COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES PLATES-FORMES PÉTROLIÈRES

(RÉPUBLIQUE ISLAMIQUE D'IRAN c. ÉTATS-UNIS D'AMÉRIQUE)

EXCEPTION PRÉLIMINAIRE

ARRÊT DU 12 DÉCEMBRE 1996

1996

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING OIL PLATFORMS

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

PRELIMINARY OBJECTION

JUDGMENT OF 12 DECEMBER 1996

SEPARATE OPINION OF JUDGE HIGGINS

1. In this jurisdictional phase the Court has had to decide whether the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States affords a basis of jurisdiction in respect of any of the claims advanced by Iran.

2. But there are also important questions relating to the methodology for determining whether a particular claim falls within the compromissory clause of a specific treaty. Some of these questions were clearly of concern to the Parties in this case. I have thought it useful briefly to address this issue, not least because of a marked uncertainty in the practice of the Court.

3. Article XXI (2) of the 1955 Treaty provides (in phraseology identical to, or closely approximating, comparable clauses in many other treaties, multilateral and bilateral) 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 . . ."

In certain other treaties the phrase "interpretation or application" appears in the reverse order, as "application or interpretation". Either way, the phrase contains two distinct elements which may form the subject-matter of a reference to the Court. All too frequently, they are treated compendiously.

4. Where the jurisdiction of the Court is contested, the "application" of a treaty can manifestly form one or more of the grounds of objection. There are a multitude of reasons why, in the face of claims advanced, a treaty may be contended not to apply. It may be said to have been terminated (Arts. 54-60, Vienna Convention on the Law of Treaties); or to be invalid (Arts. 46-53); or to have lost legal significance because of the effect of a later treaty on the same subject-matter (Art. 30); or to be non-retroactive in its application (Art. 28); or inapplicable by reference to its territorial scope (Art. 29); or subject to a relevant reservation (Art. 21). A treaty may also be claimed to be inapplicable *ratione temporis* (see *Corfu Channel* case, *Merits, Judgment, I.C.J. Reports 1949*, p. 22); or not to be in force between both parties (see the *Asylum* case, *Judgment, I.C.J. Reports 1950*, pp. 276-277; and the case concerning *Constitution of the*

Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960, p. 171).

5. There occurs rather more infrequently a preliminary objection whereby one party contends that a treaty claimed by the other party to found the jurisdiction of the Court is non-applicable *ratione materiae*. Study of such relevant jurisprudence as exists on this point is instructive.

6. There are a series of cases which should properly be referred to, but which are really marginal to the issue. The *Factory at Chorzów* case (*Judgment No. 8, 1927, P.C.I.J., Series A, No. 9)*, the *Asylum* case (*I.C.J. Reports 1950*, p. 266), the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case (*I.C.J. Reports 1950*, p. 65), the *Haya de la Torre* case (*I.C.J. Reports 1951*, p. 71), the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1952*, p. 93), the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 15), the *Barcelona Traction, Light and Power Company, Limited* case (*I.C.J. Reports 1964*, p. 6) and *Certain Phosphate Lands in Nauru* case (*I.C.J. Reports 1992*, p. 240) are among those where a treaty has fallen for interpretation in a jurisdictional context, but without raising any point directly relevant to the application of a treaty as it arises in the present case.

7. In the *United States Diplomatic and Consular Staff in Tehran* case (*I.C.J. Reports 1980*, p. 3) Iran filed no pleadings. In the various communications it nonetheless sent to the Court, it did not contest the "application" of the Vienna Convention on Diplomatic Relations and the 1955 Treaty of Amity, Economic Relations and Consular Rights in the juridical sense of that term. Rather, it said:

> "the problem . . . is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements" (*ibid.*, p. 19).

8. In the case concerning *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (*I.C.J. Reports 1988*, p. 12) the Court was called upon to decide whether there existed between the United States and the United Nations a dispute concerning the interpretation or application of the Headquarters Agreement which should be referred to arbitration as envisaged in Section 21 *(c)* of that instrument. Although the Court stated that "the request for an opinion concerns solely the applicability to the alleged dispute of the arbitration procedure provided for by the Headquarters Agreement" (*ibid.*, p. 26), the Court focused above all upon whether there was a dispute and upon all the legal elements relating to that question. It stated that it "sees no reason not to find that a dispute exists between the United Nations and the United States concerning the

'interpretation or application' of the Headquarters Agreement" (*I.C.J. Reports 1988*, p. 32). Judge Schwebel pertinently noted that the dispute was probably only a dispute as to the *application* of the arbitration provisions, and not a dispute about interpretation of the Agreement (*ibid.*, p. 43).

