DISSENTING OPINION OF JUDGE ODA

I. Introductory Remarks

1. To my great regret I find myself dissenting from the Court's Judgment on account of my belief that the Court should have upheld the preliminary objection concerning the Court's jurisdiction as raised by the United States, and should have declined to entertain the Application filed by Iran.

2. On 2 November 1992, Iran filed the Application instituting proceedings against the United States in respect of a dispute arising out of the attack on and destruction of three oil platforms by the United States Navy in 1987 and 1988, in which it claimed that the United States had breached its obligations to Iran under the Treaty of Amity, Economic Relations and Consular Rights, a bilateral treaty which it had concluded in 1955 with the United States, and had breached international law. Iran invoked that Treaty as a basis for the Court's jurisdiction to entertain the dispute. The relevant Article in the Treaty *(compromissory clause)* reads:

> "*Article XXI*
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> . . . . . .
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> 2. 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."

On 16 December 1993, the United States requested the Court to uphold its preliminary objection to the jurisdiction of the Court to entertain the case.

3. By way of an introduction to my opinion, I wonder if there was in fact any dispute between Iran and the United States prior to the filing of the Application of Iran with respect to the "interpretation or application" of the 1955 Treaty. As far as the record before the Court shows, there was no diplomatic negotiation between the two countries on this subject before Iran filed the Application in November 1992. Certainly, in the written and oral proceedings which followed on from the Application, Iran expressed its views on various articles (i.e., Articles I, IV (1) and X (1)) of that Treaty and, in response, the United States presented different views. But this surely does not mean that there was previously any dispute between Iran and the United States as to the "interpretation

or application" of the 1955 Treaty, such as to be submitted to this Court. I believe, even if only for that simple reason, that the Iranian Application in the present case could have been dismissed.

4. This is practically the first case in the history of this Court in which the Applicant attempts to rely mainly on a *compromissory clause* of a bilateral treaty to which it is a party, although there have been a few cases in which a *compromissory clause* of a bilateral treaty was relied upon as an additional or subsidiary basis for the Court's jurisdiction (e.g., the "1955 Iran-United States Treaty of Amity" — which is invoked in the present case — in the case concerning *United States Diplomatic and Consular Staff in Tehran* (*I.C.J. Reports 1980*, p. 3) and the "1956 Nicaragua-United States Treaty of Friendship, Commerce and Navigation" invoked in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility* (*I.C.J. Reports 1984*, p. 392)). For this reason, it would seem to be pertinent to examine the meaning of a *compromissory clause* included in any given bilateral treaty in the context of the fundamental principle concerning the required consent to jurisdiction of the States in dispute.

II. The *Compromissory Clause* of a Treaty in Relation to the Required Consent of States for Referral of Disputes to the Court

5. There is no doubt whatever that the consent of sovereign States to be subject to the Court's jurisdiction is a cornerstone of international justice. As is pointed out in the recent jurisprudence of the Court, "one of the fundamental principles of the Statute is that the Court cannot decide a dispute between States without the consent of those States to its jurisdiction" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 101; see also the precedents of the Court referred to therein). According to its Statute, the Court may be seised of legal disputes in three different ways: namely, (i) by joint referral of disputes to the Court (Art. 36 (1)), (ii) by seising the Court under the optional clause whereby the States may declare that they recognize as compulsory the jurisdiction of the Court (Art. 36 (2)), and (iii) by the referral of disputes in accordance with treaty provisions (Art. 36 (1)). The fact that the Court's jurisdiction *in a case of unilateral application* is restricted to the latter two instances (in other words, (ii) and (iii)) remains as a reflection of the basic principle that the consent of the sovereign State is required for the exercise of the Court's jurisdiction, as in these cases the respondent States are deemed to have given such consent in advance in general terms by means of the optional clause of the Statute or by the insertion of a *compromissory clause* into treaties. Without the consent, whether individual or gen-

eral, of the States concerned, there will be no legal dispute which can be adjudicated by the Court.

