Oil Platforms: Lessons of Dissensus

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Abstract. The recent judgment of the International Court of Justice in the Case Concerning the Oil Platforms (‘Oil Platforms’) is a fascinating and confusing mix of formal consensus and substantive dissensus. By fourteen votes to two, the Court dismissed both the United States defence and Iran’s substantive claim in the case. Yet the Court’s nearly complete unanimity is belied by a considerable substantive disagreement on the reasoning leading to this outcome, as reflected in the numerous separate and dissenting opinions appended to the judgment. An analysis of these opinions reveals that the disagreement within the Court cannot be considered simply a reflection of varying judicial appreciations of law and fact; it reveals a fundamental, even philosophical disagreement relating to the very function of the Court: Is the principal function of the Court the adjudication of claims brought by States, or the settlement of disputes between States? The fundamental disagreement among the Judges on this issue seems a reflection of their training and background – between Judges trained in the common law tradition and those hailing from the civil law or similar more policy-oriented backgrounds. Apart from the jurisprudential disagreement relating to the function of the Court, the judgment also raises important issues of substantive international law, in particular those relating to the relationship between the law of peace and the law of armed conflict. The judgment testifies to the continuing validity of this distinction, despite the many attempts of international legal scholarship to move beyond this distinction to a more enlightened era of international relations.

1. Introduction

The recent judgment of the International Court of Justice (the ‘Court’) in the Case Concerning the Oil Platforms (‘Oil Platforms’) is a fascinating and confusing mix of formal consensus and substantive dissensus.¹ On the face of it, the Court’s decision looks remarkably unanimous. By fourteen votes to two, the Court dismissed both the United States defence and Iran’s substantive claim in the case. Yet while a substantial majority of the Court stood behind the judgment’s dispositif, the Court’s nearly complete unanimity is belied by a fundamental substantive disagreement, as reflected in the numerous separate opinions and the two dissenting opinions appended to the judgment.

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The sole basis of the Court’s jurisdiction in the case was the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (the ‘Treaty of Amity’ or the ‘Treaty’). Iran alleged in its claim that the United States, by its action against Iranian oil platforms in 1987 and 1988, had breached the freedom of commerce and navigation established in Article X:1 of the Treaty. The United States argued in response that its actions were justified under Article XX:1(d) of the Treaty, which provides that the Treaty “shall not preclude the application of measures . . . necessary to protect [a Party’s] essential security interests”. Having concluded in an earlier judgment that it had jurisdiction on the basis of Article XXI:2 of the Treaty, the Court found that

“the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 (d), of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force; further that the Court cannot however uphold the submission of the Islamic Republic of Iran that those actions constitute a breach of the obligations of the United States of America under Article X, paragraph 1, of that Treaty, regarding freedom of commerce between the territories of the parties, and that, accordingly, the claim of the Islamic Republic of Iran for reparation also cannot be upheld.”

The Court thus dismissed both the United States defence and Iran’s claim – and, it should be noted, in this particular order. The Court also rejected the United States counter-claim, in which the United States suggested that Iran had approached the Court with unclean hands since, contrary to what Iran alleged, it had not been a simple victim of United States action but had itself engaged in use of force against the United States and other neutral vessels in the Gulf.\(^2\) Why the Court decided first to examine the United States defence rather than the merits of Iran’s principal claim, and indeed why the Court felt that it was necessary to rule on the United States defence at all, in view of the Court’s dismissal of Iran’s claim, are matters of great of interest; and indeed it is these issues that formed the crux of the disagreement within the Court and the subject matter of most of the dissenting and separate opinions.

The disagreement within the Court cannot be considered simply a reflection of varying judicial appreciations of law and facts; it reveals a more fundamental, even philosophical disagreement within the Court. This disagreement

\(^2\) Neutral in the sense of not being parties to the Iran-Iraq war that raged at the time and affected commercial navigation in the Gulf. See Oil Platforms (Merits), para. 23.
seems a reflection of training and background – between Judges trained in the common law tradition and those hailing from a civil law background. While the tension between these two jurisprudential traditions has perhaps always existed within the Court, it now surfaced as a disagreement on an issue that goes to the very heart of the function of the Court as an institution of international law – what is that function, in the first place?

Apart from the jurisprudential disagreement on the Court’s principal function, the judgment also raises important issues of substantive international law, in particular those relating to the relationship between the law of peace and the law of armed conflict. Indeed, the case testifies to the continuing relevance in modern international law of the traditional distinction between the law of peace and the law of war – or, as it is now termed, the law of armed conflict.

This article is an attempt at an in-depth case study on these two issues, whose importance far exceeds the particular context of this particular case. A proper understanding of the issues, and the Parties’ role in shaping them, requires a review of the procedural history of the case.

2. Procedural History

2.1 Jurisdictional Phase

Iran alleged in its application that, on 19 October 1987 and 18 April 1988, warships of the United States Navy attacked and destroyed three offshore oil production complexes owned and operated by the National Iranian Oil Company.3 According to Iran, these acts constituted fundamental breaches of various provisions of the Treaty of Amity, including Article X:1, and international law.4 Iran founded the Court’s jurisdiction to hear the claim on Article XXI:2 of the Treaty of Amity, which provides for the submission of any dispute arising out of the interpretation or application of the Treaty to the Court.

The United States objected to the Court’s jurisdiction on grounds that Iran’s application bore no relation to the Treaty of Amity and that the Court therefore lacked jurisdiction to deal with it. Specifically, the United States argued that the Treaty of Amity did not apply in the event of the use of force, and that its attack and destruction of the oil platforms occurred “in the context of a long series of attacks by Iranian military and paramilitary forces on US and other neutral vessels engaged in peaceful commerce in the Persian Gulf”.5

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4 Article X:1 provides that “[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation”.
5 Oil Platforms (Preliminary Objection), 12 December 1996, para. 18.
The Court noted that there were no provisions in the Treaty of Amity expressly excluding certain matters outside the Court’s jurisdiction. It then referred to Article XX:1(d) of the Treaty, which provides:

“1. The present Treaty shall not preclude the application of measures:

\[\ldots\]

(d) necessary to fulfil 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.”

The Court noted that this provision “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”.\(^6\) Yet according to the Court, the provision “could also be understood as affording only a defence on the merits”.\(^7\)

Referring to its judgment in *Military and Paramilitary Activities in and against Nicaragua*, where the Court interpreted an identical provision contained in the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, the Court saw no reason to vary the finding it arrived at in that case, to the effect that the provision afforded a defence on the merits.\(^8\) The Court concluded that Article XX:1(d) of the Treaty of Amity was “confined to affording the Parties a possible defence on the merits to be used should the occasion arise”.\(^9\) The Court also rejected the United States argument that the Treaty did not apply in the event of the use of force:

“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.”\(^10\)

The Court found that it had jurisdiction *ratione materiae* to entertain the dispute in so far as it related to the alleged breach by the United States of

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\(^7\) *Ibid.*


\(^9\) *Oil Platforms (Preliminary Objection)*, para. 20.

Article X:1 of the Treaty of Amity, which provides for "the freedom of commerce and navigation" between the Parties. Specifically, the Court held that it had jurisdiction in so far Iran as claimed that the United States action had affected the "freedom of commerce" between the Parties.\textsuperscript{11}

Thus the Court sought to address the United States' objection by framing it as one relating to the Court's jurisdiction \textit{ratione materiae}. According to the Court, the relevant test for the purpose of determining whether the Court has jurisdiction \textit{ratione materiae} is "whether the violations of the Treaty of 1955 pleaded by Iran \textit{do or do not fall} within the provisions of the Treaty of and whether, as a consequence, the dispute is one which the Court has jurisdiction \textit{ratione materiae} to entertain, pursuant to Article X of the Treaty.\textsuperscript{12}

The Court thus appeared to make a definitive interpretation of the Treaty as to whether or not Iran's claim fell under Article X of the Treaty. As noted by Judges Higgins and Shahabuddeen in their Separate Opinions,\textsuperscript{13} this approach appears to constitute a departure from a long line of precedents in which the Court has adopted the methodology that, for the purposes of determining

\textsuperscript{11} Ibid., para. 53.
\textsuperscript{12} Ibid., para. 16 (emphasis added).
\textsuperscript{13} Both Judges examined at length the Court's jurisprudence on the issue. Judge Higgins noted that the examination of the Court's jurisprudence "reveal[s] a struggle between the idea that it is enough for the Court to find provisionally that the case for jurisdiction has been made, and the alternative view that the Court must have grounds to determine definitively at the jurisdictional phase that it has jurisdiction". \textit{Oil Platforms (Preliminary Objections), Separate Opinion of Judge Higgins}, para. 9. The former idea was initially embraced in \textit{Nationality Decrees Issued in Tunis and Morocco}, 1923 P.C.I.J. (ser. B) No. 4 (Advisory Opinion of 7 February) and the latter in \textit{Mavrommatis Palestine Concessions}, 1924 P.C.I.J. (ser. A) No. 2 (Judgment of 30 August). A different standard, closer to that adopted by the Permanent Court in \textit{Tunis and Morocco Nationality Decrees}, was subsequently endorsed by the Court in the \textit{Ambatielos Case (Greece v. United Kingdom)}, 1953 I.C.J. 10 (Judgment on Merits of 19 May), where the Court held that, "[i]f the interpretation given by the Hellenic Government to any of the provisions relied upon appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one, then the Ambatielos claims must be considered, for the purposes of the present proceedings, to be a claim based on the Treaty of 1886." \textit{Ibid.}, p. 18. Judge Higgins concluded that, in her view, "[t]he only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept \textit{pro tem} the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes – that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them." \textit{Ibid.}, para. 32.

