DISSENTING OPINION OF VICE-PRESIDENT SCHWEBEL

While there is much with which I agree in the Court's Judgment, I am unable to accept its dispositive decision that it has jurisdiction to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955.

In interpreting the scope of a compromissory clause of a treaty according the Court jurisdiction over any dispute between the parties "as to the interpretation or application" of that treaty, the Court must, as with any other treaty, establish the intention of the parties to it. It must consider whether the parties to the treaty intended that claims of the character advanced in a particular dispute were to be subject to the Court's jurisdiction. It must consider whether the particular claims so advanced fall within the terms of any provision of the treaty.

Neither the United States nor Iran, in concluding the Treaty of 1955, in my view intended that claims of the character advanced by Iran in this case would be subject to the Court's jurisdiction. Nor do I find that the particular claims advanced by Iran in this case fall within the terms of any provision of the Treaty, including Article X, paragraph 1. Neither the text nor the circumstances of the conclusion of the Treaty sustain Iran's contentions, even to the limited extent that the Court has found those contentions to be sustainable.

In 1980, in construing this very Treaty, this Court held that:

> "The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory." (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* p. 28, para. 54.)

The Court thus drew a distinction between promotion of friendly relations (apparently a reference to Article I of the Treaty) and "mutual undertakings" to ensure the protection and security of the nationals of each party in the territory of the other. It is only the latter that is cast in the terminology of legal obligation. That, in a nutshell, is the substance of the 1955 Treaty, rightly stated and understood.

Iran's complaints in this case turn on the attacks upon and destruction of three offshore oil production complexes, owned by the National Iranian Oil Company, which were situated on Iran's continental shelf and within its exclusive economic zone. Iran maintains that the attacks were carried out by several warships of the United States Navy, during a period when Iran was the victim of a war imposed upon it by Iraq, whose forces subjected its oil installations and commercial shipping to eight years of attacks. The United States acknowledges that the oil platforms in question were destroyed by forces of the United States Navy, and claims that they were bombarded to put out of action bases which were used to support a long series of attacks by Iranian military and paramilitary forces on United States and other neutral vessels engaged in peaceful commerce in the Persian Gulf. The United States claims that numerous Iranian helicopter attacks against merchant shipping were launched from oil platforms, and that small high-speed patrol boats were deployed from oil platforms to attack shipping and lay naval mines. Those claims are denied by Iran.

What is not denied, and cannot be denied, is that the attacks by the United States Navy on the three Iranian oil platforms at issue constituted a use by the United States of armed force against what it claims to have seen as military objectives located within the jurisdiction of another State, Iran.

The threshold question that the Court must resolve is, is a dispute over attacks by United States Armed Forces against Iranian objectives in the described circumstances a dispute that arises under the Treaty of Amity, Economic Relations, and Consular Rights?

The answer to that question as I see it is, obviously not. It is obvious from the title, preamble, and terms of the Treaty. It is obvious from the circumstances of the conclusion as well as the text of the Treaty when those circumstances are set out. And what the text and circumstances of the Treaty demonstrate is sustained by such subsequent interpretation as the parties have placed upon it.

The preamble of the Treaty provides:

> "The United States of America and Iran, 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, of encouraging mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and of regulating consular relations,

> have resolved to conclude, on the basis of reciprocal equality of treatment, a Treaty of Amity, Economic Relations, and Consular Rights . . ."

It is plain that this is a Treaty which is essentially concerned with encouraging mutually beneficial trade and investments and closer economic intercourse on the basis of reciprocal equality of treatment. There is no suggestion of regulating the use of armed force by one party against the other.

