



# INTERNATIONAL COURT OF JUSTICE

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## Communiqué

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

#### Judgment on preliminary objection

The Hague, 12 December 1996. Today, the International Court of Justice delivered a Judgment in the above case by which it rejected the preliminary objection to its jurisdiction raised by the United States. It found that it had jurisdiction to deal with the case on the basis of Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, signed in Tehran on 15 August 1955 which entered into force on 16 June 1957.

The United States had argued that the Court lacked jurisdiction, on the one hand, because the Treaty of 1955, which contained commercial and consular provisions, was not applicable in the event of the use of force. The Court found in this respect that the Treaty, which does not expressly exclude any matters from the Court's jurisdiction, imposes on each of the Parties various obligations on a variety of matters. Any action incompatible with those obligations is unlawful, regardless of the means by which it is brought about, including the use of force. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty.

Other arguments of the United States had related to the scope of various articles of the Treaty of 1955. The Court found in this respect that, considering the object and purpose of the Treaty, Article I should be regarded as fixing an objective (of peace and friendship), in the light of which the other Treaty provisions were to be interpreted and applied, but that it could not, taken in isolation, be a basis for the Court's jurisdiction. Neither could Article IV, paragraph 1, of the Treaty, the detailed provisions of which concerned the treatment by each party of the nationals and companies of the other party, as well as their property and enterprises, but which did not cover the actions carried out in this case by the United States against Iran, provide such a basis.

With regard to Article X, paragraph 1, of the Treaty, however, the Court found that the destruction of the Iranian oil platforms by the United States complained of by Iran was capable of having an effect upon the export trade in Iranian oil and, consequently, upon the freedom of commerce guaranteed in that paragraph. The lawfulness of that destruction could therefore be evaluated in relation to that paragraph.

As a consequence, there existed between the Parties a dispute as to the interpretation and the application of Article X, paragraph 1, of the Treaty of 1955; that dispute fell within the scope of the compromissory clause in Article XXI, paragraph 2, of the Treaty; and the Court therefore had jurisdiction to entertain the dispute.

The full text of the operative paragraph reads as follows:

"THE COURT,

(1) rejects, by fourteen votes to two, the preliminary objection of the United States of America according to which the Treaty of 1955 does not provide any basis for the jurisdiction of the Court;

IN FAVOUR: President Bedjaoui; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judge ad hoc Rigaux;

AGAINST: Vice-President Schwebel; Judge Oda;

(2) finds, by fourteen votes to two, 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.

IN FAVOUR: President Bedjaoui; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judge ad hoc Rigaux;

AGAINST: Vice-President Schwebel; Judge Oda."

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The Court was composed as follows: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren; Judge ad hoc Rigaux; Registrar Valencia-Ospina.

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Judges Shahabuddeen, Ranjeva, Higgins and Parra-Aranguren and Judge ad hoc Rigaux append separate opinions to the Judgment of the Court.

Vice-President Schwebel and Judge Oda append dissenting opinions to the Judgment of the Court.

(A brief summary of the opinions may be found in the Annex to this Press Communiqué.)

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The printed text of the Judgment and the opinions appended to it will become available in due course (orders and enquiries should be addressed to the Distribution and Sales Section, Office of the United Nations, 1211 Geneva 10; The Sales Section, United Nations, New York, N.Y. 10017; or any appropriately specialized bookshop).

A summary of the Judgment is given below. It has been prepared by the Registry for the use of the Press and in no way involves the responsibility of the Court. It cannot be quoted against the text of the Judgment, of which it does not constitute an interpretation.

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**Summary of the Judgment**

**Institution of proceedings and history of the case (paras. 1-11)**

The Court begins by recalling that on 2 November 1992, the Islamic Republic of Iran instituted proceedings against the United States of America 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 of America and Iran, which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter called "the Treaty of 1955"), as well as of international law. The Application invokes, as a basis for the Court's jurisdiction, Article XXI, paragraph 2, of the Treaty of 1955.