Similarly, Judge Shahabuddeen in his Separate Opinion essentially adopted the \textit{Ambatielos} standard, suggesting that "[t]he 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". \textit{Oil Platforms (Preliminary Objections), Separate Opinion of Judge Shahabuddeen}, p. 5.
whether or not a claim is admissible _ratione materiae_, the Court generally examines only whether the applicant’s claim _appears_ to be based on the treaty containing the compromissory clause in the sense that, if one accepts the facts alleged by the applicant as true, the claim is arguably meritorious.\textsuperscript{14} If the claim meets this standard, the Court must conclude that it has jurisdiction _ratione materiae_ to hear the claim, without prejudice however to its eventual determination on the merits as to whether or not the applicant will be able to substantiate its claim.

It remains unclear whether the Court intended to depart or in fact departed from this approach. Indeed, it seemed to hold, quite simply, that it had jurisdiction over Iran’s claim _ratione materiae_ and that this finding of jurisdiction was definitive. While this finding implies that Iran’s claim was admissible _ratione materiae_, i.e., that it _appeared_ to have merit, this finding was only preliminary and did not necessarily mean that the claim will also be found _substantively_ admissible.\textsuperscript{15} It remained open for the United States to argue, on the merits, that Iran’s claim could not be upheld on the basis of Article X and other relevant provisions of the Treaty of Amity.

However, while the Court’s ruling to the effect that “[m]atters relating to the use of force are therefore not _per se_ excluded from the reach of the Treaty of 1955” seems on its face sound, it remains problematic to the extent that it fails to address, or reserve for the merits, the consequences of the United States’ allegation that Iran itself had been engaged in armed activities against the United States. Should this have been the case, a more fundamental question would arise. If both sides were in fact engaged in armed activities, should not the law applicable to the relations between them be the law of armed conflict rather than the law of peace, or more specifically, the Treaty of Amity?

\textsuperscript{14} For discussion of this standard, of which there are various formulations, see the Separate Opinions of Judges Higgins and Shahabuddin.

\textsuperscript{15} In other words, the “struggle” identified by Judge Higgins in her Separate Opinion seems to be simply a reflection of whether the Court frames its judgment in terms of the admissibility of the claim or in terms of its jurisdiction. The former finding is always “provisional” or preliminary in the sense that it does not preclude the Court’s decision on the merits; accordingly, the relevant standard is whether the claim has _prima facie_ merit, i.e., whether the claim is arguable on the basis of the source of law invoked. The latter finding is always final in the sense that, even if the Court were to dismiss the claim on the merits – as it did in the present case – this does not revoke its earlier decision on jurisdiction. The real issue for the Court to consider is whether its preliminary judgments should be framed in terms of admissibility or jurisdiction. As positive decisions on admissibility can only be preliminary (or ‘provisional’), there would be some merit in adopting an approach where positive decisions are framed in terms of jurisdiction (as they are final in terms of jurisdiction but not in terms of substantive admissibility) and negative decisions in terms of admissibility (as they are final in terms of inadmissibility, although this does not necessarily imply lack of jurisdiction).
Judge Schwebel, who dissented from the Court's judgment on jurisdiction, touched upon this issue in his Dissenting Opinion. While agreeing "in a measure" with the Court's conclusion that "[m]atters relating to the use of force are . . . not per se excluded from the reach of the Treaty of 1955", he went on to state:

"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."\(^1^6\)

Thus Judge Schwebel sought to draw a distinction between two types of use of force – one related to the subject matter of the Treaty and the other bearing no such relationship. However, while this may or may not be a valid distinction, the point made by the United States in its objection to the Court's jurisdiction was not only that the Treaty of Amity did not apply because one of the Parties had used force; the United States suggested that the Treaty did not apply because both Parties were engaged in use of force against each other. Judge Schwebel's reasoning does not address the question of what happens to the Treaty of Amity in such an event and to that extent remains beside the point.

Judge Schwebel's reasoning also remains problematic to the extent that it seems to accept that the United States could have excluded the jurisdiction of the Court in limine litis, simply by alleging use of force by Iran. This is a classic form of a fin de non-recevoir, i.e., an objection to the Court's jurisdiction on a ground that is not exclusively preliminary.\(^1^7\) Both the Court and its predecessor, the Permanent Court of International Justice, have consistently refused to consider such objections as preliminary objections in the

\(^1^6\) Oil Platforms (Preliminary Objections), Dissenting Opinion of Judge Schwebel, p. 6.

\(^1^7\) For discussion of the concept of fin de non-recevoir and related concepts see Veijo Heiskanen, Jurisdiction v. Competence: Revisiting a Frequently Neglected Distinction, 5 Fin. Y.B. Int'l L. 1 (1994).
proper sense of the term and have joined them to the merits, or declared that they do not possess an exclusively preliminary character and have to be resolved on the merits. This is arguably what the Court should have done in the present case. Instead of dismissing the United States objection to jurisdiction, the Court could have concluded that, to the extent that it raises a question of the law applicable to the merits of the claim, it is not of an exclusively preliminary character and should be left for determination on the merits.

In the end, despite its somewhat confusing analysis, this is effectively what the Court did. By characterizing the United States’ objection in part as a defence on the merits rather than as a preliminary objection to jurisdiction, the Court effectively concluded that the United States’ objection was not of an exclusively preliminary character. However, the Court reached this conclusion in a somewhat convoluted manner that seemed to prejudge what appeared to constitute the very subject matter of the dispute between the Parties – the law applicable to the merits of Iran’s claim. In effect, the United States argued that the law applicable to the relations between the Parties was

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18 After the 1972 revision of the Court’s Rules, the procedural technique of joinder to the merits is no longer available to the Court; instead, under Article 79, paragraph 7 of the revised Rules, the Court presently may declare that an objection that relies on the merits of the claim is “not of an exclusively preliminary character”. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Preliminary Objections), 1984 I.C.J. pp. 425–26 (Judgment on Jurisdiction and Admissibility of 26 November). For the jurisprudence of the Court and the Permanent Court see e.g. Certain German Interests in Polish Upper Silesia (Germany v. Poland), 1925 P.C.I.J. (ser. A) No. 6, at 18–19 (Judgment of 25 August); Administration of the Prince von Pless (Germany v. Poland) (Preliminary Objection), 1933 P.C.I.J. (ser A/B) No. 52, p. 14 (Order of 4 February); Pajzs, Csáky, Esterházy Case (Hungary v. Yugoslavia) (Preliminary Objection), 1936 P.C.I.J. (ser. A/B) No. 66, p. 9 (Order of May 23); Losinger & Co. Case (Switzerland v. Yugoslavia) (Preliminary Objection), 1936 P.C.I.J. (ser. A/B) No. 67, pp. 23–24 (Order of 27 June); Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania) (Preliminary Objections), 1938 P.C.I.J. (ser. A/B) No. 75, pp. 55–56 (Order of 30 June); Electricity Company of Sofia and Bulgaria (Bulgaria v. Belgium) (Preliminary Objections), 1939 P.C.I.J. (ser. A/B) No. 77, pp. 77–78, 82–83 (Judgment of 4 April); Right of Passage over Indian Territory (Portugal v. India) (Preliminary Objections), 1957 I.C.J. 125, pp. 150–52 (Judgment of 26 November); Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Preliminary Objections), 1964 I.C.J. 6, pp. 43–45 (Judgment of 24 July); Military and Paramilitary Activities in and against Nicaragua (Jurisdiction), supra, pp. 29–31.

