SEPARATE OPINION OF JUDGE OWADA

Court to proceed first with the examination of Article X, paragraph 1, prior to Article XX, paragraph 1 (d) — *Freedom of the Court to choose grounds for its decision not to apply because of the special relationship between Article X, paragraph 1, and Article XX, paragraph 1* (d) — *Character of the Treaty relevant for the interpretation of Article X, paragraph 1 — Essential characteristic of "commerce" to be found in its "transactional element" between the Parties — Activities of the platforms not "commerce" in this sense — No need to go into the examination of Article XX, paragraph 1* (d), *in view of the finding of the Court on Article X, paragraph 1 — Examination of Article XX, paragraph 1* (d), *not synonymous with the examination of self-defence in international law in general — Examination of self-defence as such not in order for the interpretation and application of Article XX, paragraph 1* (d) — *Asymmetry in the production of evidence as a complicating factor in the case — Desirability of Court to take a more proactive stance on evidence and fact finding for the proper administration of justice.*

1. I have voted for the Judgment of the Court in the present case, inasmuch as its conclusions in the final analysis amount to *(a)* the rejection of the claim of the Applicant and *(b)* the rejection of the counter-claim of the Respondent, the conclusions that I support. While I accept these final conclusions of the Judgment, however, I am not in a position to agree with all the points contained in the *dispositif* of the Judgment as stated in its concluding part nor with all the reasons leading to these conclusions as expounded in the main body of the Judgment. For this reason, I find it incumbent on me to state my position on some of the more salient points raised in the Judgment, to the extent that my position on those points which I regard as important may be made sufficiently clear. They are set out as succinctly as possible as follows.

I. The Basis of the Decision of the Court

2. In my view, the Judgment rightly reaches the final conclusion that neither the claims of the Applicant nor the counter-claim of the Respondent can be upheld, but in an unnecessarily convoluted and questionable way. In arriving at this outcome, the Judgment goes over the examination of the claims of the Applicant from the viewpoint, first, *(a)* of whether the actions of the United States of America can be justified as "measures necessary to protect the essential security interests" of the United States under Article XX, paragraph 1 *(d)*, of the Treaty of

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Amity, Economic Relations, and Consular Rights between the United States of America and Iran of 1955 and then, second, *(b)* of whether the submissions of the Applicant that those actions constitute a violation of the obligations of the Respondent under Article X, paragraph 1, of that Treaty can be upheld, as well as the examination of the counter-claim of the Respondent, in that order.

3. Considering the legal nature of the issues presented before the Court and the way they were presented, I am of the view that the natural and correct order in which the Court should proceed with the claims of the Applicant would have been to deal first of all with the issue of whether the actions of the United States, as alleged by the Applicant, in fact constituted a violation of the obligations of the Respondent under Article X, paragraph 1, of the Treaty at issue — the central issue to be decided at this phase of the proceedings.

4. On this point, the Judgment starts by making a general proposition as follows (Judgment, para. 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)*." (Emphasis added.)

On that basis, the Judgment considers that "[t]he question however arises in what order the Court should examine these questions of interpretation and application of the Treaty" (Judgment, para. 35). It is no doubt true, as the Judgment asserts, that *in order to uphold the claim of Iran*, the Court must be satisfied on both of these two points. However, it does not follow from this general proposition that the Court, *in order to pass a judgment on the claim of the Applicant*, must therefore examine both of these two questions in any case.

5. In the present case, the Court found by its Judgment on the Preliminary Objection of 12 December 1996 that it had jurisdiction "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of [the 1955] Treaty" (*I.C.J. Reports 1996 (II)*, p. 821, para. 55 (2)). It is this task that is presented before the Court at this phase of the proceedings. Needless to say, it is not to be contested in this context that to the extent required for the interpretation or application of Article X, paragraph 1, of the Treaty, which offers the sole basis for the jurisdiction of the Court, the Court can enter into the examination of Article XX as far as that is relevant to the task of the Court as determined by its Judgment of 1996 on jurisdiction. However, I submit that it is precisely the existence of this legal link between the two provisions of Article X, paragraph 1, and Article XX, paragraph 1 *(d)*, which brings the examination of Article XX, paragraph 1 *(d)*, within the jurisdictional orbit of the Court. It follows from this that the examina-

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tion of Article X, paragraph 1, should have the precedence, by reason of its logical order, to the examination of Article XX, paragraph 1 *(d)*.