1. Joint Referral to the Court by a Special Agreement — Article 36 (1)

6. Some disputes have been presented to the Court on an *ad hoc* basis by a special agreement of the two States in dispute under the first part of Article 36 (1). The joint referral of any case to the Court, as a result of the consent of the States parties thereto, is undoubtedly the closest to the ideal in terms of the application of international legal justice. There were some cases referred to the Court by a special agreement in its first 30-year period but the following are the only cases of this type with which the Court has dealt during the past 20 years, apart from some *ad hoc* Chamber cases: *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (*I.C.J. Reports 1982*, p. 18), *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*I.C.J. Reports 1985*, p. 13), and *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (*I.C.J. Reports 1994*, p. 6).

2. The General Commitments of States to Refer to the Court Disputes of a Wider Scope — the Optional Clause in the Statute — Article 36 (2)

7. Some States are prepared to defer to the Court's jurisdiction on an extremely wide range of disputes with other unspecified States. In other words, the Court's jurisdiction in

> "all legal disputes concerning:
> *(a)* the interpretation of a treaty;
> *(b)* any question of international law;
> *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation;
> *(d)* the nature or extent of the reparation to be made for the breach of an international obligation"

exists on a reciprocal basis among certain States, as Article 36 (2) — the optional clause — provides that the States parties to the Court's Statute

> "may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court"

in the matters referred to in the above quotation. The subject-matter of the disputes that can be submitted to the Court's compulsory jurisdiction is wide enough to cover all legal disputes, as mentioned above. A State which makes such a declaration is deemed to be ready and willing to defer to the Court's jurisdiction on a wide range of legal disputes which may possibly arise in its relations with other States making similar declarations.

8. In fact, however, as can be seen from the Annual Report of the Court for this year, as of the end of July 1996, only 59 States out of a total of 187 States members of the Court's Statute had made declarations under Article 36 (2). In addition, most of the declarations are accompanied by various reservations and their validity is limited to certain restricted periods. It should also be noted that, in the past, when the preliminary objections raised by some States were rejected by the Court, those States proceeded to withdraw the declaration of the acceptance of the Court's jurisdiction under the optional clause which they had previously made (e.g., France, in January 1974 after the *Nuclear Tests* cases; the United States, in October 1985 after the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*). This tells us that there are not so many States that are really willing or prepared to subject themselves to the compulsory jurisdiction of the Court in relation to any disputes, in whatever shape or form, that might arise in the future. In fact, neither Iran nor the United States had made such a declaration as of November 1992, the date of filing of the Application in the present case.

9. It is noted in the history of the Court that most cases of unilateral application were related to disputes which arose between those States which had accepted the Court's jurisdiction under the optional clause, as referred to above. In some of those cases, the disputes came to the merits phase of the Court's proceedings without occasioning any objection by the respondent State and were finally settled by a Judgment of the Court. While there were four cases in the first 30-year period of the Court, the only two cases of this type with which the Court dealt during the past 20 years are: *Arbitral Award of 31 July 1989* (*I.C.J. Reports 1991*, p. 53) and *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*I.C.J. Reports 1993*, p. 38). However, in a number of cases of unilateral application on the basis of the optional clause of the Court's Statute, preliminary objections to the Court's jurisdiction were raised by the respondent States on account of their interpretations of the ways in which that clause had been applied. In some cases, the Court dismissed such objections, so that the cases in question came to the merits phase. The case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1986*, p. 14) is the only one of this type with which the Court has dealt in the course of the past 20 years. Alternatively, the Court could uphold the

objections on the ground of the application of the optional clause, thus bringing the case to an end. There has, in fact, been no case of this kind dealt with by this Court in this past 20-year period.

10. The application of the optional clause of the Court's Statute can only be effected among a certain limited number of States. For this reason, some treaties concluded to promote the peaceful settlement of disputes among a group of States establish the compulsory jurisdiction of the Court among the States signing these treaties. The 1928 General Act for the Pacific Settlement of International Disputes (Art. 17) was used as the basis of jurisdiction in the case concerning the *Aegean Sea Continental Shelf* (*I.C.J. Reports 1978*, p. 3), in which, however, the Court dismissed the Application of Greece; it was also invoked by Australia and New Zealand in the *Nuclear Tests* cases (*I.C.J. Reports 1974*, pp. 253, 457). The 1948 American Treaty on Pacific Settlement (the Pact of Bogotá) (Art. XXX1) is another such example successfully invoked in the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility* (*I.C.J. Reports 1988*, p. 67).

