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 SHAHABUDDEEN

PRELIMINARY

The question before the Court is whether the Applicant has a right to have its claim adjudicated. The Respondent says there is not such a right. The objection presents the Court with the delicate problem of ensuring, on the one hand, that the Respondent is not given cause to complain that it has been brought before the Court against its will, and, on the other hand, that the Applicant is not left to feel that it has been needlessly driven from the judgment seat. It is necessary to navigate carefully between these perils.

As the Court has found, there is a dispute between the Parties, which it has not been possible to adjust by diplomacy, and which the Parties have not agreed to settle by any pacific means other than recourse to the Court. To that extent, the corresponding conditions of the compromissory clause are therefore satisfied. Nevertheless, the Parties differ on the question whether there is a right of recourse to the Court, the particular issue being

> "whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application' of the Treaty of 1955" (Judgment, para. 16).

The Court has taken the position that:

> "In order to answer that question, . . .[i]t must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2." *(Ibid.)*

Thus, in the view of the Court, the test of jurisdiction is whether the alleged violations "do or do not fall within the provisions of the Treaty". Some seeming plasticity in that statement notwithstanding, the remainder of the Judgment makes it clear that what the statement means is that the Court is required to make a definitive interpretation of the Treaty at this jurisdictional phase. In paragraph 52, for example, the Court holds that Article I of the Treaty "by itself . . . is not capable of generating legal rights and obligations" — thus definitively determining the main issue dividing the Parties on that provision. The Applicant had contended for a lower test, which, however worded, does not involve the making of a definitive interpretation of the Treaty at this stage. Without addressing

extensive arguments on the point, the Court has opted for the higher test. If a lower test is used, the consequences are not wholly congruent with those produced by the Court's test. Which is the right test?

THE OBJECTION

Put briefly, the issue now before the Court arises this way: the Respondent contends that the 1955 FCN Treaty between itself and the Applicant is irrelevant to the matters alleged in the Applicant's claim, and therefore that the jurisdiction conferred by the compromissory clause of the Treaty is not available.

To underpin the objection, the Respondent makes the opening submission that the Court has to be satisfied that the compromissory clause of the Treaty establishes that the Respondent has consented to the jurisdiction of the Court in respect of this particular case. That is correct; the Applicant does not say otherwise. It may be added that the Court must be clearly satisfied that it has jurisdiction. However, whether the Court can be satisfied, and satisfied with the requisite clarity, that the Parties have consented to jurisdiction in this particular case depends on what exactly is the kind of dispute over which they have agreed that the Court should have jurisdiction. What they have agreed to submit to the Court is not a specific dispute which can be concretely identified, but a category of disputes defined as "[a]ny dispute between the High Contracting Parties as to the interpretation or application of the present Treaty. . ."[1]. The amplitude of that language in a treaty is apparent; it embraces all "difficulties which might be raised by this treaty" *[translation by the Registry]*[2].

In this respect, it has to be borne in mind that, unlike the case with some treaties, the compromissory clause of the 1955 FCN Treaty is not limited to disputes as to the interpretation or application of some only of the provisions of the Treaty: it extends to "any dispute . . . as to the interpretation or application of the present Treaty", i.e., as to any part of the Treaty. Thus, the jurisdiction conferred by the compromissory clause

[1] In treaty practice, the phrase "interpretation or application" dates back to the 1880s. See *Factory at Chorzów, P.C.I.J., Series C, No. 13 (I)*, "Réponse du Gouvernement allemand à l'exception préliminaire du Gouvernement polonais", pp. 174-176, and J. B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, 1898, Vol. V, p. 5057.

[2] A. Merignhac, *Traité théorique et pratique de l'arbitrage international. Le rôle du droit*, 1895, p. 202, para. 198. And see Dionisio Anzilotti, *Corso di diritto internazionale*, Vol. 3, 1915, p. 56; *Factory at Chorzów, Jurisdiction, P.C.I.J., Series A, No. 9*, p. 24; and *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, p. 152 and p. 153, footnote 14.

could apply in relation to a provision of the Treaty even if the provision creates no legal obligation; for, even if, on a true construction, it creates no legal obligation, there could be a dispute between the Parties as to whether it does — a point not considered by the Court in its treatment of the normative value and jurisdictional status of Article I of the Treaty. More generally, the jurisdiction conferred by the compromissory clause could be exercised even though it turns out that the Treaty does not apply to the alleged acts or circumstances; for there can be a dispute as to the interpretation or application of the Treaty in relation to a matter to which it is eventually held that the Treaty does not apply. But reason says that there must equally be a limit beyond which it is not possible for a dispute as to the interpretation or application of a treaty to arise in relation to matters to which the Treaty does not apply; beyond that limit, the compromissory clause no longer operates to confer jurisdiction. Where is that limit to be drawn?