Within the extended time-limit 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. Consequently, the proceedings on the merits were suspended. After Iran had filed a written statement of its observations and submissions on the preliminary objection raised by the United States within the time-limit fixed, public hearings were held between 16 and 24 September 1996.

The following final submissions were presented by the Parties:

**On behalf of the United States,**

"The United States of America requests that the Court uphold the objection of the United States to the jurisdiction of the Court in the case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)."

**On behalf of Iran,**

"In the light of the facts and arguments set out above, the Government of the Islamic Republic of Iran requests the Court to adjudge and declare:

1. That the Preliminary Objection of the United States is rejected in its entirety;
2. That, consequently, the Court has jurisdiction under Article XXI (2) of the Treaty of Amity to entertain the claims submitted by the Islamic Republic of Iran in its Application and Memorial as they relate to a dispute between the Parties as to the interpretation or application of the Treaty;
3. That, on a subsidiary basis in the event the Preliminary Objection is not rejected outright, it does not possess, in the circumstances of the case, an exclusively preliminary character within the meaning of Article 79 (7) of the Rules of Court; and
4. Any other remedy the Court may deem appropriate."

**Article XXI, paragraph 2, of the Treaty of 1955 and the nature of the dispute (paras. 12-16)**

After summarizing the arguments put forward by Iran in the Application and in the course of the subsequent proceedings, the Court concludes that Iran claims only that Article I, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty of 1955 have been infringed by the United States and that the dispute thus brought into being is said to fall within the jurisdiction of the Court pursuant to Article XXI, paragraph 2, of the same Treaty.

The United States for its part maintains that the Application of Iran bears no relation to the Treaty of 1955. It stresses that, as a consequence, the dispute that has arisen between itself and Iran does not fall within the provisions of Article XXI, paragraph 2, of the Treaty and deduces from this that the Court must find that it lacks jurisdiction to deal with it.

The Court points out, to begin with, that the Parties do not contest that the Treaty of 1955 was in force at the date of the filing of the Application of Iran and is moreover still in force. The Court recalls that it had decided in 1980 that the Treaty of 1955 was applicable at that time (United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 28, para. 54); none of the circumstances brought to its knowledge in the present case would cause it now to depart from that view.

By the terms of Article XXI, paragraph 2, of that Treaty:

"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."

It is not contested that several of the conditions laid down by this text have been met in the present case: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy and the two States have not agreed "to settlement by some other pacific means" as contemplated by Article XXI. On the other hand, the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute "as to the interpretation or application" of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction ratione materiae to entertain, pursuant to Article XXI, paragraph 2.

**Applicability of the Treaty of 1955 in the event of the use of force (paras 17-21)**

The Court first deals with the Respondent's argument that the Treaty of 1955 does not apply to questions concerning the use of force. In this perspective, the United States contends that, essentially, the dispute relates to the lawfulness of actions by naval forces of the United States that "involved combat operations" and that there is simply no relationship between the wholly commercial and consular provisions of the Treaty and Iran's Application and Memorial, which focus exclusively on allegations of unlawful uses of armed force.

Iran maintains that the dispute that has arisen between the Parties concerns the interpretation or application of the Treaty of 1955. It therefore requests that the preliminary objection be rejected,

or, on a subsidiary basis, if it is not rejected outright, that it should be regarded as not having an exclusively preliminary character within the meaning of Article 79, paragraph 7, of the Rules of Court.

The Court notes in the first place that the Treaty of 1955 contains no provision expressly excluding certain matters from the jurisdiction of the Court. It takes the view that the Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955. The arguments put forward on this point by the United States must therefore be rejected.

#### Article I of the Treaty (paras. 22-31)

In the second place, the Parties differ as to the interpretation to be given to Article I, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty of 1955. According to Iran, the actions which it alleges against the United States are such as to constitute a breach of those provisions and the Court consequently has jurisdiction *ratione materiae* to entertain the Application. According to the United States, this is not the case.

