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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Tuesday 28 August 2018, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

***in the case concerning* Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran *v.* United States of America)**

VERBATIM RECORD

ANNÉE 2018

Audience publique

tenue le mardi 28 août 2018, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***en l'affaire relative à des* Violations alléguées du traité d'amitié, de commerce et de droits consulaires conclu en 1955 (République islamique d'Iran c. Etats-Unis d'Amérique)**

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Gaja
		Robinson
		Crawford
		Gevorgian
		Salam
		Iwasawa
	Judges *ad hoc*	Brower
		Momtaz
	Registrar	Couvreur

Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
Gaja
Robinson
Crawford
Gevorgian
Salam
Iwasawa, juges
MM. Brower
Momtaz, juges *ad hoc*

M. Couvreur, greffier

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

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The PRESIDENT: Please be seated. The sitting is now open. For reasons duly made known to me, Judges Sebutinde and Bhandari are unable to sit with us today. Judge Robinson will join us after the coffee break. The Court meets today to hear the first round of oral observations of the United States of America on the Request for the indication of provisional measures submitted by the Islamic Republic of Iran. I now call on Ms Jennifer G. Newstead, Agent of the United States of America. You have the floor.

Ms NEWSTEAD:

OVERVIEW OF THE CASE AND PROVISIONAL MEASURES REQUEST

1. Thank you, Mr. President and Members of the Court: I am honoured to appear today as Agent of the United States in these proceedings and in my capacity as Legal Adviser to the United States Department of State. Two of my colleagues — Professor Donald Childress and Ms Lisa Grosh — will join me in presenting the position of the United States today. You will also hear from Sir Daniel Bethlehem, Q.C., who is well known to the Court.

2. Mr. President and Members of the Court: the United States is here in strong opposition to Iran's Request. Iran manifestly cannot meet the conditions required for the indication of provisional measures. My colleagues and I will address how Iran fails to carry its burden to establish the existence of prima facie jurisdiction; how the rights Iran invokes are not plausible Treaty of Amity rights; how the measures Iran seeks would irreparably prejudice the United States; how provisional measures are not required to avoid irreparable prejudice to Iran; and how, in reality, the measures Iran seeks would amount to an interim judgment on the merits.

3. First, notwithstanding what you heard from Iran's representatives yesterday, this case is *entirely* about an attempt to compel the United States, by order of this Court, to resume implementation of the Joint Comprehensive Plan of Action, or JCPOA. This is clear from the fact that Iran seeks to reinstate sanctions relief that the JCPOA provided, and to do so in circumstances that the JCPOA, by design, did not authorize: namely, an application to this Court. Iran is endeavouring to use the procedures of the Treaty of Amity to enforce rights that it claims under an entirely different instrument that specifically excludes judicial remedies.

4. Second, looking to the Treaty of Amity, Iran's attempt to engage the jurisdiction of this Court by invoking that Treaty is unsustainable. The Treaty, in Articles XX and XXI, carves out from its scope *precisely* the types of national security measures — those that are necessary to protect essential security interests and those relating to nuclear materials — which lie at the heart of this case. Iran's nuclear ambitions pose a grave threat today, as they have for decades, to the United States and the international community. Iran has proven its willingness to commit and to support acts of terrorism and to pursue violent and destabilizing policies when it serves the *régime*'s interests. The possibility that Iran may take such actions in the future with a nuclear weapons capability is not a risk that can be tolerated.

5. The United States' decision to cease participation in the JCPOA was made in recognition of the threat that Iran's behaviour continues to pose to the national security, foreign policy and economy of the United States, and the JCPOA's failure to address the totality of those concerns about Iran's behaviour[1]. But the Treaty of Amity preserves the United States' sovereign right to make such decisions and to take such measures. It cannot, therefore, provide a basis for this Court's jurisdiction, nor does it provide Iran any basis to demonstrate rights that are plausible on the merits.

6. Third, the provisional measures that Iran requests would provide, in effect, the very relief that Iran seeks on the merits, which is contrary to this Court's jurisprudence[2]. The prejudice to the United States from such an order by the Court is plain to see. Such an order would purport to prevent the United States, for years to come, from taking non-forcible, lawful measures to counter Iran's nuclear ambitions, as well as Iran's threatening conduct outside the scope of the JCPOA, including its development of ballistic missiles, its support for international terrorism and its escalating campaign of regional destabilization.

7. For this Court to accept Iran's legal manoeuvrings would have grave and sobering consequences. The United States' sovereign right to take lawful measures in defence of its essential security interests is not simply a prima facie right: it is more firmly rooted. And it cannot be

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[1] Judges' folders, tab 1, Letter from the President to the Speaker of the House of Representatives and the President of the Senate, 6 Aug. 2018, https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-senate-30/.

[2] *Construction of a Road along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, 1.C.J. Reports 2013*, p. 404, para. 21.

properly constrained through a provisional measures request that does not, and cannot, engage with the substance of that US right.

8. Mr. President, Iran's Request warrants another observation before I proceed. It rests on the basis of a treaty whose central purpose — friendship with the United States — Iran has expressly and repeatedly disavowed since 1979 in its words and actions, by sponsoring terrorism and other malign activity against United States citizens and interests. In other words, the situation that the Parties find themselves in today is nowhere near what was contemplated when the Treaty was concluded in 1955. In spite of this, Iran invokes the Treaty in an effort to force the United States to implement an entirely separate, non-binding arrangement — the JCPOA — which contains its own dispute resolution mechanism that purposefully excludes recourse to this Court. That cannot be an appropriate role for provisional measures.

9. Before I elaborate on these points further, I will take a moment to address what you heard yesterday. Iran sought to characterize itself as a victim, as a law-abiding State, brought to its knees by unlawful US sanctions. The suggestion that Iran is a victim does not withstand scrutiny at any level. The history of Iran's destructive acts is well-documented, and I will address it in detail shortly.

10. For now, I will simply note that the United States' 8 May decision to cease participation in the JCPOA, which is at the centre of this case, was motivated by an acute, long-standing, and growing concern about the national security threat posed by Iran. The sanctions that the United States has reintroduced are lawful and appropriate in the face of Iran's activities — past, continuing, and threatened. They are the very same sanctions that were integral to a multilateral effort over years prior to the JCPOA, including with the European Union and the United Nations Security Council, to respond to the growing and well-recognized threat posed by Iran. Whether or not one agrees with the United States' decision regarding the JCPOA, there should be no misapprehension of the threat that Iran poses.

11. It also bears emphasis that the economic and social concerns that Iran's representatives raised yesterday, which Iran seeks to lay at the doorstep of the United States, find deep roots in the Iranian government's mismanagement of its own economy and repression of its own population. The Iranian government cannot succeed in shielding itself from responsibility for the consequences

of its own threats to international peace and stability, as well as to its own people, by submission to this Court.

12. Mr. President, I must also be clear that the United States does intend, lawfully and for good reason, to bring heavy pressure to bear on the Iranian leadership to change their ways. We do this in the interests of US national security, as well as in pursuit of a more peaceful Middle East and a more peaceful world. Contrary to what you heard yesterday, the United States takes seriously the importance of ensuring that sanctions do not apply to humanitarian activities. This is why there are humanitarian exceptions in all of the US domestic sanctions statutes at issue in this case. In addition, the United States has affirmed in public guidance from the Department of the Treasury that authorizations to permit humanitarian transactions and the Statement of Licensing Policy for Safety of Flight remain in effect following the 8 May decision. Mr. Bethlehem will have more to say on this issue shortly.

13. With this introduction, let me provide a brief roadmap to my submission to come. I will provide additional background on the JCPOA and the US decision of 8 May, as it is helpful in understanding the reasons why Iran's request should not be granted. Following that, I will demonstrate — by recalling for this Court Iran's support for terrorism and promotion of regional conflicts, as well as its history of repeated violations of internationally agreed restrictions on its nuclear programme — that essential national security concerns, which fall expressly outside the scope of the Treaty of Amity, are the foundation of the actions which Iran seeks to challenge. I will conclude by addressing in a summary fashion why Iran's request does not meet the requirements for the indication of provisional measures.

I. This case is about the JCPOA, which provides no consent to jurisdiction to this Court, not the Treaty of Amity

14. Let me now turn to expand on the point that this case is in reality about the JCPOA, not the Treaty of Amity. Yesterday, Iran sought to reassure this Court that its case was *not* founded on the JCPOA. As my colleagues and I will show, Iran's Request for provisional measures is fundamentally an effort to restore the sanctions relief that the United States had provided when implementing the JCPOA. The Treaty of Amity is therefore simply a device in Iran's search for a jurisdictional basis to this Court.

15. The JCPOA is a distinct, multilateral instrument, entered into in 2015 by the Permanent Members of the United Nations Security Council, Germany, the European Union and Iran. Its motivation was an attempt to address the international community's concerns about Iran's nuclear programme[3].

16. The JCPOA represents a series of "reciprocal commitments" by the participants. Iran committed to take steps — most of which were time-limited — to scale back its nuclear programme and to allow for certain verification measures. In return, the other participants lifted specific "nuclear-related" sanctions[4]. Consistent with the participants' deliberate intent, the JCPOA was drafted to reflect the non-legally binding nature of the commitments thereunder. In this way, the JCPOA certainly did not guarantee Iran that the sanctions measures imposed by any of the participants prior to its entry would not be reimposed if a participant decided to exit. Equally, the JCPOA clearly declined to provide any recourse to this Court to adjudicate such a decision.

17. Both Iran's Application and its Request for provisional measures make clear that this is in fact a dispute about the JCPOA. On the screen in front of you, and at slide 1 in your judges' folder, is an extract from paragraph 2 of Iran's Application, which states:

> "The present Application exclusively concerns the internationally wrongful acts of the USA resulting from its decision to re-impose in full effect and enforce the 8 May sanctions that the USA previously decided to lift in connection with the Joint Comprehensive Plan of Action"[5].

18. The *relief* that Iran requests also underscores this point. It asks the Court to order "the suspension of the implementation and enforcement of the 8 May sanctions"[6]. This is, fundamentally, a request for the restoration of sanctions relief under the JCPOA.

II. The US measures were taken to counter the persistent threats posted by Iran to the United States and vital US national interests

19. Mr. President, I will now turn to the context in which the United States made the decision of 8 May. As I have said, the JCPOA was an attempt to meet the threat of Iran's pursuit of

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[3] The JCPOA refers to the participants collectively as Iran and "the E3/EU+3", with France, Germany and the United Kingdom being the E3, and the remaining "plus three" being the United States, Russia and China.

[4] Judges' folders, tab 2, JCPOA Main Text, para. 24.

[5] Application of Iran (AI), para. 2.

[6] Iran's Request for the indication of provisional measures (RPMI), para. 42 *(a)*.

nuclear capabilities. Some believed the JCPOA might also improve regional stability or moderate Iran's behaviour in other respects. But in the view of the United States, it is a flawed initiative for a number of reasons. It is time-limited. It contains insufficient inspection and verification measures, despite Iran's well-known deception about the purposes of its nuclear programme. It does not address the threat posed by Iran's ballistic missile programme. Nor does it address Iran's sponsorship of terrorism. And it provides a windfall of access to extraordinary amounts of funds that the Iranian *régime* has used to fuel proxy wars across the Middle East[7].

20. Iran's behaviour continued, and in many respects worsened, after the JCPOA was concluded. Iran provides hundreds of millions of dollars a year to Hezbollah in support of its worldwide terrorist activities, including using rockets supplied by Iran to target Israeli neighbourhoods and providing ground forces for the conflict in Syria[8]. Recent reports have described the arrest of a Vienna-based Iranian diplomat in connection with an alleged plot to bomb an Iranian dissident rally in France[9]. Here in The Netherlands, authorities have expelled two Iranian officials believed to be tied to the murder of an Iranian dissident, Ahmad Mola Nissi[10]. And last week, the United States Department of Justice indicted two individuals accused of acting on behalf of the Government of Iran by conducting covert surveillance of Israeli and Jewish facilities in the United States and collecting detailed information on American members of an Iranian dissident group[11]. The Islamic Revolutionary Guard Corps continues to send thousands of fighters into Syria to support the Assad *régime*, perpetuating a conflict that has displaced more than 6 million

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[7] Judges' folders, tab 3, *After the Deal: A New Iran Strategy*, Remarks by Secretary of State Michael Pompeo, dated 21 May 2018, available at https://www.state.gov/secretary/remarks/2018/05/282301.htm.

[8] Judges' folders, tab 4, Speech by Under Secretary of the Treasury Sigal Mandelker, 5 June 2018, at https://home.treasury.gov/news/press-releases/sm0406.

[9] Judges' folders, tab 5, Matthew Levitt, *Iran's Deadly Diplomats*, CTC Sentinel, Aug. 2018, available at https://www.washingtoninstitute.org/policy-analysis/view/irans-deadly-diplomats.

[10] *Ibid.*

[11] *Two Individuals Charged for Acting as Illegal Agents of the Government of Iran*, Department of Justice Office of Public Affairs, 20 Aug. 2018, available at https://www.justice.gov/opa/pr/two-individuals-charged-acting-illegal-agents-government-iran.

Syrians[12]. And months after the ink was dry on the JCPOA, and repeatedly thereafter, Iran has tested ballistic missiles capable of delivering a nuclear weapon[13].

21. These more recent actions must be viewed against a long history of violent and destabilizing activities by the Iranian *régime*. The seizure of the US Embassy in Tehran and the taking of US personnel hostage on 4 November 1979 was just the beginning. In the decades since, Iran has sponsored international terrorism, including attacks against Americans and nationals of many other countries, and has provided material and financial support to terrorist groups and their proxies[14]. Iran violated its obligations as a non-nuclear weapon State party to the Nuclear Nonproliferation Treaty (NPT) and under agreements with the International Atomic Energy Agency (IAEA). Among other things, it developed a covert, underground enrichment facility and engaged in weaponization activities, while denying the IAEA information and access to address those issues[15]. And, as is well-known, for years Iran has openly defied the binding decisions of the United Nations Security Council applicable to it, while contesting the unimpeachable lawfulness of those very measures[16].

22. Mr. President and Members of the Court, in the face of these actions by Iran, the United States has found it imperative to act. As outlined in the National Security Presidential Memorandum of 8 May, an extract of which is on the screen:

> "[i]t is the policy of the United States that Iran be denied a nuclear weapon and intercontinental ballistic missiles; that Iran's network and campaign of regional aggression be neutralized; to disrupt, degrade, or deny the Islamic Revolutionary Guards Corps and its surrogates access to the resources that sustain their destabilizing activities; and to counter Iran's aggressive development of missiles and other asymmetric and conventional weapons capabilities"[17].

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[12] Judges' folders, tab 3, *After the Deal: A New Iran Strategy*, Remarks by Secretary of State Michael Pompeo, dated 21 May 2018, available at https://www.state.gov/secretary/remarks/2018/05/282301.htm.

