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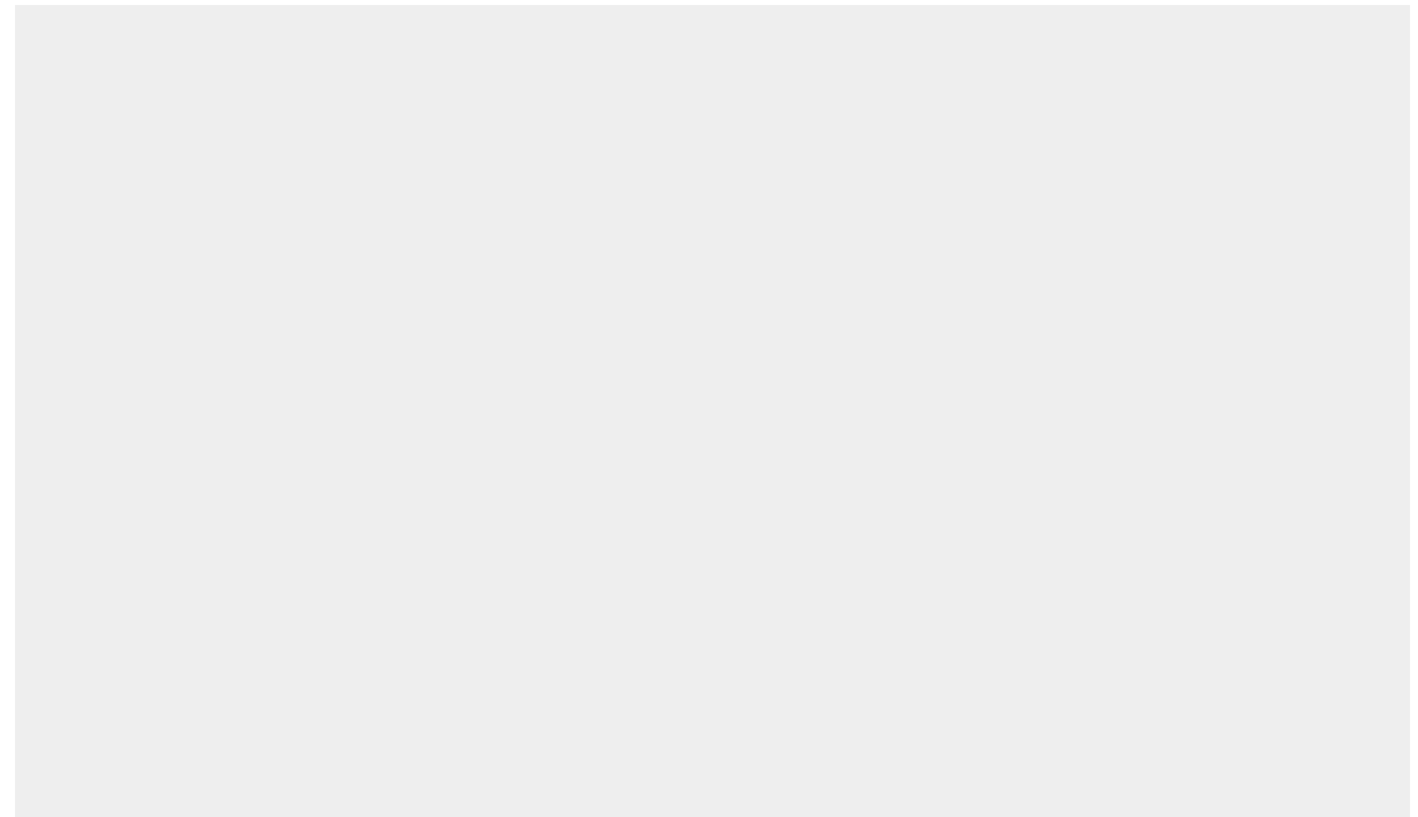

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ALLEGED VIOLATIONS OF THE 1955 TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS (IRAN v. U.S.) (JUDGMENT ON PRELIMINARY OBJECTIONS) (I.C.J.)

BY DIANE A. DESIERTO*

[February 3, 2021]

Introduction

On February 3, 2021, the International Court of Justice delivered its judgment on preliminary objections in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*.[1] The judgment rejected all of the United States' preliminary objections, declared the admissibility of Iran's Application, and held that the Court has jurisdiction "on the basis of Article XXI, paragraph 2 of the Treaty of Amity, Economic Relations, and Consular Rights of 1955."[2]

Background

Iran's application alleges that the United States violated the 1955 Treaty of Amity, Economic Relations, and Consular Rights (hereafter, 1955 Treaty), when the United States reimposed various sanctions against Iran, including all . US. sanctions that had already been lifted or waived in connection with the Joint Comprehensive Plan of Action (JCPOA).[3] The JCPOA sought to ensure an exclusively peaceful nature to Iran's nuclear program and to guarantee the "comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme."[4] The United States and the European Union imposed various sanctions to compel Iran's implementation of its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, as well as related United Nations Security Council resolutions 1696 (2006), 1737 (2006), 1696 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010), 2224 (2015), and 2231 (2015).

On May 8, 2018, U.S. President Donald Trump issued a National Security Presidential Memorandum, which U.S. participation in the JCPOA and reimposed all sanctions that had been "lifted or waived in connection with the JCPOA."[5] His August 6, 2018 Executive Order thereafter reimposed sanctions on Iran, its nationals, and its companies, and revoked all previous Executive Orders issued to implement the JCPOA.[6]

The International Court of Justice's Judgment on Preliminary Objections

The Court rejected all five of the United States' preliminary objections. In its first two objections, the United States challenged the Court's jurisdiction *ratione materiae,* arguing that the real dispute with Iran was on the application of the JCPOA, and not Article XXI, paragraph 2, of the 1955 Treaty (e.g., "Any 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").[7] According to the United States, the 1955 Treaty simply referred to trade and transactions between Iran and third countries, or their companies and nationals.

The Court unanimously disposed of the first two preliminary objections by subjecting its determination of the subject-matter of any dispute to an examination under an "objective basis . . . while giving particular attention to the formulation of the dispute chosen by the Applicant," scrutinizing the Application, as well as the written and oral pleadings of the parties and the facts alleged by the Applicant.[8] Based on this examination, the Court held that

> the fact that the dispute between the Parties has arisen in connection with and in the context of the decision of the United States to withdraw from the JCPOA does not in itself preclude the dispute from relating to the interpretation or application of the Treaty of Amity . . . Certain acts may fall

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> within the ambit of more than one instrument and a dispute relating to those acts may relate to the "interpretation or application" of more than one treaty or other instrument. To the extent that the measures adopted by the United States following its decision to withdraw from the JCPOA might constitute breaches of certain obligations under the Treaty of Amity, those measures relate to the interpretation or application of that Treaty.[9]

The Court further observed that "the 'third country measures' objection does not concern all of Iran's claims, but only the majority of them . . . the second preliminary objection of the United States relates to the scope of certain obligations relied upon by the Applicant in the present case and raises legal and factual questions which are properly a matter for the merits."[10] In his Declaration, Judge Tomka disagreed with this approach, since the Court did not see that:

> The legal question which the Court should have determined at the present stage of the proceedings is whether the Treaty of Amity provides Iran (and its nationals or companies) with a right not to have its trade, commercial or financial relations with third States (and their nationals or companies) interfered with by the United States' measures, or, in other words, whether the United States have obligations under the provisions invoked by Iran not to interfere with these trade, commercial or financial relations.[11]

Judge Tomka argued that the exclusive preliminary character of this legal question could have been resolved by directly interpreting the 1955 Treaty, as the Court did in prior cases also involving the 1955 Treaty, such as its 1996 Judgment on Preliminary Objections in the *Oil Platforms* case, and the 2019 Judgment on Preliminary Objections in the *Certain Iranian Assets* case.[12]

By a vote of 15 to 1, the Court rejected the United States' third preliminary objection, which sought the inadmissibility of Iran's Application due to the alleged abuse of process and judicial impropriety of exercising jurisdiction over Iran's claims when the real dispute exclusively concerns the JCPOA, and Iran did not resort to the required political mechanisms under the JCPOA to advance its concerns about the United States' nuclear-related sanctions.[13] The Court stressed that "if the Court eventually found on the merits that certain obligations under the Treaty of Amity have indeed been breached, this would not imply giving Iran any 'illegitimate advantage' with regard to its nuclear programme, as contended by the United States."[14] Judge ad hoc Charles Brower held that Iran's application should have been deemed inadmissible as an abuse of process, since granting Iran's requested relief of removing sanctions related to the non-binding JCPOA would legally bind the United States, while Iran has already admitted to non-compliance with the JCPOA.[15]

The Court rejected the United States' fourth preliminary objection (unanimously) and fifth preliminary objection (on a 15 to 1 vote), which were based, respectively, on Article XX, paragraphs 1(b) and (d) of the 1955 Treaty. Article XX paragraph 1(b) and paragraph 1(d) respectively provide that the 1955 Treaty "does not preclude" the application of measures "relating to fissionable materials" or that are necessary to protect a state's "essential security interests."[16] The United States argued that these particular objections remain exclusively preliminary in character, and thus could be resolved by the Court without having to decide the merits of the case or cause any prejudgment of Iran's Application. The Court did not accept this argument. Instead, the Court recalled its prior ruling in the *Oil Platforms* case, which characterized Article XX, paragraph 1(d) of the 1955 Treaty as "confined to affording the Parties a defence on the merits," and in the present dispute, "there are equally no relevant grounds for a distinction with regard to subparagraph (b), which may [also] only afford a possible defence on the merits."[17] The Court held that "the two objections raised by the United States on the basis of Article XX, paragraph 1(b) and (d), cannot be considered as preliminary. A decision concerning these matters requires an analysis of issues of law and fact that should be left to the stage of the examination of the merits."[18] Judge ad hoc Brower took the view that Article XX, paragraph 1 (b) should have been treated as "a legitimately preliminary objection due to its language and the statements of both Parties that repeatedly tracked its language in relation to exactly the limited category of sanctions subject of [Iran's] Application."[19]

Conclusion

The Court's Judgment on Preliminary Objections in *Iran v. United States* is an example of the choice to accept jurisdiction, while punting blended legal and factual questions to the merits phase of the proceedings.[20] The Court has not always exercised the same choice. In previous cases, the Court declined jurisdiction after it directly resolved intertwined legal and factual questions related to preliminary objections. [21]

ENDNOTES

1 Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Judgment on Preliminary Objections (Feb. 3, 2021), https://www.icj-cij.org/public/files/case-related/175/175-20210203-JUD-01-00-EN.pdf [hereinafter Judgment on Preliminary Objections].

2 Judgment on Preliminary Objections, ¶ 114.

3 Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Application Instituting Proceedings (July 16, 2018), ¶¶ 39–49, https://www.icj-cij.org/public/files/case-related/175/175-20180716-APP-01-00-EN.pdf.

4 Judgment on Preliminary Objections, ¶ 31.

5 *Id.* ¶ 35.

6 *Id.* ¶ 37.

7 *Id.* ¶¶ 39–40.

8 *Id.* ¶ 53.

9 *Id.* ¶ 56.

10 *Id.* ¶¶ 76 and 82.

11 Declaration of Judge Tomka, ¶ 10.

12 Declaration of Judge Tomka, ¶¶ 6, 8.

13 *Id.* ¶¶ 87-88.

14 *Id.* ¶ 95.

15 Separate, Partly Concurring and Partly Dissenting, Opinion of Judge Ad Hoc Brower, para. 2.

16 *Id.* ¶ 98.

17 *Id.* ¶ 109.

18 *Id.* ¶ 110.

19 *Id.* ¶ 16.

20 *Id.* ¶ 81.

21 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. UAE), Judgment on Preliminary Objections (Feb. 4, 2021), ¶¶ 81–87, 115, https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf; Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment on Preliminary Objections (Apr. 1 2011), ¶¶ 156–184, 187, https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-00-EN.pdf; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment on Preliminary Objections (Oct. 5, 2016), ¶¶ 42–59, https://www.icj-cij.org/public/files/case-related/160/160-20161005-JUD-01-00-EN.pdf.

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3 FEBRUARY 2021
JUDGMENT

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

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

VIOLATIONS ALLÉGUÉES DU TRAITÉ D'AMITIÉ, DE COMMERCE ET DE DROITS CONSULAIRES DE 1955

(RÉPUBLIQUE ISLAMIQUE D'IRAN c. ÉTATS-UNIS D'AMÉRIQUE)

3 FÉVRIER 2021
ARRÊT

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INTERNATIONAL COURT OF JUSTICE

2021

3 February
General List
No. 175

YEAR 2021

3 February 2021

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

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

PRELIMINARY OBJECTIONS

Factual background.

1955 Treaty of Amity in force on date of filing of Application — Iran party to 1968 Treaty on Non-Proliferation of Nuclear Weapons — International Atomic Energy Agency and Security Council critical of Iran's nuclear activities — Security Council resolutions on Iranian nuclear issue — Iran subject to nuclear-related "additional sanctions" by United States — Joint Comprehensive Plan of Action ("JCPOA") concerning nuclear programme of Iran concluded on 14 July 2015 — Revocation of certain United States nuclear-related "sanctions" under Executive Order 13716 of 16 January 2016 — Participation of United States in JCPOA terminated under National Security Presidential Memorandum of 8 May 2018 — Reimposition by United States of "sanctions" on Iran, its nationals and companies under Executive Order 13846 of 6 August 2018.

*

Jurisdiction of the Court ratione materiae *under Article XXI of Treaty of Amity.*

First preliminary objection to jurisdiction: subject-matter of dispute — Question whether dispute concerns interpretation and application of Treaty of Amity or exclusively JCPOA — Subject-matter of dispute to be determined by the Court on objective basis — Particular account to be taken of facts identified by Applicant as basis for its claim — Opposing views as to whether impugned measures constitute violations of Treaty of Amity — Fact that dispute arose in context of decision of United States to withdraw from JCPOA does not preclude it from relating to interpretation and application of Treaty of Amity — A dispute may relate to certain acts that fall within ambit of more than one instrument — The Court cannot support argument that subject-matter of Iran's claims relates exclusively to JCPOA and not to Treaty of Amity — First preliminary objection to jurisdiction cannot be upheld.

Second preliminary objection to jurisdiction: "third country measures" — The Court must ascertain whether acts of which applicant complains fall within provisions of treaty containing compromissory clause — "Third country measures" objection does not concern all of Iran's claims but only majority of them — Were the Court to uphold second objection to jurisdiction the proceedings would not be terminated — Disagreement between the Parties about relevance of concept of "third country measures" — Disagreement between the Parties as regards territorial scope and ambit of provisions of Treaty of Amity allegedly breached by United States — Fact that some impugned measures directly targeted third States, their nationals or companies, does not automatically exclude them from ambit of Treaty of Amity — Second preliminary objection relates to the scope of certain obligations relied upon by Applicant — Also raises legal and factual questions which are properly a matter for the merits — Second preliminary objection to jurisdiction cannot be upheld.

*

Admissibility.

Preliminary objection to admissibility of Iran's Application: alleged abuse of process — Claim based on valid title of jurisdiction can be rejected on ground of abuse of process only in exceptional circumstances — No such exceptional circumstances in present case — Preliminary objection to admissibility rejected.