Article I of the Treaty provides that there shall be firm and enduring peace and sincere friendship between the United States and Iran. The Court has quite correctly held that this provision must merely be regarded as fixing an objective, in the light of which other Treaty provisions are to be interpreted and applied; of itself it imposes no obligations, including obligations governing the use of force in international relations. Those other Treaty provisions regulate the conditions of residence of nationals of one party on the territory of the other, particularly for purposes of trade and investment, and assure the nationals of one party the most constant protection and security in the territory of the other (Art. II); treat the juridical status of companies and access to courts and arbitration (Art. III); provide for fair and equitable treatment of the nationals and companies of the other party and prescribe the most constant protection and security for the property of nationals and companies of either party in the territory of the other (Art. IV); provide for the leasing of real property and the acquisition of other property and its disposition by sale or testament or otherwise, as well as effective protection of intellectual property (Art. V); govern taxation (Art. VI); regulate financial transfers (Art. VII); regulate imports, exports and customs duties (Arts. VIII and IX); treat freedom of commerce and navigation (Art. X) and economic transactions by government agencies (Art. XI); and provide for the rights and duties of consuls (Arts. XII-XIX). None of these core provisions of the Treaty suggests that attacks by armed forces of one party against what it treats as military objectives within the jurisdiction of the other party are within the reach of the Treaty.

It is significant as well that the Treaty contains none of the treaty provisions which typically do bear on the international use of force. There is no pledge of non-aggression or alliance. There is no reference to military assistance by one party in the event of armed attack upon or aggression against the other. There is no reference to regional security arrangements, to the provision of military equipment, to status of forces, to bases on the territory of one party for the forces of the other. Also significant is the fact, which the Court's Judgment acknowledges, that the United States

and Iran concluded other treaty arrangements for such purposes, notably the Agreement of Co-operation between the Government of the United States of America and Imperial Government of Iran of 5 March 1959. That Agreement affirms "their right to co-operate for their security and defence in accordance with Article 51 of the Charter of the United Nations" and declares that the United States "regards as vital to its national interest and to world peace the preservation of the independence and integrity of Iran". It provides that, in case of aggression against Iran, the United States will take appropriate action, including the use of armed forces, in order to assist Iran at its request. It also provides for the continued furnishing to Iran of military and economic assistance, and for co-operation with other Governments in mutually agreed defensive arrangements (*Treaties and Other International Acts Series 4189*).

Moreover, Article XX of the Treaty of 1955 indicates that certain international uses of armed force, far from being within the compass of the Treaty, are excluded from it. Article XX — the sole reference in the Treaty to such matters — provides that:

> "1. The present Treaty shall not preclude the application of measures:
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> . . . . . .
>
> (*d*) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

Article XX is an exclusion clause. It excludes from the areas regulated by the obligations of the Treaty the application of specified measures, including measures of a party "necessary to protect its essential security interests". Such an exclusion can hardly entitle the Court to assume jurisdiction over a claim that engages the essential security interests of the United States if not Iran as well. The object of Iran's claims in this case is the calculated application of armed force by the United States against what it has treated as military objectives within the jurisdiction of Iran, which objectives for its part Iran views as vital to its economic and strategic interests. It follows that, since the Treaty does not preclude the application of such measures, they do not fall within its regulated reach and hence do not fall within the scope of the compromissory clause submitting disputes "as to the interpretation or application of the present Treaty" to the jurisdiction of the Court.

How does the Judgment of the Court affirming its jurisdiction deal with Article XX?

It asserts that the Treaty of 1955 contains no provision expressly excluding certain matters from the jurisdiction of the Court. It then quotes Article XX, paragraph 1 *(d)*, and acknowledges that,

> "This text could be interpreted as excluding certain measures from the actual scope of the Treaty and, consequently, as excluding the jurisdiction of the Court to test the lawfulness of such measures." (Para. 20.)

But it continues:

> "It could also be understood as affording only a defence on the merits. The Court, in its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, adopted the latter interpretation for the application of an identical clause included in the Treaty of Friendship, Commerce and Navigation concluded between the United States and Nicaragua on 21 January 1956 (*I.C.J. Reports 1986*, p. 116, para. 222, and p. 136, para. 271). Iran argues, in this case, that the Court should give the same interpretation to Article XX, paragraph 1 *(d)*. The United States, for its part, in the most recent presentation of its arguments, stated that 'consideration of the interpretation and application of Article XX, paragraph 1 *(d)*, was a merits issue'. The Court sees no reason to vary the conclusions it arrived at in 1986. It accordingly takes the view that Article XX, paragraph 1 *(d)*, does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits to be used should the occasion arise." *(Ibid.)*