[13] Judges' folders, tab 6, *U.S. confirms Iran tested nuclear-capable ballistic missile*, Reuters, 16 Oct. 2015, available at https://www.reuters.com/article/us-iran-missiles-usa-idUSKCN0SA20Z20151016.

[14] Judges' folders, tab 7**,** see e.g. US Department of State Country Reports on Terrorism of 2016, at Chap. 3, available at https://www.state.gov/j/ct/rls/crt/2016/272235.htm.

[15] See Report by the IAEA Director General to the IAEA Board of Governors regarding Implementation of the NPT Safeguards Agreement and relevant provisions of the Security Council resolutions in the Islamic Republic of Iran, 8 Nov. 2011, available at https://www.iaea.org/sites/default/files/gov2011-65.pdf.

[16] See letter dated 20 July 2015 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Secretary General (S/2015/550), para. 13, available at http://dag.un.org/handle/11176/312365.

[17] Judges' folders, tab 8**,** *Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon*, National Security Presidential Memorandum, dated 8 May 2018, para. 3, available at https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/.

23. Mr. President, the actions of the United States taken to protect its essential national security interests over decades, using sanctions and other peaceful tools, were lawful under the Treaty. The use of these peaceful measures to counter Iran's behaviour and protect US essential security interests have directly tracked the history of Iran's threats. They are aimed at preventing Iran from having the resources to sustain and increase these threats, and from using the United States financial system in furtherance of those threats. On the screen we have provided an overview of the critical sanctions authorities adopted over time by the United States to address these essential security concerns.

24. For example, the United States designated Iran as a State sponsor of terrorism in January 1984, a designation it retains to this day, which prevents certain exports and assistance from the United States to Iran. In 1987, President Reagan banned the importation of most Iranian goods and services due to Iran's active support for terrorism and to prevent such imports from contributing to financial support for such acts[18]. In 1995, President Clinton prohibited certain transactions with respect to development of petroleum resources in Iran[19]. Following years of Iranian evasion of sanctions aimed at a range of illicit activities, President Obama imposed measures in 2012 that blocked all property subject to US jurisdiction of the Government of Iran, including its Central Bank and Iranian financial institutions[20]. Each of these measures was firmly grounded in national security considerations and the recognition that, because resources are fungible, the imposition of economic restrictions would directly contribute to combatting Iran's actions.

25. The United States has also enacted a range of sanctions measures over time which were expressly tied to Iran's persistent effort to expand its nuclear programme, in clear violation of multiple United Nations Security Council resolutions, Iran's obligations under the NPT, and decisions by the IAEA Board of Governors.

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[18] Judges' folders, tab 9, Executive Order 12613, *Prohibiting Imports from Iran*, 52 Fed. Reg. 41940 (30 Oct. 1987).

[19] Judges' folders, tab 10, Executive Order 12957, *Prohibiting Certain Transactions with Respect to the Development of Iranian Petroleum Resources*, 60 Fed. Reg. 14613 (15 Mar. 1995).

[20] Judges' folders, tab 11, Executive Order 13599, *Blocking Property of the Government of Iran and Iranian Financial Institutions*, 77 Fed. Reg. 6659 (8 Feb. 2012).

26. For example, the US Congress enacted the Iran Sanctions Act of 1996 after finding that Iran's efforts to acquire weapons of mass destruction "endanger the national security and foreign policy interests of the United States" and that "additional efforts to deny Iran the financial means to sustain its nuclear, chemical, biological, and missile weapons programs" were necessary[21].

27. In 2010, as part of a concerted multilateral effort, President Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act, which stated that the sanctions it imposed, as well as other Iran-related sanctions, are "necessary to protect the essential security interests of the United States" to prevent Iran from developing nuclear weapons[22]. As noted on the screen, this Act, as well as subsequent statutes enacted in 2012, followed the adoption between 2006 and 2010 of multiple United Nations Security Council resolutions intended to constrain Iran's nuclear programme, and was reinforced by parallel restrictive measures adopted by the European Union. These were among the measures that were lifted by the JCPOA.

28. Executive Order 13846, which the United States issued on 6 August — as Iran acknowledged yesterday, simply reimposes many of the sanctions previously relieved — and directly states its national security purpose by referring to "the goal of applying financial pressure on the Iranian regime in pursuit of a comprehensive and lasting solution to the full range of threats posed by Iran"[23].

29. In the interest of time, I will not specifically cite to all of the sanctions that Iran contests today, but the point is clear. Each of these measures shares a common theme — to counter the growing threat to the United States posed by Iran by cutting off the sources of funds that can be used to support its malign activities. The sanctions are designed to, and have the effect of, constraining Iran's economic capacity to do harm.

30. Mr. President, the United States' decision to participate in the JCPOA was a continuation of these multilateral efforts to address the threat posed by Iran's nuclear programme. But in light of

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[21] Iran Sanctions Act of 1996, as amended, Public Law 104-172 (50 U.S.C. 1701 note), sect. 1.

[22] Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA), Public Law 111-195 (22 U.S.C. 8501 *et seq.*), sect. 2, para. 10.

[23] Judges' folders, tab 12**,** Executive Order 13846, *Reimposing Certain Sanctions with Respect to Iran*, 83 Fed. Reg. 38939 (7 Aug. 2018).

all of these facts and particularly the conduct of Iran following the JCPOA, the United States concluded that the JCPOA did not have its intended effect and decided to cease its participation.

31. This decision, which was announced on 8 May of this year, followed a full review of the United States' policy toward Iran. The specific reasons for the decision include the following US national security concerns:

— First, the nuclear issues. The JCPOA "provided [Iran] with significant benefits in exchange for temporary commitments to constrain its uranium enrichment program and to not conduct work related to nuclear fuel reprocessing"[24]. Its mechanisms for inspecting and verifying Iran's compliance were insufficient[25]. And the revelation of a large trove of Iranian documents relating to nuclear weaponization activities, which Iran was apparently preserving during the pendency of the JCPOA, called into question whether Iran could be trusted to enrich or control nuclear material[26].

— Second, the JCPOA did nothing to curb Iran's continuing development of ballistic missiles and cruise missiles, which could deliver a nuclear weapon[27].

— Third, since the JCPOA's inception, Iran had "only escalated its destabilizing activities in the surrounding region"[28], using the benefit of the JCPOA sanctions relief to "fuel[] proxy wars across the Middle East and lin[e] the pockets of the Islamic Revolutionary Guard Corps . . ."[29].

— Fourth, despite the JCPOA, Iran remains "the world's leading state sponsor of terrorism, and provides assistance to Hezbollah, Hamas, the Taliban, al-Qaida, and other terrorist networks"[30].

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[24] Judges' folders, tab 8**,** *Ceasing US Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon*, National Security Presidential Memorandum, dated 8 May 2018, para. 3, available at https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/.

[25] Judges' folders, tab 3, *After the Deal: A New Iran Strategy*, Remarks by Secretary of State Michael Pompeo, dated 21 May 2018, available at https://www.state.gov/secretary/remarks/2018/05/282301.htm.

[26] Judges' folders, tab 13**,** Statement by Secretary of State Michael Pompeo, 30 Apr. 2018, available at https://www.state.gov/secretary/remarks/2018/281345.htm.

[27] Judges' folders, tab 3, *After the Deal: A New Iran Strategy*, Remarks by Secretary of State Michael Pompeo, dated 21 May 2018, available at https://www.state.gov/secretary/remarks/2018/05/282301.htm.

[28] Judges' folders, tab 8**,** *Ceasing US Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon*, National Security Presidential Memorandum, dated 8 May 2018, para. 3, available at https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/.

[29] Judges' folders, tab 3**,** *After the Deal: A New Iran Strategy*, Remarks by Secretary of State Michael Pompeo, dated 21 May 2018, available at https://www.state.gov/secretary/remarks/2018/05/282301.htm.

— And finally, Iran continues to commit "grievous human rights abuses, and arbitrarily detains foreigners, including United States citizens, on spurious charges without due process of law"[31].

32. Mr. President and Members of the Court: these are concerns that many of our partners have publicly affirmed that they share, even if they disagree with our calculus on the JCPOA. In a Joint Statement issued on 8 May, the Heads of Government of the United Kingdom, France and Germany noted their agreement that "other major issues of concern need to be addressed", including "shared concerns about Iran's ballistic missile programme and destabilising regional activities, especially in Syria, Iraq and Yemen"[32].

33. Mr. President, as this history demonstrates, the basis for the sanctions measures imposed over decades by the United States toward Iran is protection of the essential security interests of the United States. As Ms Grosh will address, the Parties excluded such measures from the Treaty of Amity to preserve their sovereign discretion to decide, and to act, in accordance with their solemn national security interest on such sensitive matters. The decision and the measures imposed are squarely within the Treaty's exceptions for measures necessary to protect US essential security and other national security interests.

III. Iran's Request fails to meet the requirements for the indication of provisional measures

34. Mr. President and Members of the Court, I have already given you the essence of our case, as it will be developed by my colleagues. Let me, in the interest of clarity, summarize our case so that you have all the elements knitted together in one place.

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[30] Judges' folders, tab 8**,** *Ceasing US Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon*, Presidential Memorandum, dated 8 May 2018, at paragraph 1, *available at* https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/.

[31] *Ibid.*, para. 2. See, e.g., Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, A/72/322, 14 Aug. 2017, paras. 43-48, available at https://daccess-ods.un.org/TMP/5787962.6750946.html (stating that the Working Group on Arbitrary Detention identified an emerging pattern involving the arbitrary deprivation of liberty of dual nationals in the Islamic Republic of Iran).

[32] Judges' folders, tab 14**,** Joint Statement from Prime Minister May, Chancellor Merkel and President Macron Following President Trump's statement on Iran, 8 May 2018, available at https://www.gov.uk/government/news/joint-statement-from-prime-minister-may-chancellor-merkel-and-president-macron-following-president-trumps-statement-on-iran.

35. Iran has failed to show each of the four essential elements of a request for provisional measures, as well as other conditions my colleagues will address. Its request for provisional measures should therefore be rejected.

36. *First*, it must be rejected because the Court lacks prima facie jurisdiction to hear Iran's claims. The dispute between the United States and Iran is manifestly a dispute about the implementation of the JCPOA and an effort to interfere with the sovereign rights of the United States to take lawful measures in support of its national security. This dispute is not about the interpretation or application of rights arising under the Treaty of Amity. As this Court has recognized, it "cannot decide a dispute between States without the consent of those States to its jurisdiction"[33]. The JCPOA reflects a clear intent that such matters are to be handled through political channels. The JCPOA participants, including Iran, clearly excluded from the dispute settlement mechanism of the JCPOA any resort to this Court. Iran's application to the Court is therefore a deliberate effort to manufacture a legal right to challenge the US decision that continued participation in the JCPOA is not in its essential security interests. As a result, the Court lacks jurisdiction to address this dispute.

37. But even if the Court looks to the text of the Treaty of Amity as a potential source of jurisdiction, there is none to be found. Iran has failed to satisfy the basic preconditions of the Treaty's compromissory clause in Article XXI, paragraph 2. Read together with Article XX, paragraph 1, of the Treaty, this excludes from the scope of application of the Treaty exactly the kinds of measures that the United States is now taking against Iran, and has taken for approaching 40 years. Ms Grosh will develop this reasoning in greater detail.

38. *Second*, the rights Iran asserts do not plausibly arise under the Treaty of Amity. They are in actuality benefits that arose under the JCPOA that Iran is seeking to cast as rights and to have restored. In addition, because Article XX (1)'s exceptions clause applies to all the measures at issue here, Iran does not have a plausible claim on the merits with respect to any of the particular substantive provisions invoked.

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[33] *Legality of Use of Force (Yugoslavia* v. *United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 923, para. 19.

39. *Third*, as Mr. Bethlehem will address more fully, Iran cannot show either irreparable prejudice or urgency. The harm of which Iran complains is economic harm. This is presumptively not amenable to interim relief, and Iran cannot rebut the presumption.

40. *Finally*, when weighing whether provisional measures are warranted, the Court must also consider the rights of the Respondent. This includes with respect to the effect of any provisional measures on those rights, as well as whether it prejudices the final decision of the Court at the merits stage. Our position is that Iran's request fails, yet again, on these grounds. A grant of provisional measures in this case would fundamentally prejudge Iran's merits claims and would cause irreparable prejudice to the rights of the United States.

41. Mr. President and Members of the Court, before I conclude, I would like to address briefly Iran's comments on what it described as the United States' violation of the President's letter under Article 74 (4) of the Rules of the Court. The United States has great respect for this Court. We are here making our case and standing on the law. As you have heard, we have a considered view that the circumstances Iran has presented clearly do not fit within the Court's standard for the indication of provisional measures. We do not believe that the Court has jurisdiction to entertain Iran's case. We do believe that Iran is attempting to circumvent the terms of the very instrument that it is trying to enforce. In such circumstances, the United States does not believe that it has acted in any way improperly.

IV. Closing

42. Mr. President and Members of the Court, that concludes my submissions. I thank you for your kind attention and ask that you call upon Professor Childress to continue the US submissions.

The PRESIDENT: I thank the Agent of the United States and I now give the floor to Professor Childress. You have the floor, Sir.

Mr. CHILDRESS:

JURISDICTIONAL DEFECTS REGARDING THESE JCPOA CLAIMS AND IRAN'S FAILURE TO SEEK TO ADDRESS ITS DISPUTE THROUGH DIPLOMACY

1. Thank you, Mr. President, Members of the Court. It is an honour to appear before the Court on behalf of the United States. Today, I will be addressing two reasons why Iran cannot show that the Court has prima facie jurisdiction to indicate provisional measures in this case.

2. *First*, Iran invokes Article XXI, paragraph 2, of the Treaty of Amity as the basis for the Court's jurisdiction. That clause, which is now up on the screens in front of you, only applies by its terms to "[a]ny dispute between the High Contracting Parties as to the interpretation or application of the present Treaty". But Iran does not bring to this Court a dispute as to the interpretation or application of the Treaty. As you have heard Ms Newstead explain, Iran's claims arise from the JCPOA and relate to the United States' decision to cease participation in the JCPOA. The JCPOA is not, therefore, simply the "context" for this dispute, as Iran suggested yesterday. Indeed, as Iran made plain yesterday, this case is all about the *reimposition* of US sanctions — and not just any sanctions, but the very nuclear-related sanctions the United States lifted in connection with the JCPOA.

3. Yet, the JCPOA is a distinct multilateral instrument negotiated among a different set of participants that has its own dispute resolution mechanism. That mechanism does not manifest any parties' consent to the jurisdiction before this Court, but instead elects for political channels to resolve JCPOA disputes. The Treaty of Amity cannot be used as an end-run around the JCPOA.

