

International Court of Justice — Provisional measures — Conditions for the indication of provisional measures — Prima facie basis for jurisdiction — Treaty of Amity, Economic Relations, and Consular Rights, 1955, between Iran and the United States of America — Whether acts of which Iran complained falling within material scope of the 1955 Treaty — Article XX, 1(c) and 1(d) of the 1955 Treaty — Whether Article XX restricting the Court's jurisdiction — Plausibility of rights asserted — Whether Article XX making Iran's asserted rights not plausible — Whether rights invoked by Iran arising under the 2015 Joint Comprehensive Plan of Action — Defence available to United States of America — Link between measures requested and rights whose protection Iran seeking — Real and imminent risk of irreparable prejudice — Evidence of irreparable prejudice — Continuing character of irreparable prejudice — Urgency in the circumstances — Humanitarian concerns — Non-aggravation and non-extension of the dispute — Binding character of provisional measures

Economics, trade and finance — Economic sanctions — Sanctions imposed by the United States of America against Iran — Territorial extent — Whether capable of affecting rights under the Treaty of Amity, Economic Relations, and Consular Rights, 1955, between Iran and the United States of America — Provisional measures jurisdiction of the International Court of Justice

ALLEGED VIOLATIONS OF THE 1955 TREATY OF AMITY,
 ECONOMIC RELATIONS, AND CONSULAR RIGHTS
 (ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)¹

International Court of Justice

Order on Provisional Measures. 3 October 2018

(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna, Cañado Trindade, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam and Iwasawa, *Judges*; Brower and Momtaz, *Judges ad hoc*)

¹ Counsel for the Parties are listed in para. 13 of the Order.

SUMMARY:² *The facts*:—On 14 July 2015, China, France, Germany, the Russian Federation, the United Kingdom and the United States of America (“USA”), with the European Union and the Islamic Republic of Iran (“Iran”), adopted the Joint Comprehensive Plan of Action (“JCPOA”). The JCPOA’s declared purpose was to ensure the exclusively peaceful character of Iran’s nuclear programme, and provided for the lifting of all sanctions, both unilateral and multilateral, which had previously been imposed on Iran. On 20 July 2015, the United Nations Security Council adopted resolution 2231 (2015), endorsing the JCPOA and urging its full implementation. On 16 January 2016, US President Obama issued Executive Order (“EO”) 13716, revoking previous sanctions imposed on Iran by the US.

On 8 May 2018, following a change of administration in the USA, US President Trump issued a National Security Presidential Memorandum, in which he announced the end of the USA’s participation in the JCPOA, and the reimposition of the sanctions revoked by EO 13716. According to this Memorandum, it was in the national interest of the USA to reimpose sanctions on Iran. Shortly thereafter, the Office of Foreign Assets Control of the US Department of the Treasury announced that the reimposition of sanctions on Iran would be done in two stages: first, by 6 August 2018 the USA would reimpose certain sanctions relating to financial transactions, trade in metals, the importation of Iranian-origin carpets and foodstuffs, and the export of commercial passenger aircraft and related parts; secondly, by 4 November 2018 the USA would reimpose all other sanctions. The first stage was accomplished with the issue of EO 13846 on 6 August 2018.

On 16 July 2018 Iran filed with the International Court of Justice (“the Court”) an application instituting proceedings against the US concerning alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights, 1955 (“the 1955 Treaty”). Iran sought to found the Court’s jurisdiction on Article XXI(2) of the 1955 Treaty,³ and on Article 36(1) of the Court’s Statute. On the same day, Iran also submitted a request for the indication of provisional measures under Article 41 of the Court’s Statute.

Pending the hearing on Iran’s request for provisional measures, on 23 July 2018 the President of the Court, acting under Article 74(4) of the Rules of Court, sent an urgent communication to the US Secretary of State, calling upon the USA to act in such a way as would enable any order the Court might make on the request for provisional measures to have its appropriate effects.