9. Other cases are more directly relevant for the purpose of addressing the methodological problems at the heart of the present case. They reveal a struggle between the idea that it is enough for the Court to find provisionally that the case for jurisdiction has been made, and the alternative view that the Court must have grounds sufficient to determine definitively at the jurisdictional phase that it has jurisdiction.

10. In the case concerning *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion, 1923, P.C.I.J., Series B, No. 4)* an objection was made to the jurisdiction of the Court. The Court found that it would be necessary for it to reach a *provisional conclusion* as to the asserted bases of jurisdiction.

11. In the *Mavrommatis* case *(Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2)*, it was necessary for the Court to assure itself that the dispute fell within the requirements of Article 26 of the Mandate, that is, that it related "to the interpretation or the application of the provisions of the Mandate". The Court on this occasion stated that it "cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate" (*ibid.*, p. 16). It distinguished the case concerning *Nationality Decrees Issued in Tunis and Morocco* on the grounds that in an advisory opinion the principle of the consent of States to the submission of disputes was not in issue. The Greek Government had alleged violations of Article 11 of the Mandate. The Permanent Court declared that "The question to be solved is whether the dispute above mentioned should be dealt with on the basis of this clause" (*ibid.*, p. 17). The technique employed by the Permanent Court was to enter into a very substantive and detailed analysis of the claims under the various concessions, by reference to the first paragraph of Article 11. The analysis was anything but "provisional". Nor was there any suggestion that the Permanent Court thought its task was to see if Greece had made "plausible arguments" or suggested a "reasonable link" between the claims and those provisions. The Permanent Court said it was "constrained at once to ascertain whether . . . any breach of [the obligations in Article 11] would involve a breach of the provisions of this article" (*ibid.*, p. 23). It correctly pointed out that that was not to prejudge the merits, for only upon the merits would it be possible to know whether the obligations truly had been violated.

12. On that basis the Permanent Court upheld the British preliminary objection in so far as it related to the claim regarding works at Jaffa and dismissed it in so far as it related to the claim regarding works at Jeru-

salem. The Jerusalem part of the claim could proceed to a judgment on the merits.

13. In *Certain German Interests in Polish Upper Silesia (Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6)* various preliminary objections were advanced by Poland, one of which contended that the Court had no jurisdiction because the dispute was not one contemplated under Article 23 of the Convention of Geneva, on which the Court's jurisdiction was claimed by Germany to be founded. Observing that the Court's jurisdiction could not be based on the contentions of either Party as to Article 23, the Permanent Court acknowledged that it must decide that matter for itself, at the outset. The Permanent Court acknowledged that it was important not to intrude upon the merits, but continued:

> "On the other hand, however, the Court cannot on this ground alone declare itself incompetent; for, were it to do so, it would become possible for a Party to make an objection to the jurisdiction — which could not be dealt with without recourse to arguments taken from the merits — have the effect of precluding further proceedings simply by raising it *in limine litis*; this would be quite inadmissible. (*Ibid.*, p. 15.)

The Court concluded that it had to proceed to determine if Article 23 applied "even if this enquiry involves touching upon subjects belong to the merits of the case" *(ibid.)*.

14. The *Mavrommatis* case, in which issues of direct pertinence for the present case were canvassed both directly and deeply, remains of seminal importance. The correct way to approach these difficult matters, there so clearly addressed, appears to have been put in some doubt some 29 years later by another case between Greece and the United Kingdom. The *Ambatielos* case received the detailed attention of both Iran and the United States in the present case. The comparable issue — that is, whether a claim was indeed "based on" a treaty (the Treaty of Commerce and Navigation of 1986) was this time dealt with in a Judgment on the merits, the Court in its Judgment on jurisdiction the year before having found that it had jurisdiction to decide whether the United Kingdom was under an obligation to submit to arbitration in accordance with the Declaration annexed to the Treaty of Commerce and Navigation of 16 July 1926 between Great Britain and Greece. It had found that it had jurisdiction to determine this question "in so far as that claim was based on the Treaty of Commerce and Navigation of November 10th, 1886" (*I.C.J. Reports 1953*, p. 12). And *that* matter now fell for determination in the Court's Judgment of 1953.

