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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Tuesday 25 February 2003, at 10 a.m., at the Peace Palace,

President Shi presiding,

***in the case concerning* Oil Platforms**
(Islamic Republic of Iran *v.* United States of America)

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le mardi 25 février 2003, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

***en l'affaire des* Plates-formes pétrolières**
(République islamique d'Iran c. Etats-Unis d'Amérique)

COMPTE RENDU

Present:	President	Shi
	Vice-President	Ranjeva
	Judges	Guillaume
		Koroma
		Vereshchetin
		Higgins
		Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Simma
		Tomka
	Judge *ad hoc*	Rigaux
	Registrar	Couvreur

Présents :	M.	Shi, président
	M.	Ranjeva, vice-président
	MM.	Guillaume
		Koroma
		Vereshchetin
	Mme	Higgins
	MM.	Parra-Aranguren
		Kooijmans
		Rezek
		Al-Khasawneh
		Buergenthal
		Elaraby
		Owada
		Simma
		Tomka, juges
	M.	Rigaux, juge *ad hoc*
	M.	Couvreur, greffier

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Mr. S. M. Zeinoddin, Head of Legal Affairs, National Iranian Oil Company,

Mr. Michael Bothe, Professor of Public Law, Johann Wolfgang Goethe University of Frankfurt-am-Main, Head of Research Unit, Peace Research Institute, Frankfurt,

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Ms Nanette Pilkington, avocat à la cour d'appel de Paris, Frere Cholmeley/Eversheds, Paris,

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Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

Mr. Michael J. Mattler, Attorney-Adviser, United States Department of State,

Mr. Sean Murphy, Professor, George Washington University School of Law,

Mr. Ronald D. Neubauer, Associate Deputy General Counsel, United States Department of Defence,

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as Administrative Staff.

Mme Aileen Robinson, département d'Etat des Etats-Unis,

Mme Laura Romains, ambassade des Etats-Unis à La Haye,

comme personnel administratif.

The PRESIDENT: Please be seated. The sitting is now open, and I first call on Mr. Bettauer.

Mr. BETTAUER:

12. INTRODUCTION TO LEGAL PRESENTATION

12.1. Thank you, Mr. President. Mr. President, Members of the Court, up to this point in the presentation of the United States you have heard about the relevant facts of the case.

12.2. Now we have arrived at the point at which we shall take up our legal analysis of both Iran's claim against the United States and, equally important, of the United States counter-claim against Iran.

12.3. We shall proceed in the following order. First, Professor Prosper Weil will address the legal context of this proceeding, taking into account the Court's Judgment in the preliminary objections phase of this case. He will set the stage for the discussion that will follow.

12.4. Following Professor Weil this morning, Mr. Mathias will show that Iran's claim should be denied by the Court as a consequence of Iran's own conduct with respect to the subject-matter of this case. His argument will have three main themes. First, he will demonstrate that because Iran breached its reciprocal obligation under the 1955 Treaty with respect to United States freedom of commerce and navigation, Iran cannot prevail on its claim with respect to United States action. Second, he will show that Iran cannot prevail because the United States measures were a consequence of Iran's own unlawful conduct. Finally, he will show that any damage suffered by Iran arises out of its own unlawful conduct more generally — for example, its unlawful mining and missile attacks.

12.5. Professor Murphy will then begin the United States discussion of Article X, paragraph 1, of the Treaty. He will show that United States measures against the platforms did not violate Article X, for two reasons. First, the platforms were not, in fact, engaged in activities involving "freedom of commerce" within the meaning of the Treaty. Second, there was no commerce "between the territories of the two High Contracting Parties" was, in fact, affected by the United States measures.

12.6. Following Professor Murphy, I will return to the podium and show that there was no violation of Article X for two additional reasons. I will demonstrate that, even if there were remote, incidental effects that might have been caused by the United States measures, any such effects on Iranian commerce would not be a sufficient basis for a finding of breach of the Treaty. I will then argue that Iran's use of the platforms in support of offensive military activity precludes a finding that United States measures against them breached the "freedom of commerce" provision in Article X, paragraph 1.

12.7. Tomorrow morning, we shall turn to Article XX of the Treaty. Professor Weil will present a comprehensive analysis of the meaning of Article XX.

12.8. Professor Matheson will then show that, under Article XX, the measures taken by the United States are fully consistent with the terms of the Treaty and, accordingly, that they did not violate the Treaty even if they might otherwise have violated Article X, which they did not. Professor Matheson will also show that the United States measures were appropriate exercises of the right to act in self-defence, although the Court need not reach that issue in this case. Professor Matheson will then end the morning session.

12.9. Tomorrow afternoon, we will turn to the counter-claim. Professor Murphy will introduce the counter-claim with a discussion of jurisdiction and admissibility issues in light of the arguments made by Iran in its final pleading.

12.10. Following Professor Murphy, Mr. Mattler will briefly review the facts of particular relevance to the counter-claim, including the nature of the damages suffered by United States shipping interests as a result of Iran's attacks on United States and other neutral shipping.

12.11. Professor Murphy will then demonstrate in some detail how Iran's actions violated Article X, paragraph 1.

12.12. Following that presentation by Professor Murphy, Mr. Taft will conclude the United States first round presentation.

12.13. There is only one additional point that I wish to make before I ask you to call upon Professor Weil. It is a general point that applies across the board to Iran's claim. Iran, as claimant, has the burden of establishing all the facts necessary to support its claim. As this Court said in its Judgment in the jurisdiction and admissibility phase of the *Nicaragua* case, "it is the litigant

seeking to establish a fact who bears the burden of proving it" (case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). Just four months ago, in its Judgment in the *Cameroon* v. *Nigeria* case, the Court relied on this point, citing it favourably, and made clear that "in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved" (case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment*, para. 321, quoting case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). Thus, it is for Iran — and for Iran alone — to prove that the United States violated the 1955 Treaty, by undertaking measures in contravention of Article X, paragraph 1.

12.14. Mr. President, that concludes my introduction. I ask that you call upon Professor Weil.

The PRESIDENT: Thank you, Mr. Bettauer. I now give the floor to Professor Weil.

M. WEIL :

13. LA COMPETENCE DE LA COUR A LA LUMIERE DE L'ARRET DE 1996 SUR L'EXCEPTION PRELIMINAIRE : L'ARTICLE X, ALINEA 1, DU TRAITE DE 1955

13.1. Monsieur le président, Madame et Messieurs les juges, dans son arrêt du 12 décembre 1996 sur l'exception préliminaire (*C.I.J. Recueil 1996*, p. 803), la Cour a pris deux décisions qui définissent avec autorité de *res judicata* le cadre dans lequel elle se propose de se prononcer sur la requête de l'Iran au présent stade du fond :

— En premier lieu, la Cour a défini l'étendue et les limites de la compétence que lui confère l'article XXI, paragraphe 2, du traité d'amitié entre les Etats-Unis et l'Iran de 1955 pour statuer sur «[t]out différend qui pourrait s'élever entre les Hautes Parties contractantes quant à l'interprétation ou à l'application du présent traité». La Cour est compétente, a-t-elle décidé, «pour connaître des demandes formulées par la République islamique d'Iran au titre du

paragraphe 1 de l'article X dudit traité», aux termes duquel «Il y aura liberté de commerce et de navigation entre les territoires des deux Hautes Parties contractantes.»