3. *The Referral of all Matters Provided for in Treaties and Conventions — the* Compromissory Clause

11. There are some cases in which States enter into agreements in which they accept the Court's jurisdiction to deal with certain disputes in accordance with the Statute — as the second part of Article 36 (1) provides that the Court may deal with "all matters specially provided for . . . in treaties and conventions in force".

(a) *The commitments of States given in advance to refer any particular dispute to the Court*

12. In the *Aegean Sea Continental Shelf* case, as mentioned above, Greece relied — as a second basis of jurisdiction — upon the Brussels Joint Communiqué of 1975 issued by the Prime Ministers of Greece and Turkey and conferring jurisdiction in that particular case concerning the continental shelf of the Aegean Sea (see para. 10 above). In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility* (*I.C.J. Reports 1995*, p. 6), Qatar invoked as the basis of jurisdiction the two agreements determining the subject and scope of the commitment to accept that jurisdiction (the "Bahraini formula"). Each of these agreements between two States does not itself constitute a special agreement but is an agreement expressing the intention to submit a concrete dispute to the Court.

(b) *The* compromissory clause *of multilateral treaties*

13. States may agree in advance in rather general terms to submit to the Court specific disputes in a certain fixed context. Some multilateral

treaties (concluded to deal with the substantive rights and duties of more than two States) contain a *compromissory clause* which in effect provides that any dispute which may arise between the States concerning the "interpretation or application" of those treaties, and which is not settled by negotiation, shall be referred to the International Court of Justice. In addition, some law-making multilateral treaties adopted at diplomatic conferences convened by the United Nations, of which a first example was that of the four 1958 Geneva Conventions on the law of the sea, are accompanied by an "Optional Protocol [of Signature] concerning the Compulsory Settlement of Disputes" which, constituting a separate instrument appended to the main body of the treaty, provides for the compulsory jurisdiction of the Court for those States that accept it. The type of disputes to be subjected to the Court's jurisdiction by invoking as a basis of that jurisdiction a *compromissory clause* of a multilateral treaty or an optional protocol concerning the compulsory settlement of disputes is not so general as are those "concerning the interpretation of [any] treaty or any questions of international law" as defined by the optional clause of the Court's Statute, but is limited to the "interpretation or application" of the particular treaty in which a *compromissory clause* is included or to which an optional protocol is attached.

14. The signatory States which have either been willing to ratify those multilateral treaties containing a *compromissory clause* without making any reservations with respect to that particular clause or have been ready to ratify the optional protocol concerning the compulsory settlement of disputes, as the case may be, are considered to have opted for the compulsory jurisdiction of the Court, in their relations with other signatory States which have accepted the same obligation, in a dispute as to the "interpretation or application" of the relevant treaty.

15. There are only a few precedents of a unilateral application relying on the *compromissory clause* of a multilateral treaty or on the optional protocol concerning the compulsory settlement of disputes as a basis of the Court's jurisdiction. However, even among those States which have thus accepted the Court's compulsory jurisdiction, a unilateral application might have met with preliminary objections, just as in the case of an application on the basis of the optional clause of the Statute. In fact, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, to both of which an optional protocol concerning the compulsory settlement of disputes was appended, were relied upon by the United States as a basis for jurisdiction in the case concerning *United States Diplomatic and Consular Staff in Tehran* (see para. 4 above). A *compromissory clause* (Art. IX) of the Genocide Convention was similarly relied upon by Bosnia and Herzegovina in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (*I.C.J. Reports 1996*, p. 595). In the former case, the Court proceeded to the merits phase without the

participation of the Respondent (Iran) and, in the latter case, by rejecting the preliminary objections raised by the Respondent (Yugoslavia).