19 Indeed, Iran had submitted on a subsidiary basis, in the event that the United States’ preliminary objection was not rejected outright, that the objection did not possess, in the circumstances of the case, an exclusively preliminary character. Oil Platforms (Preliminary Objection), para. 10. Having dismissed the United States objection, the Court concluded that Iran’s subsidiary submission “no longer ha[d] any object”. Ibid., para. 54.

20 Ibid., para. 20. (“[The Court] 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.”)
not the Treaty of Amity. To this extent the United States’ objection should not have been rejected in the jurisdictional phase of the proceedings, as it related to the law applicable on the merits and thus was clearly not of an exclusively preliminary character. The Court could and arguably should have expressis verbis reserved the consideration of this issue for the merits.

2.2 United States’ Counter-claim

After the conclusion of the jurisdictional phase of the proceedings, the United States in its Counter-Memorial brought a counter-claim arguing that Iran engaged in military activities during the time period 1987–88, including attacking vessels and laying mines in the Persian Gulf, that were “dangerous and detrimental to maritime commerce” and in breach of Iran’s obligations to the United States under Article X of the Treaty of Amity.\(^{21}\)

Iran objected to the United States’ counter-claim on grounds that the counter-claim did not fall within the jurisdiction of the Court, since Iran’s original claim and the counter-claim were not “directly connected”, as required by Article 80, paragraph 1 of the Rules of the Court.\(^{22}\)

Overruling Iran’s objection, the Court found that the facts alleged by the United States were “capable of falling within the scope of Article X, paragraph 1” of the Treaty in so far as they may have prejudiced the freedom of commerce. The Court observed that both Iran’s claim and the United States counter-claim “rest[ed] on facts of the same nature . . . [and] form[ed] part of the same factual complex since the facts relied on – whether involving the destruction of oil platforms or of ships – [were] alleged to have occurred in the Gulf during the same period . . .” and concluded that “the counter-claim presented by the United States [was] directly connected with the subject-matter of the claims of Iran”.\(^{23}\)

The Court’s admission of the United States’ counter-claim raised squarely the question of whether there was in fact an armed conflict between the Parties during the relevant period, 1987–88. However, as the United States, like Iran, based its claim on the Treaty of Amity (the United States now having no choice, as the Court had determined that the Treaty of Amity formed the sole basis of its jurisdiction), the United States effectively boxed itself in in terms of the applicable law. It could no longer argue, as it sought to do during

\(^{21}\) *Oil Platforms Counter-Claim*, Order of 10 March 1998, para. 4.

\(^{22}\) *Ibid.*, para. 14. Article 80, para. 1 of the Rules provides that “[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party”.

the jurisdictional phase of the proceedings that the Treaty of Amity did not apply to the use of force between the Parties.

Bringing a counter-claim on the basis Article X:1 of the Treaty of Amity may well have been a strategic mistake on the part of the United States; in any event, the United States’ counter-claim and its admission by the Court created a great potential for confusion between the Court’s findings in its judgment on jurisdiction and the issues that remained to be adjudicated on the merits. It now became much more difficult, if not impossible, for the Court to reach the conclusion, in the event that the facts on the merits would warrant such a conclusion, that the Treaty of Amity did not apply between the Parties because there was, in effect, an armed conflict between them. It also became much more difficult to clearly identify the subject matter of the dispute between the parties. Was the subject matter of the dispute now whether Iran’s claim had any merit in terms of Article X:1 of the Treaty of Amity? Or was it rather whether the United States defence had any merit under Article XX:1(d) the Treaty of Amity? Or was it the United States’ allegation in its counter-claim that Iran itself had breached Article X:1 of the Treaty by engaging in armed activities against the United States? Or was it rather whether the Treaty of Amity applied at all between the Parties, assuming there was an ongoing armed conflict between them at the time?

3. The Judgment on the Merits

3.1 The Applicable Law

As initially argued, the case presented an ideal opportunity for the Court to clarify the relationship between the scope of application of a commercial treaty, the Treaty of Amity, and the rules governing the use of force or, more broadly, between the law of peace and the law of armed conflict. The Court’s decision on this issue in the merits phase was not necessarily prejudged by its determination in the jurisdictional phase to the effect that “[m]atters relating to the use of force are therefore not per se excluded from the reach of the Treaty of 1955”.24 It still remained open for the Court to conclude, should the facts justify such a conclusion, that there was in fact an armed conflict between the Parties during the relevant period, and that therefore the applicable regime of law was not the Treaty of Amity but the law of armed conflict.

However, as discussed above, it became very difficult, if not impossible, for the Court to reach this conclusion once it had admitted the United States’ counter-claim, which was also based on an alleged breach of Article X:1 of

24 Ibid., para. 21.
the Treaty of Amity. Consequently, the United States could no longer effectively pursue the issue of applicable law before the Court without contradicting itself. While the United States suggested in its argument on the merits that, since Iran had also used force, it had approached the Court with unclean hands, the United States did not press the issue and failed to clearly characterize it as one of applicable law that the Court should determine before addressing the merits of the Parties’ respective claims. The Court found an easy way out:

"The Court notes that these issues [regarding Iran’s own use of force] were first raised by the United States in its Counter-Memorial, after the Judgment of the Court of 12 December 1996 on the preliminary objection of the United States to jurisdiction. In that pleading those issues were dealt with at the end, after the United States had set out its arguments on the merits, and not by way of a preliminary objection. In subsequent pleadings and in oral argument it has presented them as having rather a preliminary character, but it has nevertheless not gone so far as to suggest that they are issues of admissibility, appropriate to be enquired into before any examination of the merits. Objections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination on the merits. This is not the case here. The United States does not ask the Court to find Iran’s claim inadmissible; it asks the Court to dismiss that claim. It does not argue that the Court should be debarred from examining the merits of the Iranian claim on the grounds of Iran’s conduct; rather it argues that Iran’s conduct is such that it ‘precludes it from any right to the relief if seeks from this Court,’ or that it ‘should not be permitted to recover on its claim.’ The United States invites the Court to make a finding ‘that the United States’ measures against the platforms were the consequence of Iran’s own unlawful uses of force’ and submits that the ‘appropriate legal consequences should be attached to that finding.’ The Court notes that in order to make that finding it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period – which it has also to do in order to rule on the Iranian claim and the United States counter-claim."

25 The Court simply noted that the United States appeared to attribute to its contention “a certain preliminary character”. *Oil Platforms (Merits)*, para. 27.

It is debatable whether the Court adopted the proper approach to the United States argument. The Court could have concluded that what the United States questioning was not so much the merits of Iran’s claim under the Treaty of Amity, but rather the applicable law. Admittedly the United States’ argument was not particularly clear or forceful and, given its counter-claim, could not have been, but the Court could and arguably should have dealt with the issue of applicable law proprio motu, on the basis of the well-established doctrine of jura novit curia.\(^{27}\) Indeed, the Court itself acknowledged – and invoked – its freedom to “choose the ground upon which it will base its judgment”,\(^{28}\) not for the purpose of determining the applicable law, but for the purpose of identifying what it considered the subject matter of the dispute between the Parties.\(^{29}\)

Had the Court decided to tackle the applicable law issue as a preliminary issue of the merits, it could have concluded that the provisions of the Treaty of Amity, which govern the economic and consular relations between the Parties and thus by definition apply to those relations only at a time of peace, may well have been suspended. If in fact there was, as asserted by the United States, an armed conflict between the Parties during the relevant period, the law applicable to the relations between the Parties was the law of armed conflict and not the law of peace. While the Court did not specifically address this issue, it did conclude, in the end, that the application of the Treaty of Amity was effectively suspended between the Parties. Yet the Court reached this conclusion in a manner that is less than convincing and tends to confuse the distinction between the law of peace and the law of armed conflict.