15. Greece suggested that a modest link between the subject-matter of

the dispute and the Treaty of Commerce would suffice: it was said that the claim "does not *prima facie* appear to be unconnected with those provisions" *(I.C.J. Reports 1953,* p. 12). The United Kingdom thought that this was the wrong jurisdictional test — and that even had it been right the claim was "obviously unrelated" (*ibid.,* p. 13). The United Kingdom further contended that "even if all the facts alleged by the Hellenic Government were true, no violation of the Treaty would have occurred" *(ibid.)*.

16. The Court departed from the approach so clearly set out in the *Mavrommatis* case, stating that in dealing with the words "in so far as this claim is based on the Treaty of 1866" did "not mean that the Ambatielos claim must be found by the Court to be validly based on the Treaty of 1886" (*ibid,* p. 16). Rather, its task was to determine whether:

> "the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886. On the other hand, it is not necessary for that Government to show, for present purposes, that an alleged treaty violation has an unassailable legal basis . . . If the interpretation given by the Hellenic Government to any of the provisions relied upon appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one, then the Ambatielos claim must be considered, for the purposes of the present proceedings, to be a claim based on the Treaty of 1886." (*Ibid.*, p. 18.)

17. This passage was much examined in the present case. It manifestly marks both a different standard and a different methodology from that employed in the *Mavrommatis* case. The Court sought to explain this by stating that this case was "quite unlike the case of *Mavrommatis Palestine Concessions*" (*ibid.,* p. 14), because in the *Ambatielos* case the Court could not itself decide on the merits of the claim, that matter reserved to another tribunal. Its only duty was to see whether the dispute should be referred to that tribunal.

18. Some may wonder at the distinction being made, noting that the International Court must just as much avoid passing upon on the merits in the jurisdictional phase of a case where the merits (if proceeded to) it will itself later have to address. And in the *Appeal Relating to the Jurisdiction of the ICAO Council* case the Court was later to find that the analysis of the compromissory clause would necessarily be the same, whether the substantive competence was its own or ICAO's (*I.C.J.*

Reports 1972, p. 61). In any event, whether or not one shares the perception that the *Ambatielos* case was "quite unlike" the *Mavrommatis* case, in the present case there is no question of the merits of the case being decided by any tribunal other than the Court itself. The *Mavrommatis* model remains the more compelling.

19. In the *Interhandel* case (1959) the Court had to decide whether it had jurisdiction over the Swiss claims in the light of the United States objection that the issues raised in the Swiss Application and Memorial were matters within the domestic jurisdiction of the United States. The Swiss Government, in responding to this objection, invoked the Washington Accord between the two Parties. The Court stated that it would:

> "confine itself to considering whether the grounds invoked by the Swiss Government are such as to justify the *provisional conclusion that they may be of relevance in this case* and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law" (*I.C.J. Reports 1959*, p. 24; emphasis added).

The approach of the Court as to the application of the Washington Accord was to see, as a "provisional conclusion", whether it might be "relevant to this case", i.e. apply to the claims advanced. But no further attention was directed to the matter.

20. The case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, in both its jurisdictional phase and in the Judgment for the merits, has important implications for this case, as both Parties have stressed. Nicaragua's claim was based on certain military activities in Nicaragua and the waters off its coast, responsibility for which it attributed to the United States of America (*I.C.J. Reports 1984*, p. 428). While the main basis for jurisdiction was predicated on Article 36 (2) of the Statute, Nicaragua offered as a subsidiary basis of jurisdiction the 1956 Treaty of Friendship, Commerce and Navigation between itself and the United States. The terms of Article XXIV (2), the compromissory clause, are exactly the same as those in Article XXI of the Iran-United States Treaty of 1955. Nicaragua in its Memorial alleged violations of Articles XIX, XIV, XVII, XX and I of the Treaty, though virtually no further reference was made to these heads of the subsidiary claim in the oral argument (see *ibid.*, Judge Oda, separate opinion, p. 472).