Concerning *prima facie* jurisdiction, Iran argued that there was a dispute between the Parties on the interpretation and application of the 1955 Treaty, specifically relating to Articles IV and VII-X,⁴ and that the alleged violations stemmed from the measures of 8 May 2018. Iran also argued that the dispute did not concern the USA’s withdrawal from the JCPOA. Iran contended that

² Prepared by Dr M. Lando.

³ For the text of Article XXI(2) of the 1955 Treaty, see para. 26 of the Order.

⁴ For the text of the relevant Articles of the 1955 Treaty, see para. 66 of the Order.

Article XX of the 1955 Treaty⁵ could not limit the Court's jurisdiction, as the Court had already found in *Oil Platforms*,⁶ and that, in any event, the measures of 8 May 2018 did not fall within the purview of that provision. Iran also stated that the dispute had not been satisfactorily adjusted by diplomatic means under Article XXI(2) of the 1955 Treaty, as demonstrated by the Notes Verbales sent by Iran to the Embassy of Switzerland in Tehran, which acted as the diplomatic channel between the Parties.

The USA replied that the dispute between the Parties arose within the framework of, and concerned, the JCPOA, which contained no compromissory clause providing for the Court's jurisdiction. It argued that the measures of 8 May 2018 were, in any case, covered by the exceptions provision of Article XX of the 1955 Treaty, which excluded such measures from the material scope of the Treaty itself. The USA contended that the measures of 8 May 2018 fell within the scope of Article XX, and were therefore *prima facie* outside the scope *ratione materiae* of the Court's jurisdiction. It added that there had been no genuine endeavour to settle the dispute by diplomatic means, as the Notes Verbales did not constitute a genuine attempt at negotiation, and, in any event, had reached the USA three days after Iran had instituted proceedings at the Court.

Iran contended that the rights for which it sought protection were plausible because they were grounded in a possible interpretation of the 1955 Treaty. Iran argued that it was plausible that the measures of 8 May 2018 were incompatible with its rights under the 1955 Treaty, including those arising under Article IV (fair and equitable treatment), Article VII (prohibition of restrictions on payments and remittances), Article VIII (most-favoured-nation treatment and national treatment relating to products), Article IX (most-favoured-nation treatment and national treatment relating to persons and companies) and Article X (freedom of commerce). Iran also submitted that there was a link between the measures requested and the rights for which it sought protection.

The USA argued that the rights which Iran sought to protect did not arise under the 1955 Treaty, but under the JCPOA, and were thus not plausibly capable of protection under the 1955 Treaty. Furthermore, the rights which Iran asserted fell within the exceptions pursuant to Article XX of the 1955 Treaty. The USA rejected the existence of a link between the measures requested and the rights for which Iran sought protection, arguing that Iran was seeking that the Court indicate relief under the JCPOA, which would not vindicate the rights asserted by Iran anyway since those rights fell outside the material scope of the 1955 Treaty.

According to Iran, the measures of 8 May 2018 caused irreparable prejudice in relation to airline safety and security, as contracts concluded by Iran for the provision of spare parts and related services had already been terminated.

⁵ For the text of the relevant part of Article XX of the 1955 Treaty, see para. 40 of the Order.

⁶ *Islamic Republic of Iran v. United States of America (Oil Platforms) (Preliminary Objection)*, 130 ILR 174, at pp. 191-2, para. 20.

Similarly, contracts were also being terminated for the provision of humanitarian assistance to Iran, including the provision of health-related goods, such as medicines and medical devices. Iran contended that the measures of 8 May 2018 caused, and continued to cause, irreparable prejudice to the entire Iranian economy, which the US could not restore upon the delivery of the final judgment in the case.