6. It is recalled that in 1986, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court was faced with a similar problem concerning the relationship between Article XIX of the treaty between Nicaragua and the United States, which contained provisions equivalent to Article X of the present case, and Article XXI of the same treaty, which contained provisions equivalent to Article XX of the present case. In that case, the Court was very clear in characterizing the legal nature of Article XXI of the treaty, declaring that "[Article XXI] defines the instances in which the Treaty itself provides for *exceptions* to the generality of its other provisions" (*I.C.J. Reports 1986*, p. 116, para. 222; emphasis added); and that

> "[s]ince [it] 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 Respondent] would otherwise be in conflict with the relevant provisions of the Treaty*" (*ibid.*, p. 117, para. 225; emphasis added).

7. In fact, this Court in its Judgment on the Preliminary Objection in the present case also made this basic relationship between Article X and Article XX of the 1955 Treaty abundantly clear, when it stated the view that

> "Article XX, paragraph 1 *(d)*, does not restrict its jurisdiction in the present case, but is confined to affording the Parties *a possible defence* on the merits to be used should the occasion arise" (*I.C.J. Reports 1996 (II)*, p. 811, para. 20; emphasis added).

8. It seems clear that for all these reasons it would have been compelling, as well as logical, in the context of the legal relationship between the two Articles, for the Court to start with an examination of Article X, paragraph 1, of the Treaty, before proceeding, if necessary, to an examination of Article XX, paragraph 1 *(d)*, of the Treaty.

9. As a general proposition, it cannot be disputed that the Court has the "freedom to select the ground upon which it will base its judgment" (Judgment, para. 37). The Judgment cites in this respect what the Court stated in its Judgment in the case concerning the *Application of the Convention of 1902 Governing the Guardianship of Infants* (*I.C.J. Reports 1958,* p. 62). This is undoubtedly true with regard to the cases where the Court has a complete freedom to choose among a number of alternative grounds on which to base its Judgment. The present case, however, is to be distinguished from these precedents in the sense that in the present case the task on which the Court is given jurisdiction to decide is the question of the interpretation and application of Article X of the 1955

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Treaty from the viewpoint of whether there has been a breach of Article X of the Treaty, and in that connection to proceed to an examination of the purport of Article XX of the Treaty, which is legally linked to Article X *as a possible defence on the merits*, in case the finding of the Court on Article X makes such examination necessary.

10. In this sense the present case is also to be distinguished from the *Nicaragua* case. In the *Nicaragua* case, the Court had jurisdiction to entertain the claim of the Applicant "in so far as that Application relates to a dispute concerning the interpretation or application of the [entire] Treaty [of 1956] . . . on the basis of Article XXIV of that Treaty" (*I.C.J. Reports 1984*, p. 442, para. 113 (1) *(b)*), as well as jurisdiction to entertain the Application more generally on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court. Thus the problem of interpretation and application of Article XXI fell squarely and fully within the competence of the Court, wholly independent of Article XIX of that Treaty. The present case is different in this respect. While in the *Nicaragua* case the Court could be free, as a matter of judicial discretion, to choose its own order of priority for examination among a number of grounds for the claim presented by the Applicant, I submit that this is not so with the present case.

11. It is argued in the Judgment that in the present case, nevertheless, "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" (Judgment, para. 37). The Judgment points to the fact in this connection 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" and that "[a]t the time of those actions, neither Party made any mention of the 1955 Treaty" (*ibid.*; emphasis added). The Judgment notes in this connection that:

> "the United States itself recognizes in its Rejoinder [that] '[t]he self-defense 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" (Judgment, para. 38).

On that basis, the Judgment comes to the conclusion that

> "to the extent that [the] jurisdiction [of the Court] under Article XXI, paragraph 2, of the 1955 Treaty authorizes it to examine and rule on such issues [i.e., the self-defence issues], it should do so" *(ibid.)*.

12. It is my submission that, as far as the present case is concerned, the dispute before the Court is as defined by the Parties in their submissions to this Court. The so-called "original dispute between the Parties" has no direct legal relevance to this dispute before the Court. In this connection,

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the fact that "[a]t the time of those actions [of the United States of 1987 and 1988], neither Party made any mention of the 1955 Treaty" (Judgment, para. 37) is only to be expected, for the simple reason that at that time, especially in relation to the Security Council of the United Nations, the legality of the actions taken by the United States as such was *the issue*, but that in itself was not *the dispute between the United States and Iran* which later came to be brought before the Court. A distinct legal dispute arising out of this issue came about and crystallized in the form of the present case between the Applicant and the Respondent, only when Iran alleged that the United States actions in question constituted a "fundamental breach of various provisions of the [1955] Treaty" (Application of the Islamic Republic of Iran filed in the Registry of the Court on 2 November 1992) and the United States denied that allegation.