It is true that the Court in its 1986 Judgment on the merits in *Military and Paramilitary Activities in and against Nicaragua* treated the corresponding article of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua as a defence on the merits, which in the particular circumstances it found to be unpersuasive. The Court had failed to address the question at all in its 1984 Judgment on jurisdiction, when it should naturally have done so; as a consequence, the question fell to the merits if it was to be addressed at all. In my view, this history leaves the Court free in the present proceedings objectively to apply the terms of Article XX of the Treaty of 1955, unconstrained by the 1986 holding. The reasoning belatedly expressed by the Court on the matter in 1986 was in my view unpersuasive and remains so; and question has been rightly raised about the "value as a precedent" of holdings of the Court in the case (Shabtai Rosenne, *The World Court, What It Is and How It Works*, 5th ed., rev., 1995, pp. 152-153).

The Court in this Judgment takes the position that Iran argued in these

proceedings that the Court should give the same interpretation to Article XX, paragraph 1 *(d)*, as it did in 1986, and that the United States concluded that consideration of the interpretation and application of Article XX, paragraph 1 *(d)*, was an issue for the merits. The Court declares that it sees no reason to vary the conclusions arrived at in 1986. But I believe the position of the United States in this case, and the responsibilities of the Court in this case, to be somewhat different.

In its Preliminary Objection, the United States maintained that:

> *"Section 4. Article XX Confirms that the 1955 Treaty Is Not Intended to Address Questions Relating to the Use of Force by the Parties During Armed Conflict*
>
> 3.36. Any doubts as to the applicability of the 1955 Treaty to Iran's claims is dispelled by Article XX of the Treaty, paragraph (1), which provides:
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> '1. The present Treaty shall not preclude the application of measures:
>
> . . . . . .
>
> *(d)* necessary . . . to protect its [a party's] essential security interests.'
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> 3.37. The intended relationship of this provision to the jurisdiction of the Court was expressly addressed during the process of obtaining ratification of other friendship treaties with the identical provision. Thus, in connection with the ratification of the treaty with China the Department of State submitted to the United States Senate a memorandum on the dispute settlement clause that addressed the scope of the compromissory clause providing for the submission of disputes under that treaty to this Court. That Memorandum provides:
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> 'The compromissory clause . . . is limited to questions of interpretation or application of this treaty; i.e., it is a special not a general compromissory clause.
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> . . . . . .
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> Furthermore, certain important subjects, notably immigration, traffic in military supplies, and the "essential interests of the country in time of national emergency", are specifically excepted from the purview of the treaty. In view of the above, it is difficult to conceive how Article XXVIII could result in this Government's being impleaded in a matter in which it might be embarrassed.'
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> A similar memorandum was later submitted to the Senate in regard to FCN treaties with Belgium and Viet Nam. That memorandum points out:
>
> 'a number of the features which in its view make this provision satisfactory . . . These include the fact that the provision is limited

to differences arising immediately from the specific treaty concerned, that such treaties deal with familiar subject matter and are thoroughly documented in the records of the negotiation, that an established body of interpretation already exists for much of the subject matter of such treaties, and that such purely domestic matters as immigration policy and military security are placed outside the scope of such treaties by specific exceptions.'

This history demonstrates that the 1955 Treaty was not intended to reach matters relating to the essential security interests of the parties.

. . . . . .

3.40. In the *Nicaragua* case the Court held that US national security interests were not threatened by the insurgent attacks against El Salvador that had formed the basis of the US claim to have acted in self-defense. In contrast, Iranian attacks on US and other neutral vessels in the Persian Gulf clearly threatened US national security interests. In the current case, the United States invokes the comparable article in the 1955 Treaty for the purpose of supporting its argument that Articles I, IV and X of the 1955 Treaty relied upon by Iran were never intended to address the use of force issues presented by Iran's claims in connection with the events of October 1987 and April 1988."

The United States Preliminary Objection concluded that, in this case, "Consequently, the Court is presented with exactly the type of situation the 1955 Treaty does not cover." (Pp. 50-53.)