*

Objections on basis of Article XX, paragraph 1 (b) *and* (d)*, of Treaty of Amity.*

Article XX, paragraph 1 (b) *and* (d)*, of Treaty of Amity does not affect the Court's jurisdiction but affords a possible defence on the merits — Treaty of Amity does not preclude application of measures "relating to fissionable materials" under Article XX, paragraph 1* (b) *— Similarly, it does not preclude application of measures deemed necessary to protect a State's "essential security interests" under Article XX, paragraph 1* (d) *— A decision concerning these matters requires analysis of issues of law and fact that should be left to the merits — Arguments based on these provisions cannot provide basis for preliminary objections but may be presented at the merits stage — Preliminary objections based on Article XX, paragraph 1* (b) *and* (d)*, of Treaty of Amity rejected.*

JUDGMENT

Present: *President* YUSUF; *Vice-President* XUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN, SALAM, IWASAWA; *Judges* ad hoc BROWER, MOMTAZ; *Registrar* GAUTIER.

In the case concerning alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights,

between

the Islamic Republic of Iran,
represented by

Mr. Hamidreza Oloumiyazdi, Head of the Centre for International Legal Affairs of the Islamic Republic of Iran, Associate Professor of Private Law at Allameh Tabataba'i University, Tehran,

as Agent and Advocate;

Mr. Mohammad H. Zahedin Labbaf, Agent of the Islamic Republic of Iran to the Iran-United States Claims Tribunal, Director of the Centre for International Legal Affairs of the Islamic Republic of Iran in The Hague,

as Co-Agent and Counsel;

Mr. Seyed Hossein Sadat Meidani, Legal Adviser of the Ministry of Foreign Affairs of the Islamic Republic of Iran,

as Deputy Agent and Counsel;

Mr. Vaughan Lowe, QC, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, Essex Court Chambers, member of the Bar of England and Wales,

Mr. Alain Pellet, Emeritus Professor at the University Paris Nanterre, former Chairman of the International Law Commission, member of the Institut de droit international,

Mr. Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary-General of the Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,

Mr. Samuel Wordsworth, QC, Essex Court Chambers, member of the Bar of England and Wales, member of the Paris Bar,

Mr. Hadi Azari, Legal Adviser to the Centre for International Legal Affairs of the Islamic Republic of Iran, Assistant Professor of Public International Law at Kharazmi University, Tehran,

as Counsel and Advocates;

Mr. Behzad Saberi Ansari, Director General for International Legal Affairs, Ministry of Foreign Affairs of the Islamic Republic of Iran,

H.E. Mr. Alireza Kazemi Abadi, Ambassador Extraordinary and Plenipotentiary of the Islamic Republic of Iran to the Kingdom of the Netherlands,

Mr. Mohsen Izanloo, Deputy in Legal Affairs, Centre for International Legal Affairs of the Islamic Republic of Iran, Associate Professor of Law at University of Tehran,

as Senior Legal Advisers;

Mr. Luke Vidal, member of the Paris Bar, Sygna Partners,

Mr. Sean Aughey, Essex Court Chambers, member of the Bar of England and Wales,

Ms Philippa Webb, Professor at King's College London, Twenty Essex Chambers, member of the Bar of England and Wales, member of the Bar of the State of New York,

Mr. Jean-Rémi de Maistre, PhD candidate, Centre de droit international de Nanterre (CEDIN),

Mr. Romain Piéri, member of the Paris Bar, Sygna Partners, as Counsel;

Mr. Seyed Mohammad Asbaghi Namini, Acting Director, Department of International Claims, Centre for International Legal Affairs of the Islamic Republic of Iran,

Mr. Mahdad Fallah Assadi, Legal Adviser to the Centre for International Legal Affairs of the Islamic Republic of Iran,

Mr. Mohsen Sharifi, Acting Head, Department of Litigations and Private International Law, Ministry of Foreign Affairs of the Islamic Republic of Iran,

Mr. Yousef Nourikia, Second Counsellor, Embassy of the Islamic Republic of Iran in the Netherlands,

Mr. Alireza Ranjbar, Legal Adviser to the Centre for International Legal Affairs of the Islamic Republic of Iran,

Mr. Seyed Reza Rafiey, Legal Expert, Department of Litigations and Private International Law, Ministry of Foreign Affairs of the Islamic Republic of Iran,

Mr. Soheil Golchin, Legal Expert, Department of Litigations and Private International Law, Ministry of Foreign Affairs of the Islamic Republic of Iran,

Mr. Mahdi Khalili Torghabeh, Legal Expert, Ministry of Foreign Affairs of the Islamic Republic of Iran,

as Legal Advisers,

and

the United States of America,
represented by

Mr. Marik A. String, Acting Legal Adviser, United States Department of State, as Agent, Counsel and Advocate (until 28 January 2021);

Mr. Richard C. Visek, Acting Legal Adviser, United States Department of State, as Agent (from 28 January 2021);

Mr. Steven F. Fabry, Deputy Legal Adviser, United States Department of State, as Co-Agent and Counsel;

Mr. Paul B. Dean, Legal Counselor, Embassy of the United States of America in the Netherlands,

Ms Lara Berlin, Deputy Legal Counselor, Embassy of the United States of America in the Netherlands,

as Deputy Agents and Counsel;

Sir Daniel Bethlehem, QC, Twenty Essex Chambers, member of the Bar of England and Wales,

Ms Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva, member of the Institut de droit international,

Ms Kimberly A. Gahan, Assistant Legal Adviser, United States Department of State, Ms Lisa J. Grosh, Assistant Legal Adviser, United States Department of State,

as Counsel and Advocates;

Mr. Donald Earl Childress III, Counselor on International Law, United States Department of State,

Ms Maegan L. Conklin, Assistant Legal Adviser, United States Department of State, Mr. John D. Daley, Deputy Assistant Legal Adviser, United States Department of State, Mr. John I. Blanck, Attorney Adviser, United States Department of State,

Mr. Jonathan E. Davis, Attorney Adviser, United States Department of State, Mr. Joshua B. Gardner, Attorney Adviser, United States Department of State, Mr. Matthew S. Hackell, Attorney Adviser, United States Department of State, Mr. Nathaniel E. Jedrey, Attorney Adviser, United States Department of State, Mr. Robert L. Nightingale, Attorney Adviser, United States Department of State, Ms Catherine L. Peters, Attorney Adviser, United States Department of State, Mr. David B. Sullivan, Attorney Adviser, United States Department of State,

Ms Margaret E. Sedgewick, Attorney Adviser, United States Department of State, as Counsel;

Mr. Guillaume Guez, Assistant, Faculty of Law of the University of Geneva, Mr. John R. Calopietro, Paralegal Supervisor, United States Department of State, Ms Anjail B. Al-Uqdah, Paralegal, United States Department of State,

Ms Katherine L. Murphy, Paralegal, United States Department of State,

Ms Catherine I. Gardner, Administrative Assistant, Embassy of the United States of America in the Netherlands,

as Assistants,

THE COURT,

composed as above,
after deliberation,

delivers the following Judgment:

1. On 16 July 2018, the Islamic Republic of Iran (hereinafter "Iran") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter the "United States") with regard to alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights, which was signed by the two States in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter the "Treaty of Amity" or the "1955 Treaty").

2. In its Application, Iran seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article XXI, paragraph 2, of the 1955 Treaty.

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

4. The Registrar immediately communicated to the Government of the United States the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court, and the Request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and the Request for the indication of provisional measures by Iran.

5. In addition, by a letter dated 25 July 2018, the Registrar informed all Member States of the United Nations of the filing of the above-mentioned Application and Request for the indication of provisional measures.

6. Pursuant to Article 40, paragraph 3, of the Statute, the Registrar notified the Member States of the United Nations, through the Secretary-General, and any other State which is entitled to appear before the Court, of the filing of the Application, by transmission of the printed bilingual text of that document.

7. On 18 July 2018, the Registrar informed both Parties that the Member of the Court of the nationality of the United States, pursuant to Article 24, paragraph 1, of the Statute, had notified the President of the Court of her intention not to participate in the decision of the case. In accordance with Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, the United States chose Mr. Charles Brower to sit as judge *ad hoc* in the case.

8. Since the Court included upon the Bench no judge of Iranian nationality, Iran proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Djamchid Momtaz.

9. On 23 July 2018, the President of the Court, acting in conformity with Article 74, paragraph 4, of the Rules of Court, addressed an urgent communication to the Secretary of State of the United States, calling upon the Government of the United States "to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects". A copy of that letter was transmitted to the Agent of Iran.

10. By an Order of 3 October 2018, the Court, having heard the Parties, indicated the following provisional measures:

> "(1) The United States of America, in accordance with its obligations under the 1955 Treaty of Amity, Economic Relations, and Consular Rights, shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of
>
> (i) medicines and medical devices;
>
> (ii) foodstuffs and agricultural commodities; and
>
> (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation;
>
> (2) The United States of America shall ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to in point (1);
>
> (3) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve." (*I.C.J. Reports 2018 (II)*, p. 652, para. 102.)

11. By an Order dated 10 October 2018, the Court fixed 10 April 2019 and 10 October 2019, as the respective time-limits for the filing of a Memorial by Iran and a Counter-Memorial by the United States.

12. In a letter dated 19 February 2019, Iran requested the Court to "exercise its authority, under Article 78 of the Rules, to call on the USA to explain, as a matter of urgency, the specific steps that have been and are being taken to implement the Court's Order of 3 October 2018".

13. Following this communication, the Court requested the United States to provide, by 4 June 2019, information on its implementation of the provisional measures indicated by the Court in its Order of 3 October 2018 and Iran to furnish, by the same date, any information it might have in that regard. This information was submitted by both Parties within the time-limit fixed for that purpose. By letters dated 19 June 2019, the Parties were informed that the Court had taken due note of the responses provided by them, and that it considered that any issues relating to the implementation of the provisional measures may be addressed at a later stage, if the case proceeded to the merits.

14. By a letter dated 1 April 2019, the Co-Agent of Iran requested the Court to extend the time-limit for the filing of the Memorial by one and a half months, and indicated the reasons for that request. On receipt of that letter, the Deputy-Registrar, referring to Article 44, paragraph 3, of the Rules of Court, transmitted a copy thereof to the Agent of the United States. By a letter dated 5 April 2019, the Agent of the United States indicated that her Government had no objection to the extension of the time-limit requested by Iran.

15. By an Order dated 8 April 2019, the President of the Court extended to 24 May 2019 and 10 January 2020, the respective time-limits for the filing of the Memorial by Iran and a Counter-Memorial by the United States. The Memorial of Iran was filed within the time-limit thus extended.

16. On 23 August 2019, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the United States raised certain preliminary objections (see paragraph 38 below). Consequently, by an Order of 26 August 2019, the President of the Court, noting that, by virtue of Article 79, paragraph 5, of the Rules, the proceedings on the merits were suspended, fixed 23 December 2019 as the time-limit within which Iran could present a written statement of its observations and submissions on the preliminary objections raised by the United States. Iran filed its written statement within the time-limit so prescribed and the case became ready for hearing with respect to the preliminary objections.

17. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings and documents annexed thereto would be made accessible to the public on the opening of the oral proceedings.

18. Public hearings on the preliminary objections raised by the United States were held by video link from 14 to 21 September 2020, at which the Court heard the oral arguments and replies of:

For the United States: Mr. Marik A. String,
Sir Daniel Bethlehem,
Ms Lisa J. Grosh,
Ms Kimberly A. Gahan,
Ms Laurence Boisson de Chazournes.

For Iran: Mr. Hamidreza Oloumiyazdi,
Mr. Vaughan Lowe,
Mr. Samuel Wordsworth,
Mr. Jean-Marc Thouvenin,
Mr. Alain Pellet.

*

19. In the Application, the following claims were made by Iran:

"Iran requests the Court to adjudge, order and declare that:

(a) The USA, through the 8 May and announced further sanctions referred to in the present Application, with respect to Iran, Iranian nationals and companies, has breached its obligations to Iran under Articles IV (1), VII (1), VIII (1), VIII (2), IX (2) and X (1) of the Treaty of Amity;

(b) The USA shall, by means of its own choosing, terminate the 8 May sanctions without delay;

(c) The USA shall immediately terminate its threats with respect to the announced further sanctions referred to in the present Application;

(d) The USA shall ensure that no steps shall be taken to circumvent the decision to be given by the Court in the present case and will give a guarantee of non-repetition of its violations of the Treaty of Amity;

(e) The USA shall fully compensate Iran for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves the right to submit and present to the Court in due course a precise evaluation of the compensation owed by the USA."

20. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Iran in its Memorial:

"Iran respectfully requests the Court to adjudge, order and declare that:

(a) The United States, through the measures that were implemented pursuant to or in connection with the U.S. Presidential Memorandum of 8 May 2018 and announced further measures, with respect to Iran, Iranian nationals and companies, has breached its obligations to Iran under Articles IV (1), IV (2), V (1), VII (1), VIII (1), VIII (2), IX (2), IX (3) and X (1) of the Treaty of Amity;

(b) The United States shall, by means of its own choosing, terminate the measures that were implemented pursuant to or in connection with the U.S. Presidential Memorandum of 8 May 2018 and announced further measures without delay;

(c) The United States shall immediately terminate its threats with respect to announced further sanctions;

(d) The United States shall ensure that no steps shall be taken to circumvent the decision to be given by the Court in the present case and will give a guarantee of non-repetition of its violations of the Treaty of Amity;

(e) The United States shall fully compensate Iran for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves the right to submit and present to the Court in due course a precise evaluation of the compensation owed by the United States."

21. In the preliminary objections, the following submissions were presented on behalf of the Government of the United States:

"[T]he United States 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."

22. In the written statement of its observations and submissions on the preliminary objections, the following submissions were presented on behalf of the Government of Iran:

"Iran respectfully requests that the Court:

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

(b) adjudge and declare:

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

(ii) that Iran's claims are admissible."

23. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the United States,

at the hearing of 18 September 2020:

> "For the reasons explained during these hearings and any other reasons the Court might deem appropriate, the United States of America requests that the Court uphold the U.S. preliminary objections set forth in its written submission and at this hearing and decline to entertain the case. Specifically, the United States of America requests that the Court:
>
> *(a)* Dismiss Iran's claims in their entirety as outside the Court's jurisdiction.
>
> *(b)* Dismiss Iran's claims in their entirety as inadmissible.
>
> *(c)* Dismiss Iran's claims in their entirety as precluded by Article XX, paragraph 1 (b) of the Treaty of Amity.
>
> *(d)* Dismiss Iran's claims in their entirety as precluded by Article XX, paragraph 1 (d) of the Treaty of Amity.
>
> *(e)* Dismiss as outside the Court's jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on third country measures."

On behalf of the Government of Iran,

at the hearing of 21 September 2020:

"The Islamic Republic of Iran respectfully requests that the Court:

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

(b) adjudge and declare:

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

(ii) that Iran's claims are admissible."

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* *

I. FACTUAL BACKGROUND

24. In the present proceedings, Iran alleges violations by the United States of the Treaty of Amity, which was signed by the Parties on 15 August 1955 and entered into force on 16 June 1957 (see paragraph 1 above). It is not disputed by the Parties that on the date of the filing of the Application, namely, on 16 July 2018, the Treaty of Amity was in force. In accordance with Article XXIII, paragraph 3, of the Treaty of Amity, "[e]ither High Contracting Party may, by giving one year's written notice to the other High Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter". By a diplomatic Note dated 3 October 2018 addressed by the United States Department of State to the Ministry of Foreign Affairs of Iran, the United States, in accordance with Article XXIII, paragraph 3, of the Treaty of Amity, gave "notice of the termination of the Treaty".

