



## Oil Platforms (Islamic Republic of Iran v. United States of America)

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### Summary of the Summary of the Judgment of 6 November 2003



#### Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)

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##### History of the proceedings and submissions of the Parties (paras. 1-20)

On 2 November 1992, the Islamic Republic of Iran (hereinafter called "Iran") instituted proceedings against the United States of America (hereinafter called "the United States") in respect of a dispute "aris[ing] out of the attack [on] and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively".

In its Application, Iran contended that these acts constituted a "fundamental breach" of various provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter called "the 1955 Treaty"), as well as of international law. The Application invoked, as a basis for the Court's jurisdiction, Article XXI, paragraph 2, of the 1955 Treaty.

Within the time-limit fixed for the filing of the Counter-Memorial, the United States raised a preliminary objection to the jurisdiction of the Court pursuant to Article 79, paragraph 1, of the Rules of Court of 14 April 1978. By a Judgment dated 12 December 1996 the Court rejected the preliminary objection of the United States according to which the 1955 Treaty did not provide any basis for the jurisdiction of the Court and found that it had jurisdiction, on the basis of Article XXI, paragraph 2, of the 1955 Treaty, to entertain the claims made by Iran under Article X, paragraph 1, of that Treaty.

The United States Counter-Memorial included a counter-claim concerning "Iran's actions in the Gulf during 1987-88 which, among other things, involved mining and other attacks on U.S.-flag or U.S.-owned vessels". By an Order of 10 March 1998 the Court held that this counter-claim was admissible as such and formed part of the proceedings.

Public sittings were held between 17 February and 7 March 2003, at which the Court heard the oral arguments and replies on the claim of Iran and on the counter-claim of the United States. At those oral proceedings, the following final submissions were presented by the Parties:

##### On behalf of the Government of Iran,

at the hearing of 3 March 2003, on the claim of Iran:

"The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare:

1. That in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran's Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks; and
2. That the United States is accordingly under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused in a form and amount to be determined by the Court at a subsequent stage of the proceedings, the right being reserved to Iran to introduce and present to the Court in due course a precise evaluation of the reparation owed by the United States; and
3. Any other remedy the Court may deem appropriate";

at the hearing of 7 March 2003, on the counter-claim of the United States:

"The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare:

That the United States counter-claim be dismissed."

##### On behalf of the Government of the United States,

at the hearing of 5 March 2003, on the claim of Iran and the counter-claim of the United States:

"The United States respectfully requests that the Court adjudge and declare:

- (1) that the United States did not breach its obligations to the Islamic Republic of Iran under Article X, paragraph 1, of the 1955 Treaty between the United States and Iran; and
- (2) that the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, the United States requests that the Court adjudge and declare:

- (1) Rejecting all submissions to the contrary, that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the Islamic Republic of Iran breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty; and
- (2) That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for its breach of the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings."

##### Basis of jurisdiction and factual background (paras. 21-26)

The Court begins by pointing out that its task in the present proceedings is to determine whether or not there have been breaches of the 1955 Treaty, and if it finds that such is the case, to draw the appropriate consequences according to the submissions of the Parties. The Court is seised both of a claim by Iran alleging breaches by the United States, and of a counter-claim by the United States alleging breaches by Iran. Its jurisdiction to entertain both the claim and the counter-claim is asserted to be based upon Article XXI, paragraph 2, of the 1955 Treaty.

The Court recalls that, as regards the claim of Iran, the question of jurisdiction has been the subject of its judgment of 12 December 1996. It notes that certain questions have however been raised between the Parties as to the precise significance or scope of that Judgment, which will be examined below.

As to the counter-claim, the Court also recalls that it decided by its Order of 10 March 1998 to admit the counter-claim, and indicated in that Order that the facts alleged and relied on by the United States "are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court", and accordingly that "the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1" (*I.C.J. Reports 1998*, p. 204, para. 36). It notes that in this respect also questions have been raised between the Parties as to the significance and scope of that ruling on jurisdiction, and these will be examined below.

The Court points out that it is however established, by the decisions cited, that both Iran's claim and the counter-claim of the United States can be upheld only so far as a breach or breaches of Article X, paragraph 1, of the 1955 Treaty may be shown, even though other provisions of the Treaty may be relevant to the interpretation of that paragraph. Article X, paragraph 1, of the 1955 Treaty reads as follows: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

The Court then sets out the factual background to the case, as it emerges from the pleadings of both Parties, observing that the broad lines of this background are not disputed, being a matter of historical record. The actions giving rise to both the claim and the counter-claim occurred in the context of the general events that took place in the Persian Gulf - which is an international commercial route and line of communication of major importance - between 1980 and 1988, in particular the armed conflict that opposed Iran and Iraq. In 1984, Iraq commenced attacks against ships in the Persian Gulf, notably tankers carrying Iranian oil. These were the first incidents of what later became known as the "Tanker War": in the period between 1984 and 1988, a number of commercial vessels and warships of various nationalities, including neutral vessels, were attacked by aircraft, helicopters, missiles or warships, or struck mines in the waters of the Persian Gulf. Naval forces of both belligerent parties were operating in the region, but Iran has denied responsibility for any actions other than incidents involving vessels refusing a proper request for stop and search. The United States attributes responsibility for certain incidents to Iran, whereas Iran suggests that Iraq was responsible for them.

The Court takes note that two specific attacks on shipping are of particular relevance in this case. On 16 October 1987, the Kuwaiti tanker *Sea Isle City*, reflagged to the United States, was hit by a missile near Kuwait harbour. The United States attributed this attack to Iran, and three days later, on 19 October 1987, it attacked two Iranian offshore oil production installations in the Reshadat ["Rostam"] complex. On 14 April 1988, the warship USS *Samuel B. Roberts* struck a mine in international waters near Bahrain while returning from an escort mission; four days later the United States employed its naval forces to attack and destroy simultaneously the Nasr ["Sirri"] and Salman ["Sassan"] complexes.

These attacks by United States forces on the Iranian oil platforms are claimed by Iran to constitute breaches of the 1955 Treaty; and the attacks on the *Sea Isle City* and the USS *Samuel B. Roberts* were invoked in support of the United States' claim to act in self-defence. The counter-claim of the United States is however not limited to those attacks.

#### The United States request to dismiss Iran's claim because of Iran's allegedly unlawful conduct (paras. 27-30)

The Court first considers a contention to which the United States appears to have attributed a certain preliminary character. The United States asks the Court to dismiss Iran's claim and refuse it the relief it seeks, because of Iran's allegedly unlawful conduct, i.e., its violation of the 1955 Treaty and other rules of international law relating to the use of force.

The Court notes that in order to make the finding requested by the United States it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period - which it has also to do in order to rule on the Iranian claim and the United States counter-claim. At this stage of its judgment, it does not therefore need to deal with this request.

