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

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

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

I. INADMISSIBILITY DUE TO ABUSE OF PROCESS

A. The abuse

2. I believe that the present Application indeed is inadmissible as an abuse of process in that it seeks from this Court a legally binding judgment compelling the United States to rescind forever

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

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

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

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

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

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

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

[3] See e.g. POUS, Ann. 102, Letter from M. Javad Zarif, Minister of Foreign Affairs of the Islamic Republic of Iran, to Federica Mogherini, EU High Representative for Foreign Affairs and Security Policy (8 May 2019), p. 2 (noting that Iran had decided "to cease performing its commitments in part" under the JCPOA, including commitments related to the size of its uranium stockpile).

[4] The United States notes, without contradiction from Iran, that it has since 1987 maintained various measures which "generally prohibit transactions involving U.S. persons or non-U.S. persons acting within U.S. jurisdiction (such as a U.S. branch of a foreign bank, or U.S.-incorporated subsidiaries of a foreign company) and Iran" (POUS, para. 2.26). These measures have included sanctions designed to address "non-nuclear issues of concern" such as international terrorism, ballistic missile activities and human rights abuses, and which were excluded from the scope of the JCPOA (*ibid*., para. 2.17).

The JCPOA itself indicates that the sanctions the United States would lift in accordance with that instrument were only those "directed towards non-U.S. persons" and that "U.S. persons and U.S.-owned or -controlled foreign entities will continue to be generally prohibited from conducting transactions of the type permitted pursuant to this JCPOA, unless authorised to do so by [OFAC]"; see Memorial of the Islamic Republic of Iran (MI), Vol. I, Ann. 10, JCPOA, p. 131, fn. 6.

B. Abuse of process as "the holy grail"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

One year later, and 29 years ago, in 1992, the Court itself raised the issue of "abuse of process" unprompted for the first time in *Certain Phosphate Lands in Nauru*. Australia had argued that "Nauru has failed to act consistently and in good faith" and on that basis urged that "the Court

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

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

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

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

[15] *Ibid.*, para. 27.

in exercise of its discretion, and in order to uphold judicial propriety should . . . decline to hear the Nauruan claims"[16]. The Court responded as follows:

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

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

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

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

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

[17] *Ibid.*, para. 38.

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

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

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

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

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

[23] *Ibid.*

[24] *Ibid.*, para. 28.

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

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

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

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

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

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

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

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

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

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

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

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

10. Hard on the heels of the Court's Judgment in *Immunities and Criminal Proceedings* came its Judgment dismissing the United States' preliminary objections to jurisdiction and admissibility in *Certain Iranian Assets*. In that case, the United States sought dismissal, *inter alia*, on the basis of what it came to term an "abuse of process"[31] in that "the fundamental conditions underlying the [1955] Treaty of Amity [, Economic Relations, and Consular Rights between the United States and Iran] no longer exist" and "Iran's attempt to found the Court's jurisdiction on the Treaty does not seek to vindicate interests protected by the Treaty, but rather to embroil the Court in a broader strategic dispute"[32]. As usual when addressing claims of "abuse of process", the Court devoted only 3 of the 126 paragraphs in its Judgment to its dismissal[33]. Referring to its Judgments in *Immunities and Criminal Proceedings* as well as in *Certain Phosphate Lands in Nauru*, the Court limited itself to the by now standard phrases that to find an application inadmissible on such a basis requires "exceptional circumstances" and "clear evidence", neither of which standards has ever been defined by the Court, let alone — as Judge Donoghue pointed out in her dissenting opinion in *Immunities and Criminal Proceedings* — the Court ever having defined "abuse of process" itself. (While I myself approved the dismissal of the United States' plea of abuse of process in *Certain Iranian Assets*, the facts of the present case are so far different from those of that case as to have commanded my view favouring dismissal of the application in the present case as inadmissible on the ground of abuse of process.)

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

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

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

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

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

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

C. The Court's Judgment disincentivizes States from agreeing to non-legally binding dispute settlement

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

D. The uncertain future of abuse of process

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

II. ARTICLE XX 1 *(B)*

A. Distinctions among paragraphs 1 *(a)*, *(b)*, *(c)* and *(d)*

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

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

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

(a) regulating the importation or exportation of gold or silver;

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

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment; and

(d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

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

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

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

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

16. Paragraph 1 *(b)* should, however, have been treated in the present case as a legitimately preliminary objection due to its language and the statements of both Parties that repeatedly have tracked its language in relation to exactly the limited category of sanctions that is the subject of the present Application. To begin, the present Judgment addressed paragraph 1 *(b)* and *(d)* together, rehearsing (paragraph 109) its ritual references to *Oil Platforms* and *Certain Iranian Assets*, noting that in the latter Judgment "the Court noted that the interpretation given to Article XX, paragraph 1,