25. As regards the events forming the factual background of the case, the Court recalls that Iran is a party to the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968. According to Article III of this Treaty, each non-nuclear-weapon State party undertakes to accept safeguards, as set forth in an agreement to be negotiated and

concluded with the International Atomic Energy Agency (hereinafter the "IAEA" or "Agency"), for the exclusive purpose of verification of the fulfilment of its obligations assumed under the Treaty "with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices". The Agreement between Iran and the Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons has been in force since 15 May 1974. In a report dated 6 June 2003, the IAEA Director General stated that Iran had "failed to meet its obligations under its Safeguards Agreement with respect to the reporting of nuclear material, the subsequent processing and use of that material and the declaration of facilities where the material was stored and processed". In its resolution GOV/2006/14 of 4 February 2006, the Agency's Board of Governors recalled

> "Iran's many failures and breaches of its obligations to comply with its NPT Safeguards Agreement and the absence of confidence that Iran's nuclear programme is exclusively for peaceful purposes resulting from the history of concealment of Iran's nuclear activities, the nature of those activities and other issues arising from the Agency's verification of declarations made by Iran since September 2002"

and requested the Director General to report the matter to the Security Council of the United Nations.

26. On 29 March 2006, the President of the Security Council made a statement on behalf of the Council in which he referred to the Security Council's serious concern regarding "Iran's decision to resume enrichment-related activities, including research and development". He further noted that the Security Council underlined "the particular importance of re-establishing full and sustained suspension" of these activities, "to be verified by the IAEA".

27. On 31 July 2006, the Security Council, acting under Article 40 of Chapter VII of the Charter of the United Nations, adopted resolution 1696 (2006), in which it noted, with serious concern, Iran's decision "to resume enrichment-related activities" and demanded "in this context, that Iran shall suspend all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA". The Security Council further expressed its intention, in the event of non-compliance by Iran, to adopt appropriate measures under Article 41 of Chapter VII of the Charter of the United Nations, "to persuade Iran to comply with [the] resolution and the requirements of the IAEA".

28. On 23 December 2006, the Security Council, acting under Article 41 of Chapter VII of the Charter of the United Nations, adopted resolution 1737 (2006), in which it noted, with serious concern, *inter alia*, that Iran had not established "full and sustained suspension of all enrichment-related and reprocessing activities as set out in resolution 1696 (2006)". The Security Council expressed its determination "to give effect to its decisions by adopting appropriate measures to persuade Iran to comply with resolution 1696 (2006) and with the requirements of the IAEA, and also to constrain Iran's development of sensitive technologies in support of its nuclear and missile programmes". Thus, in resolution 1737 (2006), the Security Council decided that Iran must suspend "all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA", as well as "work on all heavy water-related projects, including the construction of a research reactor moderated by heavy water, also to be verified by the IAEA". It further decided that all States must take the necessary measures to prevent the supply, sale or transfer of all items, materials, equipment, goods and technology which could contribute to Iran's nuclear-related activities. Subsequently, the Security Council adopted further resolutions on the Iranian nuclear issue, namely, resolutions 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010) and 2224 (2015).

29. On 26 July 2010, the Council of the European Union adopted Decision 2010/413/CFSP and, on 23 March 2012, Regulation No. 267/2012 concerning nuclear-related "restrictive measures against Iran", banning arms exports, restricting financial transactions, imposing the freezing of assets and restricting travel for certain individuals.

30. The United States, by Executive Orders 13574 of 23 May 2011, 13590 of 21 November 2011, 13622 of 30 July 2012, 13628 of 9 October 2012 (Sections 5 to 7, and 15) and 13645 of 3 June 2013, imposed a number of nuclear-related "additional sanctions" with regard to various sectors of Iran's economy.

31. On 14 July 2015, China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy, and Iran concluded the Joint Comprehensive Plan of Action (hereinafter the "JCPOA") concerning the nuclear programme of

Iran. The declared purpose of that instrument was to ensure the exclusively peaceful nature of Iran's nuclear programme and to produce "the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme".

32. On 20 July 2015, the Security Council adopted resolution 2231 (2015), whereby it endorsed the JCPOA and urged its "full implementation on the timetable established [therein]". In the same resolution, the Security Council provided, in particular, for the termination under certain conditions of provisions of previous Security Council resolutions on the Iranian nuclear issue and set out measures of implementation of the JCPOA. Annex A to Security Council resolution 2231 (2015) reproduced the text of the JCPOA.

33. The JCPOA describes, in particular, the steps to be taken by Iran within a set timeframe, regarding agreed limitations on all uranium enrichment and uranium enrichment-related activities and addresses the co-operation of Iran with the IAEA. It provides for the termination of all sanctions adopted by the Security Council and the European Union, respectively, as well as the cessation of the implementation of certain United States sanctions (as described in Annex II to the JCPOA) concerning, in particular, the financial and banking system, investments, the petrochemical industry, the energy, shipping, shipbuilding and automotive sectors, and trade in commodities. Finally, the JCPOA contains an "Implementation Plan" as well as provisions regarding the resolution of disputes. These provisions establish a procedure to be used, should one of the participants complain that another participant is not meeting its commitments under the JCPOA.

34. On 16 January 2016, the President of the United States issued Executive Order 13716 revoking or amending a certain number of earlier Executive Orders on "nuclear-related sanctions" imposed on Iran or Iranian nationals.

35. On 8 May 2018, the President of the United States issued a National Security Presidential Memorandum announcing the end of the participation of the United States in the JCPOA and directing the reimposition of "sanctions lifted or waived in connection with the JCPOA". In the Memorandum, the President of the United States indicated that Iranian or Iran-backed forces were engaging in military activities in the surrounding region and that Iran remained a State sponsor of terrorism. He further stated that Iran had publicly declared that it would deny the IAEA access to military sites and that, in 2016, Iran had twice violated the JCPOA's heavy-water stockpile limits. The Presidential Memorandum determined that it was in the national interest of the United States to reimpose sanctions "as expeditiously as possible", and "in no case later than 180 days" from the date of the Memorandum.

36. Simultaneously, the United States Department of the Treasury's Office of Foreign Assets Control announced that "sanctions" would be reimposed in two steps. Upon expiry of a period of 90 days, the United States would reimpose a certain number of measures concerning, in particular, financial transactions, trade in metals, the importation of Iranian-origin carpets and foodstuffs, and the export to Iran of commercial passenger aircraft and related parts. Upon expiry of a period of 180 days, the United States would reimpose additional measures.

37. On 6 August 2018, the President of the United States issued Executive Order 13846 reimposing "certain sanctions" on Iran, its nationals and companies. Earlier Executive Orders implementing the commitments of the United States under the JCPOA were revoked.

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38. The United States has raised five preliminary objections. The first two relate to the jurisdiction of the Court *ratione materiae* to entertain the case on the basis of Article XXI, paragraph 2, of the Treaty of Amity. The third contests the admissibility of Iran's Application by reason of an alleged abuse of process and on grounds of judicial propriety. The last two are based on subparagraphs *(b)* and *(d)* of Article XX, paragraph 1, of the Treaty of Amity. Although, according to the Respondent, they relate neither to the jurisdiction of the Court nor to the admissibility of the Application, the Respondent requests a decision upon them before any further proceedings on the merits.

The Court will begin by considering issues related to its jurisdiction.

II. JURISDICTION OF THE COURT *RATIONE MATERIAE* UNDER ARTICLE XXI OF THE TREATY OF AMITY

39. The United States contests the Court's jurisdiction to entertain the Application of Iran. It submits that the dispute before the Court falls outside the scope *ratione materiae* of Article XXI, paragraph 2, of the Treaty of Amity, the basis of jurisdiction invoked by Iran, which provides that:

> "Any 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."

40. According to the Respondent, the dispute which Iran seeks to bring before the Court falls outside the scope of the above-mentioned compromissory clause for two reasons which, in its view, are alternative in nature.

First, the United States contends 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". Therefore, in the Respondent's view, the subject-matter of the dispute which Iran seeks to have settled by the Court is not "the interpretation or application of the . . . Treaty" within the meaning of the second paragraph of Article XXI, as cited above.

Secondly, the United States argues that the vast majority of the measures challenged by Iran fall outside the scope *ratione materiae* of the Treaty of Amity, because they principally concern trade and transactions between Iran and third countries, or their companies and nationals, and not between Iran and the United States, or their companies and nationals.

41. The Court will begin by examining the first of these two objections, which, if well founded, would cause all of Iran's claims to be excluded from the Court's jurisdiction; then, if necessary, it will consider the second objection, which concerns only the majority, and not the entirety, of the claims at issue.

1. FIRST PRELIMINARY OBJECTION TO JURISDICTION: THE SUBJECT-MATTER OF THE DISPUTE

42. According to the United States, the dispute that Iran seeks to bring before the Court has arisen out of the United States' decision of 8 May 2018 to cease participation in the JCPOA and thereby to reimpose the sanctions that it had lifted under that instrument. The United States maintains that, by its Application, Iran in fact seeks the restoration of the sanctions relief provided by the United States when it was a participant in the JCPOA. The dispute thus exclusively pertains to the United States' decisions relating to the JCPOA; the case is inextricably bound up in the latter and has no real relationship to the Treaty of Amity.

43. The United States contends that the foregoing is evidenced by the text of the diplomatic Note of 11 June 2018, by which Iran claims to have notified the United States of the existence of the dispute now before the Court. The United States observes that, in that Note, Iran complains of the "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'", without even mentioning the Treaty of Amity. According to the United States, a second Note from Iran, dated 19 June 2018, also focuses exclusively on the United States' decision to cease participation in the JCPOA and to reimpose the previously lifted sanctions.

44. The United States notes that Iran brought its claims regarding the alleged wrongfulness, under the Treaty of Amity, of the measures that it is challenging only when these were reinstated as a result of the United States' withdrawal from the JCPOA, even though the measures in question had been in force prior to the adoption of the JCPOA — in some cases for decades — without Iran invoking the Treaty of Amity to challenge their imposition.

45. Equally telling, in the United States' view, is the fact that Iran is challenging before the Court only the reimposition of the sanctions that had been lifted under the JCPOA. The Respondent points out that the JCPOA provided for the suspension or removal only of "multilateral and national sanctions related to Iran's nuclear programme", and that, as a result, the other measures aimed at Iran which had been put in place by the United States before the adoption of the JCPOA continued to apply during the period in which the latter was implemented.

46. All the foregoing demonstrates, in the view of the Respondent, that the true subject-matter of the dispute relates exclusively to the JCPOA. According to the United States, the JCPOA is a multilateral political arrangement which does not create legally binding obligations. Moreover, it does not contain any clause giving the Court jurisdiction to entertain a dispute arising between two or more JCPOA participants.

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47. Iran rejects the arguments raised by the United States in support of the first preliminary objection to jurisdiction. It asserts that the subject-matter of the dispute that it has submitted to the Court is indeed the interpretation and application of the Treaty of Amity, and that the dispute thus falls squarely within the scope of the Treaty's compromissory clause.

48. According to Iran, its Application wholly and exclusively concerns violations of the Treaty of Amity. The measures that it challenges constitute violations of the Treaty of Amity, whether or not they are also associated with, or adopted against the background of, the JCPOA. The question is simply whether, as the Applicant maintains, those measures are inconsistent with the Treaty, without there being any need to determine whether or not they also breach the JCPOA.

49. Iran adds that the fact that the JCPOA makes no reference to the settlement of disputes by the Court is irrelevant, given that the subject-matter of the dispute now before the Court is compliance with the Treaty of Amity, not the JCPOA. Although the JCPOA does in fact contain a specific dispute settlement mechanism, nothing suggests that this mechanism might have the effect of removing from the jurisdiction of the Court any dispute relating to measures which, while falling within the scope of a clause conferring jurisdiction on the Court, might also be relevant to the JCPOA.

50. Finally, in response to the United States' argument that Iran did not challenge the imposition of the disputed measures before the JCPOA was adopted or during the negotiation leading up to its adoption, the Applicant replies that it did in fact protest against the United States' measures, which it considers to be contrary to international law. It adds that it is for each State to determine at what point the circumstances warrant pursuing its rights through judicial means rather than continuing only to seek a diplomatic settlement, which is what the Applicant has done in this instance by deciding to bring the present dispute before the Court.

* *

51. The Court notes that the Parties do not contest that there is a dispute between them, but they disagree as to whether this dispute concerns the interpretation and application of the Treaty of Amity, as Iran claims, or exclusively the JCPOA, as the United States contends. In the latter case, the dispute would fall outside the scope *ratione materiae* of the compromissory clause of the Treaty of Amity.

52. As the Court has consistently recalled, while it is true that, in accordance with Article 40, paragraph 1, of the Statute, the applicant must indicate to the Court what it considers to be the "subject of the dispute", it is for the Court to determine, taking account of the parties' submissions, the subject-matter of the dispute of which it is seised (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447-449, paras. 29-32). As it stated in the *Nuclear Tests* cases:

> "[I]t is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30.)

53. The Court's determination of the subject-matter of the dispute is made "on an objective basis" (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26), "while giving particular attention to the formulation of the dispute chosen by the Applicant" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30). To identify the subject-matter of the dispute, the Court bases itself on the application, as well as on the written and oral pleadings of the parties. In particular, it takes account of the facts that the applicant identifies as the basis for its claim

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

54. In the present case, according to the submissions presented in its Application and its Memorial, Iran essentially seeks to have the Court declare that the measures reimposed pursuant to the United States' decision expressed in the Presidential Memorandum of 8 May 2018 are in breach of various obligations of the United States under the Treaty of Amity, and consequently to have the situation prior to that decision restored. The United States contests that the impugned measures constitute violations of the Treaty of Amity. Hence there exists an opposition of views which amounts to a dispute relating to the Treaty of Amity.

55. It is true that this dispute arose in a particular political context, that of the United States' decision to withdraw from the JCPOA. However, as the Court has had occasion to observe:

> "[L]egal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them." (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 20, para. 37.)

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

57. Even if it were true, as the Respondent contends, that a judgment of the Court upholding Iran's claims under the Treaty of Amity would result in the restoration of the situation which existed when the United States was still participating in the JCPOA, it nonetheless would not follow that the dispute brought before the Court by Iran concerns the JCPOA and not the Treaty of Amity.

58. The Court notes that the United States has made clear that it does not assert that the existence of a connection between the dispute and its decision to withdraw from the JCPOA suffices in itself to preclude the Court from finding that it has jurisdiction over Iran's claims under the Treaty of Amity, or that jurisdiction under the Treaty is precluded solely because the dispute is part of a broader context that includes the JCPOA.

59. The Respondent's argument is that the very subject-matter of Iran's claims in this case relates exclusively to the JCPOA, and not to the Treaty of Amity. The Court does not see how it could support such an analysis without misrepresenting Iran's claims as formulated by the Applicant. The Court's "duty to isolate the real issue in the case and to identify the object of the claim" (see paragraph 52 above) does not permit it to modify the object of the submissions, especially when they have been clearly and precisely formulated. In particular, the Court cannot infer the subject-matter of a dispute from the political context in which the proceedings have been instituted, rather than basing itself on what the applicant has requested of it.