#### Application of Article XX, paragraph 1 (d), of the 1955 Treaty (paras. 31-78)

The Court recalls that the dispute in the present case has been brought before it on the jurisdictional basis of Article XXI, paragraph 2, of the 1955 Treaty, which provides that "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

The Court further recalls that by its Judgment of 12 December 1996, it found that it had jurisdiction, on the basis of this Article, "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty" (*I.C.J. Reports 1996 (II)*, p. 821, para. 55 (2)). Its task is thus to ascertain whether there has been a breach by the United States of the provisions of Article X, paragraph 1; other provisions of the Treaty are only relevant in so far as they may affect the interpretation or application of that text.

In that respect, the Court notes that the United States has relied on Article XX, paragraph 1 (d), of the Treaty as determinative of the question of the existence of a breach of its obligations under Article X. That paragraph provides that

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

.....  
 (d) necessary to fulfil 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."

In its Judgment on the United States preliminary objection of 12 December 1996, the Court ruled that Article XX, paragraph 1 (d), does not afford an objection to admissibility, but "is confined to affording the Parties a possible defence on the merits" (*I.C.J. Reports 1996 (II)*, p. 811, para. 20). In accordance with Article XXI, paragraph 2, of the Treaty, it is now for the Court to interpret and apply that subparagraph, inasmuch as such a defence is asserted by the United States.

To uphold the claim of Iran, the Court must be satisfied both that the actions of the United States, complained of by Iran, infringed the freedom of commerce between the territories of the Parties guaranteed by Article X, paragraph 1, and that such actions were not justified to protect the essential security interests of the United States as contemplated by Article XX, paragraph 1 (d). The question however arises in what order the Court should examine these questions of interpretation and application of the Treaty.

In the present case, it appears to the Court that there are particular considerations militating in favour of an examination of the application of Article XX, paragraph 1 (d), before turning to Article X, paragraph 1. It is clear that the original dispute between the Parties related to the legality of the actions of the United States, in the light of international law on the use of force. At the time of those actions, neither Party made any mention of the 1955 Treaty. The contention of the United States at the time was that its attacks on the oil platforms were justified as acts of self-defence, in response to what it regarded as armed attacks by Iran, and on that basis it gave notice of its action to the Security Council under Article 51 of the United Nations Charter. Before the Court, it has continued to maintain that it was justified in acting as it did in exercise of the right of self-defence; it contends that, even if the Court were to find that its actions do not fall within the scope of Article XX, paragraph 1 (d), those actions were not wrongful since they were necessary and appropriate actions in self-defence. Furthermore, as the United States itself recognizes in its Rejoinder, "The self-defence issues presented in this case raise matters of the highest importance to all members of the international community", and both Parties are agreed as to the importance of the implications of the case in the field of the use of force, even though they draw opposite conclusions from this observation. The Court therefore considers that, to the extent that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty authorizes it to examine and rule on such issues, it should do so.

The question of the relationship between self-defence and Article XX, paragraph 1 (d), of the Treaty has been disputed between the Parties, in particular as regards the jurisdiction of the Court. In the view of the Court, the matter is one of interpretation of the Treaty, and in particular of Article XX, paragraph 1 (d). The question is whether the parties to the 1955 Treaty, when providing therein that it should "not preclude the application of measures . . . necessary to protect [the] essential security interests" of either party, intended that such should be the effect of the Treaty even where those measures involved a use of armed force; and if so, whether they contemplated, or assumed, a limitation that such use would have to

comply with the conditions laid down by international law. The Court considers that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation or application of (inter alia) Article XX, paragraph 1 (d), of that Treaty extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law.

The Court therefore examines first the application of Article XX, paragraph 1 (d), of the 1955 Treaty, which in the circumstances of this case, as explained above, involves the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence. On the basis of that provision, a party to the Treaty may be justified in taking certain measures which it considers to be "necessary" for the protection of its essential security interests. In the present case, the question whether the measures taken were "necessary" overlaps with the question of their validity as acts of self-defence.

In this connection, the Court notes that it is not disputed between the Parties that neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage, during the Iran-Iraq war. It notes also that this was to a great extent due to the presence of mines and minefields laid by both sides. The Court has no jurisdiction to enquire into the question of the extent to which Iran and Iraq complied with the international legal rules of maritime warfare. It can however take note of these circumstances, regarded by the United States as relevant to its decision to take action against Iran which it considered necessary to protect its essential security interests. Nevertheless, the legality of the action taken by the United States has to be judged by reference to Article XX, paragraph 1 (d), of the 1955 Treaty, in the light of international law on the use of force in self-defence.

The Court observes that the United States has never denied that its actions against the Iranian platforms amounted to a use of armed force. The Court indicates that it will examine whether each of these actions met the conditions of Article XX, paragraph 1 (d), as interpreted by reference to the relevant rules of international law.

#### Attack of 19 October 1987 on Reshadat (paras. 46-64)

The Court recalls that the first installation attacked, on 19 October 1987, was the Reshadat complex, which was also connected by submarine pipeline to another complex, named Resalat. At the time of the United States attacks, these complexes were not producing oil due to damage inflicted by prior Iraqi attacks. Iran has maintained that repair work on the platforms was close to completion in October 1987. The United States has however challenged this assertion. As a result of the attack, one platform was almost completely destroyed and another was severely damaged and, according to Iran, production from the Reshadat and Resalat complexes was interrupted for several years.

The Court first concentrates on the facts tending to show the validity or otherwise of the claim to exercise the right of self-defence. In its communication to the Security Council at the time of the attack, the United States based this claim on the existence of "a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation"; it referred in particular to a missile attack on the Sea Isle City as being the specific incident that led to the attack on the Iranian platforms. Before the Court, it has based itself more specifically on the attack on the Sea Isle City, but has continued to assert the relevance of the other attacks.

The Court points out that the United States has not claimed to have been exercising collective self-defence on behalf of the neutral States engaged in shipping in the Persian Gulf. Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.

Having examined with great care the evidence and arguments presented on each side, the Court finds that the evidence indicative of Iranian responsibility for the attack on the Sea Isle City, is not sufficient to support the contentions of the United States. The conclusion to which the Court has come on this aspect of the case is thus that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the Sea Isle City, has not been discharged.

In its notification to the Security Council, and before the Court, the United States has however also asserted that the Sea Isle City incident was "the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce".

The Court finds that even taken cumulatively, and reserving the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States.

#### Attacks of 18 April 1988 on Nasr and Salman and "Operation Praying Mantis" (paras. 65-72)

The Court recalls that the second occasion on which Iranian oil installations were attacked was on 18 April 1988, with the attacks on the Salman and Nasr complexes. Iran states that the attacks caused severe damage to the production facilities of the platforms; that the activities of the Salman complex were totally interrupted for four years, its regular production being resumed only in September 1992, and reaching a normal level in 1993; and that activities in the whole Nasr complex were interrupted and did not resume until nearly four years later.

The nature of the attacks on the Salman and Nasr complexes, and their alleged justification, was presented by the United States to the United Nations Security Council in a letter from the United States Permanent Representative of 18 April 1988, which stated inter alia that the United States had "exercised their inherent right of self-defence under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf", namely the mining of the USS Samuel B. Roberts; according to the United States, "This [was] but the latest in a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf."

