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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Thursday 30 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 jeudi 30 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
Bhandari
Robinson
Crawford
Gevorgian
Salam
Iwasawa
Judges *ad hoc* Brower
Momtaz

Registrar Couvreur

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

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The PRESIDENT: Please be seated. The sitting is now open. The Court meets today to hear the second round of oral observations of the United States on the Request for the indication of provisional measures filed by the Islamic Republic of Iran. I invite Sir Daniel Bethlehem to take the floor. You have the floor.

Sir Daniel BETHLEHEM:

GENERAL ISSUES, IRREPARABILITY, PREJUDGMENT

I. Introductory observations

1. Mr. President, Members of the Court, Iran's case is that this dispute is about the Treaty of Amity, even though it arises out of the reimposition of US sanctions lifted in consequence of the JCPOA. It says that the rights in issue are plausible Treaty of Amity rights and it takes you through provisions of the Treaty in an attempt to anchor the rights that it asserts. It says, further, that these claimed Treaty of Amity rights are at real and imminent risk of irreparable prejudice in consequence of reimposed US sanctions and that the Court must act to preserve its rights by restraining the reimposition and enforcement of the US sanctions.

2. In its arguments yesterday, Iran went further. It said that there was no basis in law for considering any risk of prejudice to the rights of the United States from any measures of interim relief that it asks the Court to indicate. It said that it was not required to prove that the irreparable prejudice it alleges would be caused by the acts of the United States of which it complains, as opposed to being in large measure the consequence of its own governmental economic mismanagement. Indeed, Iran says that Iranian government mismanagement is "wholly irrelevant" to the assessment it urges on the Court.

3. Iran says, also, that it need not prove, even to a *prima facie* standard, the rights that it says are at risk of irreparable prejudice. It need only come with evidence to suggest that such rights exist. The potential availability of alternative sources of supply and demand are also irrelevant, in Iran's contention, as is also Iran's economic position *now* by contrast to its position pre-2016 when it was the subject of a more extensive multilateral sanctions régime. And Iran pours scorn on the United States' assurance regarding the humanitarian concerns that it raises.

4. Mr. President, Members of the Court, we take issue with all of these contentions by Iran. This case is all about using the expedited and summary procedures of provisional measures, and their lower jurisdictional bar and burden of proof, to secure an order from the Court designed to compel the United States to resume participation in the JCPOA. We made this point in our submissions on Tuesday. Iran did not distance itself from the proposition yesterday. And it cannot do so, quite plainly, as a clear-eyed review of both Iran's Application and its provisional measures Request confirms. And, this would not simply be the effect of the relief that Iran seeks on the merits, but also the effect of the interim relief that it requests in these proceedings. It follows without question that Iran is endeavouring to repackage a dispute rooted in the JCPOA, in respect of which the jurisdiction of the Court was intentionally excluded, as a dispute under the Treaty of Amity for the sole purpose of bringing it before the Court for provisional measures proceedings. It cannot properly be permitted to do so.

5. Iran's case would also effectively denude of all content essential security carve-out clauses in treaties such as the Treaty of Amity, as it would, if accepted by the Court, open the door to circumventing them through the device of a request for provisional measures. This, too, Iran cannot properly be permitted to do. The systemic damage to the integrity of the Court would be significant.

6. Ms Grosh and Professor Childress will develop these points more fully following me, as well as other related points going to *prima facie* jurisdiction, the plausibility of rights and the true nature of the dispute. They will also address Iran's invitation to the Court to substitute its own view of US essential security for that of the Administration in Washington, as well as Iran's easy inclination to sweep away the gateway condition of Article XXI (2) of the Treaty of Amity which requires a genuine attempt to adjust the dispute by diplomacy.

II. The legal framework of provisional measures

7. Mr. President, Members of the Court, I turn to the legal framework relevant to provisional measures, and there are four points that I would like to make:

8. The *first* concerns the character of provisional measures as a remedy of interim relief. I addressed this issue in passing on Tuesday, assuming that the point was so incontestable and so

uncontroversial as not to require detailed comment. I was evidently wrong. So, let me reiterate and underline the point. Provisional measures are an exceptional remedy of interim relief. They are exceptional because they act to restrain a respondent in the exercise of its rights before the respondent has been heard in defence of those rights. They are exceptional as they are a binding measure of constraint before the Court is properly informed of the issues, and potentially for years to come, as the proceedings before the Court unfold in their time-honoured way. It is incontestable that the rights claimed by the respondent are prejudiced by the indication of provisional measures, not simply the material rights in issue but also the due process procedural right to be heard. And the latter is no less important than the former as — if the Court is perceived to jump towards the indication of such measures in circumstances in which the conditions for doing so have not been met — it is the system of judicial settlement that is vulnerable.

9. Professor Thouvenin says that the law does not mandate the Court taking account of the rights of the respondent. He is wrong. Article 41 of the Statute requires this. The Court's jurisprudence acknowledges this. Legal principle dictates this. A court cannot contemplate constraining the rights of the respondent without first weighing those rights, not just in isolation, not just as against the claimed rights of the applicant, but also to assess the risk of irreparable prejudice to those rights from measures which it is asked to indicate. The claimed rights of the Applicant in these proceedings are not more weighty than the asserted rights of the Respondent. We take it as axiomatic that the Court must have careful regard to the rights of the United States in these proceedings. These are rights that go to the very essence of the State, to act in its essential security interests. They are not to be easily disregarded.

10. Mr. President, Members of the Court, my *second* point goes to both Mr. Wordsworth's and Professor Thouvenin's attempts to dislodge the additional principles relevant to an assessment of provisional measures that I identified in my submissions on Tuesday — beyond the four requirements of *prima facie* jurisdiction, plausibility of rights, irreparable prejudice, and urgency.

11. Mr. President, Members of the Court, as is well known, plausibility of rights is a recent addition to the list of requirements that an applicant is required to show, this having first emerged in the Court's provisional measures Order in the *Obligation to Extradite or Prosecute* case in 2009.

And, indeed, it was only elaborated upon in detail in the *Ukraine* v. *Russia* Order of 2017. The law in this area is therefore still developing.

12. But the additional principles that I identified on Tuesday are neither new nor controversial. There were two: *first*, that it is necessary to weigh the rights of both parties; and *second*, that provisional measures cannot amount to an interim judgment on all or part of the claim formulated in the Application or otherwise prejudice the final decision of the Court. Both principles are well grounded in the Court's jurisprudence and commentary, which I need not rehearse again. Iran may dispute the relevance of these principles in the present case, but it cannot credibly dispute their application as essential to an assessment of whether provisional measures are properly warranted.

13. My *third* point goes to the issue of proof required in provisional measures proceedings. Mr. Wordsworth took issue with the contention that Iran's case on economic harm is speculative as to cause, consequence and cost. To be clear, it is not our case that a definitive showing of proof is required at the provisional measures stage. We accept that this is for the merits. But before the Court can purport to restrain the respondent in the exercise of its rights, the applicant must show to a sufficient standard that the harm that it alleges is actually, or would actually be, caused by the respondent and that the harm alleged would indeed be irreparable.

14. The question of proof would not normally be an issue in provisional measures proceedings. In a death penalty case such as *Jadhav*, for example, the execution of an individual by the respondent would manifestly cause irreparable prejudice. In other cases of individual rights, the showing of such prejudice will also be straightforward. But where, as in this case, the harm alleged to be irreparable is largely economic in nature, and where, as in this case, the conduct of the Applicant is also a proximate cause of that harm, the cause of the claimed irreparability must be shown.