— En second lieu, la Cour a décidé que dans le cadre de sa compétence ainsi définie il lui appartiendrait de se prononcer sur la «défense au fond» qu'elle autorise les Etats-Unis à «faire valoir le moment venu» — «défense au fond», «faire valoir le moment venu» sont les termes employés par la Cour — sur le fondement du paragraphe 1 *d)* de l'article XX de ce même traité de 1955, aux termes duquel «Le présent traité ne fera pas obstacle à l'application de mesures … nécessaires … à la protection des intérêts vitaux [des Hautes Parties contractantes] sur le plan de la sécurité.» J'observe immédiatement que cette traduction française, utilisée par la Cour, de la version anglaise authentique du traité de 1955 n'est pas d'une rigoureuse exactitude. Le texte anglais qui fait foi se lit de la manière suivante : «*The present Treaty shall not preclude the application of measures … necessary to protect its [a High Contracting Party's] essential security interests.*» *Essential security interests*, intérêts «essentiels», n'est de toute évidence pas synonyme d'intérêts «vitaux» : des intérêts «vitaux» sont des intérêts qui soulèvent un problème de vie ou de mort, de *to be or not to be;* des intérêts «essentiels» sont des intérêts d'une particulière importance mais qui ne soulèvent pas nécessairement un problème de vie ou de mort, d'être ou de ne pas être. Dans la version en langue persane, également authentique, du traité de 1955, m'a t-on dit, le mot utilisé *assasi* correspond au mot anglais *essential* alors que «vitaux» se serait dit *hiati*. Il est intéressant de noter à cet égard que la convention d'établissement entre les Etats-Unis et la France de 1959, dont les textes anglais et français font également foi, tout deux parlent en anglais de *essential security interests*, et en français d'«intérêts essentiels en matière de sécurité». Sur la base de ce précédent et par référence à l'article 33 de la Convention de Vienne sur le droit des traités, je me permettrai, Monsieur le président, d'utiliser dans mon intervention l'expression d'intérêts «essentiels» de préférence à celle, manifestement moins exacte, d'intérêts «vitaux».

13.2. Monsieur le président, la mission que la Cour s'est assignée sur la base de la clause de compétence de l'article XXI du traité de 1955 est ainsi axée autour de deux pôles : d'une part, le paragraphe 1 de l'article X du traité (que j'appellerai simplement, pour plus de commodité, «l'article X»), qui énonce le principe de la liberté de commerce et de la liberté de navigation, et,

d'autre part, le paragraphe 1 *d)* de l'article XX (que j'appellerai simplement, pour plus de commodité, «l'article XX») qui décide que le traité ne fera pas obstacle aux mesures nécessaires à la protection des intérêts essentiels de l'une des parties en matière de sécurité.

13.3. Le Gouvernement des Etats-Unis m'a fait l'honneur de me confier l'exposé des aspects juridiques de sa position sur ces deux problèmes. Je tiens à lui exprimer ma gratitude pour la confiance qu'il m'a témoignée et à lui dire, ainsi qu'à la Cour, que je mesure pleinement le poids de la responsabilité qui m'est ainsi dévolue.

13.4. Comme M. Bettauer l'a indiqué tout à l'heure, mon intervention se déroulera en deux temps.

— Je me propose ce matin de définir les contours de la compétence que la Cour s'est reconnue au regard de l'article X du traité de 1955 qui pose le principe de la liberté de commerce et de navigation entre les territoires des Etats-Unis et de l'Iran. C'est au regard de cette seule disposition, je le rappelle, que la Cour s'est reconnue compétente dans son arrêt de 1996 pour se prononcer sur les actes reprochés aux Etats-Unis.

— Il m'appartiendra demain de m'attacher à la «défense au fond», ouverte aux Etats-Unis par l'article XX du traité, c'est-à-dire aux mesures auxquelles, selon les termes de cette disposition, «le traité ne fera pas obstacle» *(shall not preclude)*, c'est-à-dire aux mesures nécessaires à la protection des intérêts essentiels de sécurité de la partie qui les a prises. A la suite de quoi, M. Matheson montrera que les mesures reprochées aux Etats-Unis tombent sous le coup de cette disposition, qu'en conséquence l'article X ne leur faisait pas obstacle et qu'elles étaient donc licites.

Il sera ainsi établi tout à la fois, *négativement* que les actions reprochées aux Etats-Unis n'ont pas contrevenu au principe de la liberté de commerce et de navigation posé par l'article X du traité de 1955, et, *positivement* que ces actions sont légitimées par l'article XX de ce même traité.

13.5. Monsieur le président, nous nous sommes interrogés sur l'ordre dans lequel il convenait d'aborder les deux éléments de cette problématique. Fallait-il commencer par établir que les actions américaines n'ont pas porté atteinte à la liberté de commerce et de navigation de l'article X et établir ensuite, dans un second temps, que même s'il en avait été autrement ces mesures auraient été légitimées par l'article XX parce qu'elles étaient nécessaires à la protection

des intérêts essentiels des Etats-Unis sur le plan de la sécurité ? Ou bien fallait-il commencer par nous demander si les mesures américaines étaient nécessaires à la protection des intérêts essentiels des Etats-Unis en matière de sécurité, auquel cas ces mesures étaient licites sans même qu'il eût été besoin de se demander si elles avaient respecté la liberté de commerce et de navigation ?

13.6. Pour résoudre ce problème nous nous sommes tournés vers le précédent de l'affaire *Nicaragua* de 1986, qui mettait en cause une disposition du traité d'amitié entre les Etats-Unis et le Nicaragua identique à celle de notre article XX.

13.7. Dans cet arrêt la Cour a déclaré que pour conclure qu'une disposition du traité avait été violée, il lui fallait «s'être *d'abord* assurée» *(first satisfied)* — je souligne le mot *d'abord (first)* — que le comportement incriminé n'avait pas été nécessaire à la protection des intérêts essentiels de sécurité des Etats-Unis (*C.I.J. Recueil 1986*, p. 136, par. 272); les Etats-Unis, a précisé la Cour, n'avaient violé le traité d'amitié avec le Nicaragua que «pour autant que *[subject to the question whether]* les exceptions … concernant … les «mesures nécessaires … à la protection des intérêts vitaux» d'une partie … ne puissent être invoquées pour justifier les actes incriminés» (*op. cit.*, p. 140-141, par. 280). La Cour semblait ainsi laisser entendre que priorité devait être donnée à la question de savoir si les mesures américaines étaient «justifiées» *(justified)* — c'est le mot qu'elle a employé — par la nécessité de protéger les intérêts essentiels de sécurité des Etats-Unis, et que c'est seulement dans l'hypothèse où cette question aurait appelé une réponse négative qu'elle aurait eu à se demander si ces mesures avaient contrevenu aux autres obligations pesant sur les Etats-Unis en vertu du traité de 1955.

13.8. Il suffit cependant d'un coup d'œil sur l'arrêt de 1986 pour constater qu'en fait la Cour a procédé en sens inverse : elle a commencé par rechercher si les Etats-Unis avaient violé les obligations qui leur incombaient, et elle a ajouté que c'est seulement — je cite ses propres termes — «[d]ans la mesure où les actes du défendeur peuvent paraître constituer des violations des règles de droit pertinentes [qu'elle] … devra déterminer s'il existe des circonstances qui excluraient l'illicéité…» (*C.I.J. Recueil 1986*, p. 117-118, par. 226).

13.9. Monsieur le président, c'est pour nous conformer à la méthode ainsi suivie par la Cour dans *Nicaragua* que nous commencerons par montrer que les Etats-Unis n'ont pas porté atteinte à la liberté de commerce et de navigation édictée par l'article X; et c'est dans un second temps que

nous établirons que les mesures reprochées aux Etats-Unis étaient «justifiées» par la disposition de l'article XX. Si la Cour conclut que les actions américaines n'ont pas violé le principe de la liberté de commerce et de navigation de l'article X, elle n'a plus besoin de se demander si ces actions étaient légitimées par la protection des intérêts essentiels de sécurité de l'article XX. A l'inverse, si la Cour conclut que les actions américaines étaient «justifiées» par la protection des intérêts essentiels de sécurité de l'article XX, elle n'a plus besoin de se demander si ces actions contrevenaient au principe de la liberté de commerce et de navigation de l'article X. Que ce soit sur la première de ces bases ou sur la seconde, le résultat est le même, à savoir que les Etats-Unis n'ont pas violé le traité de 1955 et que leur responsabilité internationale n'est pas engagée envers l'Iran. L'ordre dans lequel la Cour décidera dans notre affaire d'aborder ces deux aspects de la question qui lui est soumise — et par conséquent la base juridique qu'elle retiendra pour rejeter, comme nous l'espérons, la demande de l'Iran — relève de son entière discrétion.