At the stage of the oral proceedings, counsel of the United States initially submitted:

"Article XX (1) *(d)* requires that the 1955 Treaty

'shall not preclude the application of measures . . . necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security or necessary to protect its essential security interests'.

Our preliminary objection suggested that, as a jurisdictional matter, this provision helped to show that Articles I, IV and X, those invoked by Iran, were not designed or intended to govern Iran's claims regarding the use of force. This is because Article XX (1) *(d)* manifested the parties' intent to keep such matters outside the scope of the Treaty. We believe that jurisdictional point remains valid. However, the Islamic Republic of Iran's Observations and Submissions responded to it with several pages of animated arguments

essentially addressing how Article XX (1) *(d)* should be interpreted and applied to the merits of this dispute.

With respect, I think this is not the point on which to join issue on these particular arguments. We do not now, where the issue is the Court's lack of jurisdiction, raise Article XX (1) *(d)* as a defence against the merits of Iran's claims. The significance of Article XX (1) *(d)* is not at the heart of our position concerning this Court's lack of jurisdiction. It should not be allowed to cloud the issues that are before the Court. Thus, I suggest that it is not necessary for the Court to address the specific arguments regarding the construction and application of Article XX (1) *(d)*, unless there should be a future merits phase." (CR 96/13, p. 33.)

Subsequently, United States counsel stated:

"that consideration of the interpretation and application of Article XX (1) *(d)* was a merits issue . . . The position of the United States is that the 1955 Treaty does not regulate the conduct of military hostilities, and therefore, that such conduct should never — never — be the subject of any merits proceedings in this Court under the Treaty. Article XX (1) *(d)* is not inconsistent with this position . . . If the Court should rule that it does have jurisdiction to adjudicate Iran's claims regarding the military events at issue — then, of course, the United States would demonstrate that its actions did not violate the Treaty. In this regard, the United States would invoke Article XX, paragraph 1, and show that the Treaty does not preclude the Parties from taking actions consistent with the law governing the use of force and the exercise of self-defence.

Thus, the United States certainly does not concede that the 1955 Treaty regulates the conduct of armed conflict. However, should the Court rule otherwise, there will be a need for the Parties and the Court to examine with care the exceptions to the reach of the Treaty that are expressly written into Article XX (1) *(d)*." (CR 96/16, pp. 35-36.)

Therefore, in the end, as in the beginning, the United States treats Article XX as specifying exceptions to the reach of the Treaty. As I understand its position, it maintains that Article XX on its face places the use of force in protection of a party's essential security interests beyond the reach of the Treaty, but if nevertheless the Court should assume jurisdiction in the case, this provision will provide a defence on the merits.

In my view, for the reasons stated, the Court should have passed upon Article XX, paragraph 1 *(d)*, at this stage of the proceedings and given

effect to it, whatever the equivocations in the construction of it advanced in the oral argument.

Apart from Article XX, the Court more generally concludes:

> "The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955." (Para. 21.)

I agree with this reasoning in a measure. If Iran or the United States were to expropriate property of a national of the other without compensation and use force in the process, or if Iran or the United States were by force to maltreat or imprison a consul of the other, the Treaty would be violated. To this extent, the Court is right to say that a violation of the rights of a party under the Treaty by means of the use of force is as much a breach as would be a violation by administrative decision or other means. In this sense, matters relating to the use of force are not as such excluded from the purview of the Treaty.

But it does not follow that the use by one party to the Treaty of its armed forces to attack what it treated as military objectives within the jurisdiction of the other party is within the reach of the Treaty. The Treaty simply does not deal with that kind of use of force, which is rather governed by the Charter of the United Nations and other provisions of international law relating to armed conflict between States.

This conclusion is sustained by papers submitted by the United States Government to the United States Senate in connection with the ratification of the Treaty of 1955 as well as other very similar treaties of friendship, commerce and navigation. Not only did the United States cite and rely upon these papers in these proceedings; it is significant that Iran itself did so as well (see the Memorial submitted by the Islamic Republic of Iran, Exhibit 98, which quotes from a statement on commercial treaties with Iran, Nicaragua and the Netherlands submitted to the United States Senate on 3 July 1956, and the Observations and Submissions on the United States Preliminary Objection Submitted by the Islamic Republic of Iran, Exhibit 10, which quotes from a memorandum to the United States Embassy at Chongqing of 2 February 1945 for use in negotiating the Treaty of Friendship, Commerce and Navigation with China). These papers may properly be weighed by the Court not as *travaux préparatoires*, but as part of the circumstances of the conclusion of the Treaty, introduced by both of the Parties to the Treaty and to these proceedings, as to the admissibility of which no question was raised by the Court.