THE JURISDICTIONAL TEST

The location of the limit beyond which it is not possible for a dispute to arise as to the interpretation or application of a treaty within the meaning of its compromissory clause depends on the relationship between the claim and the treaty on which the claim is sought to be based. The test as to what should be the requisite relationship has been variously worded. It is possible to argue, both interestingly and sagely, about which formulation is best. Possibly, the differences in wording reflect the specific characteristics of the particular cases. For present purposes, it is sufficient to take the broad position that the various formulations may be reasonably understood as embodying what, in an omnibus way, may be called a form of relativity test. This opinion will consequently abstain from microscopic examination of particular phrases used; it will call on them interchangeably. They occur in the following dicta:

It "is not necessary for the Court to find . . . that the [claimant] Government's interpretation of the Treaty is the correct one", nor for that "Government to show . . . that an alleged treaty violation has an unassailable legal basis" (*Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 18). But it "is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty" relied on *(ibid.)*. The proper test is met where "the arguments advanced by the [claimant] Government in respect of the treaty provisions on which the . . . claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty"

(*I.C.J. Reports 1953*, p. 18) or where "the interpretation given by the [claimant] 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 . . ." *(ibid.)* or, "if it is made to appear that the [claimant] Government is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended whether or not it ultimately prevails . . ." *(ibid.)* or, where "the complaint . . . indicate[s] some genuine relationship between the complaint and the provisions invoked . . ." (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 89); or where "the terms and the provisions invoked appear to have a substantial and not merely an artificial connexion with the" alleged act *(ibid.)* or, where the assertion that the instrument relied on gave the right claimed has "some serious juridical basis" (*ibid.*, p. 90); or where "the grounds invoked by the [claimant] Government are such as to justify the provisional conclusion that they may be of relevance in [the] case . . ." (*Interhandel, Judgment, I.C.J. Reports 1959*, p. 24); or where the provision in question "may be of relevance for the solution of the . . . dispute" *(ibid.)* or where there is "a reasonable connection between the Treaty and the claims submitted to the Court" (*Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 81).

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Some of these formulations related to the functions of a body other than the Court; others to the functions of the Court itself. Some were made at the jurisdictional phase of a case before the Court; others at the merits phase. A reasonable view, however, is that they may all be understood as applicable to the functions of the Court itself in a situation in which it is called upon to consider whether the alleged acts bear such a relationship to the treaty relied on as to attract the jurisdiction provided for under its compromissory clause.

In *Ambatielos*, it was at the merits stage of the case before it that the Court spoke of the relevant jurisdictional criteria, and it spoke of them in relation to the functions of an arbitral tribunal. It held that the United Kingdom was under a treaty obligation to refer a dispute to arbitration. The problem, presented late in the arguments, was how far could the Court go in affirming such a duty without encroaching on the authority of the arbitral body, in exercise of its *compétence de la compétence*, to decide on its own jurisdiction. It is possible to see how the problem arose (see *I.C.J. Pleadings, Ambatielos*, pp. 356ff., Henri Rolin, and p. 385, Fitzmaurice). A distinction no doubt existed between the competence of the Court to determine whether there was a duty to submit to arbitration and the competence of the arbitral tribunal subsequently to determine whether it had jurisdiction. Nevertheless, so far as the Court was con-

cerned, it could scarcely hold that there was a duty to submit to arbitration without also at least presuming that the dispute would be within the jurisdiction of the arbitral body. Not surprisingly, there is a strong view that the Court in substance held that the dispute would be within the jurisdiction of the arbitral body[3]. It is difficult to see why, subject to subsequent jurisprudential refinement, the substance of the *Ambatielos* test should not apply wherever an issue arises as to whether a matter falls within the jurisdiction of any deciding body, including the Court itself. The identity of the particular deciding body is not material; what is material is the juridical question involved. This is always the same whatever may be the deciding authority. It is not logical to suppose that the Court would put forward one jurisdictional test in the case of other tribunals and adopt a different one in the case of itself.

That the same test applies in relation to the Court is suggested by the *Interhandel* and *Military and Paramilitary Activities in and against Nicaragua* cases, in which the particular point at issue concerned the jurisdiction of the Court itself. In *Interhandel*, whether there was an obligation to submit a matter to arbitration was the subject of "an alternative submission" by Switzerland. However, Switzerland's "principal submission" sought an exercise of the Court's own jurisdiction for the purpose of adjudging and declaring that the United States of America was under an obligation to restore the seized assets of Interhandel (*I.C.J. Reports 1959*, p. 19). In ruling on the respondent's objection to the Court's jurisdiction on the ground that the seizure and retention of the assets were matters within the domestic jurisdiction of the respondent, the Court said:

> "In order to determine whether examination of the grounds . . . invoked [by Switzerland] is excluded from the jurisdiction of the Court for the reason alleged by the United States, the Court will base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees Issued in Tunis and Morocco* (Series B, No. 4), when dealing with a similar divergence of view. Accordingly, the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will 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

[3] Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 239.

> this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law." (*Interhandel, Judgment, I.C.J. Reports 1959*, p. 24.)

