

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OIL PLATFORMS (Islamic Republic of Iran v United States of America) JUDGMENT ON PRELIMINARY OBJECTION

[1996] ICJ Reports

On 12 December 1996, the International Court of Justice delivered a judgment in the case between Iran and the United States by which it rejected the preliminary objection to its jurisdiction which was raised by the United States. The Court found that it had jurisdiction to deal with the case on the basis of Article XXI(2) of the Treaty of Amity, Economic Relations and Consular Rights entered into between the two states and signed in Teheran on 15 August 1955. The Treaty had entered into force on 16 June 1957.

The United States had argued that the Court lacked jurisdiction because the Treaty, which contained commercial and consular provisions, was not applicable in the event of the use of force. In this respect, the Court found that the Treaty, which did not expressly exclude any matters from the Court's jurisdiction, imposed on the parties various obligations on a variety of matters. Any action incompatible with those obligation was unlawful, regardless of the means by which it was brought about, including the use of force. Matters relating to the use or force were therefore not *per se* excluded from the reach of the Treaty.

Other arguments of the United States related to the scope of the various articles of the Treaty. The Court found in this respect that, considering the purpose and object of the Treaty, Article 1 should be regarded as fixing an objective (of peace and friendship), in the light of which the other treaty provisions were to be interpreted and applied. However, it could not, taken in isolation, be a basis for the Court's jurisdiction. Neither could Article IV(1) of the Treaty provide such a basis. The detailed provisions of Article IV(1) concerned the treatment by each party of the nationals and companies of the other party, as well as their property and enterprises. However, the provision did not cover the actions carried out in this case by the United States against Iran.

On Article X(1) of the Treaty, the Court found that the destruction of the Iranian oil platforms by the United States complained of by Iran was capable of having an effect upon the export trade in Iranian oil and consequently upon the freedom of commerce granted in that provision. The lawfulness of that destruction could therefore be evaluated in relation to that provision.

As a consequence, a dispute existed between the parties on the interpretation of and the application of Article X(1) of the Treaty and the dispute fell within the scope of the compromissory clause in Article XXI(2).

Therefore, the Court held it had jurisdiction to entertain the dispute in the following terms (per Bedjaoui P, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins, Parra-Aranguren JJ, Rigaux J *ad hoc*; Schwebel V-P and Oda J dissenting):

- (1) The Court rejects, by 14 votes to 2, the preliminary objection of the United States of America according to which the Treaty of 1955 does not provide any basis for the jurisdiction of the case; and
- (2) found, by 14 votes to 2, that it has jurisdiction on the basis of Article XXI(2) of the Treaty of 1955, to entertain the claims made by the Islamic Republic of Iran under article X(1) of that Treaty.

Shahabuddeen, Ranjeva, Higgins and Parra-Aranguren JJ and Rigaux J *ad hoc* appended separate opinions to the judgment of the Court. Schwebel V-P and Oda J appended dissenting opinions to the judgment of the Court. The following is a brief summary of the judgment and opinions of the Court.

SUMMARY OF THE JUDGMENT

Institution of Proceedings and History of the Case (paragraphs 1-11)

The Court began by recalling that on 2 November 1992, Iran instituted proceedings against the United States in respect of a dispute:

arising out of the attack [on] and destruction of three offshore oil production complexes owned and operated for commercial purposes

by the national Iranian Oil Company, by several warships of the United States navy on 19 October 1987 and 18 April 1988 respectively.

In its Application, Iran contended that these acts constituted a "fundamental breach" of various provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, as well as of international law. The Application invoked, as a basis for the Court's jurisdiction, Article XXI(2) of the Treaty.

Within the extended time limit for the filing of the counter memorial, the United States raised a preliminary objection to the Court's jurisdiction pursuant to Article 79(1) of the Rules of the Court. Consequently, the proceedings on the merits were suspended. After Iran had filed a written statement of its observations and submissions on the preliminary objection raised by the United States within the time limit fixed, public hearings were held between 16 and 24 September 1996.

