

DECLARATION OF VICE-PRESIDENT RANJEVA

[Translation]

Violation of freedom of commerce and non-violation of freedom of commerce between the territories of the two Parties — Court's discretionary power and structure of its reasoning — Piercing the veil of the dispute — Constituent elements of the claim: subject-matter and "cause", Article 38, paragraph 2, of the Rules — Jura novit curia — Importance of notion of "cause" of claim.

1. I agree with the following findings in the Judgment:

- the absence of legal justification for the destruction of the platforms on the basis of Article XX, paragraph (1) (*d*);
- the violation of freedom of commerce as a result of the destruction of the platforms;
- dismissal of the Applicant's claim for reparation;
- dismissal of the counter-claims.

The question whether freedom of commerce in general on the part of one of the contracting parties can legitimately be dissociated from that of freedom of commerce between the territories of the parties to the 1955 Treaty is debatable.

2. The Court's freedom to determine the order in which questions of law raised in the dispute should be addressed is a discretionary one; that does not imply that the Court is entitled to determine in an arbitrary manner how its reasoning should be structured. The choice of method of reasoning depends directly on the general scheme of the dispute: its subject-matter, the parties' claims, their arguments, their overall forensic strategy. It is problematic in practice to rely dogmatically on the dictates of legal or judicial logic, which can be seen on closer examination to be more matters of formal logic. Hence, the way in which a case is to be approached remains unique, and specific to each dispute.

3. In the present case, the Court has not allowed itself to be obstructed by obstacles of a formalistic or formal nature. The terms in which the problem was posed have in fact been distorted by peripheral issues, on which the Parties focused to an unreasonable extent. The result has been a certain artificiality in the subject-matter of the dispute, in the claims presented by the Parties and in their overall forensic strategy, which has at times smacked of sophistry. In the face of these diversionary tactics, the Court has "pierced the veil" of the dispute, relying directly on acts, conduct and statements contemporaneous with the events having given rise thereto. It has taken the view that it should begin by addressing the issue of the lawfulness of use of force in light of the provisions of Article XX, paragraph 1 (*d*), of the 1955 Treaty.

4. In thus going directly to the real heart of the dispute, the Court has complied with its obligation to analyse the facts in a transparent manner and to make a true interpretation of substantive law. That presupposes strict respect for the law applicable, here in the first instance conventional law deriving from the 1955 Treaty and then, by way of interpretive framework to the treaty instrument, international law, that is to say law deriving from the United Nations Charter and international customary law. Piercing the veil of the dispute is a necessary condition, or at least a helpful contribution, in terms of providing a sounder basis for the settlement of international disputes.

5. I would have preferred to adopt a different procedural approach from that of the Court in this dispute in order to arrive at the same solutions. Inasmuch as this approach departs from the traditional ones, it does not justify an opinion. It is based on an analysis of the substance of the claim or matter in dispute. It consists of two essential elements: the subject-matter (*quid*) and the “cause” (*cur*); those elements are essential in order to determine and characterize the substance of a dispute, even though it may be difficult precisely to define their respective content.

6. Defining the “cause” of a claim — the underlying reason therefor — is a controversial issue in doctrine because of the notion’s malleable character and metaphysical connotations. Article 40 of the Statute confines itself to requiring that the elements to be indicated in the application instituting proceedings shall include the subject-matter of the claim. However, in Article 38, paragraph 2, of the Rules there is a fleeting reference to the notion of “cause”: the application “*shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based*” (emphasis added). Under the Rules, the applicant is required to set out the factual and legal bases of its claim. This drafting device simply transposes the problem without resolving it. Thus the issue of “cause” is bound up with that of the compatibility of the consensual basis of the Court’s jurisdiction with the principle *jura novit curia*. It would be inappropriate here to enlarge upon the doctrinal controversy regarding the difficulty of distinguishing between subject-matter and “cause” and determining the latter’s constituent elements, as these are issues not directly dealt with in the Judgment.

7. The notion of “cause” poses a dual difficulty: that of the extent of the Court’s power to determine the rule of law to be applied to the dispute submitted to it, and that of how it determines the rules and methods which appear to it to be the most appropriate. Irrespective of forensic strategy and pleading techniques, the Court must not debar itself from ascertaining the true intention of each Party. In paragraphs 32 and 37, the Judgment was at pains to note the position of the respondent Party, which effectively left it to the Court to determine how it should address the connection between Article X, paragraph 1, the basis of its jurisdiction, and Article XX, paragraph 1 (*d*), which is the underlying “cause” in terms of the applicable law as well as of the claim. I can only regret

that the Court failed to take the opportunity to find a practical, empirical solution to a delicate problem and to provide a more convincing justification for the order in which it decided to address the issues.

(Signed) Raymond RANJEVA.
