

INTERNATIONAL COURT OF JUSTICE

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CASE CONCERNING OIL PLATFORMS

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES
OF AMERICA)

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18. In the Application, the following requests were made by Iran:

“On the basis of the foregoing, and while reserving the right to supplement and amend these submissions as appropriate in the course of further proceedings in the case, the Islamic Republic respectfully requests the Court to adjudge and declare as follows:

- (a) that the Court has jurisdiction under the Treaty of Amity to entertain the dispute and to rule upon the claims submitted by the Islamic Republic;
- (b) that in attacking and destroying the oil platforms referred to in the Application on 19 October 1987 and 18 April 1988, the United States breached its obligations to the Islamic Republic, *inter alia*, under Articles I and X (1)* of the Treaty of Amity and international law;
- (c) that in adopting a patently hostile and threatening attitude towards the Islamic Republic that culminated in the attack and destruction of the Iranian oil platforms, the United States breached the object and purpose of the Treaty of Amity, including Articles I and X (1), and international law;
- (d) that the United States is under an obligation to make reparations to the Islamic Republic for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. The Islamic Republic reserves the right to introduce and present to the Court in due course a precise evaluation of the reparations owed by the United States; and
- (e) any other remedy the Court may deem appropriate.”

*Note that, in its Memorial, Iran also referred to Article IV(1)

[...]

20. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Iran,

at the hearing of 3 March 2003, on the claim of Iran:

“The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare:

1. 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, paragraph 1, of the Treaty of Amity, and that the United States bears responsibility for the attacks; and
 2. That the United States is accordingly under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused in a form and amount to be determined by the Court at a subsequent stage of the proceedings, the right being reserved to Iran to introduce and present to the Court in due course a precise evaluation of the reparation owed by the United States; and
 3. Any other remedy the Court may deem appropriate";
- at the hearing of 7 March 2003, on the counter-claim of the United States:

"The Islamic Republic of Iran respectfully requests the Court, rejecting all contrary claims and submissions, to adjudge and declare:

That the United States counter-claim be dismissed."

On behalf of the Government of the United States,

at the hearing of 5 March 2003, on the claim of Iran and the counter-claim of the United States:

"The United States respectfully requests that the Court adjudge and declare:

- (1) that the United States did not breach its obligations to the Islamic Republic of Iran under Article X, paragraph 1, of the 1955 Treaty between the United States and Iran; and
- (2) that the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, the United States requests that the Court adjudge and declare:

- (1) rejecting all submissions to the contrary, that, in attacking vessels in the Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the territories of the United States and the Islamic Republic of Iran, the Islamic Republic of Iran breached its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty; and
- (2) that the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for its breach of the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings."

* * *

21. The task of the Court in the present proceedings is to determine whether or not there have been breaches of the 1955 Treaty, and if it finds that such is the case, to draw the appropriate consequences according to the submissions of the Parties. The Court is seised both of a claim by Iran alleging breaches by the United States, and of a counter-claim by

the United States alleging breaches by Iran. Its jurisdiction to entertain both the claim and the counter-claim is asserted to be based upon Article XXI, paragraph 2, of the 1955 Treaty.

22. The Court recalls that, as regards the claim of Iran, the question of jurisdiction has been the subject of a judgment, given on 12 December 1996, whereby the Court found "that it has jurisdiction, on the basis of Article XXI, paragraph 2, of the 1955 Treaty, to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty" (*I.C.J. Reports 1996 (II)*, p. 821, para. 55 (2)); certain questions have however been raised between the Parties as to the precise significance or scope of that Judgment, which will be examined below.

As to the counter-claim, the Court also recalls that it decided by an Order made on 10 March 1998 to admit the counter-claim, and indicated in that Order that the facts alleged and relied on by the United States "are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court", and accordingly that "the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1" (*I.C.J. Reports 1998*, p. 204, para. 36). In this respect also questions have been raised between the Parties as to the significance and scope of that ruling on jurisdiction, and these will be examined below.

It is however established, by the decisions cited, that both Iran's claim and the counter-claim of the United States can be upheld only so far as a breach or breaches of Article X, paragraph 1, of the 1955 Treaty may be shown, even though other provisions of the Treaty may be relevant to the interpretation of that paragraph. Article X, paragraph 1, of the 1955 Treaty reads as follows: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

23. Before proceeding further, it will be convenient to set out the factual background to the case, as it emerges from the pleadings of both Parties; the broad lines of this background are not disputed, being a matter of historical record. The actions giving rise to both the claim and the counter-claim occurred in the context of the general events that took place in the Persian Gulf between 1980 and 1988, in particular the armed conflict that opposed Iran and Iraq. That conflict began on 22 September 1980, when Iraqi forces advanced into the western areas of Iranian territory, and continued until the belligerent parties accepted a ceasefire in the summer of 1988, pursuant to United Nations Security Council resolution 598 (1987) of 20 July 1987. During the war, combat occurred in the territories of both States, but the conflict also spread to the Persian Gulf — which is an international commercial route and line of communication of major importance — and affected commerce and navigation in the region. From the very beginning of the conflict, on 22 September 1980, Iran established a defence exclusion zone around its coasts; shortly after, in early October 1980, Iraq declared a "prohibited war zone" and later

established a "naval total exclusive zone" in the northern area of the Persian Gulf. In 1984, Iraq commenced attacks against ships in the Persian Gulf, notably tankers carrying Iranian oil. These were the first incidents of what later became known as the "Tanker War": in the period between 1984 and 1988, a number of commercial vessels and warships of various nationalities, including neutral vessels, were attacked by aircraft, helicopters, missiles or warships, or struck mines in the waters of the Persian Gulf. Naval forces of both belligerent parties were operating in the region, but Iran has denied responsibility for any actions other than incidents involving vessels refusing a proper request for stop and search. The United States attributes responsibility for certain incidents to Iran, whereas Iran suggests that Iraq was responsible for them.

24. A number of States took measures at the time aimed at ensuring the security of their vessels navigating in the Persian Gulf. In late 1986 and early 1987, the Government of Kuwait expressed its preoccupation at Iran's alleged targeting of its merchant vessels navigating in the Persian Gulf. It therefore requested the United States, the United Kingdom and the Soviet Union to "reflag" some of these vessels to ensure their protection. Following this request, the Kuwaiti Oil Tanker Company was able to charter a number of Soviet vessels, and to flag four ships under United Kingdom registry and 11 ships under United States registry. In addition, the Government of the United States agreed to provide all United States-flagged vessels with a naval escort when transiting the Persian Gulf, in order to deter further attacks; these escort missions were initiated in July 1987, under the designation "Operation Earnest Will". Other foreign Powers, including Belgium, France, Italy, the Netherlands and the United Kingdom, took parallel action, sending warships to the region to protect international shipping. Despite these efforts, a number of ships, including reflagged Kuwaiti vessels, merchant tankers carrying Kuwaiti oil and warships participating in "Operation Earnest Will", suffered attacks or struck mines in the Persian Gulf between 1987 and the end of the conflict.