The USA argued that the measures of 8 May 2018 were identical to those which had already been in place before EO 13716, which showed the lack of urgency in the circumstances. The USA further contended that Iran had not provided sufficient evidence to demonstrate the existence of irreparable prejudice to the rights it asserted under the 1955 Treaty. Moreover, under the measures of 8 May 2018, it maintained a licensing policy which allowed for the exportation of aircraft spare parts into Iran, and that a similar licensing policy existed in relation to humanitarian and health-related goods. To the contrary, the provisional measures which Iran requested were likely to restrict the rights of the USA to adopt measures to protect its essential security interests, as permitted under Article XX of the 1955 Treaty.

Held (unanimously):—(1) The USA had to remove, by means of its choosing, any impediments arising from the measures of 8 May 2018 to the free exportation to the territory of Iran of: (i) medicines and medical devices; (ii) foodstuffs and agricultural commodities; and (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation (paras. 90-8 and 102).

(2) The USA had to ensure that licences and necessary authorizations were granted and that payments and other transfers of funds were not subject to any restriction in so far as they related to the goods and services listed under operative paragraph 1 (paras. 98 and 102).

(3) Both Parties had to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve (paras. 99 and 102).

(4)(a) For the Court to be able to indicate provisional measures, there had to be *prima facie* jurisdiction over the merits of the case. Article XXI(2) of the 1955 Treaty made the Court's jurisdiction conditional on the existence of a dispute between the Parties concerning the interpretation or application of the 1955 Treaty. That a dispute had arisen concerning withdrawal from the JCPOA did not necessarily entail that the dispute could not be about the 1955 Treaty, since one dispute could fall within the purview of multiple legal instruments. The JCPOA did not provide that its dispute settlement mechanism was to be the exclusive mechanism for resolving disputes falling within the scope of the JCPOA itself. Article XX of the 1955 Treaty had already been found not to exclude any matter from the material scope of the treaty, and, therefore, the measures of 8 May 2018 came, *prima facie*, within the scope of the 1955 Treaty and were subject to judicial examination thereunder. As the 1955 Treaty concerned issues of commerce between the Parties, and as the measures of 8 May

2018 appeared to affect commerce between the Parties, the dispute between the parties *prima facie* fell within the scope of the 1955 Treaty (paras. 24-43).

(b) Article XXI(2) of the 1955 Treaty was descriptive in character, and therefore did not require an enquiry into whether the Parties had engaged in formal negotiations before seising the Court. It was sufficient to ascertain whether the dispute had been “satisfactorily adjusted by diplomacy”. As there was no evidence that the Parties had engaged in any negotiations concerning their dispute, that dispute had not been satisfactorily adjusted by diplomacy (para. 44).

(5) Provisional measures might be indicated only if the rights for which protection was sought were at least plausible. The USA had not argued that Iran did not hold rights under the 1955 Treaty, or that the measures of 8 May 2018 were not capable of affecting those rights, but that Article XX of the 1955 Treaty entitled the US to apply measures to protect its “essential security interests”. The rights whose protection Iran sought were based on a possible interpretation of the 1955 Treaty, and some of the measures imposed by EO 13846 appeared to be capable of affecting those rights. Article XX of the 1955 Treaty could not affect Iran’s rights relating to aircraft safety and security, and to humanitarian and health-related goods, which were thus plausible. There was a link between the measures sought by Iran and the rights which it asserted on the merits (paras. 54-76).

(6) In order to indicate provisional measures, it was necessary to determine whether the rights whose protection was sought were at risk of irreparable prejudice. The measures of 8 May 2018 had already affected the import and export of products and payments and transfers of funds, and those effects were of a continuing nature. Iran could suffer irreparable prejudice, especially in cases when individuals could face danger to their life and health. Although the USA had offered assurances at the oral proceedings, since such assurances were limited to best endeavours and cooperation between government departments and agencies, they were not adequate to address fully Iran’s concerns under the 1955 Treaty. The indication of provisional measures in respect of these goods could not cause irreparable prejudice to any rights invoked by the USA (paras. 77-94).