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

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

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

with regard to subparagraph *(d)* also applies to subparagraph *(c)*" and that "[t]he Court observed that in this respect 'there are no relevant grounds on which to distinguish [subparagraph *(c)*] from Article XX, paragraph 1, subparagraph *(d)*'". This lack of analysis was continued in the next sentence: "The Court finds that there are equally no relevant grounds for a distinction with regard to subparagraph *(b)*, which may only afford a possible defence on the merits." The Court then did take one stab at explaining why paragraph 1 *(b)* must be heard at the merits phase (paragraph 111)[39]:

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

B. Iranian declarations that the sanctions to which it objects are "nuclear-related" eliminate any possible dispute as to whether such sanctions are "relating to fissionable materials"

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

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

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

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

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

19. It cannot be denied that "fissionable materials" fundamentally means nuclear substances, nuclear processing and power generation facilities, and nuclear weapons[42]. Anything "nuclear-related" necessarily is "relating to fissionable materials". A plethora of official Iranian and American statements confirm that the narrow category of sanctions addressed by the Application are "nuclear-related". During the provisional measures phase, Iran's Agent recalled that, on 8 May 2018, the United States announced its intention to "reinstat[e] U.S. nuclear sanctions on the Iranian regime"[43]. The United States President's remarks on that date indeed began with the statement: "I want to update the world on our efforts to prevent Iran from acquiring a nuclear weapon", and concluded: "it is clear to me that we cannot prevent an Iranian nuclear bomb" under the JCPOA[44]. Thus, the very 8 May 2018 decision that is the *fons et origo* of Iran's claims in these proceedings evidently "related to" concerns regarding nuclear proliferation in Iran. This is further confirmed by the text of the JCPOA itself, as well as statements made by the participants at the time the JCPOA was finalized. Paragraph v of the JCPOA's preamble states that the Plan "will produce the comprehensive lifting of . . . national sanctions *related to Iran's nuclear programme*"[45]. Paragraph 24 of the JCPOA goes on to state that "[t]he E3/EU and the United States specify in Annex II a full and complete list *of all nuclear-related sanctions or restrictive measures* and will lift them in accordance with Annex V"[46]. In Section 4 of Annex II to the JCPOA, the United States "commits to cease the application of, and to seek such legislative action as may be appropriate to terminate, or modify to effectuate the termination of, *all nuclear-related sanctions* as specified in Sections 4.1-4.9 below"[47]. Thus, both the United States and Iran accepted the text of an agreement that stipulated, multiple times and in clear terms, that the sanctions the United States would suspend were "related to" Iran's nuclear programme. In July 2015, just as the JCPOA was finalized, the European Union's High Representative and the Iranian Foreign Minister issued a joint statement in which they announced that they had "reached an agreement on the Iranian nuclear issue"[48]. The Joint Statement went on to note that the JCPOA "includes Iran's own long-term plan with agreed *limitations on Iran's nuclear program*, and will produce the comprehensive lifting of all UN Security Council sanctions as well as multilateral and *national sanctions related to Iran's nuclear programme*"[49].

C. Iran has admitted in these very proceedings that the sanctions it attacks are "nuclear-related"

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

> "Let me recall the factual background of the decision of the United States *to reimpose and to aggravate nuclear-related sanctions* and restrictive measures. These *'nuclear-related' sanctions*, Mr. President, which Iran has always considered as

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

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

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

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

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

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

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

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

> unlawful, had been built up by the United States, first back in 1996 and then in 2006 and afterwards, through a series of legislative and executive acts targeting entire economic sectors as well as several Iranian individuals."[50]

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

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

D. Court precedents accept statements against interest "as a form of admission"

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

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

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

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

[51] MI, para. 9.21.

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

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

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

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

E. Application of the Vienna Convention on the Law of Treaties

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

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

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

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

signed on 15 August 1955, just six months later[56]. CENTO terminated in 1979, the year of the Islamic Revolution in Iran. Given that "supplementary means of interpretation" are not defined, the many statements set forth above of authorized representatives of Iran and the United States, as well as the language of the JCPOA itself, to the effect that precisely those sanctions that are the subject of the Application are "nuclear-related", should have settled the meaning of paragraph 1 *(b)* and led to the dismissal of the present Application.

(Signed) Charles N. BROWER.

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