The following final submission was presented on behalf of the United States:

The United States of America requests that the Court uphold the objection of the United States to the jurisdiction of the Court in the case concerning Oil Platforms (Islamic Republic of Iran v United State of America).

The following final submission was presented on behalf of Iran:

In the light of the facts and arguments set out above, the Government of the Islamic Republic of Iran requests the Court to adjudge and declare:

1. [t]hat the Preliminary Objection of the United States is rejected in its entirety;
2. [t]hat, consequently, the Court has jurisdiction under Article XXI(2) of the Treaty of Amity to entertain the claims submitted to the Islamic Republic of Iran in its Application and Memoria as they relate to a dispute between the Parties as to the interpretation or application of the Treaty;
3. [t]hat, on a subsidiary basis in the event of the Preliminary Objection is not rejected outright, it does not possess, in the

- circumstances of the case an exclusively preliminary character within the meaning of Article 79(7) of the Rules of the Court; and
4. [a]ny other remedy the Court may deem appropriate.

Article XX(2) of the Treaty and the Nature of the Dispute (paragraphs 12-16)

After summarising Iran's arguments in the application and in the course of the subsequent proceedings, the Court concluded that Iran claimed only that Articles I, IV(1) and X(1) of the 1955 Treaty had been infringed by the United States. As such, the dispute was said to fall within the jurisdiction of the Court pursuant to Article XXI(2) of the Treaty.

The United States had maintained that the application of Iran bore no relation to the Treaty. It stressed that, as a consequence, the dispute that had arisen with Iran did not fall within the provisions of Article XXI(2) of the Treaty. It deduced from this that the Court must find that it lacked jurisdiction to deal with it.

The Court pointed out that the parties did not contest that the Treaty was in force at the date of the filing of Iran's application and the Treaty was still in force. The Court recalled that it had decided in 1980 that the Treaty was applicable at that time¹ and none of the circumstances brought to its knowledge in the present case would cause it now to depart from that view.

Article XXI(2) provided:

Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

It was not contested that several of the conditions laid down by this text had been met in the present case. A dispute had arisen between the United States and Iran and it had not been possible to adjust the dispute by

¹ United States Diplomatic and Consular Staff in Tehran [1980] ICJ Reports 28 para 54.

diplomacy. The two states had not agreed “to settlement by some other pacific means” as contemplated by Article XXI. On the other hand, the parties differed on the question 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 was a dispute “as to the interpretation or application” of the Treaty.

In order to answer the question, the Court could not limit itself to noting that one of the parties maintained that such a dispute existed, and the other denied it. It had to ascertain whether the violations of the Treaty pleaded by Iran did or did not fall within the provisions of the Treaty and whether, as a consequence, the dispute was one which the Court had jurisdiction *ratione materiae* to entertain, pursuant to Article XXI(2).

Applicability of the 1955 Treaty in the event of the use of force (paragraphs 17-21)

The Court first dealt with the United States’ arguments that the Treaty did not apply to questions concerning the use of force. The United States had contended that, essentially, the dispute related to the lawfulness of actions by its naval forces that “involved combat operations” and that there was simply no relationship between the wholly commercial and consular provisions of the Treaty and Iran’s application and memorial, which focused exclusively on allegations or unlawful uses of armed force.

Iran maintained that the dispute concerned the interpretation or application of the Treaty. It therefore requested that the preliminary objection be rejected. Alternatively, on a subsidiary basis, if it was not rejected outright, that it should be regarded as not having an exclusively preliminary character within the meaning of Article 79(7) of the Rules of the Court.

The Court noted that, in the first place, the Treaty contained no provision expressly excluding certain matters from the Court’s jurisdiction. It took the view that the Treaty imposed on each party various obligations on a variety of matters. Any action by one of them that was incompatible with those obligations was unlawful, regardless of the means by which it was brought. A violation of the rights of one party, under the Treaty, by means of the use of force was as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use

of force were therefore not *per se* excluded from the reach of the Treaty. The arguments put forward on this point by the United States therefore had to be rejected.