60. For the reasons set out above, the Court cannot uphold the first preliminary objection to jurisdiction raised by the United States.

2. Second preliminary objection to jurisdiction: "third country measures"

61. The United States contends that, even if the actual subject-matter of the dispute were the application of the Treaty of Amity and not of the JCPOA, the Court would lack jurisdiction to entertain the vast majority of Iran's claims, as those claims relate to measures which principally concern trade or transactions between Iran and third countries, or between their nationals and companies. According to the Respondent, the Treaty of Amity is applicable

only to trade between the two States parties, or their nationals and companies, and not to trade between one of them and a third country, or their nationals and companies.

62. According to the United States, the vast majority of the measures implemented or reinstated under the Memorandum of 8 May 2018 concern the trade or transactions of Iran (or its companies and nationals) with third countries (or their companies and nationals). Indeed, the measures aimed directly at "U.S. persons" (within the specific meaning in which this category of person is defined by the JCPOA), seeking to prohibit such persons from carrying out certain operations with Iran or Iranian entities, had not been lifted by the JCPOA; they were therefore not reinstated by the Memorandum of 8 May 2018 and its implementing measures. Consequently, according to the United States, since Iran is only challenging before the Court the lawfulness of the "8 May measures" under the Treaty of Amity, it is thus complaining of measures of which the vast majority do not affect the commercial or financial relations between the United States and Iran, but between Iran and third countries, or between their companies and nationals. According to the Respondent, such measures, which it characterizes as "third country measures", fall outside the scope of the Treaty of Amity.

63. More specifically, the United States explains that the disputed measures can be divided into four categories, according to their purpose: (i) the reimposition of certain sanctions provisions under United States 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 relisting of certain persons on the Department of the Treasury's Specially Designated Nationals and Blocked Persons List or SDN List (which identifies natural or legal persons from specially designated countries or subject to a block on assets); and (iv) the revocation of certain licensing actions related to carpets, foodstuffs, commercial passenger aircraft and parts, and activities of foreign entities owned or controlled by United States natural or legal persons.

The Respondent contends that the measures in the first three categories are "third country measures" which do not fall within the scope of the Treaty of Amity. It states that its second objection to jurisdiction is not directed at Iran's claims relating to measures in the fourth category.

64. As regards the first three categories of measures, and in particular those involving the reimposition of certain statutory provisions governing sanctions which had been withdrawn under the JCPOA, the United States points out that the latter specified that "[t]he 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". The United States argues that, as a result, leaving aside the limited fourth category referred to in paragraph 63 above, the only sanctions that were lifted during the period of application of the JCPOA were those aimed at third States or their companies and nationals, and that it was only such "third country measures" that were reinstated after 8 May 2018.

65. According to the Respondent, the same applies to the provisions resulting from Executive Order 13846, which reinstated certain earlier Executive Orders that had been terminated or amended in connection with the implementation of the JCPOA. The sanctions reimposed by Executive Order 13846 are those directed at non-United States persons.

66. Lastly, regarding the return of certain persons and assets to the United States Department of the Treasury's SDN List, the Respondent maintains that the relisting of more than 400 individuals or entities principally affected the nationals and companies of third countries by prohibiting those nationals or companies, on pain of sanctions, from supplying goods and services to Iranian persons included in the list.

67. Having so characterized the measures challenged by Iran in these proceedings, the United States argues that such measures do not fall within the terms of any of the provisions of the Treaty of Amity, which contains no clause that might require the United States either to take or to refrain from taking any measures in respect of trade or transactions between Iran and a third country. In particular, according to the United States, such measures do not fall within the terms of any of the provisions of the Treaty of Amity which Iran claims to have been violated, namely Articles IV (paras. 1 and 2), V (para. 1), VII (para. 1), VIII (paras. 1 and 2), IX (paras. 2 and 3) and X (para. 1).

68. The United States maintains that Article IV, paragraph 2, and Article V, paragraph 1, are expressly limited to conduct that occurs within the territory of the United States. Likewise, according to the Respondent, Iran is incorrect in claiming that Article VII, paragraph 1, which prohibits restrictions on the transfer of funds, could apply to the United States' measures that affect payments to or from third countries, and not merely to or from the territory of Iran.

69. With regard to Article VIII, paragraphs 1 and 2, which set forth certain obligations relating to the exportation and importation of products, the United States considers that these provisions concern only products of Iran destined for import to the territory of the United States or products of the United States destined for export to Iran. For similar reasons, according to the United States, the measures concerning third States fall outside the scope of Article IX, paragraphs 2 and 3, which require each party to accord certain treatment to the companies and nationals of the other party in matters of importation and exportation, and in respect of the ability of companies to obtain marine insurance. Lastly, the United States points out that Article X, paragraph 1, which provides that "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation", contains an "important territorial limitation" and therefore does not apply to goods that are subject to intermediate transactions with third countries.

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70. Iran challenges the concept of "third country measures" which underlies the United States' second preliminary objection to jurisdiction. According to Iran, this is not only an invention on the part of the Respondent, but above all a concept that is misleading, since in reality all the United States' measures at issue in this case are specifically targeted at Iran and Iranian nationals and companies, not at third States or their nationals and companies. Iran cites as evidence of this, in particular, the words of the United States Department of the Treasury of 5 November 2018, which described the measures at issue as "the toughest U.S. sanctions ever imposed on Iran, [which] will target critical sectors of Iran's economy".

71. Taking the example of Article X, paragraph 1, of the Treaty of Amity, which protects "freedom of commerce" "[b]etween the territories of the two High Contracting Parties", Iran points out that it matters little whether an obstruction to that freedom takes the form of the withdrawal by the United States of a licence permitting an American company to sell products to an Iranian company (a measure which the Respondent does not contest falls within the scope of the Treaty), or of a United States' sanction on a third State bank or other business that prevents the Iranian company from paying for or physically acquiring the products sold by the American company (which would be a so-called "third country measure").

72. Iran maintains that its Application is based on certain provisions of the Treaty of Amity interpreted in accordance with the rules codified in the Vienna Convention on the Law of Treaties. The Applicant emphasizes that the ordinary meaning of the text is of key importance and that the context must also be taken into account. In this respect, Iran acknowledges that certain provisions of the Treaty of Amity contain territorial limitations. But the very fact that this is the case in certain provisions is seen by Iran as providing an important part of the context for the interpretation of those provisions where such limitations are absent, since the obvious inference is that such absence is deliberate.

73. Having considered each of the Treaty provisions which it claims that the United States has violated, namely — according to the Application — Articles IV (para. 1), VII (para. 1), VIII (paras. 1 and 2), IX (para. 2) and X (para. 1), together with — under the terms of the Memorial — Articles IV (para. 2), V (para. 1) and IX (para. 3), Iran requests the Court to determine whether, on the basis of the relevant facts which it alleges, there could exist a violation of one or more of those provisions by the United States' measures which it is contesting. According to Iran, the "relevant facts" are in particular: that the object and effect of the United States' measures, including the "third country measures", is to deprive Iranian nationals and companies of their property and enterprises or to harm such property and enterprises on a large scale; that Iranian nationals and companies operating in the key sectors of Iran's economy are being deliberately targeted by the United States' measures; and that the sanctions are destroying the economy and currency of Iran, driving millions of people into poverty.

74. Reviewing the various provisions of the Treaty which it claims have been violated, Iran concludes that "the violations of the Treaty of 1955 pleaded by Iran . . . fall within the provisions of the Treaty and [that], as a

consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2", thus echoing the terms of the well-known statement of the Court in the *Oil Platforms* case.

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75. The Court recalls that, according to its well-established jurisprudence, in order to determine its jurisdiction *ratione materiae* under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it cannot limit itself to noting that one of the parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the acts of which the applicant complains fall within the provisions of the treaty containing the compromissory clause. This may require the interpretation of the provisions that define the scope of the treaty (see *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I. C.J. Reports 2018 (I)*, p. 308, para. 46; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16).

76. The Court observes that the "third country measures" objection does not concern all of Iran's claims, but only the majority of them. Indeed, the Respondent stated that one of the four categories into which it divides the measures put in place or reimposed pursuant to the Presidential Memorandum of 8 May 2018 (see paragraph 63 above) cannot be characterized as "third country measures" and is therefore not included in the second preliminary objection to jurisdiction. This fourth category consists of the revocation of certain licensing actions which had made it possible to engage in certain commercial or financial transactions with Iran during the period of implementation of the JCPOA. According to the Respondent, the licences in question, which were revoked pursuant to the Memorandum of 8 May 2018, benefited "U.S. persons" and their withdrawal is not included in the objection now under consideration.

77. It follows that even if the Court were to uphold the second objection to jurisdiction — and assuming that it does not accept any of the other preliminary objections, each of which concerns all of Iran's claims — the proceedings would not be terminated. They would in any event have to continue to the merits in respect of the category of measures challenged by Iran which, according to the United States, are not "third country measures".

The Court notes, however, that, as regards this category, the United States has declared that it "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" at a later stage in the proceedings, should they continue.

78. The Court observes that the Parties are in disagreement about the relevance of the concept of "third country measures" and about the effects that should follow from the application of such a concept in this case. While, according to the United States, the Court should find that it lacks jurisdiction to entertain most of Iran's claims, since the vast majority of the measures complained of by the Applicant are directed against "non-U.S." persons, companies or entities, Iran, on the other hand, contends that the concept of "third country measures" is irrelevant. It is only necessary, according to the Applicant, to examine each category of measures at issue in order to determine whether they fall within the scope of the various provisions of the Treaty of Amity which it claims to have been violated.

79. Moreover, the Parties disagree on the interpretation of the provisions of the Treaty which Iran claims to have been breached by the United States, as regards their territorial scope and their ambit. According to Iran, the provisions that do not contain an express territorial limitation must be interpreted generally as being applicable to activities exercised in all places, whereas, according to the United States, it follows from the object and purpose of the Treaty of Amity that it is concerned only with the protection of commercial and investment activities of one Party, or of its nationals or companies, on the territory of the other or in the context of trade between them. Furthermore, Iran maintains that the Treaty prohibits the United States from impairing the rights guaranteed to Iran and Iranian nationals and companies, not only through measures applied directly to those nationals or companies, or to "U.S. persons" in their relations with Iran, but also through measures directed in the first instance against a third party, whose real aim is however to prevent Iran, its nationals and its companies from enjoying their rights under the Treaty. The United States contests this view.

80. The Court observes that all the measures of which Iran complains — those put in place or reinstated as a result of the Presidential Memorandum of 8 May 2018 — are intended to weaken Iran's economy. Indeed, on the

basis of the official statements of the United States' authorities themselves, Iran, its nationals and its companies are the target of what the Respondent describes as "third country measures", as well as of the measures aimed directly against Iranian entities and of those against "U.S. persons" which are intended to prohibit them from engaging in transactions with Iran, its nationals or its companies.

However, it cannot be inferred from the above that all the measures at issue are capable of constituting breaches of the United States' obligations under the Treaty of Amity. What is decisive in this regard is whether each of the measures — or category of measures — under consideration is of such a nature as to impair the rights of Iran under the various provisions of the Treaty of Amity which the Applicant claims to have been violated.

81. Conversely, the fact that some of the measures challenged — whether or not they are "the vast majority", as the United States maintains — directly target third States or the nationals or companies of third States does not suffice for them to be automatically excluded from the ambit of the Treaty of Amity. Only through a detailed examination of each of the measures in question, of their reach and actual effects, can the Court determine whether they affect the performance of the United States' obligations arising out of the provisions of the Treaty of Amity invoked by Iran, taking account of the meaning and scope of those various provisions.

82. In sum, the Court considers that the second preliminary objection of the United States relates to the scope of certain obligations relied upon by the Applicant in the present case and raises legal and factual questions which are properly a matter for the merits (cf. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 586, para. 63). If the case were to proceed to the merits, such matters would be decided by the Court at that stage, on the basis of the arguments advanced by the Parties.

83. In light of the above, the Court finds that the second preliminary objection to jurisdiction raised by the United States cannot be upheld.

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84. For all the reasons set out above, the Court finds that it has jurisdiction *ratione materiae* to entertain the Application of Iran on the basis of Article XXI, paragraph 2, of the 1955 Treaty of Amity.

III. ADMISSIBILITY OF IRAN'S APPLICATION

85. The United States submits, in the alternative, a preliminary objection to the admissibility of Iran's Application. In its view, all claims brought by Iran are inadmissible because they would amount to an abuse of process and would raise questions of judicial propriety.

86. The Respondent observes that there is no comprehensive definition in the Court's jurisprudence of what type of conduct constitutes an abuse of process; what is considered an abuse will vary depending on the circumstances of the case. The United States contends that, while the notion of abuse of process may be tied to the principle of good faith, an analysis of whether a State has acted or is acting in good or bad faith is not necessarily required. The Respondent recalls that the Court may decline to hear a case where there exists clear evidence that the conduct of the applicant State amounts to an abuse of process.

87. The United States maintains that in the present case there are exceptional circumstances that warrant the dismissal by the Court of the entirety of the case on account of an abuse of process. The Respondent contends that through this case Iran is seeking to obtain "an illegitimate advantage" in respect of its nuclear activities and aims to bring "political and psychological pressure on the United States". As with regard to its first objection to the Court's jurisdiction, the United States argues that the dispute exclusively concerns the JCPOA. It asserts that, by bringing this case to the Court, Iran is seeking relief from the sanctions that had been lifted under the JCPOA and that had been reinstated subsequently. The United States points out that political mechanisms were set forth under the JCPOA to address the non-performance by a participant of its commitments, but that the participants did not consent to the jurisdiction of the Court to resolve disputes under that instrument. The Respondent contends that, were the case to proceed to the merits and the Court to grant the relief Iran has requested, the Applicant would

obtain the lifting of a specific set of nuclear-related sanctions, which "formed the heart of the bargain in the JCPOA". Iran could be granted relief from United States' nuclear-related sanctions without being bound to uphold its own commitments under the JCPOA. In light of these circumstances, which in the view of the Respondent are exceptional, the Application should be held inadmissible.

88. Moreover, the United States contends that the Court has the inherent power to decline to exercise its jurisdiction in order to protect the integrity of its judicial function. In the Respondent's view, it would be "reasonable, necessary and appropriate" for that purpose for the Court to declare the present case inadmissible. By hearing a case that raises questions deeply entangled with the JCPOA, the Court could compromise its judicial integrity. The United States contends that, if the Court were to grant Iran relief from nuclear-related sanctions, it would be placed "at odds with its inherently judicial function".

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89. Iran points out that the Court has had to consider arguments based on abuse of process in the past, but has stated that an abuse could occur only under exceptional circumstances which have never been found to exist. Iran argues that the threshold for an abuse of process is very high and may be reached only if supported by clear evidence.

90. In the present case, Iran contends that there are no exceptional circumstances that would justify the Court pronouncing an abuse of process. In Iran's view, it is normal that a dispute brought under a treaty has political implications. Responding to the United States' contention that Iran would obtain an "illegitimate advantage" if the Court were to pronounce in its favour, and that the case is really about the JCPOA and not the Treaty of Amity, Iran recalls that the Court has already considered similar contentions in other cases and concluded that the relevant circumstances did not constitute an abuse of process. The Applicant argues that asserting its rights under a treaty in force between the Parties cannot be illegitimate. Moreover, it maintains that access to judicial recourse cannot be barred simply because of the "risk of influencing the execution of another international instrument".