4. *Second*, quite apart from this, Iran has failed to satisfy the procedural preconditions contained in Article XXI, paragraph 2, of the Treaty of Amity. The Treaty and this Court's jurisprudence requires a genuine attempt at diplomacy. This Iran has not done.

I. The importance of establishing prima facie jurisdiction

5. Mr. President, Members of the Court, permit me briefly to reflect on the fundamental importance of the Court's jurisdictional inquiry.

6. Article 41 of the Court's Statute makes clear that provisional measures are designed to preserve the rights of *both* parties, not just the rights of the applicant. While provisional measures

proceedings are necessarily compressed, they nevertheless require a careful examination of a respondent's claim that the request is outside the scope of its consent to the Court's jurisdiction. Purporting to constrain a State's sovereign rights in circumstances in which there are serious doubts about whether the Court has jurisdiction to adjudicate the merits of the case would raise significant concerns. This is especially so in circumstances where, as here, the jurisdictional question relates to the sovereign rights preserved by a party to address a long-standing national security concern.

7. Indicating provisional measures in the absence of a sufficient jurisdictional foundation for the applicant's case would raise precisely the grave concern expressed by Sir Gerald Fitzmaurice over 30 years ago. He warned: "nothing undermines confidence in the process of international adjudication so quickly and completely as the feeling that international tribunals may assume jurisdiction in cases not really covered by the intended scope of the consents given by the parties"[34]. This is especially salient in the context of the "extraordinary powers" implicated by interim relief, when a State is claiming that the case is not one it has consented to be heard.

8. To be sure, the Court "need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case" at the provisional measures stage. Even so, the Court has equally been clear about the need for caution. The Court's jurisprudence thus establishes that provisional measures are warranted *only* if the provisions relied on by the applicant "appear, prima facie, to afford a basis on which its jurisdiction could be founded . . ."[35].

9. In its recent Order on provisional measures in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France)*, the Court emphasized that it "cannot limit itself to noting that one of the Parties maintains that the [relevant treaty] applies, while the other denies it". Rather, the Court "must ascertain whether the acts complained of by [the applicant] are prima facie capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to

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[34] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius, 1986), Vol. II, p. 514.

[35] See e.g. *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018*, para. 14.

entertain . . .”[36]. Even at this early stage, consideration must be given to the text, object, and purpose of the relevant instruments to determine whether the requisite consent is present.

10. In this case, as I will discuss, no such consent can be found.

II. The Court lacks prima facie jurisdiction because the acts complained of fall under the JCPOA, not the Treaty of Amity

11. Mr. President, Members of the Court, with those jurisprudential observations in mind, I return to the fundamental and incontestable point that this case is all about the JCPOA. Iran has suggested that it has framed this case as a dispute about the Treaty of Amity, and that this Court is essentially required to take Iran's Application only at its words. But, this is not the standard set in the Court's Statute, its Rules, or its jurisprudence. Instead, the Court's jurisprudence shows that the Court will not confine itself to the Applicant's formulation of the dispute, but rather will determine for itself on an objective basis the subject-matter of the dispute[37]. Although Iran attempts to present its Application as rooted in the Treaty of Amity, the case that it in fact brings to the Court is a dispute arising from and concerning the application of the JCPOA and the reimposition of United States sanctions. This is evident from the fact that the dispute Iran asserts arises from the 8 May decision by the United States to cease participation in the JCPOA. It is also evident from the fact that the provisional measures Iran requests would effectively require the United States to restore the sanctions relief provided under the JCPOA.

12. Let me return to the real instrument in dispute — the JCPOA. The JCPOA is a distinct multilateral instrument. Unlike the Treaty of Amity, it was concluded among multiple participants (beyond the United States and Iran). Furthermore, it was negotiated in a different historical context than the Treaty, and it has a vastly different legal character than the Treaty. While the JCPOA is at the heart of the dispute Iran presents to this Court, it provides no jurisdiction of the Court. Rather, the JCPOA establishes a highly particular dispute resolution mechanism, which in text and

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[36] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1159 para. 47; see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017*, at para. 22.

[37] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015* p. 592, para. 26; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, paras. 30-31; *Nuclear Tests (Australia* v. *France), Judgment, I. C. J. Reports 1974*, p. 253, para. 29; *Legality* of *Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 124, para. 27.

structure necessarily excludes consent to the jurisdiction of this Court in favour of the resolution of the dispute through *political channels*.

13. Nowhere in the text of the JCPOA will you find either a compromissory clause allowing for resolution of disputes by the Court, or any indication at all of the consent by the JCPOA participants to the jurisdiction of the Court on matters concerning the implementation of that instrument.

14. This was not an oversight. Indeed, the JCPOA's dispute resolution mechanism contemplates exactly the kind of dispute which has now arisen, namely, that a participant has decided to cease implementing some or all of the commitments under that instrument. This dispute settlement mechanism is detailed in the JCPOA Main Text, principally at paragraph 36, which you will find at tab 2 of the judges' folders. Several of its elements are noteworthy. First, its reliance on political channels. Second, its limited allowance for consideration by an outside "advisory" panel, on a strictly non-binding basis. Third, its rapid time frames. Together, these elements make plain that the JCPOA participants sought to ensure that disputes concerning its implementation would be addressed through *political channels*, among its participants, rather than through adjudication, contrary to the case that Iran attempts to bring before this Court.

15. An examination of the JCPOA's text illuminates these key elements. Permit me to briefly take the Court through these provisions, which appear on the screens in front of you. The JCPOA establishes a Joint Commission, consisting exclusively of the participants[38]. The Joint Commission has responsibility for addressing disputes concerning allegations of non-performance through a time-limited dispute resolution process. Specifically, pursuant to paragraph 36, if a participant believes that another participant is not meeting its commitments, the complaining participant may refer the issue to the Joint Commission for resolution[39]. Such a referral initiates consideration by the Joint Commission for 15 days. Following that, if the issue is not resolved, it proceeds to consideration by the Ministers for Foreign Affairs of the participants for another 15 days. These short time frames — 15 days, followed by 15 days — may be adjusted *only* if all participants agree to an extension. The strict timeline underscores the intention of the participants to have a swift,

[38] Joint Comprehensive Plan of Action (JCPOA), Main Text, para. ix; judges' folders, tab 2.

[39] JCPOA Main Text, para. 36.

responsive dispute resolution mechanism that would not be bogged down by formality or delay, given the gravity of the international peace and security issues at stake. This streamlined process is also consistent with the decision of the participants *not* to include a compromissory clause for a court or arbitral tribunal, whose processes can take years.

16. Where the JCPOA provides for a consideration of a dispute outside the Joint Commission or Ministers of the participants, it does so in a highly circumscribed way that deliberately eschews any binding judicial mechanism. This limited avenue is the potential for referral — in parallel with or in lieu of consideration by Ministers, and also subject to a 15-day time-limit — to an *ad hoc* "Advisory Board". Notably, this Board is expressly empowered to provide only a non-binding opinion, further reinforcing that it does not contemplate resort to this Court[40].

17. Finally, the JCPOA dispute mechanism expressly anticipates a situation in which one side is dissatisfied with the outcome of the process. Yet again, however, the JCPOA does not allow for resort to a judicial body. Rather, if a participant concludes that the issue is unresolved and amounts to significant non-performance, the JCPOA permits the participant to "cease performing its commitments under this JCPOA in whole or in part, and/or to notify the United Nations Security Council that it believes the issue constitutes significant non-performance"[41]. This was the remedy that the participants contemplated if the dispute mechanism did not resolve the issue. Paragraph 37 simply describes what follows if a participant decides to go to the Security Council. The JCPOA does not provide for resort to the Court to settle disputes arising therefrom. Rather, it favours political channels over adjudication.

18. Mr. President, Members of the Court, Iran cannot establish that its claims, which challenge US actions under the JCPOA, are prima facie capable of falling within the scope of the Treaty of Amity. They are manifestly — not simply prima facie — claims concerning the application of the JCPOA. The JCPOA expressly provides only a *political* mechanism for the settlement of disputes. Accordingly, Iran's attempt to provide the Treaty of Amity's

[40] JCPOA Main Text, para. 36.

[41] *Ibid.*

compromissory clause to draw the Court into matters concerning implementation of the JCPOA is unsustainable. It is a misuse of this Court. Iran's request should be emphatically rejected.

III. Iran's claims are outside the scope of Article XXI (2) of Treaty of Amity because Iran has failed to genuinely attempt to resolve its claims through diplomacy

19. Mr. President, Members of the Court, the second reason why the Court lacks prima facie jurisdiction in this case is that Iran has not shown — and cannot show — that its claims are "not satisfactorily adjusted by diplomacy", as Article XXI, paragraph 2, of the Treaty of Amity requires. That clause is now up on the screens in front of you. Based on a plain reading of the text, as well as the Court's recent decisions, an applicant may only bring a claim under Article XXI, paragraph 2, following a *genuine attempt to negotiate* on the subject-matter of the dispute with the objective of adjusting the dispute by diplomacy[42]. And the negotiations must relate to the subject-matter of the Treaty invoked by the applicant[43]. This precondition was a critically important feature in the drafting of the Treaty of Amity and, as this Court affirmed recently in both the *Georgia* v. *Russia* and *Qatar* v. *United Arab Emirates* cases, it cannot be considered a mere formality.

20. Permit me to provide some context. First, the historical record of both the Treaty of Amity and other similar treaties negotiated by the United States during the same period indicates clearly that resort to the Court would be a rare occurrence, given these preconditions favouring diplomacy. For example, when negotiating such a treaty with Germany, which contained a nearly identical compromissory clause, the US view was that "any problems arising would ordinarily be reviewed and settled bilaterally through the normal processes of diplomacy", and that if that failed,

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[42] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018*, paras. 37-38; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 125, para. 59.

[43] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I),* p. 132, para. 157. See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018*, para. 36; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 122, paras. 50, 52; case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 247, para. 79.

either party would be entitled as "an ultimate resort" to take the dispute to the Court[44]. Iran is plainly acting contrary to this intent, as is evidenced by its precipitous resort to the Court in this case.

21. Second, Article XXI, paragraph 1, of the Treaty, now on the screens in front of you, further illustrates that the parties did not intend to create an avenue to this Court in the absence of a genuine effort to resolve the dispute between themselves. It states that each party "shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting Party may make with respect to any matter affecting the operation of the present Treaty". This requirement to "afford adequate opportunity for consultation[s]", when read together with Article XXI, paragraph 2, makes clear that the parties must first attempt a diplomatic process and afford adequate opportunity for consultation before seeking resort to this Court. Contrary to what Iran stated yesterday, Iran never afforded the United States an adequate opportunity to consult on alleged violations of the Treaty nor attempted to resolve their claims through diplomacy. Iran cannot therefore establish prima facie jurisdiction under the requirements of the Treaty's compromissory clause.

22. The Court's recent decisions also support the conclusion that Iran's efforts do not satisfy the standard of attempting genuine diplomacy before bringing its purported treaty claim to the Court, and that its assertion of jurisdiction under the compromissory clause of the Treaty must therefore fail. As I turn to the *Georgia* v. *Russia*, *Ukraine* v. *Russia* and *Qatar* v. *United Arab Emirates* (UAE) cases, it is worth observing that those disputes involved an apparent breakdown of normal diplomatic intercourse between the parties such as might be said to obviate the requirement to engage in a diplomatic effort. But any such supposition had no sway before this Court, which emphasized the importance of respecting the gateway requirements of the treaties there in issue. As in those cases, so also the case here.

23. Turning to the jurisprudence, in *Georgia* v. *Russia*, the Court found that a similar compromissory clause — Article 22 of the Convention on the Elimination of Racial Discrimination

[44] Instruction dated 23 Sept. 1954, from the Department of State to the US High Commissioner in Bonn, NARA, Record Group 59, Department of State File No. 611.62A4/9-2354. See also telegram dated 14 Jan. 1955, from the Department of State to the US Embassy in Tehran, NARA, Record Group 59, Department of State File No. 611.885/1-1455; judges' folders, tab 16.

(CERD) — required, "at the very least", "a genuine attempt by one of the disputing parties to engage in discussions . . . with a view to resolving the dispute"[45]. In *Qatar* v. *United Arab Emirates*, the Court applied this standard in a provisional measures context. As part of its jurisdictional analysis, the Court found that Article 22 of the CERD was satisfied because Qatar had issued the UAE a "formal invitation to negotiate", expressly referred to the CERD-related issues, and did not receive a response from the UAE[46]. In *Ukraine* v. *Russia*, the Court similarly examined whether the requirement of Article 22 of the CERD that the dispute "is not settled by negotiation" had been satisfied[47]. The Court concluded that it was satisfied, based on "the exchange of more than 20 diplomatic Notes and participation in four rounds of bilateral negotiations". The Court was satisfied that the parties to the dispute had "engaged in negotiations regarding the latter's compliance with its substantive obligations under the CERD", and that the issues "had not been resolved by negotiations" at the time Ukraine initiated the case.

24. In contrast, in the present case, the factual record shows no genuine attempt by Iran to use diplomatic means to resolve its concerns. Iran thus fails to satisfy the precondition for jurisdiction in Article XXI, paragraph 2, of the Treaty.

25. It is important to bear in mind that the sanctions being *reimposed* by the United States have been in place before, some of them for many years, even decades. Never in the more than 20 years of these sanctions being in place did Iran raise concern in diplomatic channels that the United States was violating the Treaty of Amity through imposition of these sanctions. Never. Hundreds of diplomatic Notes were sent to the United States by Iran through the Swiss from 1996 to 2018. None of those diplomatic Notes, *not a single one*, as confirmed by Iran's reliance only on the two diplomatic Notes in its Application, ever made the request. Iran made much of those two recent Notes yesterday, and claimed that those Notes constituted an attempt at diplomacy. This argument is plainly inconsistent with the facts. Of these two Notes, only the second (dated

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[45] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 132, para. 157.

[46] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018*, paras. 37-38.

[47] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, para. 42.

19 June 2018) even mentions the Treaty, and even then, only in passing, with no specifics. Moreover, this Note was not received by the United States until 19 July 2018, *after* Iran's filing of the case.

26. In any event, neither of the two recent diplomatic Notes suggest — let alone invite — diplomatic engagement with the United States on matters of concern. Instead, the Notes contain demands or threats to litigate if Iran's demands are unmet. The first Note was sent on 11 June 2018. Iran's Application was filed on 16 July 2018. This was hardly an adjusted by diplomacy initiative. As to Iran's contention yesterday that its Notes went unanswered, the Notes sent by Iran do not suggest a meeting, they do not propose when or how to meet, and they do not even ask the United States to respond. They simply demand that the United States provide sanctions relief. Iran also makes no mention of the Treaty in the 11 June Note, let alone of the six specific provisions that it now cites as the source of the Treaty rights it claims require protection. Thus, Iran's assertions yesterday that it brought this case after concluding that a diplomatic settlement was not possible ring hollow.