The Court reached its confusing conclusion when addressing the United States’ argument to the effect that there could not have been any breach of Article X:1 of the Treaty by the United States, since the platforms in question were under repair as a result of an earlier attack by Iraq, and since

\(^{27}\) See e.g. Military and Paramilitary Activities in and against Nicaragua (Merits), supra note 8, p. 24 (“For the purpose of deciding whether the claim is well founded in law, the principle of jura novit curia signifies that the Court is not solely dependent on the argument that the parties before it with respect to the applicable law . . .”) See also The Case of S.S. “Lotus” (France v. Turkey), 1927 P.C.I.J. (ser. A), No. 10, p. 31 (Judgment of 7 September); The Payment of Gold of the Brazilian Federal Loans Issued in France (France v. Brazil), 1929 P.C.I.J. (ser. A) No. 20/21, p. 124 (Judgment of 12 July); The Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), 1932 P.C.I.J. (ser. A/B) No. 46, p. 138 (Judgment of 7 June); Fisheries Jurisdiction (United Kingdom v. Iceland), 1974 I.C.J. 3, p. 9 (Judgment on Merits of 25 July); Nuclear Tests Cases (Australia v. France.; New Zealand v. France), 1974 I.C.J. 2534, pp. 262; 457, 466 (Judgment of 20 December); The Continental Shelf (Tunisia v. Liberia), 1982 I.C.J. 18, p. 38 (Judgment of 24 February).


\(^{29}\) See infra note 58 and accompanying text.
Executive Order 12613 of 29 October 1987 by President Reagan had prohibited, with immediate effect, the import into the United States of most goods (including petroleum products) and services of Iranian origin. The United States argued that, as a result of these events, there was no commerce between the Parties and therefore there could not have been any breach of the Treaty protecting such commerce.\(^{30}\)

Having examined the question of whether there was in the case “an interference with freedom of commerce between the territories of the Parties”, the Court eventually accepted this argument and concluded that the United States’ attacks on the platforms could not be said to have infringed the rights of Iran under Article X:1 of the Treaty, as there was at the time of the attacks no commerce between the territories of Iran and the United States.\(^{31}\)

On the face of it, the conclusion seems unpersuasive. The applicability of a legal principle such as the freedom of commerce should not be, and as a matter of legal theory is not, contingent on facts, i.e., whether or not any commerce is in fact conducted between the parties. As stated by some of the Judges in their Separate and Dissenting Opinions, it is in the very nature of a legal principle such as freedom of commerce that it protects not only the actual conduct of commerce, but also the *freedom* to engage in commerce.\(^{32}\) This freedom may be infringed even when it is not effectively exercised; it is in the very nature of the concept of freedom that it contains both a positive right to engage in commerce and a negative right not to engage.\(^{33}\) Interference with this freedom adversely affects the rights of a party even when there is no


\(^{32}\) *See* Dissenting Opinion of Judge Elaraby, pp. 4–5 (“The conclusion completely disregards the fact that the 1955 Treaty provides for an obligation not to impede freedom of commerce and commercial activities between the territories of the two parties in general. Thus whether a particular platform was or was not producing oil at a certain moment is irrelevant.”); Dissenting Opinion of Judge Al-Khasawneh, p. 1 (“[W]hat 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 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.”) (emphasis in original); Separate Opinion of Judge Simma, para. 25 (“[T]he key issue is not damage to commerce in practice but the violation of the freedom to engage in commerce, whether or not there actually was any commerce going on at the time of the violation.”); Separate Opinion of Judge Rigaux, para. 24 (“La liberté du commerce n’implique pas seulement le choix, librement fait par l’Iran, des lieux de production et de commercialisation de ses richesses pétrolières, elle inclut aussi la maîtrise du développement futur de ce commerce.”)

\(^{33}\) For a conceptual analysis of the concept of freedom (or ‘liberty’) see e.g. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Greenwood Pub. Group, 1964).
commerce, as it deprives that party from the option to engage in commerce. The Court itself in its Judgment on the Preliminary Objections seems to have adopted this view:

"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." ³⁴

The Court’s revised reasoning in its judgment on the merits may be saved only if one takes the view, as suggested above, that what the Court effectively meant, in concluding that there had not been interference with the freedom of commerce, that the Treaty of Amity did not apply between the Parties during the relevant period because its application had been suspended. This view would imply, in turn, that the Treaty of Amity did not apply because there was effectively a low-intensity armed conflict between the Parties; as a result, the relations between the Parties were governed by the law of armed conflict rather than by an instrument belonging to the law of peace, i.e., the Treaty of Amity.

While this would have been the logical conclusion, it remains problematic inasmuch as it contradicts the Court’s finding that, based on the evidence before it, the United States was unable to establish that Iran was engaged in armed action against the United States. One should note, though, that some of the dissenting Judges adopted a different view, and there appears to have been at least some evidence, although in the Court’s view not conclusive, that Iran had also engaged in armed activities – although not in a manner or at a level of intensity that would have justified the types of measures taken by the United States. ³⁵

The end result of the Court’s reasoning is confusing. Both the United States’ defence, which was effectively based on the argument that there was an ongoing armed conflict between the Parties, and Iran’s claim, which was based on the theory that the law of peace embodied in the Treaty of Amity governed the relations between the Parties, were dismissed. In other words, when dismissing the United States’ defence, the Court seemed to assume that

³⁴ Oil Platforms (Preliminary Objections), para. 50 (emphasis in original).
³⁵ Indeed, Judge Kooijmans cites in his Separate Opinion a report by Lloyds Maritime Information Service, which suggests that a total of 544 ships were attacked during the Iran-Iraq war. According to Lloyds, more than 200 of these incidents from March 1984 onwards could be attributed to the Iranian military.
there was no armed conflict between the Parties and the law of peace governed their relations, whereas when dismissing Iran’s claim it appears to have assumed the opposite – that there was in fact a conflict between the Parties and that, as a result, the Treaty of Amity was effectively suspended. The Court’s judgment seems to be based on an internal contradiction – an untenable compromise between two conflicting assumptions as to both the applicable law and the existence of a conflict.

The Court’s judgment on the issue of applicable law remains unsatisfactory and is likely to be reargued in the future when a similar occasion arises. Although modern international legal scholarship does not always make the distinction clearly and indeed has attempted to deny its continuing validity, it is implicit in the large body of discussion on substantive international law that there exists, in effect, two separate regimes of substantive international law – the law of peace and the law of armed conflict.36

The distinction between the law of peace and the law of armed conflict is a matter of legal logic. The prohibition of use of force embodied in Article 2, paragraph 4 of the United Nations Charter – the cornerstone of the law of peace – only applies at a time of peace; it does not apply and does not prohibit use of force during an armed conflict. Conversely, the law of armed conflict, including the various regulations governing the conduct of hostilities and doctrines such as military necessity, clearly do not apply at a time of peace. Thus, establishing whether there was, as a matter of fact, an armed conflict between the Parties at the time is a critical determination for purposes of determining the applicable law.

While the distinction between the law of peace and the law of armed conflict is a matter of logic, the applicability of one or the other is triggered by facts – the absence or presence of use of force. The law of peace applies to the relationships between States in the absence of an armed conflict between them. This regime of the substantive law of peace is premised on the prohibition of the use of force and includes other important rules and principles such as non-intervention and the principle of territorial integrity. Merits of substantive international claims not involving allegations of use of force by both sides can largely be resolved on the basis of these rules and principles.37

36 While the law of war has been renamed as the law of armed conflict and its applicability has been made independent of the declaration of war – the applicability of the law of armed conflict is triggered by the mere fact of force – the two regimes remain logically separate. For further discussion of the structure of the law of force in international law see Veijo Heiskanen, *International Legal Topics* (Finnish Lawyers Publishing Company, 1992), pp. 355–471.
The law of armed conflict is logically separate from the law of peace. It applies to relationships between States when there is an armed conflict between them. In other words, this regime of law applies in circumstances where force, in fact, is being used by both sides to the conflict, without prejudice to the legal question whether or not such use of force by one of the parties to the conflict was initially justified under international law, e.g., by way of self-defence. Normally the applicability — but not necessarily the application — of the law of armed conflict is triggered by the invocation by one of the parties to the conflict of the right of self-defence. Conceptually, this right is a facultative or subjective right in the sense that each State is the sole judge to assess, in the first instance, whether any action is necessary in self-defence. This assessment of necessity takes place in an opaque context, i.e., in a context where the decision as to whether or not to act depends on whether the State in question believes that, based on its assessment, action is necessary.