Article 1 of the 1955 Treaty (paragraphs 22-31)

The parties had differed on the interpretation to be given to Articles I, IV(1) and X(1) of the Treaty. According to Iran, the actions which it alleged against the United States were such as to constitute a breach of those provisions and the Court consequently had jurisdiction *ratione materiae* to entertain the application. According to the United States, this was not the case. Article 1 provided:

There shall be firm and enduring peace and sincere friendship between the United States...and Iran.

According to Iran, this provision did “not merely formulate a recommendation or desire..., but imposes actual obligations on the Contracting Parties, obliging them to maintain long-lasting peaceful and friendly relations”. It would impose upon the parties “the minimum requirement...to conduct themselves with regard to the other in accordance with the principles and rules of general international law in the domain of peaceful and friendly relations”.

The United States considered, on the contrary, that Iran “reads far too much into Article I”. It argued that that text “contains no standards” but only constituted “a statement of aspiration”. That interpretation was called for in the context and on account of the “purely commercial and consular” character of the Treaty.

The Court considered that the general formulation of Article I could not be interpreted in isolation from the Treaty’s object and purpose. There were some Treaties of Friendship which contained both a provision similar to found in Article I and clauses aimed at clarifying the conditions of application. However, this did not apply to the present case. Article I was in fact not inserted into a treaty of that type but into a treaty of “Amity, Economic Relations and Consular Rights” whose object was, according to the Preamble, the “encouraging [of] mutually beneficial trade and investments and closer economic intercourse generally,” as well as “regulating consular relations” between the two states. The Treaty

regulated the conditions of residence of nationals of one of the parties on the territory of the other in Article II, the status of companies and access to the courts and arbitration in Article III, safeguards for the nationals and companies of each of the states as well as their property and enterprises in Article IV, the conditions for the purchase and sale of real property and protection of intellectual property in Article V, the tax system in Article VI, the system of transfers in Article VII, customs duties and other import restrictions in Articles VIII-IX, freedom of commerce and navigation in Articles XI-XII, and the rights and duties of consuls in Articles XII-XIX.

It therefore followed that the object and purpose of the Treaty was not to regulate the peaceful and friendly relations between the two states in a general sense. As a consequence, Article I could not be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations. Rather, by incorporating the Treaty the form of words used in Article I, the two states intended to stress that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations. Such a development would in turn reinforce that peace and friendship. It also followed that Article I should be regarded as fixing an objective, in the light of which the other treaty provisions were to be interpreted and applied.

The Court observed that it did not have before it any Iranian document to support Iran's position. As for the United States, documents introduced by the two parties showed that at no time did the United States regard Article I as having the meaning now given to it by Iran. Nor did the practice followed by the parties lead to any different conclusions. In the light of the foregoing, the Court considered that the objective of peace and friendship proclaimed in Article I of the Treaty was such as to throw light on the interpretation of other treaty provisions, in particular Articles IV and X. Article I was thus legally significant for such an interpretation, but could not, when taken in isolation, be a basis for the Court's jurisdiction.

Article IV(1) of the Treaty (paragraphs 32-36):

Article IV(1) provided:

Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain

from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

The Court observed that Article IV(1), unlike the other paragraphs of the same article, did not include any territorial limitation. It pointed out that the other provisions of that paragraph concerned the treatment by each party of the nationals and companies of the other, as well as their property and enterprises. Such provisions did not cover the actions carried out in this case by the United States against Iran. Article IV(1) thus did not lay down any norms applicable to this particular case. This Article, therefore, did not form the basis of the Court's jurisdiction.

Article X(1) of the Treaty (paragraphs 37-52)

Article X(1) provided:

Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.

