SEPARATE OPINION OF JUDGE KOOIJMANS

Factual context — Political relations between Parties before and during Iran-Iraq war (1980-1988) — Tanker War and neutral shipping — Attacks against platforms — United States embargo — 1955 Treaty not mentioned at the time.

Limited jurisdiction of the Court — Sole issue whether Article X, paragraph 1, has been violated — Character and interpretation of Article XX, paragraph 1 (d) *— Question is not whether United States acted in self-defence — Order of arguments in reasoning.*

Article XX, paragraph 1 (d)*, not relevant for decision on claim — First finding of* dispositif *no ground for disposition on final submission —* Obiter dictum *in operative part of Judgment.*

Freedom of commerce not adversely affected by actions against platforms — Effect of United States embargo — Indirect commerce.

Analysis of measures necessary to protect essential security interests — Test of reasonableness — Legality test — Role of general international law — Attributability to Iran of incidents — Role of platforms — Whether United States actions are appropriate response to threat to security interests.

INTRODUCTION

1. I have voted in favour of the operative part of the Judgment since I agree with the substance of what is said there. I am of the view that the military actions of the United States against the Iranian oil platforms on 19 October 1987 and 18 April 1988 did not constitute a violation of Article X, paragraph 1, of the 1955 Treaty between the United States and Iran since they did not adversely affect freedom of commerce between the territories of the Parties and that consequently Iran's claim must be dismissed. Likewise, I am of the view that Iran did not violate its obligation under that same Article concerning freedom of commerce and navigation between the territories of the Parties and that the counter-claim of the United States must therefore be dismissed. Moreover, I share the Court's view that the United States actions cannot be qualified as measures necessary to protect its essential security interests in the sense of Article XX, paragraph 1 *(d)*, of the Treaty.

2. I cast my vote with considerable hesitation however. This hesitation arises from my view, despite my support for the substance of the operative part, that the structure of the Judgment is not in keeping either with

what would be expected of the Court or with the Court's usual practice. It is not well balanced, does not sufficiently reflect the factual context of the case and is not a transparent, well-defined reply to the Applicant's claim and the Respondent's defence, even if their arguments are comprehensively dealt with.

3. My main reason of concern, however, upon casting my vote was that the operative part does not immediately respond to the claim as formulated by the Applicant, but starts with a finding not essential to the Court's decision on that claim, thereby creating the impression that it nevertheless was essential for that purpose. I have checked the operative parts of all judgments of this Court and its predecessor, the Permanent Court of International Justice, in contentious cases and none of them starts with a finding that is not determinative for the Court's disposition of the claim. Although it is not unusual for the *dispositif* of a judgment to contain elements which do not respond directly to points raised in the claim, such paragraphs either are addressed to both parties (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 149, para. 292 (16); *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1108, para. 104 (3)) or are observations by the Court concerning existing rights belonging to or obligations undertaken by one of the parties (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 117, para. 252 (2) *(b)*; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 516, para. 118 (6); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 457, para. 325 (V) (C)). In the *Hostages* case, paragraph 1 of the *dispositif* contained a finding (a violation by the Respondent of its obligations under general international law) which did not directly correspond to the Applicant's claim in the final submission but that claim itself was first upheld *in toto* (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 44, para. 1).

It is, however, unprecedented in the history of both Courts for a claim against a Respondent to be *rejected* while earlier in the same paragraph the Respondent is found to have acted unlawfully even though that finding is not — and is not said to be — determinative or even relevant for the dismissal of the claim. This *novum* can be seen as setting a precedent which in my view is a highly hazardous one since it raises questions about the scope of a judgment of the Court, for example, with regard to its *res judicata* character.

4. I have found it necessary to set out what in my opinion would have been the appropriate approach to deal with a dispute which originated in

the use of force but was brought to the Court as a violation of treaty-guaranteed freedom of commerce.

I will first give an overview of the factual context; I will then deal with the character of the case before the Court as defined by the claim and counter-claim; finally, I will consider a number of issues dealt with in the reasoning of the Judgment.

The Factual Context

5. The circumstances surrounding the military actions against the oil platforms, which are the main issue of the dispute between the Parties, are well known and have been described in paragraphs 23 and 24 of the Judgment. Nevertheless, it seems useful to recall the political aspects of the war that raged for eight years between Iran and Iraq and the impact this war had on the already strained relations between Iran and the United States.

6. Relations between the United States and Iran had been excellent until the beginning of 1979 when the Shah's régime was toppled. The 1955 Treaty of Amity, Economic Relations and Consular Rights exemplified these warm relations, which, however, turned sour when the government which came to power after the Islamic Revolution accused the United States of long-time interference in the internal affairs of Iran. Relations between the two countries plummeted to an all-time low after the seizure of and hostage-taking in the American Embassy in Tehran in November 1979.