This does not necessarily mean that the exercise of self-defence is entirely outside judicial control. However, when exercising this control, the Court must keep in mind the context in which the State’s decision is taken. While the Court may conclude that, in its view, it was not necessary for the State to act at the time, this does not necessarily mean that the State acted unreasonably in taking a contrary decision. The State may have had a reasonable basis to believe at the time that it was impossible not to act; consequently, its decision to act

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38 Certain regulations also apply in internal conflicts as well as during military occupation, even if there is no armed resistance; see Articles 2 and 3 common to the four Geneva Conventions of 1949. The term ‘international humanitarian law’ is often used to refer this larger body of law. See e.g. Marco Sassoli and Antoine A. Bouvier, How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law (International Committee of the Red Cross, 1999).

39 ‘Facultative’ in the deontic sense of being neither compulsory nor prohibited. For an early (formal) analysis of the deontic concepts (compulsory/prohibited/permitted/facultative) see e.g. G.H. von Wright, Norm and Action: A Logical Enquiry (Routledge & Kegan Paul, 1963).

40 The context in which the State must decide whether or not to act in self-defence is logically an opaque (or intensional) context in the sense that the State concerned may believe that there is an imminent threat of an armed attack by another State and that it is therefore necessary to act in self-defence, and yet it may be (objectively) not true that the other State in fact intends to attack. Logically, necessity to act in self-defence implies that it is impossible not to act and, by extension, that it is possible to act. These categories are logical and not empirical, i.e., necessity is logically implied but not strictly required in an empirical sense. For a formal logical analysis of the modal concepts of necessary/impossible/possible/contingent and the concept of opaque context see e.g. Willard van Orman Quine, Word and Object (The M.I.T. Press, 1980), pp. 195–221; Ibid., From a Logical Point of View: Logico-Philosophical Essays (2nd ed., Harvard University Press, 1980) pp. 139–159; Saul Kripke, Naming and Necessity (Harvard University Press, 1980).
should be given the benefit of the doubt *in terms of its necessity*. Thus, the only aspect of this assessment of necessity that remains judicially controllable is, precisely, whether the State had a *reasonable* basis for its decision to act. Such a reasonable basis to act exists if there is some evidence, although not necessarily conclusive evidence, that an imminent threat of armed action existed, or that the other party had already engaged in armed action against the State concerned. If the Court goes beyond this assessment, it will simply substitute the State’s subjective assessment of necessity for its own, equally subjective assessment.\(^{41}\)

The Court denied in the present case that any such logical difficulties existed and took the position that it knew better. Overruling the United States’ argument to the effect that a “measure of discretion” was involved in assessing necessity, the Court declared:

“[I]n the present case a question of whether certain action is ‘necessary’ arises both as an element of international law relating to self-defence and on the basis of the actual terms of Article XX, paragraph 1(d), of the 1955 Treaty, already quoted, whereby the Treaty does ‘not preclude . . . measures . . . necessary to protect [the] essential security interests’ of either party. In this latter respect, the United States claims that it considered in good faith that the attacks

\(^{41}\) In *Military and Paramilitary Activities in and against Nicaragua (Merits)*, the Court suggested that the standard of reasonableness applied in the assessment of whether a State’s invocation of the security exception in Article XXI of the FCN Treaty was justified. *Ibid.* para. 224 (“The Court has therefore to assess whether the risk run by these ‘essential security interests’ is reasonable . . . ”).

Judge Buergenthal argued in his Separate Opinion in the present case that the standard of reasonableness was the applicable standard; see *Separate Opinion of Judge Buergenthal*, para. 37 (“The language of Article XX, paragraph 18(d) – ‘measures . . . necessary to protect essential security interests’ – suggests that the parties to the Treaty, without leaving it exclusively to their subjective determination as to whether or not the measures were necessary to protect their respective essential security interests, must nevertheless not be understood to have excluded the right of each party to make that assessment by reference to a standard of reasonableness. That much is implicit in the requirement the Article postulates, if only because the concept of ‘essential security interests must of necessity bear some relation to a State’s own reasonable assessment of its essential security interests, even if ultimately it is for the Court to pass on that assessment . . . [The Court] may not substitute its judgment completely for that of the government which, in assessing whether the disputed measures were necessary, must be given the opportunity to demonstrate that its assessment of the perceived threat to its essential security interests was reasonable under the circumstances.”) *See also Separate Opinion of Judge Kooijmans*, pp. 43–44. (“The evaluation of what essential security interests are and whether they are in jeopardy is first and foremost a political question and can hardly be replaced by a judicial assessment. Only when the political evaluation is patently unreasonable (which might bring us close to an ‘abuse of authority’) is a judicial ban appropriate.”)
on platforms were necessary to protect its essential security interests, and suggests that ‘A measure of discretion should be afforded to a party’s good faith application of measures to protect its essential security interests.’ Iran was prepared to recognize some of the interests referred to by the United States – the safety of United States vessels and crew, and the uninterrupted flow of maritime commerce in the Persian Gulf – as being reasonable security interests of the United States, but denied that the United States’ actions against the platforms could be regarded as ‘necessary’ to protect those interests. The Court does not however have to decide whether the United States’ interpretation of Article XX, paragraph 1(d), on this point is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any ‘measure of discretion.’

Although the Court sought to present its own assessment of necessity as a strictly objective one, it could not escape the opaque context of self-defence. Indeed, the Court failed to specify any standard of proof and literally searched for words in seeking to explain its assessment of evidence, sometimes stating that it would attribute responsibility on the basis of “balance of evidence”, or that there was “no direct evidence”, or that the evidence was “not sufficient”, or that the evidence was “suggestive, but no more” and finally, that the evidence was “highly suggestive, but not conclusive”. It is difficult to disagree with Judge Higgins, who concluded that “the methodology [the Court] uses seems flawed”.

However, although the Court managed to prove the point that a State’s assessment of necessity cannot be reasonably second-guessed, what can be

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42 Oil Platforms (Merits), para. 73 (emphasis added). Having reviewed the evidence produced by the United States, the Court also concluded that, “[i]n the case both of the attack on the Sea Isle City and the mining of the USS Samuel B. Roberts, the Court is not satisfied that the attacks on the platforms were necessary to respond to these attacks”. Ibid., para. 76 (emphasis added).

43 Ibid., para. 57.

44 Ibid., para. 59.

45 Ibid., para. 61.

46 Ibid., para. 59.

47 Ibid., para. 71.

48 Separate Opinion of Judge Higgins, para. 39. See also Separate Opinion of Judge Buergenthal, para. 41 (“One might ask, moreover, where the test of ‘insufficient’ evidence comes from . . . and by reference to what standards the Court applies it? What is meant by ‘insufficient’ evidence? Does the evidence have to be ‘convincing,’ ‘preponderant,’ ‘overwhelming’ or ‘beyond reasonable doubt’ to be sufficient? The Court never spells out what the here relevant standard of proof is.”)
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objectively assessed by a judicial body with reasonable certainty is whether a State’s reaction was proportionate to the perceived threat or actual use of force.\(^{49}\) Unlike the assessment of necessity, this determination can be made objectively by reference to facts, i.e., by reference to the extent and intensity of use of force by the other State. If the action taken by the target State is disproportionate in terms of its extent and intensity, such action must be considered justified by way of self-defence; and in any event, even if the reaction was disproportionate, in legal terms the conclusion must be, assuming there is evidence of use of force by both parties to the conflict, that the law applicable to the relations between the parties must be the law of armed conflict and not the law of peace.

This is arguably the approach that the Court should have adopted in the Oil Platforms. As the United States raised the argument that it had been acting in self-defence, the Court should have concluded that the subject matter of the dispute between the parties was not, in fact, whether Iran’s claim of breach of Article X of the Treaty had any merit, but whether the law of peace – including the Treaty of Amity – constituted the substantive regime of law applicable between the Parties. In effect, this is what the Court apparently sought to suggest by examining the United States’ defence first, before entering into discussion of the merits of Iran’s substantive claim. However, the Court did not state this clearly, and in any event it is evident that the Court did not approach the United States’ defence in terms of the applicable law.