It had not been alleged by Iran that any military action had affected its freedom of navigation. Therefore, the question the Court had to decide in order to determine its jurisdiction, was whether the actions of the United States complained of by Iran had the potential to affect "freedom of commerce" as guaranteed by the above provision. Iran had argued that Article X(1) did not contemplate only maritime commerce, but commerce in general. On the other hand, the United States had argued that the word "commerce" should be understood as being confined to maritime commerce between the two states, and as referring solely to the actual sale or exchange of goods.

Having regard to other indications in the Treaty of an intention of the parties to deal with trade and commerce in general, and taking into account the entire range of activities dealt with in the Treaty, the view that the word "commerce" in Article X(1) was confined to maritime commerce did not commend itself to the Court. In the Court's view, there was nothing to indicate that the parties intended to use the word "commerce" in any sense different from that which it generally bore. The word, whether taken in the ordinary sense or in its legal meaning, or at the

domestic or international level, had a broader meaning than the mere reference to purchase and sale. The Court noted in this connection that the Treaty dealt, in its general articles, with a wide variety of matters ancillary to trade and commerce. It referred to *Oscar Chinn*² in which the expression "freedom of trade" was seen by the Permanent Court of International Justice as contemplating not only the purchase and sale of goods, but also industry, and in particular, the transport business.

The Court pointed out that it should not in any event overlook Article X(1). The provision did not, strictly speaking, protect "commerce" but "*freedom of commerce*". Any act which impeded that "freedom", such as the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export, was thereby prohibited. The Court further pointed out that in this respect, the oil pumped from the platforms attacked in October 1987 passed from there by sub-sea lines to the oil terminal on Lavan Island, and that the Salman complex, the object of the attack of April 1988, was also connected to the oil terminal on Lavan Island by the sub-sea line.

The Court therefore found that on the material before it, it was not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil. Nonetheless, it concluded that their destruction was capable of having such an effect, and as a result, of having an adverse effect upon the freedom of commerce as guaranteed by Article X(1) of the Treaty. It followed that its lawfulness could be evaluated in relation to that provision. In the light of the foregoing, the Court concluded that there existed between the parties a dispute as to the interpretation of Article X(1) and that the dispute fell within the scope of the compromissory clause in Article XXI(2). Consequently, the Court had jurisdiction to entertain the dispute.

The Court noted that it had to reject the preliminary objection raised by the United States and its objection to the submissions requested by Iran on a subsidiary basis. It found that since the objection did not possess an exclusively preliminary character, it no longer had any object in the circumstances of the case.

² (1934) Permanent Court of Justice Reports, Series A/B, No 63.

ANNEXURES

SEPARATE OPINION OF SHAHABUDEEN J

In his separate opinion, Shahabuddeen observed that possibilities for improvement did not prevent him from giving support to the *dispositif* in the form in which it stood. However, he was of the view that the jurisdictional text which the Court had used precluded it from asking the right questions. Effectively, the Court had sought to make a definitive determination of the meaning of the 1955 Treaty between the parties. In his view, the Court should merely have asked whether the construction of the treaty on which Iran had relied was an arguable one, even if it later turned out to be incorrect.

The question at this stage was not whether Iran's claim was sound in law but whether it was entitled to an adjudication of its claim. His impression was that the neglect to distinguish these issues consistently and to apply the right test meant that the principle on which the judgment was constructed was inadequate to do justice to either party and it created unnecessary disadvantages for both.

SEPARATE OPINION OF RANJEVA J

After setting out his reasons for voting in favour of the judgment, Ranjeva J criticised the reference to Article X(1) of the 1955 Treaty and stated that the reference might render the reading of the judgement difficult. The Court's title to jurisdiction was the compromissory clause, whose terms raised no particular problem of interpretation. But in transposing the reasoning adopted in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*³ Ranjeva J queried if the judgment had gone beyond the object of the preliminary objection procedure. In his opinion, the problem resided in the fact the objections were envisaged from the standpoint of their scope and significance and not from their definition. Further, in reality, it was not easy to draw a distinction between questions appertaining to the preliminary objections procedure and questions appertaining to the merits of the case.