91. Iran further argues that, by exercising its jurisdiction in the present case, the Court would not compromise the integrity of its judicial function. It points out that the United States has not defined the conditions under which the Court should declare a case inadmissible for considerations of judicial propriety. Iran argues that for the Court to decide not to exercise its jurisdiction, there must exist circumstances "of such a nature that they are capable of preventing or hindering the capacity of the Court to address the specific legal and factual subject-matter" of the case. According to Iran, whether the dispute is entangled with the JCPOA, and whether there exists a risk of granting an "illegitimate advantage" to Iran, are not valid reasons for questioning the integrity of the judicial process. Iran argues that none of the claims it presents actually requires the Court to make any legal finding on the JCPOA; the fact that the JCPOA constitutes part of the factual background has no impact on the Court's exercise of its judicial function.

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92. The objection to admissibility raised by the United States is based on the contention that Iran's claims amount to an abuse of process and would work an injustice that would raise serious questions of judicial propriety". This is because "Iran has invoked the Treaty [of Amity] in a case involving a dispute that solely concerns the application of the JCPOA". The Court notes that the United States did not address its objection to the admissibility of Iran's Application during the oral hearings, but expressly maintained that objection.

93. As the Court observed in *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, "[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process" (*Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 336, para. 150). The Court has specified that there has to be "clear evidence" that the Applicant's conduct amounts to an abuse of process (for analogous statements, see *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, pp. 42-43, para. 113; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II)*, p. 433, para. 49).

94. In the present case, the Court has already ascertained that the dispute submitted by the Applicant concerns alleged breaches of obligations under the Treaty of Amity and not the application of the JCPOA (see paragraph 60 above). The Court has also found that the compromissory clause included in the Treaty of Amity provides a valid

basis for its jurisdiction with regard to the Applicant's claims (see paragraph 84 above). If the Court eventually found on the merits that certain obligations under the Treaty of Amity have indeed been breached, this would not imply giving Iran any "illegitimate advantage" with regard to its nuclear programme, as contended by the United States. Such a finding would rest on an examination by the Court of the treaty provisions that are encompassed within its jurisdiction.

95. In the view of the Court, there are no exceptional circumstances that would justify considering Iran's Application inadmissible on the ground of abuse of process. In particular, the fact that Iran only challenged the consistency with the Treaty of Amity of the measures that had been lifted in conjunction with the JCPOA and then reinstated in May 2018, without discussing other measures affecting Iran and its nationals or companies, may reflect a policy decision. However, as was noted in *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, the Court's judgment "cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement" (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52). In any event, the fact that most of Iran's claims concern measures that had been lifted in conjunction with the JCPOA and were later reinstated does not indicate that the submission of these claims constitutes an abuse of process.

96. In light of the foregoing, the Court finds that the objection to the admissibility of the Application raised by the United States must be rejected.

IV. OBJECTIONS ON THE BASIS OF ARTICLE XX, PARAGRAPH 1 *(B)* AND *(D)*, OF THE TREATY OF AMITY

97. The United States maintains that Article 79 (now Article 79*bis*) of the Rules of Court sets out three types of preliminary objections, namely objections to the jurisdiction of the Court, objections to the admissibility of the application, and any "other objection the decision upon which is requested before any further proceedings on the merits". The Respondent contends that the Court has recognized in the past that an objection may fall into this last category and may have an exclusively preliminary character even if it touches on certain aspects of the merits.

98. The United States submits that in the present case its objections based on Article XX, paragraph 1 *(b)* and *(d)* — which provide that the Treaty of Amity does not preclude the application of measures "relating to fissionable materials" or that are necessary to protect a State's "essential security interests" — fall into this third category of objections under Article 79 of the Rules of Court and are of an exclusively preliminary character. The Respondent argues that a determination on these objections can be made on the basis of the facts already before the Court, without deciding on the merits of the case and without prejudging Iran's claims. According to the United States, even though in its jurisprudence the Court has decided that objections based on Article XX, paragraph 1, of the Treaty of Amity were defences on the merits to be considered at a subsequent phase, in the present case the Court should examine them as a preliminary matter, in particular because they are "severable from the merits of Iran's claims". In the "interests of fairness, procedural economy, and the sound administration of justice", the United States maintains that the Court should render an early decision on these questions.

99. The United States argues that both objections cover the entirety of Iran's claims. It maintains, therefore, that a decision on the objections should be made at the preliminary stage of the proceedings.

100. In the United States' view, all measures at issue in this case can be categorized as "nuclear-related"; therefore, they are all covered by Article XX, paragraph 1 *(b)*, of the Treaty of Amity. The United States contends that, in light of the text and context of this provision, the phrase "relating to fissionable materials" gives a party a considerable degree of discretion for taking "a full range of measures developed and adopted to control and prevent proliferation of sensitive nuclear materials", and not only measures regulating direct trade in fissionable materials.

101. The United States notes that the present case is concerned solely with the measures reinstated on 8 May 2018, which were those that had been lifted with the adoption of the JCPOA. The Respondent indicates that all of those measures were categorized by JCPOA participants, including Iran, as "national sanctions related to Iran's nuclear programme". In the Respondent's opinion, for Article XX, paragraph 1 *(b)*, to apply, it is irrelevant that the measures were reimposed for both nuclear and non-nuclear related security reasons.

102. Additionally, the United States contends that the measures at issue fall within Article XX, paragraph 1 *(d)*, of the Treaty of Amity. The Respondent argues that the notion of essential security interests referred to in this provision is broad; to reach the required threshold, measures do not need to be taken in relation to an armed attack, or with regard to matters considered by the Security Council as a threat to international peace and security. The United States contends that "wide discretion" and "substantial deference" must be granted to the State invoking subparagraph *(d)* in determining whether national security is at stake and what measures are necessary.

103. In the present case, the United States indicates that in light of "Iran's ongoing record of violent and destabilizing acts", measures were necessary to protect the Respondent's essential security interests. The decision to reimpose sanctions was taken at the highest level of government, on the basis of an evaluation of Iran's nuclear ambitions, as well as other Iranian policies that were of concern for the United States, such as those related to the financing of terrorism.

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104. Iran argues that the Respondent's objections that are based on Article XX, paragraph 1, do not fall within the objections mentioned in Article 79 of the Rules of Court. Iran acknowledges that some preliminary objections may not be easily classified as either pertaining to the jurisdiction of the Court or to the admissibility of the application, but this does not mean that there exists a "third category" of preliminary objections which may include objections pertaining to the merits. Iran argues that, in order to be dealt with at this stage, "an objection must be jurisdictional in nature without touching upon the substance of the merits of the case". It maintains that the position of the United States, which argues that its objections do not affect the Court's jurisdiction but are nonetheless "preliminary in nature", is contradictory; in Iran's view, a preliminary objection can only be aimed at preventing the Court from exercising its jurisdiction. Iran argues that whether subparagraphs *(b)* and *(d)* of Article XX, paragraph 1, of the Treaty of Amity cover the entirety of its claims is irrelevant in determining the nature of the objections: these objections remain defences on the merits, whether they cover all of Iran's submissions or not.

105. Iran contends that there is no reason for the Court to depart from its findings in the case concerning *Certain Iranian Assets*, in which it concluded that "subparagraphs *(c)* and *(d)* of Article XX, paragraph 1, do not restrict its jurisdiction but merely afford the Parties a defence on the merits". Moreover, the Applicant submits that an extensive factual analysis would be necessary to decide on the objections based on subparagraphs *(b)* and *(d)* of Article XX, paragraph 1, and that such an analysis can only be conducted at the merits stage; it is "unsuitable and improper" at the present stage. Indeed, the facts and arguments in support of these objections are substantially the same as the ones forming the basis of the case on the merits. The Applicant submits that if the Court were to pronounce at this stage on the defences of Article XX, paragraph 1, Iran's rights would form the very subject-matter of the decision. Moreover, in the Applicant's view, at this stage of the proceedings the Court does not have in its possession all the necessary factual elements to make a determination on the objections raised on the basis of Article XX, paragraph 1 *(b)* and *(d)*.

106. Iran also points out that subparagraph *(b)* must be interpreted in light of the object and purpose of the Treaty and that therefore it only applies to trade, investment or other economic activities in relation to fissionable materials. Measures related to nuclear activity broadly speaking are not covered by Article XX, paragraph 1 *(b)*. In the present case, Iran contends that none of the measures in dispute concerns fissionable materials or their radioactive by-products.

107. In relation to subparagraph *(d)*, Iran maintains that the concerns of the United States with regard to its essential security interests did not justify implementing the measures at hand. The Applicant recalls that it is the Court's role to assess the probative value of the arguments put forward by the Respondent and to determine whether there exist reasonable grounds for the United States to consider that the imposition of the sanctions in dispute was necessary and proportional to protect its security interests. In the present case, Iran contends that the measures reimposed by the United States cannot be considered as necessary in order to protect its essential security interests. According to the Applicant, the invocation of Article XX, paragraph 1 *(d)*, by the United States is "unfounded and abusive".

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108. Article XX, paragraph 1, of the Treaty of Amity reads as follows:

"1. The present Treaty shall not preclude the application of measures:

. . . .

(b) relating to fissionable materials, the radio-active by-products thereof, or the sources thereof;

. . . .

(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."

109. The Court recalls that in the *Oil Platforms* case *(Islamic Republic of Iran* v. *United States of America)*, it found that "Article XX, paragraph 1 *(d)*, [of the Treaty of Amity] does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits" (*Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20). A similar view was expressed in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)* (*Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 25, para. 45), where the Court noted that the interpretation given to Article XX, paragraph 1, with regard to subparagraph *(d)* also applies to subparagraph *(c)*, which concerns measures "regulating the production of or traffic in arms, ammunition and implements of war". The Court observed that in this respect "there are no relevant grounds on which to distinguish [subparagraph *(c)*] from Article XX, paragraph 1, subparagraph *(d)*" (*ibid.*, p. 25, para. 46). The Court finds that there are equally no relevant grounds for a distinction with regard to subparagraph *(b)*, which may only afford a possible defence on the merits.

110. The Parties do not dispute that arguments based on Article XX of the Treaty of Amity do not affect either the Court's jurisdiction or the admissibility of the application. However, the Respondent argues that objections formulated on the basis of Article XX, paragraph 1 *(b)* and *(d)*, may be presented as preliminary according to Article 79 of the Rules of Court as "other objection[s] the decision upon which is requested before any further proceedings on the merits". For the following reasons, the two objections raised by the United States on the basis of Article XX, paragraph 1 *(b)* and *(d)*, cannot be considered as preliminary. A decision concerning these matters requires an analysis of issues of law and fact that should be left to the stage of the examination of the merits.

111. The Applicant contends that subparagraph *(b)*, which refers to measures "relating to fissionable materials, the radio-active by-products thereof, or the sources thereof", should be interpreted as addressing only measures such as those specifically concerning the exportation or importation of fissionable materials. It was however argued by the Respondent that subparagraph *(b)* applies to all measures of whatever content addressing Iran's nuclear programme, because they may all be said to relate to the use of fissionable materials. The question of the meaning to be given to subparagraph *(b)* and that of its implications for the present case do not have a preliminary character and will have to be examined as part of the merits.

112. The same applies to measures taken by the United States allegedly because they are deemed "necessary to protect its essential security interests" and are therefore argued to be comprised in the category of measures that are outlined in subparagraph *(d)*. The analysis of this objection would raise the question of the existence of such essential security interests and may require an assessment of the reasonableness and necessity of the measures in so far as they affect the obligations under the Treaty of Amity (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 117, para. 224). Such an assessment can be conducted only at the stage of the examination of the merits.

113. For the foregoing reasons, the arguments raised by the Respondent with regard to Article XX, paragraph 1 *(b)* and *(d)*, of the Treaty of Amity cannot provide a basis for preliminary objections, but may be presented at the merits stage. Therefore, the preliminary objections raised by the United States based on these provisions must be rejected.

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114. For these reasons, THE COURT,

(1) Unanimously,

Rejects the preliminary objection to its jurisdiction raised by the United States of America according to which the subject-matter of the dispute does not relate to the interpretation or application of the Treaty of Amity, Economic Relations, and Consular Rights of 1955;

(2) Unanimously,

Rejects the preliminary objection to its jurisdiction raised by the United States of America relating to the measures concerning trade or transactions between the Islamic Republic of Iran (or Iranian nationals and companies) and third countries (or their nationals and companies);

(3) By fifteen votes to one,

Rejects the preliminary objection to the admissibility of the Application raised by the United States of America;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; *Judge* ad hoc Momtaz;

AGAINST: *Judge* ad hoc Brower;

(4) By fifteen votes to one,

Rejects the preliminary objection raised by the United States of America on the basis of Article XX, paragraph 1 *(b)*, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; *Judge* ad hoc Momtaz;

AGAINST: *Judge* ad hoc Brower;

(5) Unanimously,

Rejects the preliminary objection raised by the United States of America on the basis of Article XX, paragraph 1 *(d)*, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955;

(6) By fifteen votes to one,

Finds, consequently, that it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955, to entertain the Application filed by the Islamic Republic of Iran on 16 July 2018, and that the said Application is admissible.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; *Judge* ad hoc Momtaz;

AGAINST: *Judge* ad hoc Brower.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand and twenty-one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Islamic Republic of Iran and the Government of the United States of America, respectively.

(Signed) Abdulqawi Ahmed YUSUF,

President.

(Signed) Philippe GAUTIER, Registrar.

Judge TOMKA appends a declaration to the Judgment of the Court; Judge *ad hoc* BROWER appends a separate, partly concurring and partly dissenting, opinion to the Judgment of the Court.

(Initialled) A.A.Y.

(Initialled) Ph.G.

DECLARATION OF JUDGE TOMKA

Second preliminary objection — Jurisdiction ratione materiae *— Question whether "third country measures" fall within the scope of the Treaty of Amity — Court departing radically from the approach set out in its prior case law relating to the same bilateral treaty.*

1. The way the Court has treated the second preliminary objection raised by the United States calls for some observations.

2. According to this objection, Iran's claims brought under the provisions of the Treaty of Amity that are predicated on "third country measures" fall outside the Court's jurisdiction which, according to the Applicant, is based on Article XXI, paragraph 2, of the bilateral Treaty of Amity concluded by the Parties in 1955.

> The United States specified that its objection on "third country measures" concerns three categories of measures, namely those relating to
>
> (i) the reimposition of certain sanctions provisions under United States statutes that had been waived pursuant to the Joint Comprehensive Plan of Action (these provisions concern sanctions against non-US persons that engage in trade with Iran or Iranian companies and nationals);
>
> (ii) the reinstatement, through issuance of Executive Order 13846, of certain sanctions authorities that were previously terminated (they concern sanctions against non-US persons that engage in trade with Iran or Iranian companies and nationals); and
>
> (iii) the relisting of certain persons on the Department of the Treasury's Specially Designated Nationals and Blocked Persons List (or SDN List, which identifies natural or legal persons from specially designated countries or subject to a block on assets).