The Court notes that the attacks on the Salman and Nasr platforms were not an isolated operation, aimed simply at the oil installations, as had been the case with the attacks of 19 October 1987; they formed part of a much more extensive military action, designated "Operation Praying Mantis", conducted by the United States against what it regarded as "legitimate military targets"; armed force was used, and damage done to a number of targets, including the destruction of two Iranian frigates and other Iranian naval vessels and aircraft.

As in the case of the attack on the Sea Isle City, the first question is whether the United States has discharged the burden of proof that the USS Samuel B. Roberts was the victim of a mine laid by Iran. The Court notes that mines were being laid at the time by both belligerents in the Iran-Iraq war, so that evidence of other minelaying operations by Iran is not conclusive as to responsibility of Iran for this particular mine. The main evidence that the mine struck by the USS Samuel B. Roberts was laid by Iran was the discovery of moored mines in the same area, bearing serial numbers matching other Iranian mines, in particular those found aboard the vessel Iran Ajr. This evidence is highly suggestive, but not conclusive.

Furthermore, no attacks on United States-flagged vessels (as distinct from United States-owned vessels), additional to those cited as justification for the earlier attacks on the Reshadat platforms, have been brought to the Court's attention, other than the mining of the USS Samuel B. Roberts itself. The question is therefore whether that incident sufficed in itself to justify action in self-defence, as amounting to an "armed attack". The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"; but in view of all the circumstances, including the inconclusiveness of the evidence of Iran's responsibility for the mining of the USS Samuel B. Roberts, the Court is unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an "armed attack" on the United States by Iran, in the form of the mining of the USS Samuel B. Roberts.

#### Criteria of necessity and proportionality (paras. 73-77)

The Court points out that in the present case a question of whether certain action is "necessary" arises both as an element of international law relating to self-defence and on the basis of the actual terms of Article XX, paragraph 1 (d), of the 1955 Treaty, already quoted, whereby the Treaty

does "not preclude . . . measures . . . necessary to protect [the] essential security interests" of either party. The Court therefore turns to the criteria of necessity and proportionality in the context of international law on self-defence. One aspect of these criteria is the nature of the target of the force used avowedly in self-defence.

The Court indicates that it is not sufficiently convinced that the evidence available supports the contentions of the United States as to the significance of the military presence and activity on the Reshadat oil platforms; and it notes that no such evidence is offered in respect of the Salman and Nasr complexes. However, even accepting those contentions, for the purposes of discussion, the Court finds itself unable to hold that the attacks made on the platforms could have been justified as acts of self-defence. In the case both of the attack on the Sea Isle City and the mining of the USS Samuel B. Roberts, the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents.

As to the requirement of proportionality, the attack of 19 October 1987 might, had the Court found that it was necessary in response to the Sea Isle City incident as an armed attack committed by Iran, have been considered proportionate. In the case of the attacks of 18 April 1988, however, they were conceived and executed as part of a more extensive operation entitled "Operation Praying Mantis". As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither "Operation Praying Mantis" as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.

#### Conclusion (para. 78)

The Court thus concludes from the foregoing that the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 cannot be justified, under Article XX, paragraph 1 (d), of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and thus did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty.

#### Iran's claim under Article X, paragraph 1, of the 1955 Treaty (paras. 79-99)

Having satisfied itself that the United States may not rely, in the circumstances of the case, on the defence to the claim of Iran afforded by Article XX, paragraph 1 (d), of the 1955 Treaty, the Court turns to that claim, made under Article X, paragraph 1, of that Treaty, which provides that "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

In its Judgment of 12 December 1996 on the preliminary objection of the United States, the Court had occasion, for the purposes of ascertaining and defining the scope of its jurisdiction, to interpret a number of provisions of the 1955 Treaty, including Article X, paragraph 1. It noted that the Applicant had not alleged that any military action had affected its freedom of navigation, so that the only question to be decided was "whether the actions of the United States complained of by Iran had the potential to affect ♦freedom of commerce" as guaranteed by that provision (I.C.J. Reports 1996 (II), p. 817, para. 38). After examining the contentions of the Parties as to the meaning of the word, the Court concluded that "it would be a natural interpretation of the word ♦commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general - not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce" (ibid., p. 819, para. 49).

In that decision, the Court also observed that it did not then have to enter into the question whether Article X, paragraph 1, "is restricted to commerce ♦between' the Parties" (I.C.J. Reports 1996 (II), p. 817, para. 44). However it is now common ground between the Parties that that provision is in terms limited to the protection of freedom of commerce "between the territories of the two High Contracting Parties". The Court observes that it is oil exports from Iran to the United States that are relevant to the case, not such exports in general.

In the 1996 Judgment, the Court further emphasized that "Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect ♦commerce' but ♦freedom of commerce", and continued: "Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and storage with a view to export" (ibid., p. 819, para. 50). The Court also noted that "Iran's oil production, a vital part of that country's economy, constitutes an important component of its foreign trade", and that "On the material now before the Court, it is . . . not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil . . ." (ibid., p. 820, para. 51). The Court concludes by observing that if, at the present stage of the proceedings, it were to find that Iran had established that such was the case, the claim of Iran under Article X, paragraph 1, could be upheld.

Before turning to the facts and to the details of Iran's claim, the Court mentions that the United States has not succeeded, to the satisfaction of the Court, in establishing that the limited military presence on the platforms, and the evidence as to communications to and from them, could be regarded as justifying treating the platforms as military installations (see above). For the same reason, the Court is unable to regard them as outside the protection afforded by Article X, paragraph 1, of the 1955 Treaty, as alleged by the United States.

The Court in its 1996 Judgment contemplated the possibility that freedom of commerce could be impeded not only by "the destruction of goods destined to be exported", but also by acts "capable of affecting their transport and their storage with a view to export" (I.C.J. Reports 1996 (II), p. 819, para. 50). In the view of the Court, the activities of the platforms are to be regarded, in general, as commercial in nature; it does not, however, necessarily follow that any interference with such activities involves an impact on the freedom of commerce between the territories of Iran and the United States.

The Court considers that where a State destroys another State's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is in principle an interference with the freedom of international commerce. In destroying the platforms, whose function, taken as a whole, was precisely to produce and transport oil, the military actions made commerce in oil, at that time and from that source, impossible, and to that extent prejudiced freedom of commerce. While the oil, when it left the platform complexes, was not yet in a state to be safely exported, the fact remains that it could be already at that stage destined for export, and the destruction of the platform prevented further treatment necessary for export. The Court therefore finds that the protection of freedom of commerce under Article X, paragraph 1, of the 1955 Treaty applied to the platforms attacked by the United States, and the attacks thus impeded Iran's freedom of commerce. However, the question remains whether there was in this case an interference with freedom of commerce "between the territories of the High Contracting Parties".