13.10. Monsieur le président, Madame et Messieurs les juges, j'aborde donc immédiatement la question de la licéité des actions américaines au regard du traité de 1955. Du dispositif de l'arrêt rendu par la Cour en 1996 sur sa compétence dans notre affaire, tel qu'il est éclairé par les motifs, il ressort que la mission de la Cour au présent stade du fond est encadrée par deux principes, l'un et l'autre posés par l'arrêt de 1996.

13.11. *Premier principe posé par l'arrêt de 1996 : La Cour n'est compétente pour examiner la compatibilité des actions reprochées aux Etats-Unis avec le traité de 1955 qu'au regard d'une seule disposition de ce traité : celle de l'article X relative à la liberté de commerce et de navigation.* Parmi les «trois dispositions bien déterminées» du traité à la violation desquelles l'Iran avait, dans le dernier état de la procédure sur l'exception préliminaire, «rigoureusement» et «exclusivement» limité sa demande — ce sont les termes utilisés par l'Iran et cités par la Cour (*op. cit.*, p. 809, par. 13) —, la Cour a en effet décidé qu'une seule est de nature à fonder sa compétence : celle de l'article X relative à la liberté de commerce et de navigation. Le dispositif de l'arrêt de 1996 (*op. cit.*, p. 821, par. 55) ne laisse aucun doute à ce sujet. C'est donc au regard de cette seule disposition que la Cour est appelée au présent stade de la procédure à examiner la licéité des actions dont l'Iran fait grief aux Etats-Unis. MM. Murphy et Bettauer montreront tout à l'heure que les actions des Etats-Unis n'ont pas violé cette disposition.

13.12. *Deuxième principe posé par l'arrêt de 1996 : La Cour n'a pas compétence pour se prononcer sur la compatibilité des actions reprochées aux Etats-Unis avec des règles du droit international extérieures au traité de 1955, telles les règles du droit international général ou coutumier relatives à l'interdiction du recours à la force sauf cas de légitime défense qui ont trouvé expression dans la Charte des Nations Unies.* Le traité de 1955 a conféré compétence à la Cour pour veiller au respect — et donc pour sanctionner la violation éventuelle — «d'un droit qu'une partie tient du traité» (ce sont les mots exacts de la Cour : *C.I.J. Recueil 1996 (II)*, p. 811, par. 21), en l'occurrence des droits que les parties tiennent de la disposition de l'article X qui garantit la liberté de commerce et de navigation. Les Etats-Unis ont-ils violé l'article X par quelque moyen que ce soit, par la force ou autrement ? Voilà la question à laquelle la Cour est appelée à répondre au présent stade du fond, comme elle l'a déclaré dans son arrêt sur l'exception préliminaire (*C.I.J. Recueil 1996 (II)*, p. 811-812, par. 21). La Cour n'est pas appelée à se prononcer sur la licéité des moyens employés au regard du droit international général ou de la Charte. En bref, *violation de la liberté de commerce et de navigation de l'article X ou pas violation : là est la question. Violation par la force ou violation par quelque autre moyen, là n'est pas la question.*

13.13. Il ressort d'ailleurs du paragraphe 13 de l'arrêt de 1996 sur l'exception préliminaire qu'au cours des audiences l'Iran s'était déclaré d'accord avec cette interprétation de la clause de compétence du traité de 1955 : «[q]uant au droit international général», observait la Cour, «il n'est pas invoqué par l'Iran en tant que tel…» (*C.I.J. Recueil 1996 (II)*, p. 809, par. 13).

13.14. Il est de principe, Monsieur le président, comme la Cour l'a énoncé avec fermeté, qu'«établir ou ne pas établir sa compétence n'est pas une question qui relève des parties; elle est du ressort de la Cour elle-même» (*Compétence en matière de pêcheries, C.I.J. Recueil 1996*, p. 450, par. 37). Dans la présente affaire, il y a conjonction parfaite entre les vues des deux Parties, telles qu'elles se sont dégagées au cours de la procédure sur l'exception préliminaire, et les décisions de la Cour, telles qu'elles ressortent de l'arrêt de 1996 sur cette exception : *la compétence de la Cour, la mission de la Cour au présent stade du fond porte, et porte exclusivement, sur la licéité des actions américaines au regard de l'article X du traité de 1955; cette compétence ne s'étend pas à la licéité des actions américaines au regard d'autres règles du droit international, et notamment de celles du droit international général ou de la Charte.*

Licéité des actes d'un Etat et compétence de la Cour

13.15. Monsieur le président, il me faut à ce sujet formuler immédiatement un *caveat* de toute première importance. Comme la Cour l'a déclaré dans l'affaire de la *Compétence en matière de pêcheries* qui opposait l'Espagne au Canada, «Il existe une distinction fondamentale entre l'acceptation par un Etat de la juridiction de la Cour et la compatibilité de certains actes avec le droit international.» (*C.I.J. Recueil 1998*, p. 456, par. 55.) Il ne faut pas, a déclaré la Cour, «confondre licéité des actes et consentement à la juridiction» (*op. cit.*, p. 465, par. 79). Ce principe, la Cour l'a confirmé récemment dans son arrêt relatif à l'*Incident aérien du 10 août 1999* qui opposait le Pakistan à l'Inde (par. 51). *L'existence d'un droit ou d'une obligation est une chose; la compétence de la Cour pour en vérifier le respect et en assurer la sanction en est une autre.*

13.16. Cette distinction entre l'existence d'une règle juridique, d'un droit ou d'une obligation, d'une part, et sa justiciabilité — c'est-à-dire la compétence de la Cour pour en assurer le respect et en sanctionner la violation —, d'autre part, a été soulignée par la Commission du droit international dans le commentaire de son projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite. Comme la Cour le sait, la Commission a adopté ce projet en août 2001 et l'a communiqué à l'Assemblée générale (doc. A/56/10). Le professeur Crawford vient de consacrer à ce projet, dans l'élaboration duquel il a joué un rôle décisif en sa qualité de rapporteur spécial de la Commission, un livre sous le titre *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, 2002). Or, comme je viens de le noter, le projet de la Commission prend soin de distinguer entre les règles de fond gouvernant la responsabilité, d'une part, et la compétence de la Cour, de l'autre. Les articles proposés, écrit la Commission, «ne traitent pas des questions de compétence des cours et tribunaux» (introduction au commentaire du chapitre V, par. 8; version française, p. 183; cf. Crawford, *op. cit.*, p. 162). Certes, ajoute-t-elle, «les Etats parties au Statut peuvent déclarer reconnaître comme obligatoire la juridiction de la Cour…» (introduction au commentaire de la deuxième partie, par. 2; version française, p. 228; cf. Crawford, *op. cit.*, p. 191), mais ils peuvent ne pas le faire, et s'ils ne le font pas la Cour n'a pas compétence pour connaître d'un différend à ce sujet.

13.17. Monsieur le président, dans notre affaire les Parties ne l'ont pas fait. Elles n'ont pas étendu la compétence de la Cour à tous les différends pouvant surgir entre elles. Elles ont, tout au contraire, expressément limité la compétence de la Cour aux seuls différends portant sur l'application ou l'interprétation «du présent traité». La seule et unique base de compétence de la Cour, le seul et unique titre de juridiction de la Cour dans notre affaire, c'est le paragraphe 2 de l'article XXI du traité du 15 août 1955, par lequel l'Iran et les Etats-Unis attribuent compétence à la Cour pour connaître de «[t]out différend qui pourrait s'élever entre les Hautes Parties contractantes quant à l'interprétation ou à l'application du présent traité…». «[Q]uant à l'interprétation ou à l'application *du présent traité*» — et non pas quant à l'interprétation ou à l'application d'un autre traité, ou d'une règle coutumière, ou d'une règle générale de droit international, ou d'une disposition de la Charte des Nations Unies. Cette limitation est d'autant plus frappante que, comme la Cour elle-même en a fait l'observation, elle ne figure pas dans certains autres traités d'amitié qui eux se réfèrent expressément à des sources autres que le traité, par exemple à la Charte; rien de tel dans le traité irano-américain (*C.I.J. Recueil 1996 (II)*, p. 813, par. 27).