13. It is clear from this history that the case before the Court is one on a dispute between the Applicant and the Respondent concerning the interpretation and application of the 1955 Treaty in relation to certain United States actions alleged to be a violation of some provisions of this Treaty. It was on this basis that the Court decided in its Judgment on the Preliminary Objection of 1996 to have jurisdiction over the claims of the Applicant concerning this dispute under Article XXI, paragraph 2, of the 1955 Treaty. The Court thus has the competence to examine Article XX, especially its paragraph 1 *(d)*, in the context of the interpretation and application of Article X, paragraph 1, of the Treaty, but not to examine and rule on the issue of self-defence under general international law.

14. In saying this, I do not mean to suggest that the Court is not entitled, for this jurisdictional reason stated above, to get into an examination of the scope and the relevance of the rules of general international law relating to the use of force. As I am going to elaborate later, my submission is simply that the Court is certainly entitled to do so, but only to the extent that such examination, ancillary to the examination of Article XX, paragraph 1 *(d)*, is found to be necessary for clarifying the interpretation and application of Article XX, paragraph 1 *(d)*, relating to "measures necessary to protect . . . essential security interests [of one of the Parties]", once the Court decides that an examination of Article XX, paragraph 1 *(d)*, is required as the result of its finding on Article X, paragraph 1. In such an eventuality, it will not be the issue of "self-defence" under general international law as such but the issue of the use of force by the United States in the alleged actions complained of by the Applicant in the context of the provisions of Article XX, paragraph 1 *(d)*, of the Treaty that the Court will have the competence to examine.

15. What has been analysed above leads me to the conclusion that what the Court should undertake at this stage was first of all to examine whether the alleged actions of the United States against the oil platforms in question constituted a violation of the provisions of Article X, paragraph 1, of the 1955 Treaty. Only if the Court found that it indeed was

the case, the Court should proceed to an examination of the provisions of Article XX, paragraph 1 *(d)*, of the Treaty in the context of its relevance to Article X, paragraph 1, of the same Treaty, to see whether those provisions of Article XX, paragraph 1 *(d)*, as interpreted in light of the relevant rules of international law, offered *a possible defence* for justifying the actions of the United States under the Treaty.

16. In the conclusions of its Judgment in the present case, the Court has found that it cannot uphold the submission of the Applicant that the actions of the United States as alleged by Iran constitute a violation of the obligations of the United States under Article X, paragraph 1, of that Treaty relating to the freedom of commerce. Since I concur with this finding, I do not see any reason further to go into an examination of the second question relating to the interpretation and application of Article XX, paragraph 1 *(d)*, of the Treaty.

II. The Scope of Article X, Paragraph 1

17. I find myself in general agreement with the Judgment of the Court on this question of the interpretation and application of Article X, paragraph 1, of the 1955 Treaty, both in its conclusion as well as in its basic reasoning. For this reason, I do not intend to dwell upon a detailed examination of the issues involved in the interpretation and application of Article X, paragraph 1. I concur with the Judgment in its basic reasoning that has led the Court to its conclusion on this question.

18. However, there is one point on which I wish to put my position on the record in the context of this Article. It is the question of the basic character of a treaty of this kind, i.e., what is generically known as the Treaty of Friendship, Commerce and Navigation (the so-called FCN treaty), and the question of the scope of Article X of the Treaty as interpreted in light of this basic character of the Treaty.

19. The 1955 Treaty between the United States and Iran falls broadly within this category of treaties, which is traditionally described as the "general commercial treaty" (R. R. Wilson, *United States Commercial Treaties and International Law* (1960), p. 1). It is a "broad-purpose device" *(ibid.)* touching upon many subjects, but always in the field of economic relations between nations, such as the right of establishment of the nationals of the Contracting Parties in the territory of each other, the right of the Contracting Parties to engage in various economic activities in the territory of each other and freedom of commerce and navigation between the Contracting Parties, as guaranteed in the treaty on the basis of certain legal principles such as the principle of the most-favoured-nation treatment, the principle of national treatment and the principle of fair and equitable treatment. As such, it is the type of treaties which in their origin date back to several centuries ago (in the case of the United States, the conclusion of the first treaty of this type — the Treaty of Amity and Commerce with France of 1778 — is in fact older than the

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establishment of the United States Constitution), and which have provided a concrete legal framework for economic activities of the nationals of each Contracting Party in relation to the other by guaranteeing certain standards of treatment to be observed by each Contracting Party.