15. In this case Iran, in our submission, has not done enough to show, even to a *prima facie* level, and even assuming irreparability, that it is the US sanctions that are the cause of that irreparability. On Tuesday, I cited an extract of a 23 August speech — that is last week — by Ayatollah Khamenei to the effect that domestic economic mismanagement has played a greater role in Iran's economic woes than have sanctions. Iran, evidently pricked by that citation, came back

with a statement of its own, with a Reuters report, which Mr. Wordsworth put on the screen, quoting President Rouhani saying that "the troubles only began when Washington reimposed sanctions on Tehran"[1].

16. Now, the quotation that Mr. Wordsworth referred to you came from the first page of the Reuters' report. He omitted to take you to the second page of the Reuters' report. The extract is on the screen, and the second page of that report contains the following:

> "Rouhani said the troubles began with anti-government protests *in early January* when many Iranians, angered by rising prices took to the streets, chanting slogans against the government and Supreme Leader Ayatollah Ali Khamenei.
>
> 'The protests tempted Trump to withdraw from the nuclear deal', he said — that's President Rouhani — asking lawmakers to support his cabinet and not add to anti-government sentiment.
>
> Although the economic problems were critical, Rouhani said, 'More important than that is that many people have lost their faith in the future of the Islamic Republic and are in doubt about its power.'"

17. Mr. Wordsworth took you to the first page; he did not take you to the second page. And there is more of this, as President Rouhani has been consistent in his comments on the causes of Iran's economic woes. In a report recorded on President Rouhani's website, for example, although only recorded in Farsi, he is quoted as saying the following in a 15 July meeting with Ayatollah Khamenei — and the slide is on the screen:

> "The President, emphasizing that some issues such as problems in the banking system and liquidity have no relation to sanctions and foreign pressure and have existed in the past, pointed to the Administration's program to solve these issues and said, 'Resolving these issues is part of the fundamental work of the Supreme Council for Economic Cooperation and the Administration's economic staff.'"[2]

18. Whether it is the depreciation of the rial or other economic harm which Iran complains is irreparable, or would become irreparable, it is incumbent upon Iran to show that the cause is not more properly laid at its own doorstep. Mr. Wordsworth, colourfully, sought to liken the United States to an assailant seeking to blame his victim for having a thin skull. The better analogy is of a man who steals a motorbike and sustains head injuries after a high-speed crash in which he

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[1] CR 2018/18, p. 28, para. 24 (Wordsworth); judges' folders, 29 Aug. 2018, tab 25.

[2] Statement from website of the Iranian President describing a 15 July 2018 meeting of his cabinet and Supreme Leader Khamenei – http://www.president.ir/fa/105285/, excerpt judges' folders, tab RE-11.

is not wearing a helmet and then seeks to blame the policeman who chased him for the injuries that he sustained.

19. Mr. President, Members of the Court, my *fourth* point is to address Mr. Wordsworth's invocation of the provisional measures Order in the *Anglo-Iranian Oil Co.* case, on which he relies heavily to show that the Court has in fact indicated provisional measures for economic loss.

20. A reading of the Order, however, in that case, indicates that it cannot easily sustain the weight that Mr. Wordsworth places on it. It is the very first provisional measures Order issued by the present Court, in 1951. It has been followed by 48 subsequent Orders. Its reasoning is skeletal. At the time of the Order, the requirements to show *prima facie* jurisdiction, irreparable prejudice, urgency and the plausibility of rights had not yet fully emerged, or even emerged at all, from the Court's jurisprudence, and, had they done so, it is doubtful that provisional measures would have been indicated. Furthermore, the Order of the Court is interesting in an important respect. It rejects the detailed requests for relief against Iran made by the United Kingdom. It emphasizes the requirement to preserve the rights of both parties. And it proceeds to make a *proprio motu* Order that is addressed in identical terms to both parties. This is not exactly the weighty authority in support of Iran's proposition, and even less so when it is read in the light of the Orders in more recent cases, such as the *Aegean Sea Continental Shelf* and *Pulp Mills* cases, to which I referred on Tuesday, which plainly and in unambiguous terms, proceed on the basis that harm that is capable of being remedied in due course, whether by an award of damages or some other form, is not in principle amenable to provisional measures. And, in this regard, it warrants recalling that Iran has indicated that it will seek an award of damages if it prevails on the merits of this case.

III. Prejudgment, irreparable prejudice and prejudice to US rights

21. Mr. President, Members of the Court, I turn now to make some brief observations in response to the submissions of Mr. Wordsworth and Professor Thouvenin on the issues of prejudgment, irreparable prejudice and prejudice to US rights. And I begin with the issue of *prejudgment*.

22. Professor Thouvenin's opening was to suggest that the Court's Order in the *Construction of a Road* case was an outlier and not to be relied upon. And he went on to cite a number of cases

in which the Court had ordered interim relief that overlapped with what had been requested on the merits. And the death penalty cases are the prime example of this, and we do not take issue with that point.

23. The more important point is that the provisional measures indicated in the death penalty and individual harm cases, to which Professor Thouvenin refers, are measures requiring the respondent to refrain from conduct that it is adjudged would cause irreparable harm. The present case is different. Here, a key and central part of Iran's Request is that the Court indicate measures to *compel* the United States to take affirmative action of one sort or another. The issue in this case is also qualitatively different, in that the alleged harm is either economic or it is commercial in nature and is therefore remediable in other ways in due course. In the case of Iran's humanitarian allegations, the harm is speculative, in the sense that Iran cannot identify specific harm that is bound to occur. The assurance that I gave on Tuesday on this issue, about which Iran was so dismissive, should give the Court comfort that the United States will act in good faith to give effect to its statutory exceptions and regulatory authorizations in respect of such matters.

24. Two other observations are warranted on the issue. The *first* is that, although Professor Thouvenin sought to make something of the distinction between the remedy of *termination* sought in the Application and the remedy of *suspension* sought in the provisional measures Request, he sensibly passed quickly over this. It is not persuasive, particularly having regard to the essential security character of the matters in issue and that the purported suspension of sanctions, potentially for many years to come, is in everything but name the same remedy.

25. The *second* observation is that the injunction against prejudgment is broader than simply that there should be no anticipation of the outcome on the merits. As my submissions on Tuesday will have made clear, the principle requires that there should be no prejudice to the Court's final decision. This encompasses procedural fairness and prejudice to the rights of the respondent in respect of the defence of its rights. In our submission, a final determination by the Court would be fundamentally prejudiced, both procedurally and materially, by the indication of provisional measures along the lines requested by Iran.

26. Mr. President, Members of the Court, I turn to the issue of irreparable prejudice, both of Iran's claimed rights and of the rights of the United States. And in the short time available to me, I

have three points to make. The *first* is that we heard nothing, or virtually nothing, from Iran yesterday on an issue that is at the centre of its provisional measures Request, namely, that the United States "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"[3].

27. In my submissions on Tuesday, I observed that we had heard nothing from Iran on this in its opening on Monday. Its virtual silence on this, yesterday, is a trend. Yet, this is a request of some specificity, referring to licences both general and specific, and particularly to licences for the sale or leasing of passenger aircraft, aircraft spare parts and equipment.

28. As I noted on Tuesday, this is an issue on which Iran is proceeding on a false premise, as the general licences that were issued were not transaction specific and were subject to revocation, and some portion of the transactions addressed in the specific licences required further authorizations, that were not guaranteed, before they could be completed.

29. Mr. Wordsworth, with a deft manoeuvre yesterday, all but walked away from this request. He failed to give it any specificity, or even to identify what licences Iran is addressing. His response was simply to say that this request is a generic request in respect of any and all licences.

30. Mr. President, Members of the Court, that won't do. Iran is requesting from the Court something very specific, yet it has failed to identify to what it is referring — which licences, covering what transactions, subject to what terms. There is no basis whatever on which the Court can entertain this request in the light of Iran's failure to particularize it. The United States is proceeding on the assumption, notwithstanding the terms of Iran's final submissions yesterday, that this request is effectively withdrawn.