It is reasonably clear that in *Interhandel* the Court adopted a form of relativity test in relation to its own jurisdiction. The Court did likewise in *Military and Paramilitary Activities in and against Nicaragua*. It is not satisfactory to say that the Court was merely recalling the respondent's argument when it said:

> "In order to establish the Court's jurisdiction over the present dispute under the Treaty, Nicaragua must establish a reasonable connection between the Treaty and the claims submitted to the Court." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 81.)

In so far as the Court was recalling the respondent's submission, the Court was also adopting it. It certainly did not reject the proposition; on the contrary, its subsequent treatment of the matter accorded with the proposition. It referred to or summarized five articles of the treaty in question and then, without intervening remark, said:

> "Taking into account these Articles of the Treaty . . ., 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 or application' of the Treaty." (*Ibid.*, p. 428, para. 83.)

The Court did not make a definitive interpretation of the treaty texts; it did not analyse them; it gave them limited consideration — almost restricted to inspection — for the purpose of determining whether there was "a reasonable connection" between them and the claims submitted to the Court. Interestingly, also, almost throughout its written and oral presentation in the instant case the Respondent argued in favour of a "reasonable connection" test, as it did in the *Military and Paramilitary Activities in and against Nicaragua* case, and so to this extent accepted that some form of relativity test was applicable.

A Definitive Interpretation of the Treaty Cannot Be Made at the Preliminary Stage

Developing the point last alluded to, one may recall that *Military and Paramilitary Activities in and against Nicaragua* was not the only case in which the Court refrained from making a definitive interpretation of the relevant texts. Similar restraint was shown in *Ambatielos*. Likewise in

Interhandel, as appears from the passage cited above. It will be remembered that in the last-mentioned case the United States of America contended that Article IV of the Washington Accord, which was relied on by Switzerland, was "of no relevance whatever in the present dispute" — an idea central to the objection in this case. The Parties were in disagreement over certain terms of that Article. Referring to this, the Court said:

> "The interpretation of these terms is a question of international law which affects the merits of the dispute. At the present stage of the proceedings, it is sufficient for the Court to note that Article IV of the Washington Accord may be of relevance for the solution of the present dispute and that its interpretation relates to international law." (*I.C.J. Reports 1959*, p. 24.)

Thus, the instrument relied on may be judged relevant for the solution of the dispute, with resulting jurisdiction, even though the interpretation of its terms is regarded as a matter for the merits.

In the course of determining whether the alleged circumstances bear the requisite relationship to the treaty relied on in order to attract the jurisdiction provided for by the compromissory clause, the Court cannot altogether avoid some interpretation of the treaty. But, if the foregoing approach is correct, the issue before the Court at the preliminary stage, and on which jurisdiction under the compromissory clause turns, is not whether the treaty applies to the alleged circumstances, but whether the applicant has an arguable contention to that effect. Thus, the Court can only interpret the treaty at the jurisdictional stage in so far as it is necessary to do so for the purpose of determining whether the applicant's interpretation of the treaty is an arguable one, and not for the purpose of determining definitively whether the treaty applies to the alleged circumstances. The more limited function is undertaken by the Court in exercise of its *compétence de la compétence*; the more definitive function is undertaken in exercise of its substantive jurisdiction. In exercise of its *compétence de la compétence*, the Court could well hold that the applicant has an arguable contention that the treaty applies to the alleged circumstances even if, in exercise of the substantive jurisdiction which flows from that holding, it eventually holds that the treaty does not. In effect, the treaty may not apply to the alleged circumstances and yet the Court may have substantive jurisdiction to determine precisely whether it does.

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There is a different line of holdings. Cases have occurred in which, when dealing with the question whether the dispute fell within the jurisdiction conferred on the Court by the compromissory clause of the

treaty, the Court took a position which suggests that it was of the view that it was required at the jurisdictional stage to determine definitively whether the provisions relied on by the applicant applied, on their true construction, to the alleged circumstances (see, for example, *Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2*, p. 16, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, I.C.J. Reports 1996*, pp. 615-617, paras. 30-33). That view, which the Court has adopted in this case, differs materially from the more limited view that the duty of the Court at this stage is merely to decide whether the construction of the treaty on which the applicant relies for saying that the treaty applies to the alleged circumstances is an arguable one in the sense mentioned above.

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Which of these two different strands of jurisprudence should the Court now follow? The solution is to be found in returning to the terms of the compromissory clause. Under this, jurisdiction depends on whether there is a dispute between the parties as to the interpretation or application of the treaty. There could be a dispute as to whether there is a dispute as to the interpretation or application of the treaty. To decide on the correctness of the applicant's interpretation is to decide the second dispute, not the first; and that is to determine part of the substance of the claim before the merits stage has been reached. The reason is that, as in municipal law, proof of a claim before the Court involves proof of two things, first, that the alleged obligation exists in law, and, second, that the obligation was breached on the facts (see, in this respect, *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 17). The second of these two points would turn on the evidence. The first point would be determined by making a definitive interpretation of the texts relied on (including general international law) with a view to ascertaining whether they placed the respondent under the asserted obligation. The making of that interpretation is therefore a matter for the merits. The proposition may be tested this way.