7. This crisis came to an end upon the release of the remaining hostages in the beginning of 1981 and by a diplomatic settlement by means of the Algiers Declarations of 19 January 1981, which led to the establishment of the Iran-United States Claims Tribunal in The Hague (which has not yet completed its task). Notwithstanding the settlement, relations remained tense; diplomatic relations between the two countries, which had been severed after the hostage-taking, were not resumed.

8. In the meantime, Iran became involved in a war with its neighbour when it was invaded by Iraqi military forces on 22 September 1980. It is common knowledge that the Security Council was lax in taking action: only in 1987 did it determine that there was a breach of the peace and adopt a resolution under Chapter VII of the Charter (resolution 598 (1987) of 20 July 1987). Until then it had confined itself to calling for a ceasefire and for greater respect for the rules of international humanitarian law, of which there were gross breaches during the war; it did not however attribute specific violations to either of the Parties.

9. Iran, which considered itself to be the victim of aggression, ascribed this passivity on the part of the Council to the partiality of a number of

influential United Nations member States, notably the Arab countries and the United States, and accused them of in fact supporting Iraq and preventing the Security Council from taking meaningful measures to bring the war to an end. Iran accused Kuwait, Saudi Arabia and the United States in particular of enabling Iraq to continue its unlawful use of force and of not respecting their duties as neutral States. It did not, however, deny these States their status as formally neutral powers.

10. In 1984 the war, which until then had been mainly a land war, spread to the Persian Gulf when Iraq started harming Iran's oil trade, which provided the latter with the finances to sustain its war efforts. Iraq attacked ships on their way to and from Iranian ports in order to hinder Iran's oil exports. This was the beginning of the Tanker War, which lasted until the ceasefire in August 1988 and during which Iran retaliated by attacking or mining ships coming from or destined for Kuwaiti and Saudi ports.

11. Although Iran denied responsibility for individual incidents, it nevertheless openly stated that it was entitled to take action against neutral ships trading with the "enemy".

According to a list produced by Lloyd's Maritime Information Service (Counter-Memorial of the United States, Exhibit 9), a total of 544 ships[1] were attacked during the war, the overwhelming majority of them sailing under a neutral flag. According to Lloyd's, more than 200 of these incidents from March 1984 onward could be attributed to Iranian military forces. These developments caused a number of States to send warships to the region in order to protect international shipping and continued international trade through the Gulf.

12. It is in this context and against this backdrop that the United States attacks against the oil platforms took place. The already tense relations between Iran and the United States had remained extremely bad during the first years of the war, Iran blaming the United States for its alleged undisguised support of the aggressor Iraq and the United States accusing Iran of blatantly violating the laws of neutrality and of naval warfare.

Not only the United States but also other States did, however, regularly express through diplomatic channels their deep concern about Iran's behaviour vis-à-vis neutral shipping. Moreover, on 1 June 1984 the Security Council, acting on a complaint by a number of Arab States against Iran, adopted a resolution calling upon all States to respect the right of free navigation in the Gulf area (resolution 552 (1984)). Although neither

[1] The list of 546 incidents also includes the United States attacks on the oil platforms.

Iran nor Iraq was mentioned by name in the operative part, Iran considered this resolution another illustration of the Council's bias, since the Tanker War had been started by Iraq.

13. It seems indisputable in the light of reports from independent sources like international shipping associations that during the Tanker War both Iraq and Iran disregarded the rules on neutral shipping on a massive scale. Whether all the cases itemized on Lloyd's List as Iranian attacks are indeed attributable to Iran is less relevant than the fact that Iran's non-compliance with the rules of naval warfare is too well documented to ignore or deny. On the other hand, according to Lloyd's List, only three United States flagged ships, two of them recently reflagged Kuwaiti tankers, suffered alleged attacks by Iran before the destruction of the Salman and Nasr platforms; this renders the contention by the United States that its ships were specifically targeted less credible. A verbal and diplomatic battle may have been going on on a nearly daily basis, but the bad political relations did not, until October 1987, translate into a military confrontation.

14. I have thought it useful to describe the factual context since it sufficiently illustrates that at the time the actions against the platforms took place nothing was further from the minds of the Parties than the 1955 Treaty on Amity, Economic Relations and Consular Rights. This is evidenced by the fact that Iran in its letter to the Security Council called these actions "acts of aggression" whereas the United States called them "actions taken in the exercise of the inherent right of self-defence".

15. On 29 October 1987, the President of the United States promulgated Executive Order 12613, entitled "Prohibiting imports from Iran", in order: "to ensure that United States imports of Iranian goods and services will not contribute financial support to terrorism or to further aggressive actions against non-belligerent shipping" (Counter-Memorial of the United States, Exhibit 138). Nowhere in the Order is there any mention of the 1955 Treaty, let alone any reference to its Article XX, paragraph 1 *(d)*, as a justification for the Treaty's partial suspension. Nor did Iran at the time protest against the embargo as a measure not in conformity with the 1955 Treaty.

16. Yet in 1992, when Iran filed its Application instituting proceedings against the United States, it did so on the basis of the compromissory clause contained in Article XXI of that Treaty, since that clause provided the only possible ground for the Court's jurisdiction.