3. The Respondent argues that the Treaty of Amity "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"[1]. In the Respondent's view, therefore, Iran's claims that the United States breached its obligations under the Treaty of Amity by adopting measures concerning trade or transactions between Iran and a third country (or their nationals and companies), must be dismissed at a preliminary stage as outside the Court's jurisdiction[2].

4. Iran, in its Application, claims that these measures constitute breaches of the United States' obligations under Article IV, paragraph 1, Article VII, paragraph 1, Article VIII, paragraphs 1 and 2, Article IX, paragraph 2, and Article X, paragraph 1, of the Treaty of Amity. In its Memorial, Iran further expands this list of allegedly breached obligations by adding those under Article IV, paragraph 2, and Article IX, paragraph 3, of the Treaty of Amity.

5. Although the Parties devoted much attention, both in their written pleadings[3] and during the hearings[4], to the analysis of these provisions, the Court refrains from analysing and interpreting them and, after a short discussion, in some seven paragraphs, concludes that "the second preliminary objection of the United States relates to the scope of certain obligations relied on by the Applicant . . . and raises legal and factual questions which are properly a matter for the merits" (Judgment, paragraph 82). The Court states that "such matters would be decided . . . at [the merits] stage, on the basis of the arguments advanced by the Parties" *(ibid.)*. To determine "the scope of certain obligations relied on by the Applicant" is nothing else than to interpret the provisions of the Treaty invoked by Iran as a source of such alleged obligations. The Court has been provided with sufficient information and arguments by both Parties in order to resolve this interpretative issue already at this stage of the proceedings.

6. However, the approach taken by the Court today radically departs from the one it adopted in 1996 when it had to determine its jurisdiction *ratione materiae* under the same Treaty between the same Parties[5]. In that case, Iran alleged that the acts complained of breached the United States' obligations under Article I, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty of Amity and the Court, therefore, had jurisdiction *ratione materiae*

to entertain the case[6]. The United States, for its part, argued that Iran's claims bore no relation to the Treaty of Amity[7].

7. In its 1996 Judgment, the Court devoted no less than 27 paragraphs to a detailed analysis of Article I, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty, inquiring whether the acts complained of were capable of falling within the scope of the provisions invoked by the Applicant. It concluded that "the destruction [of the platforms] was capable of having . . . an adverse effect upon the freedom of commerce as guaranteed by Article X, paragraph 1, of the Treaty of 1955"[8]. Already at the jurisdictional phase of the case, the Court arrived at the conclusion that Article I and Article IV, paragraph 1, of the Treaty could not form a basis for the Court's jurisdiction[9].

8. The Court recently followed the same approach to the analysis of various provisions of the Treaty of Amity, invoked by Iran in support of its claims, in the 2019 Judgment on preliminary objections in the *Certain Iranian Assets* case[10]. When it turned to the consideration of the second preliminary objection raised by the United States, the Court analysed Article IV, paragraph 2, Article XI, paragraph 4, Article III, paragraph 2, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty of Amity[11].

9. In the present case, by contrast, the Court avoids analysing the articles relied on by Iran when it alleges that the United States' measures, which target third countries (and their nationals or companies) because they maintain trade, commercial or financial relations with Iran (and its nationals or companies), are in breach of the United States' obligations under the Treaty of Amity.

10. The legal question which the Court should have determined at the present stage of the proceedings is whether the Treaty of Amity provides Iran (and its nationals or companies) with a right not to have its trade, commercial or financial relations with third States (and their nationals or companies) interfered with by the United States' measures, or, in other words, whether the United States have obligations under the provisions invoked by Iran not to interfere with these trade, commercial or financial relations. In order to answer this question, the Court should have analysed the text of the provisions of the Treaty, relied on by Iran, in light of the Treaty's object and purpose. Without going into the detail, one may just recall the preamble of the Treaty, which sets out the object and purpose of the Treaty. The preamble specifies, in particular, that the United States and Iran concluded the Treaty with the desire to "encourag[e] mutually beneficial trade and investments and closer economic intercourse generally *between their peoples*"[12]. What was required from the Court was to interpret the text of the various articles of the Treaty of Amity invoked by Iran in order to determine whether Iran's claims are capable of falling within these provisions. The Court received detailed submissions by both Parties on the interpretation of these provisions.

11. Instead of answering the above question, which captures the substance of the United States' second preliminary objection, the Court rejects it (Judgment, paragraph 83). But, at the same time, the Court leaves open the possibility for the Parties to argue "legal and factual questions" raised by the second preliminary objection (Judgment, paragraph 82). It is almost as though the Court considers that the objection does not possess an exclusively preliminary character. However, that is not the Court's conclusion. It simply rejects the objection.

12. If, at the merits stage of the proceedings, the Court comes to the conclusion that the provisions relied on by Iran do not provide it (and its nationals or companies) with a right not to have its trade, commercial or financial relations with third States (and their nationals or companies) interfered with, the logical conclusion should be that Iran's claims do not fall within those provisions and therefore the Court lacks jurisdiction. However, such a conclusion is foreclosed by today's Judgment rejecting the second preliminary objection. In such hypothesis, the Court would be left with only one option — to conclude that there was no breach of the provisions invoked since they do not provide for the right claimed by Iran.

13. I cannot share the approach adopted by the Court in this case, which is inconsistent with the approach it took in 1996 and 2019 in cases concerning the same Treaty. As my learned colleagues have stated in the past: "Consistency is the essence of judicial reasoning. This is especially true . . . with regard to closely related cases."[13]

14. As the issues of applicability of particular provisions of the Treaty to the claims advanced by Iran will be reargued, upon the Court's invitation, during the merits stage, I do not consider it appropriate for me to disclose my position at this stage with respect to each of the provisions relied on by Iran.

(Signed) Peter TOMKA.

ENDNOTES

1 Preliminary Objections submitted by the United States of America (hereinafter "POUS"), pp. 94-95, para. 7.3.

2 *Ibid.*

3 POUS, pp. 94-117, in particular pp. 106-117, paras. 7.26-7.64; Observations and Submissions on the U.S. Preliminary Objections Submitted by the Islamic Republic of Iran, pp. 17-60, in particular pp. 25-60, paras. 3.15-3.101.

4 CR 2020/10, pp. 34-48, paras. 1-47; CR 2020/11, pp. 27-41, paras. 1-46, and pp. 42-54, paras. 3-46; CR 2020/12, pp. 25-26, paras. 17-21, and pp. 27-34, paras. 3-32; CR 2020/13, pp. 24-29, paras. 14-26, and pp. 30-36, paras. 4-29.

5 *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 22 *et seq*.

6 *Ibid.*

7 *Ibid.*, p. 809, para. 14, and p. 812, para. 22.

8 *Ibid.*, p. 820, para. 51.

9 *Ibid.*, p. 815, para. 31, and p. 816, para. 36.

10 *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 7.

11 *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, pp. 25-35, paras. 48-80.

12 Emphasis added.

13 *Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2004 (III)*, joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, p. 1353, para. 3.

SEPARATE, PARTLY CONCURRING AND PARTLY DISSENTING, OPINION OF JUDGE *AD HOC* BROWER

Agreement with the Court's findings concerning the preliminary objections to jurisdiction and the preliminary objection based on Article XX, paragraph 1 (d)*, of the Treaty of Amity — Disagreement with the Court's findings that Iran's Application is admissible and that the United States' preliminary objection based on Article XX, paragraph 1* (b)*, should be rejected — Iran's Application constitutes an abuse of process in that it seeks from the Court a judgment legally binding the United States to carry out its undertakings under the non-legally binding JCPOA — The Court devotes scant analysis to this issue and continues its long-standing practice of failing to clarify the content of the abuse of rights principle — The United States' objection under Article XX, paragraph 1* (b)*, of the Treaty of Amity should have been treated as a legitimate preliminary objection and should have been addressed at this stage of the proceedings — The language of this provision and the Parties' own statements indicate the applicability of Article XX, paragraph 1* (b)*, to the sanctions at issue in this case — The Court does not perform the standard analysis under Article 31 of the Vienna Convention on the Law of Treaties — Such an analysis confirms the applicability of Article XX, paragraph 1* (b)*, and that the United States' objection under this provision should have been accepted.*

1. While I have joined the unanimous Judgment of the Court in so far as it rejects the United States' two preliminary objections to the jurisdiction of the Court, as well as its preliminary objection based on Article XX, paragraph 1 *(d)*, of the Treaty of Amity, Economic Relations, and Consular Rights (hereinafter the "Treaty of Amity"), I diverge from the Judgment in so far as it (1) finds the Application of the Islamic Republic of Iran to be admissible and (2) declines to accept the United States' preliminary objection based on Article XX, paragraph 1 *(b)*[1].

I. INADMISSIBILITY DUE TO ABUSE OF PROCESS

A. THE ABUSE

2. I believe that the present Application indeed is inadmissible as an abuse of process in that it seeks from this Court a legally binding judgment compelling the United States to rescind forever only those sanctions that it had suspended pursuant to the Joint Comprehensive Plan of Action (hereinafter the "JCPOA" or the "Plan") but by action of 8 May 2018 reimposed following its withdrawal from the non-legally binding JCPOA[2]. Were the Court to grant Iran the relief it seeks, the United States would be legally bound to previously non-legally binding terms of the JCPOA while the Applicant would remain free not to comply with the JCPOA, as indeed it has admitted to doing already[3], thereby gaining an illegitimate or illicit advantage.

3. Most unfortunately, in finding the Application to be admissible, the Court has devoted to its discussion of this issue only five paragraphs (92-96) of the 114 comprising the Judgment, in which paragraphs it has said very little. Interestingly, it begins (paragraph 92) by "not[ing] that the United States did not address its objection to the admissibility of Iran's Application during the oral hearings, but expressly maintained that objection", seeming to intimate that the United States' decision to concentrate its limited time in the "virtually" conducted oral proceedings on other arguments could be a relevant factor in assessing the merits of the issue. It then proceeds to cite (paragraph 93) various earlier Court cases to the effect that "[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process" and that "there has to be 'clear evidence' that the Applicant's conduct amounts to an abuse of process". The Judgment then jumps to the conclusion (paragraph 94), without making any assessment relating to "exceptional circumstances" or "clear evidence", that "[i]f the Court eventually found on the merits that certain obligations under the Treaty of Amity have indeed been breached, this would not imply giving Iran any 'illegitimate advantage' with regard to its nuclear programme, as contended by the United States". Does the Court's approach in these paragraphs not simply suggest that so long as the Court finds that it has jurisdiction, it can never find that an applicant's invocation of such jurisdiction constitutes an abuse of process? Finally, the Judgment (paragraph 95) states that the fact that "most of Iran's claims concern measures that had been lifted in conjunction with the JCPOA and were later reinstated", and hence exclude the many other sanctions that have been applied to it by the United States for decades[4], may simply "reflect a policy decision" and does not constitute an abuse of process. I submit that the Court, in brushing off as a "policy decision"

the fact that Iran's Application concentrates exclusively on the nuclear-related sanctions suspended by the JCPOA and later reinstated by the Respondent, leaving all of the many other sanctions against it untouched, has avoided actually analysing the import of Iran's strategy, instead hastily turning a blind eye to Iran's obvious abuse of the Court's jurisdiction.

B. ABUSE OF PROCESS AS "THE HOLY GRAIL"

4. The reality is that abuse of process has become the holy grail of international law as applied by the Court and its predecessor, the Permanent Court of International Justice (hereinafter the "PCIJ"), i.e. something in which this Court fervently believes, but the actual shape, substance and content of which the Court never has ascertained. As Judge Donoghue wrote in her dissenting opinion in *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*: "I am not aware of any authoritative definition of ['abuse of process'] in the context of international adjudication"[5]. Indeed, neither the Court nor the PCIJ ever has come to grips with the concept of abuse of process, doubtless due to the total absence anywhere of a definitive description or inventory of its contents. I doubt not that this is the reason that in the 95 years since the concept was first addressed judicially neither this Court nor its predecessor ever has applied it to adjudge an application to be inadmissible, despite their various mentions of it.

5. A review of the nonagenarian judicial history of the concept of abuse of process illustrates why its life has remained, like that of an abandoned infant who never has been adopted, fostered or taken in hand by anyone, utterly devoid of substantive development. The first mention of the originating concept of "abuse of rights"[6] in the international law context was by Arturo Ricci-Busatti, one of the ten members of the Advisory Committee of Jurists producing the draft Statute of the PCIJ in 1920[7]. Six years later, the PCIJ in *Certain German Interests* addressed the concept, in rejecting Poland's claim, that Germany had "misused" a substantive right, noting that Germany's action "was not designed to procure . . . an illicit advantage and to deprive [Poland] of an advantage to which [it] was entitled"[8]. Still later, in 1932, the PCIJ in the *Free Zones* case referred to the concept, likewise rejecting its application[9].

6. This Court's own dealings with the concept of "abuse of rights", and its gradual recognition of the concept of "abuse of process" as a fraternal twin of the former, began in 1951 with the *Fisheries* case. In that case the Court considered the United Kingdom's complaints regarding the way in which Norway had delimited its territorial sea. The Court alluded to the concept of "abuse of rights" when stating that it would not confine itself to examining Norway's delimitation of its territorial waters along only one sector of the coast, "except in a case of manifest abuse"[10]. Prior to this, however, as well as later, interspersed opinions or declarations of individual judges formed a combination of background music to, and support for the application of, the concept of abuse of rights and eventually abuse of process. Indeed, Judge Alvarez's earlier (1950) dissenting opinion in the advisory proceeding *Competence of the General Assembly for the Admission of a State to the United Nations* straightforwardly urged adoption by the Court of the "abuse of rights" principle:

> "This concept is relatively recent in private law, but it is already generally accepted. Even before the first World War, some publicists had asked that it should be extended to international law. Because of the new conditions that have arisen in the life of peoples, it is necessary to-day to find a place for this concept, and the International Court of Justice must take its share in this evolution."[11]

In the *Ambatielos* case in 1953, the Court dealt with the first plea made to it expressly based on abuse of process. The United Kingdom argued that Greece was responsible for "undue delay and abuse of the process of the Court" in that only in 1951 had it made its application to the Court, which it could have done 25 years earlier, in 1926. The Court rejected that defence, stating that Greece had not done "anything improper in instituting proceedings [when it did] in conformity with the relevant provisions of the Statute and Rules of Court"[12]. Following that, in 1966, Judge Forster in his dissenting opinion to the Judgment in the *South West Africa* cases argued, given that the League of Nations Mandatory for German South West Africa (today Namibia), i.e. South Africa, had full power over the territory subject to the Mandate, "the discretionary power cannot cover acts performed for a purpose different from that stipulated in the Mandate. Such acts would be an abuse of power *[détournement de pouvoir]*"[13].