It is possible to conceive of a dispute in which, the facts being agreed, the sole question is whether, on its true interpretation, the treaty relied on applies to those facts. If, in the course of determining a preliminary objection that the treaty is wholly irrelevant to the claim, the Court were to decide the question of interpretation in favour of the applicant, nothing would be left for determination at the merits stage; the Court would be determining the merits at the preliminary stage, that is to say, at a time when, according to Article 79, paragraph 3, of the Rules of Court, the merits stood suspended. On the view presently offered, there would be something left for determination at the merits stage, since all that the Court would be now deciding is that the applicant can present an argu-

able construction of the treaty to support its claim that the treaty applies to the alleged facts. Whether the treaty, on its true construction, does indeed apply would then be determined at the merits stage.

If it is thought that that example leads to an undesirable necessity to continue the proceedings to the merits stage, the answer lies in the fact that, as has been often observed, the Court lacks a filter mechanism through which, on the model available in some municipal legal systems, part of the merits could be argued and decided in advance of the normal merits stage. In such systems it is possible to argue, ahead of the normal merits phase, that, taking the facts alleged by the plaintiff at their highest, they do not justify the claim for the reason that the asserted obligation does not exist in law, or that, if it exists, it is not breached by the alleged facts. The practice of thus "striking out" an application has not yet developed in proceedings before this Court. Except in the indirect sense in which they are contemplated by Article 36, paragraph 6, of the Statute, the latter lays down no procedure relating to preliminary objections. An applicant is entitled under the Statute to a hearing at the normal merits stage, both for the purpose of showing that, on the law, the alleged obligation exists, and for the purpose of showing that, on the facts, the obligation was breached by the respondent. Misunderstanding arises if this difference between the Court's system and municipal systems is not borne in mind in fixing the limits of preliminary proceedings based on an objection which in effect asserts that there is no dispute within the meaning of the compromissory clause sought to be invoked for the reason that the treaty containing the clause is irrelevant to the applicant's claim. The determination of such an objection cannot extend to the question whether, on a true construction of the treaty, the asserted obligation exists. This would be a matter for the merits in the ordinary way; preliminary proceedings cannot change that.

There being no desire to extend this opinion unduly, it is simply submitted that the 1972 changes in the Rules of Court did not abrogate the fundamental principle that a preliminary decision cannot decide, or even prejudge, issues belonging to the merits. The idea that, in determining preliminary objections, the Court's enquiry could "touch" on the merits went back to the 1920s. The 1972 amendments encouraged the Court to proceed along earlier established lines and consequently to dispose of preliminary objections even if the Court would have to "touch" on the merits, but only within the limits of the equally long-settled principle that the Court cannot determine or prejudge the merits at the preliminary stage; the 1972 amendments did not authorize the Court to depart from this principle. Therefore, all that the Court can decide in preliminary proceedings of this kind is whether the applicant's construction of the treaty is or is not arguable.

One accepts that, since jurisdiction depends on consent, the Court has to decide definitively, and not provisionally, that the particular dispute is "within the category of disputes for which the [Respondent] has accepted the jurisdiction of the Court" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 29; and see *ibid.*, p. 16). But a distinction has to be drawn between the making of a definitive decision as to whether the dispute falls within the stipulated category of disputes and the criterion on which the decision is made. There is no reason why a definitive decision of that kind can not be made on the basis of a criterion based on a possibility — in this case, the possibility that the applicant can present an arguable construction of the instrument to support its claim. Other areas of the law show that a court could well take definitive decisions on the basis of its appreciation of a possibility.

The circumstance that the correct criterion to be employed was not argued in the line of cases ending with the recent case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* does not mean that those cases should be disregarded. But that circumstance may be properly borne in mind in considering the value of other and more fully reasoned cases which suggest that the task of the Court at this stage is not to make a definitive interpretation of the treaty, but only to determine whether the construction of the treaty on which the applicant relies is an arguable one in the sense mentioned above. It is respectfully submitted that this is the correct position, and that that adopted by the Court is mistaken.

How Can a Relativity Test Be Applied?

The conclusion is reached then that the Court's statement in *Ambatielos* that it "is not necessary for the Court to find . . . that the [claimant] Government's interpretation of the treaty is the correct one" is applicable to the determination of any issue (however worded) as to whether the instrument relied on is relevant to the claim. It follows that, since the Court cannot at this stage place a definitive construction on the 1955 Treaty and consequently cannot thereby set up a known benchmark by reference to which it could determine whether there is a reasonable connection between the Treaty and the claim, all that the Court can do in determining whether such a connection exists is to say whether the interpretation given by the applicant to the treaty "relied upon appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one . . ." (*Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 18).