20. In this sense, the essential character and the basic scope of the treaties of this type as the legal instrument for regulating concrete economic activities that take place between the two Contracting Parties are well defined and the concrete legal rules applicable to these activities fairly specific. It is against this background that the United States introduced a new treaty-making practice of incorporating a compromissory clause of the type we find in Article XXI of the 1955 Treaty between the United States and Iran into these FCN treaties it was concluding in the post-World War II period. From the *travaux préparatoires* of these treaties it is clear that the United States adopted this new practice of accepting the jurisdiction of the International Court of Justice on the interpretation and application of the provisions of these treaties, because "provisions of commercial treaties were, in general, familiar", and "there were numerous court decisions interpreting them" (R. R. Wilson, *op. cit.*, p. 24).

21. This specific character of the FCN treaties, which include the 1955 Treaty that we are dealing with, should be kept in mind in assessing the general purport of the Treaty before us and in interpreting its concrete provisions in the context of the present case. In this sense, the position taken by the Court in its Judgment of 1996 on the Preliminary Objection in the present case is correct in my view, when it states that "the object and purpose of the Treaty of 1955 was not to regulate peaceful and friendly relations between the two States in a general sense" (*I.C.J. Reports 1996 (II)*, p. 814, para. 28), in spite of the very broad language used in the provisions of its Article I.

22. Against this backdrop relating to the essential character and the basic scope of the Treaty, the legal relevance *vel non* of the 1955 Treaty and in particular its Article X, paragraph 1, to the claims advanced by the Applicant is to be examined as one of interpretation of the concept of "freedom of commerce and navigation" in its usual usage in business transactions as envisaged in these commercial treaties. Its significance in relation to the actions taken by the United States against certain Iranian oil platforms is in turn to be appreciated in light of this essential character and the basic scope of the Treaty in question.

23. The Court in its 1996 Judgment ruled that

> "[t]he word 'commerce' is not restricted in ordinary usage to the mere act of purchase and sale; it has connotations that extend beyond mere purchase and sale to include 'the whole of the transactions, arrangements, etc., therein involved'" (*I.C.J. Reports 1996 (II)*, p. 818, para. 45).

Then the Court went on to elaborate the point further as follows:

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> "The Court should not in any event overlook that Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect 'commerce' but '*freedom* of commerce'. Any act which would impede that 'freedom' is thereby prohibited. 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 their storage with a view to export." (*I.C.J. Reports 1996 (II)*, p. 819, para. 50; emphasis in the original.)

24. In relation to this passage, an argument is advanced by the Respondent to the effect that since the alleged actions of the United States constituted neither "acts entailing the destruction of goods destined to be exported" nor "[acts] capable of affecting their transport and their storage with a view to export", its actions therefore did not amount to a violation of "freedom of commerce" as provided for in Article X, paragraph 1, of the 1955 Treaty. Clearly this is an argument which cannot be accepted. Needless to say, these examples are given by the Court not as the definition of acts in violation of "freedom of commerce"; they are given, not as an exhaustive list of all the cases falling under the category of a violation of "freedom of commerce", but only as an illustrative list that demonstrates some of the typical cases that can constitute an impediment of "freedom of commerce".

25. At the same time, these examples are nonetheless significant inasmuch as they are indicative of a certain common characteristic element that is involved in the concept of "freedom of commerce" as used in these FCN treaties. Commerce is defined as "mercantile transaction" (*The Shorter Oxford Dictionary*, 10th ed.). What is essential in the concept of "commerce" as its constituent element, especially in its context of "freedom of commerce and navigation" as used in the Treaty, is, I submit, the existence of this "transactional element" that links the two Parties under the Treaty. This to me is the critical element of "commerce", as the term is used in this Treaty, that distinguishes it from a mere economic activity which, even if it might envisage a possibility of export in a general sense, does not contemplate any concrete transaction in view. In fact, I submit that the term "freedom of commerce and navigation between the High Contracting Parties" as used in many of the FCN treaties concluded by the United States in the post-World War II period is meant to refer to this notion of unimpeded flow of *mercantile transactions* in goods and services between the territories of the Contracting Parties, as distinguished from a broader problem of the rights of the Contracting Parties to engage in various economic activities of a commercial character within the territories of each other — a problem dealt with in concrete detail by various provisions of the Treaty (for example, Article II through Article IX of the 1955 Treaty).

26. It is true that the oil platforms which were the subject of United States attacks were owned and operated for general commercial purposes

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by the National Iranian Oil Company as an integral part of a series of complex operations that included such economic activities as the extraction of oil from the continental shelf, its transportation to a storage place, and its processing from crude oil into a final product for export/consumption. In that sense, the oil platforms no doubt performed an important function in the chain of operations that consisted of a network of economic activities ranging from the oil production to its export/consumption.