25. Two specific attacks on shipping are of particular relevance in this case. On 16 October 1987, the Kuwaiti tanker *Sea Isle City*, reflagged to the United States, was hit by a missile near Kuwait harbour. The United States attributed this attack to Iran, and three days later, on 19 October 1987, it attacked Iranian offshore oil production installations, claiming to be acting in self-defence. United States naval forces launched an attack against the Reshadat ["Rostam"] and Resalat ["Rakhsh"] complexes; the R-7 and R-4 platforms belonging to the Reshadat complex were destroyed in the attack. On 14 April 1988, the warship USS *Samuel B. Roberts* struck a mine in international waters near Bahrain while returning from

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* * *

31. As noted above (paragraph 21), the dispute in the present case has been brought before the Court on the jurisdictional basis of Article XXI, paragraph 2, of the 1955 Treaty, which provides that

“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.”

By its Judgment of 12 December 1996, the Court found that it had jurisdiction, on the basis of this Article, “to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty” (*I.C.J. Reports 1996 (II)*, p. 821, para. 55 (2)), which provides, as noted above (paragraph 22), that “Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.” In the reasoning of that Judgment, the Court indicated that another Article of the Treaty relied on by Iran, Article IV (which relates to reciprocal treatment of nationals and companies of each party), could not “form the basis of the Court’s jurisdiction” (*ibid.*, p. 816, para. 36). It found further that Article I of the Treaty, which provides that “There shall be firm and enduring peace and sincere friendship between the United States of America and Iran”, while being “such as to throw light on the interpretation of the other Treaty provisions” and “thus not without legal significance for such an interpretation, . . . cannot, taken in isolation, be a basis for the jurisdiction of the Court” (*ibid.*, p. 815, para. 31). The task of the Court is thus to ascertain whether there has been a breach by the United States of the provisions of Article X, paragraph 1; other provisions of the Treaty are only relevant in so far as they may affect the interpretation or application of that text.

32. In that respect, the Court notes that the United States has relied on Article XX, paragraph 1 (*d*), of the Treaty as determinative of the question of the existence of a breach of its obligations under Article X. That paragraph provides that

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

.....

- (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.”

It is the contention of the United States that the actions complained of by Iran were measures necessary to protect the essential security interests of the United States, and that accordingly, if those actions would otherwise have been breaches of Article X, paragraph 1, of the Treaty, which the United States denies, the effect of Article XX, paragraph 1 (d), is that they are justified under the terms of the Treaty itself, and thus do not constitute breaches of it.

33. In its Judgment on the United States preliminary objection of 12 December 1996, the Court ruled that Article XX, paragraph 1 (d), does not afford an objection to admissibility, but “is confined to affording the Parties a possible defence on the merits” (*I.C.J. Reports 1996 (II)*, p. 811, para. 20). In accordance with Article XXI, paragraph 2, of the Treaty, it is now for the Court to interpret and apply that subparagraph, inasmuch as such a defence is asserted by the United States.

34. As was noted in that Judgment, the Court has had occasion, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, to examine a provision in another treaty concluded by the United States, of which the text is substantially identical to that of Article XX, paragraph 1 (d). This was Article XXI, paragraph 1 (d), of the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua. In its decision in that case, the Court observed that since that provision

“contains a power for each of the parties to derogate from the other provisions of the Treaty, the possibility of invoking the clauses of that Article 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” (*I.C.J. Reports 1986*, p. 117, para. 225).

If in the present case the Court is satisfied by the argument of the United States that the actions against the oil platforms were, in the circumstances of the case, “measures . . . necessary to protect [the] essential security interests” of the United States, within the meaning of Article XX, paragraph 1 (d), of the 1955 Treaty, it must hold that no breach of Article X, paragraph 1, of the Treaty has been established.

35. 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*). The question however arises in what order the Court should examine these questions of interpretation and application of the Treaty. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court first examined the question whether the United States conduct constituted a prima facie breach of other provisions of the Treaty; it concluded that the United States had "committed acts which are in contradiction with the terms of the Treaty", but added that this was "subject to the question whether the exceptions in Article XXI" of the 1956 Treaty, concerning *inter alia* protection of the essential security interests of a party, "may be invoked to justify the acts complained of" (*I.C.J. Reports 1986*, p. 140, para. 280). The Court thus dealt first with the substantive provisions of the 1956 Treaty, breaches of which had been alleged, before turning to Article XXI of the Treaty; in effect, it analysed that Article as providing for "exceptions" to the substantive obligations provided for in other Articles of the Treaty (see *ibid.*, p. 116, para. 222).

36. In the present case the United States has argued that Article XX, paragraph 1 (*d*), of the 1955 Treaty is not a limitation on Article X, paragraph 1, nor yet a derogation from it; and that it is a substantive provision that determines, defines and delimits the obligations of the parties, simultaneously with and on the same level as Article X, paragraph 1. The United States therefore contends that there is no compelling reason to examine the question of breach of Article X, paragraph 1, before turning to Article XX, paragraph 1 (*d*); the Court can, it suggests, 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.

37. The Court does not consider that the order in which the Articles of the 1956 Treaty were dealt with in the case concerning *Military and Paramilitary Activities in and against Nicaragua* was dictated by the economy of the Treaty; it was rather an instance of the Court's "freedom to select the ground upon which it will base its judgment" (*Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 62). 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. 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.

38. 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.

39. The question of the relationship between self-defence and Article XX, paragraph 1 (*d*), of the Treaty has been disputed between the Parties, in particular as regards the jurisdiction of the Court. The United States emphasizes that the Court's jurisdiction in this case is limited, pursuant to Article XXI, paragraph 2, of the 1955 Treaty, to the interpretation and application of that Treaty, and does not extend directly to the determination of the legality of any action of either Party under general international law. It has contended that

"the Court need not address the question of self-defence . . . [T]he scope of the exemption provided by Article XX, paragraph 1 (*d*), is not limited to those actions that would also meet the standards for self-defence under customary international law and the United Nations Charter."

It however does not contend that the Treaty exempts it, as between the parties, from the obligations of international law on the use of force, but simply that where a party justifies certain action on the basis of Article XX, paragraph 1 (*d*), that action has to be tested solely against the criteria of that Article, and the jurisdiction conferred on the Court by Article XXI, paragraph 2, of the Treaty goes no further than that.