31. Mr. President, Members of the Court, the *second* point goes to a related and equally important issue on which we similarly heard nothing from Iran yesterday. On Tuesday, I identified three aspects of the irreparable prejudice that would be suffered by the United States were the Court to indicate provisional measures along the lines requested by Iran. The first would be irreparable prejudice to US sovereign rights to pursue its sanctions policy towards Iran, as a general

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[3] Request, para. 42 *(b)*.

matter. The second would be the irreparable prejudice to US rights 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. And we heard brief comments on both of these yesterday but, given the time available, I will let my submissions on Tuesday stand for themselves.

32. On the third aspect, however, and the most tangible illustration of the irreparable prejudice that would be suffered by the United States, we heard nothing at all from Iran. This relates to rights embodied in US national security sanctions and related licensing policy, which would be immediately irreparably prejudiced on compliance with any order that purported to require the issuance of licences to permit certain transactions to take place.

33. Mr. President, Members of the Court, I put it in terms of the horse would have bolted in my submissions on Tuesday. Transactions, once consummated, could not be unwound. This applies to the sale of aircraft and aircraft parts. It applies to the waivers of sanctions in respect of banking transactions, as well as to other transactions or conduct that would be permitted. The harm, irreparable, would arise the moment the transactions took place.

34. But there is another dimension as well, which goes significantly beyond the horse has bolted metaphor, and let me take you to the issue of the sale of aircraft parts as an example.

35. Iran's two largest air carriers, Iran Air and Mahan Air, have in the past both engaged in non-civilian activity in support of Iran's destabilizing activity in the region. For example, Iran Air has transported military-related equipment for the Islamic Revolutionary Guard Corps (IRGC). Mahan Air ferries weapons, foreign fighters and Iranian operatives to the conflict in Syria[4].

36. Given this, and the deep concern that the United States has had with respect to aircraft sales, the United States, in the JCPOA, only committed to license such items and services on a case-by-case basis, and specifically reserved the right to cease performing this commitment in whole or in part if licensed items were used for purposes other than exclusively civilian aviation end use. Indeed, this commitment in the JCPOA contained an express reservation, which is clear

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[4] See US Department of the Treasury, Fact Sheet: Treasury Sanctions Major Iranian Commercial Entities; Treasury Targets Commercial Infrastructure of IRGC; Exposes Continued IRGC Support for Terrorism (23 June 2011), available at: https://www.treasury.gov/press-center/press-releases/Pages/tg1217.aspx, judges' folders, tab RE-4 and US Department of the Treasury, Press Release: Treasury Designates Mahan Air Service Provider (9 July 2018), https://home.treasury.gov/news/press-releases/sm423, judges' folders, tab RE-3.

evidence of the challenging issues facing the licensing of aircraft sales and parts to Iran given the potential for misuse and diversion[5]. Similar concerns about abuse arise in other sectors.

37. So, Mr. President, Members of the Court, the irreparable prejudice to the rights of the United States that would follow an order purporting to compel the licensing of transactions in the field of the sale and leasing of commercial passenger aircraft and spare parts and equipment has an even more acute dimension. This is irreparable prejudice that would follow from the diversion or misuse of such items for malign purposes.

38. Mr. President, Members of the Court, I turn, lastly, to the issue of humanitarian risks.

39. Iran accepts, as it must, that US sanctions legislation contains clear exceptions and that OFAC has issued broad authorizations permitting humanitarian-related activity. The note and materials submitted at tab 38 of the judges' folders for our first submission addresses this in detail.

40. Iran's complaint is that, on the basis of pre-2016 experience, these exceptions and authorizations are illusory. The difficulty with Iran's claim on this issue, however, is that it speculates about the harm that has not yet occurred, in respect of humanitarian transactions that are not sanctionable and in connection with financial sanctions that have not yet been reimposed. There is therefore simply no factual basis to conclude that any particular set of harms will result from the sanctions reimposition.

41. As I stated on Tuesday, should difficulties arise in this area as a matter of practice, including as regards the licensing process, the State Department will use its best endeavours to ensure that such concerns receive full and expedited consideration by the US Treasury and other relevant agencies.

42. Now, Iran was quick to dismiss this assurance. We note, however, that Iran has not come to the Court offering any assurances to cease its unlawful and threatening conduct that has prompted the US measures of which it complains. Iran continues to export arms in violation of binding United Nations Security Council resolutions. Iran has ignored the international

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[5] See fn. 12 to Sect. 5.1.1 of JCPOA Ann. II, judges' folders, tab RE-2; see also OFAC, Iranian Transactions and Sanctions Regulations, 31 C.F.R. Part 560, Statement of Licensing Policy for Activities Related to the Export or Re-Export to Iran of Commercial Passenger Aircraft and Related Parts and Services (16 Jan. 2016) (explaining that licences would include appropriate conditions to ensure that licensed activities do not involve, and no licensed aircraft, goods or services are re-sold or re-transferred to, any person on the List of Specially Designated Nationals and Blocked Persons), judges' folders, tab RE-1.

community's call to suspend its ballistic missile programme that would provide it with a means to deliver nuclear warheads. Iran continues to intervene in regional States, sparking instability. Moreover, Iran has been completely silent about its reasons for secretly storing nuclear-weapons-related documents notwithstanding its JCPOA commitments. These are all gravely concerning matters putting at risk the security of the United States and other members of the international community.

43. Mr. President, Members of the Court, that concludes my submissions. I thank you for your kind attention. Mr. President, may I ask you to call Ms Grosh to the podium.

The PRESIDENT: I thank Sir Daniel Bethlehem. I now invite Ms Grosh to the podium. You have the floor, Madam.

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, I would like to return to the central importance of Article XX, paragraph 1, to these proceedings. Iran suggested yesterday that Article XX is irrelevant to the Court's inquiry. That cannot be right. A provisional measures proceeding cannot selectively consider only the articles of the treaty cited by the applicant but not the articles in the same treaty raised by the respondent. This is especially so where a treaty provision raised by the respondent is an express exceptions article, like Article XX, paragraph 1. And even more so where the exceptions involve matters of national security.

2. Through Article XX, paragraph 1, the Parties expressly agreed that the Treaty of Amity would not regulate measures that fall within its exceptions. With regard to such measures, the Treaty does not supply the governing law, and it does not supply a jurisdictional foundation for the disputes in this Court.

3. Iran has lost sight of the fact that, at this early stage of proceedings, the question of whether the Court views Article XX as jurisdictional in nature or only as a merits defence need not

be answered definitively. Nor are we inviting the Court to wade deeply into what Iran labels the "merits" of essential security. The key point is that, however it is viewed, Article XX is indisputably relevant to the overall inquiry of whether provisional measures are warranted.

4. The stakes for this inquiry are high. The interim relief Iran seeks, without the benefit of fuller briefing and argument on all of these issues, would infringe — potentially for years to come — on sovereign rights of the United States that the Treaty expressly reserves, in highly sensitive areas of US national security. Article XX, paragraph 1, makes clear that the United States has no obligations under the Treaty to refrain from taking such measures. It should go without saying that where the parties to a treaty took pains to include express exceptions like those in Article XX, they surely did not intend for the Court to indicate provisional measures that would purport to restrain conduct in such areas. Article XX would be deprived of all meaning if it could be circumvented by the simple mechanism of advancing a request for provisional measures.

5. So, although the Court's inquiry on the law and facts is provisional and not definitive at this stage, it must consider the full range of treaty provisions that could bear on its jurisdiction and the parties' rights. Nothing less is required when the Court is considering under Article 41 of the Statute whether the circumstances require provisional measures, taking into account the respective rights of both parties.