³ (Bosnia and Herzegovina v Yugoslavia) [1996] International Court of Justice Reports (to be published); also see [1996] Australian International Law Journal 197.

Ranjeva J held that the circumstances of the case did not warrant the transposition of the analytical method adopted in the above case, in which the Court had to first of all make a determination on a condition of the applicability of the compromissory clause. Such a condition was lacking in the present case as the preliminary problem related more to the applicability in general of the 1955 Treaty than to that of the compromissory clause. That being so, he considered it was for the Court not to state whether the arguments were true or false from the legal standpoint but to ensure that there was nothing absurd about them or nothing which ran counter to the norms of positive law. Hence, unless the objection related to the *competence de la competence* as in the above case, or unless the objection was of a general nature, as in the present case, the Court's conclusion could but be limited to an affirmative or negative reply to the objection. Otherwise, it would run the risk of raising a problem of legal prejudice.

Ranjeva J regretted that the interpretation of Articles I and IV had been made independently and in a strictly analytical framework. Article I implied a negative obligation of conduct inherent to the prescriptions of amity and peace. Its function was to shed light on the understanding of the other treaty provisions. That being so, he wondered whether one was justified in thinking that Article IV excluded from its domain the effective and voluntary conduct of one of the litigants with respect to a company falling within the jurisdiction of the other. Further, the explicit reference to Article X raised the problem of the integrity of the rights of the United States: how was the connection established between the freedom of commerce and navigation and a possible claim for reparation as a result of the destruction of warships?

In conclusion, Ranjeva J considered that the interpretation of the "bases of jurisdiction" did not affect the rights of the parties if the preliminary decision was limited to meeting the arguments on the sole basis of the plausibility of the arguments in relation to the problems inherent to the terms of the provisions, and whose violation was claimed by Iran.

SEPARATE OPINION OF HIGGINS J

Various contentions had been made by the parties as to whether Iran's claims fell within the compromissory clause of the 1955 Treaty. Higgins J addressed the methodology to be used in answering the issues raised. She

reviewed the relevant case law of the Permanent Court of International Justice and the present Court. In certain of those cases it had been said that what was required was a "reasonable connection" between the facts alleged and the terms of the treaty said to provide jurisdiction, and the Court would then reach a provisional conclusion as to the claimed bases of jurisdiction.

Higgins J found that this line of cases fell into a particular category and that another line of cases, stemming from *Mavrommatis*,⁴ were the more pertinent precedents for the present case. They required that the Court fully satisfied itself that the facts as alleged by the applicant would constitute a violation of treaty terms and this finding was definitive. Whether there was a violation of the treaty could only be decided on the merits. Accordingly, it was necessary at the jurisdictional stage to examine certain articles of the 1955 Treaty in detail. This did not intrude upon the merits of the case.

Using this approach, Higgins J agreed with the Court that Articles I and IV(1) provided no basis for jurisdiction. However, in her view, the correct reason for that conclusion as it applied in Article IV(1) was because that provision referred to the obligation of one party towards the nationals, property and enterprises of the other party within the former's own territory. Further, the key terms in Article IV(1) were standard terms in law and inapplicable to Iran's claims.

Higgins J agreed that the Court had jurisdiction under Article X (1) but only insofar as the destroyed platforms were shown to be closely associated with, or ancillary to, maritime commerce. Petroleum production did not fall within the term "commerce", nor did interference with production fall under "freedom of commerce". But destruction of platforms used to pass petroleum into pipelines concerned transportation, which was comprised within commerce, and thus might fall within Article X(1).

SEPARATE OPINION OF PARRA-ARANGUREN J

The actions of the United States in this case were directed against the offshore oil platforms belonging to the National Iranian Oil Company, not

⁴ [1924] Permanent Court of Justice Reports Series A, No 2 at 16.

against Iran, as stated in paragraph 36 of the judgment of the Court. The Company is a juridical person different from Iran, even though Iran might own all of its shares. Consequently, as an Iranian corporation, the Company was covered by Article IV(1) of the 1955 Treaty and should be accorded "fair and equitable treatment". It was also protected against the application of "unreasonable or discriminatory measures" that would impair its legally acquired rights and interests.

