iran's destabilizing, destructive, and threatening activities. As measures necessary to protect the essential security interests of the United States, they are therefore also excluded from the substantive obligations of the Treaty by paragraph 1(d) of Article XX. The United States does not advance these Article XX objections as jurisdictional, but rather maintains that the examination of whether the exceptions apply in this case is exclusively preliminary in nature and that the Court should address both exceptions at this preliminary objections stage for the sake of fairness, procedural economy, and the sound administration of justice.

8.3 Finally, even were the Court to reject the previous contentions, the Court should conclude that Iran's challenge to third country measures (which are the vast majority of the May 8 Measures) fall plainly outside the scope of this bilateral commercial and consular Treaty. Whereas the Treaty of Amity provides certain protections in respect of trade and transactions between the Parties (and their nationals and companies), the May 8 Measures overwhelmingly concern trade and transactions between Iran and third countries. Iran may believe that such third country measures are "unfriendly" in the general sense, or indeed criticize what it calls the "extraterritorial character" of the third country measures. But this criticism does not engage the substantive or jurisdictional reach of the Treaty. The Treaty provides no obligations applicable to the third country measures, and Iran's challenge to them therefore does not fit within the Treaty's compromissory clause.

8.4 For the reasons given above, the Court should reject Iran's case as outside its jurisdiction under Article XXI(2) of the Treaty of Amity, which applies solely in respect of disputes "as to the interpretation or application of" the Treaty, and does not extend to the JCPOA subject matter of this case. These same core concerns render Iran's case an abuse of process, as its adjudication would work substantial injustice, and the Court should rule that it is inadmissible on this basis. If the Court does not do so, it should engage with the United States' Article XX(1) objections, which are exclusively preliminary in nature and provide two independent bases for the dismissal of Iran's claims in their entirety. And finally, this Court should conclude that where the May 8 Measures that Iran challenges are third country measures, they are plainly not governed by the Treaty, and therefore not capable of coming within its compromissory clause.

SUBMISSIONS

In light of the foregoing, the United States of America requests that the Court uphold the objections set forth above as to the claims brought by Iran in its Application of July 16, 2018 and decline to entertain the case. Specifically, the United States of America requests that the Court:

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

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

(c) Dismiss Iran's claims in their entirety as precluded by Article XX, paragraph 1(b) of the Treaty of Amity.

(d) Dismiss Iran's claims in their entirety as precluded by Article XX, paragraph 1(d) of the Treaty of Amity.

(e) Dismiss as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on third country measures.[367]

Respectfully submitted,

Marik A. String

Agent of the United States of America

August 23, 2019

[367] *See*, *supra*, Chapter 7.

CERTIFICATION

I, Marik A. String, Agent of the United States of America, hereby certify that the copies of this pleading and all documents annexed to it are true copies of the originals and that all translations submitted are accurate.

Marik A. String

Agent of the United States of America

August 23, 2019