21. The Court decided, by 14 votes to 2, that it had jurisdiction under Article XXIV. In so doing it referred to the generality of the articles invoked "particularly the provision in, *inter alia,* Article XIX". It continued that, taking these factors into account

> "there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia*, as to the 'interpretation and application' of the Treaty" (*I.C.J. Reports 1984,* p. 428, para. 83).

22. The Court appears on this occasion, as before, to have made a definitive finding by reference to the various articles of the 1956 Treaty, especially Article XIX, but this time without legal reasoning being proffered for its findings. The separate and dissenting opinions generally do not elucidate further the matter of legal reasoning. Of those who mention the matter at all, Judge Singh limited himself to observing that the FCN Treaty was in fact the best basis of jurisdiction. Judge Oda clearly felt the matter had received insufficient attention by bar and bench. In Judge Ago's view, the jurisdictional requirement was met by the very recitation of claims alleging violations of specific articles. The necessary implication is that there was no further task for the Court itself to perform at the jurisdictional phase. Judge Sir Robert Jennings approved the FCN Treaty as a basis of jurisdiction, and treated compendiously the concepts of seeing that a clause "covers" alleged acts and making good the allegations relating to them. Both "must await the proceedings on the merits" (*ibid.*, p. 556).

23. Judge Schwebel, by contrast, clearly was of the view that a link between the claims and the treaty must be offered by Nicaragua, and determinatively resolved by the Court, at the phase of jurisdiction. He engaged in that task himself in relation to each of the articles invoked and concluded "[I]t is plain that the Treaty itself cannot plausibly be interpreted to afford the Court jurisdiction" (*ibid.*, p. 637). It would appear that Judge Schwebel believed the correct test to be the relative modest one of "plausible interpretation" *(ibid.)* and that it was for the Court to resolve the jurisdictional matter on that basis at the outset.

24. The Court, however, was to leave its substantive analysis of the clauses of the Treaty, claimed to found a subsidiary basis of jurisdiction, until the merits.

25. In the recent *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the Court returned to a rather more traditional approach to these matters. Bosnia and Herzogovina invoked Article IX of the Genocide Convention as the jurisdictional basis for the claims it brought against the Federal Republic of Yugoslavia. Yugoslavia claimed that the dispute did not fall within the compromissory clause of the Genocide Convention, which gave the Court jurisdiction over "disputes . . . relating to the interpretation, application or fulfilment of the present Convention" (*Application of the Convention on the*

Prevention and Punishment of the Crime of Genocide, Judgment, I.C.J. Reports 1996, p. 614, para. 27). It was not suggested by Yugoslavia that — as the United States has suggested in the present case — the claim had nothing to do with the subject-matter of the Treaty. But it did claim that Article IX envisaged an *international* dispute, which it saw as being absent, and that, furthermore, the responsibility of a State for its own actions falls outside of the subject-matter jurisdiction of Article IX.

26. It is true that the question of "sufficiency of subject-matter connection" was not an issue. Nor did the manner in which the Court should approach its task receive special attention from the Parties or the Court. At the same time the Court simply pronounced with finality on the objections *ratione materiae* advanced by the Federal Republic of Yugoslavia under Article IX. There was no suggestion from the Court that it thought it sufficed for Yugoslavia to advance a "possible interpretation" *(Ambatielos)* or that it was reaching a "provisional conclusion" *(Interhandel)*.

* * *

27. The present case has put into sharp focus a range of related but discrete issues that must be addressed. When the Court faces a preliminary objection to its jurisdiction on the grounds that the invoked treaty "does not cover" the claims, or concludes that the claims "do not fall under" or "do not fall to be determined by reference to" the Treaty, three questions arise. First, what is the test by which the Court is to make its finding? Second, is the Court's finding on this issue at the jurisdictional stage provisional or final? Third, in what way is the answer dictated by the necessity of the Court avoiding entering into the merits at the jurisdictional phase?

28. It is not an easy task to see a clear or constant line of jurisprudence on these matters, but certain answers suggest themselves. In formulating them, it is to be borne in mind that:

> "Neither the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken *in limine litis* to the Court's jurisdiction. The Court therefore is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 16.)