6. Iran has pointed to no authority for its remarkable contention that the Court can simply put Article XX to one side in this proceeding. Yesterday, Iran tried to assert that the Court should not worry about issuing provisional measures that would limit US sovereign rights in the areas reserved by Article XX, paragraph 1, as this was a routine matter. And Iran cited several cases in which the Court indicated provisional measures notwithstanding a respondent raising national security concerns[6]. But let us be clear: the United States is not simply raising national security *concerns*. The United States is relying on an *express provision* of the treaty that has been invoked. And that treaty excludes from its scope measures necessary to the invoking party's essential security interests or relating to nuclear materials. The Court has *never* indicated provisional measures in the face of a respondent's reliance on such exclusions, and it should not start now.

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[6] CR 2018/18, p. 37, para. 12 (Thouvenin).

II. Article XX (1) excludes Iran's claims prima facie from the Court's jurisdiction

A. Effect of Article XX (1) on the prima facie jurisdictional inquiry

7. I turn first to the effect of Article XX, paragraph 1, on the Court's *prima facie* jurisdictional inquiry. Yesterday, Professor Pellet did not dispute that standard for assessing a respondent's invocation of an exception to jurisdiction at the provisional measures phase as a *prima facie* one. Instead, he focused on arguing that Article XX, paragraph 1, is not relevant to the *prima facie* jurisdictional inquiry at all. But in doing so, Professor Pellet failed to engage with the Court's recent decision in the *Jadhav* case. That case articulated a central point — that the presence of an express provision excluding a particular area from the scope of a treaty's substantive obligations is relevant to the *prima facie* jurisdictional inquiry[7]. And where a treaty contains a provision, it operates to exclude, on a *prima facie* basis, jurisdiction for purposes of provisional measures. This is appropriate, particularly given the nature of provisional relief — which should not be ordered with respect to matters that are capable of falling within an area excepted from a treaty.

8. Nor did Professor Pellet counter the points I made on the text and history of Article XX, paragraph 1, which illustrate that measures found to fall within the enumerated exceptions cannot give rise to disputes as to the "interpretation or application of the Treaty" encompassed by the compromissory clause in Article XXI. These are not areas in which the United States consented to the Court's jurisdiction when it entered into commercial treaties[8].

9. Iran's response was instead to suggest that certain issues in the Court's jurisprudence were more settled than they are in reality, and to engage in accusation as much as substance. Contrary to Professor Pellet's argument, the United States is not trying to convince the Court to reopen a matter already definitively settled in the Court's case law. Rather, we have reviewed the Court's preliminary objections Judgment in *Oil Platforms* with great care and nuance, highlighting the express language used by the Court to delineate the bounds of that decision.

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[7] *Jadhav (India* v. *Pakistan)*, *Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 240, para. 32; CR 2018/17, p. 34, para. 7 (Grosh).

[8] 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., p. 30 (26 Apr. 1948) (statement of Charles Bohlen, Dept. of State); see judges' folder, tab 18, *Charles H. Sullivan, US Dept. of State, Standard Draft Treaty of Friendship, Commerce and Navigation: Analysis and Background (1981)*, pp. 327-328.

10. Recall that the Court has addressed an exceptions clause such as that reflected in Article XX, paragraph 1, in only two cases — the *Nicaragua* case and *Oil Platforms*. And in both cases, the Court's decision reflected the unique procedural circumstances as to how Article XX, paragraph 1, came to be placed before it in the specific case.

11. Professor Pellet did not contest the fact that the Court in the *Nicaragua* case never spelled out any *reasoning* for its treatment of the essential security clause as a merits defence. It simply assumed that to be the case. And nowhere in its decision did the Court exclude the possibility that the clause *could* be raised as a jurisdictional bar. So I will say no more about that case here.

12. With regard to the preliminary objections Judgment in *Oil Platforms*, let me respond to Professor Pellet's claim of "selective quotation" — a claim that was completely misplaced. You will note in the US slide that accompanied my presentation on Tuesday that a broader quotation appeared on the screen than what I read aloud. But for the sake of completeness here, the slide in front of you includes the *entirety* of the relevant paragraph.

13. The first sentence of that paragraph, which Professor Pellet highlighted yesterday, goes to the point that does not seem to us to be debated either in that case or in this one: that Article XX, paragraph 1, is not *explicitly* framed in terms of jurisdiction or located inside the compromissory clause[9]. If it were, we presumably would not be having this argument about the nature of the article.

14. After noting this lack of an *express* exclusion from jurisdiction, the Court went on to correctly state that "[t]he text *could be interpreted* as excluding certain measures from the actual scope of the Treaty and, consequently, as excluding the jurisdiction of the Court", and that "[i]t could also be understood as affording only a defence on the merits". In other words, the Court recognized the clause's ambiguity — that it could be read either way.

15. The Court then recalled its treatment of the equivalent exceptions clause in the *Nicaragua* case; Iran's support for the same interpretation as in that case; and the United States'

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

position in the case at hand, before concluding that it "sees no reason to vary the conclusions it arrived at in 1986". The Court could have stopped there, but it did not.

16. Instead, the Court continued, stating that it "takes the view that Article XX, paragraph 1 *(d)*, does not restrict its jurisdiction *in the present case*, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise". In using this phrase *in the present case*, the Court was apparently conscious of the fact that the United States was willing to leave an Article XX, paragraph 1, argument to the merits in the *particular circumstances* of *Oil Platforms*, whereas I noted on Tuesday the United States had made a much broader objection to jurisdiction in the preliminary objections phase, not predicated on any particular article of the Treaty. This does not mean that the nature of Article XX, paragraph 1, was a closed issue for the United States. The Court sensibly seemed to recognize that and declined to make a definitive ruling on the issue other than for the case at hand. It left space for the clause to be treated differently in a future case.

17. So the fundamental point that I stressed on Tuesday remains: the Court in *Oil Platforms* explicitly acknowledged the possibility that Article XX, paragraph 1, *could indeed afford* a jurisdictional objection. It did not make a definitive ruling that the exception clause could only *ever* provide a merits defence. The Court therefore did not foreclose the invocation of the essential security clause as a jurisdictional matter in a *future* case. At this stage, the Court need not reach a definitive conclusion, but there are certainly grounds for the Court to assess *prima facie* jurisdiction in light of Article XX.

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

18. I turn now to why Article XX, subparagraph 1 *(d)*, provides a *prima facie* jurisdictional bar to Iran's claims in this case. A detailed analysis of the elements of this exception — such as what "necessary" means — is not required at this stage and is best left to development at the preliminary objections phase, where the Court must render a definitive decision.

19. However, both the Court's jurisprudence and the history of the essential security provision support the provision being properly invoked in the circumstances here, as the invoking

State is provided a substantial degree of deference regarding what is "necessary" to protect its essential security interests.

20. As I noted on Tuesday, in *Djibouti* v. *France*, the Court characterized the essential security clause *of this Treaty* as granting "wide discretion" to the invoking State[10]. In light of Professor Pellet's further assertions about selective quoting from the Court's decisions, I will return to paragraph 145 of the Court's *Djibouti* Judgment[11]. You can see the relevant segment of that paragraph on the screen. The remainder of this paragraph, which I have omitted for convenience here, concerns the specific application of the provision France was invoking in that case.

21. Professor Pellet questioned my failure to discuss the first sentence of this paragraph. But that sentence simply provides another unremarkable observation, that "this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the law of treaties"[12].

22. Mr. President, Members of the Court, the fact that a State must act in good faith in invoking an essential security clause — or indeed in interpreting and applying any portion of a treaty — is not in question. The United States has no hesitation in embracing that principle.