In its preliminary objections, the United States contended that the 1955 Treaty does not apply to questions concerning the use of force

and that consequently the Court lacked jurisdiction to entertain Iran's claim.

In the Judgment of 12 December 1996, the Court held that Article XX, paragraph 1 *(d)*, is not an exclusion clause barring the Court from testing the lawfulness of measures taken to protect a party's essential security interest, but a defence on the merits.

> "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." (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 811-812, para. 21.)

The Court further concluded that the destruction of the oil platforms was capable of having an adverse effect upon the freedom of commerce guaranteed by Article X, paragraph 1, of the Treaty and that its lawfulness could be evaluated in relation to that paragraph.

THE CASE BEFORE THE COURT

17. The main issue before the Court is thus whether the United States, by destroying Iranian oil platforms on two occasions, violated its obligation under Article X, paragraph 1, of the 1955 Treaty. It is *not* whether the United States acted in violation of its obligations under the United Nations Charter and/or general customary law. This is in striking contrast to the case concerning *Military and Paramilitary Activities in and against Nicaragua* where the Court had jurisdiction to consider *both* questions since the basis of its jurisdiction was much broader and an identical compromissory clause in a bilateral treaty between Nicaragua and the United States was merely additional to the jurisdiction based upon acceptance thereof by the Parties by virtue of unilateral declarations made under Article 36, paragraph 2, of the Statute. In spite of the similarities between the *Nicaragua* case and the present case, this essential difference should be kept in mind continuously since in the present case the Court's jurisdiction is considerably more limited.

18. In view of the more limited scope of the Court's jurisdiction, it would have been logical for the Court first to have ascertained whether the destruction of the platforms was indeed a violation of Article X, paragraph 1, since in its claim Iran had submitted that the United States

actions had negatively affected freedom of commerce between the territories of the Parties as guaranteed under that provision. Once that question had been answered in the affirmative, the Court would have been obliged to determine whether the action taken by the United States was a measure necessary to protect its essential security interests in the sense of Article XX, paragraph 1 *(d)*, of the Treaty. This approach was followed by the Court in 1986 in the *Nicaragua* case when it said that

> "the possibility of invoking the clauses of that Article [Art. XXI, para. 1 *(d)*, of the 1956 Treaty of Friendship which is identical to Art. XX, para. 1 *(d)*, of the 1955 Treaty] must be considered *once it is apparent* that certain forms of conduct by the United States would *otherwise* be in conflict with the relevant provisions of the Treaty" *(Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 117, para. 225; emphasis added).

19. In the present Judgment, the Court has not followed this approach, which, according to the Court, was not "dictated by the economy [a term which I understand to be synonymous with 'the structure'] of the Treaty" (Judgment, para. 37). It can indeed be maintained that both Article X, paragraph 1, and Article XX, paragraph 1 *(d)*, are substantive, free-standing provisions; this is not contested by either of the Parties. They agree that the order in which the Court deals with the two provisions is a matter for the discretion of the Court and that if the Court were to deal first with the use of force as practised by the United States and to conclude that the actions against the platforms were in conformity with Article XX, paragraph 1 *(d)*, the question whether Article X, paragraph 1, was violated would no longer arise.

20. In the present case, the Court has chosen this second approach; it has explained this by pointing to the fact 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". It is true that neither of the Parties made any reference at the time to the 1955 Treaty. And it is equally true that, as the Court points out, during the recent proceedings the United States continued to maintain that it had justifiably acted in exercise of the right of self-defence. But the United States also observed that this was not a question for the Court to pass upon. During the oral proceedings, counsel for the United States explicitly stated that

> "the jurisdiction of the Court is confined to the issue of whether the actions of the United States were necessary in order to protect its essential security interests; that jurisdiction [of the Court] does not

extend to the issue of the legality of those actions in light of the rules governing the use of force and self-defence" (CR 2003/12, p. 26).

21. The Court has duly taken note of this position of the United States (para. 39 of the Judgment). It observes, however, that when a measure taken under Article XX, paragraph 1 *(d)*, is invoked to justify actions involving the use of force, allegedly in self-defence, the interpretation and application of that Article will necessarily entail an assessment of the conditions of legitimate self-defence under general international law and that, consequently, its jurisdiction extends to the determination whether action (under Article XX, paragraph 1 *(d)*) was or was not an unlawful use of force, by reference to the provisions of the United Nations Charter and customary international law. And the Court thoughtfully adds "that its jurisdiction remains limited to that conferred on it by Article XXI, paragraph 2, of the 1955 Treaty" (paras. 40 and 42 of the Judgment).