III. Specific Problems Related to the *Compromissory Clause* of a Bilateral Treaty

16. A *compromissory clause* is included not only in multilateral treaties but also sometimes in bilateral treaties. The conclusion between two States of a bilateral treaty with a *compromissory clause* is, however, different in nature from a State's participation in a multilateral treaty containing a *compromissory clause* in the sense that the conclusion of such a bilateral treaty must in itself inevitably imply acceptance of the compulsory jurisdiction of the Court. The making of reservations to any provision of a bilateral treaty is clearly inconceivable and, simply on account of the fact that the two States have concluded a bilateral treaty which contains a *compromissory clause*, each one of those two States is regarded not only as having agreed on the substantive text of the bilateral treaty itself but also as having given its definite consent to the exercise of the Court's jurisdiction over disputes arising under the treaty. This is in contrast to the case of a multilateral treaty in which any signatory State is in principle free to make reservations to the *compromissory clause* or not to ratify the optional protocol appended to the treaty. It follows that, the meaning of the *compromissory clause* in a bilateral treaty should be considered with even greater care, because neither party can escape from the compulsory jurisdiction of the Court once the two States have agreed to negotiate and conclude that particular bilateral treaty. Particularly in the case of a bilateral treaty, it is more important to investigate the extent to which the two States have agreed to be subject to the compulsory jurisdiction of the Court by including a *compromissory clause* in the treaty between them.

17. The bilateral treaty must, without a doubt, be a product of complete accord of the two States parties not only with regard to the substantive text but concerning the scope — the object and purpose — of the treaty. Such a conveyance of views and intentions of the two States is a prerequisite for the conclusion of the bilateral treaty itself, without which the treaty itself would not exist. Thus it is most unlikely that a good-faith dispute could arise between the two States with regard to the scope of the treaty even though it could happen that an interpretation of the substantive provisions in their application to some concrete events might be called for. It follows that, even if the parties to a bilateral treaty are ready to defer to the jurisdiction of the Court by including a *compromissory clause*, the subject of any dispute cannot relate to the question of whether

essential issues fall within the comprehensive scope — the object and purpose — of the treaty but only to the "interpretation or application" of a provision of the agreed text of the treaty. This power to adjudicate would have been limited to the technical interpretation or application of any individual provisions in the treaty, the whole scope of which the States themselves had agreed to accept. The range of the "interpretation or application" of a treaty as covered by the *compromissory clause* in a bilateral treaty is strictly limited. 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*.

18. 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 States to a bilateral treaty could be presumed to have agreed (and certainly, in fact, never has agreed) to let the other State 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 States 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*. This is, then, quite different from the case of the "interpretation or application" of the individual provisions of the treaty on which the two States may, if the need arises, argue under the *compromissory clause* of that treaty from opposite stances before the Court.

19. The number of bilateral treaties containing a *compromissory clause* conferring jurisdiction upon the Court is minimal, as can be seen from the fact that during the past 20 years only four such bilateral treaties have been concluded (see *I.C.J. Yearbook 1994-1995*, p. 119), although the immediate post-war period witnessed the conclusion of a fair number of such bilateral treaties, of which the 1955 Treaty was one. This may perhaps be explained by the consideration that few States are willing to risk giving an expansive scope to the exercise of the Court's jurisdiction by reason of consenting to the conclusion of a bilateral treaty providing for specified rights and duties in their mutual relations. The referral of disputes under the *compromissory clause* of a bilateral treaty has been far less frequent than referrals under the optional clause or even under the *compromissory clause* of a multilateral treaty. In fact, throughout the history of the Court, there has been no single case in which the typical form of the *compromissory clause* included in a bilateral treaty has been

invoked as a main basis of jurisdiction, as I have already indicated (see para. 4). (The Trusteeship Agreement of 1946 (of which Article 19 constituted a compromissory clause) which was referred to as a basis of jurisdiction in the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 15) may not be regarded as a bilateral treaty in the ordinary sense.)

20. In conclusion, the *compromissory clause* of a bilateral treaty cannot be deemed to give the freedom to one party to bring before the Court disputes with the other party that may not relate specifically to the legal interests (rights and duties) reflecting the object and purpose for which the treaty was agreed by the two States. In the case of a bilateral treaty in particular, the basic principle concerning the jurisdiction of the Court to the effect that the jurisdiction is based on the consent of sovereign States given on an *ad hoc* basis or in advance in one way or the other, should be interpreted restrictively and not given any kind of loose interpretation.

