DISSENTING OPINION OF JUDGE AL-KHASAWNEH

Putting two distinct findings in one paragraph unusual and unfortunate — Leaves no choice but to accept paragraph as a whole or reject it — Vote against operative paragraph because reasoning and conclusion on freedom of commerce unpersuasive and incorrect — Nevertheless accepts in principle finding relating to essential security measures — Majority approach too formalistic — 1955 Treaty protects freedom of commerce — Factually oil continued to flow to the United States after embargo — Indirect trade law concepts ill-suited as a yardstick for measuring treaty-protected commerce — No basis for distinction between direct and indirect commerce — relevance of Article VIII of the 1955 Treaty — United States counter-claim admissible subject to problems of attributability to Iran — Asymmetry of evidence — Appropriate to deal with non-use of force — Judgment should be more concerned with clarity than presentational aspects.

1. It is unusual from the point of view of established drafting technique and unfortunate from that of logical coherence that the *dispositif* of the present Judgment amalgamates in a single paragraph (paragraph 125 (1)) two separate findings that do not depend on each other for their validity or soundness and hence leaves us with no choice but to accept the paragraph as a whole or to reject it.

2. Those findings are:

(a) That the United States actions against Iranian oil platforms in 1987 and 1988 cannot be justified as measures necessary to protect the essential security interests of the United States under Article XX, paragraph 1 *(d)*, of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran as interpreted in the light of international law on the non-use of force.

(b) That nevertheless, those actions do not constitute a violation of the obligations of the United States under Article X, paragraph 1, of the 1955 Treaty regarding freedom of commerce between the territories of the two parties.

This, being the formal structure of the operative paragraph, I have no choice but to vote against the paragraph as a whole, for whilst I concur in principle with the first finding regarding Article XX, paragraph 1 *(d)*,

I find the reasoning and the finding regarding Article X, paragraph 1, of the Treaty unpersuasive and, with respect, incorrect.

3. In the first place, what is at issue here is not whether oil from the destroyed platforms was impeded from being traded between the territories of the two Parties at the time of the attacks, but rather that the *possibility* of such oil flowing and being traded was impeded. The 1955 Treaty protects the freedom of commerce, which must mean commerce actual and potential. The Court could not have been clearer when it said in the 1996 Judgment:

> "50. The Court should not in any event overlook that Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect 'commerce' but '*freedom* of commerce'. Any act which would impede that 'freedom' is thereby prohibited. Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export." (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 50.)

4. Secondly, it seems that, factually, Iranian oil continued to flow to the United States even after the adoption of Executive Order 12613 dated 29 October 1987, for an exception was made in that Order in Section 2 *(b)* which reads: "[t]he prohibition contained in Section 1 shall not apply to: . . . *(b)* petroleum products refined from Iranian crude oil in a third country". It has been argued that such oil undergoes a metamorphosis upon being refined and mixed in third countries so that the final product could no longer be regarded as Iranian, but the Executive Order itself by speaking of "petroleum products refined from Iranian crude oil" clearly shows that this final product was viewed by the United States as easily traceable back to its Iranian origin. Moreover, international trade law concepts are ill-suited to be used as a yardstick against which a treaty-protected freedom of commerce can be measured. For such a treaty-protected freedom to be infringed it is sufficient to show that a flow of Iranian oil into the United States in the form of refined products and a correspondent outflow of capital that ultimately reached Iran to pay for such products took place. There is ample evidence that this was the case.

5. Thirdly, the reasoning is singularly unpersuasive in its attempts at showing a distinction between protected direct commerce and unprotected indirect commerce. There is nothing in the 1955 Treaty or in similar treaties to which the United States is party to suggest that only direct commerce was protected. Indeed a simple textual analysis of the provisions of the 1955 Treaty with the aim of ascertaining the definition of the

concept of freedom of commerce used therein would reveal that the Treaty contemplated the possibility of the products of one State reaching the territory of the other indirectly. Thus Article VIII provides:

> "1. Each High Contracting Party shall accord to products of the other High Contracting Party, *from whatever place and by whatever type of carrier arriving*, and to products destined for exportation to the territories of such other High Contracting Party, *by whatever route and by whatever type of carrier*, treatment no less favourable than that . . ." (emphasis added).

6. I believe the arguments just made will show that the majority in this Court have followed a formalistic and disconnected approach in their reasoning with regard to the violation of the United States of its obligations under Article X, paragraph 1, on the freedom of commerce. Such an approach is not supported by the text of the 1955 Treaty, and seems to be based on assumptions that are factually wrong and do not correspond to the realities of trade in oil. Moreover, such an approach seems to detract from aspects of the Court's jurisprudence and I have in mind both the *Oscar Chinn* case (*Judgment, P.C.I.J., Series A/B, No. 63*, p. 65) and the 1996 Judgment (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 819, para. 50.)

7. A consequence of the narrow approach that the majority followed was that the United States counter-claim was also rejected. It would have been much better had the Court admitted both the Iranian claim and the United States counter-claim. Having said this I should hasten to add that the problems relating to the United States counter-claim stem from problems of attributability to Iran, problems that emanate in part from an asymmetry in the Iranian and United States position with regard to evidence, for in the case of the latter, there is no question of the attribution of attacks against the oil platforms to the United States, while in the case of Iran, its denial of responsibility for specific acts and the presence of another actor, Iraq, would compound problems of attribution. Be this as it may, there is no reason why specific elements of the United States claim cannot be upheld if the hurdle of attribution is overcome.

8. Lastly, I stated above (para. 2) that I concurred with the first finding of the Court, namely that the United States actions cannot be justified as measures necessary to protect the essential security interests of the United States under Article XX, paragraph 1 *(d)*, of the Treaty as interpreted in the light of international law on the non-use of force. It has been suggested that devoting a large part of the Judgment to a discussion of the concept of non-use of force is inappropriate and unnecessary for disposing of the case besides the risk this runs of going beyond the limits

of the Court's jurisdiction which are extremely narrow. Nothing is more debatable.

9. The determining factor is the United States resort to armed force as distinct from other measures such as the imposition of an embargo that fall short of armed force. Whilst the legality of measures short of armed force are open to scrutiny against the twin criteria of whether they were essential and reasonable to the risk perceived, when armed force is resorted to a discussion of that concept in terms of proportionality and necessity becomes interwoven with the concept of necessary measures. I find therefore that it was appropriate for the Court to have clarified those aspects in its reasoning. I do not feel that the *ultra petita* rule was infringed nor that the concept of *lex specialis* (assuming that the 1955 Treaty was one) would operate to exclude the operation of rules of international law that have a peremptory character.

10. What I find both regrettable and disconcerting is that the Court has pronounced on those central questions of international law in the best traditions of *oratio obliqua*, thus the United States resort to armed force resulting in the destruction of the oil platforms is referred to as "actions". Similarly while the Court makes it clear that what is meant by international law on the non-use of force is both Charter law and customary law (Judgment, para. 42), a careful reading of the Judgment is needed to find the link between the reasoning and the operative paragraph. A court of law should be more concerned with the clarity of its judgments than with the presentational aspects of those judgments.

(*Signed*) Awn Al-Khasawneh.