Therefore, in Parra-Aranguren J's opinion, the Court had jurisdiction to entertain the claims made by Iran under Article IV(1) on the basis of Article XXI(2) of the 1955 Treaty.

SEPARATE OPINION OF RIGAUX J AD HOC

Having supported the majority on the two subparagraphs of the *dispositif*, and unreservedly so in relation to subparagraph 1, Rigaux J *ad hoc* expressed his agreement with subparagraph 2. At the same time, he expressed regret at the excessively narrow legal basis favoured to found the jurisdiction of the Court.

He distanced himself from certain parts of the reasoning relating to the significance of Article I of the 1955 Treaty and he also disassociated himself from the reasons why Article IV(1) was apparently unable to provide an adequate title of jurisdiction.

He felt that the objections thus formulated against certain parts of the judgment could have been avoided had the Court adopted a different method, which would be deemed more in keeping with the precedents. This method would have entailed limiting oneself strictly to settling the preliminary objection to jurisdiction and determining whether questions of interpretation and application of the Treaty existed, notably as regards the application of the facts alleged by Iran to Articles I, IV(1) and X(1), and the characterisation, though not the materiality of which was disputed by the United States.

DISSENTING OPINION OF SCHWEBEL V-P

Schwebel J dissented from the Court's judgment on two grounds. In his opinion, neither of the parties in concluding the 1955 Treaty intended that claims of the character advanced by Iran in this case would be

comprehended by the Treaty or its compromissory clause. Nor did the particular claims of Iran fall within the terms of any provision of the Treaty, including Article X(1).

What could not be denied was that the attacks of the United States on the three Iranian oil platforms at issue constituted a use of armed force against what that state saw as military objectives located within Iranian jurisdiction. The question therefore was: was the dispute over the attacks one that arose under the Treaty?

Schwebel J answered the above question in the negative, as indicated by the title, preamble and terms of the Treaty. Not only did the provisions of the Treaty concentrate on the treatment of the nationals of one party in the territory of the other but the Treaty contained none of the provisions that typically bore on the international use of force. On the other hand, such provisions were fully found in the Agreement of Cooperation which the parties had entered into in 1959.

Moreover, Article XX(1)(d) of the 1959 Treaty excluded from its reach measures necessary to protect a party's essential security interests. Such an exclusion clause would hardly entitle the Court to assume jurisdiction over a claim that engaged the essential security interests of the parties. The United States in oral argument had contended that this clause applied to the merits, a conclusion which the Court itself reached in 1986 when construing an identical clause in *Military and Paramilitary Activities in and against Nicaragua*,⁵ and the Court had declared that it saw no reason to vary the 1986 conclusion.

In Schwebel J's view, the position of the United States and the responsibilities of the Court were somewhat different in this case. The United States affirmed in these proceedings that Article XX(1)(d) indicated the parties intended to keep such matters outside the scope of the Treaty. It maintained throughout that it prescribed exceptions to the reach of the Treaty. The Court in the above case had totally failed in 1984 to address this question at the jurisdictional stage of proceedings. As a result, it fell to the merits if it was to be addressed at all. This historical background therefore allowed the Court in this case to objectively apply

⁵ (Nicaragua v United States of America) [1984] International Court of Justice Reports 427.

the terms of Article XX(1)(d), unconstrained by the 1986 decision. In addition, a question had rightly been raised about the precedent value of the Court's prior decision.⁶

In Schwebel J's opinion, the Court was right in this case to hold that the Treaty could be violated by a use of force. An expropriation could be effected by force or a consul could be forcibly maltreated. But it did not follow that the use of force by a party of its armed forces to attack what it treated as military objectives within the jurisdiction of the other party was within the reach of the 1955 Treaty.