Article I of the Treaty of 1955 provides that: "There shall be firm and enduring peace and sincere friendship between the United States . . . and Iran."

According to Iran this provision "does not merely formulate a recommendation or desire . . . , but imposes actual obligations on the Contracting Parties, obliging them to maintain long-lasting peaceful and friendly relations"; it would impose upon the Parties "the minimum requirement . . . to conduct themselves with regard to the other in accordance with the principles and rules of general international law in the domain of peaceful and friendly relations".

The United States considers, on the contrary, that Iran "reads far too much into Article I". That text, according to the Respondent, "contains no standards", but only constitutes a "statement of aspiration". That interpretation is called for in the context and on account of the "purely commercial and consular" character of the Treaty.

The Court considers that the general formulation of Article I cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted. There are some Treaties of Friendship which contain not only a provision on the lines of that found in Article I but, in addition, clauses aimed at clarifying the conditions of application. However, this does not apply to the present case. Article I is in fact inserted not into a treaty of that type, but into a treaty of "Amity, Economic Relations and Consular Rights" whose object is, according to the terms of the Preamble, the "encouraging [of] mutually beneficial trade and investments and closer economic intercourse generally" as well as "regulating consular relations" between the two States. The Treaty regulates the conditions of residence of nationals of one of the parties on the territory of the other (Art. II), the status of companies and access to the courts and arbitration (Art. III), safeguards for the nationals and companies of each of the contracting parties as well as their property and enterprises (Art. IV), the conditions for the purchase and sale of real property and protection of intellectual property (Art. V), the tax system (Art. VI), the system of transfers (Art. VII), customs duties and other import restrictions (Arts. VIII and IX), freedom of commerce and navigation (Arts. X and XI), and the rights and duties of Consuls (Arts. XII-XIX).

It follows that the object and purpose of the Treaty of 1955 was not to regulate peaceful and friendly relations between the two States in a general sense. Consequently, Article I cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning

such relations. Rather, by incorporating into the body of the Treaty the form of words used in Article I, the two States intended to stress that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations and that such a development would in turn reinforce that peace and that friendship. It follows that Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied. The Court further observes that it does not have before it any Iranian document in support of Iran's position. As for the United States documents introduced by the two Parties, they show that at no time did the United States regard Article I as having the meaning now given to it by the Applicant. Nor does the practice followed by the Parties in regard to the application of the Treaty lead to any different conclusions.

In the light of the foregoing, the Court considers that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions, and in particular of Articles IV and X. Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court.

**Article IV, paragraph 1, of the Treaty (paras. 32-36)**

Article IV, paragraph 1, of the Treaty of 1955 provides that:

"Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

The Court, with regard to the arguments advanced by the Parties, observes that Article IV, paragraph 1, unlike the other paragraphs of the same Article, does not include any territorial limitation. It further points out that the detailed provisions of that paragraph concern the treatment by each party of the nationals and companies of the other party, as well as their property and enterprises. Such provisions do not cover the actions carried out in this case by the United States against Iran. Article IV, paragraph 1, thus does not lay down any norms applicable to this particular case. This Article cannot therefore form the basis of the Court's jurisdiction.

**Article X, paragraph 1, of the Treaty (paras. 37-52)**

Article X, paragraph 1, of the Treaty of 1955 reads as follows: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

It has not been alleged by the Applicant that any military action has affected its freedom of navigation. Therefore, the question the Court must decide, in order to determine its jurisdiction, is whether the actions of the United States complained of by Iran had the potential to affect "freedom of commerce" as guaranteed by the provision quoted above.

Iran has argued that Article X, paragraph 1, does not contemplate only maritime commerce, but commerce in general; while according to the United States the word "commerce" must be understood as being confined to maritime commerce; as being confined to commerce between the United States and Iran; and as referring solely to the actual sale or exchange of goods.