23. In the citations at the *end* of this sentence that I noted on Tuesday, the Court specifically referenced its decisions concerning the essential security clauses in the Treaty of Amity and the Nicaragua FCN Treaty. These were held up as examples of the competence of the Court in the face of provisions giving "wide discretion". The Court's characterization of this discretion as *"wide"* in relation to the Treaty of Amity is obviously *directly* relevant to the Court's consideration of the United States' invocation of Article XX, paragraph 1, here, and that is why I highlighted it.

24. As a final point on interpretation, it is incontrovertible that wide discretion was understood to be a key element of essential security clauses in US FCN treaties at the time of their conclusion. This is evidenced in contemporaneous documents concerning this and other FCN

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[10] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145.

[11] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, *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. 116, para. 222; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment*, *I.C.J. Reports 2003*, p. 183, para. 43).

[12] CR 2018/18, pp. 18-19, para. 19 (Pellet).

treaties, including negotiating history of the Treaty of Amity. I took you to a small sampling of those documents on Tuesday[13]. Iran had nothing to say about these historical documents, which reflect the intention of the Parties at the time the Treaty was concluded.

25. I turn now to the *application* of Article XX, subparagraph (1) *(d)* in this case. Iran boldly asserted that the challenged US measures are not even *prima facie* necessary for the protection of the United States' essential security interests for purposes of Article XX, paragraph (1) *(d)*[14]. This assertion lacks all credibility when considered against Iran's ongoing record of violent and destabilizing acts, which amply substantiates the threat Iran poses to US security interests. Ms Newstead will elaborate further on these points, but the US decision to cease participation in the JCPOA was based on a considered US national security assessment. This was not — as Iran would like the Court to believe — a decision that was made capriciously or without a sound factual basis.

26. The fact that the United States made a different calculus on the JCPOA in 2015 does not undermine the bona fide national security basis of the 8 May decision. Even at the time the JCPOA was concluded, the Obama Administration acknowledged enduring concerns about the threat Iran posed to US national security interests, and the decision to lift nuclear-related sanctions reflected a close weighing of those risks at that time[15]. There were many in the United States and in the international community who disputed that the JCPOA struck the correct balance. And since then, Iran has only escalated its destabilizing activities. It has advanced its ballistic missile programme, testing missiles in defiance of a United Nations Security Council resolution[16]. Iran has continued its long record of providing material and financial support for terrorist groups that threaten US interests[17]. And Iran continues to arbitrarily detain US nationals in Iran[18]. In this context, the

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[13] CR 2018/17, p. 38, paras. 20-21 (Grosh).

[14] CR 2018/18, p. 19, para. 21 (Pellet).

[15] Statement by President Barack Obama on Iran, 17 Jan. 2016, available at https://obamawhitehouse.archives.gov/the-press-office/2016/01/17/statement-president-iran.

[16] See e.g. Third Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2017/515, paras. 16-17.

[17] See e.g. judges' folders, tab RE-5, Borzou Daragahi, *Iranian-Backed Militias Set Sights on U.S. Forces*, Foreign Policy, available at https: https://foreignpolicy.com/2018/04/16/iranian-backed-militias-set-sights-on-u-s-forces/; 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; Tab 7 Department of State Country Report on Terrorism (2016).

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.

27. In response to these growing threats, and in light of the fact that the JCPOA itself failed to put a nuclear weapons capability permanently out of Iran's reach, the United States decided that the reimposition of nuclear-related sanctions was necessary to protect its essential security interests. A fundamental way to address US concerns is to deny Iran additional resources that could be used to sponsor its malign activities. The challenged measures work in concert to achieve this aim, and the United States has made far more than a *prima facie* showing that Article XX, paragraph (1) *(d)*, applies.

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

28. With regard to paragraph 1 *(b)*, Iran has little to say, so I will be brief as well. As I explained on Tuesday, the use of the phrase "relating to" in this paragraph provides parties with considerable space for the full range of measures that might be adopted to prevent proliferation of nuclear materials. Iran concedes that the provision could encompass sanctions on Iranian persons engaged in illicit trade in sensitive nuclear materials. Perhaps even more significantly, the specific sanctions statute that Iran admits would fall within paragraph 1 *(b)* is listed among those sanctions that the JCPOA participants agreed constitute nuclear-related sanctions[19]. Despite this, Iran disputes that paragraph 1 *(b)* can be understood to apply to the measures at issue here — sanctions that were adopted to target *revenue* that Iran was using to facilitate illicit nuclear activities[20]. Iran and the other JCPOA participants acknowledged in the JCPOA that all of these were "national sanctions related to Iran's nuclear programme"[21] — and that was the predicate for those sanctions being lifted.

29. The fact that the sanctions are now being reimposed for both nuclear and non-nuclear-related reasons does not vitiate the link that has always existed between these

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[18] Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, 14 Aug. 2017, paras. 43-44.

[19] Judges' folders, tab RE-2, Sect. 4.9.1 of Ann. II of the JCPOA.

[20] Judges' folders, tab 25, Excerpts of Nuclear-Related Sanctions.

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

measures and nuclear proliferation. The reimposition of these sanctions is intended to deny Iran resources that could be used to facilitate development of a nuclear weapon, as well as to block their financing of terror and other malign activities that pose a threat to US essential security interests. In light of Iran's own acknowledgment in the JCPOA that the sanctions at issue here are nuclear-related, and the United States' express reference to the need to "deny Iran all paths to a nuclear weapon" when deciding to reimpose those sanctions, certainly the exception is at least *prima facie* applicable.

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

30. I will now turn to Iran's presentation yesterday on plausibility of rights.

31. Iran continues to miss the mark. Iran does not have any rights under the Treaty with respect to measures that are covered by the exceptions in Article XX, paragraph 1, as the US measures at issue in this case plainly are.

32. Iran suggested yesterday that the Court should begin its plausibility of rights analysis by looking solely to the obligations in each of the individual treaty articles that Iran invokes. Iran contends that if the Court concludes that the rights are plausible, the inquiry stops there. In Iran's view, the Court should disregard the more than plausible showing by the United States that the measures fall under the exceptions in Article XX, because that is a merits defence. This approach is backward.

33. In deciding whether to issue provisional measures, the Court must evaluate the rights of the applicant *and* the rights of the respondent[22]. 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[23].

34. Where the respondent has reserved its rights under a treaty to take certain types of measures and excluded those measures from the treaty's substantive obligations, the applicant does not and cannot have plausible rights with respect to those measures. Thus, the Court cannot assess

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[22] *Jadhav*, para. 35.

[23] 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*, p. 104, paras. 74-75.

whether the applicant's asserted rights are plausible on the merits *without* considering whether relevant exceptions to the substantive treaty obligations could plausibly apply.

35. This is consistent with the Court's approach in assessing the provisional measures request in *Ukraine* v. *Russia*. The Court found that Ukraine's asserted rights under Article 18 of the International Convention on the Suppression of the Financing of Terrorism were not plausible, because Russia's obligations to prevent certain types of offences under Article 18 and Ukraine's corresponding rights were limited by the scope of Article 2 of that Treaty, which listed the covered offences. The Court stated: "in the context of a request for the indication of provisional measures, a State party to the Convention may rely on Article 18 to require another State party to co-operate with it in the prevention of certain types of acts only if it is plausible that such acts constitute offences under Article 2 of the ICSFT"[24]. Similarly, in the present case, Iran may rely on the Treaty provisions invoked in respect of the US measures, but again *only* if it is plausible that such measures are not covered by the exceptions in Article XX.