40. In the view of the Court, the matter is one of interpretation of the Treaty, and in particular of Article XX, paragraph 1 (*d*). The question is whether the parties to the 1955 Treaty, when providing therein that it should "not preclude the application of measures . . . necessary to protect

[the] essential security interests” of either party, intended that such should be the effect of the Treaty even where those measures involved a use of armed force; and if so, whether they contemplated, or assumed, a limitation that such use would have to comply with the conditions laid down by international law. In the case concerning *Military and Paramilitary Activities in and against Nicaragua* the Court took the view that “action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI” — the text in that case corresponding to Article XX of the 1955 Treaty — “as ‘necessary to protect’ the ‘essential security interests’ of a party” (*I.C.J. Reports 1986*, p. 117, para. 224); and it cited an extract from the proceedings of the United States Senate Foreign Relations Committee tending to show that such had been the intentions of the Parties (*ibid.*). This approach is consistent with the view that, when Article XX, paragraph 1 (*d*), is invoked to justify actions involving the use of armed 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 international law.

41. It should not be overlooked that Article I of the 1955 Treaty, quoted in paragraph 31 above, declares that “There shall be firm and enduring peace and sincere friendship between the United States of America and Iran.” The Court found in 1996 that this Article “is such as to throw light on the interpretation of the other Treaty provisions” (*I.C.J. Reports 1996 (II)*, p. 815, para. 31). It is hardly consistent with Article I to interpret Article XX, paragraph 1 (*d*), to the effect that the “measures” there contemplated could include even an unlawful use of force by one party against the other. Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account “any relevant rules of international law applicable in the relations between the parties” (Art. 31, para. 3 (*c*)). The Court cannot accept that Article XX, paragraph 1 (*d*), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty.

42. The Court is therefore satisfied that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty to decide any question of interpretation or application of (*inter alia*) Article XX, paragraph 1 (*d*), of that Treaty extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an

unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law. The Court would however emphasize that its jurisdiction remains limited to that conferred on it by Article XXI, paragraph 2, of the 1955 Treaty. The Court is always conscious that it has jurisdiction only so far as conferred by the consent of the parties.

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43. The Court will thus examine first the application of Article XX, paragraph 1 (*d*), of the 1955 Treaty, which in the circumstances of this case, as explained above, involves the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence. On the basis of that provision, a party to the Treaty may be justified in taking certain measures which it considers to be "necessary" for the protection of its essential security interests. As the Court emphasized, in relation to the comparable provision of the 1956 United States/Nicaragua Treaty in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, "the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose"; and whether a given measure is "necessary" is "not purely a question for the subjective judgment of the party" (*I.C.J. Reports 1986*, p. 141, para. 282), and may thus be assessed by the Court. In the present case, the question whether the measures taken were "necessary" overlaps with the question of their validity as acts of self-defence. As the Court observed in its decision of 1986 the criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence (see *ibid.*, p. 103, para. 194, and paragraph 74 below).

44. In this connection, the Court notes that it is not disputed between the Parties that neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage, during the Iran-Iraq war. It notes also that this was to a great extent due to the presence of mines and minefields laid by both sides. The Court has no jurisdiction to enquire into the question of the extent to which Iran and Iraq complied with the international legal rules of maritime warfare. It can however take note of these circumstances, regarded by the United States as relevant to its decision to take action against Iran which it considered necessary to protect its essential security interests. Nevertheless, the legality of the action taken by the United States has to be judged by reference to Article XX, paragraph 1 (*d*), of the 1955 Treaty, in the light of international law on the use of force in self-defence.

45. The United States has never denied that its actions against the Iranian platforms amounted to a use of armed force. Some of the details of the attacks, so far as established by the material before the Court, may be pertinent to any assessment of the lawfulness of those actions. As already indicated, there were attacks on two successive occasions, on 19 October 1987 and on 18 April 1988. The Court will examine whether each of these met the conditions of Article XX, paragraph 1 (*d*), as interpreted by reference to the relevant rules of international law.

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46. The first installation attacked, on 19 October 1987, was the Reshadat complex, which consisted of three drilling and production platforms — R-3, R-4 and R-7 — linked to a total of 27 oil wells. The crude oil produced by the R-3 platform was transported by submarine pipeline to the R-4 platform and thence, together with the crude oil produced by R-4, to the R-7 platform that accommodated both production facilities and living quarters. This latter platform was also connected by submarine pipeline to another complex, named Resalat, which consisted of three linked drilling and production platforms, referred to as R-1. All the crude oil produced at the Reshadat and Resalat complexes, after gas and water separation, was transported by undersea pipeline from the R-7 platform to Lavan Island. At the time of the United States attacks, these complexes were not producing oil due to damage inflicted by prior Iraqi attacks in October 1986, July 1987 and August 1987. Iran has maintained that repair work on the platforms was close to completion in October 1987. The United States has however challenged this assertion (see below, paragraphs 65 and 93).

47. On 19 October 1987, four destroyers of the United States Navy, together with naval support craft and aircraft, approached the Reshadat R-7 platform. Iranian personnel was warned by the United States forces via radio of the imminent attack and abandoned the facility. The United States forces then opened fire on the platform; a unit later boarded and searched it, and placed and detonated explosive charges on the remaining structure. The United States ships then proceeded to the R-4 platform, which was being evacuated; according to a report of a Pentagon spokesman, cited in the press and not denied by the United States, the attack on the R-4 platform had not been included in the original plan, but it was seen as a “target of opportunity”. After having conducted reconnaissance fire and then having boarded and searched the platform, the United States forces placed and detonated explosive charges on this second installation. As a result of the attack, the R-7 platform was almost completely destroyed and the R-4 platform was severely damaged. While the attack was made solely on the Reshadat complex, it affected also the

operation of the Resalat complex. Iran states that production from the Reshadat and Resalat complexes was interrupted for several years.

48. The nature of this attack, and its alleged justification, was presented by the United States to the United Nations Security Council in the following terms (letter from the United States Permanent Representative of 19 October 1987, S/19219):

“In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that United States forces have exercised the inherent right of self-defence under international law by taking defensive action in response to attacks by the Islamic Republic of Iran against United States vessels in the Persian Gulf.

At approximately 11 p.m. Eastern Daylight Time on 16 October 1987, a Silkworm missile fired by Iranian forces from Iranian-occupied Iraqi territory struck the *Sea Isle City*, a United States flag vessel, in the territorial waters of Kuwait. This is the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce. These actions are, moreover, only the latest in a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation.