27. In addition, Iran addressed this issue yesterday only superficially, simply concluding that this dispute could not possibly be adjusted by diplomacy. But this suggestion misses the mark, for two reasons. First, provisions such as the one here in consideration have been rightly regarded by this Court as imposing substantive threshold requirements that cannot be disregarded, even in the most difficult of disputes in which normal channels seem not to be apparent. Second, as you will know from the public record, the United States, at our highest political levels, stands ready to engage with Iran in response to a genuine initiative to address the issues of acute concern to the United States. The "adjusted by diplomacy" provision is a substantive requirement of the compromissory clause that Iran seeks to invoke. Iran cannot pick and choose which parts of that clause to rely upon and which parts to ignore. Iran's jurisdictional case fails at this threshold hurdle and should be rejected by the Court for this reason, independently of the other compelling reasons that form the basis of our objections.

28. Mr. President and Members of the Court, I have explained in detail the first two reasons why the Court lacks prima facie jurisdiction over Iran's Request. First, because this case is really about the JCPOA, which has its own dispute resolution mechanism that does not refer disputes to

this Court. And second, because Iran has not met the procedural preconditions for dispute settlement under the Treaty of Amity.

29. Mr. President, Members of the Court, that concludes my submissions. I thank you for your attention. Mr. President, may I ask that you call on Ms Grosh at this time.

The PRESIDENT: I thank Professor Childress. Before I invite Ms Grosh, and in order to avoid interrupting her presentation, the Court will observe a coffee break now for 15 minutes. The hearing is suspended.

The Court adjourned from 11.00 a.m. to 11.15 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now call on Ms Lisa Grosh to take the floor. You have the floor.

Ms GROSH:

THE COURT LACKS PRIMA FACIE JURISDICTION UNDER ARTICLE XXI (2) AND ARTICLE XX (1) OF THE TREATY OF AMITY, AND THE RIGHTS IRAN ASSERTS ARE IMPLAUSIBLE

I. Introduction

1. Mr. President, Members of the Court, it is an honour for me to appear before you today on behalf of the United States. My presentation today will focus primarily on the key role of Article XX, paragraph 1, of the Treaty of Amity, an issue Iran hardly touched on yesterday. That article reflects the Parties' agreement to exclude from the Treaty's scope the very type of national security measures at issue here — measures necessary to protect essential security interests and measures related to nuclear materials. By adopting these exclusions, the Parties expressly reserved their paramount, sovereign rights to take actions in these sensitive areas. Iran's effort to obtain a provisional measures order is therefore unsustainable.

2. *First*, I will explain why Article XX, paragraph 1, deprives the Court of prima facie jurisdiction under the Treaty of Amity's compromissory clause. *Second*, I will address the further element of the Court's standard for provisional measures and show that the rights that Iran claims

are not plausible Treaty of Amity rights, given the express exceptions in Article XX, paragraph 1, and when considered against the JCPOA-related relief that Iran seeks.

II. The Court lacks prima facie jurisdiction because Iran's claims challenge measures excluded from the scope of the Treaty by Article XX (1)

3. I begin with my discussion of the jurisdictional effect of Article XX, paragraph 1, which will proceed in three parts. *First*, I will address the jurisdictional character of the article, and thus its central importance to the Court's inquiry into prima facie jurisdiction. *Second*, I will explain why subparagraphs (1) *(d)* and (1) *(b)*, respectively, operate as bars to prima facie jurisdiction over all of Iran's claims.

A. Jurisdictional character of Article XX (1)

4. I will begin with the *chapeau* of Article XX, paragraph 1, which states that "[t]he present Treaty shall not preclude the application of measures" falling within the listed subject-matter exceptions. Through Article XX, paragraph 1, the Parties provided for a definitive exclusion of jurisdiction in respect of measures set out in subparagraphs *(a)* through *(d)*. The Parties did not agree to have the Court adjudicate the merits of these measures that is, in connection with the Treaty's substantive obligations — in either a provisional or a final manner. This is clear from the text of the Treaty. Article XX, paragraph 1, provides that the Treaty shall not preclude the "application" of these enumerated measures. As a result, the compromissory clause, Article XXI, paragraph 2, concerning disputes about the "interpretation or application" of the Treaty does not operate with respect to such excluded measures.

5. When the United States entered into Friendship, Commerce, and Navigation treaties — and I will refer to them as FCN treaties — the United States in no way understood itself to be consenting to the Court's jurisdiction over matters falling within these sensitive areas. As the Court recognized in *Oil Platforms*, the FCN compromissory clause was "consistently referred to by the Department of State as being 'limited to differences arising immediately from the specific treaty concerned'"[48]. In ratifying FCN treaties, the US Senate accepted the ICJ clause in light of its

[48] Case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 29 (quoting the 1948 State Department statement below).

limited character, and was influenced by the key role of Article XX, paragraph 1, exceptions — that "certain important subjects", including essential security, were "specifically excepted from the purview of the treaty"[49]. And despite Iran's suggestion yesterday to the contrary, the fact that the Treaty's exceptions article precedes the compromissory clause in the Treaty does not establish that Article XX, paragraph 1, is something other than an exception to jurisdiction.

6. While the question of whether Article XX, paragraph 1, is engaged here is readily resolved in the United States' favour at this point, a definitive showing is not required for a provisional measures request. And just as Iran is held to a prima facie standard to show that the Court has jurisdiction, so too is the United States held to that standard in showing that the relevant Article XX exceptions apply. Therefore, if the Court concludes that Article XX, paragraph 1, prima facie excludes jurisdiction over the merits, there is no basis for provisional measures.

7. The Court recently acknowledged this important point in its unanimous decision in the *Jadhav (India* v. *Pakistan)* case. In that case, Pakistan argued that prima facie jurisdiction was lacking under the Optional Protocol to the Vienna Convention on Consular Relations (VCCR). In Pakistan's view, the consular notification and access provision invoked by India, Article 36 of the VCCR, did not apply in cases involving espionage or terrorism. In rejecting this argument, the Court made clear that the VCCR "*does not* contain express provisions excluding from its scope persons suspected of espionage or terrorism". As a result, the Court held that it was unable to conclude that Article 36 would not apply in the case of Mr. Jadhav so as "*to exclude on a* prima facie *basis* the Court's jurisdiction under the Optional Protocol"[50]. It is precisely our contention that Article XX, paragraph 1, *is* such an express provision, and that it in fact excludes jurisdiction over Iran's claims here.

8. And for similar reasons, the Court has declined to order provisional measures where a reservation to the treaty at issue was prima facie applicable, even where the applicant challenged the validity or effect of the reservation. In *Armed Activities on the Territory of the Congo* case, for

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[49] Judges' folders, tab 17, *Hearing Before a Subcomm. of the S. Comm. on Foreign Relations on a Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Republic of China*, 80th Cong. 2d Sess., at 30 (26 Apr. 1948) (statement of Charles Bohlen, Dep't of State); Charles H. Sullivan, U.S. Department of State, Standard Draft Treaty of Friendship, Commerce and Navigation: Analysis and Background (1981), pp. 327-328; see judges' folders, tab 18.

[50] *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 240, para. 32.

example, the Court held that it had no prima facie jurisdiction to indicate provisional measures in circumstances where the respondent, Rwanda, had made a reservation to the treaty and that reservation was prima facie applicable to exclude the Court's jurisdiction over the claims[51].

9. Mr. President, Members of the Court, we submit that provisional measures are all the more inappropriate where, as here, a prima facie applicable exception addresses measures necessary to protect important and sensitive areas of national security. Where the Parties have taken pains to include such exceptions in their agreement, they surely did not intend the Court to indicate provisional measures on such issues. Exceptions clauses such as Article XX, paragraph 1, would be fundamentally undermined if they could be readily circumvented by advancing a request for provisional measures.

10. Now, contrary to what you heard from Iran yesterday, this position is consistent with the Court's jurisprudence on the exceptions article of this and other, similar FCN treaties, which the Court has considered in only two prior cases; that is, *Nicaragua* and the *Oil Platforms* cases. Neither case addressed how the exceptions affect the inquiry that the Court must conduct at the provisional measures stage. And neither case stands for the proposition that the Court cannot consider the exceptions in Article XX, paragraph 1, when deciding whether prima facie jurisdiction exists.

11. *First*, in *Nicaragua*, the Court considered the exceptions clause of the US-Nicaragua FCN Treaty, which was virtually identical to Article XX, paragraph 1, of the Treaty of Amity. The article was not addressed at the provisional measures phase, because at that point Nicaragua had not yet mentioned the FCN Treaty as a potential basis for jurisdiction. Eventually, the Court evaluated the application of the article alongside the merits of Nicaragua's claims. But the Court did not exclude the possibility that the article's exceptions could be addressed other than as a defence on the merits. Rather, the jurisdictional analysis in the *Nicaragua* judgment provided simply that the Court had jurisdiction to *decide whether the listed exceptions applied* to the measures in question[52].

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[51] See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 219, para. 67.

[52] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 222.

12. *Next*, we turn to the *Oil Platforms* case. There, neither party sought provisional measures, and the United States did not invoke Article XX, paragraph 1, at the jurisdictional phase of the case. Yesterday Iran quoted a single line from the *Oil Platforms* jurisdictional proceedings without further context, and suggested that Article XX, paragraph 1, is therefore a merits question. However, as the rest of the transcript from that proceeding makes clear, the United States made a *broader* preliminary objection in *Oil Platforms* that did not rely on *any* particular Treaty article. Instead, the United States argument was that the entire subject-matter of the case, which involved military hostilities, lay completely outside the scope of the Treaty[53]. It did not exclude the possibility that Article XX, paragraph 1, itself *could* provide the basis for a jurisdictional objection in another case. But under the specific circumstances of *Oil Platforms*, consideration of Article XX, paragraph 1 — or any other specific article of the Treaty — was left to the merits phase[54]. When the case did reach the merits, the United States argued that Article XX, paragraph 1, "removes such measures [to which it applies] from the scope, operation and application of the Treaty"[55].

13. Most importantly, however, is what the Court said in its Judgment on the Preliminary Objection in *Oil Platforms*. There, the Court stated that Article XX, paragraph 1, "could be interpreted as excluding certain measures from the actual scope of the Treaty and, consequently, as excluding the jurisdiction of the Court to test the lawfulness of such measures"[56]. Iran failed to mention this language in its presentation yesterday. I will repeat the point here. The Court *accepted* that the article was in principle capable of operating as a jurisdictional bar. That said, as I have already mentioned, the Court was not called upon to apply the clause in this way in *Oil Platforms*, since the United States, in the specific circumstances of that case, had made a broader jurisdictional objection that was not predicated on any specific Treaty article, including Article XX, paragraph 1. The Court deferred consideration of Article XX, paragraph 1, to the merits phase *"in the present*

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[53] Verbatim Record of the public sitting of the ICJ held on 23 Sept. 1996 (CR 96/16), pp. 35-36, case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection*; see also *ibid.*, pp. 32-33.

[54] Verbatim Record of the public sitting of the ICJ held on 17 Sept. 1996 (CR 96/13), pp. 32-33, case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection*.

[55] Rejoinder submitted by the United States of America (23 Mar. 2001), para. 4.02, case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection*.

[56] Case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 20.

case"[57]. It left open the possibility of considering Article XX, paragraph 1, as a jurisdictional matter in a future case.

14. Mr. President, Members of the Court, *this is that future case.* And as I explained earlier, this interpretation is consistent with the intended operation of the exceptions clause.

B. Article XX (1) *(d)*: Essential security

15. I now turn to the first applicable exception in Article XX, paragraph 1, and that is subparagraph *(d)*.

1. Interpretation of Article XX (1) *(d)*

16. This subparagraph excludes measures "necessary to protect" a party's "essential security interests". These are matters that the Parties agreed the Treaty would not constrain.

17. The Court's prior jurisprudence has acknowledged the breadth of this type of exception. In its Judgment in the *Nicaragua* case, the Court noted that the concept of essential security interests "certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past"[58].

18. With regard to the question of whether the measures are "necessary" to protect essential security interests, the United States' own determination in this regard is to be accorded substantial deference. The Court made this clear in paragraph 145 of its 2008 Judgment in *Djibouti* v. *France*, where it held up the Treaty of Amity, and the very similar US-Nicaragua FCN, as examples of treaties with essential security clauses that granted "wide discretion" to the invoking State[59]. That is the appropriate lens for evaluating the US measures at issue here.

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[57] Case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 20; emphasis added.

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

[59] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Merits, Judgment, I.C.J. Reports 2008*, p. 177, para. 145 (citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 222: case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Merits, Judgment, I.C.J. Reports 2003*, p. 161, para. 43; emphasis added.

19. The negotiating history and other contemporaneous sources on essential security clauses in US FCN treaties also strongly support a wide margin of deference to the judgment of a State invoking the clause.

20. First, there is the negotiating history of the Treaty of Amity itself. When Iran proposed a revision to Article ***II*** (1) of the Treaty during the negotiations in order to provide the Parties with latitude with respect to internal safety regulations, the State Department noted that "[s]ecurity interests" were already "provided for in [Article] XX-1-d", and that the "Treaty fully recognizes [the] *paramount right* [of the] state [to] take measures to protect itself and public safety"[60]. Iran apparently agreed, as it assented to the final Treaty text without its proposed amendment.

21. The negotiating history of the US-Germany FCN treaty, which was under discussion at the same time as the Treaty of Amity with Iran, provides a further example of the United States and its treaty partners preserving space to address national security matters. In the course of negotiating that treaty, the United States assured Germany that

> "the language had been drafted in such a manner as to leave a *wide area of discretion* to both parties in order to allow for necessary action over an indefinite future . . . [The US negotiators then] stressed the ***words*** 'necessary' and 'essential' had been added to emphasize that the reservation was not be invoked in a *frivolous* manner."[61]

2. The sanctions that Iran now challenges are necessary to protect the United States' essential security interests

22. Keeping these points of interpretation in mind, I turn now to the application of the essential security exception in the context of the measures that Iran challenges here, and which Iran seeks to persuade the Court to constrain by the indication of provisional measures. As a preliminary matter, it is important to recognize that economic measures enacted for reasons of national security, such as property restrictions and sanctions, were historically understood to be the kinds of actions that would fall squarely within essential security provisions. For example, in response to a question from the US Senate in 1948 in the context of the ratification of the US-Italy FCN treaty, the State Department explained that measures taken pursuant to the Trading with the Enemy Act — a US

[60] Tab 19, judges' folders, Telegram No. 1561 from US Dept. of State to US Embassy Tehran (15 Feb. 1955); emphasis added.