29. The necessary interpretative analysis in the *Mavrommatis* case fell to be made within the framework of Article 11 of the Mandate. But it cannot be doubted that had Greece suggested that the British Government had violated other articles of the Mandate, the Permanent Court would have gone through the same exercises of interpretation with regard to those articles, too. It is true, of course, that the Court must found its jurisdiction on the compromissory clause, Article XXI of the 1955 Treaty. But that cannot be done on an impressionistic basis. The Court can only determine whether there is a dispute regarding the interpretation and application of the 1955 Treaty, falling within Article XXI (2), by interpreting the articles which are said by Iran to have been violated by the United States destruction of the oil platforms. It must bring a detailed analysis to bear.

30. Nor does it suffice to say that there is manifestly a dispute about the application, and indeed the interpretation of the Treaty — and that *ergo* there exists jurisdiction under Article XXI. It was suggested to the Court by Iran that it was enough for there to be differences between the two sides as to the application of the Treaty (CR 96/15, p. 31). But one must ask the question: enough for what? It is, of course, enough for the Court to have to exercise its *compétence de la compétence*, as it is now doing. But it is not necessarily enough in the sense of it being a pass-key for the case to proceed to the merits. The Court has first to decide if the claims fall under the 1955 Treaty — in other words, that the Treaty applies. In the present case, where jurisdiction is disputed, and there is a dispute about "the interpretation or application" of a treaty, "application" falls for determination at the jurisdictional phase.

31. Where the Court has to decide, on the basis of a treaty whose application and interpretation is contested, whether it has jurisdiction, that decision must be definitive. (It is uncertain whether cases where the merits fall to be determined by another tribunal may perhaps be an exception to this general provision — notwithstanding that the *rationale*, when closely examined, is debatable.) It does not suffice, in the making of this definitive decision, for the Court to decide that it has heard claims relating to the various articles that are "arguable questions" or that are "bona fide questions of interpretation" (each being suggestions advanced in this case). This is so notwithstanding that the *Interhandel* case (with its passing reference to a "provisional conclusion") and the *Military and Paramilitary Activities in and against Nicaragua* case do not fit easily into this approach. The treatment of the issue in the latter case contained so many remarkable elements and so many diverse views that it cannot be seen as a clear decision by the Court to move away from the approach so powerfully established in the *Mavrommatis* case. Nor, in my view, is the answer to be found in the establishment of a "reasonable connection"

between the claims and the Treaty — that is a necessary but not sufficient condition.

32. There has been some suggestion that "plausibility" provides another test for determination of whether the Court has jurisdiction. It was said in the *Ambatielos* case that the Court must determine whether the arguments of the applicant State

> "in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim *is* based on a Treaty" (*I.C.J. Reports 1953*, p. 18; emphasis added).

"Plausibility" was not the test to warrant a conclusion that the claim *might* be based on the Treaty. The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes — that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.

33. In the *Ambatielos* case (1953), the Court rejected the United Kingdom claim that the Court should provisionally accept the facts as asserted by the applicant and see if they would constitute a violation of the Treaty said to provide the Court with jurisdiction. The Court did this for two reasons: first, to find that the facts *would* constitute a violation was to step into the merits; and second, the merits in this case had been reserved to a different body, the Commission of Arbitration established under the Protocol of 1886. This constraint does not operate in the present case. It is interesting to note that in the *Mavrommatis* case the Permanent Court said it was necessary, to establish its jurisdiction, to see if the Greek claims "would" involve a breach of the provisions of the article. This would seem to go too far. Only at the merits, after deployment of evidence, and possible defences, may "could" be converted to "would". The Court should thus see if, on the facts as alleged by Iran, the United States actions complained of might violate the Treaty articles.

34. Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases (unless it had been decided that a preliminary objection did not possess an exclusively preliminary character under Article 29 (2) of the Rules of Procedure) and to protect the integrity of the proceedings on the merits. Of course any definitive decision that even on the facts as described by Iran no breach of a particular article could follow, does "affect the merits" in the sense that that matter no longer may go to the merits. That is inherent in the nature of the preliminary jurisdiction of the Court. What is for the merits

— and which remains pristine and untouched by this approach to the jurisdictional issue — is to determine what exactly the facts are, whether as finally determined they do sustain a violation of, for example, Article X; and if so, whether there is a defence to that violation, lying in Article XX or elsewhere. In short, it is at the merits that one sees "whether there really has been a breach" *(Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 23).