The United States in fact contends further that there was in any event no breach of Article X, paragraph 1, inasmuch as, even assuming that the attacks caused some interference with freedom of commerce, it did not interfere with freedom of commerce "between the territories of the two High Contracting Parties". First, as regards the attack of 19 October 1987 on the Reshadat platforms, it observes that the platforms were under repair as a result of an earlier attack on them by Iraq; consequently, they were not engaged in, or contributing to, commerce between the territories of the Parties. Secondly, as regards the attack of 18 April 1988 on the Salman and Nasr platforms, it draws attention to United States Executive Order 12613, signed by President Reagan on 29 October 1987, which prohibited, with immediate effect, the import into the United States of most goods (including oil) and services of Iranian origin. As a consequence of the embargo imposed by this Order, there was, it is suggested, no commerce between the territories of the Parties that could be affected, and consequently no breach of the Treaty protecting it.

Iran has asserted, and the United States has not denied, that there was a market for Iranian crude oil directly imported into the United States up to the issuance of Executive Order 12613 of 29 October 1987. Thus Iranian oil exports did up to that time constitute the subject of "commerce between the territories of the High Contracting Parties" within the meaning of Article X, paragraph 1, of the 1955 Treaty.

The Court observes that at the time of the attack of 19 October 1987 no oil whatsoever was being produced or processed by the Reshadat and Resalat platforms, since these had been put out of commission by earlier Iraqi attacks. While it is true that the attacks caused a major setback to the process of bringing the platforms back into production, there was at the moment of the attacks on these platforms no ongoing commerce in oil produced or processed by them.

The Court further observes that the embargo imposed by Executive Order 12613 was already in force when the attacks on the Salman and Nasr platforms were carried out; and that, it has not been shown that the Reshadat and Resalat platforms would, had it not been for the attack of

19 October 1987, have resumed production before the embargo was imposed. The Court must therefore consider the significance of that Executive Order for the interpretation and application of Article X, paragraph 1, of the 1955 Treaty.

The Court sees no reason to question the view sustained by Iran that, over the period during which the United States embargo was in effect, petroleum products were reaching the United States, in considerable quantities, that were derived in part from Iranian crude oil. It points out, however, that what the Court has to determine is not whether something that could be designated "Iranian" oil entered the United States, in some form, during the currency of the embargo; it is whether there was "commerce" in oil between the territories of Iran and the United States during that time, within the meaning given to that term in the 1955 Treaty.

In this respect, what seems to the Court to be determinative is the nature of the successive commercial transactions relating to the oil, rather than the successive technical processes that it underwent. What Iran regards as "indirect" commerce in oil between itself and the United States involved a series of commercial transactions: a sale by Iran of crude oil to a customer in Western Europe, or some third country other than the United States; possibly a series of intermediate transactions; and ultimately the sale of petroleum products to a customer in the United States. This is not "commerce" between Iran and the United States, but commerce between Iran and an intermediate purchaser; and "commerce" between an intermediate seller and the United States.

The Court thus concludes, with regard to the attack of 19 October 1987 on the Reshadat platforms, that there was at the time of those attacks no commerce between the territories of Iran and the United States in respect of oil produced by those platforms and the Resalat platforms, inasmuch as the platforms were under repair and inoperative; and that the attacks cannot therefore be said to have infringed the freedom of commerce in oil between the territories of the High Contracting Parties protected by Article X, paragraph 1, of the 1955 Treaty, particularly taking into account the date of entry into force of the embargo effected by Executive Order 12613. The Court notes further that, at the time of the attacks of 18 April 1988 on the Salman and Nasr platforms, all commerce in crude oil between the territories of Iran and the United States had been suspended by that Executive Order, so that those attacks also cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the 1955 Treaty.

The Court is therefore unable to uphold the submissions of Iran, that in carrying out those attacks the United States breached its obligations to Iran under Article X, paragraph 1, of the 1955 Treaty. In view of this conclusion, the Iranian claim for reparation cannot be upheld.

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The Court furthermore concludes that, in view of this finding on the claim of Iran, it becomes unnecessary to examine the argument of the United States (referred to above) that Iran might be debarred from relief on its claim by reason of its own conduct.

#### United States Counter-Claim (paras. 101-124)

The Court recalls that the United States has filed a counter-claim against Iran and refers to the corresponding final submissions presented by the United States in the Counter-Memorial.

The Court further recalls that, by an Order of 10 March 1998 it found "that the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings."

#### Iran's objections to the Court's jurisdiction and to the admissibility of the United States counter-claim (paras. 103-116)

Iran maintains that the Court's Order of 10 March 1998 did not decide all of the preliminary issues involved in the counter-claim presented by the United States; the Court only ruled on the admissibility of the United States counter-claim in relation to Article 80 of the Rules of Court, declaring it admissible "as such", whilst reserving the subsequent procedure for further decision. Iran contends that the Court should not deal with the merits of the counter-claim, presenting five objections.

The Court considers that it is open to Iran at this stage of the proceedings to raise objections to the jurisdiction of the Court to entertain the counter-claim or to its admissibility, other than those addressed by the Order of 10 March 1998. It points out that this Order does not address any question relating to jurisdiction and admissibility not directly linked to Article 80 of the Rules. The Court indicates that it will therefore proceed to address the objections now presented by Iran.

The Court finds that it cannot uphold the first objection of Iran to the effect that the Court cannot entertain the counter-claim of the United States because it was presented without any prior negotiation, and thus does not relate to a dispute "not satisfactorily adjusted by diplomacy" as contemplated by Article XXI, paragraph 2, of the 1955 Treaty. The Court points out that it is established that a dispute has arisen between Iran and the United States over the issues raised in the counter-claim; and that it is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to the Court.

The Court finds that the second objection of Iran, according to which the United States is in effect submitting a claim on behalf of third States or of foreign entities and has no title to do so, is devoid of any object and cannot be upheld. The Court recalls that the first submission presented by the United States in regard to its counter-claim simply requests the Court to adjudge and declare that the alleged actions of Iran breached its obligations to the United States, without mention of any third States.

In its third objection, Iran contends that the United States counter-claim extends beyond Article X, paragraph 1, of the 1955 Treaty, the only text in respect of which the Court has jurisdiction, and that the Court cannot therefore uphold any submissions falling outside the terms of paragraph 1 of that Article. The Court notes that the United States, in presenting its final submissions on the counter-claim, no longer relies, as it did at the outset, on Article X of the 1955 Treaty as a whole, but on paragraph 1 of that Article only, and, furthermore, recognizes the territorial limitation of Article X, paragraph 1, referring specifically to the military actions that were allegedly "dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran" (emphasis added) rather than, generally, to "military actions that were dangerous and detrimental to maritime commerce". By limiting the scope of its counter-claim in its final submissions, the United States has deprived Iran's third objection of any object, and the Court finds that it cannot therefore uphold it.

In its fourth objection Iran maintains that "the Court has jurisdiction to rule only on counter-claims alleging a violation by Iran of freedom of commerce as protected under Article X (1), and not on counter-claims alleging a violation of freedom of navigation as protected by the same paragraph". The Court notes nevertheless, that Iran seems to have changed its position and recognized that the counter-claim could be founded on a violation of freedom of navigation. The Court further observes that it also concluded in 1998 that it had jurisdiction to entertain the United States Counter-Claim in so far as the facts alleged may have prejudiced the freedoms (in the plural) guaranteed by Article X, paragraph 1, of the 1955 Treaty, i.e., freedom of commerce and freedom of navigation. This objection of Iran thus cannot be upheld by the Court.