Having regard to other indications in the Treaty of an intention of the parties to deal with trade and commerce in general, and taking into account the entire range of activities dealt with in the Treaty, the view that the word "commerce" in Article X, paragraph 1, is confined to maritime commerce does not commend itself to the Court.

In the view of the Court, there is nothing to indicate that the parties to the Treaty intended to use the word "commerce" in any sense different from that which it generally bears. The word "commerce", whether taken in its ordinary sense or in its legal meaning, at the domestic or international level, has a broader meaning than the mere reference to purchase and sale. The Court notes in this connection that the Treaty of 1955 deals, in its general articles, with a wide variety of matters ancillary to trade and commerce; and refers to the Oscar Chinn case in which the expression "freedom of trade" was seen by the Permanent Court as contemplating not only the purchase and sale of goods, but also industry, and in particular the transport business.

The Court further points out that it should not in any event overlook that Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect "commerce" but "freedom of commerce". Any act such as the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export, which impedes that "freedom", is thereby prohibited. The Court points out in this respect that the oil pumped from the platforms attacked in October 1987 passed from there by subsea line to the oil terminal on Lavan Island and that the Salman complex, object of the attack of April 1988, was also connected to the oil terminal on Lavan by subsea line.

The Court finds that on the material now before it, it is indeed 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; it notes nonetheless that their destruction was capable of having such an effect and, consequently, of having an adverse effect upon the freedom of commerce as guaranteed by Article X, paragraph 1, of the Treaty of 1955. It follows that its lawfulness can be evaluated in relation to that paragraph.

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In the light of the foregoing, the Court concludes that there exists between the Parties a dispute as to the interpretation and the application of Article X, paragraph 1, of the Treaty of 1955; that this dispute falls within the scope of the compromissory clause in Article XXI, paragraph 2, of the Treaty; and that as a consequence the Court has jurisdiction to entertain this dispute.

The Court notes that since it must thus reject the preliminary objection raised by the United States, the submissions whereby Iran requested it, on a subsidiary basis, to find that the objection did not possess, in the circumstances of the case, an exclusively preliminary character, no longer have any object.

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### **Separate opinion of Judge Shahabuddeen**

In his separate opinion, Judge Shahabuddeen observed that possibilities for improvement did not prevent him from giving support to the dispositif in the form in which it stood. However, he was of the view that the jurisdictional test which the Court had used precluded it from asking the right questions. Effectively, the Court had sought to make a definitive determination of the meaning of the 1955 Treaty between the Parties. In Judge Shahabuddeen's view, the Court should merely have asked whether the construction of the Treaty on which the Applicant relied was an arguable one, even if it later turned out to be incorrect. This was so far the reason that the question at this stage was not whether the Applicant's claim was sound in law, but whether the Applicant was entitled to an adjudication of its claim. The respectful impression with which he left the case was that the neglect to distinguish between these issues as consistently as was required and to apply the right test meant that the principle on which the Judgment was constructed was not adequate to do full justice to either Party; it created unnecessary disadvantages for both.