[61] Tab 20, judges' folders, Despatch No. 2254 from US High Commission, Bonn to US Dept. of State, p. 1-2 (12 Feb. 1954); emphasis added.

statute that provides the President with authority to impose economic sanctions — would be covered by the essential security exception[62]. Similarly, during the same FCN negotiations with Germany that I already referred to, the United States said (in response to a question from Germany) that an export ban on strategic materials would come within the essential security clause[63]. Those documents are at tabs 20 and 21 of your judges' folders.

23. Here, reimposition of the nuclear-related economic sanctions that were lifted pursuant to the JCPOA is based on a core national security decision made at the highest levels of the US Government. Ms Newstead has already walked you through the historical context and the underlying reasons for these sanctions measures, and I will not repeat her submissions here. But, I will simply recall that every one of the reimposed sanctions was explicitly predicated on grave national security concerns, and that the sanctions were in place long before — in some instances *decades* before — the JCPOA. In fact, relevant Executive Orders, including the one issued on 6 August to reimpose certain of these sanctions, rely on a 1995 declaration of a national emergency based on the finding that "the actions and policies of the Government of Iran constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States"[64]. These measures, and the US decision to reimpose them, fall squarely within the essential security provision.

24. The essential security rationale for the United States' cessation of participation in the JCPOA was outlined in the National Security Presidential Memorandum of 8 May. The Memorandum begins by making clear that the decisions it contains are an issue of "the safety and security of the United States and the American people"[65]. It then describes in detail a range of Iranian malign activities that together form the basis for the President's decision, including Iran's support for terrorism and its assistance to terrorism organizations that specifically target Americans; Iran's aggressive development of missiles; and the arbitrary detention of US citizens in

[62] Tab 21, judges' folders, *Hearing Before the S. Comm. on Foreign Relations on Proposed Treaty of Friendship, Commerce and Navigation between the United States and the Italian Republic*, 80th Cong. 2d Sess., p. 3 (30 Apr. 1948) (response from State Department to question from Senator Thomas of Utah).

[63] Tab 20, judges' folders, Despatch No. 2254 from US High Commission, Bonn to US Dept. of State, p. 2 (17 Feb. 1954).

[64] Tab 12, judges' folder, Executive Order 13846 of 6 Aug. 2018; see also tab 10, Executive Order 12957 of 15 March 1995.

[65] Judges' folders, tab 8, National Security Presidential Memorandum/NSPM-11, 8 May 2018.

Iran[66]. The JCPOA did not address these deeply troubling aspects of Iran's behaviour, as the deal focused exclusively on Iran's nuclear programme. The Memorandum was clear that Iran has escalated its destabilizing activities since the JCPOA's implementation, and that "Iran's behaviour threatens the national interest of the United States"[67]. The United States came to the conclusion that sanctions relief under the JCPOA was fuelling Iran's dangerous activities by giving Iran access to additional revenue, due to Iran's increased ability to engage in the global economy.

25. In addition to the broader scope of Iran's threatening activities, the United States' decision to cease participating in the JCPOA was also related to flaws in the nuclear deal itself. As discussed earlier, the JCPOA failed to put a nuclear weapons capability permanently out of Iran's reach[68].

26. So, in response to these many threats posed by the Iranian *régime*, the United States decided that the reimposition of these sanctions was necessary to counter Iran's destabilizing activities in the region, block their financing of terror, including against US nationals, address Iran's proliferation of missiles, and ensure that Iran has no path to a nuclear weapon[69]. A fundamental way to address these concerns is to deny Iran access to resources that can be used to sponsor its malign activities. The challenged measures together function to accomplish this objective.

27. All of these are core national security decisions that the Treaty does not constrain, and a grant of provisional measures in this case would completely disregard the carefully crafted parameters of the Parties' consent to the Court's jurisdiction and intrude on US rights that the Treaty was never intended to reach. Particularly in light of the "wide discretion" standard that the Court has previously articulated on essential security, and the prima facie jurisdictional standard applicable at this stage, a provisional measures order would be manifestly unfounded.

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[66] Judges' folders, tab 8, National Security Presidential Memorandum/NSPM-11, 8 May 2018.

[67] *Ibid.*, p. 2; see also judges' folders, tab 3, Speech of Secretary of State Michael Pompeo, "After the Deal: A New Iran Strategy", 21 May 2018, available at https://www.state.gov/secretary/remarks/2018/05/282301.htm.

[68] Judges' folders, tab 8, National Security Presidential Memorandum/NSPM-11, 8 May 2018, p. 2.

[69] See judges' folders, tab 3, Speech of Secretary of State Michael Pompeo, "After the Deal: A New Iran Strategy", 21 May 2018, available at https://www.state.gov/secretary/remarks/2018/05/282301.htm.

C. Article XX (1) *(b)*: Relating to fissionable materials

28. Mr. President, Members of the Court, I turn now to the exception in Article XX, paragraph 1 *(b).* The measures at issue here are sanctions that all the participants in the JCPOA, including Iran, acknowledged as "nuclear-related", meaning they were imposed in relation to Iran's nuclear programme. As such, Article XX, paragraph 1 *(b)* is engaged. It excludes the challenged measures "relating to" fissionable materials.

1. Article XX (1) *(b)* supplies a broad exception for nuclear-related measures

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

30. The context for this provision confirms that paragraph 1 *(b)* broadly excludes the application of measures relating to such sensitive materials from the Treaty. This is evident from the Treaty's use of "relating to", which clearly provides for a more flexible, broader reach for the parties to act than other language in the same Article. For example, a comparison of paragraph 1 *(b)*'s language excepting measures "*relating to* fissionable materials" stands in contrast to the exception in paragraph 1 *(a)*, which excludes only measures regulating the "*importation or exportation of* gold or silver". This distinction reveals that paragraph 1 *(b)* clearly extends beyond import and export restrictions on fissionable materials and the radioactive by-products and sources thereof. Similarly, paragraph 1 *(b)* extends beyond measures "regulating" these materials, as is evident from the selection of the words "relating to" in contrast to the term "regulating" in both paragraphs 1 *(a)* and 1 *(c)*.

31. Excluding the broad category of measures that the Contracting Parties may apply in relation to fissionable materials comports with the Treaty's object and purpose, which sought to address commercial and consular matters between the countries[70]. The Treaty was not intended to tackle the indisputably sensitive and complex issues relating to the use, application, or proliferation

[70] See case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 813, para. 27.

of fissionable materials. The flexibly worded text of paragraph 1 *(b)* leaves considerable space for the full range of measures that might be developed and adopted to control and prevent proliferation of sensitive nuclear materials.

2. The nuclear-related sanctions Iran challenges here are encompassed by Article XX (1) *(b)*

32. Given its broad text and this context, paragraph 1 *(b)* supplies another basis for excluding, prima facie, the nuclear-related sanctions that Iran challenges from the Court's jurisdiction. As Ms Newstead discussed at the outset, it is quite clear that Iran is asking for the Court to provide it — even at this provisional measures stage — with the sanctions relief it obtained pursuant to the JCPOA. But as the face of the JCPOA makes plain, all of the US sanctions that were lifted, and that are now being reimposed, were considered by the participants to the JCPOA, including Iran, to be "national sanctions related to Iran's nuclear programme"[71].

33. These US sanctions were aimed at supplementing, and reinforcing, a broad range of measures that the international community imposed in response to Iran's failures, over the course of more than a decade, to comply with its nuclear non-proliferation obligations. In the face of Iran's continued violations of multiple United Nations Security Council resolutions and of its obligations as a non-nuclear weapon State party to the Nuclear Non-proliferation Treaty, as well as its refusal to co-operate with the IAEA, the United States imposed a range of additional sanctions and restrictions. These measures were designed to deter Iran's illicit activities in relation to fissionable materials and to prevent Iran from acquiring a nuclear weapons capability through the denial of resources and the use of economic leverage. The connection between these measures and Iran's proliferation-sensitive activities is confirmed not only in the JCPOA itself but is also evident in the US measures themselves, which date back to 1996 and are excerpted in relevant part at tab 25 in your judges' folders[72].

34. In making the decision to cease participation in the JCPOA, and accordingly cease providing the sanctions relief associated with its implementation, the 8 May National Security Presidential Memorandum was clear in its considered assessment that the JCPOA did not

[71] Judges' folders, tab 2, JCPOA, Preamble, para. V, Main Text, para. 24; Sect. 4 of Ann. II.

[72] Judges' folders, tab 25, Collection of Findings in Nuclear-Related US Sanctions Statutes and Executive Orders.

sufficiently address concerns about Iran's nuclear programme, and that the United States is therefore now taking steps to "deny[] Iran all paths to a nuclear weapon"[73]. The United States had expressed deep concerns about the fact that the JCPOA failed to permanently address Iran's nuclear proliferation threats, because it included "sunset clauses that, in just a few years, will eliminate key restrictions on Iran's nuclear programme", including in particular on its enrichment capacity[74]. In light of these concerns, and the fact that the JCPOA had not addressed the many other serious security-related concerns that I discussed earlier, the United States decided to reimpose the nuclear-related sanctions that were lifted or waived under the JCPOA. Were the Court to indicate provisional measures seeking to constrain the United States' measures in relation to Iran's nuclear programme, it would run squarely contrary to the per se carve-out in Article XX, paragraph 1 *(b)*.

III. Iran's claims are not plausible under the Treaty, and there is no link between the treaty rights asserted and the provisional measures requested

35. Mr. President, Members of the Court, I turn now to the second part of my presentation, regarding plausibility of rights.

36. As this Court well knows, in addition to demonstrating prima facie jurisdiction, an Applicant must also demonstrate *both* that its claimed rights are at least plausible and that a link exists between the rights for which protection is sought and the provisional measures being requested[75]. This requirement stems directly from the purpose of provisional measures, which is to "preserve the respective rights of either party"[76]. As I will explain, Iran cannot make such a showing.

37. Given the extraordinary power of the Court to indicate provisional measures limiting sovereign rights, Iran must do more than list provisions of the Treaty of Amity and assume that the

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[73] Judges' folders, tab 8, National Security Presidential Memorandum/NSPM-11, 8 May 2018.

[74] Judges' folders, tab 22, Remarks by President Trump on Iran Strategy (13 Oct. 2017); see also, e.g., judges' folders, tab 23, Remarks of President Trump on the JCPOA, 8 May 2018; judges' folders, tab 3, Remarks of Secretary of State Mike Pompeo, "After the Deal: A New Iran Strategy", 21 May 2018; judges' folders, tab 24, Remarks of Christopher Ashley Ford, Assistant Secretary, Bureau of International Security and Nonproliferation, "Moving American Policy Forward in the Aftermath of the Iran Nuclear Deal", 25 July 2018.

[75] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures Order of 23 July 2018*, para. 43.

[76] ICJ Statute, Art. 41.

Court will accept its allegations at face value. Judge Abraham explained this logic in his separate opinion in *Pulp Mills*, stating

> "[the Court] cannot order a State to conduct itself in a certain way simply because another State claims that such conduct is necessary to preserve its own rights, unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated — and irreparably so — in the absence of the provisional measures the Court [is being] asked to prescribe: thus, unless the Court has given some thought to the merits of the case"[77].

So, by satisfying itself that the applicant's arguments are "sufficiently serious on the merits"[78], the Court can ensure that any action it takes that would potentially "encroach[] upon the respondent's sovereign rights . . . rest[s] on sufficiently solid legal ground"[79].

38. However, Iran has not, and cannot, establish that its case rests on solid legal ground, for two reasons. First, Iran's asserted rights in fact arise from the JCPOA and relate to benefits it received under the JCPOA; they do not arise under the Treaty of Amity. Second, because the US measures at issue plainly fall within the exceptions provided for in Article XX, paragraph 1, of the Treaty of Amity, as I just discussed, Iran does not plausibly have any rights under the Treaty with respect to such measures. As I will discuss, Iran's presentation yesterday did nothing to cure these deficiencies in its plausibility of rights argument.

39. Turning to the first point, even if you conclude that Iran has established prima facie jurisdiction with respect to its claims, Iran cannot make a showing on the merits that the rights it has asserted plausibly arise under the Treaty of Amity. This is because the conduct by the United States that Iran seeks to characterize as unlawful is the United States decision regarding the JCPOA, and the relief Iran is asking for is a restoration of the benefits it received under the JCPOA. A detailed examination of Iran's pleadings will help to make this point clear. In paragraph 1 of its Application, for example, Iran states: "the dispute between Iran and the USA concerns the re-imposition and announced aggravation by the USA of a comprehensive set of so-called 'sanctions' and restrictive measures . . . resulting from the USA's Decision of 8 May

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[77] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006,* pp. 139-140, para. 8; sep. op. of Judge Abraham.

[78] *Ibid.*, pp. 140-141, para. 10.

[79] *Ibid.*, pp. 138-139, para. 6.

2018"[80]. And, although Iran includes an allegation in that paragraph that these actions constitute breaches of the Treaty of Amity, the Court should not be distracted by this. In paragraph 2 of the Application, as Ms Newstead highlighted earlier this morning, Iran makes clear that its case "exclusively concerns"[81] the United States' sovereign decision to cease participation in the JCPOA. Indeed, all of the measures that Iran complains of arise from the decision by the United States to cease its participation in the JCPOA. Iran's perfunctory attempt to draw a link between the US decision to cease participation in the JCPOA and the US obligations under the Treaty of Amity does not withstand scrutiny.

40. In both the Application and the Request for provisional measures, Iran addresses the sanctions measures that it challenges by cataloguing US actions relating solely to the cessation of participation in the JCPOA. These actions concern principally the 8 May decision and the actions the United States announced it would take thereafter to implement its cessation of participation. The harms that Iran identifies in Section III***.b*** of its Application relate to the alleged loss of economic activity resulting from the US reimposition of sanctions following the 8 May decision. Yet, in the years preceding the JCPOA, Iran never brought a claim to this Court under the Treaty of Amity in connection with these alleged harms from US sanctions[82]. Similarly, the relief Iran requests involves a reversal of the US decision to cease participation in the JCPOA and a continuation of sanctions relief under the JCPOA[83]. It is thus clear that Iran in fact views its purported rights and requested relief through the lens of the JCPOA, such that there is no basis for the United States or the Court to read into Iran's claims any rights under the Treaty of Amity.

41. Although Iran, in its presentation yesterday, attempted to connect its purported rights with specific provisions of the Treaty, its discussion, like Iran's pleadings, was framed entirely in connection with the *reimposition* of sanctions under the JCPOA stemming from the US decision on 8 May. I would call the Court's attention to paragraphs 11-22 in yesterday's transcript, where Iran repeatedly describes Iran's claims in connection with the "May 8 sanctions" and refers to the

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[80] AI, para. 1.

[81] See *ibid.*, para. 2.

[82] *Ibid.*, paras. 29-38.