22. I seriously doubt, however, whether the Court has faithfully stuck to this declared intention. Already in the next paragraph the Court observes that in the present case the question whether measures taken under Article XX, paragraph 1 *(d)*, were necessary overlaps with the question of their validity as acts of self-defence. And then the Court immediately cites the 1986 *Nicaragua* Judgment, where it said that the criteria of necessity and proportionality must be met if a measure is to be qualified as self-defence. That statement, however, was made in the context of the Court's dealing with the dispute concerning the lawfulness of the use of force under customary international law as submitted to the Court under Article 36, paragraph 2, of the Statute. That does not mean that that statement is irrelevant for the interpretation of Article XX, paragraph 1 *(d)*, but it seems to pave the way for a nearly exclusive consideration of the United States actions in the light of the right of self-defence under general international law. It can therefore come as no surprise when the Court says in paragraph 50 that it will "first concentrate on the facts tending to show the validity or otherwise of the *claim* to exercise the *right of self-defence*" (emphasis added).

23. But that is putting the shoe on the wrong foot. For this is not the claim before the Court, which has to decide whether the actions against the platform can be qualified as measures necessary to protect the United States security interests in the sense of Article XX, paragraph 1 *(d)*, of the 1955 Treaty, not whether they were justified as measures taken in self-defence under international law. It can be readily admitted that if these measures involve the use of force, the rules of general international law become relevant for the question whether these measures can qualify as being "necessary". But that is something completely different from putting these measures directly to the test of the general rules of law on the use of

force. The relationship is in my opinion aptly reflected in the decision of the Iran-United States Claims Tribunal in the *Amoco International Finance* case when it said with regard to the 1955 Treaty that "the rules of customary law may be useful . . . to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions" (15 *Iran-US CTR* 189, p. 222, para. 112).

24. The Court, however, considers the United States actions nearly exclusively in the light of the right of self-defence and returns only at a rather late stage to the terms of Article XX, paragraph 1 *(d)* (para. 73 of the Judgment). In doing so, it takes as its point of departure the letters sent to the Security Council by the United States Permanent Representative after each of the two incidents, letters that were inevitably worded in Charter-language and most certainly would not have referred to Article XX, paragraph 1 *(d)*, of the 1955 Treaty even if the United States had linked the actions against the platforms with that Treaty. It is these letters, from which the United States understandably did not distance itself in the present proceedings, which are constantly referred to as yardsticks for the evaluation of the conduct of the United States.

25. The result is that the Court in paragraph 78 of the Judgment concludes that the actions carried out by United States forces against the oil platforms 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 by Article XX, paragraph 1 *(d)*, of the 1955 Treaty (emphasis added). But as Judge Jennings pointedly said in his opinion in the *Nicaragua* case:

> "The question . . . is not . . . whether such measures are justified in international law as action taken in self-defence . . .; the question is whether the measures in question are, or are not, in breach of the Treaty." *(Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 541.)

26. The parallel finding of the Court in the *dispositif,* where it is said that the actions against the platforms cannot be justified as measures necessary to protect the essential security interests of the United States "*as interpreted in the light of* international law on the use of force" (emphasis added), is in my opinion phrased in a way which is more in conformity with the proper character of the Court's jurisdiction.

27. The question may, however, be raised whether this finding should have a place in the *dispositif* in view of the fact that it is not relevant for the Court's ultimate decision on Iran's claim, viz. that the actions against

the platforms did not infringe the freedom of commerce in oil between the territories of the Parties.

28. In this respect, it may be recalled that the Court in paragraph 34 of the Judgment said that

> "If in the present case the Court is satisfied . . . that the actions against the oil platforms were . . . 'measures . . . necessary to protect [the] essential security interests' of the United States . . . it must hold that no breach of Article X, paragraph 1, of the Treaty has been established."

The Court came, however, to the opposite conclusion (a conclusion which I share): the actions against the platforms do *not* qualify as "measures" under Article XX, paragraph 1 *(d)*. That conclusion, therefore, does not release the Court from the separate task of considering whether the actions adversely affected the freedom of commerce in the sense of Article X, paragraph 1.

29. From a procedural point of view the Court's consideration of Article XX, paragraph 1 *(d)*, became irrelevant for the decision on the claim, its effect merely being that that claim had to be decided on arguments material to Article X, paragraph 1, itself. And from a more practical point of view, one could say that the Court could have spared itself a lot of work if it had taken the same approach as it had taken in 1986 in the *Nicaragua* case and had dealt first with Article X, paragraph 1. In the present case the Court would have found (as it actually did) that there was no violation of Article X, paragraph 1, and the whole issue of Article XX, paragraph 1 *(d)*, could have been left aside, an outcome which is totally different from that reached in 1986.

30. It is not my intention to criticize the Court for the fact that it decided to deal in depth with the lawfulness of the actions against the platforms under Article XX, paragraph 1 *(d)*. Nor do I seriously doubt the Court's wisdom in taking up this issue first and considering only at a later stage the main issue of a violation of Article X, paragraph 1, although with hindsight it can be said that that would have been the more logical and, therefore, the more desirable approach. But pure logic does not always provide the most desirable solution.