Iran presents one final argument against the admissibility of the United States counter-claim, which however it concedes relates only to part of the counter-claim. Iran contends that the United States has broadened the subject-matter of its claim beyond the submissions set out in its counter-claim by having, belatedly, added complaints relating to freedom of navigation to its complaints relating to freedom of commerce, and by having added new examples of breaches of freedom of maritime commerce in its Rejoinder in addition to the incidents already referred to in the Counter-Claim presented with the Counter-Memorial.

The Court observes that the issue raised by Iran is whether the United States is presenting a new claim. The Court is thus faced with identifying what is "a new claim" and what is merely "additional evidence relating to the original claim". It is well established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings "transform the dispute brought before the Court into a dispute that would be of a different nature." The Court recalls that it has noted in its Order of 10 March 1998 in the present case that the Counter-Claim alleged "attacks on shipping, the laying of mines, and other military actions said to be dangerous and detrimental to maritime commerce" (I.C.J. Reports 1998, p. 204, para. 36). Subsequently to its Counter-Memorial and Counter-Claim and to that Order of the Court, the United States provided detailed particulars of further incidents substantiating, in its contention, its original claims. In the view of the Court, the United States has not, by doing so, transformed the subject of the dispute originally submitted to the Court, nor has it modified the substance of its counter-claim, which remains the same. The Court therefore cannot uphold the objection of Iran.

Merits of the United States Counter-Claim (paras. 119-123)

Having disposed of all objections of Iran to its jurisdiction over the counter-claim, and to the admissibility thereof, the Court considers the counter-claim on its merits. It points out that, to succeed on its counter-claim, the United States must show that: (a) its freedom of commerce or freedom of navigation between the territories of the High Contracting Parties to the 1955 Treaty was impaired; and that (b) the acts which allegedly impaired one or both of those freedoms are attributable to Iran.

The Court recalls that Article X, paragraph 1, of the 1955 Treaty does not protect, as between the Parties, freedom of commerce or freedom of navigation in general. As already noted above, the provision of that paragraph contains an important territorial limitation. In order to enjoy the protection provided by that text, the commerce or the navigation is to be between the territories of the United States and Iran. The United States bears the burden of proof that the vessels which were attacked were engaged in commerce or navigation between the territories of the United States and Iran.

The Court then examines each of Iran's alleged attacks, in chronological order, from the standpoint of this requirement of the 1955 Treaty and concludes that none of the vessels described by the United States as being damaged by Iran's alleged attacks was engaged in commerce or navigation "between the territories of the two High Contracting Parties". Therefore, the Court concludes that there has been no breach of Article X, paragraph 1, of the 1955 Treaty in any of the specific incidents involving these ships referred to in the United States pleadings.

The Court takes note that the United States has also presented its claim in a generic sense. It has asserted that as a result of the cumulation of attacks on US and other vessels, laying mines and otherwise engaging in military actions in the Persian Gulf, Iran made the Gulf unsafe, and thus breached its obligation with respect to freedom of commerce and freedom of navigation which the United States should have enjoyed under Article X, paragraph 1, of the 1955 Treaty.

The Court observes that, while it is a matter of public record that as a result of the Iran-Iraq war navigation in the Persian Gulf involved much higher risks, that alone is not sufficient for the Court to decide that Article X, paragraph 1, was breached by Iran. It is for the United States to show that there was an actual impediment to commerce or navigation between the territories of the two High Contracting Parties. However, the United States has not demonstrated that the alleged acts of Iran actually infringed the freedom of commerce or of navigation between the territories of the United States and Iran. The Court also notes that the examination above of specific incidents shows that none of them individually involved any interference with the commerce and navigation protected by the 1955 Treaty; accordingly the generic claim of the United States cannot be upheld.

The Court has thus found that the counter-claim of the United States concerning breach by Iran of its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty, whether based on the specific incidents listed, or as a generic claim, must be rejected; there is therefore no need for it to consider, under this head, the contested issues of attribution of those incidents to Iran. In view of the foregoing, the United States claim for reparation cannot be upheld.

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The full text of the operative paragraph (para. 125) reads as follows:

"For these reasons,

The court,

(1) By fourteen votes to two,

Finds that the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 (d), of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force; finds further that the Court cannot however uphold the submission of the Islamic Republic of Iran that those actions constitute a breach of the obligations of the United States of America under Article X, paragraph 1, of that Treaty, regarding freedom of commerce between the territories of the parties, and that, accordingly, the claim of the Islamic Republic of Iran for reparation also cannot be upheld;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal, Owada, Simma, Tomka; Judge ad hoc Rigaux;

AGAINST: Judges Al-Khasawneh, Elaraby;

(2) By fifteen votes to one,

Finds that the counter-claim of the United States of America concerning the breach of the obligations of the Islamic Republic of Iran under Article X, paragraph 1, of the above-mentioned 1955 Treaty, regarding freedom of commerce and navigation between the territories of the parties, cannot be upheld; and accordingly, that the counter-claim of the United States of America for reparation also cannot be upheld.

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Rigaux;

AGAINST: Judge Simma.

Annex to Summary 2003/2

### Declaration of Judge Ranjeva

Subscribing to the conclusions set out in the Judgment, Judge Ranjeva raises the distinction arising in respect of the same set of facts between the violation of freedom of commerce between the two Parties and the non-violation of freedom of commerce between those Parties' territories.

In his declaration Judge Ranjeva draws attention to the fact that the Judgment pierces the veil of the dispute: the Court sought to give priority to thorough consideration of the point of law to which the Parties ascribed the greatest importance: whether the use of force was justified under Article XX, paragraph 1, of the 1955 Treaty or the principle of self-defence under international law. The negative response given in the operative part itself reflects the Court's decision to adopt an approach grounded on an analysis of the elements of the claim: its cause (cur) and its subject (quid). It would have been appropriate under these circumstances to look to Article 38, paragraph 2, of the Rules of Court and to refer directly to the concept of the cause of the claim. Another approach, masking the cause of the claim, would have affected the subject of the litigants' true intent and favoured wholly artificial considerations or purely logical ones, given the strategy employed in presenting the claims and arguments. In the present proceedings the Respondent's attitude helped to forestall the theoretical debate concerning the tension between the consensual basis of the Court's jurisdiction and the principle jura novit curia.

### Declaration of Judge Koroma

In the declaration he appended to the Judgment, Judge Koroma stated that it was crucial and correct, in his view, that the Court had determined that measures involving the use of force and purported to have been taken under the Article of the 1955 Treaty relating to the maintenance or restoration of international peace and security, or necessary to protect a State party's essential security interests, had to be judged on the basis of the principle

of the prohibition under international law of the use of force, as qualified by the right of self-defence. In other words, whether an action alleged to be justified under the Article was or was not an unlawful measure had to be determined by reference to the criteria of the United Nations Charter and general international law.