At approximately 7 a.m. Eastern Daylight Time on 19 October 1987, United States naval vessels destroyed the Iranian military ocean platform at Rashadat [*sic*] (also known as Rostam) in international waters of the Persian Gulf. The military forces stationed on this platform have engaged in a variety of actions directed against United States flag and other non-belligerent vessels and aircraft. They have monitored the movements of United States convoys by radar and other means; co-ordinated minelaying in the path of our convoys; assisted small-boat attacks against other non-belligerent shipping; and fired at United States military helicopters, as occurred on 8 October 1987. Prior warning was given to permit the evacuation of the platform.”

49. In its Counter-Memorial, the United States linked its previous invocation of the right of self-defence with the application of Article XX, paragraph 1 (*d*), of the 1955 Treaty. It argued that Iranian actions during the relevant period constituted a threat to essential security interests of the United States, inasmuch as the flow of maritime commerce in the

Persian Gulf was threatened by Iran's repeated attacks on neutral vessels; that the lives of United States nationals were put at risk; that United States naval vessels were seriously impeded in their security duties; and that the United States Government and United States nationals suffered severe financial losses. According to the United States, it was clear that diplomatic measures were not a viable means of deterring Iran from its attacks: "Accordingly, armed action in self-defense was the only option left to the United States to prevent additional Iranian attacks."

50. The Court will thus first concentrate on the facts tending to show the validity or otherwise of the claim to exercise the right of self-defence. In its communication to the Security Council, cited above, the United States based this claim on the existence of

"a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation";

it referred in particular to a missile attack on the *Sea Isle City* as being the specific incident that led to the attack on the Iranian platforms. Before the Court, it has based itself more specifically on the attack on the *Sea Isle City*, but has continued to assert the relevance of the other attacks (see paragraph 62 below). To justify its choice of the platforms as target, the United States asserted that they had "engaged in a variety of actions directed against United States flag and other non-belligerent vessels and aircraft". Iran has denied any responsibility for (in particular) the attack on the *Sea Isle City*, and has claimed that the platforms had no military purpose, and were not engaged in any military activity.

51. Despite having thus referred to attacks on vessels and aircraft of other nationalities, the United States has not claimed to have been exercising collective self-defence on behalf of the neutral States engaged in shipping in the Persian Gulf; this would have required the existence of a request made to the United States "by the State which regards itself as the victim of an armed attack" (*I.C.J. Reports 1986*, p. 105, para. 199). Therefore, in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature

as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. As the Court observed in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it is necessary to distinguish "the most grave forms of the use of force (those constituting an armed attack) from other less grave forms" (*I.C.J. Reports 1986*, p. 101, para. 191), since "In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack" (*ibid.*, p. 103, para. 195). The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.

52. Since it was the missile attack on the *Sea Isle City* that figured most prominently in the United States contentions, the Court will first examine in detail the evidence relating to that incident. The *Sea Isle City* was a Kuwaiti tanker reflagged to the United States; on 16 October 1987 it had just ended a voyage under "Operation Earnest Will" (see paragraph 24 above), when it was hit by a missile near Kuwait's Al-Ahmadi Sea Island (or Mina al-Ahmadi) terminal. This incident, which caused damage to the ship and injury to six crew members, was claimed by the United States to be the seventh involving Iranian anti-ship cruise missiles in the area in the course of 1987. The United States asserts that the missile that struck the *Sea Isle City* was launched by Iran from a facility located in the Fao area. It recalls that in February 1986 Iran had taken control of a large part of the Fao peninsula and had captured three formerly Iraqi missile sites in the area, which it held at the time of the attack. It also maintains that there was an additional active cruise missile staging facility on Iranian territory near the Fao peninsula.

[. . .]

57. For present purposes, the Court has simply to determine whether the United States has demonstrated that it was the victim of an "armed attack" by Iran such as to justify it using armed force in self-defence; and the burden of proof of the facts showing the existence of such an attack rests on the United States. The Court does not have to attribute responsibility for firing the missile that struck the *Sea Isle City*, on the basis of a balance of evidence, either to Iran or to Iraq; if at the end of the day the evidence available is insufficient to establish that the missile was fired by Iran, then the necessary burden of proof has not been discharged by the United States. [. . .]

61. In short, the Court has examined with great care the evidence and arguments presented on each side, and finds that the evidence indicative of Iranian responsibility for the attack on the *Sea Isle City* is not sufficient to support the contentions of the United States. The conclusion to which the Court has come on this aspect of the case is thus that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City*, has not been discharged.

62. In its notification to the Security Council, and before the Court, the United States has however not relied solely on the *Sea Isle City* incident as constituting the "armed attack" to which the United States claimed to be responding. It asserted that that incident was "the latest in a series of such missile attacks against United States flag and other non-belligerent vessels in Kuwaiti waters in pursuit of peaceful commerce" and that

“These actions are, moreover, only the latest in a series of unlawful armed attacks by Iranian forces against the United States, including laying mines in international waters for the purpose of sinking or damaging United States flag ships, and firing on United States aircraft without provocation.” (See paragraph 48 above.)

Before the Court, it has contended that the missile attack on the *Sea Isle City* was itself an armed attack giving rise to the right of self-defence; the alleged pattern of Iranian use of force, it is said, “added to the gravity of the specific attacks, reinforced the necessity of action in self-defense, and helped to shape the appropriate response”.

63. The United States relies on the following incidents involving United States-flagged, or United States-owned, vessels and aircraft, in the period up to 19 October 1987, and attributes them to Iranian action: the mining of the United States-flagged *Bridgeton* on 24 July 1987; the mining of the United States-owned *Texaco Caribbean* on 10 August 1987; and firing on United States Navy helicopters by Iranian gunboats, and from the Reshadat oil platform, on 8 October 1987. The United States also claims to have detected and boarded an Iranian vessel, the *Iran Ajr*, in the act of laying mines in international waters some 50 nautical miles north-east of Bahrain, in the vicinity of the entrance to Bahrain’s deep-water shipping channel. Iran has denied any responsibility for the mining of the *Bridgeton* and the *Texaco Caribbean*; as regards the *Iran Ajr*, Iran has admitted that the vessel was carrying mines, but denies that they were being laid at the time it was boarded, and claims that its only mission was to transport them by a secure route to a quite different area.