### **Separate opinion of Judge Ranjeva**

After setting out his reasons for voting in favour of the Judgment, Judge Ranjeva nevertheless criticized the reference to the first paragraph of Article X of the Treaty of 1955; that reference might render the reading of the Judgment difficult. The Court's title of jurisdiction was the compromissory clause, whose terms raised no particular problem of interpretation. But in transposing the reasoning adopted in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), had the Judgment not gone beyond the object of the preliminary objection procedure? The problem, the author of the opinion acknowledged, resided in the fact that the objections were envisaged from the standpoint of their scope and significance and not from that of their definition and that, in reality, it was not easy to draw a distinction between questions appertaining to the preliminary objections procedure and questions appertaining to the merits of the case. In the view of Judge Ranjeva, the circumstances of the case did not warrant the transposition of the analytical method adopted in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), in which the Court first had to make a determination on a condition of the applicability of the compromissory clause. Such a condition was lacking in the present case, as the preliminary problem related more to the applicability in general of the Treaty of 1955 than to that of the compromissory clause. That being so, Judge Ranjeva considered, it was for the Court not to state whether the arguments were true or false from the legal standpoint but to ensure that there was nothing absurd about them or nothing which ran counter to the norms of positive law. Hence, unless the objection related to the compétence de la compétence as in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), or unless the objection was of a general nature, as in the present case, the Court's conclusion could but be limited to an affirmative or negative reply to the objection, as otherwise it would run the risk of raising a problem of legal prejudice. Judge Ranjeva regretted that the interpretation of Articles I and IV had been made independently and in a strictly analytical framework. Article I implied a negative obligation of conduct inherent to the prescriptions of amity and peace and whose function was to shed light on the understanding of the other treaty provisions. That being so, the author of the opinion wondered whether one was justified in thinking that Article IV excluded from its domain the effective and voluntary conduct of one of the litigants with respect to a company falling within the jurisdiction of the other. Lastly, the explicit reference to Article X raised the problem of the integrity of the rights of the United States of America: how was the link of connexity established as between freedom of commerce and navigation and a possible claim for reparation as a result of the destruction of warships? In conclusion, Judge Ranjeva considered that the interpretation of the "bases of jurisdiction" did not affect the rights of the Parties, if the preliminary decision were limited to meeting the arguments on the sole basis of the plausibility of the arguments in relation to the problems inherent to the terms of the provisions, whose violation was claimed by the Applicant.

### **Separate opinion of Judge Higgins**

Various contentions had been made by the Parties as to how it should be decided whether Iran's claims fall within the compromissory clause of the 1955 Treaty of Amity, Economic Relations and Consular Rights. In her separate opinion Judge Higgins addresses the methodology to be used in answering this question. She reviews the relevant case law of the Permanent Court of International Justice as well as of the International Court. In certain of those cases it had been said that what was required was a "reasonable connection" between the facts alleged and the terms of the treaty said to provide jurisdiction; and that the Court would reach a provisional conclusion as to the claimed bases of jurisdiction. Judge Higgins finds that this line of cases fall into a particular category and that another line of cases, stemming from the Mavrommatis case, are the more pertinent precedents for the present case. They require that the Court fully satisfies itself that the facts as alleged by an applicant could constitute a violation of the treaty terms, and that this finding is definitive. Whether there is a violation can only be decided on the merits. Accordingly, it is necessary at the jurisdictional stage to examine certain articles of the 1955 Treaty in detail. To do this does not intrude upon the merits.

Using this approach, Judge Higgins agreed with the Court that Articles I and IV (1) provided no basis for jurisdiction. However, in her view the correct reason for that conclusion as it applies in Article IV (1) is because that provision refers to the obligations of one party towards the nationals, property and enterprises of the other party within the former's own territory; and because the key terms in Article IV (1) were standard terms in law and inapplicable to Iran's claims. Judge Higgins agrees that the Court has jurisdiction under Article X (1), but only insofar as the destroyed platforms are shown to be closely associated with, or ancillary to, maritime commerce. Petroleum production does not fall within the term "commerce", nor does interference with production fall under "freedom of commerce". But destruction of platforms used to pass petroleum into pipelines concerns transportation, which is comprised within commerce, and thus may fall within Article X (1).

### **Separate opinion of Judge Parra-Aranguren**

The actions carried out by the United States in this case were directed against the offshore oil platforms belonging to the National Iranian Oil Company, not against Iran, as stated in paragraph 36 of the Judgment; and the National Iranian Oil Company is a juridical person different from Iran, even though Iran may own all of its shares. Consequently, as an Iranian corporation, the National Iranian Oil Company is covered by Article IV, paragraph 1, of the Treaty of 1955, and shall be accorded "fair and equitable treatment", and also protected against the application of "unreasonable or discriminatory measures" that would impair its legally acquired rights and interests. Therefore, in my opinion, the Court has jurisdiction to entertain the claims made by Iran under said Article IV, paragraph 1, on the basis of Article XXI, paragraph 2, of the Treaty of 1955.