Indeed in its Judgment the Court itself relies on these documents — and the absence of divergent Iranian documents — to show the meaning attached to provisions of the Treaty of 1955.

Iran invoked a memorandum concerning negotiation of the Treaty of Friendship, Commerce and Navigation between the United States and China. One of the papers of that negotiation is published in the pleadings in the case concerning *United States Diplomatic and Consular Staff in Tehran*, Annex 52, entitled, "Memorandum on Dispute Settlement Clause in Treaty of Friendship, Commerce and Navigation with China". It says of a compromissory clause identical to that found in the Treaty of 1955:

> "The compromissory clause (Article XXVIII) of the treaty with China, however, is limited to questions of the interpretation or application of this treaty; i.e., it is a special not a general compromissory clause. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations. Much of the general subject-matter — and in some cases almost identical language — has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are, therefore, to a considerable extent established and well known. Furthermore, certain important subjects, notably immigration, traffic in military supplies, and the 'essential interests of the country in time of national emergency', are specifically excepted from the purview of the treaty. In view of the above, it is difficult to conceive how Article XXVIII could result in this Government's being impleaded in a matter in which it might be embarrassed."

Annex 53 to the same pleadings refers to the foregoing paper in these terms:

> "This paper indicates that the provision in question is intended to fill the need for an agreed method of settling differences arising out of treaties of this type, that would be both sound and generally acceptable. It points out a number of the features which in its view make the provision satisfactory from this standpoint. These include the fact that the provision is limited to differences arising immediately from the specific treaty concerned, that such treaties deal with familiar subject-matter and are thoroughly documented in the records of the negotiation, that an established body of interpretation already exists for much of the subject-matter of such treaties, and that such purely domestic matters as immigration policy and military security are placed outside the scope of such treaties by specific

> exceptions. The paper indicates the Department's view not only that such a treaty provision would not operate in a manner detrimental to US interests but that it is in the interest of the United States to be able to have recourse to the International Court of Justice in case of treaty violation." (*I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, pp. 235, 237.)

These quotations establish not only that treaties of friendship, commerce and navigation concluded by the United States, like a large number of treaties concluded over a long period of time by almost all nations, concern familiar commercial matters, as to which there is voluminous documentation, the authorities for the interpretation of which are established and well known and which are the subject of much national adjudication (unlike matters concerning the international use of force, which are not). They establish as well that the compromissory clause is meant to be "limited to differences arising immediately from the specific treaty concerned". Moreover, they reaffirm that essential security interests "are specifically excepted from the purview of the treaty". Military security "is placed outside the scope of such treaties by specific exception[s]".

All this demonstrates the intention of the United States in concluding treaties of this content and character. It is significant not only that Iran has itself introduced evidence of this very kind in these proceedings. It is no less significant that Iran has not introduced any evidence showing that its intentions in concluding the Treaty of 1955 differed from those of the United States. By way of contrast, Iran introduced vital evidence of its legislative intent "filed for the sole purpose of throwing light on a disputed question of fact, namely, the intention of the Government of Iran" at the time it adhered to the Court's compulsory jurisdiction under the Optional Clause (*Anglo-Iranian Oil Co., I.C.J. Reports 1952,* pp. 93, 107).