64. On the hypothesis that all the incidents complained of are to be attributed to Iran, and thus setting aside the question, examined above, of attribution to Iran of the specific attack on the *Sea Isle City*, the question is whether that attack, either in itself or in combination with the rest of the “series of . . . attacks” cited by the United States can be categorized as an “armed attack” on the United States justifying self-defence. The Court notes first that the *Sea Isle City* was in Kuwaiti waters at the time of the attack on it, and that a Silkworm missile fired from (it is alleged) more than 100 km away could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters. Secondly, the *Texaco Caribbean*, whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State. As regards the alleged firing on United States helicopters from Iranian gunboats and from the Reshadat

oil platform, no persuasive evidence has been supplied to support this allegation. There is no evidence that the minelaying alleged to have been carried out by the *Iran Ajr*, at a time when Iran was at war with Iraq, was aimed specifically at the United States; and similarly it has not been established that the mine struck by the *Bridgeton* was laid with the specific intention of harming that ship, or other United States vessels. Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a "most grave" form of the use of force (see paragraph 51 above).

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65. The second occasion on which Iranian oil installations were attacked was on 18 April 1988, with the action against the Salman and Nasr complexes. The Salman offshore oil complex consisted of seven interconnected platforms, including one drilling and two production platforms. Oil extracted from 21 wells was transported by submarine pipeline to this complex, and then on to Lavan Island after initial water and gas separation. This complex had been attacked by Iraq in October and November 1986, and was still undergoing repairs in April 1988; by that time, according to Iran, the works were "virtually completed", but the United States questions this. The Nasr complex comprised one central platform, one flaring point, and six oil-producing platforms grouped around the central platform, served by 44 wells in the Sirri field and four wells in the Nosrat field. Crude oil from all these wells was transported by submarine pipeline to the central platform, and from there to Sirri Island. This complex was functioning normally in April 1988.

66. United States naval forces attacked the Salman and Nasr complexes on 18 April 1988. Two destroyers and a supply ship were involved in the attack on the Salman complex: shortly before 8 a.m., local time, the United States forces warned the personnel on the platforms that the attack was due to begin; some of them began to evacuate the installation, while others opened fire. A few minutes later, shelling on the complex commenced from United States ships, warplanes and helicopters. United States forces then boarded some of the platforms (but not that containing the control centre), and placed and detonated explosives. Iran states that the attack caused severe damage to the production facilities of the platforms, and that the activities of the Salman complex were totally

interrupted for four years, its regular production being resumed only in September 1992, and reaching a normal level in 1993.

The central platform of the Nasr complex was attacked at around 8.15 a.m. by three United States warships and a number of helicopters. After having been warned of the imminent military action, Iranian personnel evacuated the platform. The United States forces bombarded the installation and almost completely destroyed it; the platform was not boarded, since it was considered unsafe due to secondary explosions and fire. According to Iranian accounts, activities in the whole Nasr complex (including oil production and water injection) were interrupted as a consequence of the attack and did not resume until nearly four years later.

67. The nature of the attacks on the Salman and Nasr complexes, and their alleged justification, was presented by the United States to the United Nations Security Council in the following terms (letter from the United States Permanent Representative of 18 April 1988, S/19791):

“In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that United States forces have exercised their inherent right of self-defence under international law by taking defensive action in response to an attack by the Islamic Republic of Iran against a United States naval vessel in international waters of the Persian Gulf. The actions taken are necessary and are proportionate to the threat posed by such hostile Iranian actions.

At approximately 1010 Eastern Daylight Time on 14 April the USS *Samuel B. Roberts* was struck by a mine approximately 60 miles east of Bahrain, in international waters. Ten US sailors were injured, one seriously, and the ship was damaged. The mine which struck the *Roberts* was one of at least four mines laid in this area. The United States has subsequently identified the mines by type, and we have conclusive evidence that these mines were manufactured recently in Iran. The mines were laid in shipping lanes known by Iran to be used by US vessels, and intended by them to damage or sink such vessels. This is but the latest in a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf.

Through diplomatic channels, the United States has informed the Government of the Islamic Republic of Iran on four separate occasions, most recently 19 October 1987, that the United States would not accept Iran's minelaying in international waters or in the waters

of neutral States. In October, my Government indicated that the United States did not seek a military confrontation with Iran, but that it would take appropriate defensive measures against such hostile actions.

Starting at approximately 0100 Eastern Daylight Time 18 April US forces attacked military targets in the Persian Gulf which have been used for attacks against non-belligerent shipping in international waterways of the Gulf.

The US actions have been against legitimate military targets. All feasible measures have been taken to minimize the risk of civilian damage or casualties . . .”

68. The Court notes that the attacks on the *Salman* and *Nasr* platforms were not an isolated operation, aimed simply at the oil installations, as had been the case with the attacks of 19 October 1987; they formed part of a much more extensive military action, designated “Operation Praying Mantis”, conducted by the United States against what it regarded as “legitimate military targets”; armed force was used, and damage done to a number of targets, including the destruction of two Iranian frigates and other Iranian naval vessels and aircraft.

69. The USS *Samuel B. Roberts* was a warship returning to Bahrain on 14 April 1988, after escorting a convoy of United States-flagged merchant ships in the context of “Operation Earnest Will”, when it hit a mine near Shah Allum Shoal in the central Persian Gulf. The United States reports that, in the days following the attack, Belgian and Dutch mine-clearing forces and its own navy discovered several mines bearing Iranian serial numbers in the vicinity and it concludes therefore that the mine struck by the USS *Samuel B. Roberts* was laid by Iran. It also adduces other discoveries of Iranian mining activities at the time (including the boarding by United States forces of the Iranian vessel *Iran Ajr*, said to have been caught in the act of laying mines, referred to in paragraph 63 above), contemporary statements by Iranian military leaders and conclusions of the international shipping community (see paragraph 60 above), all allegedly demonstrating that Iran made a general practice of using mines to attack neutral shipping.

70. Iran denies that it had systematic recourse to minelaying in the Persian Gulf and suggests that evidence produced by the United States is unpersuasive. Furthermore, it contends that the United States has submitted no independent evidence that the laying of the mine that hit the

USS *Samuel B. Roberts* is attributable to Iran. Iran also suggests that the mine may have been laid by Iraq, a hypothesis that the United States rejects.

71. As in the case of the attack on the *Sea Isle City*, the first question is whether the United States has discharged the burden of proof that the USS *Samuel B. Roberts* was the victim of a mine laid by Iran. The Court notes that mines were being laid at the time by both belligerents in the Iran-Iraq war, so that evidence of other minelaying operations by Iran is not conclusive as to responsibility of Iran for this particular mine. In its communication to the Security Council in connection with the attack of 18 April 1988, the United States alleged that "The mines were laid in shipping lanes known by Iran to be used by US vessels, and intended by them to damage or sink such vessels" (paragraph 67 above). Iran has claimed that it laid mines only for defensive purposes in the Khor Abdullah Channel, but the United States has submitted evidence suggesting that Iran's mining operations were more extensive. The main evidence that the mine struck by the USS *Samuel B. Roberts* was laid by Iran was the discovery of moored mines in the same area, bearing serial numbers matching other Iranian mines, in particular those found aboard the vessel *Iran Ajr* (see paragraph 63 above). This evidence is highly suggestive, but not conclusive.