[83] *Ibid.*, para. 50; para. 42.

actions taken by the United States on 6 August or anticipated on 4 November, to implement the 8 May decision. As Professor Childress discussed, if Iran is permitted to pursue these JCPOA-related grievances in this Court, it would amount to an end-run around the clear terms of the JCPOA, which does not contain an ICJ compromissory clause, and which does not allow recourse to binding dispute resolution.

42. I will now turn to address the *second* reason that Iran fails the plausibility test, namely, that the measures at issue are covered by the exceptions in Article XX. So, even if the Court were to disagree that Article XX can deprive it of prima facie jurisdiction, that provision remains an insurmountable bar to the plausibility of Iran's rights under the Treaty. Recall again the cautionary observation of Judge Abraham in *Pulp Mills* that the Court should satisfy itself that the applicant's claims are "sufficiently serious on the merits" in order to ensure that any action it takes that would potentially "encroach[] upon the respondent's [] rights . . . rest[s] on sufficiently solid legal ground"[84]. This caution is particularly salient when one considers that the US measures at issue relate to critical matters of national security.

43. Given the serious national security and nuclear-related concerns that underlie the US measures at issue and the fact that the Treaty excludes such measures from the scope of the Parties' obligations, the Court cannot be satisfied that Iran's claims are "sufficiently serious on the merits" as to justify an order of provisional measures. Such an order would not only protect rights Iran does not have under the Treaty, it would seriously "encroach upon" the sovereign prerogative of the United States to take measures to protect its national security, a prerogative which *is* protected under the Treaty of Amity.

44. Moreover, the Court has made clear that the plausibility test requires the Court to consider all provisions of the Treaty that are relevant to the asserted rights, not just those asserted by the applicant[85]. It is most certainly the case that the Treaty's substantive obligations cannot plausibly be engaged with respect to measures covered by Article XX that "relat[e] to fissionable

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[84] See *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 138-139, para. 6; pp. 140-141, para. 10; sep. op. of Judge Abraham.

[85] See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 104, paras. 74-75.

materials" or measures that are "necessary to the protection of [one party's] essential security interests". It therefore should not matter how many particular articles of the Treaty of Amity Iran attempts to put before the Court for its claims. Because of Article XX, paragraph 1, the rights asserted by Iran are simply not, *on the merits*, plausible.

45. In this regard, Iran's presentation yesterday in connection with plausibility of rights did not provide the full picture, because it did not consider all provisions that are relevant to the asserted rights. While Iran discussed various treaty provisions in connection with its claims, it utterly failed to recognize that the obligations contained in those provisions are expressly limited by the essential security and fissionable material exceptions in Article XX. When one considers the full picture, it becomes clear that Iran's asserted rights are not plausible.

46. Mr. President, Members of the Court, because the plausibility test serves the purpose of ensuring that the applicant has identified the rights it seeks to protect, it is also necessary for the applicant to show that a link exists between the rights whose protection is sought and the provisional measures being requested[86]. Now, I will be brief in addressing this point, as Iran has done little to link its extremely broad request for relief to the specific rights it seeks to protect. Yesterday, Iran merely stated which rights it considers would be vindicated by each element of the requested relief, but without any further explanation. And that is unsurprising, because there is no linkage between the rights that Iran invokes under the Treaty of Amity and the measures that it requests from the Court.

47. Recall that what Iran requests is in effect the restoration of sanctions relief provided for by the JCPOA that the United States decided it would cease to apply following its decision to cease participation in the JCPOA. What Iran requests of the Court, therefore, is to order the United States to issue numerous specific waivers and licences under US law.

48. Iran's remarkably broad and intrusive request contorts both plausibility and common sense. Even if the Court were to accept that the rights asserted by Iran are plausible, Iran has provided no basis for the Court to conclude that the relief it requests — the restoration of JCPOA relief — would vindicate those rights, particularly in light of the Treaty's exceptions in Article XX

[86] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018*, para. 43; *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 241, para. 36.

protecting the US right to take measures to address sensitive matters of national security. It follows necessarily that the Court must conclude that it lacks a basis to indicate provisional measures.

IV. Conclusion

49. Mr. President, that concludes my presentation and I would ask that you call Mr. Bethlehem to the podium.

The PRESIDENT: I thank Ms Lisa Grosh, and I now give the floor to Sir Daniel Bethlehem. You have the floor.

Sir Daniel BETHLEHEM:

THE NON-JURISDICTIONAL CONDITIONS APPLICABLE TO THE INDICATION OF PROVISIONAL MEASURES

1. Mr. President, Members of the Court, it is an honour to appear before you in these proceedings representing the United States. The focus of my submissions will be the non-jurisdictional conditions applicable to the indication of provisional measures, including not only the requirements to show irreparable prejudice and urgency but also other elements of fundamental importance, notably, that regard must be had to the rights of *both* parties, not just the rights of the applicant, and that provisional measures cannot amount to an interim judgment or otherwise prejudice the final decision of the Court. There are three propositions that I hope to leave you with by the end of my submissions:

— *first*, and contrary to Mr. Aughey's assertion, granting Iran's provisional measures request would constitute an interim judgment on material parts of Iran's merits claim and would fundamentally prejudice the final decision of the Court;

— *second*, and contrary to the assertions of Mr. Wordsworth and Professor Thouvenin, Iran cannot satisfy the requirements of irreparable prejudice and urgency for a combination of reasons. Iran does not, as a general matter, seek the preservation of rights but rather it seeks protection from economic loss, and economic loss is not, presumptively, harm that is appropriate to interim relief. In so far as Iran claims humanitarian and safety of flight-related

harms, these fall squarely within established exemptions, authorizations or licensing policies under relevant US measures;

— *third*, such irreparable prejudice as can be shown is irreparable prejudice to the rights of the United States that would follow were the Court to indicate provisional measures along the lines requested by Iran.

2. I hope to make good each of these propositions by the end of my submissions.

I. Introduction and the broader context of the case

3. Mr. President, Members of the Court, with this said, let me very briefly situate my remarks in the broader context of this case. It is trite to observe that there is, at the moment, a great deal of heat over the Iranian nuclear issue. Commentators oscillate between apocalypse and opportunity. And everyone has a strongly held view about the JCPOA and the merits of the US cessation of participation in the JCPOA announced earlier this year.

4. Now, I make this observation as a foil for making another observation that warrants express articulation. As Ms Newstead has already observed, these proceedings are not an adjudication of the US policy of cessation of participation in the JCPOA, and whatever one's view on this question, informed minds acknowledge that there is a legitimate debate. Even amongst those who disagree with the United States, there is an acknowledgment that Iran is a bad actor and that the JCPOA has many flaws. Simply by way of example, everyone will recall the visit of President Macron of France to Washington in late April this year and his public comments on the JCPOA in advance of his discussions with the US President[87]. As you will see from the extract on the screen, President Macron was plain in his assessment. "Is the [JCPOA] agreement perfect? . . . No!", he said. On the contrary, he expressed dissatisfaction with the JCPOA. It did not address Iran's pursuit of ballistic missiles. It did not address Iran's bad conduct in the Middle East. His, President Macron's, view was that the JCPOA should be preserved because there was "no Plan B" to deal with nuclear issues, and that the United States and its allies should work together to forge a new deal that would address the issues of wider concern regarding Iran's bad conduct.

[87] Emmanuel Macron Interview with Chris Wallace, FOX News Sunday, 22 Apr. 2018: https://www.youtube.com/watch?v=E-tZV7jX2-w (at 10.15-11.20); judges' folder, tab 26.

5. Now, the United States takes a different view, concluding that the shortcomings of the JCPOA should be addressed in a new process, not by building on a flawed foundation.

6. This hearing cannot, quite plainly, be an adjudication of the US Iran policy. And I make the point simply to identify in words, and with them to sweep away, what many will consider to be the elephant in this courtroom today.

7. Mr. President, Members of the Court, with that introductory remark, I turn to the issue of the non-jurisdictional conditions applicable to provisional measures.

II. The non-jurisdictional conditions applicable to provisional measures

8. Now, the legal principles applicable to provisional measures are well settled. As, however, there are some relatively novel features to Iran's Request, it will be useful to make some brief observations on the law by way of foundation for my submissions to come.

II. A Legal principles relevant to provisional measures

9. Beyond the issues of prima facie jurisdiction and the plausibility of rights, an applicant requesting provisional measures is required to meet three key conditions: *first*, the measures requested must be necessary to preserve the applicant's rights pending the final decision of the Court; *second*, the rights said to require preservation must be at real risk of irreparable prejudice from the claimed actions of the other party; and, *third*, the danger of irreparable prejudice must be imminent, with the consequence that there is an urgent need to indicate provisional measures.

10. Now, the preservation of rights requirement comes from Article 41 of the Court's Statute. The requirements of irreparable prejudice and urgency emerge from the Court's jurisprudence and are very well settled. Each of these requirements must be met before one gets to the Court's exercise of discretion of whether an indication of provisional measures is warranted in the circumstances of the case. Article 41 gives the Court the power to indicate provisional measures "if it considers that the circumstances so require". The Court must therefore be satisfied *both* that the applicant has met the conditions necessary for the indication of provisional measures *and* that the provisional measures are warranted in the circumstances of the case.

11. Beyond these requirements, there are two other fundamental principles that apply. The *first* is that it is necessary to weigh the rights and interests of both parties when assessing whether

provisional measures are warranted. The issue is not simply whether the rights of the *applicant* are in danger of irreparable prejudice but also the impact of the requested measures on the rights of the *respondent*.

12. Article 41 of the Statute is cast in terms of measures "which ought to be taken to preserve the *respective rights* of either party". The Zimmerman commentary on the Court's Statute addresses this in the following terms:

> "The rights concerned are the rights of both parties and therefore it is vital for the Court to consider what action is called for in order to ensure that none of the parties is at a disadvantage and that any impression of bias is avoided."[88]

13. The requirement to have careful regard to the rights of the respondent also flows from the exceptional character of provisional measures as a remedy of interim relief[89]. Provisional measures are only warranted in the most exceptional of circumstances having regard to the rights and interests of the respondent, not simply to those of the applicant. It is our contention — and I will develop this further during my submissions — it is our contention that Iran's Request fails at this hurdle, quite apart from others, as the provisional measures Iran requests would, if indicated, cause irreparable prejudice to the rights of the United States. In our submission, weighing the rights of the United States against those of Iran leads to the conclusion that provisional measures cannot properly be indicated in the circumstances here in issue.

14. A *second* principle flowing from the exceptional character of provisional measures is that the indication of provisional measures cannot anticipate or prejudge a judgment on the merits. Rosenne addresses the point as follows: "The power to indicate provisional measures cannot be invoked if its effect would be to grant to the applicant an interim judgment in favour of all or a part of the claim formulated in the document instituting proceedings."[90]

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[88] Zimmerman, et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (OUP, 2006), pp. 930-931, para. 20. See also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*; sep. op. of Judge Abraham, p. 139, para. 6.

[89] See, for example, *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 11, para. 32, and sep. op. of Vice-President Nagendra Singh, p. 18; also, *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, and sep. op. of Judge Shahabuddeen, pp. 28-29, quoting Dr. E. Dumbauld, Interim Measures of Protection in International Controversies, 1932, p. 184; also, *Anglo-Iranian Oil Co., Order of 5 July 1951, I.C.J. Reports 1951*, pp. 96-97; joint diss. op. of Judges Winiarski and Badawi Pasha.

[90] Shaw (ed.), *Rosenne's Law and Practice of the International Court: 1920 – 2015* (Fifth Edition, Brill Nijhoff, 2016), Vol. III, p. 1457.

15. The same point is made in the Zimmerman commentary on the Court's Statute: "As the term already indicates, measures indicated under Art. 41 are provisional in character and should neither amount to an interim judgment, nor prejudice [*any*] decision on the merits."[91]

16. The principle against prejudgment was the essential basis of the Court's decision in respect of the first provisional measure requested by Nicaragua in the *Construction of a Road* case. Having found that the jurisdictional requirement for provisional measures was satisfied, and that the rights asserted by Nicaragua were plausible, the Court went on to address the issue of whether the provisional measures requested were linked to the rights claimed and did not "prejudge the merits of the case"[92].

17. As regards the first provisional measure requested by Nicaragua, that Costa Rica provide Nicaragua with the environmental impact assessment and associated reports and assessments, the Court observed as follows:

> "this request is exactly the same as one of Nicaragua's claims on the merits contained at the end of its Application and Memorial in the present case. A decision by the Court . . . would therefore amount to prejudging the Court's decision on the merits of the case"[93].

18. That was the end of the matter in respect of this element of Nicaragua's request[94].

19. Mr. President, Members of the Court, I will return shortly to address the application of these principles in the circumstances of this case. My purpose at the moment is simply to lay the foundation for my submissions to come and there are three propositions emerge from what I have said so far:

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[91] Zimmerman, et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (OUP, 2006), p. 932, para. 23. In the discussion that follows, the learned author rightly concludes that this principle is not one of form but flows rather from the requirement to preserve the substance of the rights *pendente lite*. And the rights requiring preservation *pendente lite* include the rights of the respondent.

[92] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 404, para. 20.

[93] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013*, p. 404, para. 21.

[94] The issue of prejudgment of the merits has arisen in other cases as well. For example, *Factory at Chorzow (Germany* v. *Poland), Order of 21 November 1927, P.C.I.J., Series A, No.12*, p.10; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, pp. 193 and 201, paras. 36, 72–73.

(i) *First*, provisional measures are an exceptional form of relief which, given that the respondent has not been heard in defence of its rights, should only be indicated in the most compelling of circumstances, having careful regard to the rights of the respondent.

(ii) *Second*, in addition to prima facie jurisdiction and the ***plausibility*** of the claimed rights, an applicant must show a necessity to preserve its claimed rights in dispute in the proceedings in the face of real and imminent risk of irreparable prejudice by the respondent pending a final decision of the Court.

(iii) *Third*, the indication of provisional measures will not be appropriate in circumstances in which this would amount to an interim judgment on part or on all of the claim formulated in the application or would otherwise prejudice the final decision of the Court.

20. Mr. President, Members for the Court, there is a further point that I would note simply so as not to lose sight of it, and that is that the indication of provisional measures will not be appropriate in circumstances in which pecuniary damages or some other form of satisfaction would be an available remedy, if the claim is ultimately upheld[95]. As this goes to irreparable prejudice, I will address it further under that heading.

II. B The application of the legal principles in the circumstances of this case

21. I would now like to turn to address the application of these legal principles in the circumstances of the case.

22. There are three headline submissions that I would like to develop: *first*, that the provisional measures requested by Iran materially overlap with the judgment that it seeks from the Court on the merits; *second*, that Iran cannot meet the requirements to show irreparable prejudice and urgency; and, *third*, that any indication of provisional measures directed at constraining US sanctions would result in irreparable prejudice to US rights. And, in our submission, it follows from each of these points, whether considered separately or together, that the conditions necessary for the indication of provisional measures are not met in this case and, accordingly, that any indication of provisional measures would not be appropriate.