He agreed with the Court's decision, as reflected in the Judgment, that the actions carried out against the oil installations were not lawful as measures necessary to protect the essential security interests of the United States, since those actions constituted recourse to armed force not qualifying, under the United Nations Charter and general international law, as acts of self-defence, and thus did not fall within the category of measures contemplated by the 1955 Treaty. Judge Koroma maintained that that finding constituted a reply to the submissions of the Parties and, accordingly, the issue of non ultra petita did not arise.

He also subscribed to the Court's finding that the protection of freedom of commerce under the 1955 Treaty applied to the oil installations and that the attacks, prima facie, impeded Iran's freedom of commerce within the meaning of that expression in the text of the Treaty, but did not violate the freedom of commerce. Judge Koroma considered this finding not devoid of significance.

#### Separate opinion of Judge Higgins

Judge Higgins has voted in favour of the dispositif, because she agrees that the claim of Iran that the United States has violated Article X, paragraph 1, of the Treaty of Amity cannot be upheld.

However, she believes that this determination makes it unnecessary for the Court also to address in its Judgment the question of whether the United States could justify its military attacks on the oil platforms under Article XX, paragraph 1 (d), of the same Treaty. This is because the Court itself has said, in its Judgment on Preliminary Objections in 1996, that Article XX, paragraph 1 (d), is in the nature of a defence. In the absence of any finding of a breach by the United States of Article X, paragraph 1, the issue of a possible defence does not arise.

Judge Higgins observes that there are two particular reasons why there should not have been a finding on Article XX, paragraph 1 (d), in the dispositif. The first is that the Court usually treats a defence as part of its reasoning in deciding whether a Respondent has acted contrary to an international legal obligation. It is its conclusion which normally constitutes the dispositif, and not its reasoning as to any possible defence or justification. The second reason is that, given the consensual basis of jurisdiction, the Court is limited in the dispositif to making findings upon matters that the Applicant has requested for determination. The final submissions of Iran do not include any request for a determination on Article XX, paragraph 1 (d).

Even if it had been correct for the Court to deal with that clause, Judge Higgins believes that it should then have interpreted the particular provisions in the light of general international law as to their specific terms. In her view, the Court has not interpreted the actual terms of Article XX, paragraph 1 (d), but has essentially replaced them, assessing the United States military action by reference to the law on armed attack and self-defence.

Finally, in Judge Higgins's opinion, in the handling of the evidence that would fall for consideration in any examination of Article XX, paragraph 1 (d), the Court has not specified the standard of evidence to be met; nor dealt with the evidence in sufficient detail; nor dealt with it in an even-handed manner.

#### Separate opinion of Judge Parra-Aranguren

Judge Parra-Aranguren declared that his vote for the operative part of the Judgment should not be understood as an expression of agreement with each and every part of the reasoning followed by the Court in reaching its conclusions. In particular he indicated his disagreement with the first sentence of paragraph 125 (1) stating that the Court: "Finds that the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 (d), of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force."

The reasons for his disagreement are the following:

The Court decided in its 12 December 1996 Judgment that: "it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of 1955, to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty" (Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 821, para. 55 (2)).

In its first and main submission Iran requests the Court to reject all contrary claims and submissions and to adjudge and declare "That in attacking and destroying on 19 October 1987 and 18 April 1988 the oil platforms referred to in Iran's Application, the United States breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks."

Thus Judge Parra-Aranguren considered that the subject-matter of the dispute submitted by the Islamic Republic of Iran (hereinafter Iran) to the Court was whether the military actions of the United States of America (hereinafter the United States) breached its obligations to Iran under Article X, paragraph 1, of the Treaty of Amity, Economic Relations and Consular Rights signed in Teheran on 15 August 1955 (hereinafter the 1955 Treaty), in force between the parties. Therefore the task of the Court was to decide the claim presented by Iran, i.e., to examine and determine whether the United States violated its obligations under Article X, paragraph 1, of the 1955 Treaty. In his opinion it is only if the Court came to the conclusion that the United States breached its obligations under Article X, paragraph 1, of the 1955 Treaty that it would have jurisdiction to enter into the consideration of the defence advanced by the United States to justify its military actions against Iran, in particular whether they were justified under Article XX, paragraph 1 (d), of the 1955 Treaty as necessary to protect its "essential security interests".

In the Court's view there are particular considerations militating in favour of an examination of the application of Article XX, paragraph 1 (d), before turning to Article X, paragraph 1.

The first particular consideration militating in favour of reversing the order of examination of the Articles of the 1955 Treaty, as explained in paragraph 37 of the Judgment, is that: "It is clear that the original dispute between the Parties related to the legality of the actions of the United States, in the light of international law on the use of force"; "At the time of those actions, neither Party made any mention of the 1955 Treaty", the United States contending that "its attacks on the oil platforms were justified as acts of self-defence, in response to what it regarded as armed attacks by Iran"; and "on that basis it gave notice of its action to the Security Council under Article 51 of the United Nations Charter".

As the second particular consideration, paragraph 38 of the Judgment indicates that, in its Rejoinder, the United States itself recognizes that "The self-defence issues presented in this case raise matters of the highest importance to all members of the international community"; and that Iran also stresses the great importance of those issues.

In the opinion of Judge Parra-Aranguren there can be no doubt that matters relating to the use of force and to self-defence are of the highest importance to all members of the international community. He also stated that, while being perfectly well aware at that time of the two particular considerations indicated above, the Court in its 1996 Judgment expressly interpreted Article XX, paragraph 1 (d), of the 1955 Treaty "as affording only a defence on the merits", concluding that it "is confined to affording the Parties a possible defence on the merits to be used should the occasion arise" (Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 811, para. 20).

Consequently, Judge Parra-Aranguren is convinced that there are no "particular considerations militating in favour of an examination of the application of Article XX, paragraph 1 (d), before turning to Article X, paragraph 1". On the contrary, there are strong considerations in favour of not doing so. The second sentence of paragraph 125 (1) of the Judgment dismisses the claim presented by Iran because the Court came to the conclusion that the United States had not violated Article X, paragraph 1, of the 1955 Treaty. In the opinion of Judge Parra-Aranguren, that is the end of the story. Therefore he concluded that the Court did not have jurisdiction to examine the defences advanced by the United States on the basis of Article XX, paragraph 1 (d), to justify its hypothetical violation of Article X, paragraph 1, of the 1955 Treaty.

## Separate opinion of Judge Kooijmans

Judge Kooijmans has voted in favour of the dispositif since he agreed with its substance. He is, however, of the view that the Court's finding that the actions of the United States against the oil platforms cannot be justified as measures necessary to protect its essential security interests is not part of the decision on the claim and therefore should not have found a place in the dispositif. That creates the hazardous precedent of an obiter dictum in the operative part of a judgment.

In his separate opinion Judge Kooijmans first gives a more detailed overview of the factual context than is presented in the Judgment.

He then deals with the substance of the dispute before the Court, which deals with the question whether the United States violated its obligation under Article X, paragraph 1, of the 1955 Treaty concerning freedom of commerce, and not whether it used force in breach of the United Nations Charter and customary law.