Further, in determining whether the requisite connection exists, it is useful to consider that, in the nature of things, it is only in exceptional and clear cases that the Court may find that an applicant's assertion that the instrument relied on gave the right claimed lacks "some serious juridi-

cal basis", to use one of the phrases employed by the Court. Counsel would not advise litigation unless it was considered that some serious juridical basis existed. That thought does not of course absolve the Court of its responsibility to exclude cases lacking that characteristic; but it does advise caution. If the Court has to wrestle its way to the conclusion that a claim lacks a serious juridical basis, that is scarcely a case for exclusion. The Jaffa claims in the *Mavrommatis Palestine Concessions* case are illustrative. There the Court held that the dispute between the two Governments concerning the claims "has no connection with Article 11 of the Mandate and consequently does not fall within the category of disputes for which the Mandatory has accepted the jurisdiction of the Court" (*P.C.I.J., Series A, No. 2*, p. 29). In coming to this conclusion — and the word "connection" may be noted — the Court observed that it was "impossible to maintain" an argument leading to the opposite effect (*ibid.*, p. 28). Translated into the terminology of the later jurisprudence, that observation in a very early case would mean that, in the view of the Court, the applicant's construction of the instruments relied on as capable of showing the necessary "connection" between the claims and Article 11 of the Mandate was simply not arguable in the sense mentioned above.

How then is it to be determined whether the applicant's construction of the treaty is arguable? An objection that there is no reasonable connection between a claim and the treaty relied on really raises a dispute as to whether there is a dispute within the meaning of the compromissory clause which is sought to be invoked. So, it is helpful to recall that, as a general matter, there is no dispute within the meaning of the law where the claim lacks any reasonably arguable legal basis or where it is manifestly frivolous or unsupportable (*Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 430, Judge *ad hoc* Barwick, dissenting, and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 535, Judge Jennings, dissenting. See also the analogous views of Judge *ad hoc* Spiropoulos in his separate opinion in *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 56). As was observed in the joint dissenting opinion in the *Nuclear Tests (Australia* v. *France)* case:

> "if an applicant were to dress up as a legal claim a case which to any informed legal mind could not be said to have any rational, that is, reasonably arguable, legal basis, an objection contesting the legal

character of the dispute might be susceptible of decision *in limine* as a preliminary question" (*I.C.J. Reports 1974*, p. 364, para. 107).

A tenable view is that whether the Applicant's construction of the Treaty in this case is "arguable", or whether it is "sufficiently plausible," or whether the Treaty is "of relevance" to the claim, or whether the claim has some "serious juridical basis", is likewise to be decided by the Court from the point of view that might be taken by "any informed legal mind". The Court can only hold that the Applicant's construction is not "arguable", or that it is not "sufficiently plausible", or that the Treaty is not "of relevance" to the claim, or that the claim lacks some "serious juridical basis", or that the corresponding criterion set by other similar formulations is not met, if, from the point of view of an informed legal mind, it finds that the construction relied on is not based on rational and reasonably arguable grounds, account being taken of the fact that, as was remarked by Brierly, "different minds, equally competent may and often do arrive at different and equally reasonable results"[4]. To hold that this opens the way to inadmissible subjectivity is to misunderstand the processes of judicial thought: an ultimate standard by which the Court appreciates many a legal issue is that set by the informed legal mind.

In sum, the law in action — as I also believe, the legal scientific community — gives recognition to the possibility of an arguable contention being made that a given situation falls within a certain juridical category as well as to the impossibility of an arguable contention being made to that effect. In the first situation, there is a reasonable chance that the contention may or may not prevail; in the second, it is clear that the contention must fail. In other words, the law in some cases allows for an evaluation of the prospects of success, with resulting legal consequences. In like manner, the jurisprudence of the Court discloses a jurisdictionally significant distinction between a claim which is based on an arguable construction of the instrument relied on and a claim which is not based on an arguable construction of the instrument relied on. In all these cases the Court judges by the standard set by an informed legal mind.

[4] Sir Hersch Lauterpacht and C. H. M. Waldock (eds.), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly*, 1958, p. 98. Or, as it was said in an English case,

> "Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. . . . Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable." (*Per* Lord Hailsham, *In re W. (An Infant)*, [1971] AC 682, HL, p. 700.)

THE JUDGMENT IN RELATION TO PARTICULAR PROVISIONS OF THE TREATY

If a lower test, such as that of a reasonable connection, is the right one, it would strengthen the Judgment on some points, although also tending on other points to yield results which might not be exactly the same as those reached by the Court on the basis of the higher test used by it.

In a prefatory way, it would be right to have regard to the nature of the case. The Respondent admits that it destroyed the Applicant's oil platforms in question, but it says that it did so in self-defence against previous acts of aggression committed against it by the Applicant. If the Applicant accepted that the Respondent was acting in self-defence but sought to contend that the Treaty nonetheless prohibited the use of force in self-defence, its contention to that effect would, in terms of the jurisprudence referred to above, be unarguable to the point of being artificial. In that event, it would be the duty of the Court to say at this stage that such a contention could not found a dispute as to the interpretation or application of the Treaty within the meaning of its compromissory clause and accordingly to hold that the Court has no jurisdiction thereunder. To hold otherwise would be to overlook the responsibility of the Court to defend its process against abuse.