### **Separate opinion of Judge ad hoc Rigaux**

1. Having supported the majority on the two subparagraphs of the dispositif — unreservedly so where subparagraph 1 is concerned — I expressed my agreement with subparagraph 2, at the same time regretting the excessively narrow legal basis favoured to found the jurisdiction of the Court.

2. I feel I must also distance myself from certain parts of the reasoning relating to the significance of Article I of the Treaty of Amity and respectfully dissociate myself from the reasons why Article IV, paragraph 1, was apparently unable to provide an adequate title of jurisdiction.

3. The objections thus formulated against certain parts of the Judgment could have been avoided had the Court adopted a different method, which must be deemed more in keeping with the precedents. This method would have entailed limiting oneself strictly to settling the preliminary objection to jurisdiction and determining whether questions of interpretation and application of the Treaty existed,

notably as regards the application, to the facts alleged by the Applicant, of Article I, Article IV, paragraph 1, and of Article X, paragraph 1, and the characterization, though not the materiality of which, was disputed by the Respondent.

### **Dissenting opinion of Vice-President Schwebel**

Judge Schwebel dissented from the Court's Judgment on two grounds. In his view, neither the United States nor Iran, in concluding the Treaty of 1955, intended that claims of the character advanced by Iran in this case would be comprehended by the Treaty or its compromissory clause. Nor do the particular claims of Iran fall within the terms of any provision of the Treaty including Article X, paragraph 1.

What cannot be denied is that the attacks by the United States Navy on the three Iranian oil platforms at issue constituted a use by the United States of armed force against what it claims to have seen as military objectives located within the jurisdiction of Iran. Is a dispute over such attacks one that arises under the Treaty?

Obviously not, as the title, preamble and terms of the Treaty indicate. It is a Treaty concerned with encouraging mutually beneficial trade and investment and economic relations on the basis of reciprocal equality of treatment. There is no suggestion of regulating the use of armed force by one Party against the other.

Not only do the provisions of the Treaty concentrate on the treatment of the nationals of one Party in the territory of the other. The Treaty contains none of the treaty provisions that typically do bear on the international use of force. Such provisions are however fully found in the Parties' Agreement of Cooperation of 1959.

Moreover, Article XX, paragraph 1 (d), of the Treaty excludes from its reach measures necessary to protect a Party's essential security interests. Such an exclusion clause can hardly entitle the Court to assume jurisdiction over a claim that engages the essential security interests of the Parties. The Court holds that the United States in oral argument concluded that this clause applied to the merits, a conclusion which the Court itself reached in 1986 in construing an identical clause in Military and Paramilitary Activities in and against Nicaragua; and the Court declares that it sees no reason to vary the 1986 conclusion. In Judge Schwebel's view, the position of the United States in this case, and the responsibilities of the Court in this case, are somewhat different. The United States affirmed in these proceedings that Article XX, paragraph 1 (d), manifested the Parties intent to keep such matters outside the scope of the Treaty; it maintained throughout that it prescribes exceptions to the reach of the Treaty. The Court in Military and Paramilitary Activities in and against Nicaragua failed in 1984 to address this question at all at the stage of jurisdiction when it should have; as a consequence it fell to the merits if it was to be addressed at all. This history leaves the Court free in this case objectively to apply the terms of Article XX, paragraph 1 (d), unconstrained by the 1986 holding. Moreover, question has rightly been raised about the value as a precedent of the Court's holdings in that case.