As the Court concluded, based on its assessment of the evidence before it, that Iran had not engaged in use of force to an extent or at a level of intensity that would have justified the measures complained of, the Court never reached the question of the possible applicability of the law of armed conflict. Having found that there was no sufficient or conclusive evidence of use of force by Iran, having dismissed the United States’ defence, and there being no dispute between the Parties that the United States had used force, one would have expected the Court now to conclude that Iran’s claim was meritorious. Yet the Court also dismissed Iran’s claim, on the ground that there was, at the time of the attack of 19 October 1987,

“no commerce between the territories of Iran and the United States in respect of oil produced by th[e] [Reshadat] platforms and the Resalat platforms, inasmuch as the platforms were under repair and inoperative; and that the attacks cannot therefore be said to have infringed the freedom of commerce in oil between the territories of the High Contracting Parties protected by Article X, paragraph 1, of

\(^{49}\) For discussion of the criteria of necessity and proportionality, see e.g., Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. paras. 30, 40–43. (Advisory Opinion of 8 July).
the 1955 Treaty, particularly taking into account the date of entry into force of the embargo effected by Executive Order 12613. The Court notes further that, at the time of the attacks of 18 April 1988 on the Salman and Nasr platforms, all commerce in crude oil between the territories of Iran and the United States had been suspended by that Executive Order, so that those attacks also cannot be said to have infringed the rights of Iran under Article X, paragraph 1, of the Treaty."\(^{50}\)

The Court seemed to reach its conclusions on the basis of facts rather than on the basis of law. In other words, the Court reasoned that the United States could not have breached Article X:1 because there was, as the time of attacks, *as a matter of fact* no trade between the territories of the Parties. It did not decide that the application of the Treaty of Amity had been suspended between the Parties as a result of the trade embargo; indeed, as the trade embargo was imposed only on 29 October 1987, i.e., after the United States attack on the Reshadat platforms on 19 October 1987, it could not have had any effect at the time of this prior attack. As discussed above, the Court’s reasoning remains debatable inasmuch as it seems to endorse the theory that the applicability of a legal principle such as the freedom of commerce is dependent on facts; it is arguable that freedom of commerce can be breached by an act that deprives a Party from the option to engage in commerce even when there is, as a matter of fact, no commerce between the Parties.\(^{51}\)

Yet even accepting the Court’s reasoning on this point, the finding remains problematic to the extent that it appears to contradict the Court’s earlier finding regarding the United States’ defence. The Court’s dismissal of the United States’ defence perforce assumes that the Treaty of Amity was still in force and applicable between the Parties; but as the Court also dismissed Iran’s claim on the basis that the application of the Treaty of Amity was effectively suspended in the sense that there was no commerce between the territories of the Parties, the Court appears to have contradicted itself in most fundamental terms. The Court appears to have taken the view that there is a distinction between the Treaty’s formal applicability and its actual application, and that the dismissal of the United States’ defence was based on the former aspect of the Treaty (i.e., the Treaty was applicable), whereas the dismissal of Iran’s claim was based on the latter aspect (i.e., the Treaty was not applied). This seems legal sophistry and as such hardly convincing.

In dismissing Iran’s claim, the Court appeared to concede that there was, in effect, a low-intensity armed conflict between the Parties, although not

\(^{50}\) *Oil Platforms (Merits)*, para. 98.

\(^{51}\) See supra note 32.
necessarily one justifying the types of measures taken by the United States. Yet the difficulty with this reasoning is not only that it reads a finding of facts into the judgment that the Court never explicitly made. A further difficulty is that, although it would explain the suspension of application of the Treaty of Amity, it would also exclude the Court’s jurisdiction to assess the United States’ compliance with Article XX:1(d) and thus undermine the Court’s decision on this point. In other words, had the Court made the finding that there was a low-intensity armed conflict between the Parties, it would not have been able to assess the merits of the United States’ defence before examining the substance of Iran’s claim.

One must grant that the Court’s task on the merits was exceptionally difficult – and largely because of the way the Parties chose to argue their case. As there was effectively no dispute between the Parties as to the applicable law – both Parties argued their respective claims on the basis of the Treaty of Amity – it would not have been easy for the Court to decide that this issue constituted the subject matter of the dispute between the Parties. But, as discussed above, it would and should not have been impossible.

3.2 *The Function of the Court*

Apart from the issue of applicable law, the Court’s judgment on the merits also raises a fundamental question of the Court’s principal function. Is the Court’s principal function the adjudication of claims brought by States or the settlement of disputes between them? While these two functions may overlap and even coincide, this is not always the case. The merits of the applicant’s claim do not necessarily coincide with the subject matter of the dispute between the Parties, as the respondent may or may not choose to focus in its response on the merits of the applicant’s claim. The respondent may also decide to focus on the Court’s jurisdiction and make a preliminary objection to the Court’s jurisdiction. It may decide not to challenge the Court’s jurisdiction but the justiciability of the dispute. It may also challenge the applicable law, which is what the United States appeared to do in the jurisdictional phase of the present proceedings.

Taking a decision on the principal focus of the respondent’s defence is a key issue of litigation strategy. It requires not only a thorough examination of the strengths and weaknesses of the applicant’s claim, but also of the strengths and weaknesses of the respondent’s own legal position. Once adopted, changing the focus of one’s principal line of defence is not advisable, as it necessarily results in a shift in the subject matter of the dispute and thus tends to weaken not only the respondent’s original position (if still maintained or available), but also the newly adopted position. Yet this is precisely
what the United States did in the present proceedings. Having argued in the
jurisdictional phase of the proceedings that the Treaty of Amity was not
applicable to the dispute between the Parties – and thus implicitly choosing
the applicable law as its principal line of defence – the United States subse-
quently brought a counter-claim on the basis of the very same Treaty of
Amity, the applicability of which it had challenged earlier.

This shift in the United States’ principal line of defence put the Court in a
difficult position. While it had left it open (although admittedly not very
clearly) in its judgment on jurisdiction as to whether the use of force between
the Parties, if proven, could have an impact on the applicability of the Treaty
of Amity to the subject matter of the dispute, the United States’ counter-
claim changed the constellation in the sense that the Court could no longer
decide – or at least it became much more difficult for it to decide – that the
Treaty of Amity was not applicable between the Parties at the relevant time.
The subject matter of the dispute had changed. It was no longer – or at least
it could no longer easily become – the applicable law.

Nonetheless, the Court made an attempt to identify the subject matter of
the dispute – and thus the issue that it needed to settle in order to exercise its
dispute settlement function – by focusing on the United States’ defence
before entering into the merits of Iran’s claim. While this may be a proper
approach in any case where the subject matter of the dispute (as determined
by the principal line of the respondent’s defence) is of a preliminary charac-
ter in relation to the merits of the applicant’s claim in the sense that it relates
to the applicable law rather than the merits of the applicant’s claim under that
law, in the present case such an approach became problematic, precisely
because the United States had dropped the principal line of defence that it
had pursued in the jurisdictional phase of the proceedings, i.e., that the Treaty
of Amity did not apply in the event of the use of force by both Parties – a line
of defence that appeared to possess such a preliminary character.⁵²

Although the United States argued on the merits that Iran had itself used
force and thus had approached the Court with unclean hands, it did not press
this issue as its principal line of defence. The United States did not urge the
Court to decide this issue as a principal substantive issue of the merits; it sug-
gested that this issue could and should be considered by the Court only if the
Court found that Iran’s claim had merit.⁵³ At the same time, as the United States’
armed action against the Iranian oil platforms in 1987 and 1988 was a matter of
public knowledge, the United States could not and did not make denying the
merits of Iran’s claim its principal line of defence; the United States could

⁵² That is to say, ‘preliminary’ in the substantive rather than procedural sense, as the analy-
sis here relates to the merits phase of the proceedings.
⁵³ Oil Platforms (Merits), paras. 27–29.
not and did not argue that it had not engaged in any armed action against the Iranian platforms.\textsuperscript{54}

In these circumstances the sole option left for the United States to invoke as its principal line of defence was the security exception in Article XX.1(d) of the Treaty of Amity. According to this provision, the Treaty does not preclude the application of measures by a Party that are “necessary to protect its essential security interests”. In adopting this line of defence, the United States argued that Article XX.1(d) was “not a limitation on Article X, paragraph 1, nor yet a derogation from it”, but rather “a substantive provision that determines, defines and delimits the obligations of the parties, simultaneously with and on the same level as Article X, paragraph 1”.\textsuperscript{55} The United States contended that “there [was] no compelling reason to examine the question of Article X, paragraph 1, before turning to Article XX, paragraph 1(d)”; accordingly, “the Court can . . . dismiss the Iranian claim either on the ground that the actions of the United States did not involve breach of Article X, paragraph 1, or on the ground that those actions were measures necessary to protect the essential security interests of the United States, and therefore justified under Article XX, paragraph 1”.\textsuperscript{56} In conclusion, the United States suggested that the order in which the issues are to be treated was “a matter for the discretion of the Court”.\textsuperscript{57}

The United States itself having defined Article XX.1(d) as its principal line of defence, and as the United States did not deny the facts underlying Iran’s claim, i.e., that it had used force against the Iranian platforms, the Court now chose to focus on the question of whether the United States had a justification under the Treaty of Amity for its action as the subject matter of the dispute between the Parties. Seeking to distinguish this approach from the one adopted in \textit{Military and Paramilitary Activities in and against Nicaragua}, where the Court first considered the merits of the principal claim and only thereafter the identical justification available in Article XXI of the Nicaragua-US Treaty on Friendship, Commerce and Navigation, the Court explained its chosen approach as follows:

“The Court does not consider that the order in which the Articles of the 1956 Treaty were dealt with in the case concerning \textit{Military and Paramilitary Activities in and against Nicaragua} was dictated by the economy of the Treaty; it was rather an instance of the Court’s ‘freedom

\textsuperscript{54} The United States had in its communication to the Security Council invoked self-defence as a justification for its action. \textit{Ibid.}, paras. 45, 48.