27. This does not mean, however, that every single link in this chain of operations can be qualified as part of "commerce", and especially as an activity that falls within the concept of "freedom of commerce between the territories of the Contracting Parties" in the sense in which the term is used in Article X, paragraph 1, of the Treaty. In my view, there is a fine but clear distinction in this regard between "industrial activities" and "commercial activities" for the purpose of the Treaty, although the two activities may be linked with each other within the broad category of "economic activities".

28. In light of this reasoning and quite apart from the factual ground relied on by the Judgment that

> "there was at the time of [the attacks of 19 October 1987] no commerce between the territories of Iran and the United States in respect of oil produced by [the] platforms [in question] . . . inasmuch as the platforms were under repair and inoperative" (Judgment, para. 98)

and that "at the time of the attacks of 18 April 1988 . . . all commerce in crude oil between the territories of Iran and the United States had been suspended by [the] Executive Order [12613 of the United States]" *(ibid.)*, I come to the conclusion that primordially on this legal ground the actions of the United States against the oil platforms in question did not amount to an infringement of "freedom of commerce" as stipulated in Article X, paragraph 1. The word "commerce" as employed in Article X, paragraph 1, while going beyond the immediate act of purchase and sale, should be understood to extend only to those activities which can be regarded as "the ancillary activities integrally related to commerce" (*I.C.J. Reports 1996 (II)*, p. 819, para. 49) in the sense that they constitute essential ingredients of mercantile transactions carried out between Iran and the United States.

III. THE RELEVANCE OF ARTICLE XX, PARAGRAPH 1 *(d)*

29. I have already stated earlier in this opinion that once the Court decides, for the reasons stated above, that it should first examine the submission of the Applicant relating to the interpretation and application of Article X, paragraph 1, of the 1955 Treaty, and comes to the conclusion,

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as the present Judgment has come, that the submission of the Applicant to the effect that the alleged United States actions violated the provisions in question cannot be upheld, there is no further need to go into the examination of the second question, i.e., the question as to whether the actions of the United States in question can be justified under the provisions of Article XX, paragraph 1 *(d)*, of the Treaty. For this reason, I shall refrain from going into a comprehensive discussion of all the issues involved in the problem of Article XX, paragraph 1 *(d)*, at this juncture.

30. However, there is one aspect of the problem that I wish to address in this context, as I find that the way in which the Judgment approaches the problem would seem to me to be questionable, even if the Court were to decide to go into the problem of interpretation and application of Article XX, paragraph 1 *(d)*, of the Treaty.

31. The Judgment states, correctly in my view, that "[i]n the view of the Court, the matter is one of interpretation of the Treaty, and in particular of Article XX, paragraph 1 *(d)*" (Judgment, para. 40). Having stated this position, however, the Judgment appears nevertheless to shift to the domain of "self-defence", assimilating this problem of interpretation of Article XX, paragraph 1 *(d)*, with the general problem of self-defence under general international law. Thus, quoting from the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, to the effect that

> "action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI as 'necessary to protect' the 'essential security interests' of a party" (*I.C.J. Reports 1986*, p. 117, para. 224),

the Judgment states as follows:

> "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" (Judgment, para. 40).

32. It is submitted that this conclusion is a *non sequitur*. It is true in my view that, as a general proposition, the measures taken under Article XX, paragraph 1 *(d)*, when they involve the use of force, have to be compatible with the requirements of international law concerning the use of force. However, this does not mean that the problem involved in the "measures necessary to protect essential security interests" of a High Contracting Party under Article XX, paragraph 1 *(d)*, is synonymous with the problem involved in the right of self-defence under international law. Moreover, it has to be kept in mind that in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court was examining this problem on the basis of its jurisdiction given under

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Article XXIV of the 1956 Treaty between the parties with its application to the entire treaty, as well as under Article 36, paragraphs 2 and 5, of the Statute of the Court. Thus the Court could in that case get into the examination of the problem of self-defence under general international law without restriction. By contrast, the Court in the present case has jurisdiction only for the interpretation and application of Article XX, paragraph 1 *(d)*. Under such circumstances, the interpretation and application of that Article in this specific context cannot be said to "necessarily entail an assessment of the conditions of legitimate self-defence under international law" (Judgment, para. 40), which presumably will mean an assessment of these measures in light of the requirements prescribed by the Charter of the United Nations as measures of "self-defence" under its Article 51.