IV. Concluding Remarks

21. The 1955 Treaty of Amity was concluded between Iran and the United States, a treaty aimed at providing protection for the property and interests of the citizens and companies of one party in the territory of the other party, and which gives a mutual assurance of fair and non-discriminatory treatment of nationals and companies engaged in commercial, industrial and financial activities. It may be that a dispute may arise between the two States as to the "interpretation or application" of any particular provision of the 1955 Treaty of Amity, in the event that the right of an individual or a company of one party protected by the Treaty in the territory of another party is violated by the other party, or that the Government of one party fails to perform its obligations to an individual or a company of the other party as prescribed in the Treaty. If the dispute is not "adjusted by diplomacy" between the two States parties (certainly after the exhaustion of local remedies), a unilateral application by one party may be filed with the Court by virtue of Article XXI (2) of that Treaty. However, whether the dispute described in the Application filed by Iran on 2 November 1992 is indeed the kind of dispute thus defined in the Treaty is quite a different matter. The problem which faces the Court 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 use of force by both sides in the Iran-Iraq War is, as Iran alleges and the Court concludes, a dispute as to the "interpretation or application" of the Treaty within the meaning of its Article XXI (2). In my view, this is certainly not the case.

22. Assuming that the attack on the platforms or their destruction (or

the use of armed force in general) had become a subject of diplomatic negotiations between Iran and the United States which had failed, that attack could not be seen as falling within the scope of the 1955 Treaty for reasons which counsel for the United States called "a lack of a reasonable connection" and, as I see it, is by its very nature irrelevant to the scope of the Treaty. The United States had certainly not intended (and no State may be prepared to intend) to confer jurisdiction upon the Court to deal with such a dispute simply by having concluded such a treaty. The Court is at present required to ascertain whether the particular action of the United States was of the kind which really fell within the scope of the Treaty, or, more particularly, affected the legal interests (rights and duties) of Iran which were meant to have been protected under the 1955 Treaty.

23. In my view, Iran is not competent to refer to the Court unilaterally, by invoking the *compromissory clause* in that Treaty, a dispute going beyond the interpretation or application of the provisions of the bilateral 1955 Treaty of Amity and turning upon the scope of the Treaty. Certainly a dispute created by the destruction by the United States' armed forces of the Iranian oil platforms can be subjected to the Court's jurisdiction by other means, i.e., by a joint submission (a special agreement) or, by the application of the rule of *forum prorogatum* in the event that the United States should subsequently agree to accept the Court's jurisdiction. In fact the United States has raised an objection to the Court's jurisdiction in respect of the Iranian Application.

24. While rejecting Article I of the Treaty of Amity as "a basis for the jurisdiction of the Court" (Judgment, para. 31) and Article IV (1) as "the basis for the Court's jurisdiction" (*ibid.*, para. 36), the Court holds the view that "[the] lawfulness [of the destruction of the Iranian oil platforms] can be evaluated in relation to [Article X (1)]" (*ibid.*, para. 51) and

> "[i]n 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" (*ibid.*, para. 53).

Iran has brought the present case to the Court in the hope that the Court will find that the United States had breached several obligations under the 1955 Treaty and international law, and has contended that "the Court has jurisdiction under the Treaty of Amity to entertain the *dispute*" (Application of Iran, p. 12; emphasis added). The Court now responds 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*" (Judgment, *dispositif*, para. 2; emphasis added).

25. The way in which the Court responds to the Iranian Application in this Judgment derives from a misconception. The Court was requested by Iran to adjudge 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). In my view the conclusion reached by the Court is unjustified because the Court should not have interpreted each provision of Articles I, IV (1) and X (1) as providing a basis for the jurisdiction of the Court but should rather have determined that a dispute — if any such exists — between Iran and the United States arising from the attack on and destruction of the Iranian oil platforms falls within the purview of the 1955 Treaty of Amity.

26. 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 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 "the Court might seem in danger of inviting a case 'through the back door'" (see my separate opinion in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, p. 472).

(Signed) Shigeru ODA.