Finally, in construing the Treaty of 1955 before the Iran-United States Claims Tribunal, that is, in interpreting the Treaty in practice, Iran argued that the use of military force "was unforeseen by that Treaty and cannot be regulated by it". In *Amoco International Finance Corp.* v. *Islamic Republic of Iran*, Iran contended:

> "'First, it is totally unrealistic to assume that at the time in question, 1979/1980, the Treaty of Amity was operative in the relations between the United States and Iran. The situation which existed (and which included the sending of a US military expedition into Iranian territory, as well as the seizure of Iranian assets) was not one which could be said to be regulated by the terms of the 1955 Treaty

of Amity. The situation was unforeseen by that Treaty and cannot be regulated by it.'" (*Defence and Counterclaim of the Islamic Republic of Iran et al.*, of 24 May 1984, as quoted in Preliminary Objection of the United States of America, Exhibit 54.)

ARTICLE X OF THE TREATY OF 1955

The Court finds that it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty, "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1" of the Treaty. In its Application, Iran maintained that,

> "By its actions in assisting the Government of Iraq in its war efforts, in threatening and provoking the Islamic Republic with the deployment of US forces in the region, and in attacking and destroying Iranian entities and the oil installations referred to here, the United States has gravely interfered with the commerce and navigation of the Islamic Republic and had thus violated the provisions of Article X (1) of the Treaty."

In its written and oral pleadings, Iran confined itself to the claim that violation of Article X, paragraph 1, sprung from the attacks on and destruction of the oil platforms.

Article X of the Treaty provides:

> "1. Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.
>
> 2. Vessels under the flag of either High Contracting Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that High Contracting Party both on the high seas and within the ports, places and waters of the other High Contracting Party.
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> 3. Vessels of either High Contracting Party shall have liberty, on equal terms with vessels of the other High Contracting Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other High Contracting Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other High Contracting Party; but each High Contracting Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.
>
> 4. Vessels of either High Contracting Party shall be accorded national treatment and most-favored-nation treatment by the other

> High Contracting Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other High Contracting Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other High Contracting Party, with respect to: *(a)* duties and charges of all kinds, *(b)* the administration of the customs, and *(c)* bounties, drawbacks and other privileges of this nature.
>
> 5. Vessels of either High Contracting Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other High Contracting Party, and shall receive friendly treatment and assistance.
>
> 6. The term 'vessels', as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war."

Since every paragraph of Article X except the first refers expressly to "vessels" and since stationary oil platforms are not vessels, neither Iran nor the Court purport to found jurisdiction on paragraphs of Article X other than paragraph 1, which refers to "freedom of commerce and navigation".

Evidence introduced before the Court treats the whole of Article X as "a navigation article". A principal United States negotiator of the series of largely identical treaties of friendship, commerce and navigation describes the standard article on these matters precisely as "a navigation article" that

> "reaffirms a liberal regime of treatment to be applied to international shipping. The rules set forth reflect the practices which have historically been developed by leading maritime nations . . ." (Herman Walker, "The Post-War Commercial Treaty Program of the United States", *Political Science Quarterly*, Vol. LXXIX, p. 73.)

Other commentators cited to the Court similarly interpret Article X. Article X as a whole is concerned with shipping, not with commerce generally. The fact that every paragraph but the first refers to "vessels" suggests that the purpose of paragraph 1 is not to deal with commerce generally — for if that were its purpose it would appear as a separate article of the Treaty — but to introduce and set the objective of the remaining paragraphs of the article. (In reviewing those paragraphs, it is worth noting that, in the last, "vessels of war" are excluded from the reach of the article except in specified respects.) Moreover, specifics of freedom of commerce are dealt with in detail in Articles VIII and IX of the Treaty. Accordingly when the Treaty means to address more than

freedom of maritime commerce, it does so in other articles and in terms that have no bearing on the dispute before the Court.

The Court nevertheless finds that Article X is not restricted to maritime commerce for the reasons set out in the Judgment.

Even if those reasons are thought to be tenable, where in my view the Court's conclusions are untenable is in its holding that "commerce" is not restricted to acts of purchase and sale. It interprets "commerce" as embracing "the ancillary activities related to commerce". It thus appears to conclude, although it does not state, that "commerce" includes "production". It offers quotations from the *Oxford English Dictionary* and the *Oscar Chinn* case and a few other sources in support of this conclusion.