He is of the view that Article XX, paragraph 1 (d), of the 1955 Treaty enabling the parties to take measures necessary to protect their essential security interests, is not an exoneration clause but a freestanding provision and that the Court therefore correctly concluded that it was free to choose whether it would first deal with Article X, or with Article XX, paragraph 1 (d). But once the Court had found that the United States could not invoke Article XX, it had to decide the case on grounds material to Article X, paragraph 1, itself. Its conclusion with regard to Article XX, paragraph 1 (d), became irrelevant for the disposition on the claim and therefore should not have found a place in the operative part of the Judgment.

Judge Kooijmans also dissociates himself from the way in which the Court puts the measures, invoked by the United States as "necessary to protect its essential security interests", directly to the test of the general rules of law on the use of force including the right to self-defence, thereby misinterpreting the scope of its jurisdiction.

In the last part of his opinion, Judge Kooijmans indicates what in his opinion would have been the proper approach to deal with the legal aspects of Article XX, paragraph 1 (d). In this respect he follows the distinction made by the Court in its 1986 Judgment in the Nicaragua case between a test of reasonableness with regard to the assessment of the threat to the security risks and a legality test with regard to the necessity of the measures taken. Applying this method and using the rules of general international law on the use of force as a means to interpret the meaning of "necessary", Judge Kooijmans concludes that the actions against the oil platforms do not constitute measures which can be deemed necessary to protect the essential security interests of the United States.

## Dissenting opinion of Judge Al-Khasawneh

Judge Al-Khasawneh felt that the formal structure of the dispositif amalgamating as it does two distinct findings in one paragraph was unorthodox and unfortunate. It also left Judge Al-Khasawneh with a difficult choice of accepting the paragraph as a whole or leaving it. He felt compelled to dissent because he disagreed with the finding that the United States was not in violation of its obligations under Article X, paragraph 1, of the 1955 Treaty on the freedom of commerce. That finding was arrived at by unpersuasive reasoning that draws an artificial distinction between protected commerce (direct commerce) and unprotected commerce (indirect commerce). He pointed out that international trade law thresholds were ill-suited as a yardstick for treaty-protected commerce, moreover the Judgment was unduly restrictive of the definition of freedom of commerce which included not only actual but also potential commerce. Judge Al-Khasawneh felt also that the approach could not be supported on the basis of textual analysis and was at variance with earlier jurisprudence.

Regarding the United States counter-claim which was rejected by the Court, Judge Al-Khasawneh felt this was a consequence of the Court's narrow interpretation of protected commerce and felt it would be better if the Court had upheld claim and counter-claim. The main difficulty with the United States claim was however the problem of attribution to Iran.

Judge Al-Khasawneh felt that the Court should have been clearer in its use of language when it came to rejecting United States claims that their actions against the oil platforms were justified by Article XX, paragraph 1 (d), of the 1955 Treaty as necessary measures to protect United States essential security interests. The use of force made it inevitable to discuss these criterion in the language of necessity and proportionality which form part of the concept of the non-use of force.

## Separate opinion of Judge Buergenthal

Judge Buergenthal agrees with the Court's Judgment to the extent that it holds that the United States of America did not breach Article X, paragraph 1, of the 1955 Treaty between it and Iran. He also agrees with the Court's decision rejecting the counter-claim interposed by the United States against Iran. That decision of the Court is justified, in his view, for the very reasons, mutatis mutandis, that led the Court to find that the United States did not breach the obligations it owed Iran under Article X, paragraph 1, of the 1955 Treaty. But Judge Buergenthal dissents from the Court's conclusion that the actions of the United States, in attacking certain Iranian oil platforms, cannot be justified under Article XX, paragraph 1 (d), of the Treaty "as interpreted in the light of international law on the use of force". He considers that this pronouncement has no place in the Judgment, much less in the operative part thereof.

Judge Buergenthal believes that the Court's Judgment, as it relates to Article XX, paragraph 1 (d), is seriously flawed for the following reasons. First, it makes a finding with regard to Article XX, paragraph 1 (d), of the 1955 Treaty that violates the non ultra petita rule, a cardinal rule governing the Court's judicial process, which does not allow the Court to deal with a subject - here Article XX, paragraph 1 (d) - in the dispositif of its judgment that the parties to the case have not, in their final submissions, asked it to adjudicate. Second, the Court makes a finding on a subject which it had no jurisdiction to make under the dispute resolution clause - Article XXI, paragraph 2 - of the 1955 Treaty, that clause being the sole basis of the Court's jurisdiction in this case once it found that the United States had not violated Article X, paragraph 1, of the Treaty. Third, even assuming that the Court had the requisite jurisdiction to make the finding regarding Article XX, paragraph 1 (d), its interpretation of that Article in light of the international law on the use of force exceeded its jurisdiction. Finally, Judge Buergenthal considers that the manner in which the Court analyses the evidence bearing on its application of Article XX, paragraph 1 (d), is seriously flawed.

## Dissenting opinion of Judge Elaraby

Judge Elaraby voted against the first paragraph of the dispositif, essentially dissenting on three points.

First, the Court had jurisdiction to rule upon the legality of the use of force. Particularly that the Court held that the United States use of force cannot be considered as legitimate self-defence in conformity with the "criteria applicable to the question" which the Court identified as "the provisions of the Charter of the United Nations and customary international law". United States action amounted to armed reprisals and their illegality as such should have been noted. The Court missed an opportunity to reaffirm and clarify the law on the use of force in all its manifestations.

Second, the Court's refusal to uphold Iran's claim of a violation of Article X, paragraph 1, was based on unsound premises in facts and in law. What is relevant is not whether the targeted platforms were producing oil at the time of the attacks, but rather whether Iran as a whole was producing oil and exporting it to the United States. The test is whether the freedom of commerce between the territories of the two Parties had been prejudiced. Once the embargo was imposed, indirect commerce was allowed and in fact continued. The ordinary meaning of the Treaty in its context supports the argument that its purview covers commerce in a broad sense. Also, Article X, paragraph 1, does not exclude such indirect commerce. The ten days between the first attack and the imposition of the embargo would have sufficed to declare that the freedom of commerce was prejudiced. Hence, the obligation emanating from Article X, paragraph 1, was breached.

Third, the Court was right in examining Article XX, paragraph 1 (d), before Article X, paragraph 1. It had jurisdiction to enhance its contribution to the progressive development of the law by ruling more exhaustively on the use of force.

## Separate opinion of Judge Owada

Judge Owada concurs in the final conclusion of the Court that neither the claims of the Applicant nor the counter-claim of the Respondent can be upheld, but he is not in a position to agree to all the points in the dispositif nor with all the reasons leading to the conclusions. For this reason Judge Owada attaches his separate opinion, focusing only on some salient points.



First, on the question of the basis of the decision of the Court, Judge Owada takes the view that the Court should have examined Article X, paragraph 1, prior to Article XX, paragraph 1 (d). Article XX, paragraph 1 (d), constitutes a defence on the merits of the claims of the Applicant on Article X, paragraph 1, and should for that reason be considered only if and when the Court finds that there has been a breach of Article X, paragraph 1. The Court cannot freely choose the ground upon which to pass judgment when its jurisdiction is limited to the examination of Article X, paragraph 1.