7. In 1991 the Court next addressed, in *Arbitral Award of 31 July 1989*, an application that the respondent sought to have declared inadmissible expressly on the basis of its plea that the application was an "abuse of process". The applicant, Guinea-Bissau, argued that an arbitral award won against it by the respondent, Senegal, was invalid due to the fact that the President of the arbitral tribunal, himself a member of the majority that had rendered the award, had appended to it a declaration that contradicted the award. Senegal, however, maintained that

> "that declaration is not part of the Award, and therefore . . . any attempt by Guinea-Bissau to make use of it for that purpose 'must be regarded as an abuse of process aimed at depriving Senegal of the rights belonging to it under the Award'. Senegal also contends that the remedies sought are disproportionate to the grounds invoked and that the proceedings have been brought for the purpose of delaying the final solution of the dispute."[14]

The Court rejected Senegal's claim of inadmissibility, however, stating

> "that Guinea-Bissau's Application has been properly presented in the framework of its right to have recourse to the Court in the circumstances of the case. Accordingly, it does not accept Senegal's contention that Guinea-Bissau's Application, or the arguments used in support of it, amount to an abuse of process."[15]

One year later, and 29 years ago, in 1992, the Court itself raised the issue of "abuse of process" unprompted for the first time in *Certain Phosphate Lands in Nauru*. Australia had argued that "Nauru has failed to act consistently and in good faith" and on that basis urged that "the Court in exercise of its discretion, and in order to uphold judicial propriety should . . . decline to hear the Nauruan claims"[16]. The Court responded as follows:

> "[T]he Application by Nauru has been properly submitted in the framework of the remedies open to it. At the present stage, the Court is not called upon to weigh the possible consequences of the conduct of Nauru with respect to the merits of the case. It need merely note that such conduct does not amount to an abuse of process."[17]

8. Notwithstanding having dealt with two cases in succession in which the respondent, and then the Court itself, had invoked the concept of "abuse of process" *expressis verbis*, in 1996, in the *Bosnian Genocide* case, the Court returned to addressing "abuse of rights"[18]. Bosnia-Herzegovina argued that Yugoslavia abused its rights by presenting wholly artificial preliminary objections in an attempt to play for time by unjustifiably delaying the proceedings, although, it should be noted, Bosnia's counsel in fact did refer to "abuse[] [of] the procedure of the Court"[19], citing the Court's Judgment in the *Nauru* case[20], in which, as noted above, the Court rendered its decision based on its analysis of "abuse of process". Nevertheless, in dealing a few years later with the *Aerial Incident of 10 August 1999*, the Court continued to speak of "abuse of rights", Pakistan having claimed that India had been guilty of such an abuse when it included, in its declaration accepting the Court's compulsory jurisdiction under Article 36 (2) of the Court's Statute, a reservation excluding from such acceptance disputes with States which are or have been a member of the "Commonwealth of Nations". In finding the application admissible, the Court concluded as follows:

> "[The Court cannot] accept Pakistan's argument that India's reservation was a discriminatory act constituting an abuse of right because the only purpose of this reservation was to prevent Pakistan from bringing an action against India before the Court. It notes in the first place that the reservation refers generally to States which are or have been members of the Commonwealth. It would add . . . that States are in any event free to limit the scope *ratione personae* which they wish to give to their acceptance of the compulsory jurisdiction of the Court."[21]

In its 2004 Judgment in *Avena and Other Mexican Nationals*, the Court dealt with an objection that the respondent (the United States) characterized as relating to an "abuse of the Court's jurisdiction"[22]. The abuse was said to stem from the fact that Mexico had invited the Court to make "far-reaching and unsustainable findings concerning the United States criminal justice systems"[23]. The Court rejected this objection, finding that it was not barred from enquiring into the conduct of criminal proceedings in United States courts, and the degree to which it might do so was a matter for the merits of the case[24]. While the United States did not use the terms "abuse of rights" or

"abuse of process", and while it presented this objection as going to the Court's jurisdiction rather than as an objection to the admissibility of Mexico's claims, the objection nonetheless could be considered an abuse of process objection, relating as it did to an alleged abuse of the Court's procedures. While 14 years passed before the Court again was seised of a case in which either "abuse of rights" or "abuse of process" was in issue, it is worth noting that such abuses continued to be subject to acknowledgment and acceptance as a basis for dismissal of an application. Thus Judge Keith's declaration in *Certain Questions of Mutual Assistance* in 2008, while agreeing with the decision of the Court, expressed a preference for different reasoning, specifically that the acts in issue constituted "an abuse of power or a *détournement de pouvoir* — an exercise of the power for wrong reasons and a thwarting of the purpose of the Convention", compliance with which was in issue[25].

9. After the aforementioned 14-year gap in Court cases dealing with either "abuse of rights" or "abuse of process", there has been a flurry of activity regarding such abuses in four cases decided starting in 2018. The first was *Immunities and Criminal Proceedings*, in which France argued that "Equatorial Guinea's conduct was an abuse of rights and that its seisin of the Court was an abuse of process"[26]. In this case, the Court spelled out for the first time the difference between the two abuses:

> "In the case law of the Court and its predecessor, a distinction has been drawn between abuse of rights and abuse of process. Although the basic concept of an abuse may be the same, the consequences of an abuse of rights or an abuse of process may be different.[27]
>
> . . . .
>
> An abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of these proceedings.[28]
>
> . . . .
>
> As to the abuse of rights . . . it will be for each Party to establish both the facts and the law on which it seeks to rely at the merits phase of the case. The Court considers that abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits. Any argument in relation to abuse of rights will be considered at the stage of the merits"[29].

It is this case in which for the first time a judge of the Court, namely Judge Donoghue, as noted in paragraph 4 above, concluded in her dissenting opinion that the application should have been dismissed at the preliminary stage as being an abuse of process, and therefore inadmissible.

Particularly in light of Judge Donoghue's dissenting opinion, it is troubling that even then the Court did not see itself compelled to do more in dismissing France's abuse of process objection than intone the by now ritual but opaque catchphrases "clear evidence" and "exceptional circumstances":

> "In this case, the Court does not consider that Equatorial Guinea, having established a valid title of jurisdiction, should be barred at the threshold without clear evidence that its conduct could amount to an abuse of process. Such evidence has not been presented to the Court. It is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process. The Court does not consider the present case to be one of those circumstances."[30]

It is as though the Court is determined to continue 95 years of enshrouding the principle of abuse of process in mystery, leaving consequently unedified litigants wondering whether the Court itself knows its substance, let alone the threshold for its application. The Court thus would do well to clarify both the principle and the evidentiary condition for its acceptance.

10. Hard on the heels of the Court's Judgment in *Immunities and Criminal Proceedings* came its Judgment dismissing the United States' preliminary objections to jurisdiction and admissibility in *Certain Iranian Assets*. In that case, the United States sought dismissal, *inter alia*, on the basis of what it came to term an "abuse of process"[31] in that "the fundamental conditions underlying the [1955] Treaty of Amity [, Economic Relations, and Consular Rights between the United States and Iran] no longer exist" and "Iran's attempt to found the Court's jurisdiction on the

Treaty does not seek to vindicate interests protected by the Treaty, but rather to embroil the Court in a broader strategic dispute"[32]. As usual when addressing claims of "abuse of process", the Court devoted only 3 of the 126 paragraphs in its Judgment to its dismissal[33]. Referring to its Judgments in *Immunities and Criminal Proceedings* as well as in *Certain Phosphate Lands in Nauru*, the Court limited itself to the by now standard phrases that to find an application inadmissible on such a basis requires "exceptional circumstances" and "clear evidence", neither of which standards has ever been defined by the Court, let alone — as Judge Donoghue pointed out in her dissenting opinion in *Immunities and Criminal Proceedings* — the Court ever having defined "abuse of process" itself. (While I myself approved the dismissal of the United States' plea of abuse of process in *Certain Iranian Assets*, the facts of the present case are so far different from those of that case as to have commanded my view favouring dismissal of the application in the present case as inadmissible on the ground of abuse of process.)

11. Less than seven months after *Certain Iranian Assets*, the Court was confronted by Pakistan's claim that India's application should be held to be inadmissible due to claimed abuses of process. In dismissing those claims of abuse of process, the Court rehearsed the "exceptional circumstances" and "clear evidence" pronouncements of *Certain Iranian Assets* and *Immunities and Criminal Proceedings*, while at the same time, however, considering the substance of Pakistan's claimed abuses of process and finding them not to be true[34].

C. THE COURT'S JUDGMENT DISINCENTIVIZES STATES FROM AGREEING TO NON-LEGALLY BINDING DISPUTE SETTLEMENT

12. I reiterate that for this Court even to entertain the possibility, by not declaring the pending Application inadmissible as an abuse of process, of becoming the instrument of a grossly "illegitimate" advantage to the Applicant by forcing upon the Respondent a legally binding Judgment requiring the Respondent to honour undertakings it had made in the non-legally binding JCPOA, which legally it was free to exit, as it did, while leaving the Applicant free to ignore that political instrument, as its Foreign Minister officially broadcast months ago that it already had been doing, is in sharp discord with the Parties' search for a peaceful resolution of their differences in the form of the JCPOA. As the principal judicial organ of the United Nations, the Court, in confronting a claim that a pending application is inadmissible, should be heedful of the Charter of the United Nations, in particular of its Chapter I, Articles 1 (1) ("take effective . . . measures for the prevention and removal of threats to the peace") and 2 (3) ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"). In fulfilment of those shared obligations, the parties to the JCPOA chose to do so by means of a political instrument that is, and was, not legally binding. As the Respondent noted in its Preliminary Objections (para. 5.28), the JCPOA was agreed by the parties as a non-legally binding instrument because it "facilitated an expedient and expeditious resolution that could clear various international political hurdles and also address important domestic legal and political considerations". The failure of this Court to find the present Application inadmissible, added to its and its predecessor's 95 years of treating the concept of abuse of process with what may fairly be described as acute neglect, most definitely must disincentivize States from seeking to fulfil their obligations under the Charter of the United Nations by means that are not legally binding, which, as was the case with the present Parties, may often be the only means, due to domestic constitutional and political considerations, of complying with that Charter.

D. THE UNCERTAIN FUTURE OF ABUSE OF PROCESS

13. Thus the concept of "abuse of process" continues, at age 95, to be the holy grail of international law as addressed by the Court, a storied mystery without dimensions, shape or content, with undefined "standards" for its application, which, as a result, though periodically discussed (more so recently), never ever has been invoked successfully before either this Court or the PCIJ. This "precedent" of perpetual absence of any application of the principle of abuse of process doubtless will continue unless and until this Court gives it substance, in the form of a delineation of its contents, totally absent until now, and, in addition, a sharper outline of what are the "exceptional circumstances" and "clear evidence" required to sustain a claim of inadmissibility on that basis. Unless these steps are taken and the nonagenarian "precedent" of non-application of the "principle" of abuse of process continues into the future, the words of Benjamin Disraeli, speaking on 22 February 1848, may be its fate: "A precedent embalms a principle."[35]

II. ARTICLE XX 1 *(B)*

A. DISTINCTIONS AMONG PARAGRAPHS 1 *(A)*, *(B)*, *(C)* AND *(D)*

14. To date, the Court has been unable to discern any distinction among paragraphs 1 *(a)*, *(b)*, *(c)* and *(d)* of Article XX of the Treaty of Amity, which article provides as follows:

> "1. 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 by-products 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."

I have agreed, both here, and in *Certain Iranian Assets*, that a defence based on Article XX, paragraph 1 *(d)*, indeed is to be heard at the merits phase, as the Court previously had ruled in the *Oil Platforms* case, relying both there and in *Certain Iranian Assets* (para. 45) on its Judgment in *Military and Paramilitary Activities in and against Nicaragua*. It seemed to me then, and seems to me now, obvious, given the allegations on which the United States has relied in regard to that defence, that a decision as to whether "measures . . . [have been] necessary to protect its essential security interests", which defence is not self-judging, involves such a multitude of factors to be considered as to require that it be addressed at the merits stage.

15. In *Certain Iranian Assets*, the United States invoked also Article XX, paragraph 1 *(c)*[36], the Court's rejection of which lacked articulated analysis. After stating in its Judgment (para. 45), in respect of paragraph 1 *(d)*, that "[t]he Court sees no reason in the present case to depart from its earlier findings", the Court proceeded (paras. 46-47) to dispose of paragraph 1 *(c)* as follows:

> "In the Court's opinion, this same interpretation also applies to Article XX, paragraph 1, subparagraph *(c)*, of the Treaty since, in this regard, there are no relevant grounds on which to distinguish it from Article XX, paragraph 1, subparagraph *(d)*.
>
> The Court concludes from the foregoing that subparagraphs *(c)* and *(d)* of Article XX, paragraph 1, do not restrict its jurisdiction but merely afford the Parties a defence on the merits."[37]

In fairness, in *Certain Iranian Assets*, I, too, did not distinguish between paragraphs 1 *(c)* and *(d)*. Inasmuch as the claim in that case was for damages to the extent that Iranian assets subject to United States jurisdiction were being paid out to successful United States plaintiffs in United States court cases against Iran in which Iran defaulted, and given the language of paragraph 1 *(c)*, at least in that situation, clearly in my view, like paragraph 1 *(d)*, for the reasons I have expressed above regarding paragraph 1 *(d)*, it required consideration at the merits stage[38].

16. Paragraph 1 *(b)* should, however, have been treated in the present case as a legitimately preliminary objection due to its language and the statements of both Parties that repeatedly have tracked its language in relation to exactly the limited category of sanctions that is the subject of the present Application. To begin, the present Judgment addressed paragraph 1 *(b)* and *(d)* together, rehearsing (paragraph 109) its ritual references to *Oil Platforms* and *Certain Iranian Assets*, noting that in the latter Judgment "the Court noted that the interpretation given to Article XX, paragraph 1, with regard to subparagraph *(d)* also applies to subparagraph *(c)*" and that "[t]he Court observed that in this respect 'there are no relevant grounds on which to distinguish [subparagraph *(c)*] from Article XX, paragraph 1, subparagraph *(d)*'". This lack of analysis was continued in the next sentence: "The Court finds that there are equally no relevant grounds for a distinction with regard to subparagraph *(b)*, which may only afford a possible

defence on the merits." The Court then did take one stab at explaining why paragraph 1 *(b)* must be heard at the merits phase (paragraph 111)[39]:

> "The Applicant contends that subparagraph *(b)*, which refers to measures 'relating to fissionable materials, the radio-active by-products thereof, or the sources thereof', should be interpreted as addressing only measures such as those specifically concerning the exportation or importation of fissionable materials. It was however argued by the Respondent that subparagraph *(b)* applies to all measures of whatever content addressing Iran's nuclear programme, because they may all be said to relate to the use of fissionable materials. The question of the meaning to be given to subparagraph *(b)* and that of its implications for the present case do not have a preliminary character and will have to be examined as part of the merits."

B. IRANIAN DECLARATIONS THAT THE SANCTIONS TO WHICH IT OBJECTS ARE "NUCLEAR-RELATED" ELIMINATE ANY POSSIBLE DISPUTE AS TO WHETHER SUCH SANCTIONS ARE "RELATING TO FISSIONABLE MATERIALS"

17. The Court's decision in this regard is regrettable in that it ignores both the plain language of paragraph 1 *(b)* and the statements made by both Parties, individually, collectively and in the text of the JPCOA itself confirming that the limited sanctions that are the object of the Application in fact are "relating to fissionable materials, the radio-active by-products thereof, or the sources thereof".