But the Applicant does not accept that the Respondent was acting in self-defence; nor does it make the improbable assertion that the Treaty prohibits the use of force in self-defence. It is saying that the use of force by the Respondent was aggressive and that such use of force by one Party against the other is prohibited by the Treaty (apart from any prohibition flowing from general international law). The Respondent rightly accepts that, for jurisdictional purposes, the Court has to proceed on the footing that the Applicant is correct in its allegations as to what were the facts relating to the merits. (For supporting *dicta,* see *Mavrommatis Palestine Concessions, Judgment No. 2, 1927, P.C.I.J., Series A, No. 2,* pp. 74-75, dissenting opinion of Judge Moore, and *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 34, dissenting opinion of Judge Read). In particular, the Respondent accepts that it is not open to the Court at this stage of the proceedings to make a finding on its contention that it was acting in self-defence (CR 96/13, p. 61). It is on this basis that the present issues should be approached.

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As to Article I of the Treaty, in addition to the elements of the Preamble referred to in the third paragraph of paragraph 27 of the Judgment, relating to trade, investments, economic intercourse and consular

relations, the Preamble, in its opening sentences, stated that the parties were "desirous of emphasizing the friendly relations which have long prevailed between their peoples, of reaffirming the high principles in the regulation of human affairs to which they are committed . . .". Stressing this part of the Preamble as being also pertinent to an appreciation of the object and purpose of the Treaty, the Applicant emphasized that Article I (which has no counterpart in the FCN Treaty in *Military and Paramilitary Activities in and against Nicaragua*) is in any event not a preambular statement; it is part of the operative provisions of the Treaty. Being an operative provision, it might be thought that it is at least arguable that it is not merely "aspirational", but that it has a normative character — that it propounds a rule of conduct. There is not in principle any reason why parties cannot by treaty bind themselves legally to live in firm and enduring peace and sincere friendship with each other. In *Military and Paramilitary Activities in and against Nicaragua*, the Court recognized that it was possible for parties by an appropriately worded treaty to bind themselves "to abstain from any act toward the other party which could be classified as an unfriendly act, even if such act is not in itself the breach of an international obligation" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 136-137, para. 273). To determine whether there is jurisdiction to decide whether Article I of the 1955 Treaty is such a provision, the Court would have needed to ask whether the close and extensive arguments between the Parties (not here fully recited) sufficed to show that the Applicant's construction of the provision was an arguable one, even if it might later turn out to be incorrect. This has not been the Court's approach.

There is a further point. The Court seems to have proceeded on the basis that, if the provision does not create a legal obligation, that suffices to negative the existence of jurisdiction (see Judgment, paras. 31 and 52). However, even if the provision does not create a legal obligation, it need not follow that there cannot be a dispute as to its interpretation or application so as to give the Court jurisdiction. As has been noted above, unlike the position in some other treaties, the compromissory clause in this case applies in relation to the whole of the treaty, and not only to some parts of it; the clause speaks of "[a]ny dispute . . . as to the interpretation or application of the present Treaty . . .". Article I is part of the Treaty. There can be a dispute between the Parties as to whether it creates a legal norm. That dispute can be a dispute within the meaning of the compromissory clause and can give rise to jurisdiction. The Court has not pursued the enquiry along these lines.

Also, if the existence of a dispute as to whether Article I of the Treaty creates a legal obligation suffices to confer jurisdiction, there could be cir-

cularity in holding that there is no jurisdiction because the provision does not create a legal obligation. Whether it creates a legal obligation is the substance of the dispute and can only be ascertained in exercise of jurisdiction to determine the dispute. On the test which it has used, the Court has not had occasion to consider whether a holding that the provision creates no legal obligation presupposes the existence of the jurisdiction which has been found wanting in respect of the provision.

Finally, I entertain a reservation over the Court's treatment of the Respondent's internal documentation relating to its ratification procedures (Judgment, para. 29, first paragraph). This material does not form part of the *travaux préparatoires* of the previously ended treaty negotiations or part of the circumstances of the conclusion of the Treaty. Nor does it evidence any subsequent practice of the Parties in the application of the Treaty which establishes their agreement regarding its interpretation. The argument based on the fact that the material was in part introduced by the Applicant is a powerful one; but perhaps it does not go far enough. It is necessary to distinguish between the material and what it proves, and more particularly as compared with what has to be proved. In *Anglo-Iranian Oil Co.*, in the view of the Court what had to be proved was the intention of a single party in making a declaration which was treated by the Court as a unilateral statement, and not as a treaty provision; the material in question was regarded as admissible to prove that intention (*I.C.J. Reports 1952*, p. 107). In this case, what has to be proved is the common intention of both Parties as expressed in the text of the concluded treaty. The Court does not say that the material in question shows that the Applicant's understanding of the Treaty was the same as the Respondent's. Taken at the highest in favour of the Respondent, what the material shows is that the Respondent's then understanding of the Treaty was the same as its present understanding. But this unilateral consistency does not make the material relevant to proof of that which has to be proved; what is relevant is not the Respondent's separate understanding, however consistent, but the common intention of both Parties as expressed in the terms of the concluded Treaty.