Second, on the question of the scope of Article X, paragraph 1, Judge Owada is in general agreement with the Judgment, but makes the point that the term "freedom of commerce" as used in the 1955 Treaty refers to "unimpeded flow of mercantile transaction in goods and services between the territories of the Contracting Parties" and cannot cover the activities of the oil platforms. Apart from the factual ground on which the Judgment is based, the Court for this reason cannot uphold the claim that the "freedom of commerce" in Article X, paragraph 1, has been breached.

Third, on the question of the scope of Article XX, paragraph 1 (d), which in his view the Court does not have to take up in view of its finding on Article X, paragraph 1, Judge Owada is of the opinion that the interpretation and application of Article XX, paragraph 1 (d), and the question of the self-defence under international law in general are not synonymous and that the latter as such is not the task before the Court. The examination of the latter problem by the Court should be confined to what is necessary for the interpretation and application of Article XX, paragraph 1 (d), in view of the limited scope of the jurisdiction of the Court.

Finally, Judge Owada raises the question of asymmetry in the production of evidence in this case, which leads to a difficult situation for the Court in verifying the facts involved. While accepting the basic principle on evidence, actori incumbit onus probandi, Judge Owada would have liked to see the Court engage in much more in-depth probing into the problem of ascertaining the facts of the case, if necessary proprio motu.

#### Separate opinion of Judge Simma

Judge Simma starts his separate opinion by explaining why he voted in favour of the first part of the dispositif of the Judgment even though he agrees with the Court's treatment of only one of the two issues dealt with therein, namely that of the alleged security interests of the United States measured against the international law on self-defence. As to the remaining parts of the dispositif, Judge Simma can neither agree with the Court's decision that the United States attacks on the oil platforms ultimately did not infringe upon Iran's Treaty right to respect for its freedom of commerce with the United States, nor does Judge Simma consider that the way in which the Court disposed of the so-called "generic" counter-claim of the United States was correct. Rather, in Judge Simma's view this counter-claim ought to have been upheld. Regarding the part of the dispositif devoted to this counter-claim, Judge Simma thus had no choice but to dissent. The reason why Judge Simma did not also dissent from the first part of the dispositif (and prefers to call his opinion a "separate" and not a "dissenting" one) even though he concurs with the Court's decisions on only the first of the two issues decided therein, is to be seen in a consideration of judicial policy: Judge Simma welcomes that the Court has taken the opportunity, offered by United States reliance on Article XX of the 1955 Treaty, to state its view on the legal limits on the use of force at the moment when these limits find themselves under the greatest stress. Although Judge Simma is of the view that the Court has fulfilled what is nothing but its duty in this regard with inappropriate restraint, Judge Simma does not want to disassociate himself from what after all does result in a confirmation, albeit too hesitant, of the ius cogens of the United Nations Charter.

Since matters relating to the United States use of force are at the heart of the case, Judge Simma finds the Judgment's approach of dealing with Article XX before turning to Article X of the 1955 Treaty acceptable. On the other hand, what the Court should have had the courage to do was to restate, and thus to reconfirm, the fundamental principles of the law of the United Nations as well as customary international law on the use of force in a way conforming to the standard of vigour and clarity set by the Court already in the Corfu Channel case of half a century ago. This, unfortunately, the Court has not done.

In Judge Simma's view the Court could have clarified what kind of defensive countermeasures would have been available to the United States: in Judge Simma's view, hostile military action not reaching the threshold of an armed attack within the meaning of Article 51 of the United Nations Charter, like that by Iran in the present case, may be countered by proportionate and immediate defensive measures equally of a military character. However, the United States actions against the oil platforms did not qualify as such proportionate countermeasures.

In Judge Simma's view, the Court's treatment of Article X on freedom of commerce between the territories of the Parties follows a step-by-step approach which he considers correct up to a certain point but which then turns into wrong directions: first, the platforms attacked in October 1987 could not lose their protection under Article X through being temporarily inoperative because, according to Judge Simma, the freedom under the Treaty embraces also the possibility of commerce in the future. Secondly, according to Judge Simma, the indirect commerce in Iranian oil going on during the time of the United States embargo is also to be regarded as protected by the Treaty.

Turning to the United States counter-claim, Judge Simma finds the way in which the Court has dealt with it blatantly inadequate, particularly with regard to the so-called generic counter-claim which, in Judge Simma's view, should have been upheld. Judge Simma then sets out to develop the arguments, put forward somewhat unpersuasively by the United States, in support of the generic counter-claim. The fact that in the present instance (unlike in the Nicaragua case), it was two States which created the situation adverse to neutral shipping in the Gulf, is not determinant. According to Judge Simma, all that matters with regard to the generic counter-claim is that Iran was responsible for a significant portion of the actions impairing the freedom of commerce and navigation between the two countries; it is not necessary to determine the particular extent to which Iran was responsible for them. Neither could it be argued that all the impediments to free commerce and navigation which neutral ships faced in the Gulf were caused by legitimate acts of war carried out by the two belligerents, and that therefore neutral shipping entered the maritime areas affected by the Gulf war at its own risk. In Judge Simma's view, Iran's actions constituted a violation of Article X of the 1955 Treaty; an impediment on the freedom of commerce and navigation caused by those actions is evidenced by the increase in labour, insurance, and other costs resulting for the participants in commerce between the countries during the relevant period.

Judge Simma then turns to refuting the argument that the acts alleged to have constituted an impediment to the freedom of commerce and navigation under the Treaty cannot be attributed to Iran with certainty and that therefore it is impossible to find Iran responsible for those acts. Judge Simma demonstrates that a principle of joint-and-several responsibility can be developed from domestic legal systems as a general principle of law by which the dilemma in the present case could have been overcome.

Finally, Judge Simma argues that the so-called "indispensable-third-party" doctrine consecutively accepted and rejected by the Court's earlier jurisprudence would not have stood in the way of accepting the United States counter-claim as well-founded.

#### Separate opinion of Judge Rigaux

The operative part of the Judgment comprises two points: in the second it is concluded that the counter-claim of the United States of America must be rejected; the first is divided into two parts, the second of which rejects the claim of the Islamic Republic of Iran for reparation while in the first the American attacks on the oil platforms are held not to have satisfied the requirements of the applicable provisions of the 1955 Treaty, as interpreted in the light of international law on the use of force.

Judge Rigaux voted in favour of the two points in the operative part, with some reservations as to the first. The two clauses constituting it would appear inconsistent: it is a contradiction both to hold that use of armed force against the oil platforms was unlawful and to reject the claim for reparation for the injury caused by the unlawful act. However, the Court's affirmation of the principle prohibiting the use of armed force except in those situations where contemplated by international law appeared to Judge Rigaux sufficiently important that he felt obliged to vote in favour of it, notwithstanding the refusal to uphold Iran's rightful claim.

The reasoning supporting the rejections of the two actions contains two elements common to them, i.e., the interpretation given to the notion of "indirect" commerce and the idea that "future" commerce falls outside the scope of freedom of commerce. Judge Rigaux finds those two elements debatable.