Both parties had filed with their pleadings documents which had been submitted to the United States Senate in the course of ratification of this and like treaties of friendship, commerce and navigation. Among them were documents which showed that intentions in concluding these treaties were to include within the compromissory clause disputes "limited to the differences arising immediately from the specific treaty concerned" and to exclude disputes over military security.

Schwebel J also held that jurisdiction could not be based on Article X(1) of the 1955 Treaty. The article concerned maritime commerce. But even if its first paragraph were to be interpreted to concern commerce at large, commerce could not be equated with production. Production was not ancillary to commerce; it was anterior to it. Nor did the Court's reliance on "freedom" of commerce strengthen its interpretation. The fact or allegation that some of the oil platforms at issue were connected by pipeline to port facilities was insufficient to carry Iran's case.

DISSENTING OPINION OF ODA J

Oda J pointed out that the present case was practically the first one in the Court's history in which the applicant attempted to invoke a compromissory clause of a bilateral treaty as the basis of the Court's jurisdiction. He emphasised that the meaning of the compromissory clause in a bilateral treaty should be considered with great care because, even if the parties to a bilateral treaty were ready to defer to the

⁶ Article 59 of the Statute of the International Court of Justice provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case".

jurisdiction of the Court by including a compromissory clause, neither party might be presumed to entrust the evaluation of the scope (namely, the object and purpose) of the treaty to a third party without its consent.

This was the case even where a dispute as to the interpretation or application of the individual provisions of the treaty specified in the compromissory clause was contained therein. The subject of a dispute could not relate to the question of whether essential issues fell within the comprehensive scope (namely, the object and purpose) of the treaty. It could only concern the "interpretation or application" of the provisions of the agreed text of the treaty. The range of the "interpretation or application" of a treaty as covered by the compromissory clause in a bilateral treaty was as such strictly limited.

Oda J stated that, in view of the basic principle of international justice that referral to the Court should be based upon the consent of sovereign states, neither one of the parties to a *bilateral* treaty should be presumed to have agreed (and certainly, in fact, never had agreed) to let the other party refer unilaterally to the Court a dispute touching upon the object and purpose of the treaty, as, without a mutual understanding on those matters, the treaty itself would not have been concluded. The difference in opinion of the two parties relating to the scope (namely, the object and purpose) of a treaty cannot be the subject of an adjudication by the Court unless both of them had given their consent. Such a dispute might, however, be brought to the Court by a special agreement or, alternatively, there might be an occasion for the application of the rule of *forum prorogatum*.

The issue which faced the Court in the present case involved the determination of the real dispute between the two states as a result of the United States' attack on and destruction of the Iranian oil platforms in a chain of events that took place during the Iran/Iraq War. The Court also had to determine whether, as alleged by Iran and concluded by the Court, it was a dispute regarding the "interpretation or application" of the 1955 Treaty within the meaning of Article XXI(2). In Oda J's view, this was certainly not the case.

Oda J was of the opinion that the way in which the Court responded to the Iranian application in this judgment was derived from a misconception. The Court was requested by Iran to adjudge at this stage that the Court had jurisdiction under the Treaty to entertain the *dispute* occasioned by

the destruction of the oil platforms by United States force, but *not* to entertain any *claims* made by Iran under an specific article, which in this case was Article X(1).

Oda J maintained that failure to dismiss Iran's application invited a situation in which a state could, under the pretext of violation of any trivial provision of a treaty containing a compromissory clause, unilaterally bring the other state party to the treaty before the Court on the sole ground that one of the parties contended that a dispute within the scope of the treaty existed while the other denied it. In his opinion, this would be no more than the application of a form of false logic which was far removed from the real context of such a treaty, and which constituted nothing short of an abuse of treaty interpretation. To quote from his 1986 Separate Opinion in *Military and Paramilitary Activities in and against Nicaragua*,⁷ "the Court might seem in danger of inviting a case 'through the back door'".

⁷ *Ibid.*