18. The term "relating to" could hardly be broader, unlike "regulating" in paragraph 1 *(a)* and *(c)* and "necessary to protect its essential security interests" in paragraph 1 *(d)*. The Oxford English Dictionary provides two relevant definitions of the phrase "to relate" when coupled with the preposition "to". The first is "to have reference to; to refer to". The second is "to have some connection with; to stand in relation to"[40]. Neither of these definitions is suggestive of any need to establish a fully organic, Siamese-twins-like connection between a particular measure and fissionable materials. To the contrary, a looser connection between a measure and "fissionable materials" could not be imagined. It is understandable that the Treaty of Amity would afford the Parties such broad flexibility with regard to fissionable materials, given that issues of nuclear proliferation were at the time of the Treaty of Amity's conclusion in 1955 (and remain today) highly sensitive and critical to international peace and security. Sanctions measures are considered to be an important non-proliferation tool, as is evidenced by several United Nations Security Council resolutions aimed at Iran's nuclear programme and which authorized sanctions against Iran[41].

19. It cannot be denied that "fissionable materials" fundamentally means nuclear substances, nuclear processing and power generation facilities, and nuclear weapons[42]. Anything "nuclear-related" necessarily is "relating to fissionable materials". A plethora of official Iranian and American statements confirm that the narrow category of sanctions addressed by the Application are "nuclear-related". During the provisional measures phase, Iran's Agent recalled that, on 8 May 2018, the United States announced its intention to "reinstat[e] U.S. nuclear sanctions on the Iranian regime"[43]. The United States President's remarks on that date indeed began with the statement: "I want to update the world on our efforts to prevent Iran from acquiring a nuclear weapon", and concluded: "it is clear to me that we cannot prevent an Iranian nuclear bomb" under the JCPOA[44]. Thus, the very 8 May 2018 decision that is the *fons et origo* of Iran's claims in these proceedings evidently "related to" concerns regarding nuclear proliferation in Iran. This is further confirmed by the text of the JCPOA itself, as well as statements made by the participants at the time the JCPOA was finalized. Paragraph v of the JCPOA's preamble states that the Plan "will produce the comprehensive lifting of . . . national sanctions *related to Iran's nuclear programme*"[45]. Paragraph 24 of the JCPOA goes on to state that "[t]he E3/EU and the United States specify in Annex II a full and complete list *of all nuclear-related sanctions or restrictive measures* and will lift them in accordance with Annex V"[46]. In Section 4 of Annex II to the JCPOA, 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"[47]. Thus, both the United States and Iran accepted the text of an agreement that stipulated, multiple times and in clear terms, that the sanctions the United States would suspend were "related to" Iran's nuclear programme. In July 2015, just as the JCPOA was finalized, the European Union's High Representative and the Iranian Foreign Minister issued a joint statement in which they announced that they had "reached an agreement on the Iranian nuclear issue"[48]. The Joint Statement went on to note that 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 programme*"[49].

C. IRAN HAS ADMITTED IN THESE VERY PROCEEDINGS THAT THE SANCTIONS IT ATTACKS ARE "NUCLEAR-RELATED"

20. Similar acknowledgments of the "nuclear-related" nature of the United States sanctions can be found in the context of these proceedings themselves. During the provisional measures stage of the proceedings, Iran's Agent stated as follows:

> "Let me recall the factual background of the decision of the United States *to reimpose and to aggravate nuclear-related sanctions* and restrictive measures. These *'nuclear-related' sanctions*, Mr. President, which Iran has always considered as unlawful, had been built up by the United States, first back in 1996 and then in 2006 and afterwards, through a series of legislative and executive acts targeting entire economic sectors as well as several Iranian individuals."[50]

In its Memorial, Iran recognizes that "the JCPOA lifted sanctions whose motivation was related to an alleged Iranian military nuclear programme"[51]. In Chapter II of its Memorial, Iran states that it will describe "in detail the *re-imposed 'nuclear-related sanctions*' in order to clarify their purpose, scope, specific terms, and implementation"[52]. In its Observations and Submissions on the United States' Preliminary Objections, Iran states straightforwardly that:

> "The Application filed by Iran in the present case deals with questions based on legal considerations: namely, whether the United States, *by reimposing nuclear- related sanctions after the 8 May 2018* [sic], has breached its legal obligations under a valid international treaty, the Treaty of Amity."[53]

D. COURT PRECEDENTS ACCEPT STATEMENTS AGAINST INTEREST "AS A FORM OF ADMISSION"

21. As the Court stated in *Military and Paramilitary Activities in and against Nicaragua*,

> "[t]he material before the Court . . . includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission."[54]

As described above, in the present case, the "nuclear-related" nature of the sanctions at issue in this case has been acknowledged not only in official statements of high-ranking Iranian officials, but in the text of the JCPOA itself and in discussions of that instrument. Furthermore, such statements were also made by Iran's Agent himself during the very first hearing in this case, as well as repeatedly in Iran's Memorial submitted in this proceeding and in its Observations and Submissions on the United States' Preliminary Objections. These statements thus constitute admissions against interest[55].

E. APPLICATION OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

22. The Court has not referred in respect of this issue to the Vienna Convention on the Law of Treaties (hereinafter the "VCLT"). I suggest that reference to its Article 31 would have been in order. In my view, application of Article 31 (1), interpreting Article XX, paragraph 1 *(b),* of the Treaty of Amity "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" should have led to the conclusion that the United States' preliminary objection based on paragraph 1 *(b)* requires the dismissal of the Application. The "ordinary meaning" of "relating to fissionable materials" could not be in doubt. The Treaty of Amity's context included nothing listed in Article 31 (2) of the VCLT other than the Treaty of Amity's "text, including its preamble and annexes", of which latter there are none. The Treaty of Amity's preamble, which sets the "object and purpose" intended to be reflected in its articles, reads as follows:

> "The United States of America and Iran, *desirous of* emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed, of *encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples*, and of regulating consular relations, have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights"; emphasis added.

The fact that the Treaty of Amity's preamble, for present purposes, focuses on "encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples" and, overall, is — as I noted in my separate opinion in *Certain Iranian Assets* (para. 19) — "essentially commercial in nature", in no way is inconsistent with the Treaty of Amity's inclusion of provisions such as paragraph 1 *(b)*, and also *(d)*, which provide the two States parties a "safe exit" from their mutual commerce, if and when serious issues arise that militate against continuation of such commerce or dictate the need for its limitation. Unlike paragraph 1 *(d)*, however, given its language, paragraph 1 *(b)* is subject to being decided as a preliminary matter. Alone, the "context" of the terms of the Treaty of Amity itself is significant. In that sense, paragraph 1 of Article XX itself is contextually material, in that the scope of "relating to fissionable materials" in paragraph 1 *(b)* obviously is quite different from that of "regulating" either "the importation or exportation of gold or silver" in paragraph 1 *(a)* or "the production of or traffic in arms", etc. in paragraph 1 *(c)*, to say nothing of "necessary to protect its essential security interests" in paragraph 1 *(d)*. Nothing in the VCLT's Article 31 (3) *(a)* or *(c)* is applicable here, nor is Article 31 (4).

23. What is left as regards application of the VCLT are Article 31 (3) *(b)*, "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and Article 32, "supplementary means of interpretation", which include, but are not limited to, the *travaux préparatoires*, of which nothing relevant to paragraph 1 *(b)* has been submitted, and "the circumstances of [the treaty's] conclusion". As to those "circumstances", one can note again that even at the time the Treaty of Amity was concluded in 1955, issues of nuclear proliferation were highly sensitive and critical to international peace and security. Certainly, the United States would have wished effectively to reserve the right to take "measures", otherwise violative of the Treaty of Amity, in order to suppress possible nuclear proliferation, and to which Iran at that time easily would have agreed. It was the height of the Cold War, in which period a number of mutual defence treaties and other regional alliances were formed. Indeed, it is well known that precisely in 1955, President Eisenhower, as President of the United States, and his Secretary of State, John Foster Dulles, promoted and supported in many ways the formation that very year, on 24 February, of the Middle East Treaty Organization (METO), known as the Baghdad Pact, the member States of which were Iran, Iraq, Pakistan, Turkey and the United Kingdom, which later became the Central Treaty Organization (hereinafter "CENTO"). The Treaty of Amity was signed on 15 August 1955, just six months later[56]. CENTO terminated in 1979, the year of the Islamic Revolution in Iran. Given that "supplementary means of interpretation" are not defined, the many statements set forth above of authorized representatives of Iran and the United States, as well as the language of the JCPOA itself, to the effect that precisely those sanctions that are the subject of the Application are "nuclear-related", should have settled the meaning of paragraph 1 *(b)* and led to the dismissal of the present Application.

(Signed) Charles N. BROWER.

ENDNOTES

1 The reader of the Judgment to which this opinion is attached will notice that I joined unanimous votes in favour of rejecting the United States' two preliminary objections to the Court's jurisdiction at para. 114 (1) and (2) but voted against para. 114 (6), by which the Court, in a single paragraph, found both that it has jurisdiction to entertain the Application, with which I had agreed in para. 114 (1) and (2), and "that the said Application is admissible", which conclusion I had rejected in para. 114 (3).

I voted against para. 114 (6) as I had been placed in the same impossible position as Judge Parra-Aranguren had been in *Gabčíkovo-Nagymaros Project*:

> "A substantial number of Judges, myself among them, asked for a separate vote on each of the two issues included in paragraph 2, point D, of the operative part of the Judgment. However, the majority decided, severely curtailing freedom of expression, to force a single vote on both questions, based upon obscure reasons which are supposed to be covered by the confidentiality of the deliberations of the Court." (*Gabčíkovo-Nagymaros Project (Hungry/Slovakia), Judgment, I.C.J. Reports 1997*, p. 231, para. 21; dissenting opinion of Judge Parra-Aranguren.)

Faced with a choice between "In Favour" or "Against" — either one of which was half right and half wrong — I voted "Against". I note that the operative part of the Court's Judgment of 11 July 1996 in the *Genocide* case, which, like the present one, dealt with preliminary objections to jurisdiction and admissibility, included separate subparagraphs containing the Court's findings on jurisdiction and admissibility, and therefore did not place any judge in an impossible position. (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623, para. 47.) The same approach could and should have been followed in the present case.

2 The United States has repeatedly affirmed in the context of these proceedings that the JCPOA is a non-legally binding political instrument. See e.g. Preliminary Objections of the United States of America (POUS), paras. 5.28-5.29. Iran has not contradicted this view, despite referring to the United States' position on several occasions. See Observations and Submissions on the U.S. Preliminary Objections submitted by the Islamic Republic of Iran, para. 4.13; CR 2020/13, p. 18, para. 30 (Lowe).

3 See e.g. POUS, Ann. 102, 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 (8 May 2019), p. 2 (noting that Iran had decided "to cease performing its commitments in part" under the JCPOA, including commitments related to the size of its uranium stockpile).

4 The United States notes, without contradiction from Iran, that it has since 1987 maintained various measures which "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" (POUS, para. 2.26). These measures have included sanctions designed to address "non-nuclear issues of concern" such as international terrorism, ballistic missile activities and human rights abuses, and which were excluded from the scope of the JCPOA (*ibid*., para. 2.17).

The JCPOA itself indicates that the sanctions the United States would lift in accordance with that instrument were only 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 this JCPOA, unless authorised to do so by [OFAC]"; see Memorial of the Islamic Republic of Iran (MI), Vol. I, Ann. 10, JCPOA, p. 131, fn. 6.

5 *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 381, para. 3; dissenting opinion of Judge Donoghue.

6 Prior to the Court's 2018 Judgment in *Immunities and Criminal Proceedings*, it had not drawn a clear distinction in its jurisprudence between the concepts of "abuse of rights" and "abuse of process", the latter apparently having developed out of the former. The Court has explained that the "basic concept of an abuse may be the same" under either concept. *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 335, para. 146.

7 Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee June 16th–July 24th 1920 with Annexes,* pp. 314-315, statement of Mr. Ricci-Busatti.

8 *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 37-38.

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

10 *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 142.

11 *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 15; dissenting opinion of Judge Alvarez.

12 *Ambatielos (Greece* v. *United Kingdom), Merits, Judgment, I.C.J. Reports 1953*, pp. 13-14 and 23.

13 *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 481; dissenting opinion of Judge Forster.

14 *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 63, para. 26.

15 *Ibid*., para. 27.

16 *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 255, para. 37.

17 *Ibid*., para. 38.

18 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 622, para. 46.

19 CR 1996/8, p. 65, para. 16 (Pellet).

20 *Ibid*., pp. 66-67, para. 17 (Pellet).

21 *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 30, para. 40.

22 *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 30, para. 27.

23 *Ibid*.

24 *Ibid*., para. 28.

25 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 280, para. 7; declaration of Judge Keith.

26 *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 334, para. 139.

27 *Ibid*., p. 335, para. 146.

28 *Ibid*., p. 336, para. 150.

29 *Ibid*., p. 337, para. 151.

30 *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 336, para. 150.

31 *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I),* pp. 40-41, paras. 100-101; CR 2018/28, p. 35, para. 2 (Bethlehem).

32 *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 42, para. 107.

33 *Ibid.*, paras. 113-115.

34 *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II)*, pp. 431-433, paras. 40-50.

35 Benjamin Disraeli, "Speech on the Expenditures of the Country (February 22, 1848)", in John Bartlett, *Familiar Quotations*, 13th ed., 1955, p. 512b.

36 *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 23, para. 38.

37 *Ibid.*, p. 25, paras. 46-47.

38 Subsection *(a)*, unlike the others, appears never to have been a subject of consideration by the Court.

39 In *Certain Iranian Assets*, the Court did not declare the United States' invocation of subparagraph *(c)* not to be of a preliminary character but stated only that it would "merely afford the Parties a defence on the merits" (*(Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 25, para. 47). Thus, the Court's approach with respect to *(b)* in the present Judgment is novel.

40 "relate, v.", *OED Online*, Oxford University Press, accessed in September 2020.

41 These include resolutions 1747 (2007), 1803 (2008) and 1929 (2010).

42 The Oxford English Dictionary defines the word "fissionable" as "[c]apable of undergoing nuclear fission": "fissionable, adj.", *OED Online*, Oxford University Press, accessed in September 2020.

43 CR 2018/16, p. 19, para. 3 (Mohebi).

44 Application instituting proceedings submitted by the Islamic Republic of Iran, Ann. 3: Remarks by President Trump on the Joint Comprehensive Plan of Action, 8 May 2018, pp. 1-2.

45 Memorial of the Islamic Republic of Iran (MI), Vol. II, Ann. 10, p. 97, JCPOA, preamble, para. v; emphasis added.

46 *Ibid*., p. 104, JCPOA, para. 24; emphasis added.

47 *Ibid*., p. 131, JCPOA, Ann. II, Sec. 4; emphasis added.

48 POUS, Ann. 118, Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif, 14 July 2015, p. 1.

49 *Ibid*., p. 2; emphasis added.

50 CR 2018/16, p. 21, para. 10 (Mohebi); emphasis added.

51 MI, para. 9.21.

52 *Ibid*., para. 2.4; emphasis added.

53 Observations and Submissions on the U.S. Preliminary Objections submitted by the Islamic Republic of Iran, para. 4.34 *(b)*; emphasis added.

54 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I. C.J. Reports 1986*, p. 41, para. 64; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 206, para. 78.

55 "Admission", *Black's Law Dictionary* (11th ed. 2019) (defining an admission against interest as "[a] person's statement acknowledging a fact that is harmful to the person's position, [especially] as a litigant").

56 See "CENTO", in *Digest of International Law*, Vol. 12, Washington DC: US Government Printing Office, 1971, p. 886.