31. As the Court correctly states: the order in which the two Articles must be dealt with is not dictated by the structure (or "economy" as the Court calls it) of the Treaty: Article XX is not an exoneration clause. The Court was free to go either way. Whether it is still correct to speak of a defence on the merits (as the Court did in 1996 and still does in paragraph 33 of the Judgment) if the defence is taken up before the merits is debatable but is in my view not essential. The Court is free to choose which way to go and to give its reasons for that choice. In the present

case, the Court gave as its main argument the fact that the United States measures involved the use of force and that the lawfulness of these measures had been fiercely disputed between the Parties.

32. It is indeed true that the issue of the lawfulness of the United States actions covered a major part of the Parties' arguments and that therefore much pleads for the Court taking special note of these arguments. But the fact that the lawfulness of the use of force as practised by the United States was fiercely disputed between the Parties does not mean that that issue was the dispute before the Court. That dispute was whether the United States had violated Article X, paragraph 1, concerning freedom of commerce between the territories of the Parties. The Court did not have two heads of jurisdiction: one concerning Article X, paragraph 1, and one concerning Article XX, paragraph 1 *(d)*. Article XX, paragraph 1 *(d)*, is only relevant in its connection with Article X, paragraph 1. The whole matter of Article XX, paragraph 1 *(d)*, could have been relevant for the definitive settlement of that dispute, but once it was found not to be, it was no longer a ground upon which the Court could base its Judgment. The Court's finding in this respect therefore should not be part of the *dispositif*, which is a decision on the Applicant's claim, and that claim could be sufficiently disposed of by considering Article X, paragraph 1, in its own right.

33. There may be an "economy of a treaty" but there certainly is also an "economy of a Judgment". The first law of that latter economy is not to mix up reasoning and *dispositif*. The operative part of a judgment is the *disposition* on the final submissions.

> "A party's final submission in a case consists of a statement of what it claims in the case, or is requiring from the Court, and not of the reasoning by reference to which it maintains that the Court should act in accordance with the submission."[2]

Iran's final submission was simple and clear (see paragraph 20 of the Judgment) and the Court adequately replied to that submission in the second part of paragraph 1 of the *dispositif*. The first part of that paragraph is redundant: it introduces an *obiter dictum* into the operative part of a judgment.

34. That does not mean that the Court's reasoning should not reflect the main arguments of the Parties. Sir Hersch Lauterpacht notes with approval that:

[2] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. II, p. 578.

> "In general, the Court has examined, with exacting care, the issues raised by the Parties in their pleadings so far as this has been necessary for *explaining* its decisions. This it has done even if the Judgment or Opinion could be made to rest on a narrower ground than that actually adopted."[3]

In this respect the present Judgment would certainly not have disappointed Sir Hersch. But he most certainly would not have endorsed the inclusion of an argument in the *dispositif* which is not a ground for the decision.

35. But the inevitable effect of the prominent place given to Article XX, paragraph 1 *(d)*, and its interpretation in the light of general international law, combined with the first part of paragraph 1 of the *dispositif*, is that the Judgment reads more like a judgment on the legality of the use of force than as one on the violation *vel non* of a commercial treaty. One can only wonder what the effect will be on States which are parties to comparable treaties with a compromissory clause.

THE COURT'S REASONING

36. I find the Court's argument leading to the conclusion that the actions against the platforms cannot be said to have infringed the freedom of commerce in oil between the territories of the Parties persuasive and legally well argued.

In particular, I share the view that the platforms were not merely sites for the extraction of oil, but also were involved in the transport of goods destined to be exported and that therefore in principle their destruction affected adversely the freedom of commerce as protected by Article X, paragraph 1, of the 1955 Treaty. It is, however, the limitation of that protection to commerce between the territories of the Parties in combination with the fact that no actual commerce in oil produced at the platforms was taking place between these territories because they did not at the time of the attack produce oil or because the embargo imposed by United States Executive Order 12613 had taken effect, which must lead to the conclusion that there was no actual infringement of that freedom of commerce.

37. Although Iran's argument that the key issue is not the damage in practice but the violation of the freedom in general to engage in commerce is theoretically not without merit, it has to be kept in mind that the 1955 Treaty is a bilateral treaty enumerating the Parties' specific obligations vis-à-vis each other. It would go too far to interpret the term freedom of commerce in such a broad way that it would encom-

[3] Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1982, p. 61; emphasis added.

pass also the trade in goods only to be produced or to be traded at a later stage.

38. Likewise, Iran's argument that the United States Executive Order imposing the embargo made an exception for "petroleum products refined from Iranian crude oil in a third country", thus allowing commerce in oil to continue, tends to ignore that a bilateral treaty can only be expected to protect recognizable and identifiable trade. "Recognizable" means that there must be a commercial transaction or a set of such transactions which directly connect the territories of the Parties; identifiable means that the object of these transactions can be demonstrated as moving from the territory of one Party to that of the other.

The Court rightly concludes (para. 97 of the Judgment) that what is called "indirect commerce" by Iran is not commerce between Iran and the United States, but commerce of each of them with intermediaries which prevent them from bearing responsibility for the transactional phase in which they are not involved.