(7) Under the Rules of Court, provisional measures could be indicated which were different in whole or in part from those requested by the applicant State. In the circumstances, the measures to be indicated did not need to be identical to those requested by Iran. The circumstances also required the indication of provisional measures for the non-aggravation and non-extension of the dispute. The provisional measures created international obligations for the Parties. The findings at the provisional measures stage in no way prejudiced any decision which could be taken in the later stages of the proceedings (paras. 96-101).

Separate Opinion of Judge Cançado Trindade: (1) Treaties were living instruments, and the 1955 Treaty was no exception. This was confirmed by

the Court's approach to evolutionary interpretation of treaties in *Navigational and Related Rights*,⁷ and by Article 31(1) and (3)(c) of the Vienna Convention on the Law of Treaties, 1969. The Court itself had found that it could interpret the 1955 Treaty evolutionarily (paras. 7-13).

(2) The indication of provisional measures was not affected by the invocation of a State's security interests, but always tended to the realization of justice. The realization of justice stood above the will of States. Provisional measures were transposed from domestic procedural law into international dispute settlement, which expanded international jurisdiction. Provisional measures gradually turned from precautionary legal action into a true jurisdictional guarantee of a preventive character. The consolidation of the autonomous regime of provisional measures enhanced the preventive dimension of international law, as shown by the regime governing compliance with provisional measures (paras. 21-44).

(3) In provisional measures, human vulnerability assumed great importance. Not only States, but also human beings were subjects of international law. The measures of 8 May 2018 already affected the livelihood of the people of Iran, and the situation continued to worsen. In cases in which human vulnerability was at stake, it made no sense to refer to the "plausibility" of rights invoked by a State (paras. 51-73).

Declaration of Judge ad hoc Momtaz: (1) The first two provisional measures indicated by the Court were insufficient properly to protect the rights sought by Iran. Iran's aircraft fleet was one of the oldest in the world, which made the provisional measure relating to aircraft spare parts and services insufficient to prevent irreparable prejudice. The Court should have required that the USA refrain from taking any measures aimed at discouraging the companies and nationals of third States from maintaining trade relations with Iran (paras. 1-3).

(2) Security Council resolution 2231 (2015) imposed obligations on Member States of the United Nations. Despite the claims that Iran had violated the provisions of the JCPOA, the International Atomic Energy Agency had found that Iran was abiding by its obligations arising thereunder (paras. 6-14).

(3) The measures adopted since 8 May 2018 had an unlawful extraterritorial dimension. Such measures could not fall, even *prima facie*, within the scope of Article XX(1)(d) of the 1955 Treaty, nor could they be justified on any other ground under international law. The measures taken by the US sought to discourage nationals of third States from maintaining commercial relations with Iran, which could be incompatible with the Charter of the United Nations. In addition, the US measures could also be inconsistent with

⁷ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgment)*, 151 ILR 615.

WTO law, especially in relation to Articles XX and XXI of the 1947 General Agreement on Tariffs and Trade (paras. 15-22).

(4) The present dispute also constituted a threat to peace and security. The provisional measure indicated for the non-aggravation and non-extension of the dispute between the Parties was insufficient to address this threat. The Court should have reminded the Parties of their obligations under the Charter of the United Nations, also on the basis of the complementary role which the Court itself and the United Nations Security Council had for the maintenance of international peace and security. Provisional measures were intended to ease tensions between States and to preserve the utility of proceedings. It would thus have been appropriate for the Court to call on both Parties to respect their obligations under the Charter, under Security Council resolution 2231 (2015), not only to avoid aggravating or extending the dispute, but also to preserve international peace and security (paras. 29-36).