La clause juridictionnelle du traité de 1955 n'équivaut pas à une clause conférant compétence à la Cour sur tous les différends survenant entre les parties

13.18. Peut-être objectera-t-on que le traité de 1955 ne constitue pas un monde clos, fermé sur lui-même, et qu'il faut le lire à la lumière du droit international général ou comme incorporant certaines règles du droit international général, notamment celles qui ont trouvé expression dans la Charte ou dans d'autres instruments telle la déclaration de l'Assemblée générale des Nations Unies sur les relations amicales entre Etats. En conséquence, dira-t-on peut-être, la clause juridictionnelle du traité de 1955 ne saurait être lue comme excluant de la compétence de la Cour les différends relatifs à l'application des règles générales ou coutumières qui régissent le recours à la force et la légitime défense.

13.19. Monsieur le président, admettre une telle thèse, quelque séduisante qu'elle puisse apparaître, reviendrait à priver de toute portée le principe de la juridiction consensuelle si souvent affirmé et réaffirmé par la Cour. En insérant dans un traité une clause prévoyant la compétence de la Cour pour les différends relatifs à l'interprétation ou à l'application «du présent traité», les parties acceptent la compétence de la Cour pour les litiges qui se rapportent spécifiquement à

l'interprétation ou à l'application de *ce traité*; elles n'acceptent pas, par-là même, la compétence de la Cour pour tous les différends relatifs à l'interprétation ou à l'application des règles de caractère coutumier ou relevant du droit international général sous le prétexte que ces règles seraient à regarder comme incorporées à leur traité. En décider autrement reviendrait à dénier toute spécificité aux clauses juridictionnelles insérées dans les dispositions finales d'innombrables traités portant sur des aspects limités et bien définis des relations entre les parties (des traités de caractère technique, par exemple, ou des traités de commerce, ou des traités d'investissement). Lorsqu'un gouvernement souhaite accepter la compétence de la Cour pour tous les différends, ou pour certaines catégories de différends, c'est à une déclaration facultative de la juridiction obligatoire de l'article 36, paragraphe 2, du Statut de la Cour qu'il recourt. Ce n'est pas une compétence aussi large qu'un gouvernement accepte lorsqu'il conclut un traité dont l'une des clauses prévoit que sera soumis à la Cour tout différend portant sur l'interprétation ou l'application *du présent traité*. Aucun gouvernement au monde n'accepterait plus d'inclure dans un traité une clause juridictionnelle de ce genre s'il devait craindre que par cette porte étroite ne s'engouffre la soumission à la Cour de tous les litiges mettant en cause la conformité de ses actes et actions avec la totalité des règles générales et coutumières du droit international.

13.20. Une telle approche, Monsieur le président, la Cour l'a, au demeurant, d'ores et déjà écartée dans l'affaire *Nicaragua* où, à propos d'une clause juridictionnelle identique à celle de notre traité, elle a déclaré que sa compétence ne pouvait jouer que «dans la mesure où [les demandes du Nicaragua] impliquent des violations des dispositions *de ce traité*» (*C.I.J. Recueil 1984*, p. 441, par. 111; dans le même sens, p. 429, par. 83; les italiques sont de moi). Cette thèse, la Cour l'a condamnée à nouveau dans notre affaire même puisque, dans l'arrêt de 1996 sur l'exception préliminaire, elle a rejeté la thèse iranienne selon laquelle la disposition de l'article premier du traité de 1955, qui dispose : «Il y aura paix stable et durable et amitié sincère entre les Etats-Unis … et l'Iran», aurait eu pour effet d'«incorporer» dans le traité les dispositions de la Charte des Nations Unies et du droit coutumier régissant l'usage de la force ainsi que la résolution 2625 (XXV) de l'Assemblée générale sur les relations amicales entre Etats : «L'article premier [lit-on dans l'arrêt de 1996] ne saurait … être interprété comme incorporant dans le traité l'ensemble des dispositions du droit international concernant … [les] relations [amicales].»

(*C.I.J. Recueil 1996*, p. 814, par. 28.) De même que les règles du droit international général relatives aux relations pacifiques et amicales entre Etats n'ont pas été «incorporées» dans le traité et n'ont donc pas pris valeur de clauses conventionnelles, de la même manière n'ont pas été «incorporées» dans notre traité, et n'ont donc pas pris valeur de clauses conventionnelles, les règles du droit international général régissant l'usage de la force et la légitime défense. Le professeur Crawford l'a expressément reconnu, il y a quelques jours, la Cour a rejeté dans son arrêt de 1996 l'argument selon lequel l'article premier du traité de 1955 aurait incorporé dans le traité la totalité du droit international général *(incorporated by reference into the Treaty the whole of general international law)* (CR 2000/5, p. 33, par. 11).

13.21. Monsieur le président, dans la procédure écrite l'Iran a reproché aux Etats-Unis de soutenir ainsi une thèse qui leur aurait conféré un pouvoir discrétionnaire de recourir à la force contre l'Iran — *embodying an unqualified, extra-legal discretion to use force on whatever occasion* — et leur aurait permis d'échapper aux règles de la Charte — *evading the Charter entirely* (Réplique de l'Iran, p. 162-164, par. 7.71-7.74). Le professeur Crawford a repris longuement ce thème en accusant les Etats-Unis de se prévaloir de l'article XX du traité pour s'octroyer un *broader right*, un droit étendu, de recourir à la force, une autorisation de contourner tout à la fois le traité d'amitié et la Charte, *a licence to flout the Treaty of Amity and the Charter at the same time* (CR 2003/7, p. 51, par. 5), un pouvoir discrétionnaire de recourir à la force militaire contre le territoire ou les installations de l'autre partie, *a subjective discretion to use military force against the territory of the other party* (*op. cit.*, p. 55, par. 13; cf. CR 2003/8, p. 16, par. 30).

13.22. C'est là, il importe de le souligner, un total travestissement, une complète dénaturation, de la thèse des Etats-Unis. Que l'on nous comprenne bien. Les Etats-Unis *ne soutiennent pas* que le traité de 1955 leur a donné carte blanche pour violer envers l'Iran les règles régissant l'emploi de la force et la légitime défense, ou quelque autre règle du droit international général ou coutumier. Les Etats-Unis *ne prétendent pas* que le traité de 1955 les a dispensés du respect des règles du droit international général ou de la Charte, telles les règles qui gouvernent l'usage de la force et la légitime défense. Ces règles du droit international général, les Etats-Unis ne les ont pas violées. Ce que les Etats-Unis *soutiennent*, c'est que, même s'ils avaient violé ces règles (ce qui n'est pas le cas, je le répète), la Cour n'aurait pas pour cette seule raison compétence

pour se prononcer sur la requête de l'Iran; la violation d'une règle de droit international ne confère pas par elle-même compétence à la Cour. Cette distinction entre le fond du droit et la compétence, je l'ai rappelé il y a un instant, a été énoncée par la Cour avec une force particulière dans l'affaire de la *Compétence en matière de pêcheries*, et elle a été confirmée plus récemment dans l'affaire de l'*Incident aérien du 10 août 1999*. Et ce n'est pas parce qu'une question serait importante — et celle de l'usage de la force et de la légitime défense l'est, ô combien ! — que la Cour aurait de ce seul fait compétence pour en connaître. La Cour l'a déclaré dans l'affaire du *Timor oriental*, l'importance d'une question et des règles de droit international qu'elle met en jeu ne constitue pas en soi un titre de juridiction (*C.I.J. Recueil 1995*, p. 105, par. 36). Comme un membre de la Cour l'a observé récemment, en présence d'une clause limitative de compétence «le différend échappe à la compétence de la Cour, quelle que soit la portée des normes qui ont été violées» (*Compétence en matière de pêcheries, C.I.J. Recueil 1998*, p. 487, par. 4, opinion individuelle du juge Koroma).