33. In spite of this, it appears to me that from this point onwards the focus of discussion of the Judgment concerning the assessment of the actions of the United States under Article XX, paragraph 1 *(d)*, is primarily placed on the examination of whether the actions of the United States in question satisfied the conditions for the exercise of the right of self-defence as prescribed by general international law, including the question of whether the alleged activities of Iran, which triggered the actions of the United States, amounted to an "armed attack". Thus, for instance, referring to the actions of the United States against the Reshadat complex on 19 October 1987, the Judgment states as follows:

> "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 . . . 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 and the exercise of self-defence." (Judgment, para. 51; emphasis added.)

34. It is submitted, however, that this assertion of the Judgment must be said to be misplaced in relation to the task before the Court, since it tends to shift the problem involved from the one of Article XX, paragraph 1 *(d)*, to the one of self-defence as such under international law. In effect, when stated in this general way, the whole question under our consideration is transformed into one of self-defence in general international law — an issue which clearly falls outside the competence of the Court in view of its limited jurisdiction in the present case. What the Court should be addressing in the present context of Article XX, paragraph 1 *(d)*, is not to ask the Respondent "to establish that [the United States] was legally justified in attacking the Iranian platforms *in exercise of the right*

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of individual self-defence" (Judgment, para. 51; emphasis added), but to engage, after determining whether the Respondent has established that the alleged attacks were indeed attributable to Iran, in an examination of whether the actions of the United States in question satisfied the conditions required under Article XX, paragraph 1 *(d)*, and, ancillary to that examination, and to that extent only, to go into the problem of whether the concrete modalities of those actions in the specific circumstances of the case were not incompatible with what is required under relevant rules of international law. In the process of examining these points, it should be unnecessary for the Respondent to show that the alleged Iranian activities 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" (Judgment, para. 51), since it is quite conceivable that certain measures can be legally undertaken under Article XX, paragraph 1 *(d)*, of the Treaty, in relation to such activities as may not amount to an "armed attack", as being "necessary to protect [the] essential security interests" of the United States, in such a way that these measures are not incompatible with the requirements of the relevant rules of international law. (This test of incompatibility would inevitably bring into the discussion the whole problem of the scope of the use of force under customary international law and within the United Nations Charter system — a problem which I refrain from getting into as being unnecessary at this juncture.)

35. Essentially the same comments on my part should apply to the approach taken by the Judgment in relation to the actions of the United States against the Salman and Nasr platforms on 18 April 1988. After stating that

> "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" (Judgment, para. 73),

the Judgment goes on to assert the following:

> "The Court does not . . . 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." (Judgment, para. 73.)

I submit that this assertion of the Judgment is also open to question, since to me the cardinal question that the Court must address in this part of its enquiry is the question of whether the interpretation of the Respondent of Article XX, paragraph 1 *(d)*, in its entirety is justified or not. The task of

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the Court should not be to examine and assess the actions of the United States in question against the yardstick of "self-defence" under general international law applying the criteria of necessity and proportionality as the essential components of the right of self-defence under international law — a task which the Court in the present case has no jurisdiction to address as such. Instead, the task should be to examine and assess these actions of the United States against the yardstick of Article XX, paragraph 1 *(d)*, of the Treaty applying the criteria of reasonableness and necessity as the essential ingredients inherent in that Article — a task which the Court is fully justified in carrying out within its jurisdiction.

36. To sum it up, the question that the Court should be addressing here is not the question as to whether the actions of the United States satisfied the requirements of "self-defence" under general international law; it is the question, first and foremost, of examining whether these actions were "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 is only as an ancillary part of this examination, and to that extent only, that the question of whether the concrete modalities that these actions of the United States took were in fact confined within the bounds prescribed by the relevant rules of international law relating to the use of force.

37. As has been repeatedly stressed above, it is crucial to keep in mind that in the present case the competence of the Court is limited to the examination of the claims of the Applicant under Article X, paragraph 1, and does not extend to the examination of a broader and general problem of self-defence under general international law as such. For this reason the present case is to be distinguished in some important respects from the case concerning *Military and Paramilitary Activities in and against Nicaragua*, where the Court had jurisdiction to deal squarely with the issue of self-defence under international law in general. In this sense, whereas the Judgment asserts that "the criteria of necessity and proportionality must be observed *if a measure is to be qualified as self-defence*" (Judgment, para. 43; emphasis added), the issue here is not whether the measure in question is to be *qualified as self-defence*. The measures in question are to be tested against the criteria of Article XX, paragraph 1 *(d)*, and not against the criteria of "self-defence" under general international law, except to the extent that an examination of the latter criteria becomes relevant as being ancillary to the examination of the former criteria.