As for the requirement of "identifiability", it is Iran's expert, Professor Odell, himself who describes the third country's downstream oil industry as being capable of most effectively "de-nationalizing" the crude oil moving into it.

> "The conversion of each barrel of that crude into a slate of products . . . [makes] it impossible for any recipient of such products to demonstrate that those products were not derived in part from a crude which was embargoed." (Odell Report, p. 9, Reply of Iran, Vol. III.)

This "denationalizing" effect is clearly demonstrated by the surveys of United States General Imports and Imports for Consumption presented by the United States, which mention Iran as the country of origin of imported crude oil (until the embargo became truly effective), but never as the country of origin of (crude) oil derivatives, whether before the issuance of the embargo or thereafter (Counter-Memorial of the United States, Exhibit 141). This is also in conformity with international trade practice, which tends to base determinations of origin either on the country where the good was wholly obtained or the country where the good underwent its last substantial transformation; oil derivates fall in the latter category[4].

39. As for the counter-claim of the United States, I fully share the Court's view that in order for it to determine the existence of a violation

[4] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 1999, p. 128.

of the obligation to respect freedom of commerce and navigation, the claimant must demonstrate that the objects affected by such violating acts were actually involved in such commerce or navigation between the territories of the parties. If the claimant fails to substantiate this, the ground for the claim falls away irrespective of the question whether the violating acts can be attributed to the other party or whether the claimant could act for the allegedly affected targets. The Court's reasoning could therefore be rather straightforward and I find no fault with it.

40. As for the United States generic claim based on the alleged responsibility of Iran for the creation of a particularly unsafe situation in the Gulf which led to higher labour and insurance costs, such a claim can only be upheld if the claimant demonstrates damages which are directly linked to a concrete infringement of the freedom of commerce and navigation between the parties' territories. Increased costs which are not directly caused by such an infringement are insufficient for such purpose.

41. The most voluminous part of the reasoning in the Judgment deals with the question whether the United States actions could qualify as acts of self-defence and *thus* as measures necessary to protect its essential security interests (Judgment, para. 78).

42. As I said before, the approach taken by the Court is putting the cart before the horse. The Court rightly starts by saying that it is its competence to interpret and apply Article XX, paragraph 1 *(d)* (Judgment, para. 33), but it does so by directly applying the criteria of self-defence under Charter law and customary law and continues to do so until it reaches its conclusion in paragraph 78.

43. The proper approach in my view would have been to scrutinize the meaning of the words "necessary to protect the essential security interests" in Article XX, paragraph 1 *(d)*. In 1986 the Court said in this respect:

> "The Court has . . . to assess whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 117, para. 224.)

44. In my opinion, this is a rather felicitous choice of words. With regard to the assessment of the risk run by the essential security interests, the term "reasonableness" is used; with regard to the "measures taken", the Court states that it is not sufficient that they may be deemed "useful" but that they must be necessary. This seems to indicate that with regard

to the measures taken a stricter test must be used than with regard to the assessment that essential security interests are at risk. There seem to be good reasons for such a distinction with regard to the margin of discretion to be left to governmental authorities. The evaluation of what essential security interests are and whether they are in jeopardy is first and foremost a political question and can hardly be replaced by a judicial assessment. Only when the political evaluation is patently unreasonable (which might bring us close to an "abuse of authority") is a judicial ban appropriate. And although the choice of means to be taken in order to protect those interests will also be politically motivated, that choice lends itself much more to judicial review and thus to a stricter test, since the means chosen directly affect the interests and rights of others. Moreover, the means by which interests may be protected are usually subjected to legal prescriptions that are stricter and more compelling as the interests and rights that may be affected are deemed more important by the law.

45. In the case before the Court the United States has concluded that a missile attack on and the mining of ships flying its flag combined with other acts endangering neutral shipping are a threat to its essential security interests. I find it difficult to apply the test of reasonableness and to conclude that the American assessment cannot stand that test. Any other government finding itself in the same situation might have come to the same conclusion and the reactions of a large number of other governments confirm that assessment.

46. Confronted with this threat to its essential security interests the United States decided (unlike other States) no longer to use diplomatic and other political pressure, but to opt for a reaction which involved the use of force. By doing so, it opted for means the use of which must be subjected to strict legal norms, since the prohibition of force is considered to have a peremptory character. The measure of discretion to which the United States is entitled is therefore considerably more limited than if it had chosen, for instance, the use of economic measures.

47. This brings us to the question which criteria must be used when the legality test is applied. In this respect, the United States claims that the 1955 Treaty is a *lex specialis* and that consequently the criterion of the Charter-based notion of self-defence cannot be applied. As counsel for the United States stated:

> "*The standard for determining the lawfulness under the 1955 Treaty of the United States action is not self-defence; it is the need to take these actions to protect essential security interests.* Consequently, if the action with which the United States is reproached

were necessary to protect its essential security interests, they were lawful with respect to Article X of the 1955 Treaty." (CR 2003/12, p. 19; emphasis in the original.)