13.23. Monsieur le président, la situation est d'une grande clarté. Les parties au traité de 1955 ont conféré compétence à la Cour pour se prononcer sur les différends portant sur l'application et l'interprétation du traité de 1955; les parties n'ont pas consenti à ce que soit soumis à la Cour tout différend qui pourrait surgir entre elles au sujet de l'interprétation ou de l'application de n'importe quelle règle de droit international, coutumière ou conventionnelle, particulière ou générale, quelle que soit son importance. *Le paragraphe 1 de l'article X du traité n'équivaut pas à une clause générale de compétence de la Cour; il n'est pas un autre article 36*. La Cour a compétence pour déterminer s'il y a eu violation d'une norme édictée par le «présent traité» — en l'occurrence s'il y a eu violation des principes de la liberté de commerce et de la liberté de navigation posés par son article X : toutes les violations de cette obligation, quel qu'ait été le moyen employé, a décidé la Cour — décision administrative ou législative, ou recours à la force —, mais seulement ces violations. Si l'une des parties a violé le «présent traité», que ce soit par la force ou par quelque autre moyen, la Cour est là pour sanctionner cette infraction : c'est là sa compétence, c'est là sa mission judiciaire. Mais ce que la Cour sanctionnerait alors, ce serait la violation d'une règle du «présent traité», et non pas la violation de la règle du droit international général qui prohibe l'usage de la force. La norme de référence, celle à laquelle les actions des Etats-Unis doivent être confrontées dans notre affaire, ce sont les règles du «présent traité» — plus

précisément, le principe de la liberté de commerce et de navigation —; ce n'est pas le droit international coutumier ou général.

13.24. Monsieur le président, tout n'est pas dans tout, et réciproquement. Ce n'est pas contribuer aux relations pacifiques et ordonnées entre Etats que de demander à la justice internationale de faire plus que ce qu'elle peut et doit faire — et elle ne peut et ne doit faire que ce que les Etats s'accordent à lui demander de faire. Le principe fondamental de la justice internationale demeure, aujourd'hui comme hier, celui de la juridiction consensuelle. La Cour n'acceptera pas que la confiance croissante que les Etats lui témoignent depuis quelques années soit mise en péril par des demandes comme celle dont elle est saisie aujourd'hui. Si la Cour s'orientait vers une sorte de compétence universelle, les Etats hésiteraient à lui conférer quelque compétence que ce soit. Au lieu de plus de compétence et d'un rôle accru de la Cour, c'est à moins de compétence que l'on aboutirait.

Les limites de la compétence de la Cour ont été finalement acceptées par l'Iran

13.25. Tout cela, Monsieur le président, la Partie iranienne a fini par l'admettre à l'extrême fin de la procédure écrite, au terme d'innombrables hésitations et démarches en zigzag. Peut-être n'est-il pas sans intérêt de retracer en deux mots les étapes de cette longue marche vers la reconnaissance de ce qui n'est en définitive qu'une évidence juridique.

13.26. Dans sa requête introductive d'instance de 1992 l'Iran avait demandé à la Cour de dire et juger que par leurs opérations contre les plates-formes pétrolières iraniennes les Etats-Unis «ont enfreint leurs obligations envers la République islamique, notamment celles qui découlent de l'article premier et du paragraphe 1 de l'article X du traité d'amitié, *ainsi que du droit international*…» (les italiques sont de moi). Des conclusions du même ordre, mais élargies à deux autres dispositions de ce traité, clôturaient le mémoire de l'Iran déposé en 1993.

13.27. C'est en préparant ses observations et conclusions de 1994 que l'Iran paraît avoir compris que sa demande de voir la Cour se prononcer sur la compatibilité des actions américaines avec le «droit international» — tout le droit international — se heurtait aux termes explicites de la clause juridictionnelle du traité d'amitié et était de ce fait vouée à l'échec. Modifiant sa demande et rectifiant le tir, l'Iran écrit alors qu'il doit être absolument clair que ses réclamations sont

fondées sur la violation du traité d'amitié et non pas sur la violation du droit international coutumier *(absolutely clear that its claims are for violations of the Treaty of Amity)* (p. 2, par. 3-4). Et un peu plus loin dans ce même document, l'Iran explique qu'il est «parfaitement conscient des strictes limites que la clause compromissoire de l'article XXI 2) impose à la Cour»

> *(«Iran is perfectly well aware of the strict limits which are imposed upon the Court by the Compromissory clause in Article XXI (2), given that it restricts its jurisdiction to the settlement of only those disputes … which concern «the interpretation or application of the present Treaty».»)* (Observations et conclusions de l'Iran, p. 21, par. 2.02.)

Tout cela, Monsieur le président, ce n'est pas moi qui le dis; c'est l'Iran qui l'a écrit. C'est seulement, a précisé l'Iran dans ce document, d'une violation de ce traité bilatéral *(breaches of that international treaty)* que l'Iran demande réparation, car l'Iran sait — comme il l'écrit en toutes lettres — que

> «les questions relatives à des violations du droit international général et de la Charte ne relèvent pas en tant que telles de la compétence de la Cour dans la présente affaire où la Cour est saisie seulement en rapport avec l'interprétation et l'application du présent traité».
>
> *(«It is true ¾ and Iran does not dispute this ¾ that questions concerning violations of general international law and the Charter do not as such fall within the jurisdiction of the Court in the present case, where the Court may be seised only in connection with the interpretation and application of the 1955 Treaty.»)* (*Op. cit.*, p. 22, par. 2.06.)

Bref — c'est l'Iran qui écrit cela, je le répète — «l'Iran n'a pas demandé à la Cour de juger le comportement des Etats-Unis sur la base du droit international général et de la Charte des Nations Unies» *(«Iran has not asked the Court to judge U.S. conduct on the basis of general international law and the U.N. Charter.»)* (*Op. cit.*, p. 24, par. 2.11.)

13.28. Dans son arrêt de 1996 sur l'exception préliminaire la Cour a pris acte de ce que l'Iran avait ainsi — je cite les mots de la Cour ¾ «précisé et développé» son argumentation. La Cour a noté que l'Iran fonde sa demande «rigoureusement» et «exclusivement» sur des «dispositions bien déterminées du traité d'amitié». Quant au droit international général, précisait la Cour en toutes lettres dans cet arrêt, «il n'est pas invoqué par l'Iran en tant que tel, mais «pour déterminer la teneur et la portée des obligations découlant du traité»» (*C.I.J. Recueil 1996 (II)*, p. 809, par. 13).

13.29. Trois ans plus tard, dans sa réplique écrite de 1999, l'Iran reconnaît que, «comme la Cour l'a décidé, les règles du droit international général ne sont pas incorporées dans le traité

d'amitié sur renvoi de l'article premier» *(«as the Court has held, the rules of general international law are not incorporated by reference into the Treaty of Amity by way of its Article 1»)* (p. 162, par. 7.71); et l'Iran précise qu'il se plaint à présent seulement de ce que les Etats-Unis «ont enfreint leurs obligations envers l'Iran qui découlent du paragraphe premier de l'article X du traité d'amitié…»

13.30. Ainsi, Monsieur le président comme la Cour l'a précisé dans l'arrêt de 1996 sur l'exception préliminaire, le seul et unique différend sur lequel elle est appelée à statuer actuellement est le différend «quant à l'interprétation et à l'application de l'article X du traité» de 1955 (*C.I.J. Recueil 1996*, p. 20, par. 53). Voilà définie avec précision par la Cour elle-même, Monsieur le président, la question seule à laquelle, selon son propre arrêt de 1996, elle est appelée à répondre au présent stade de la procédure : *Les Etats-Unis ont-ils, par les actions qui leur sont reprochées par l'Iran, enfreint l'obligation qui leur incombe en vertu du paragraphe 1 de l'article X du traité de 1955 de respecter la liberté de commerce et de navigation entre les territoires des deux parties ?* La mission de la Cour au présent stade de la procédure est de se prononcer sur la licéité des actions américaines au regard de l'article X du traité d'amitié; sa mission n'est pas de se prononcer, sa mission telle qu'elle l'a définie elle-même n'est pas de se prononcer sur la licéité des actions américaines au regard de quelque autre règle que ce soit.