72. The Court notes further that, as on the occasion of the earlier attack on oil platforms, the United States in its communication to the Security Council claimed to have been exercising the right of self-defence in response to the "attack" on the USS *Samuel B. Roberts*, linking it also with "a series of offensive attacks and provocations Iranian naval forces have taken against neutral shipping in the international waters of the Persian Gulf" (paragraph 67 above). Before the Court, it has contended, as in the case of the missile attack on the *Sea Isle City*, that the mining was itself an armed attack giving rise to the right of self-defence and that the alleged pattern of Iranian use of force "added to the gravity of the specific attacks, reinforced the necessity of action in self-defense, and helped to shape the appropriate response" (see paragraph 62 above). No attacks on United States-flagged vessels (as distinct from United States-owned vessels), additional to those cited as justification for the earlier attacks on the Reshadat platforms, have been brought to the Court's attention, other than the mining of the USS *Samuel B. Roberts* itself. The question is therefore whether that incident sufficed in itself to justify action in self-defence, as amounting to an "armed attack". The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"; but in view of all the circumstances, including the inconclusiveness of the evidence of Iran's responsibility for the mining of the USS *Samuel B. Roberts*, the

Court is unable to hold that the attacks on the Salman and Nasr platforms have been shown to have been justifiably made in response to an "armed attack" on the United States by Iran, in the form of the mining of the USS *Samuel B. Roberts*.

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73. As noted above (paragraph 43), in the present case a question of whether certain action is "necessary" arises both as an element of international law relating to self-defence and on the basis of the actual terms of Article XX, paragraph 1 (*d*), of the 1955 Treaty, already quoted, whereby the Treaty does "not preclude . . . measures . . . necessary to protect [the] essential security interests" of either party. In this latter respect, the United States claims that it considered in good faith that the attacks on the platforms were necessary to protect its essential security interests, and suggests that "A measure of discretion should be afforded to a party's good faith application of measures to protect its essential security interests." Iran was prepared to recognize some of the interests referred to by the United States — the safety of United States vessels and crew, and the uninterrupted flow of maritime commerce in the Persian Gulf — as being reasonable security interests of the United States, but denied that the United States actions against the platforms could be regarded as "necessary" to protect those interests. The Court does not however have to decide whether the United States interpretation of Article XX, paragraph 1 (*d*), on this point is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion". The Court will therefore turn to the criteria of necessity and proportionality in the context of international law on self-defence.

74. In its decision in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court endorsed the shared view of the parties to that case that in customary law "whether the response to the [armed] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence" (*I.C.J. Reports 1986*, p. 103, para. 194). One aspect of these criteria is the nature of the target of the force used avowedly in self-defence. In its communications to the Security Council, in particular in that of 19 October 1987 (paragraph 46 above), the United States indicated the grounds on which it regarded the Iranian platforms as legitimate targets for an armed action in self-defence. In the present proceedings, the United States has continued to maintain that they were such, and has presented evidence directed to showing that the platforms collected and reported intelligence concerning passing vessels, acted as a military communication link coordinating Iranian naval forces and served as actual staging bases to launch helicopter and small boat attacks on neutral commercial shipping.

[. . .]

76. The Court is not sufficiently convinced that the evidence available supports the contentions of the United States as to the significance of the military presence and activity on the Reshadat oil platforms; and it notes that no such evidence is offered in respect of the Salman and Nasr complexes. However, even accepting those contentions, for the purposes of discussion, the Court is unable to hold that the attacks made on the platforms could have been justified as acts of self-defence. The conditions for the exercise of the right of self-defence are well settled: as the Court observed in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law" (*I.C.J. Reports 1996 (I)*, p. 245, para. 41); and in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court referred to a specific rule "whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it" as "a rule well established in customary international law" (*I.C.J. Reports 1986*, p. 94, para. 176). In the case both of the attack on the *Sea Isle City* and the mining of the USS *Samuel B. Roberts*, the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents. In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, in the same way as it complained repeatedly of minelaying and attacks on neutral shipping, which does not suggest that the targeting of the platforms was seen as a necessary act. The Court would also observe that in the case of the attack of 19 October 1987, the United States forces attacked the R-4 platform as a "target of opportunity", not one previously identified as an appropriate military target (see paragraph 47 above).

77. As to the requirement of proportionality, the attack of 19 October 1987 might, had the Court found that it was necessary in response to the *Sea Isle City* incident as an armed attack committed by Iran, have been considered proportionate. In the case of the attacks of 18 April 1988, however, they were conceived and executed as part of a more extensive operation entitled "Operation Praying Mantis" (see paragraph 68 above). The question of the lawfulness of other aspects of that operation is not before the Court, since it is solely the action against the Salman and Nasr complexes that is presented as a breach of the 1955 Treaty; but the Court cannot assess in isolation the proportionality of that action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation, which involved, *inter alia*, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither "Operation Praying Mantis" as a whole, nor even that

part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.

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78. The Court thus concludes from the foregoing that the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 cannot be justified, under Article XX, paragraph 1 (*d*), of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, since those actions 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, upon its correct interpretation, by that provision of the Treaty.

* *

79. Having satisfied itself that the United States may not rely, in the circumstances of the case, on the defence to the claim of Iran afforded by Article XX, paragraph 1 (*d*), of the 1955 Treaty, the Court has now to turn to that claim, made under Article X, paragraph 1, of that Treaty, which provides that "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation." In that respect, Iran's submission is 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, paragraph 1, of the Treaty of Amity . . .". It contends that the United States attacks on the oil platforms were directed against commercial facilities that were protected by Article X, paragraph 1, that they "impeded the normal functioning of the oil platforms and that they even resulted in the complete interruption of the platforms' activities, . . . thus preventing gravely *ab ovo* the possibility for Iran to enjoy freedom of commerce as guaranteed by" that Article.

[...]