35. It is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff. (I make no reference in these observations as to the jurisdictional standards applicable for establishing a competence sufficient for the ordering of provisional measures.) The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.

36. A final point on judicial methodology: in its Judgment the Court has accepted certain of the preliminary objections, and rejected others. This is not without precedent, as shown by the different treatment that was accorded in the *Mavrommatis* case to the preliminary objections as they related to the Jaffa and the Palestine Concessions. The Court may properly determine that it has jurisdiction in respect of certain claims but not in respect of others. (This approach to settling one's own jurisdiction is, incidentally, very familiar to human rights tribunals, which often are faced with claims of violations of a variety of treaty provisions, but decide that, for jurisdictional reasons, the applicant may only proceed to the merits in respect of one or more of them.) Selection of grounds of claim that may proceed to the merits is a proper exercise of the *compétence de la compétence.*

* * *

37. It is these methodological considerations that have fashioned my approach to the substantive consideration of Articles I, IV and X of the 1955 Treaty in the light of the United States preliminary objection. It is necessary to decide definitively whether any of them afford a basis of jurisdiction; and the legal threshold in this regard is exactly as it would be with any other decision.

38. The Court was informed by Iran that the destroyed platforms were in active commercial use, save for Platform 7 in the Reshadat complex and the control room at the Salman complex, which were undergoing repairs. The United States has told the Court that the platforms were being used for hostile military purposes. The question to be resolved is whether, even taking *pro tem* Iran's version of the facts, their destruction could violate Articles I, IV (1) or X (1).

39. I am essentially in agreement with what the Court has to say on the application of Articles I and IV (1) of the 1955 Treaty to the facts as claimed by Iran. In particular, I agree that the use of force is not *per se* "outside of" the 1955 Treaty: the issue rather is whether the use of force in issue could in principle cause a violation of the Treaty. I equally agree that neither Article I nor Article IV (1) provides that potentiality. My reasons regarding Article I are essentially those offered by the Court. My reasons regarding Article IV (1) are to an extent different. I believe that Article IV (1) clearly refers to the obligations of the United States to Iranian nationals, their property and their enterprises, within the territory of the United States; and vice versa. This follows from the stated duty not to impair "their legally acquired rights" — the language of foreign investment protection. It follows equally from reading Article IV (1) together with the clauses that follow. I further believe that the key terms "fair and equitable treatment to nationals and companies" and "unreasonable and discriminatory measures" are legal terms of art well known in the field of overseas investment protection, which is what is there addressed. And the well-known meaning given to these terms simply has no common point of reference with the facts as claimed by Iran.

40. The Court has founded its jurisdiction on Article X (1) which provides that "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation". In the *Oscar Chinn* case *(Judgment, 1934, P.C.I.J., Series A/B, No. 63)*, as in the present case, the Permanent Court noted that freedom of navigation and freedom of commerce were indeed separate concepts but, in the context of the rights under examination in that case, did not need separate examination. Although — as the Court has observed in paragraph 38 of its Judgment — no claim has been made by Iran relating to freedom of navigation, here too the freedom of commerce provided for in Article X (1) still has to be read in context. Freedom of commerce in its general sense is exactly what is buttressed by the provisions of Articles VIII and IX. Read both against

the background of these articles, and in the context of the paragraphs that follow in Article X itself, it does seem to me that the commerce there referred to is maritime commerce or — as in the *Oscar Chinn* case — commerce integral to, closely associated with, or ancillary to maritime commerce.

41. Were the phrase "freedom of commerce" in paragraph 1 of Article X to have a meaning entirely distinct from all that follows in Article X, it would surely either have been located in Articles VIII or IX, or have merited a separate article to itself. The fact that the 1955 Treaty replaced the provisional agreement of 1928 (Judgment, para. 41) does not seem to outweigh these considerations.

42. It is suggested in the Judgment (para. 46) that "the right to . . . operate businesses" is covered by treaties dealing with trade and commerce. But any such right is a right given to the nationals of the one party in the territory of the other. Treaties of trade and commerce do not provide that party A will allow party B to operate businesses in B's own territory. Such a provision would be strange indeed.