13.31. Monsieur le président, Madame et Messieurs les juges, comme je l'ai indiqué, le professeur Murphy et M. Bettauer montreront à présent que les actions des Etats-Unis n'ont pas violé le principe de la liberté de commerce énoncé à l'article X du traité de 1955. Mais auparavant M. Mathias va établir qu'en raison de ses propres actions et de son propre comportement l'Iran est en tout état de cause disqualifié pour alléguer une prétendue violation de cette liberté par les Etats-Unis.

13.32. Je vous remercie, Monsieur le président, Mme et MM. de la Cour et je vous prie Monsieur le président de vouloir bien donner la parole à M. Mathias.

The PRESIDENT: Thank you, Professor Weil. I now give the floor to Mr. Mathias.

Mr. MATHIAS:

14. IRAN'S CLAIM SHOULD BE REJECTED BECAUSE OF IRAN'S VIOLATIONS OF ITS RECIPROCAL OBLIGATIONS, BECAUSE THE UNITED STATES MEASURES WERE A CONSEQUENCE OF ITS OWN UNLAWFUL ACTS, AND BECAUSE OF IRAN'S WRONGFUL CONDUCT WITH RESPECT TO THE SUBJECT-MATTER OF THE DISPUTE

14.1. Thank you, Mr. President.

14.2. Mr. President and Members of the Court, my task here this morning is to demonstrate that Iran's fundamental breaches of the 1955 Treaty and its other illegal actions that harmed the United States have legal consequences with respect to Iran's ability to invoke the 1955 Treaty and to maintain its claim against the United States in this Court.

14.3. In its Rejoinder, the United States identified three principles related to Iran's own conduct that should lead the Court to deny Iran's claim: first, Iran violated obligations identical to those that are the basis for its Application; second, the United States measures complained of, by Iran, were a consequence of Iran's own unlawful conduct; and third, Iran has acted improperly with respect to the subject-matter of the dispute (Rejoinder of the United States, pp. 57-67). Counsel for Iran attempted to dismiss these arguments together last week under the general heading of "clean hands" (CR 2003/8, pp. 24-40). But I shall discuss each of them separately in turn.

14.4. Let's begin with the first: Iran's violation of the same obligations that it claims the United States violated. Denial of Iran's claim on this basis would constitute an application of the fundamental and well-established international legal principle of reciprocity. In short, because of Iran's own violation of Article X of the 1955 Treaty, Iran cannot prevail on a claim against the United States for an alleged violation of the reciprocal obligation.

14.5. Reciprocity is a core principle of international law. Before joining the Court earlier this month, Judge Simma wrote concerning reciprocity that:

> "It is on treaties . . . that reciprocity produces its most profound effect. From a purely formal point of view, reciprocity governs every international agreement, independently of its content, and consequently underlies the rules concerning the conclusion and entry into force of treaties, and their application, termination, amendment and modification." (B. Simma, "Reciprocity", *Encyclopedia of Public International Law* (ed. R. Bernhardt), Vol. IV, p. 30 (2000).)

Judge Simma wrote that "reciprocity as a principle of international law" should be applied "above all to the maxim that a State basing a claim on a particular norm of international law must accept the rule as binding on itself" *(ibid.)*.

14.6. The legal consequences of breaching a reciprocal obligation are clearly established. Lord McNair, in discussing reciprocity — which he deemed "one of the most important . . . sanctions behind international law" — asserted that "[n]o State can claim from other States, as a matter of binding obligation, conduct which it is not prepared to regard as binding upon itself" (A. D. McNair, *The Law of Treaties*, p. 573, No. 2 (1961)). To a similar effect, Sir Gerald Fitzmaurice, who considered in depth the issue of reciprocity in his fourth report on the law of treaties, asserted that "[t]here is a general *international law rule of reciprocity* entailing that the failure of one State to perform its international obligations in a particular respect will . . . at any rate *disentitle that State from objecting to . . . corresponding non-performance*" (*Yearbook of the International Law Commission*, A/CN.4/Ser.A/1959/Add.1, 1959, Vol. II, p. 70; emphasis in original).

14.7. The Court applied a related proposition in the 1971 Advisory Opinion in the *Namibia* case, stating in clear and unequivocal language that: "One of the fundamental principles governing the international relationship thus established is that a party which disowns or does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship." (*I.C.J. Reports 1971*, p. 46, para. 91.) There, of course, the relationship was not one of reciprocal treaty obligations. But, as we have just seen, the principle is applicable in such a relationship as well. If a State does not act in accordance with a reciprocal treaty-based obligation, it cannot be recognized with respect to a claim derived from alleged non-conforming conduct by the other State.

14.8. In the treaty context, the principle is sometimes known by the Latin phrase, *exceptio inadimplenti contractus*, and sometimes as the exception of non-performance. While the Court has not applied the principle by its terms, well-known and often-quoted opinions of judges of the Court have discussed it at length. Counsel for Iran last week discussed the Judgment of the Permanent Court in the *Diversion of Water from the Meuse* case *(Judgment, 1937, P.C.I.J., Series A/B, No. 70)*. In that case, the Netherlands sought relief for the construction of a lock by Belgium in

circumstances in which it — the Netherlands — had constructed a similar lock. The Court denied the application on the basis of its interpretation of the relevant Treaty, as counsel for Iran has described.

14.9. Judge Anzilotti wrote in dissent, because he had a different view of the proper interpretation of the treaty. In the course of his dissent, he had occasion to reach the alternative Belgian submission, that "by constructing certain works contrary to the terms of the Treaty, the Applicant has forfeited the right to invoke the Treaty against the Respondent" (*ibid*., p. 49). Judge Anzilotti would have accepted Belgium's alternative submission and dismissed the Dutch claim on that basis. In explaining that conclusion, he first dealt with the question "whether the legal rule on which [the submission] founds itself is applicable in relations between States" (*ibid.*, p. 50). He concluded that it was, writing, "I am convinced that the principle underlying this submission *(inadimplenti non est adimplendum)* is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these 'general principles of law . . .' which the Court applies in virtue of Article 38 of its Statute" (*ibid*.). Judge Hudson, in his concurring opinion in the same case, noted that "[w]hat are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals". Judge Hudson made express reference in this context to the *exceptio non adimplenti contractus* (*ibid.*, pp. 76, 77).

14.10. The principle continues to enjoy wide recognition. The recent French *Dictionary of Public International Law* states — and I am translating: "The exception of non-performance is the expression *par excellence* of the principle of reciprocity" ("L'exception d'inexécution constitue l'expression par excellence du principe de réciprocité." *Dictionnaire de droit international public, sous la direction de Jean Salmon,* p. 473 (2001)). Another recent work acknowledged that the exception "has been recognized to some extent as an operative principle in international judicial and arbitral decisions" (James Crawford and Simon Olleson, "The Exception of Non-performance: Links between the Law of Treaties and the Law of State Responsibility", *Australian Year Book of International Law*, Vol. 21, p. 2). The Commentaries on the International Law Commission's Draft Articles on State Responsibility explain that the exception was excluded from treatment as a circumstance precluding wrongfulness because "the exception of non-performance *(exceptio*

inadimplenti contractus) is best seen as a specific feature of certain mutual or synallagmatic obligations and not as a circumstance precluding wrongfulness" (Report of the International Law Commission (2001), A/56/10 p. 173). The Commentaries do not question the existence or the continued application of the exception.