82. In that decision*, the Court observed that it did not then have to enter into the question whether Article X, paragraph 1, "is restricted to commerce 'between' the Parties" (*ibid.*, p. 817, para. 44). However it is now common ground between the Parties that that provision is in terms limited to the protection of freedom of commerce "between the territories of the two High Contracting Parties". The Court observes that it is oil exports from Iran to the United States that are relevant to the case, not such exports in general. The United States has argued that for the purpose of interpreting Article X, paragraph 1, what must be considered is whether oil from the specific platforms attacked was, or would have been, exported to the United States. In this connection it questions whether the platforms could be said to be on the "territory" of Iran, inasmuch as they are outside Iran's territorial sea, though upon its continental shelf, and within its exclusive economic zone. The Court does not however consider tenable an interpretation of the 1955 Treaty that would have differentiated, for the purposes of "freedom of commerce", between oil produced on the land territory or the territorial sea of Iran, and oil produced on its continental shelf, in the exercise of its sovereign rights of exploration and exploitation of the shelf, and parallel rights over the exclusive economic zone.

* 1996
Preliminary
Objections

83. In the 1996 Judgment, the Court further emphasized that "Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect 'commerce' but 'freedom of commerce'", and continued:

"Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and storage with a view to export." (*I.C.J. Reports 1996 (II)*, p. 819, para. 50.)

The Court also noted that

"Iran's oil production, a vital part of that country's economy, constitutes an important component of its foreign trade.

On the material now before the Court, it is . . . not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil . . ." (*Ibid.*, p. 820, para. 51.)

If, at the present stage of the proceedings, the Court were to find that Iran had established that such was the case, the claim of Iran under Article X, paragraph 1, could be upheld.

84. The arguments of the Parties in relation to Iran's claim under that provision have therefore focused on the first and last stages of the production/export process. In order to establish that freedom of commerce in oil between the territories of the Parties was affected by the attack, so that the destruction of the platforms constituted a breach of Article X, paragraph 1, Iran has sought to show that oil produced or processed by, stored on, or transported from the platforms attacked could, to some degree, have been exported to the United States, but this was prevented by the destruction of the platforms. This has involved explanation of the construction and operation of the platforms, and assessment of the implications of the damage caused to them by the attacks. The question has also been raised as to whether there was an impact on overall oil exports to the United States, contemporaneous with, and attributable to, the attacks, or a potential impact of this kind, amounting to an interference with "freedom" of commerce between the Parties' territories.

89. ~~may be~~ ^[...] the Court considers that where a State destroys another State's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is in principle an interference with the freedom of international commerce. In destroying the platforms, whose function, taken as a whole, was precisely to produce and transport oil, the military actions made commerce in oil, at that time and from that source, impossible, and to that extent prejudiced freedom of commerce. While the oil, when it left the platform complexes, was not yet in a state to be safely exported, the fact remains that it could be already at that stage destined for export, and the destruction of the platform prevented further treatment necessary for export. The Court therefore finds that the protection of freedom of commerce under Article X, paragraph 1, of the 1955 Treaty applied to the platforms attacked by the United States, and the attacks thus impeded Iran's freedom of commerce. However, the question remains whether there was in this case an interference with freedom of commerce "between the territories of the High Contracting Parties".

The United States in fact contends further that there was in any event no breach of Article X, paragraph 1, inasmuch as, even assuming that the attacks caused some interference with freedom of commerce, it did not interfere with freedom of commerce "between the territories of the two High Contracting Parties". First, as regards the attack of 19 October 1987 on the Reshadat platforms, it observes that the platforms were under repair as a result of an earlier attack on them by Iraq; consequently, they were not engaged in, or contributing to, commerce between the territories of the Parties. Secondly, as regards the attack of 18 April 1988 on the Salman and Nasr platforms, it draws attention to United States Executive Order 12613, signed by President Reagan on 29 October 1987, which prohibited, with immediate effect, the import into the United States of most goods (including oil) and services of Iranian origin. As a consequence of the embargo imposed by this Order, there was, it is suggested, no commerce between the territories of the Parties that could be affected, and consequently no breach of the Treaty protecting it.

91. As the Court noted in its 1996 Judgment, it was then not contested between the Parties (and is not now contested) that "oil exports from Iran to the United States were — to some degree — ongoing at least until after the destruction of the first set of oil platforms", i.e., 19 October 1987 (*I.C.J. Reports 1996 (II)*, p. 818, para. 44). It appears also to be accepted by both Parties that the oil or petroleum products reaching the United States during this period were to some extent derived from crude oil produced by the platforms that were later subjected to attack. Iran has explained that in peace time it had sold crude oil in cargoes where the producing field was specifically identified, but during the Iran-Iraq war all Iranian light crudes and heavy crudes were mixed and sold generically, as either "Iranian light" or "Iranian heavy". Iran has asserted, and the United States has not denied, that there was a market for Iranian crude oil directly imported into the United States up to the issuance of Executive Order 12613 of 29 October 1987. Thus Iranian oil exports did up to that time constitute the subject of "commerce between the territories of the High Contracting Parties" within the meaning of Article X, paragraph 1, of the 1955 Treaty.

[...]

95. In response to the contention of the United States that the damage to the platforms was irrelevant to Iranian oil exports to the United States, Iran argues that this conclusion does not follow from the mere fact that direct import into the United States of Iranian crude oil, as such, ceased with the issue of the embargo. Iran suggests that "It is in the nature of the international oil trade that Iranian oil could not be excluded from the United States": "If Iranian crude oil was received by a refinery", for example in Western Europe, "and if that refinery in turn exported products to the United States, then it follows that a quantity of Iranian oil was necessarily imported into the United States in the form of products." Iran has observed that, as a result of the embargo, it found itself in 1987 with a surplus crude oil production of approximately 345,000 barrels per day, and had to find other outlets, namely in the Mediterranean and North-West Europe. At the same time, the United States had to make good the shortfall resulting from the prohibition of Iranian crude oil imports, and therefore increased its existing imports of petroleum products from refineries in the Mediterranean and Western Europe. Iran has submitted to the Court an expert report showing, *inter alia*, a very considerable increase in exports of Iranian crude oil to Western Europe from 1986 to 1987, and again in 1988, and an increase in United States imports of petroleum products from Western European refineries.

96. The Court sees no reason to question the view that, over the period during which the United States embargo was in effect, petroleum products were reaching the United States, in considerable quantities, that were derived in part from Iranian crude oil. Executive Order 12613 contained an exception (Section 2 (b)) whereby the embargo was not to apply to "petroleum products refined from Iranian crude oil in a third country". It could reasonably be argued that, had the platforms not been attacked, some of the oil that they would have produced would have been included in the consignments processed in Western Europe so as to produce the petroleum products reaching the United States. Whether, according to international trade law criteria, such as the "substantial transformation" principle, or the "value added approach", the final product could still retain for some purposes an Iranian character, is not the question before the Court. What the Court has to determine is not whether something that could be designated "Iranian" oil entered the United States, in some form, during the currency of the embargo; it is whether there was "commerce" in oil between the territories of Iran and the United States during that time, within the meaning given to that term in the 1955 Treaty.