The Court is right in this case to hold that the Treaty can be violated by a use of force. An expropriation could be effected by force or a consul could be forcibly maltreated. But it does not follow that the use by a Party of its armed forces to attack what it treats as military objectives within the jurisdiction of the other Party is within the reach of the Treaty.

Both Parties filed with their pleadings documents submitted to the US Senate in the course of ratification of this and like treaties of friendship, commerce and navigation. Among them are documents that show that intentions in concluding these treaties were to include within the compromissory clause disputes "limited to the differences arising immediately from the specific treaty concerned" and to exclude disputes over military security.

Nor can jurisdiction be based on Article X, paragraph 1, of the Treaty. That Article concerns maritime commerce. But even if its first paragraph were to be interpreted to concern commerce at large, commerce may not be equated with production. Production is not ancillary to commerce, it is anterior to it. Nor does the Court's reliance on "freedom" of commerce strengthen its interpretation. The fact or allegation that some of the oil platforms at issue were connected by pipeline to port facilities is insufficient to carry Iran's case.

#### **Dissenting opinion of Judge Oda**

Judge ODA points out that the present case is practically the first one in the history of the Court in which the Applicant attempts to invoke a compromissory clause of a bilateral treaty as a basis of the Court's jurisdiction. He emphasizes that the meaning of the compromissory clause in a bilateral treaty should be considered with great care because, even if the parties to a bilateral treaty are ready to defer to the jurisdiction of the Court by including a compromissory clause, neither party may be presumed to entrust the evaluation of the scope - the object and purpose - of the treaty to a third party without its consent, even where a dispute as to the interpretation or application of the individual provisions of the treaty is specified in the compromissory clause contained therein. The subject of a dispute cannot relate to the question of whether essential issues fall within the comprehensive scope - the object and purpose - of the treaty but only concern the "interpretation or application" of the provisions of the agreed text of the treaty. The range of the "interpretation or application" of a treaty as covered by the compromissory clause in a bilateral treaty is strictly limited.

Judge Oda contends that, in view of the basic principle of international justice that referral to the Court should be based upon the consent of sovereign States, neither one of the parties to a bilateral treaty should be presumed to have agreed (and certainly, in fact, never has agreed) to let the other party refer unilaterally to the Court a dispute touching upon the object and purpose of the treaty, as, without a mutual understanding on those matters, the treaty itself would not have been concluded. The difference of views of the two States relating to the scope - the object and purpose - of a treaty cannot be the subject of an adjudication by the Court unless both parties have given their consent; such a dispute may, however, be brought to the Court by a special agreement or, alternatively, there may be an occasion for the application of the rule of forum prorogatum. The problem which faces the Court in the present case is to determine whether the real dispute between Iran and the United States that has arisen as a result of the latter's attack on and destruction of the Iranian oil platforms in a chain of events that took place during the Iran/Iraq War, is, as Iran alleges and the Court concludes, a dispute as to the "interpretation or application" of the 1955 Treaty of Amity within the meaning of its Article XXI(2). In his view, this is certainly not the case.

Judge Oda sees the way in which the Court responds to the Iranian Application in this Judgment as deriving from a misconception. The Court was requested by Iran to adjudicate at this stage that it has jurisdiction under the Treaty to entertain the dispute occasioned by the destruction of the platforms by the United States force, but not to entertain any claims made by Iran under any specific article - in this case Article X(1).

He continues to maintain that failure to dismiss Iran's Application in the present case invites a situation in which a State could, under the pretext of the violation of any trivial provision of any treaty containing a compromissory clause, unilaterally bring the other State Party to the treaty before the Court on the sole ground that one of the Parties contends that a dispute within the scope of the treaty exists while the other denies it. This would, in his opinion, be no more than the application of a form of false logic far removed from the real context of such a treaty, and constituting nothing short of an abuse of treaty interpretation, so that, to quote from his 1986 Separate Opinion in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), "the Court might seem in danger of inviting a case 'through the back door'".