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[95] See e.g., Shaw (ed.), *Rosenne's Law and Practice of the International Court: 1920 – 2015* (Fifth Edition, Brill Nijhoff, 2016), Vol. III, p. 1458.

II. B (1) The provisional measures requested by Iran materially overlap with the judgment that it seeks from the Court on the merits

23. Turning then, first of all, to the issue of the material overlap between the provisional measures requested by Iran and its merits requests, I would like to take you, if I may, to Iran's Application and to its provisional measures Request.

24. Looking first at the prayer for relief in Iran's Application — which is at paragraph 50 of the Application — I appreciate that this was read out at the beginning of the proceedings, but it is useful to take you through it again. Paragraph 50 reads in operative part as follows:

> "Iran respectfully request 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 [and it goes on to cite various articles 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 on 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."

25. Mr. President, Members of the Court, a preliminary observation is warranted simply by reference to the text of paragraph 50. As will be readily apparent, three of the five requests made by Iran in its Application focus on securing immediate relief from the reimposition of US sanctions, including as regards sanctions not yet in force, but which are scheduled to apply from early November this year. This is the plain reading of paragraphs 50 *(b)* and 50 *(c)*, and it follows also as regards paragraph 50 *(d)*, which is linked to the preceding paragraphs. In other words, the Application instituting proceedings is very largely simply a vehicle for pursuing a provisional measures request to restrain the reimposition of US sanctions. Seen in this context, the claim in respect of the alleged Treaty of Amity violations in paragraph 50 *(a)* simply provides jurisdictional

cover to pursue the provisional measures request. And paragraph 50 *(e)* is no more than a placeholder, an unspecified claim to compensation.

26. There is, of course, nothing objectionable to an applicant filing an application instituting proceedings and submitting a request for provisional measures in parallel. The point in this case, however, is that the Application makes a provisional measures request in everything but name, with the Request for provisional measures simply developing this marginally and acting as the procedural vehicle for the proceedings in which we are now engaged.

27. The point becomes clearer still when one looks at the order that Iran seeks from the Court in paragraph 42 of its provisional measures Request. It is up on the screen in front of you, I will focus for present purposes on requests *(a)* and *(b)*. These read as follows:

> "[Iran] requests that, pending final judgment in this case, the Court indicate:
>
> *(a)* That the USA shall immediately take all measures at its disposal to ensure the suspension of the implementation and enforcement of all of the 8 May sanctions, including the extraterritorial sanctions, and refrain from imposing or threatening announced further sanctions and measures which might aggravate or extend the dispute submitted to the Court;
>
> *(b)* That the USA shall immediately allow the full implementation of transactions already licensed, generally or specifically, particularly for the sale or leasing of passenger aircraft, aircraft spare parts and equipment;"

28. Mr. President, Members of the Court, I interpolate here just very briefly — and it's a point I'll come back to. In all of its submissions yesterday, we heard very little from Iran about the specificity of its actual Request for provisional measures. And I'll come back to that and postulate a reason as to why that might be the case. Mr. President, Members of the Court, the scope of the measures requested from the Court is breath taking, and the jurisdiction asserted exorbitant, including that the Court reaches into the sovereign domestic space of the United States to order the granting of licences and issuance of waivers under US domestic law contrary to the administration's national security assessment. A cynical mind might think that the Request is calculated to play precisely to the elephant in the room, to which I alluded in opening, to tempt the Court into the fray of the debate about the merits of the US JCPOA policy.

29. Putting cynicism aside, however, a plain reading of the provisional measures requested by Iran, alongside the requests in Iran's Application, shows a fundamental overlap between the

two sets of requests. For example, provisional measure request *(a)* is virtually identical in substance to application requests *(b)* and *(c)*. The provisional measures Request, to be sure, is more granular, and is cast in terms of *suspension*, whereas the Application requests are more general, and cast in terms of *termination* but, for all intents and purposes, the scope and effect of the requests are identical. Were the Court to accede to Iran's provisional measures Request, Iran's merits objective would have been effectively achieved. Contrary to Mr. Aughey's contention yesterday — a contention made only in passing that no doubt we will hear more of tomorrow— contrary to his contention, the distinction between suspension and termination is not sufficient to differentiate Iran's provisional measures requests from its merits requests. The indication of provisional measures along the lines requested by Iran would effectively achieve the relief Iran seeks on the merits.

30. Provisional measures request *(b)*, which seeks an order that the United States immediately allow the full implementation of transactions previously licensed, particularly as regards aircraft and aircraft spare parts and equipment, also overlaps fundamentally with the application requests *(b)* and *(c)*, even if the application requests are wider in scope. Were the Court to accede to provisional measures request *(b)*, there would be nothing left to address on the merits as regards previously licensed transactions for the export or re-export of commercial passenger aircraft and related aircraft parts. Let me adopt Mr. Wordsworth's analysis from yesterday. Were the final judgment to find for the United States, it is fanciful to suggest that the *status quo ante* could be recreated and transactions consummated in the intervening period somehow unwound. A final determination by the Court, both procedurally and materially, would be fundamentally prejudiced by a provisional measures order along the lines requested by Iran.

31. Mr. President, Members of the Court, to anticipate my submissions on the closely related point of the irreparable prejudice that would be suffered by the United States were the Court to be tempted down this road, measures proposing to constrain the reimposition of US sanctions, potentially for years to come, would purport to neuter the sovereign US legitimate right to take measures to safeguard its essential security interests. Moreover, measures purporting to constrain sovereign US rights would require the issuance of licences that would enable Iran to secure, for example, the purchase of commercial passenger aircraft and aircraft parts. Mr. President, Members

of the Court, where would this leave the United States were the Court in due course to find that it had no jurisdiction after all? Where would this leave the United States were the Court to conclude on the merits that the US conduct was lawful? The horse would have bolted. There is irreparable prejudice writ large, but to the United States, not to Iran. And beyond this, where would this leave the Court? The prejudice occasioned to the United States in respect of its jurisdictional and merits arguments would cast a long shadow, raising unavoidable questions about the fairness of the procedures to come.

32. Mr. President, Members of the Court, I will address the issue of irreparable prejudice to the United States further shortly. For the moment, I would like to return to the point that an indication of provisional measures cannot amount to an interim judgment, whether in respect of all or only a part of the claim formulated in the Application instituting proceedings, and it cannot prejudice the Court's final decision on the merits.

33. The law on this point is clear. In our submission, an indication of provisional measures requested by Iran would effectively constitute an interim judgment on material parts of the claim formulated in Iran's Application. It would also fundamentally prejudice any decision on the merits, should the proceedings reach that stage. It is not simply that the conditions necessary for an indication of provisional measures have not been met. It is that any indication of provisional measures along the lines sought by Iran is precluded by settled legal principle. In our submission, the Court could not properly indicate any such provisional measures in this case.

II. B (2) Iran cannot meet the requirements to show irreparable prejudice and urgency

34. Mr. President, Members of the Court, I turn to the requirements of irreparable prejudice and urgency and begin with an observation pertinent to both. And this is turning to engage with Mr. Wordsworth's submissions yesterday. Iran's case of economic and social harm, which is the way it was characterized in the Request for provisional measures, is speculative as to *cause*, as to *consequence* and as to *cost*. It is a question of proof. Iran is overreaching, and the evidence that it presents warrants sceptical scrutiny, in our submission, given the lack of specificity of the documentation and the weighty assertions they are asked to bear.

35. The decline of the Iranian rial to which Dr. Mohebi referred is one example, but the point applies more generally[96]. While US sanctions have the intent of putting the Iranian leadership under pressure, there are many *causes* of the decline of the rial, including economic mismanagement of the Iranian government. The *consequences* of the decline of the rial are also a matter of macroeconomic debate, given that a depreciation in the value of a currency brings potential balance of payments advantages, not just disadvantages. Beyond this, quantifying the *costs* of rial depreciation, even assuming a causal effect, is anything but straightforward. And all this is before we even get to questions about responsibility, and whether the rights of the United States in these proceedings can be prejudiced before the United States has even been heard in defence of those rights.

36. In similar vein, Iran's suggestion that US sanctions will be a cause of social unrest in Iran for which the United States should be held legally responsible through an indication of provisional measures[97] is a remarkable proposition. Social unrest in Iran is a consequence of Iranian government policies towards its own people. It cannot provide a basis for a claim of provisional measures.

37. Mr. President, Members of the Court, it's also notable that Iran is saying one thing to the Court but another thing to its own people. For example, Iran's Supreme Leader, Ayatollah Khamenei, in a speech delivered just five days ago, on 23 August, said as follows. And there is a lengthy extract on the screen. I'll read just a portion of that. He said:

> "Economic experts and many officials agree that today's livelihood problems do not emerge from foreign sanctions; rather, they are tracked down to our internal issues. . . . The sanctions may have played a role in creating the current economic situation, but domestic factors are stronger role players on the matter. If actions are taken more efficiently, more prudently, more swiftly and more firmly, sanctions cannot have much of an effect, and they can be resisted. The problem mainly arises from within the country."[98]

38. Mr. President, Members of the Court, this has the ring of truth. It is not domestic spin. It does not purport to create a more comfortable picture for a domestic audience. It is saying,

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[96] RPMI, para. 27.

[97] RPMI, para. 29.

[98] http://english.khamenei.ir/news/5873/Iran-won-t-negotiate-with-the-U-S-for-5-reasons-Imam-Khamenei; judges' folders, tab 27.

candidly, that Iran is the architect of its own misfortunes. Now sanctions, to be sure, have an intended economic impact. But, when it comes to Iran's proof of cause, of consequence and of cost for purposes of sustaining its claim for interim relief, something more is required. That the United States has the intention to put Iran under economic pressure, and that US sanctions are undoubtedly having some such effect, does not translate, as Mr. Wordsworth would have you accept, into *quod erat demonstrandum*. The proof in this case requires a little more completing.

II. B (2) (i) Irreparable prejudice

39. Mr. President, Members of the Court, with this in mind, I turn to the issue of irreparable prejudice.

40. There is a rich vein of jurisprudence, going back to the Permanent Court[99], that affirms the principle that irreparable prejudice only operates in circumstances in which the claimed prejudice is incapable of remedy in due course through compensation or some other appropriate remedy. The principle first developed by the Permanent Court was affirmed by the present Court in the *Aegean Sea Continental Shelf* case[100], as well as, more recently, in the Court's two provisional measures Orders in the *Pulp Mills* case. In its 2006 Order in the *Pulp Mills case*, the Court expressly acknowledged Argentina's environmental concerns and, indeed, underlined the humanitarian dimension of those concerns[101]. It nonetheless rejected Argentina's case on irreparable prejudice, concluding that Argentina had not shown that the rights it claimed would no longer be capable of protection if the Court declined to indicate provisional measures[102]. In similar vein, in its January 2007 Order, the Court concluded that the claimed Argentinian blockading of bridges and roads, alleged to be causing hundreds of millions of dollars of damage to the Uruguayan economy, did not risk irreparable prejudice[103]. Significantly, and I *underline* this point,

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[99] *Denunciation of the Treaty of 2 November 1865 between China and Belgium, Orders of 8 January, 15 February and 18 June 1927, P.C.I.J., Series A, No.8,* pp. 6-8: Measures of Protection *(Order of 8 January 1927).*

[100] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976,* p. 11, para. 33. See also p. 10, para. 30.

[101] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006,* p. 132, para. 72.

[102] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006,* p. 132, para. 76.

[103] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007,* p. 13, para. 41.

significantly, the Court concluded in *that* provisional measures setting that it was unnecessary even to assess the damage that might be caused to the Uruguayan economy from the claimed Argentinian measures[104]. As this makes clear, economic harm does not, presumptively, rise to the level of irreparable prejudice warranting the indication of provisional measures.

41. Mr. President, Members of the Court, Mr. Wordsworth painted an aggregate picture of severe consequences for the Iranian economy which cumulatively, he argued, amounted to irreparable prejudice.

42. I have five points to make in response. The *first* is to reiterate the point I made earlier about causes, consequences and costs. We understand that it is Iran's case that all of its economic woes are to be laid at the doorstep of the United States. We understand, too, that Iran relies on the declared intention of the United States to subject the Iranian leadership to economic pressure. It does not follow, however, even on Iran's own case, that everything of which Iran complains can properly be laid at the doorstep of the United States or that it gives rise to irreparable prejudice warranting interim relief. On the contrary, more is required if Iran is to make good its case. The point is easily illustrated by reference to the fall in the rial, to which I have already alluded. Iran cannot pursue a provisional measures case on the basis of unsubstantiated claims of causation and responsibility.

43. *Second*, many of the documents submitted by Iran yesterday — most of which we saw for the first time, yesterday — do not show any right that is said to be infringed. They show withdrawals from tendering processes or refusals to undertake transactions or regrets at not being able to contract. But many of these documents do not show, even prima facie, the infringement of rights.

44. We understand, of course, that the rights that Iran must show as requiring protection are Iran's rights. What Iran is trying here is to establish its own rights said to require protection but it is attempting to do so by reference to private sector relationships — relationships rather than rights — about which we know nothing. Even if the Court were to accept, *quod non*, the prima facie application of the Treaty of Amity, Iran would still have to show the risk of irreparable prejudice to

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[104] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007*, p. 13, para. 41.

the rights that it claims by reference to something more than private parties walking away from tendering processes.

45. *Third*, the risk of the frustration or repudiation of any given contract will presumptively not be sufficient to amount to irreparable prejudice, as this would invariably always be amenable to an award of damages or some other appropriate form of relief in due course. What Mr. Wordsworth is endeavouring to do, where he has an underlying private sector contract to point to, is to found irreparable prejudice on a patchwork of claimed rights each of which individually would be incapable of sustaining such a claim on its own.

46. While, as a conceptual matter, it may be that the aggregation of harm could result in irreparable prejudice, it is our submission that the burden of proving irreparability in such circumstances must be even higher. The default must necessarily be that, as the harm caused to any individual right would be amenable to compensation if the claim is upheld in due course, the same must also apply to an aggregation of harm.

47. *Fourth*, there is a conundrum at the heart of Iran's claim of irreparable prejudice. There has been no suggestion that Iran was irreparably prejudiced by the sanctions imposed prior to January 2016. Those sanctions were, however, more robust than those which the United States is now in the process of reimposing. Prior to the JCPOA Implementation Day, Iran was subject to sanctions imposed pursuant to multiple resolutions of the United Nations Security Council. Prior to JCPOA-related sanctions relief, the EU, as well as other States, maintained their own nuclear-related and other sanctions against Iran.