36. Iran also argued yesterday that if the Court is to go "deeply into the merits", the United States would "at least" have to show that it has a "clear-cut and compelling defence" by reference to the alleged security interests. This is wrong for four reasons. First, we are not asking the Court to wade deeply into the merits, as Iran has suggested. As I stated at the outset, the Court need not determine definitively at this stage whether the measures *are* covered by Article XX. The second flaw in Iran's argument is that it serves to highlight that Iran's approach to the plausibility of rights test is disproportionate — Iran only has to show its rights are plausible, while the United States has to show "clear-cut and compelling defence". This is not a balanced weighing of interests as the Court has done in prior cases[25]. Third, it is entirely unclear where Iran's purported standard even comes from. Iran cites no support for this proposition. And finally, for the reasons I discussed earlier, we have certainly demonstrated that the US measures are plausibly within the scope of Article XX as measures necessary to protect essential security interests and relating to fissionable materials.

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[24] *Ukraine* v. *Russian Federation*, p. 131, para. 74.

[25] *Jadhav*, para. 35.

37. Iran also asserted yesterday that the United States does not have rights under Article XX. But, the legal relevance of Article XX cannot be diminished in the way that Iran suggests. The United States never suggested, as Iran seems to imply, that Article XX confers rights. Rather, it preserves pre-existing rights. For the reasons just discussed, both Iran and the United States have reserved their rights with respect to the measures listed in Article XX.

38. For the same reason, Iran's contention yesterday that the United States did not dispute Iran's case with respect to the specific provisions of the Treaty that it invokes is also misguided. Iran specifically restated its position from the first day that Iran's rights are grounded in a natural meaning of the relevant Treaty of Amity provisions "in their context". But, Article XX is not only context for those provisions that form the basis of Iran's claims, it expressly limits the scope of the obligations in those provisions. There is thus no point for the United States at this stage to discuss the interpretation of the specific Treaty provisions Iran invokes, because they are simply not engaged as a result of the United States showing that Article XX expressly limits Iran's rights under those Treaty provisions.

39. Finally, Iran fails to understand the US argument that Iran's rights are not plausible because it is seeking restoration of JCPOA sanctions relief. Iran's claim for the benefits under the JCPOA cannot be recast as a plausible right under the Treaty of Amity. And this is particularly the case, in light of the fact that the JCPOA deliberately excludes resort to ICJ dispute settlement and includes its own mechanism for resolving disputes. If the Court were to consider Iran's asserted rights to be plausible, such a result would constitute an end-run around this deliberate design of the JCPOA participants.

IV. Conclusion

40. Mr. President, Members of the Court, this concludes my presentation, and I would ask that you call on Professor Childress.

The PRESIDENT: I thank Ms Grosh 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 again before you on behalf of the United States. I will now return to two additional reasons why Iran cannot show that the Court has *prima facie* jurisdiction to indicate provisional measures in this case.

2. First, despite Iran's attempt to cloak this case as a dispute under the Treaty of Amity, this case is exclusively about the JCPOA. As Iran recognized yesterday, this Court does not have jurisdiction over disputes arising under the JCPOA[26]. Second, nothing Iran's counsel stated yesterday changes the facts that Iran failed to make any genuine attempt at diplomacy. Thus, Iran has failed to satisfy the procedural preconditions contained in Article XXI, paragraph 2, of the Treaty of Amity.

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

3. As the United States has demonstrated across all its submissions, it is unmistakable that Iran's claims arise from the JCPOA and relate to the United States' decision to cease participation in the JCPOA. Contrary to Iran's objections that the JCPOA is "irrelevant", Iran has indeed made plain throughout its submissions that this case is all about the *reimposition* of the nuclear-related sanctions the United States lifted in connection with the JCPOA. Iran's Application and Request for provisional measures and arguments yesterday make clear that its case "exclusively concerns"[27] the United States' sovereign decision to cease participation in the JCPOA. This is evident from the fact that the *actions* of which Iran complains arise from the 8 May 2018 decision by the United States to cease participation in the JCPOA. This is further evidenced by the fact that the *relief* that Iran requests — the issuance of waivers, licences, and modifications of US Executive Orders — is the restoration of the sanctions relief provided by the United States under the JCPOA. Iran's effort to use the Treaty as a basis for this Court's jurisdiction is a clear end-run around the JCPOA.

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[26] CR 2018/18, p. 10, para. 1 (Pellet).

[27] See AI, para. 2.

4. Iran is doing this because nowhere in the text of the JCPOA will this Court find a compromissory clause allowing for resolution of disputes by this Court, or any indication of consent by the JCPOA participants to the jurisdiction of this Court over matters concerning implementation of the JCPOA. But the mere absence of a compromissory clause is not the whole story. This omission is not simply neutral on the question of the Court's jurisdiction. The JCPOA's very specific and uniquely tailored dispute resolution mechanism taken together with its non-legally binding nature demonstrate that the JCPOA was carefully and intentionally crafted in all respects *to exclude* judicial remedies.

5. Iran's only response was to make the obvious point that a State could undertake overlapping treaty obligations and only include an ICJ compromissory clause in one of them. Of course, simply because a State *can* do this in no way demonstrates that Iran and the United States *did* do this in the JCPOA. A careful study of the JCPOA reveals that they did not.

6. As I explained on Tuesday, the JCPOA dispute resolution mechanism provided for very short time frames — 15 days, followed by 15 days — that could be adjusted *only* if all participants agreed to an extension. The strict timeline underscores the intention of the participants to have a swift, responsive dispute resolution procedure. This preserved their sovereign discretion by not allowing for adjudication of these sensitive matters of national security. This is not at all surprising given the gravity of the issues at stake, and the potential need to adjust very quickly should a JCPOA participant assess that the delicate balance struck in this arrangement was no longer sufficiently addressing threats to its national security. After all, the JCPOA was a series of reciprocal commitments that expressly contemplated the possibility that a participant might cease performing those commitments under the deal in the event of an unresolved situation.

7. Not only did JCPOA participants intentionally choose a dispute settlement mechanism that foreclosed resort to adjudication, they chose to remove the measures from the legal sphere altogether by concluding the JCPOA as a non-binding arrangement. Concluding the JCPOA as a political commitment enabled the participants to preserve the flexibility to protect their national security without subjecting such decisions to judicial review. Instead, the JCPOA directs the resolution of disputes through political channels.

8. All of this confirms that the invocation of the 1955 Treaty here is Iran's attempt to manufacture this Court's jurisdiction over matters that have nothing to do with the substance and the purpose of the Treaty of Amity. Iran's misuse of this Court should be rejected.

II. 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

9. Mr. President, Members of the Court, Iran attempted again yesterday to establish that its case satisfies the jurisdictional requirement in Article XXI, paragraph 2, that a dispute under the Treaty be "not satisfactorily adjusted by diplomacy". Iran's submissions are unsuccessful for two reasons. *First*, after criticizing the United States for having presented a "selective reading" of the Court's jurisprudence, Iran proceeded to rely on the Court's precedents from 15 or more years ago while ignoring several, more recent relevant decisions of this Court. *Second*, Iran's assertions that it would not have been possible to adjust the dispute by diplomacy are inconsistent with the facts.

10. Turning to the first point, yesterday Iran implied that the Court should treat the question of whether a dispute has been "adjusted by diplomacy" as merely a factual determination rather than a procedural precondition. This is plainly inconsistent with the text of Article XXI, paragraph 2, and with the Court's more recent decisions. As a textual matter, Iran's reading would render the phrase "not satisfactorily adjusted by diplomacy" meaningless. If the phrase were intended to be treated merely as a factual characterization of the dispute, the language would not be necessary, as neither party would submit a complaint about a situation that *had* been resolved through diplomacy. As the Court stated in *Georgia* v. *Russia*, "[b]y interpreting Article 22 of CERD to mean, as Georgia contends, that all is needed is that, as a matter of fact, the dispute had not been resolved . . . a key phrase of this provision would become devoid of any effect"[28]. Indeed, in the context of the US counter-claim in *Oil Platforms*, Iran itself contended "the words must be given some meaning; there must have been some attempt, not a purely formal gesture, in the direction of satisfactory adjustment by diplomacy"[29].

