



# INTERNATIONAL COURT OF JUSTICE

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## Summary

Unofficial

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### *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*

#### **History of the proceedings** (paras. 1-23)

The Court begins by recalling that, on 16 July 2018, the Islamic Republic of Iran (hereinafter “Iran”) filed an Application instituting proceedings against the United States of America (hereinafter the “United States”) with regard to a dispute concerning 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”).

In its Application, Iran sought 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. On the same day, Iran filed a Request for the indication of provisional measures.

By an Order of 3 October 2018, the Court 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.”

On 23 August 2019, the United States raised certain preliminary objections.

## **I. FACTUAL BACKGROUND (PARAS. 24-38)**

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. 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”.

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 the Safeguards Agreement. In 2006, the Agency’s Board of Governors requested the Director General to report the matter to the Security Council of the United Nations. 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 the suspension of all of its enrichment-related and reprocessing activities, to be verified by the IAEA.

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)”. 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. 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, in 2007, 2008, 2010 and 2015.

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.

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.

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”. 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]”.

The JCPOA describes, in particular, the steps to be taken by Iran within a set time frame, 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.

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.

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.

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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The Court recalls that the United States 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 begins by considering issues related to its jurisdiction.

## **II. JURISDICTION OF THE COURT *RATIONE MATERIAE* UNDER ARTICLE XXI OF THE TREATY OF AMITY (PARAS. 39-84)**

The Court notes that 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.”

The Court observes that, according to the Respondent, the dispute which Iran seeks to bring before the Court falls outside the scope of the 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.

The Court begins 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** (paras. 42-60)

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.

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.

The Court’s determination of the subject-matter of the dispute is made “on an objective basis”, “while giving particular attention to the formulation of the dispute chosen by the Applicant”. 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.

The Court notes that, 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.

According to the Court, it is true that this dispute arose in a particular political context, that of the United States' decision to withdraw from the JCPOA. However, the Court recalls that, as it 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.)

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 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.

The Court considers that, 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.

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. 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” 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.

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” (paras. 61-83)**

The Court notes that, according to the United States, the Court lacks 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, which the United States characterizes as “third country measures”, while the Treaty of Amity is

applicable only to trade and transactions between the Parties. In that regard, 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.

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 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.

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.

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.

Moreover, the Court notes that 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.

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.

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.

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. 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.

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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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 (PARAS. 85-96)**

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.

As the Court has observed in the past, “[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”. The Court has specified that there has to be “clear evidence” that the Applicant’s conduct amounts to an abuse of process.

In the present case, the Court notes that it 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. 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. 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.

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, 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”. 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.

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 (PARAS. 97-113)**

The Court then turns to the objections based on Article XX, paragraph 1, of the Treaty of Amity which 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.”

The Court recalls that in the *Oil Platforms* case, 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”. A similar view was expressed in the case concerning *Certain Iranian Assets*, 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)”. 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 observes that 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.

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.

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. Such an assessment can be conducted only at the stage of the examination of the merits.

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.

**OPERATIVE CLAUSE (PARA. 114)**

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.

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.

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### **Declaration of Judge Tomka**

Having voted in favour of the conclusions reached by the Court, Judge Tomka wishes to offer some observations on the way the Court has treated the second preliminary objection raised by the United States. According to this objection, 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, whereas the 1955 Treaty of Amity would only be applicable to trade between the two States parties, or their companies and nationals.

Although the Parties devoted much attention, both in their written pleadings and during the hearings, to the analysis of the provisions invoked by Iran, the Court stops short from analysing and interpreting them. It simply rejects the second preliminary objection raised by the United States, while at the same time leaving open the possibility for the Parties to argue "legal and factual questions" raised by the preliminary objection at the merits stage.

In the view of Judge Tomka, the approach taken by the Court in the present case is unsatisfactory as it is inconsistent with the approach followed by it in its previous case law on the same Treaty. The legal question which the Court should have determined at this stage of the proceedings is whether the 1955 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.

### **Separate, partly concurring and partly dissenting, opinion of Judge *ad hoc* Brower**

Judge *ad hoc* Brower joins the Court's unanimous rejection of the Respondent's two preliminary objections to jurisdiction, as well as the objection based on Article XX, paragraph 1, subparagraph (*d*) of the Treaty of Amity. However, he disagrees with the Court's finding that Iran's Application is admissible, as well as with its rejection of the United States' objection under Article XX, paragraph 1, subparagraph (*b*).

Judge *ad hoc* Brower considers that Iran's Application should have been declared inadmissible as an abuse of process, as it seeks from the Court a legally binding Judgment compelling the United States to carry out its undertakings under the non-legally binding JCPOA, while Iran would remain free not to comply with that instrument (as it has already admitted to doing). This would confer upon Iran an illegitimate advantage.

Judge *ad hoc* Brower notes that the Court has devoted little attention to abuse of process in its Judgment. In particular, in quickly dismissing the relevance of Iran's choice to challenge only those sanctions that had been lifted in accordance with the JCPOA (and not the many other sanctions applicable in relations between the United States and Iran) by characterizing it as a mere "political decision", the Court has avoided actually analysing the import of Iran's strategy.

The Court's approach in this case continues a longstanding practice whereby the Court has failed to provide any definition of the concept of abuse of process or of the standards for its application. In the 95 years since the related concept of abuse of rights was first discussed by the Court's predecessor, the Court has repeatedly declined to contribute to the substantive development of this principle or of that of abuse of process, despite having had many opportunities to do so. More recently, the Court has adopted and often invoked "exceptional circumstances" and "clear evidence" tests but has left the meaning of these terms opaque. In Judge *ad hoc* Brower's view, the Court would do well to clarify the principle of abuse of process and the evidentiary condition for its acceptance.

Judge *ad hoc* Brower considers that the failure of the Court in this case to declare Iran's Application inadmissible, added to its and its predecessor's 95-years of treating the concept of abuse of process with acute neglect, will disincentivize States from seeking peacefully to resolve disputes through legally non-binding means, which sometimes, as in the case of the JCPOA, are the only means available.

With regard to the United States' objection under Article XX, paragraph 1, subparagraph (b) of the Treaty of Amity, Judge *ad hoc* Brower considers that this should have been dealt with as a legitimate preliminary objection, and should have led to the dismissal of Iran's claims.

Judge *ad hoc* Brower has agreed with the majority, both in the present case and in *Certain Iranian Assets*, that United States' objections under subparagraph (d) must be heard at the merits phase of the case. However, Judge *ad hoc* Brower considers that the language of subparagraph (b), which applies to measures "relating to fissionable materials", is much broader than the language in other subparagraphs of Article XX, paragraph 1. In his view, given dictionary definitions of the terms "to relate" and "fissionable", it is clear that measures concerning nuclear weapons and nuclear proliferation are measures "relating to fissionable materials". Moreover, official statements by high officials of both Parties, including in the context of the JCPOA and in these very proceedings, confirm that the sanctions at issue in this case are "nuclear-related".

Judge *ad hoc* Brower notes that the Court has not analysed subparagraph (b) in accordance with Article 31 of the Vienna Convention on the Law of Treaties, but rather has simply applied its past treatment of other subparagraphs of Article XX, paragraph 1, to subparagraph (b). In his view, the application of Articles 31 and 32 of the Vienna Convention to subparagraph (b) would have been warranted and would yield the conclusion that the United States' objection under that provision should have been upheld and Iran's claims dismissed.

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