The following is the text of the Order on Request for the Indication of Provisional Measures:

[623] TABLE OF CONTENTS

	<i>Paragraphs</i>
Chronology of the procedure	1-15
I. Factual background	16-23
II. Prima facie jurisdiction	24-52
1. General introduction	24-26
2. Existence of a dispute as to the interpretation or application of the Treaty of Amity	27-44
3. The issue of satisfactory adjustment by diplomacy under Article XXI, paragraph 2, of the Treaty of Amity	45-51
4. Conclusion as to prima facie jurisdiction	52
III. The rights whose protection is sought and the measures requested	53-76
IV. Risk of irreparable prejudice and urgency	77-94
V. Conclusion and measures to be adopted	95-101
Operative clause	102

[624] 1. On 16 July 2018, the Islamic Republic of Iran (hereinafter referred to as “Iran”) filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the “United States”) with regard to alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights

between Iran and the [625] United States of America, which was signed at Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter the “Treaty of Amity” or the “1955 Treaty”).

2. At the end of its Application, Iran requests the Court to adjudge, order and declare that:

- a. The USA, through the 8 May and announced further sanctions referred to in the present Application, with respect to Iran, Iranian nationals and companies, has breached its obligations to Iran under Articles IV(1), VII(1), VIII(1), VIII(2), IX(2) and X(1) of the Treaty of Amity;
- b. The USA shall, by means of its own choosing, terminate the 8 May sanctions without delay;
- c. The USA shall immediately terminate its threats with respect to the announced further sanctions referred to in the present Application;
- d. The USA shall ensure that no steps shall be taken to circumvent the decision to be given by the Court in the present case and will give a guarantee of non-repetition of its violations of the Treaty of Amity;
- e. The USA shall fully compensate Iran for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves the right to submit and present to the Court in due course a precise evaluation of the compensation owed by the USA.

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

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

5. At the end of its Request for the indication of provisional measures, Iran

in its own right and as *parens patriae* of its nationals respectfully 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;
- [626] 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;

- c. That the USA shall, within 3 months, report to the Court the action it has taken in pursuance of subparagraphs (a) and (b);
- d. That the USA shall assure Iranian, US and non-US nationals and companies that it will comply with the Order of the Court, and shall cease any and all statements or actions that would dissuade US and non-US persons and entities from engaging or continuing to engage economically with Iran and Iranian nationals or companies;
- e. That the USA shall refrain from taking any other measure that might prejudice the rights of Iran and Iranian nationals and companies under the Treaty of Amity with respect to any decision this Court might render on the merits.

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

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute by transmission of the printed bilingual text of the Application to the Members of the United Nations through the Secretary-General, the Registrar informed those States of the filing of the Application and the Request.

8. By letters dated 18 July 2018, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 27, 28, 29 and 30 August 2018 as the dates for the oral proceedings on the Request for the indication of provisional measures.

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

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

[627] 11. On 23 July 2018, the President of the Court, acting in conformity with Article 74, paragraph 4, of the Rules of Court,

addressed an urgent communication to the Secretary of State of the United States, calling upon the Government of the United States “to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects”. A copy of that letter was transmitted to the Agent of Iran.

12. By a letter dated 27 July 2018, the Agent of the United States informed the Court that her Government “strongly object[ed] to Iran’s Application on a number of grounds, and consider[ed] that the Court manifestly lack[ed] jurisdiction in respect of this case”. She noted, in particular, that “[a]ll the elements of Iran’s Application and Request for provisional measures [arose] from the Joint Comprehensive Plan of Action”, which does not have a compromisory clause conferring jurisdiction on the International Court of Justice. The Agent further stated that “matters of which Iran complain[ed] [were] also outside the scope of the Treaty of Amity [of 1955] and beyond the limited jurisdictional grant provided by Article XXI(2), read in conjunction with Article XX(1), of the Treaty”.

13. At the public hearings, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of Iran:

Mr Mohsen Mohebi,
Mr Alain Pellet,
Mr Sean Aughey,
Mr Samuel Wordsworth,
Mr Jean-Marc Thouvenin.

On behalf of the United States:

Ms Jennifer G. Newstead,
Mr Donald Earl Childress III,
Ms Lisa J. Grosh,
Sir Daniel Bethlehem.

14. At the end of its second round of oral observations, Iran asked the Court to indicate the following provisional measures:

- a. the United States 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;