14.11. There can be no question that the obligations at issue in this case are reciprocal obligations. In the preamble to the 1955 Treaty, the parties specifically and expressly resolved to approach the Treaty "on the basis of reciprocal equality of treatment"; indeed, the entire Treaty is constructed around this principle. The freedoms of commerce and navigation, in particular, are appropriate for implementation by the parties on a reciprocal basis, since they necessarily encompass conduct relating to the territories of both parties.

14.12. Nor can there be any real question that Iran's actions in the Gulf violated the identical obligations, those under Article X, paragraph 1, of the Treaty, that are the basis for its claim. Professor Murphy will discuss in detail on Wednesday afternoon, in the context of the United States counter-claim, how Iran's attacks on United States and neutral shipping in the Gulf impeded "freedom of commerce and navigation" "between the territories of the two High Contracting Parties".

14.13. Accordingly, the Court should reject Iran's claim. Both parties were obligated under the 1955 Treaty to refrain from actions that obstructed freedom of commerce and navigation between the territories of the two parties. Because Iran engaged in activities that obstructed those freedoms, it cannot prevail on a claim premised on the alleged subsequent United States violation of the reciprocal obligation.

14.14. I turn now to the second of the three propositions that I mentioned at the outset: that Iran may not prevail because the United States measures it complains of were a consequence of Iran's own conduct, which was unlawful under the Treaty and otherwise.

14.15. The international legal basis for this proposition is also well established. The point was stated broadly by Sir Gerald Fitzmaurice, again in his fourth report on treaties, who wrote that "the first party will have no legal ground of complaint if [the] consequence [complained of] results from his own prior non-observance of the treaty" (*Yearbook of the International Law Commission*, A/CN.4/Ser.A/1959/Add.1, 1959, Vol. II, p. 66).

14.16. The Court has dealt with the related issue, in the case concerning the *Gabèíkovo-Nagymaros Project* (*Judgment, I.C.J. Reports 1997*). In that case, the Court, citing the decision of the Permanent Court in the *Chorzów Factory* case (*Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*), found that Hungary could not terminate the 1977 Treaty, notwithstanding Czechoslovakia's decision to proceed with Variant C (which the Court deemed an internationally wrongful act). Why could Hungary not terminate the Treaty? Because of Hungary's own wrongful conduct in suspending and abandoning the works prior to Czechoslovakia's breach. The Court said that it could not "overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct . . ." (para. 110). As Judge Koroma put it in his separate opinion, "[I]t was th[e] original breach" by Hungary, in suspending and abandoning the works, "which triggered the whole chain of events" (p. 151).

14.17. The Court concluded that Hungary's prior wrongful conduct had the legal consequence of altering Hungary's legally available options in reacting to Czechoslovakia's subsequent breach. Specifically, the Court found that "Hungary, by its own conduct, *had prejudiced its right to terminate the Treaty*" (para. 110; emphasis added). Thus, Hungary could not invoke Czechoslovakia's breach as a ground for terminating the Treaty.

14.18. In attaching this legal consequence to Hungary's prior breach, the Court made clear that the application of the *Factory at Chorzów* case is not limited, as counsel for Iran suggested last week (CR 2003/8, p. 36, para. 33), to a circumstance in which State A's conduct specifically prevents State B from fulfilling State B's obligation. Instead, the Court found that the principle is one of broader application where, to use Judge Koroma's phrase, State A's conduct "triggers" the subsequent conduct of State B. In other words, if we were to try to paraphrase the decision of the Permanent Court in the *Factory at Chorzów* case in the light of your subsequent decision in *Gabèíkovo*, "one Party cannot avail itself of the fact that the other has not fulfilled some obligation . . . if the former Party has 'triggered' the breach of the obligation".

14.19. It is clear from the record that Iran's actions triggered the United States measures against the platforms that are the basis for its claim. Iran's actions, which themselves constituted breaches of the Treaty and were otherwise unlawful, led to the United States actions that Iran

alleges violated Article X. More precisely, had Iran not violated its own obligations, the United States would not have taken the measures. In these circumstances, the Court should attach legal consequences to Iran's violation of its obligations, just as it attached legal consequences to Hungary's violation in the *Gabèíkovo* case. In the context of the present case, the appropriate legal consequence, as in the *Factory at Chorzów* case, is that Iran "cannot avail itself" of the alleged breach of Article X by the United States.

14.20. I move now to the third, and most general, of the three related propositions that I have mentioned at the outset: that Iran may not prevail on its claim because it has acted improperly with respect to the subject-matter of the dispute. The essence of this proposition is that Iran's manifestly unlawful conduct is at the very core of its claim. For this purpose, we are not concerned solely with Iran's breaches of its obligations under Article X of the 1955 Treaty, but also with its clear and sustained violations of the laws of war and the use of force. Because Iran acted unlawfully in attacking United States and other neutral shipping in the international waters of the Gulf, and because the injury for which it seeks relief here is intrinsically related to, and indeed was the consequence of, Iran's own unlawful conduct, Iran should not be permitted to recover on its claim.

14.21. Recall that senior Iranian officials admitted that Iran's attacks were inconsistent with its international obligations. The record in this case establishes that the Deputy Foreign Minister of Iran admitted that Iran was knowingly violating international law. He did so in a meeting with the Ambassador of Norway, when the Ambassador protested Iranian conduct on the instructions of his government (Exhibit 198). The record also conclusively establishes that Iran mined the international shipping lanes of the Gulf in clear violation of its international obligations under the law of armed conflict and elementary considerations of humanity (see, e.g., *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 22. and *Military and Paramilitary Activities in and again Nicaragua (Nicaragua* v *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 112, para. 215) and that Iran committed other unlawful uses of force and violations of the law of armed conflict as well.

14.22. Recall also that it was not only the United States that condemned Iran's unlawful conduct. The Security Council of the United Nations did so. The League of Arab States did so. Representatives of many other States did so.

14.23. In these circumstances, it would indeed be, as Mr. Taft suggested last week, a "perverse result" for the Court to determine that Iran may prevail on its claim against the United States (CR 2003/9, p. 10, para. 1.3).

14.24. Professor Bin Cheng identified the principle that "an unlawful act cannot serve as the basis of an action at law", as a manifestation of the principle "no one can be allowed to take advantage of his own wrong" (Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius, 1987, p. 155). These principles can be seen as aspects of the general "clean hands" doctrine, about which counsel for Iran had much to say last week (CR 2003/8, pp. 24-40). As he noted, the doctrine is also related to "good faith" (*ibid.*, para. 3); in the context of this case, Iran's failure to act in good faith can plainly be tied to its performance of the 1955 Treaty and is not asserted as an independent source of obligation, as counsel for Iran implied (CR 2003/8, p. 25, para. 3).

14.25. Iran concedes that the "clean hands" doctrine has been applied in cases in which claims of governments on behalf of their nationals have been denied because the claims arose out of or were closely related to unlawful activities by those nationals (Reply and Defence to Counter-Claim of Iran, para. 179). Counsel for Iran argued that the doctrine is limited to this diplomatic protection context (CR 2003/8, pp. 26-28, paras. 6-10), but the conceptual basis for that assertion is not clear. The related obligation to perform treaties in "good faith" is not limited to any single area of international law.

14.26. Counsel for Iran also referenced the consideration by the International Law Commission of whether to include a reference to the doctrine in its Articles on State Responsibility and the Commission's decision to exclude it from the Articles. But the Commission's treatment of the issue was more nuanced than a mere rejection of all aspects of the doctrine. The Commentaries note, for example, that "[t]he principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness" (*op. cit.*, p. 173). That Commission statement certainly does not exclude the possibility that in a particular case the principle could "generate the consequence" that the State committing the wrongful act should have

its claim denied on that basis. Instead, it suggests that the Commission was of the view that it had not been established that the principle had that general effect.