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As to Article IV, paragraph 1, of the Treaty, the Judgment favours the Applicant on all points, save one. This concerns the meaning of the word "treatment" in the phrase "fair and equitable treatment" appearing in that provision. The result of the Court's reasoning is that the word does not cover a case of State destruction by armed force. If, as seems likely,

the word covers a case of property which is, by armed force, taken and retained by a State for its own use, it may be arguable that it likewise covers a case of property which is, by armed force, taken by the State by destroying it: the idea that property destroyed is property taken is known to law[5]. Hence, if a State takes property, either for its own use or for the purpose of destroying it, there could be a question whether that constitutes impermissible "treatment" in one case as much as in the other. On the test which it has used, the Court has not had occasion to consider a question of this kind.

In a subsidiary way, I would add that the last three sentences of paragraph 36 of the Judgment rest on a misconception. True, as is obvious, Article IV, paragraph 1, of the Treaty does not regulate military action by one party against the other. But it does not follow that military action cannot result in a violation of that provision, as is suggested by this part of the Judgment. Elsewhere, in paragraph 21, the Judgment correctly recognizes that the use of force could lead to a breach of the provisions of the Treaty, even if the Treaty does not regulate the use of force. There was no state of war between the Parties, and no question of the Treaty being suspended; on the contrary, as paragraph 15 of the Judgment makes clear, both Parties agreed that the Treaty was at all times in effect. The use of armed force could obviously involve impermissible treatment of the nationals of a party or of their property, contrary to the obligations imposed by Article IV, paragraph 1, of the Treaty.

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On the other hand, the following may be added in support of the position taken by the Court on Article X, paragraph 1, of the Treaty:

First, as to whether, in the phrase "commerce and navigation" appearing in Article X, paragraph 1, of the Treaty, the word "commerce" is qualified by the word "navigation" so as to refer only to maritime commerce as submitted by the Respondent. In its 1986 Judgment in the *Military and Paramilitary Activities in and against Nicaragua* case, the Court considered that the laying of mines in the port constituted "an infringement . . . of the freedom of communications and of maritime commerce" *I.C.J. Reports 1986*, p. 129, para. 253). But that remark was based on certain navigation rights existing under "customary international law" (*ibid.*, p. 112, para. 214); thus, the Court spoke of "obligations under customary international law . . . not to interrupt peaceful maritime com-

[5] See *Corpus Juris Secundum*, Vol. 29A, 1965, pp. 442 ff.

merce" (*I.C.J. Reports 1986*, p. 147, para. 292 (6)). When the Court came to consider whether the laying of mines violated the "freedom of commerce and navigation" clause set out in Article XIX, paragraph 1, of the 1956 FCN Treaty, it did not speak of "maritime commerce"; it spoke of the respondent's "obligations under Article XIX of the" FCN Treaty (*ibid.*, p. 147, para. 292 (7)). It is legitimate to suppose that this careful difference in expressions signified that the Court wished to avoid being thought to be limiting "freedom of commerce" under the Treaty to freedom of *maritime* commerce. Also, if, as it seems, the Court considered that freedom of commerce under Article XIX, paragraph 1, of the Treaty was not limited to maritime commerce but embraced all forms of commerce, this would explain why the Court held that the respondent, "by the attacks on Nicaraguan territory . . . has acted in breach of its obligations under Article XIX of the Treaty . . ." (*ibid.*, p. 148, para. 292 (11)). It was on the basis of a contrary view that the clause was "exclusively devoted to matters of maritime commerce" that Judge Oda expressed dissatisfaction with this part of the Judgment (*ibid.*, p. 251, para. 84, dissenting opinion). There is some basis for reading the Court's 1986 Judgment as leading to the conclusion that freedom of "commerce and navigation" under Article X, paragraph 1, of the 1955 Treaty between the Parties in this case was not restricted to *maritime* commerce.

Second, as to the argument — an argument of some force — that the oil platforms in question related to production and not to commerce. There is manifestly a distinction between the two processes; but where the precise line is to be drawn between them is less clear in the case of an industry in which production was closely articulated to external commerce. Take the hypothesis (suggested by paragraph 51, first paragraph, of the Judgment) of a State being dependent for its foreign currency earnings on its exports of locally produced oil. Conceivably, another State, desiring to eliminate the commerce productive of these export earnings, may proceed either to blockade the export facilities or to destroy the oil production facilities. It is not altogether clear that the particular method employed lessens the fact that, either way, the second State would have accomplished its purpose of eliminating the first State's commerce in oil. The suggested distinction, in its strict form, is not easily accommodated by the Treaty when this is interpreted in the geopolitical framework in which it was negotiated: the shelter given to commerce was intended, at the time when it was given, largely for the future protection of export-oriented economic interests of the Respondent's corporations in the Applicant's oil industry. Some weight may be accorded to the Applicant's proposition that the same words in similar treaties may have different meanings when the particular treaty is interpreted in the special context in which it was negotiated. These considerations may be neither right nor decisive; but they are sufficient to suggest that the Applicant

may be correctly allowed to argue in favour of its point of view at the merits stage.