11. In its more recent cases, the Court has consistently interpreted similar requirements to exhaust diplomacy as procedural preconditions. In *Georgia* v. *Russia*, *Ukraine* v. *Russia,* and

[28] *Georgia* v. *Russian Federation, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 126, para. 134.

[29] *Oil Platforms (Iran* v. *United States)*, Iran Reply and Defense to Counter-claim, para. 9.18.

Qatar v. *UAE*, the Court set out three elements that must be met to satisfy this precondition. First, there must be a genuine attempt at negotiations with a view to resolving the dispute[30]; second, the negotiations must specifically "relate to the subject-matter of the dispute"[31]; and third, there must be a failure of negotiations, or negotiations must have become futile or deadlocked[32].

12. An application of this test to the present case makes clear that Iran has not satisfied the required elements. As I discussed on Tuesday, the two diplomatic Notes Iran has submitted are far from a genuine effort at diplomacy, and yesterday Iran offered no new facts to demonstrate otherwise.

13. Iran's approach here stands in stark contrast to the record of attempts at diplomacy that did satisfy the test in *Ukraine* v. *Russia* and *Qatar* v. *UAE*. Unlike Iran, Qatar had issued the UAE a "formal invitation to negotiate" that expressly referred to the CERD-related issues. Ukraine and Russia had exchanged more than 20 diplomatic Notes and participated in four rounds of bilateral negotiations. Iran has no such factual record on which to stand and as a result, cannot satisfy the precondition for jurisdiction as interpreted in this Court's jurisprudence.

14. Iran made a cursory attempt yesterday at distinguishing the language "not satisfactorily adjusted by diplomacy" from other cases where the same precondition is couched in different language, and asserted that, in *Military and Paramilitary Activities*, the Court has ruled that the precondition at issue here is "purely objective". The fact that the Treaty of Amity utilizes different language to express the same concept the Court examined in the CERD cases does not render the more recent precedents inapplicable. In fact, the Court considered the compromissory clause

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[30] *Application of the 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 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*, p. 120, para. 43. 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.

[31] *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation) Preliminary Objections, Judgment, I.C.J. Reports 2011 (I),* p. 133, para. 161; *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*, p. 120, para. 43. 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.

[32] *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation) Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 133, para. 159; *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*, p. 120, para. 43. 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.

language from a Friendship, Commerce and Navigation treaty in its decision in *Georgia* v. *Russia* without ever suggesting that the two should be treated differently. In that case, the Court took note of *Nicaragua* and then clarified that "to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty" and "concern the substantive obligations contained in the treaty in question"[33]. Furthermore, by this standard, Iran has not only failed to genuinely attempt negotiations, but also has certainly not done so in respect of the substantive obligations in the Treaty of Amity.

15. Even if the Court were to look to its older rulings, on which Iran exclusively relies, they would not support Iran's position here, because in those cases there was evidence of attempts at diplomatic efforts to resolve the dispute. In the US counter-claim in *Oil Platforms*, the factual record contained examples of "repeated diplomatic efforts" to dissuade Iran from its attack on Gulf shipping, which was the subject-matter of the dispute[34]. In the *Nicaragua* case, there was evidence on the record of bilateral talks between the United States and Nicaragua, as well as multilateral discussions before the initiation of dispute settlement[35]. In short, Iran has not met the procedural precondition in Article XXI, paragraph 2, and Iran's attempt to rely on the Court's jurisprudence is thus unavailing.

16. Turning to my second point, Iran's dismissal of the notion that diplomacy would have been possible misses the mark for two reasons. First, the Court has rightly regarded this type of procedural precondition as imposing substantive threshold requirements that cannot be disregarded, even in the most difficult of disputes in which normal channels of diplomacy seem not to be apparent. In *Georgia* v. *Russia*, the Court stated that the precondition is only satisfied if negotiations must have failed or "must have become futile or deadlocked". But, in the absence of *any* attempt at negotiations, Iran has no standing on which to assert that negotiations would not have been possible. Second, Iran's assertions of futility are without merit. Let me reiterate what I said on Tuesday: as you will know from the public record, the United States, at our highest political

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[33] *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation) Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 133, para. 161.

[34] *Oil Platforms (Islamic Republic of Iran* v. *United States of America),* Rejoinder of the United States of America, paras. 1.70, 4.07-4.11, 4.17-4.18, and 5.46.

[35] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 49, para. 83.

levels, stands ready to engage with Iran in response to a genuine initiative to address the issues of acute concern to the United States.

17. 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 Newstead at this time.

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

Ms NEWSTEAD:

CLOSING

1. Thank you, Mr. President, Members of the Court. I will conclude our presentations on behalf of the United States in response to Iran's request for provisional measures. This is a matter of utmost seriousness for the United States. You have heard our arguments and we have provided you with compelling reasons why Iran's request must be denied as a matter of law. Allow me to briefly recount those.

2. First, as we have shown, the essence of Iran's request is that this Court order the United States to reverse its decision to cease participation in the JCPOA, and to resume implementation of JCPOA sanctions commitments. But this is a result to which Iran has no right under the JCPOA or the Treaty of Amity. Iran has not responded in any meaningful way to our demonstration that its Application, and its Request, are aimed at restoring the *status quo ante* of the JCPOA. It is no answer for Iran to assert that its Application does not contest the United States' 8 May decision to cease implementing the JCPOA, when the relief that Iran requests is precisely to nullify the effect of that decision. Moreover, the dispute mechanism in the JCPOA reflects a deliberate decision of the participants to resolve disputes through political channels and to foreclose judicial resolution. There is no basis for this Court to exercise jurisdiction over a JCPOA dispute.

3. We have also demonstrated that, even viewing this case through the lens of the Treaty of Amity, there is no basis under the Treaty for the Court to find jurisdiction at this stage. As

Ms Grosh has explained, Article XX of the Treaty of Amity excludes from its scope matters relating to sensitive issues of essential national security.

4. And this returns us to the grave national security concerns which are at the heart of this case. We have shown that the decision to reimpose the economic sanctions in dispute was taken on the basis of well-documented, long-standing national security concerns of the United States regarding the full spectrum of threatening acts by Iran. These concerns are the foundation of the Unites States' decision on 8 May, as is demonstrated in the National Security Presidential Memorandum we provided at tab 8 of your judges' folders in our first-round submissions.

5. Mr. President, Members of the Court, the evidence of Iran's threats to US national security over decades is overwhelming. Yet, Iran sought yesterday to undermine this rationale for the decision to reimpose sanctions by observing that, in 2015, the United States had concluded that implementing the JCPOA was in our national interest. And I have several points in response.

6. First, I observe simply that yesterday, Iran did not genuinely contest the facts regarding the series of violent and destabilizing acts it has committed over decades, which were described in my first-round presentation. Nor could it do so. The public record of those acts is voluminous, and we have provided additional recent examples in today's judges' folders at tabs RE-5 through RE-7. But more crucially, as I described in my opening presentation, those national security concerns were the central rationale for each of the sanctions measures that successive US administrations have taken for many years to counter the threat posed by Iran.

7. Second, it is of no moment that the United States concluded, in 2015, that implementation of the JCPOA and the lifting of certain nuclear-related sanctions was in its national security interest. As Iran knows well, the decision whether to participate in the JCPOA was the subject of very serious debate in the United States and in the international community both before and after it was adopted. Critics called the JCPOA woefully inadequate for failing to address the full range of threats posed by Iran's nuclear programme or to engage with the broader range of national security threats posed by Iran.

8. For example, an extensive and heated public debate took place in the US Congress regarding whether to disapprove the JCPOA, and thereby to nullify the sanctions relief under it. In that context, multiple US senators noted the shortcomings of the deal and their national security

concerns arising from it. We have included several slides in our presentation which provide illustrative quotes from that debate.

