

SEPARATE OPINION OF JUDGE PARRA-ARANGUREN

Partial disagreement with paragraph 125 (1) — According to 1996 Judgment, Court's jurisdiction is based solely on Article X, paragraph 1, of the 1955 Treaty — Iran's main submission was that the military actions of the United States breached that Article — Task of the Court was to adjudge Iran's submission before deciding, if necessary, whether the military actions were justified under Article XX, paragraph 1 (d), of the 1955 Treaty — Court concluded that Article X, paragraph 1, of the 1955 Treaty had not been breached by the United States — Therefore, the dispute was resolved and the Court had no jurisdiction to examine the justification advanced by the United States for its hypothetical breach of Article X, paragraph 1, of the 1955 Treaty.

1. I have voted for the operative part of the Judgment but my favourable vote does not mean that I share each and every part of the reasoning followed by the Court in reaching its conclusions. In particular I am not in agreement 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.”

2. The reasons for my disagreement are the following.
3. 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)).

4. The first submission presented by Iran requests the Court, rejecting all contrary claims and submissions, 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, para-

graph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks.”

5. Thus 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 Tehran 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. It is only if the Court comes to the conclusion that the United States breached its obligations under Article X, paragraph 1, of the 1955 Treaty that it has 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 its Article XX, paragraph 1 (*d*), which provides:

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

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 (*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.”

6. Notwithstanding, paragraph 35 of the Judgment 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*).”

7. Then paragraph 37 adds:

“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.”

8. The first particular consideration militating in favour of reversing the order of examination of the Articles of the 1955 Treaty is explained in paragraph 37 of the Judgment as follows:

“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.”

9. A second particular consideration is indicated in paragraph 38 of the Judgment in the following terms:

“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.”

10. 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. However, in its 12 December 1996 Judgment, the Court interpreted Article XX, paragraph 1 (*d*), of the 1955 Treaty “as affording only a defence on the merits”; recalling that

“The Court, in its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), adopted the latter interpretation for the application of an identical clause included in the Treaty of Friendship, Commerce and Navigation concluded between the United States and Nicaragua on 21 January 1956 (*I.C.J. Reports 1986*, p. 116, para. 222, and p. 136, para. 271). Iran argues, in this case, that the Court should give the same interpretation to Article XX, paragraph 1 (*d*). The United States, for its part, in the most recent presentation of its arguments, stated that ‘consideration of the interpretation and application of Article XX, paragraph 1 (*d*), was a merits issue’. The Court sees no reason to vary the conclusions it arrived at in 1986. It accordingly takes the view

that Article XX, paragraph 1 (*d*), does not restrict its jurisdiction in the present case, but 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.)

11. The Court was perfectly well aware at that time of the two particular considerations quoted above. Notwithstanding, in its 12 December 1996 Judgment, the Court expressly interpreted Article XX, paragraph 1 (*d*), of the 1955 Treaty “as affording only a defence on the merits” and concluded that it “is confined to affording the Parties a possible defence on the merits to be used should the occasion arise”.

12. Even though this is not mentioned as a particular consideration militating in favour of reversing the order of examining the Articles of the 1955 Treaty, paragraph 36 of the Judgment nonetheless recalls that the United States suggests that the Court can:

“dismiss the Iranian claim either on the ground that the actions of the United States did not involve a breach of Article X, paragraph 1, or on the ground that those actions were measures necessary to protect the essential security interests of the United States, and therefore justified under Article XX, paragraph 1 (*d*). On this basis, the United States suggests, the order in which the issues are treated is a matter for the discretion of the Court.”

13. A suggestion made *a posteriori* by one of the parties to a case — even if that party is the United States — does not justify the modification of a previous decision adopted by the Court, in particular because the United States has strongly denied that its military actions violated Article X, paragraph 1, of the 1955 Treaty, which is the basis for the claim submitted by Iran to the Court. Therefore, in my opinion, the Court should have considered Article XX, paragraph 1 (*d*), as a defence to be examined only in the event of its having previously established that the United States had violated Article X, paragraph 1, of the 1955 Treaty.

14. The reasons indicated above explain 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 having done so. The second sentence of paragraph 125 (1) of the Judgment states that the Court cannot “uphold the submission of Iran that those [military] 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”. That is the end of the story. Therefore, in my opinion, 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 breach of Article X, paragraph 1, of the 1955 Treaty.

(Signed) Gonzalo PARRA-ARANGUREN.