\textsuperscript{55} \textit{Oil Platforms (Merits)}, para. 36.

\textsuperscript{56} \textit{Ibid.}

\textsuperscript{57} \textit{Ibid.}
to select the ground upon which it will base its judgment’ . . . In the present case, it appears to the Court that there are particular considerations militating in favour of an examination of the application of Article XX, paragraph 1(d), before turning to Article X, paragraph 1. It is clear that the original dispute between the Parties related to the legality of the actions against the United States, in light of international law on the use of force. At the time of those actions, neither Party made any mention of the 1955 Treaty. The contention of the United States at the time was that its attacks on the oil platforms were justified as acts of self-defence, in response to what it regarded as armed attacks by Iran, and on that basis it gave notice of its action to the Security Council under Article 51 of the United Nations Charter. Before the Court, it has continued to maintain that it was justified in acting as it did in exercise of the right of self-defence; it contends that, even if the Court were to find that its actions do not fall within the scope of Article XX, paragraph 1(d), those actions were not wrongful since they were necessary and appropriate actions of self-defence.”

The United States having chosen to base its principal defence on Article XX:1(d) of the Treaty, the Court decided to proceed accordingly and define this issue as the subject matter of the dispute between the Parties. By focusing on the United States’ defence rather than on Iran’s claim, the Court thus by implication defined the settlement of the dispute between the Parties (rather than the adjudication of the merits of Iran’s claim) as its principal function. After an examination of the evidence produced by the United States, the Court was unable to conclude that the United States’ action was justified in terms of Article XX:1(d) and the substantive international law of self-defence. In terms of the subject matter of the dispute between the Parties, i.e. whether or not the United States’ actions were justified under Article XX:1(d) or by way of self-defence, the Court ruled in favour of Iran – there was no such justification, based on the evidence before it.

Having disposed of the United States’ defence, the Court proceeded to exercise its adjudication function and considered the merits of Iran’s claim. As discussed above, the Court found that at the relevant time there was no commerce between the territories of Iran and the United States and that Iran’s rights under Article X:1 therefore could not have been adversely affected. Consequently, Iran’s claim was found to be without merit and was dismissed.

While the majority of the Court voted in favour of the judgment’s dispositif, there was a fundamental disagreement within the Court as to the methodology adopted, i.e. whether it was proper for the Court to consider the United States’

58 Ibid., para. 37.
defence before considering the merits of Iran’s claim, or indeed, whether there was any justification at all to consider the merits of the United States defence, given that the Court also dismissed Iran’s claim. The Judges who disagreed with the Court’s approach argued that it was entirely inappropriate for the Court to consider the merits of the United States’ defence. This would have been necessary only if the Court found that Iran’s claim was well-founded. Given that the Court dismissed Iran’s claim, there was no need for the Court to proceed any further.

The approach adopted by the dissenting Judges implies that the Court should have considered Iran’s claim first. It also implies that, in these Judges’ view, the principal function of the Court is the adjudication of claims. The Court’s focus in exercising its functions must be on the applicant’s claim and the relief that the applicant is seeking. In the present case, Iran requested the Court to declare that the United States had breached its obligations to Iran under Article X:1 of the Treaty and that the United States bore responsibility for the consequences of its action, including an obligation to pay reparation in a form and amount to be determined by the Court at a subsequent stage of the proceedings. Iran had not alleged and had not requested the Court to declare that the United States’ action was not justified under Article XX:1(d) of the Treaty; accordingly, the Court arguably could not consider Article XX:1(d) without violating the non ultra petita rule and thus, without exceeding its jurisdiction. Judge Buergenthal made this point quite forcefully in his Separate Opinion:

“The Court’s judgment, as it relates to Article XX, paragraph 1(d), is seriously flawed for a number of reasons. First, it makes a finding with regard to Article XX, paragraph 1(d), of the 1955 Treaty that violates the non ultra petita rule, a cardinal rule governing the Court’s judicial process, which does not allow the Court to deal with a subject in the dispositif of its judgment that the parties to the case have not, in their final submissions, asked it to adjudicate. Second, the Court makes a finding on a subject which it had no jurisdiction to make under the dispute resolution clause – Article XXI, paragraph 2 – of the 1955 Treaty, which was the sole basis of the Court’s jurisdiction in this case, once it found that the United States had not violated Article X, paragraph 1, of the Treaty. Third, even assuming that the Court had the requisite jurisdiction to make the finding regarding Article XX, paragraph 1(d), its interpretation of that Article in light of the international law on the use of force exceeded its jurisdiction.”

59 Ibid., para. 20. The Court had decided in its judgment on jurisdiction that it could not base its jurisdiction on Article I of the Treaty, as initially alleged by Iran.
60 Separate Opinion of Judge Buergenthal, para. 3.
Other Judges expressed similar reservations about the approach adopted by the Court, in particular the decision to include the dismissal of the United States defence in the dispositif of the judgment and as the first question determined by the Court. Judge Higgins reasoned:

“It is hard to see why it is necessary to address Article XX, paragraph 1(d), at all, let alone in the dispositif. In the present case the Court has not reached the first hurdle (violation of treaty rights) that necessitates an examination of whether there is a defence or justification. Had that been the case, then an analysis of the provisions of Article XX, paragraph 1(d), might well have been expected to form part of the Court’s reasoning – but even then not to constitute part of the dispositif. Nonetheless, in the present case the Court devotes large parts of its Judgment and part of its dispositif, to an element that is not asked for in the submissions of the Applicant and whose nature is a defence to a breach – a breach which has not yet been, and is not, determined by the Court.”

For the dissenting Judges, the approach adopted by the Court was inconsistent with the Court’s principal function to adjudicate claims brought by States, as defined in their submissions to the Court. It is these submissions that form the subject matter of the claims before the Court, and it is these

61 Separate Opinion of Judge Higgins, para. 15 (emphasis in original). See also Separate Opinion of Judge Kooijmans, para. 3 (“My main reason of concern . . . upon casting my vote was that the operative part does not immediately respond to the claim as formulated by the Applicant, but starts with a finding not essential to the Court’s decision on that claim, thereby creating the impression that it nevertheless was essential for that purpose. It is . . . unprecedented in the history of both Courts for a claim against a Respondent to be rejected while earlier in the same paragraph the Respondent is found to have acted unlawfully. . . . This novum can be seen as setting a precedent which in my view is a highly hazardous one since it raises questions about the scope of a judgment of the Court, e.g., with regard to its res judicata effect.”) (emphasis in original); Separate Opinion of Judge Owada, para. 3 (“Considering the legal nature of the issues presented before the Court and the way they were presented, I am of the view that the natural and correct order in which the Court should proceed with the claims of the Applicant would have been to deal first of all with the issue of whether the actions of the United States, as alleged by the Applicant, in fact constituted a violation of the obligations of the Respondent under Article X, paragraph 1, of the Treaty at issue – the central issue to be decided at this phase of the proceedings.”); Separate Opinion of Judge Parra-Aranguren, para. 13 (“A suggestion made a posteriori by one of the Parties to a case – even if that Party is the United States – does not justify the modification of a previous decision adopted by the Court, in particular because the United States has strongly denied that its military actions violated Article X, paragraph 1, of the 1955 Treaty, which is the basis for the claim submitted by Iran to the Court. Therefore, in my opinion, the Court should have considered Article XX, paragraph 1(d), as a defence to be examined only in the event of its having previously established that the United States had violated Article X, paragraph 1, of the 1955 Treaty.”)
submissions, and not more, that the Court has jurisdiction to adjudicate. Once the Court has determined that a claim brought by the applicant State has no merit, there is no need to proceed any further and speculate whether the respondent State’s defence might have been justified, had the Court found that the applicant’s claim had merit. The Court’s jurisdiction is limited not only by the compromissory clause; it is also limited by the submissions made by the applicant in the course of the proceedings. The arguments made by the respondent State in the course of the proceedings are not in the nature of creating a *forum prorogatum*, which would allow the Court to extend its jurisdiction to matters not covered by the compromissory clause.62