DISADVANTAGES TO THE PARTIES OF THE COURT'S TEST

If, for the foregoing reasons, it is thought that the Court's test creates some disadvantages for the Applicant, it need not be assumed that it leads to no disadvantages for the Respondent; it does. And they could be serious.

Take the holdings against the Respondent in paragraphs 21 and 51 of the Judgment. It is true that a holding on jurisdiction does not conclude issues at the merits. But if, in deciding the jurisdictional issue, the Court could competently render a definitive interpretation of the Treaty, it is difficult to see how that interpretation could fail to govern at the merits stage, where that stage is reached. In the first of the two holdings referred to, the Court rejects the Respondent's contention that the Treaty of 1955 cannot apply to questions concerning the use of force. Theoretically, it may be argued that this holding would not prevent the Respondent from arguing at the merits stage that the Treaty cannot apply to questions concerning the use of force[6]. But, given the importance of the opposite interpretation to the holding made by the Court at the preliminary stage, it is difficult to see how that interpretation could be reversed at the merits stage. In practice, the Respondent would thus be prevented from putting forward at the merits stage an argument essential to the substance of its case; in a conceivable case, even though not in this, that might be the respondent's only argument on the substance. In the second of the two holdings, the Court rejects the Respondent's contention that the claims of the Applicant cannot be founded upon Article X, paragraph 1, of the Treaty of 1955. Would not this holding likewise prevent the Respondent from arguing at the merits stage that the claims of the Applicant cannot be founded upon Article X, paragraph 1, of the Treaty of 1955?

In the normal way, these are issues which the Respondent is considered free to argue at the merits stage for the reason that they bear on the question of the existence of the legal obligations which have been allegedly

[6] See Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, 1967, p. 246.

breached. The right to argue at the merits that the alleged obligations did not exist in law is distinct from the right to rely, by way of defence on the merits, on the matters specified in Article XX, paragraph 1 *(d)*, of the Treaty, a subject discussed in paragraph 20 of the Judgment. The right to rely on such specified matters by way of defence on the merits is not therefore an answer to the fact that the Judgment deprives the Respondent of the opportunity to argue that the obligations in question did not in the first instance exist. There would be no need to rely on the specified matters by way of defence on the merits if it was established that the alleged obligations did not exist in law.

These difficulties do not arise if the correct jurisdictional test is whether the Applicant's construction of the Treaty is an arguable one. If all that the Court holds is that the Applicant's interpretation of the Treaty is an arguable one, it does not follow that the Court is saying that the Respondent's interpretation is wrong. Both interpretations could be arguable; indeed, it may happen that the Applicant's interpretation does not prevail at the merits stage, and that it is the Respondent's interpretation which is eventually upheld. On this approach, nothing would prevent the Respondent from advancing its interpretation of the Treaty at the merits stage. But the argument then will be a different one. It will not be addressed to the preliminary question whether the Applicant can present an arguable contention that the Treaty applies to the alleged acts; it will be addressed to the substantive question whether the Treaty applies to those acts. The former question, which is decided in exercise of the Court's *compétence de la compétence*, goes to the right of the Applicant to have its claim adjudicated. By contrast, the latter question, which is decided in exercise of the Court's substantive jurisdiction, goes to the adjudication of the claim on the basis that the Applicant has a right to have the claim adjudicated. It goes to the question whether the obligation, which the Applicant claims was breached, exists in law: if the obligation does not exist, there could be no breach of any obligation and the claim that there was a breach of an obligation fails on the merits.

CONCLUSION

Possibilities for improvement do not prevent me from giving support to the *dispositif* in the form in which it stands. I have given that support. It appears to me, however, that the Court has not paid sufficient regard to the fact that the question at this stage is not whether the Applicant's claims are sound in law, but whether the Applicant is entitled to an adjudication of its claims. The neglect to distinguish between these issues as consistently as was required corresponds with the fact that the Court has sought to make a definitive determination of the meaning of the 1955 Treaty, whereas, in my view, it should merely have asked whether the construction of the Treaty on which the Applicant relied was an arguable

one, even if it might eventually turn out to be incorrect. The respectful impression with which I thus leave the case is that the test which the Court has used has precluded it from asking the right questions. In the result, the principle on which the Judgment is constructed is not adequate to do full justice to either Party; it creates unnecessary disadvantages for both.

(Signed) Mohamed SHAHABUDDEEN.