9. Mr. President, Members of the Court, even its strongest supporters acknowledged the JCPOA's shortcomings. Ambassador Samantha Power, the US Permanent Representative to the United Nations, observed at the time Security Council resolution 2231 was adopted that:

> "[t]his nuclear deal doesn't change our profound concern about . . . the instability Iran fuels beyond its nuclear program — from its support for terrorist proxies, to its repeated threats against Israel, to its other destabilizing activities in the region. That is why the United States will . . . maintain our own sanctions related to Iran's support for terrorism, its ballistic missiles program and its human rights violations. And this deal will in no way diminish the United States' outrage over the unjust detention of U.S. citizens by the Government of Iran."[36]

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

> "We remain steadfast in opposing Iran's destabilizing behavior elsewhere, including its threats against Israel and our Gulf partners, and its support for violent proxies in places like Syria and Yemen. We still have sanctions on Iran for its violations of human rights, for its support of terrorism, and for its ballistic missile program . . . We're not going to waver in the defense of our security or that of our allies and partners."[37]

10. In other words, Mr. President, Members of the Court, there was considered debate even in 2015 over whether the JCPOA struck the right balance. And since then, many of the critics' fears have been realized. Iran has advanced its ballistic missile programme, continuing to test missiles repeatedly, in defiance of resolution 2231[38]. It has continued to provide material and financial support to terrorist groups[39]. And it has escalated its destabilizing activities in Syria and Yemen[40].

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[36] Explanation of Vote by Ambassador Samantha Power, US Permanent Representative to the United Nations, at a United Nations Security Council Vote on resolution 2231 on Iran Non-proliferation, 20 July 2015 (S/PV.7488).

[37] Statement by President Barack Obama on Iran, 17 Jan. 2016, at https://obamawhitehouse.archives.gov/the-press-office/2016/01/17/statement-president-iran.

[38] See e.g. Third Report of the Secretary-General on the implementation of Security Council resolution 2231, S/2017/515, paras. 16-17; Fourth Report of the Secretary-General on the implementation of Security Council resolution 2231 (2015), S/2017/1030, paras. 20-26.

[39] See e.g. judges' folders, tab RE-5, Borzou Daragahi, *Iranian-Backed Militias Set Sights on U.S. Forces*, Foreign Policy, available at https://foreignpolicy.com/2018/04/16/iranian-backed-militias-set-sights-on-u-s-forces/; 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; judges' folders, tab 7, Department of State Country Report on Terrorism (2016).

[40] Judges' folders, tab RE-7, Michael Eisenstat, *Managing Escalation Dynamics with Iran in Syria – and Beyond*, at https://www.washingtoninstitute.org/policy-analysis/view/managing-escalation-dynamics-with-iran-in-syria-and-beyond; letter dated 26 Jan. 2018 from the Panel of Experts on Yemen mandated by Security Council resolution 2342 (2017) addressed to the President of the Security Council, S/2018/68 (26 Jan. 2018).

It is not difficult to see that these facts alone could lead the United States to reassess its calculus on the JCPOA in 2018.

11. This leads me to my fourth and final point on this topic, which is the most important one. The function of this Court is not to substitute its judgment for that of the United States as to what measures are necessary to protect its essential security interest. As Ms Grosh has detailed, this Court has acknowledged the need to afford a party "wide discretion" in its application of such provisions[41].

12. Iran has sought to convince this Court that it would suffer irreparable prejudice in the absence of provisional measures. But that claim is difficult to accept in light of Mr. Bethlehem's observation that these are the very same US sanctions Iran was subject to for years prior to 2016. It also disregards the evidence we have presented, including statements by Iran's Supreme Leader, that Iran's own domestic policies are responsible for its economic crisis. And Iran's arguments — seeking a restoration of the sanctions relief that allowed its economy to grow under the JCPOA — implicitly acknowledge that the consequences of these sanctions are reversible. By extension, any prejudice that might arise from their application is not irreparable.

13. With respect to the humanitarian concerns Iran has advanced, the United States certainly has not conceded, as Mr. Wordsworth suggested, that the reimposition of sanctions risks irreparable prejudice. But Iran seems to assume that chronology suffices to demonstrate causation, without addressing the very real likelihood that Iran's own internal policies bear responsibility for these conditions. Nevertheless, consistent with the United States' long-standing policy of ensuring that the focus of sanctions pressure is directed at the Iranian régime and not at the Iranian people, the United States maintains humanitarian exceptions to all of our statutory sanctions and broad authorizations by the Department of Treasury.

14. Iran expressly acknowledges these exceptions, but questions their efficacy. In the interests of affirming our seriousness on this issue, I will reiterate the assurance Mr. Bethlehem referred to on Tuesday. If there are humanitarian or safety of flight-related concerns which arise

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[41] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 229, 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. 116, para. 222, and *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment*, *I.C.J. Reports 2003*, p. 183, para. 43); emphasis added.

following the reimposition of the US sanctions at issue in this hearing, including concerns regarding the licensing process, the 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.

15. And notwithstanding Iran's cavalier treatment of this point yesterday, it is a meaningful affirmation that the humanitarian and safety-of-flight issues that Iran raises will receive serious attention from the United States. It is true, as in all licensing matters, that the United States cannot make a blanket promise regarding outcome. Nor can the United States promise which private entities will avail themselves of these exceptions. Here again, there must be limits to what Iran can lay at the feet of the United States.

16. Mr. President, Members of the Court, I have two final points before closing. The contention made at the conclusion of Iran's presentation yesterday that the lawful economic measures taken by the United States are in any way equivalent to the seizure of the United States Embassy and holding of American citizens hostages is unacceptable. I need not remind this Court that American personnel were seized violently, held for 444 days, and systematically mistreated[42]. As this Court noted in its judgment in that very case: "Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day"[43]. Mr. President, Members of the Court, there is emphatically no equivalence.

17. Finally, Iran's own statements make clear that Iran is not invoking the Treaty of Amity in good faith in this proceeding. Yesterday, Iran's Deputy Foreign Minister, Mr. Abbas Araghchi, addressed this case. He stated:

> "We did not start this with the idea of definitely obtaining a conviction against the United States at the Court, and then compelling the United States to take certain steps. In truth, it is to display the Islamic Republic's righteousness to the international community . . . This process will lead to political and psychological pressure on the United States."

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[42] *United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 14.

[43] *United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 43, para. 92.

18. Mr. President, Members of the Court, this is a remarkable admission. Iran cannot be permitted to draw this Court into a political and psychological campaign through this proceeding.

19. Mr. President and honourable Members of the Court, in conclusion, I present to you the final submission of the United States.

20. In accordance with Article 60, paragraph 2, of the Rules of Court,

> For the reasons explained during these hearings and any other reasons the Court might deem appropriate, the United States of America requests that the Court reject the request for provisional measures filed by the Islamic Republic of Iran.

21. Mr. President and Members of the Court, that concludes the United States' submissions in this case. I thank you for your kind attention to the submissions of the United States in these proceedings.

The PRESIDENT: I thank the Agent of the United States of America. The Court takes note of the Submissions that you have just read, Madam, on behalf of your Government.

This brings us to the end of the hearings devoted to the request for the indication of provisional measures 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)*. I thank the representatives of the two Parties for the assistance they have given to the Court by their oral observations in the course of these hearings. In accordance with practice, I would ask the Agents to remain at the Court's disposal. The Court will render its Order on the Request for the indication of provisional measures as soon as possible. The date on which this Order will be delivered at a public sitting will be duly communicated to the Agents of the Parties. Since the Court has no other business before it today, the sitting is closed.

The Court rose at 11.30 a.m.

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