48. This position, although formally correct, is nevertheless question begging. The Court's jurisdiction is limited to the interpretation and application of the 1955 Treaty; it cannot therefore determine whether certain acts are contrary to the Charter provisions and the customary rules of the law on self-defence. But neither Article XX, paragraph 1 *(d)*, itself nor any other provision of the Treaty contains elements which enable the Court to apply the legality test with regard to the question whether measures, taken to protect the essential security interests, are necessary indeed. The Court, therefore, has no choice but to rely for this purpose on the body of general international law.

49. General international law is therefore indispensable as a standard of interpretation of the provisions of the 1955 Treaty. If the measures taken involve the use of force, it is therefore the rules on the use of force which have to be called in in order to enable the Court to appreciate the lawfulness of these measures. Counsel for the United States was right when he said that if the United States measures are deemed to be necessary to protect its essential security interests, there is no need to ask whether these measures were *also* taken in the exercise of self-defence. But in order to come to the first conclusion, the law on the right of self-defence cannot be disregarded.

50. The Court's Judgment in the *Nicaragua* case is in my opinion highly illustrative in this respect. With regard to the trade embargo, which had already been found to be contrary to Article XIX (the Article on freedom of commerce) of the 1956 FCN Treaty (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 140, para. 279), the Court asked the question whether its wrongfulness was precluded by Article XXI, paragraph 1 *(d)*. The Court first applied the test of reasonableness and came to a negative conclusion:

> "Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to 'essential security interests' in May 1985, when these policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo 'was necessary' to protect those interests." *(Ibid.*, p. 141, para. 282.)

If the alleged threat to the "essential" security interests cannot be deemed reasonable, the measures taken are *eo ipso* not necessary.

51. With regard to the mining of Nicaraguan ports and the attacks on ports and oil installations, the Court had (by virtue of its jurisdiction under Article 36, paragraph 2, of the Statute) already found that these acts amounted to an unlawful use of force under customary law. When dealing with these same acts in the context of Article XXI, paragraph 1 *(d)*, of the FCN Treaty, the Court confined itself to saying that these "cannot possibly be justified as 'necessary' to protect the essential security interests of the United States" (*I.C.J. Reports 1986*, p. 141, para. 282).

Evidently, in applying the legality test to the measures taken by the United States in order to protect its essential security interests, the Court used the same standard as it had applied when dealing with these acts from the viewpoint of the lawfulness of the use of force under customary law. If they could not be justified under customary law, they cannot "possibly" be justified under Article XXI, paragraph 1 *(d)*.

52. As far as the legal aspects of Article XX, paragraph 1 *(d)*, of the 1955 Treaty are concerned, the correct approach in my view is the following:

(a) The Court has no jurisdiction to determine whether the destruction of the oil platforms can or cannot be justified as acts of legitimate self-defence.

(b) When determining whether a measure is "necessary to protect a party's essential security interests" the Court must first apply the test of reasonableness with regard to the question whether there existed a plausible threat to these interests justifying certain protective measures. As already said, I am satisfied that in the present case the United States could with good reason argue that its essential security interests were at risk. The fact that other States in a comparable situation made diplomatic protests and took protective measures by means of a military presence in the Gulf is evidence of a general perception that important and essential interests were at stake.

(c) The fact that the United States decided to take measures involving the use of force makes it necessary for the Court to assess their legality in the light of the rules of general international law on the use of force. The use of force is not excluded by Article XX, paragraph 1 *(d)*. The legality test to be applied by the Court must therefore be based on the presumption that the use of force is prohibited unless it can be justified under general international law of which the principle of legitimate self-defence is an important element.

53. Although the United States often refers to Iran's unlawful behaviour in general during the Tanker War, it does not contest that the attacks on the oil platforms were a reaction to two specific incidents.

On 16 October 1987 the United States-flagged tanker *Sea Isle City* was hit by a missile; three days later the Reshadat platform was attacked and destroyed. On 14 April 1988 the United States frigate *Samuel B. Roberts* struck a mine; five days later the Salman and Nasr platforms were attacked and destroyed. The first question to be answered, therefore, is whether these incidents were attributable to Iran.

54. I share the Court's view that the United States has not been able to submit convincing evidence that the missile attack on the *Sea Isle City* can be attributed to Iran. Although this attack undoubtedly increased the security risks for United States and other neutral shipping, the contention by the United States that this increased risk must be attributed to Iran and consequently entitled the United States to use force, cannot be accepted. In view of the fact that the use of force must be subjected to a strict legality test, probabilities or even near certainties do not suffice as justification; the United States could and should have taken recourse to other means to protect its security interests. The destruction of the Reshadat and Resalat platforms therefore does not qualify as measures *necessary* to protect the essential interests of the United States.

55. The question whether the missile attack on the *Sea Isle City* and other incidents mentioned by the United States (see paragraph 64 of the Judgment) constituted an armed attack on the United States itself, entitling it to exercise the right of self-defence, is in my view less relevant. Since none of these incidents can with certainty be attributed to Iran, a retaliatory measure involving the use of force against the State cannot by any legal standards be called a measure that is necessary.