97. In this respect, what seems to the Court to be determinative is the nature of the successive commercial transactions relating to the oil, rather than the successive technical processes that it underwent. What Iran regards as "indirect" commerce in oil between itself and the United States involved a series of commercial transactions: a sale by Iran of crude oil to a customer in Western Europe, or some third country other than the United States; possibly a series of intermediate transactions; and ultimately the sale of petroleum products to a customer in the United States. This is not "commerce" between Iran and the United States, but commerce between Iran and an intermediate purchaser; and "commerce" between an intermediate seller and the United States. After the completion of the first contract Iran had no ongoing financial interest in, or legal responsibility for, the goods transferred. If, for example, the process of "indirect commerce" in Iranian oil through Western European refineries, as described above, were interfered with at some stage subsequent to Iran's having parted with a consignment, Iran's commitment and entitlement to freedom of commerce vis-à-vis the United States could not be regarded as having been violated.

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98. The Court thus concludes, with regard to the attack of 19 October 1987 on the Reshadat platforms, that there was at the time of those attacks no commerce between the territories of Iran and the United States in respect of oil produced by those platforms and the Resalat platforms, inasmuch as the platforms were under repair and inoperative; and that the attacks cannot therefore be said to have infringed the freedom of commerce in oil between the territories of the High Contracting Parties protected by Article X, paragraph 1, of the 1955 Treaty, particularly taking into account the date of entry into force of the embargo effected by Executive Order 12613. The Court notes further that, at the time of the attacks of 18 April 1988 on the Salman and Nasr platforms, all commerce in crude oil between the territories of Iran and the United States had been suspended by that Executive Order, so that those attacks also cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the 1955 Treaty.

99. The Court is therefore unable to uphold the submissions of Iran, that in carrying out those attacks the United States breached its obligations to Iran under Article X, paragraph 1, of the 1955 Treaty. In view of this conclusion, the Iranian claim for reparation cannot be upheld.

[...]

119. Having disposed of all objections of Iran to its jurisdiction over the counter-claim, and to the admissibility thereof, the Court has now to consider the counter-claim on its merits. To succeed on its counter-claim, the United States must show that:

- (a) its freedom of commerce or freedom of navigation between the territories of the High Contracting Parties to the 1955 Treaty was impaired; and that
- (b) the acts which allegedly impaired one or both of those freedoms are attributable to Iran.

The Court would recall that Article X, paragraph 1, of the 1955 Treaty does not protect, as between the Parties, freedom of commerce or freedom of navigation in general. As already noted above (paragraph 90), the provision of that paragraph contains an important territorial limitation. In order to enjoy the protection provided by that text, the commerce or the navigation is to be *between the territories* of the United States and Iran. The United States bears the burden of proof that the vessels which were attacked were engaged in commerce or navigation between the territories of the United States and Iran.

[...]

121. None of the vessels described by the United States as being damaged by Iran's alleged attacks was engaged in commerce or navigation "between the territories of the two High Contracting Parties". Therefore, the Court concludes that there has been no breach of Article X, paragraph 1, of the 1955 Treaty in any of the specific incidents involving these ships referred to in the United States pleadings.

122. The United States has also presented its claim in a generic sense. It has asserted that as a result of the cumulation of attacks on United States and other vessels, laying mines and otherwise engaging in military actions in the Persian Gulf, Iran made the Gulf unsafe, and thus breached its obligation with respect to freedom of commerce and freedom of navigation which the United States should have enjoyed under Article X, paragraph 1, of the 1955 Treaty.

123. The Court cannot disregard the factual context of the case, as described in paragraphs 23 and 44 above. While it is a matter of public record that as a result of the Iran-Iraq war navigation in the Persian Gulf involved much higher risks, that alone is not sufficient for the Court to decide that Article X, paragraph 1, of the 1955 Treaty was breached by Iran. It is for the United States to show that there was an *actual impediment* to commerce or navigation *between* the territories of the two High Contracting Parties. However, according to the material before the Court the commerce and navigation between Iran and the United States continued during the war until the issuance of the United States embargo on 29 October 1987, and subsequently at least to the extent permitted by the exceptions to the embargo. The United States has not demonstrated that the alleged acts of Iran actually infringed the freedom of commerce or of navigation between the territories of the United States and Iran.

The Court considers that, in the circumstances of this case, a generic claim of breach of Article X, paragraph 1, of the 1955 Treaty cannot be made out independently of the specific incidents whereby, it is alleged, the actions of Iran made the Persian Gulf unsafe for commerce and navigation, and specifically for commerce and navigation between the territories of the parties. However, the examination in paragraph 120 above of those incidents shows that none of them individually involved any

interference with the commerce and navigation protected by the 1955 Treaty; accordingly the generic claim of the United States cannot be upheld.

124. The Court has thus found that the counter-claim of the United States concerning breach by Iran of its obligations to the United States under Article X, paragraph 1, of the 1955 Treaty, whether based on the specific incidents listed, or as a generic claim, must be rejected; there is therefore no need for it to consider, under this head, the contested issues of attribution of those incidents to Iran. In view of the foregoing, the United States claim for reparation cannot be upheld.

* * *

125. For these reasons,

THE COURT,

(1) By fourteen votes to two,

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; *finds* further that the Court cannot however uphold the submission of the Islamic Republic of Iran that those 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, and that, accordingly, the claim of the Islamic Republic of Iran for reparation also cannot be upheld;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal, Owada, Simma, Tomka; *Judge ad hoc* Rigaux;

AGAINST: *Judges* Al-Khasawneh, Elaraby;

(2) By fifteen votes to one,

Finds that the counter-claim of the United States of America concerning the breach of the obligations of the Islamic Republic of Iran under Article X, paragraph 1, of the above-mentioned 1955 Treaty, regarding freedom of commerce and navigation between the territories of the parties, cannot be upheld; and accordingly that the counter-claim of the United States of America for reparation also cannot be upheld.

IN FAVOUR: *President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Rigaux;*
AGAINST: *Judge Simma.*

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this sixth day of November, two thousand and three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Islamic Republic of Iran and the Government of the United States of America, respectively.

(Signed) SHI Jiuyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President RANJEVA and Judge KOROMA append declarations to the Judgment of the Court; Judges HIGGINS, PARRA-ARANGUREN and KOOIJMANS append separate opinions to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge BUERGENTHAL appends a separate opinion to the Judgment of the Court; Judge ELARABY appends a dissenting opinion to the Judgment of the Court; Judges OWADA and SIMMA and Judge *ad hoc* RIGAUX append separate opinions to the Judgment of the Court.

(Initialed) J.Y.S.

(Initialed) Ph.C.