48. This is no longer the case. Pursuant to operative paragraph 7 *(a)* of Security Council resolution 2231 of 2015, multiple resolutions of the Security Council were terminated and, pursuant to operative paragraph 7 *(b)* of that resolution, they were replaced with new, time-limited measures of narrower scope. Iran is also no longer subject to the same panoply of EU nuclear-related sanctions. Given this, Iran's claim now that its rights are at imminent risk of irreparable prejudice are difficult to credit. While the United States intends to put Iran's leadership under heavy pressure, the position that Iran faces today appears to be less prejudicial than that which it faced prior to 2016.

49. There is a related consideration. There are press reports *every* day that suggest that many States intend to continue business with Iran, including as regards Iranian oil exports[105]. We have included a number of such reports in your folders at tab 28. We are not in a position to assess the accuracy of these reports but they demonstrate the current uncertainty about the specific impact that the reimposed US sanctions will have on the Iranian economy.

50. A prominent example highlighting this uncertainty is the case of the European Union, which has enacted specific measures to update its Blocking Statute[106] to "mitigate the impact" of the reimposed US sanctions[107]. In a statement issued on 15 May 2018, the EU High Representative indicated that the EU had agreed to urgent work towards practical solutions in a range of areas, all of which were focused on mitigating the effect of the then anticipated US measures[108]. This was followed by a Joint Statement issued by the EU High Representative and the Foreign Ministers of France, Germany and the United Kingdom on 6 August 2018, which indicated that the EU would be intensifying its efforts at maintaining economic relations with Iran[109]. And just as we were preparing for this hearing, as part of these efforts, the EU announced last week a tranche of €18 million in aid to help offset the effects of US sanctions, with more to come[110].

51. Mr. President, Members of the Court, my *fifth* point in response to Mr. Wordsworth's submissions takes me back to my brief point of interpretation a little bit earlier when we were addressing the specifics of the Iranian provisional measures Request. And that is that we heard

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[105] See, e.g. the press reports at tab 28 of the judges' folders.

[106] Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (Official Journal L 199 I/1, 7.8.2018), judges' folders, tab 29; Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 of 22 Nov. 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (Official Journal L 199 I/7, 7.8.2018), judges' folders, tab 30; Council Regulation (EC) No 2271/96 of 22 Nov. 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (Official Journal L 309/1, 29.11.1996), judges' folders, tab 31.

[107] European Commission, "Updated Blocking Statute in support of Iran deal", at http://ec.europa.eu/dgs/fpi/what-we-do/blocking_statute_en.htm, judges' folders, tab 32; European Commission – Press release: Updated Blocking Statute in support of Iran nuclear deal enters into force, 6 Aug. 2018 (IP/18/4805), at http://europa.eu/rapid/press-release_IP-18-4805_en.htm, judges' folders, tab 33; Guidance Note – Questions and Answers: adoption of update of the Blocking Statute (Official Journal C 277 I/4, 7.8.2018), judges' folders, tab 34.

[108] Declaration by the High Representative of behalf of the EU following US President Trump's announcement on Iran nuclear deal (JCPOA), 9 May 2018, judges' folders, tab 35.

[109] Joint Statement on the reimposition of US sanctions due to its withdrawal from the Joint Comprehensive Plan of Action (JCPOA), Brussels, 6 Aug. 2018, judges' folders, tab 35.

[110] EU agrees 18 million euro development aid for Iran, 23 Aug. 2018 at https://www.reuters.com/article/us-iran-nuclear-eu-aid/eu-agrees-18-million-euro-development-aid-for-iran-idUSKCN1L8178?il=0, judges' folders, tab 37.

virtually nothing from Iran on the detail of the general and specific licences that Iran asks the Court to compel the United States to fully implement. And this aspect of Iran's request, in respect of what Iran describes as "transactions already licensed", is at the heart of the case in these proceedings. Yet Iran is remarkably reticent about saying anything about this.

52. The reason for this is that there is a false premise at the heart of Iran's case as Iran's case proceeds on the basis that there was greater licensed-transaction certainty than in fact existed. While a number of *general* licences were issued pursuant to JCPOA sanctions-easing, licences that permitted, for example, trade in Iranian-origin carpets and foodstuffs, such as pistachio nuts, these were not transaction-specific and were always subject to revocation. And in the case of the *specific* licences that authorized particular transactions, notably, the sale or lease of passenger aircraft, further authorizations, which were by no means assured, would have been required before the delivery of certain items could take place. In the case of both the specific licences and the general licences, therefore, Iran's request to the Court, in provisional measures request *(b)* to order "full implementation of transactions already licensed" would have the Court put Iran and Iranian contractors in a more advantageous position than they would have been in had the JCPOA licensing arrangements remained in place.

53. Mr. President, Members of the Court, this brings me to Iran's plea of humanitarian and safety of life consequences, obviously a very important point which is going to be exercising the Court and us all.

54. While the concerns may be real, Iran's characterization of the reach and effect of the US measures is inaccurate as a factual matter. The United States maintains broad authorizations and exceptions, including with respect to the sanctions measures that Iran seeks to put in issue in these proceedings, to allow for humanitarian-related activity, and also maintains a licensing policy providing for the case-by-case issuance of licences to ensure the safety of civil aviation and safe operation of US-origin commercial passenger aircraft. The United States has a long-standing policy to authorize exports and re-exports to Iran of humanitarian goods, including agricultural commodities, medicines, medical devices, and replacement parts for such devices[111]. The

[111] See e.g. 31 CFR 560.530 *(a)* (2)-(5), tab 38-1; 31 CFR 560.532, tab 38-2; 31 CFR 560.533, tab 38-3, judges' folders.

United States has also generally licensed NGOs to provide a range of services to or in Iran, including in connection with activities related to humanitarian projects[112]. The United States has also taken specific steps to mitigate the impact of sanctions on the Iranian people.

55. In addition to these authorizations, a series of US statutes, executive orders and regulations provide explicit exceptions making it clear that third-State nationals who engage in humanitarian-related activity will not be exposed to US sanctions[113]. All of these measures remain intact following the reimposition of sanctions on 7 August and they will remain in place following the 5 November reimposition of the remaining sanctions.

56. As regards the risk of harm to Iranian civil aviation, Iran refers in its Request to the *Statement of Licensing Policy* that addresses the export or re-export to Iran of commercial passenger aircraft and related parts and services that was in place during the period between 16 January 2016 and 8 May 2018[114]. While this JCPOA *Statement of Licensing Policy* was indeed rescinded on 8 May, what Iran entirely fails to mention is that the US Treasury Department's Office of Foreign Assets Control (OFAC) has indicated expressly that it will still consider licence applications under a separate safety of flight licensing policy that is found in the Iranian Transactions and Sanctions Regulations[115]. And the citation to that is fully set out in the footnotes including the documents in the folder.

57. This goes directly to Iran's second provisional measures request. The United States will continue to consider licence applications regarding civil aircraft and aircraft spare parts and equipment where there is a safety of flight rationale.

58. Mr. President, Members of the Court, these exceptions, authorizations, and licensing policies are extensive, as is OFAC's published guidance, and, given that we are in provisional measures proceedings to assist your understanding of these matters, we have included in your judges' folder a brief note addressing the relevant exceptions, authorizations, and licensing

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[112] General Licence E, tab 38-4, judges' folders.

[113] See excerpts of statutory exceptions at tab 38-10, judges' folders.

[114] RPMI, para. 31.

[115] OFAC *Frequently Asked Questions Regarding the Re-Imposition of Sanctions Pursuant to the May 8, 2018 National Security Presidential Memorandum Relating to the Joint Comprehensive Plan of Action (JCPOA)*, at 4.1 (https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_winddown_faqs.pdf), tab 38-13, judges' folders. The Statement of Licensing Policy is at 31 C.F.R. §560.528, tab 38-12.

policies, as well as the texts of these provisions, and you will find that at tab 38 of the judges' folders.

II. B (2) (ii) Urgency

59. Mr. President, Members of the Court, I will have more to say on irreparable prejudice in the humanitarian dimension in just a moment, but I turn at this point to the requirement of urgency and I can be brief.

60. Iran endeavours to get over the urgency threshold effectively by conflating urgency and irreparable prejudice. I know there were two speeches yesterday, but essentially they were addressing the same point. Absent irreparable prejudice, however, there can be no showing of urgency. Moreover, urgency does not fall to be assessed simply by reference to the fact that there is a date, prior to the final decision of the Court, from which certain consequences will follow. Provisional measures are not a device for securing the crystallization of the *status quo ante* in favour of one party.

61. But there is a more forensic point to make. The US measures that were announced on 8 May are not new measures. They are the reimposition of measures that had previously been in place, in some cases, for decades.

62. The salient point is that there was never any urgency before, so why now? Iran has to come to the Court showing some qualitatively new and controlling dimension that causes urgency in circumstances in which there was none previously.

63. Iran endeavours to do so in three ways. It does not quite package it in terms of then and now, but it endeavours to do so in three ways. *First*, it endeavours to establish urgency by pointing to the severe economic consequences of the US measures. As I have already addressed, however, economic harm is presumptively not amenable to interim relief. Iran's conflation of irreparable prejudice and urgency cannot get it over the urgency bar.

64. *Second*, Iran contends that the revocation of OFAC issued licences for exports of aircraft and aircraft parts has caused urgency, as Iranian aircraft companies committed to various contracts "[r]elying on OFAC authorizations"[116]. This, however, is essentially an acquired rights or

[116] RPMI, para. 32.

legitimate expectations argument going to claims of economic loss. Urgency, however, like irreparable prejudice, cannot be established by claims of economic loss.

65. *Third*, and most importantly, Iran asserts urgency in the form of humanitarian and safety of flight risks, notably in respect of medicines and medical supplies[117] and aircraft and aircraft parts[118]. But its contention fails here, however, for the same reason that its irreparable prejudice contention fails, namely, that the exceptions, authorizations, and the possibilities of case-by-case licences operate in all of these areas. And the economic costs or bureaucratic inconvenience of applying for an authorization cannot by definition constitute urgency.

66. Mr. President, Members of the Court, there is a further point to make that goes to both irreparable prejudice and to urgency in the case of humanitarian or safety of flight-related concerns. And it is this, and it will be formally reiterated by the US Agent in our second-round submissions on Thursday. If there are humanitarian or safety of flight-related concerns which arise following the reimposition of the US sanctions at issue in this hearing, including concerns regarding the licensing process, the US State Department will use its best endeavours to ensure that such concerns receive full and expedited consideration by the Department of the Treasury or other relevant decision-making agencies.

II. B (3) Any indication of provisional measures directed at constraining the reimposition of US nuclear-sanctions would result in tangible irreparable prejudice to sovereign United States' essential security rights

67. Mr. President, Members of the Court, I come to the issue of the irreparable prejudice that would be caused to US rights by any indication of provisional measures along the lines requested by Iran. I have already outlined the point and I can be brief, and this is where I will be concluding.

68. As I highlighted in opening, consideration of whether provisional measures are warranted requires an assessment of the rights of the respondent, not just the rights of the applicant, and this does not imply a balancing of rights exercise. Provisional measures are exceptional. They are only to be indicated if the rights of the applicant truly require preservation in the face of real and imminent irreparable prejudice, *and* that there is no other remedy in due course that will

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[117] RPMI, para. 30.

[118] RPMI, paras. 33-35.

suffice, *and* — and this is the part that I underline — that the rights of the respondent will not be irreparably prejudiced and properly warrant constraint in the circumstances.

69. In this case, the issue of irreparable prejudice strikes an unusual chord as it is not simply that Iran cannot establish irreparability in respect of *its* claim of harm but that the provisional measures requested by Iran would, if indicated by the Court, risk irreparable prejudice to US sovereign rights in the area of national security.

70. Iran seeks to persuade the Court to order the United States to reissue licences authorizing the sale or leasing of commercial passenger aircraft and related parts and services. Assuming, *arguendo*, that the Court was persuaded to do this, the purported effect of the Court's order would be that Iran would get its aircraft and its spare parts and equipment. The sovereign right of the United States to prohibit such sales, and more generally to regulate the export of goods and materials capable of being diverted for malign use, would have been effectively torn up by the order of the Court, never to be restored. It is not simply that the sovereign right of the United States, as a general matter, to pursue its sanctions policy towards Iran, would be prejudiced with irreparable consequences. It is also that an order along the lines requested by Iran would irreparably prejudice US rights, as you have heard from Ms Grosh, under Article XX (1) of the Treaty of Amity to take measures that it considers necessary to protect its essential security interests as well as measures relating to fissionable materials.

71. I note as well that, even under the JCPOA, the United States did not commit to the issuance of any particular licence absent a case-by-case review. Nor did the United States, under the JCPOA, make any commitments that undermined its authority to revoke a licence in appropriate circumstances. A determination that a licence already issued is contrary to US national security interests is just such an appropriate circumstance. Any indication of provisional measures proposing to constrain US sanctions against Iran, potentially for years to come, would therefore purport to neuter a sovereign US right to take legitimate measures to safeguard its essential security interests.

72. But going beyond this, even more tangibly, rights embodied in US national security sanctions or US licensing policy would be immediately irreparably prejudiced by any indication of provisional measures that purported to require the issuance of licences that would enable Iran to

secure, for example, the purchase of commercial passenger aircraft and aircraft parts, or that would order the waiver of sanctions relating to significant banking transactions with designated entities, or some other conduct. Irreparable prejudice to US rights would follow immediately upon compliance with any such order. As I observed earlier, the horse would have bolted. Where would this leave the United States were the Court in due course to find that it had no jurisdiction? Where would this leave the United States were the Court to conclude on the merits that the US policy was lawful?

73. Mr. President, Members of the Court, the United States acknowledges that there is a hard-fought public debate about the appropriate policy to constrain Iran's bad conduct. Legal considerations are engaged by that debate. But an indication of provisional measures aimed at tipping the scale of that debate would purport to irreparably prejudice sovereign US essential security rights, and to do so before the United States has been heard in defence of its rights. This, in our submission, would be utterly inconsistent with settled legal principle.

III. Concluding observation

74. Mr. President, Members of the Court, my time has run out, or almost run out. Let me conclude simply by saying that, in our submission, there is no basis on which the provisional measures requested by Iran could properly be indicated in the circumstances of this case. We request that the Court dismiss Iran's provisional measures Request.

75. Mr. President, Members of the Court, that concludes my submissions for today, and it also concludes the first-round submissions of the United States. I thank you for your kind attention.

The PRESIDENT: I thank Sir Daniel Bethlehem for his statement which, as he pointed out, brings to an end the first round of oral observations of the United States of America. The Court will meet again tomorrow morning at 10 a.m. to hear the second round of oral observations of the Islamic Republic of Iran. The sitting is adjourned.

The Court rose at 1 p.m.