56. The case is different in my opinion with regard to the mining of the USS *Samuel B. Roberts*. I am satisfied that the United States has provided sufficient evidence to justify the conclusion that the *Samuel B. Roberts* was hit by an Iranian mine and that this can be attributed to Iran, which, in violation of the rules of naval warfare, had laid mines in international waters without notifying neutral shipping. The fact that in the days after the accident mines were found in the immediate neighbourhood which were moored, carried the distinctive serial numbering of Iranian mines and had evidently been laid recently, proves in my view beyond any reasonable doubt that the *Samuel B. Roberts* was struck by an Iranian mine. It is another question whether the *Samuel B. Roberts* was specifically targeted. The fact that the mines found were not yet encrusted with marine growth and thus had been laid recently might be an indication that this was the case. However, since no more precise data are available, as for example the exact date of the minelaying, that question cannot be answered definitively.

57. Nevertheless, the question must be answered whether the fact that the United States could with good reason assume that Iran was responsible for the mining of the *Samuel B. Roberts* entitled it to take military action against the Salman and Nasr platforms. In this respect, it may be recalled that the attacks on the platforms were part of a larger operation, code named "Praying Mantis", which was also directed against the Iranian Navy. Whether that part of the operation was wrongful under general international law is not relevant for the present case, the scope of which is confined to the destruction of the platforms.

58. The reasons given by the United States for attacking the platforms can be summarized in the words of General Crist in a statement, which was provided by the United States as an exhibit:

> "I believed the best way of undermining Iran's ability to attack US forces was to degrade their ability to observe our forces — in effect put out their eyes. Iran's offshore oil platforms were extremely valuable eyes for directing and supporting attacks against us . . . They were used as a staging facility for attacks by Iranian forces in Gulf Shipping." (Counter-Memorial of the United States, Exhibit 44.)

With regard to this argument, it may be relevant to recall what the Court said in the *Nicaragua* case, and which was quoted in paragraph 49 above, viz. that the Court has to assess whether the measures presented as being designed to protect these interests are not merely useful but "necessary".

59. I share the Court's view that the evidence concerning the military functions of the platforms is not entirely satisfactory, in particular with regard to the Salman and Nasr platforms, which were the target of the United States actions after the mining of the *Samuel B. Roberts*. Whether they had such an innocuous character as Iran contends may be open to doubt. But I do not find convincing the evidence submitted by the United States to testify to their *offensive* character. In this regard, it is also worth mentioning that the United States never referred in its many diplomatic démarches to the platforms as an important element in the threat to neutral shipping, whereas it regularly referred to Silkworm missiles, mining, attacks by helicopters and gunboats.

60. This raises the question whether the destruction of the Salman and Nasr platforms can be considered with good reason the most appropriate reaction to the mining of the *Samuel B. Roberts*, in particular in view of the fact that there is no indication that these platforms played a role in the laying of the mines and in staging the attack against the *Samuel B. Roberts*.

61. The International Law Commission's Rapporteur on State Responsibility, Roberto Ago, wrote in 1980 concerning self-defence as a circumstance precluding wrongfulness:

> "In fact, the requirements of the 'necessity' and 'proportionality' of the action taken in self-defence can simply be described as two sides of the same coin. Self-defence will be valid as a circumstance precluding the wrongfulness of the conduct of the State only if that State was unable to achieve the desired result by different conduct involving either no use of armed force at all or merely its use on a lesser scale." (*Yearbook of the International Law Commission*, 1980, Vol. II, Part One, p. 69.)

62. Regardless of whether the mining of the *Samuel B. Roberts* constituted an armed attack on the United States, entitling it to act in self-defence, the relevant question is whether the United States was unable to achieve the desired result (the protection of its essential security interests) by different conduct, involving either no use of armed force at all or merely its use on a lesser scale, for example by actions against naval vessels known to be involved in minelaying (such actions were part of operation "Praying Mantis", but their lawfulness is beyond the Court's jurisdiction).

In view of the uncertainty about the platforms' role in the minelaying and the severe damage inflicted upon Iran's economic interests, I am not convinced that the destruction of the Salman and Nasr platforms is in conformity with the standard just mentioned or that it can be called a measure necessary to protect the essential security interests of the United States. I find it hard to avoid the impression that in reality a punitive intent prevailed.

63. In conclusion (and without having to scrutinize — as the Court did — whether all requirements of the law of self-defence are fulfilled), I am of the view that the attacks on the oil platforms cannot be seen as measures necessary to protect the essential security interests of the United States, even if these interests are construed in a broad sense. With regard to the destruction of the Reshadat platform, the attack on the *Sea Isle City* cannot be said with sufficient certainty to be attributable to Iran; in the case of the *Samuel B. Roberts* the mining in my view *is* attributable to Iran, but the destruction of the Salman and Nasr platforms cannot be seen as an appropriate, in the sense of a necessary and proportionate, response.

(*Signed*) Pieter H. KOOIJMANS.