38. The general problem of self-defence under international law is an extremely complex and even controversial subject both in terms of theory and practice. It is my considered view that while it is of utmost importance for the Court to pronounce its authoritative position on this general problem in a proper context, it should do so in a context where it should be possible for the Court to deal with the problem squarely in a full-fledged manner, with all its ramifications both in terms of the law and the facts involved.

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39. Such is not the case with the present situation for a number of reasons. First of all, the scope of jurisdiction of the Court for considering the present case is narrowly limited, as has been indicated above. In addition, the Respondent in its submissions in the Counter-Memorial, in the Rejoinder and in its final submissions in the oral pleadings did not rely upon this concept of self-defence as its principal line of defence and did not argue it in its full scope. Last but not least important is the fact that the circumstances surrounding the whole series of incidents which allegedly triggered the actions of the United States are shrouded in such deep mist (and mystery) that it is not at all easy to ascertain the full facts relating to the case, and to assess the actions of the United States against those ascertained facts surrounding these actions in the context of the doctrine of self-defence in general international law. Whether the actions of the United States could be justified as an act of self-defence would depend in the final analysis to a great extent upon the facts of the situation surrounding this case, although in the context of the present proceedings, it would seem from the evidence presented to the Court that the Respondent, charged with the burden of proof on this point, could not be said in my view to have discharged the onus of proof to the satisfaction of the Court.

40. For all these reasons, I conclude that this cannot be the place for the Court to engage in an examination of the general problem of "self-defence" in international law. If the Court should decide to get into the second stage of the examination of the case relating to Article XX of the Treaty, it would seem proper for the Court to approach the problem primarily on the basis of the examination of the interpretation and application of Article XX, paragraph 1 *(d)*, of the Treaty, and, if necessary as an ancillary exercise to this examination, to go into certain relevant aspects of a broader problem of international law on the use of force, but only to the extent relevant to the interpretation and application of Article XX.

IV. The Presence of Asymmetry in the Production of Evidence

41. It must be said that in my view the present case is a highly unusual and in some sense even bizarre case, in so far as its factual aspects are concerned. There are certain specific characteristics which make this case unique and make the task of the Court extremely complex.

First, with regard to the cause of action by the Applicant on the one hand, the military actions taken by the United States are public knowledge — a point of fact which the United States as Respondent does not contest. Thus the Applicant is not required to discharge the burden of proof, as far as the alleged facts that constitute its cause of action are concerned, as it would normally have to do in many contentious proceedings.

42. With regard to the defence by the Respondent on the other hand, at any rate in so far as its defence based on Article XX, paragraph 1 *(d)*,

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is concerned, the Respondent is placed in a position to justify its actions taken in relation to certain alleged activities of the Applicant, by establishing that its actions in question were taken against those activities which were carried out by Iran. In this situation, the burden of proof on the factual aspects of these alleged activities of Iran has come to rest with the Respondent. It is the Respondent that has to establish that those activities, against which it claims to have taken certain measures in the form of military actions, are attributable to Iran — a point of fact which the Applicant categorically denies. The net effect of this situation is that somewhat paradoxically the failure of the Respondent in establishing certain material facts of the case could result, not simply in the failure of that Party in its claim against the opponent — represented in the present case typically in its counter-claim — but also in the attribution of international responsibility of that Party for its own actions taken against the alleged but unsubstantiated activities of the Applicant.

43. Second, more significantly, this problem of establishing certain material facts of the case has been made extremely difficult, due to the existence of a hidden third party to the case which nevertheless has not appeared as an actual party to the present proceedings — even by way of a third party intervention — but which in fact has presumably been a relevant party to the incidents that has led to the present proceedings. The existence of Iraq, a State which throughout the material period of the events that form the subject-matter of the present case was engaged in war against Iran, and was actively engaged in the "Tanker War" that formed the background of the incidents leading to the present proceedings, makes the problem of ascertaining the material facts extremely complex. Indeed, as the Judgment itself acknowledges, the actual situation that prevailed in the region at that time was such that it would not be unreasonable to surmise that virtually all the activities, involving attacks by missile launching and by minelaying against neutral shipping including the United States vessels passing through the Persian Gulf — the activities which the Respondent claims to have triggered its military actions at issue — were attributable either to Iran or to Iraq, or possibly to both (Judgment, para. 44).