The judgment’s confusing *dispositif* reflects the contradiction between these two differing views of the nature of the Court’s principal function. In the *dispositif*, the Court dismisses both the United States’ defence and Iran’s claim – a confusing intellectual compromise, whichever of the two views of the Court’s function one adopts. If one adopts the view that the Court’s principal function is the settlement of disputes, the Court’s finding that the United States had no justification under the Treaty for its actions essentially resolves Iran’s claim in its favour; however, this conclusion is contradicted by the Court’s concomitant finding that Iran’s claim under Article X of the Treaty had no merit. If one adopts the view that the Court’s principal function is the adjudication of claims, then the Court’s dismissal of Iran’s claim essentially settles the case in favour of the United States; however, in reaching this conclusion only after having found that the United States had no justification for its action under Article XX:1(d) of the Treaty – a finding Iran had not requested the Court to make – the Court appears to have violated the *non ultra petita* rule and thus exceeded its jurisdiction. Even more confusingly, since the Court also found that Iran’s claim of breach of Article X had no merit, there possibly was no need nor justification for the Court to consider the United States defence (quite literally) in the first place.

4. Conclusion

While the conceptual weaknesses of the Court’s judgment are largely a reflection of how the Parties chose to argue their case, they also reveal a fundamental substantive disagreement within the Court. Indeed, it is arguable that there are presently two schools of thought within the Court – those that see as the Court’s principal function the adjudication of claims brought by States, and those that take the view that the Court’s principal function is the settlement of disputes between States. This disagreement is only partly

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62 This point was made by Judge Buergenthal in his Separate Opinion, at para. 18.
masked by the Court's overwhelming 14-2 vote in favor of the dispositif; it becomes clear when reading the numerous separate (and the two dissenting) opinions appended to the judgment.

The separate and dissenting opinions reflect an underlying substantive dis-sensus that is not easily reconcilable. If one adopts the claims adjudication approach, the Court's judgment indeed appears to constitute a deviation from the non ultra petita rule, as forcefully argued by Judges Higgins and Buergenthal in their Separate Opinions. Iran never requested the Court to find that the United States' invocation of Article XX of the Treaty was not justified; yet this finding was the first finding made by the Court in the dispositif. From the claims adjudication point of view, dismissing the respondent's defence without first having determined whether the applicant's claim has any merit seems indeed inappropriate, if not designed to embarrass the respondent by depriving it of the possibility of reserving its justification.

However, if one takes the view that the principal function of the Court is the settlement of disputes between States, then, as a matter of judicial policy, the approach adopted by the Court does appear to be legitimate. The United States itself suggested during the proceedings that it was not necessary for the Court to rule on the merits of Iran's claim first, before proceeding to examine the United States' defence. In making this argument, the United States may have sought to avoid a finding in principle against it, in case the Court felt that Iran's claim had any merit. Be it as it may, by ruling on the merits of the United States' defence first, the Court sought to address what it understood to form the subject matter of the dispute between the Parties, i.e. whether the use of force by the United States was justified under the Treaty of Amity and international law. As there was no dispute between the Parties as to the fact of force, it is hard to disagree with the Court that the issue of justification indeed formed the very subject matter of the dispute between them. By ruling on this issue first, the Court sought to ensure that its judgment was effective in the sense that it addressed the core issue between the Parties. Had the Court simply dismissed Iran's claim on the basis that there could not have been any breach of Article X, paragraph 1 of the Treaty since there was no commerce between the territories of the Parties at the time, the Court's judgment might have been formally correct, but would have failed to address the principal substantive issue in the case.63

63 This point – which he described as the "piercing the veil" of the dispute – was emphasized by Vice President Ranjeva in his Declaration, para. 3 ("Dans la présente affaire, la Cour ne s'est pas laissée bloquer par les obstacles formalistes et formels. Les termes du problème ont été, en effet, contaminés par des questions considérées périphériques sur lesquelles les Parties se sont étendues plus que de raison. Il en est résulté le caractère artificiel de l'objet du différend,
The dispositif of the judgment is essentially a compromise between these two schools of thought – the ‘jurists’, who tend to define the Court’s function in terms of adjudication of claims, and the ‘diplomats’, who tend to understand it in terms of dispute settlement. For the jurists, the judgment is less than off the mark because it fails to focus on the merits of Iran’s claim and thus compromises the non ultra petita rule. For the diplomats, the judgment represents a clear victory in terms of its principal focus; however, as the Court also dismissed Iran’s claim, the suggestion that the subject matter of the dispute was thereby settled rings somewhat hollow. If the principal positions of both Parties are dismissed, can one legitimately argue that the subject matter of the dispute between them is addressed, let alone effectively settled? Is it not a Solomon’s judgment?

While disagreement on substantive issues based on differing legal philosophies is not unusual in international or domestic adjudication and on the contrary is something to be expected, the fundamental difference of opinion revealed by Oil Platforms is less a reflection of political-philosophical differences among the Members of the Court on fundamental principles of justice and equity than a reflection of a differing understanding among them as to the very function of the Court. The controversy between the Court’s jurists and its diplomats that emerged in Oil Platforms seems to reflect, to a large extent, differences in legal training and educational background. Those hailing from the common law tradition seem more inclined to define the Court’s function in terms of adjudication, whereas those with civil law and other

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des demandes présentées par les Parties et de la stratégie sinon les artifices de l’argumentation. Face à ses actes des divertissements, la Cour a percé le voile du différend en se référant directement aux actes, comportements et déclarations contemporains aux faits générateurs du litige. Elle a été amenée à traiter de manière préalable de la licéité du recours à la force au regard des dispositions de l’article XX, paragraphe 1, alinéa d), du traité de 1955 . . . Le perçement du voile du clair du différend est une condition nécessaire, au moins une contribution utile, pour un règlement des différends internationaux sur les meilleures bases.” (emphasis added)

Whether or not the United States had justification for its action was identified as the subject matter of the dispute also by those who disagreed with the Court’s approach. See e.g., Separate Opinion of Judge Higgins, para. 19 (“The Court was in 1996 well aware that there was a general dispute between the Parties in which each claimed unlawful uses of force by the other. Certainly Iran has been interested in seeking a basis of jurisdiction that could allow it to proceed with substantive claims relating to the United States’ use of force. The emphasis put by Iran, in the preliminary objections, on Article I of the Treaty was but one element of many evidencing that its real and only interest lay in the use of force. Iran has not provided hard economic and commercial data during the merits phase in order to substantiate a violation of its freedom of commerce and navigation, further indicating what matters have been of real importance to it.”)

Judges Higgins and Buergenthal were notably among the ‘jurists’ who disagreed with the inclusion in the dispositif of a determination of the United States defence.
similar more policy-oriented backgrounds tend to define it in terms of dispute settlement.65

For those involved in litigation before the Court, the tension between the Court’s jurists and diplomats is bound to become a matter of great importance in the development of their litigation – or dispute settlement – strategy. Whether or not the merits of the claim and the subject matter of the dispute coincide in any particular case is largely a result of how the Parties choose to argue their case. To the extent that these two substantive aspects of the case do not coincide – in other words, to the extent that the respondent chooses to focus in its defence on an issue other than the merits of the applicant’s claim – the philosophical division within the Court is bound to emerge. Oil Platforms may turn out to be the turning point in international litigation in unmasking a philosophical division within the Court that has previously been hidden by the jurisdictional nature of many of the disputes brought before it.

65 See e.g., Separate Opinion of Judge Simma, who explicitly stated that “[f]rom the viewpoint of legal policy and political relevance . . . there can be no doubt that that in the present case the emphasis is squarely on the question of legality vel non of the use of armed force by the United States against the oil platforms. I therefore accept the Judgment’s approach of dealing with Article XX, paragraph 1(d), of the Treaty before turning to Article X, paragraph 1, not only for the more technical reasons advanced in the Judgment – all of which I consider convincing –, but also out of this broader consideration.” Ibid., p. 2.