43. These points apart, there is also the question as to whether petroleum production platforms (whether engaged in actual production at the relevant moments or not) are "commerce" within the terms of Article X (1). The Court has persuasively shown in paragraph 45 of the Judgment that "commerce" is generally understood as going beyond purchase and sale and including a multitude of activities ancillary thereto. It is equally true that petroleum is an important commercial export from Iran to the United States. But yet a further step is required to show that commerce is generally understood to include *the means of production* of that which may, much later in the chain, form the subject matter of international commerce.

44. No authority is offered by the Court for that "step too far".

45. The quotation from the Judgment of the Permanent Court of International Justice in the *Oscar Chinn* case (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 84) cited in the Court's present Judgment (para. 48) should not be taken out of its context. In this case the Court was called upon to decide if, by virtue of the impact of certain Belgian actions upon Mr. Oscar Chinn, a British river transporter in the Congo, Belgium had violated its obligations towards the United Kingdom under the Convention of Saint-Germain-en-Laye of 1919. Article 1 of that Convention annexed Article 1 of the General Act of Berlin of 26 February 1885 according to which "the trade of all nations shall enjoy complete freedom". And Article 5 of the Convention of Saint-Germain-en-Laye provided that the navigation of the Niger and lakes within the specified

territories "shall be entirely free for merchant vessels and for the transport of goods and passengers". Further, craft of every kind belonging to the signatory Powers "shall be treated in all respects on a footing of perfect equality".

46. The Court found that, in the Saint-Germain régime, fluvial transport was a branch of commerce and that freedom of commerce ("commercial freedom") was expressly contemplated (*Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63*, pp. 81 and 83). It was but a short step for the Permanent Court to find that freedom of trade guaranteed the right to engage in any commercial activity, including "industry, and in particular the transport business" (*ibid.*, p. 84).

47. The fluvial transportation industry was an integral part of the trade envisaged under Article 5 of the Saint-Germain Convention in a way that oil production is not an integral part of what was envisaged under Article X of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States. Moreover, the aggrieved party was a foreigner, complaining about the actions of the host State. The *Oscar Chinn* case cannot, in my view, be relied on as authority for the proposition that the legality of the destruction of oil platforms falls to be decided by reference to the treaty obligation of freedom of commerce.

48. Nor is the situation saved, in my view, by the contention that "freedom of commerce", even if not "commerce" itself, covers that which is produced and which may perhaps at a later stage be exported, perhaps to the United States (cf. the present Judgment, para. 50).

49. Were the standard required for deciding any of the above matters mere "reasonable connection" or "provisional conclusion", then I concede that this test might well be met. But, for the reasons I have elaborated above, the Court must have available to it substantive reason to support a definitive finding.

50. Iran emphasized in its pleadings to the Court that the oil produced in the Reshadat field passed through a central platform within the complex, in order to be passed by pipeline to the storage and loading facilities at Lavan Island. It was also contended that it was from platform A on the Nasr complex that oil was transported by pipeline to the loading, storage and export facilities at Sirri Island. If that is so (and these assertions of fact are not conceded by the United States and until the merits cannot be adjudicated), then those particular platforms may be regarded as integral to the transport of oil to tanker loading points (and not just its production). Iran informed the Court that the United States attacks were directed at the Reshadat central platform and the Nasr complex A platform. Accordingly, their destruction might occasion a violation of

Article X (1). That transportation (or "carriage of goods") is an essential part of commerce is well recognized in the leading textbooks on the subject, as well as in the citations relied on by the Court in paragraphs 45 and 46 of its Judgment.

51. It is on these very limited grounds that I have voted in favour of the Court's *dispositif* in this case. They provide a sufficiently substantive ground for the existence under Article XX1 (2) of a dispute between Iran and the United States concerning the application and interpretation of Article X (1) of the 1955 Treaty, as it bears on the destruction of the Reshadat and Nasr complex. I do not believe the Court has any jurisdiction over the destruction of the Salman complex, where no comparable allegations of fact were made as to the transportational function of the installations destroyed.

52. It will be for the United States, upon the merits, to challenge Iran's allegations of fact as to the technical, operational character of the particular installations destroyed and to seek to make good its own claims that they were being put to military use. The United States will also be able to adduce all defences open to it.

(Signed) Rosalyn HIGGINS.