The difficulty with the reasoning of the Court is that production is not ancillary to commerce. It is anterior to it, just as the existence of territory, people, rainfall, geological formations, growing of crops, generation of capital, etc., is anterior to commerce which exchanges what may be products of the productive conjunction of such resources. The quotation from the *Oxford English Dictionary* defines commerce to include "the whole of the transactions, arrangements, etc., therein involved", and "therein" refers to sale and purchase — which hardly implies that commerce extends to production. The Court's reference to the *Dictionnaire de la terminologie du droit international* and to a few other disparate sources is no more probative; they make no reference to production whatsoever. *Black's Law Dictionary* on which Iran and the Court rely contains no reference to or suggestion that commerce includes production; it is confined to "the purchase, sale and exchange of commodities" and the agencies and means of such exchange. At the same time, a review of the dozen or more dictionaries in the Library of the Court, English and multilingual, turns up none that define commerce to include production. Rather, like David M. Walker's *The Oxford Companion to Law* (Oxford University Press, 1980), they define as "*Commerce.* The exchange of commodities and all the arrangements involved in effecting such exchanges." (P. 247.)

The fact of the matter is that commerce in ordinary and in legal usage is simply not understood to embrace production. *Oscar Chinn* gives the Court more, but insufficient support, because the term there under construction was "freedom of trade" not freedom of commerce, and "trade" is widely interpreted as a broader term than commerce, and one which, unlike commerce, may include "industry". Moreover, the "trade" at issue

in the *Oscar Chinn* case was not production but river transport; the "industry" in question was "the transport business". The Court's holding "that the fluvial transport industry is a branch of commerce" is of no relevance or assistance to Iran's position in these proceedings (*Oscar Chinn, P.C.I.J., Series A/B, No. 63*, pp. 65, 81, 85). In short, the growing of pistachio nuts in Iran is not commerce within the meaning of Article X of the Treaty; the feeding of sturgeon in the Caspian Sea is not commerce within the meaning of Article X of the Treaty; and the production of oil on Iran's continental shelf is not commerce within the meaning of Article X of the Treaty.

This being so, the Court's reliance on "freedom" of commerce does not strengthen its analysis. To be sure, if the wherewithal to exchange is lacking or is destroyed, there can be no exchange; there can be no commerce in non-existent goods. But on the Court's reasoning, action that impairs the life or health of the inhabitants of Iran, or that detracts from its climate, environment, condition of its natural resources, generation of its capital, etc., also prejudices its freedom of commerce in that such action may affect the ability of Iran to produce the goods to exchange. It might in this vein be argued that if pollution originating in country A wafts onto the territory of country B, country A, assuming it to be bound to freedom of commerce with country B, is in violation of its obligation. I do not believe that a treaty provision that, "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation" sustains so far-reaching — if not far-fetched — an interpretation. Nor am I persuaded that freedom of commerce and navigation within the meaning of the Treaty could be affected by the fact or allegation that some or all of the destroyed oil platforms in question were connected by a pipeline network to port facilities.

It may be added that the Court's holdings in *Military and Paramilitary Activities in and against Nicaragua* are consistent with the conclusion that Article X, paragraph 1, of the Treaty of 1955 is confined to commerce and does not include production or facilities for production. In that case, the Court found that mining of the approaches to ports and port installations impaired Nicaragua's right to freedom of communications and maritime commerce (*I.C.J. Reports 1986*, pp. 111-112, 128-129, 139), as that right was protected by the corresponding article of the Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States. It did not hold that attacks on oil pipelines and storage tanks violated that article of the Treaty. On the contrary, while the Court's Judgment recites that Nicaragua argued that

> "Since the word 'commerce' in the 1956 Treaty must be understood in its broadest sense, all of the activities by which the United States has deliberately inflicted on Nicaragua physical damage and economic losses of all types, violate the principle of freedom of commerce which the Treaty establishes in very general terms" (*I.C.J. Reports 1986,* p. 139),

the Court did not pass upon that contention (see *ibid.,* pp. 139-140). There is nothing in the Court's holdings that suggests that that article protected the production of oil or any other commodity in Nicaragua.

For these reasons, I conclude that the Court's reliance on Article X, paragraph 1, of the Treaty of 1955 to found the jurisdiction of the Court in this case is unfounded.

(Signed) Stephen M. SCHWEBEL.