44. Under these circumstances, if one were to succeed in reaching a truly objective conclusion on the problem of whether the actions of the United States in the present case were justified against the alleged activities of Iran in the Persian Gulf under Article XX, paragraph 1 *(d)*, of the 1955 Treaty — a question that the Court in my view is spared of addressing in the present case, as long as the Court comes to the conclusion stated in the Judgment concerning Article X, paragraph 1, of the Treaty (Judgment, para. 99) — it would be necessary for the Court to be apprised of the whole truth about the relevant facts of the case in full relating to the situation during the material period, including the alleged incidents that led to the actions of the United States in 1987 and 1988. Indeed, as has been stated above in paragraph 39, it would only be on the

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basis of such ascertained full facts that the Court could assess in a conclusive manner whether the alleged actions of the United States met the conditions prescribed by the provisions of Article XX, paragraph 1 *(d)*, including, as relevant, the rules of general international law on the use of force. This, I submit, the Court has not done. In order to do that, in my view, the Court would have had to go deeper into ascertaining the facts surrounding the case.

45. It goes without saying as a basic starting point in this context that a fundamental principle on evidence *actori incumbit onus probandi* should apply in the present case as well. Thus, the onus of proof to establish these relevant facts inevitably lies with the Party which claims the existence of these facts (i.e., the Respondent) as the basis for the defence of its actions complained of by the Applicant. On this basis, it must be said that the Respondent has failed to discharge this burden of proof to the satisfaction of the Court. To this extent, I concur with the conclusion on this specific point reached by the Judgment.

46. Nevertheless, there is no denying the fact that there undoubtedly exists an asymmetry in the situation surrounding this case as described above, in terms of producing evidence for discharging the burden of proof, between the position of the Applicant in its claim against the Respondent and the position of the Respondent in its defence against the Applicant. I am prepared to accept that this asymmetry is inherent in the circumstances of the present case and that there is little the Court can do under the circumstances. It is primarily the task incumbent upon the party which claims certain facts as the basis of its contention to establish them by producing sufficient evidence in accordance with the principle *actori incumbit onus probandi*.

47. Accepting as given this inherent asymmetry that comes into the process of discharging the burden of proof, it nevertheless seems to me important that the Court, as a court of justice whose primary function is the proper administration of justice, should see to it that this problem relating to evidence be dealt with in such a way that utmost justice is brought to bear on the final finding of the Court and that the application of the rules of evidence should be administered in a fair and equitable manner to the parties, so that the Court may get at the whole truth as the basis for its final conclusion. It would seem to me that the only way to achieve this would have been for the Court to take a more proactive stance on the issue of evidence and that of fact-finding in the present case.

48. This brings me to the problem of the standard of proof to be required for discharging the burden of proof in a case where the party who carries the burden of proof, though responsible for discharging that burden, finds itself in an extremely difficult situation as seen from an objective point of view.

49. It was Judge Sir Hersch Lauterpacht who stated, on this question of the burden of proof, although under quite different circumstances, as follows:

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> "There is, in general, a degree of unhelpfulness in the argument concerning the burden of proof. However, some *prima facie* distribution of the burden of proof there must be . . . [T]he degree of burden of proof . . . to be adduced ought not to be so stringent as to render the proof unduly exacting." (*Certain Norwegian Loans, I.C.J. Reports 1957*, p. 39.)

50. The Court in the *Corfu Channel* case was itself confronted with a situation where such consideration could apply. On the question of the standard of proof involved in this case, the Court had the following to say:

> "It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims . . ..
>
> On the other hand, the fact of [the] exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion." (*I.C.J. Reports 1949*, p. 18.)

51. It goes without saying that there are fundamental differences between the circumstances that gave rise to the incidents which formed the cause of action by the Applicant before the Court in the *Corfu Channel* case and the circumstances that led to the incidents which formed the basis for the defence by the Respondent before the Court in the present case. One of the critical differences lies in the fact that the incidents in the *Corfu Channel* case took place within the territorial waters of the Respondent, while the incidents in question in the present case allegedly took place in the international waters of the Gulf where the Applicant had no "exclusive territorial control" *(ibid.)*.

52. Nevertheless, it would seem to me that this *dictum* of the *Corfu Channel* case contains some valid points which could be susceptible of general application to an international court, where the procedures and rules on evidence seem to be much less developed, and the task of the Court for fact finding much more demanding, than in the case of the national courts. It is on this consideration that, without in any way prejudging the ultimate outcome of such examination by the Court in the present case, I should have liked to see the Court engage in a much more

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in-depth examination of this difficult problem of ascertaining the facts of the case, if necessary *proprio motu*, through various powers and procedural means available to the Court under its Statute and the Rules of Court, including those relating to the questions of the burden of proof and the standard of proof, in the concrete context of the present case.

(Signed) Hisashi OWADA.

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