14.27. The "clean hands" doctrine has also been addressed in the academic literature and frequently discussed in the separate and dissenting opinions of international judges, including Members of this Court. For example, Judge Weeramantry in the *Legality of Use of Force* cases referred to this doctrine as "a principle of equity and judicial procedure, well recognized in all legal systems, by which he who seeks the assistance of a court must come to the court with clean hands" (*Legality of Use of Force (Yugoslavia* v. *Belgium), I.C.J. Reports 1999*, p. 184, dissenting opinion of Vice-President Weeramantry). Judge Ajibola similarly noted in the *Genocide* case "that [an] applicant [to the Court] 'must come with clean hands'" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1993*, p. 395, separate opinion of Judge Ajibola). I note that neither of these cases involved the specialized area of diplomatic protection, to which counsel for Iran would confine the application of the doctrine. And, of course, in the *Gabèíkovo* case, the Court made specific use in its Judgment of the principle *ex injuria jus non oritur* (para. 133).

14.28. With respect to our third proposition, then, the United States suggests that Iran's claim should be denied on the basis of accepted equitable and legal principles because it arises out of Iran's own admitted and manifestly unlawful conduct.

14.29. Mr. President, Members of the Court, to summarize our submissions to this point: international law provides the basis for the Court, in the light of Iran's own conduct, its many and repeated violations of the Treaty at issue in this case, as well as fundamental rules of international law and of the Charter, to dismiss Iran's claim. In particular, Iran's claim should be denied, first, because Iran breached its reciprocal obligation under the 1955 Treaty, second, because the United States actions were a consequence of Iran's own unlawful conduct under the Treaty and other obligations, and third, because Iran's claim arises out of its unlawful operations. As we have seen, there is substantial authority in international law for all three of these propositions. The fundamental principle of reciprocity and the exception of non-performance are the basis for the first proposition. These principles are well established in international law and are fully applicable here. The decision of the Permanent Court in the *Factory at Chorzów* case provides a clear and precise

basis for the second proposition. With respect to the third proposition, the United States submits that the Court may properly apply good faith and equitable principles in light of the fact that Iran's claim cannot be separated from its own manifestly unlawful conduct in this case.

14.30. Before I conclude, let me make three other important points. First, the forcible United States measures at issue in this case were taken in response to unlawful uses of force by Iran. Accordingly, this is not a case in which the Court needs to assess the consequences of an allegedly wrongful act involving the use of force taken in response to an unlawful act not involving the use of force. Iran's own conduct was a wrongful use of force and it is entirely appropriate for the Court to attach the consequences to it that the United States has suggested and to dismiss Iran's claim.

14.31. Second, Iran's attempt to turn these propositions around and have the Court apply them against the United States cannot be accepted. Iran's wrongful conduct against the United States pre-dated and directly resulted in the United States measures that are the basis for Iran's claim. Given these facts, Iran cannot argue that the alleged United States violation of Article X somehow gave rise to its own violations. Nor can Iran prevail on a more general "clean hands" argument, which is premised on either erroneous assertions about United States conduct, including allegations of violations of the 1955 Treaty, or references to United States policy (CR 2003/8, p. 38, para. 40).

14.32. Finally, for the Court to determine in this case that the consequence of Iran's manifestly unlawful conduct should be the dismissal of its claim would not establish a general principle that a State must demonstrate perfection in its conduct before it can come to the Court. Instead, it would confirm that there are cases, such as this one, in which the conduct of an applicant is of such a seriously wrongful character, in the context of the subject-matter of the proceeding, that it would be appropriate for the Court to dismiss the case on the basis of that conduct.

14.33. In his concurring opinion in the River *Meuse* case, Judge Hudson addressed this question. He was writing in the context of the Netherlands claim against Belgium for conduct in which the Netherlands had also engaged, but the point that he was making is equally applicable to each of the principles that we have been discussing. Judge Hudson wrote:

> "The general principle [that a party that is engaged in a continuing non-performance of an obligation should not be permitted to take advantage of a similar non-performance by the other party] is one of which international tribunals

> should make a very sparing application. It is certainly not to be thought that a complete fulfillment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness." *(Ibid.)*

14.34. Mr. President, Members of the Court, the case before you now is Judge Hudson's "proper case". Members of the Court, I thank you for your attention. Mr. President, I ask that you call upon Professor Murphy after the break.

The PRESIDENT: Thank you, Mr. Mathias. The hearing is now suspended for ten minutes.

The Court adjourned from 11.25 to 11.35 a.m.

The PRESIDENT: Please be seated. I give the floor to Professor Murphy.

Mr. MURPHY:

15. THE UNITED STATES DID NOT VIOLATE ARTICLE X, PARAGRAPH 1 PART I

Introduction

15.1. Thank you, Mr. President. It is again a great honour to appear before this Court on behalf of the United States.

15.2. Mr. President, Members of the Court, my presentation today will focus on applying the facts of this case to the proper interpretation of Article X, paragraph 1. As Professor Weil has explained, Article X, paragraph 1, is the sole basis on which the Court may review the conduct of the United States in the present proceedings. Iran alleges that such conduct violated Article X. Iran is wrong.

15.3. Iran is wrong for four reasons, two of which I will deal with and two of which Mr. Bettauer will deal with. The two reasons I will address are as follows.

15.4. *First*, Iran has not proven that the United States actions against the platforms impeded any "freedom of commerce and navigation" as that phrase has been defined by this Court.

15.5. *Second*, Iran has not proven that the United States actions against the platforms impeded commerce and navigation "between the territories" of Iran and the United States.

A. The United States actions against the platforms did not impede any "freedom of commerce and navigation" as that phrase is defined by this Court

15.6. Let me turn to the first reason that Iran's allegations are without merit, which is that the United States actions against the platforms did not impede "freedom of commerce and navigation".

15.7. I start with the text of Article X, paragraph 1, which is on the screen and also at tab 1 in the judges' folders.

15.8. Obviously, the stationary platforms at issue in this case were not engaged in any form of "navigation" and thus Iran's claim is not and cannot be based on that portion of Article X, paragraph 1 (see *Judgment, I.C.J. Reports 1996 (II)*, p. 817, para. 38).

15.9. Yet, in our written pleadings, the United States also has demonstrated that the actual use to which these particular oil platforms were put does not fall within the scope of "freedom of commerce". Any analysis of this issue must start with the Court's 1996 Judgment.

15.10. What did the Court decide in 1996 on this issue? While noting the placement of the term "commerce" in Article X — an article that otherwise deals with maritime commerce — the Court found that the word "commerce" was not restricted to "maritime commerce", given other indications in the Treaty of an intention of the parties to deal with trade and commerce more generally (1996 Judgment, p. 817, para. 41). Further, the Court read the word "commerce" to cover "not merely the immediate sale and purchase of goods, but also the ancillary activities integrally related to commerce" (1996 Judgment, p. 819, para. 49). As thus defined, whenever the freedom of "such commerce" between the territories of the parties was "impeded" — the Court used the word "impeded" —, the Court said that there would be a violation of Article X, paragraph 1 (1996 Judgment, p. 819, para. 50).

15.11. Of particular importance, the Court went on to identify the types of acts that could be capable of "impeding" the "freedom of commerce". In paragraph 50 of its Judgment, the Court said that the "possibility" must be entertained that the freedom of commerce "*could* actually be impeded as a result of acts entailing the destruction of goods . . . to be exported, or capable of affecting their transport and their storage with a view to export" (1996 Judgment, p. 819, para. 50; emphasis added). We would submit that here, the Court established a test for what acts could impede "freedom of commerce" for purposes of Article X, paragraph 1, which is captured on the slide on the screen and also appears at tab 2 in the judges' folders. For a violation to be found,

either (1) the act in question must entail the *destruction of goods* destined to be exported; or (2) the act in question must affect the *means of transport of goods* destined to be exported; or, finally (3) the act in question must affect the *storage of goods* destined to be exported.

15.12. What did the Court *not* decide in 1996? The Court only found, on the facts alleged by Iran, that there was a "possibility" that the freedom of commerce might be impeded (1996 Judgment, p. 819, para. 50). It only found the United States actions "capable" of having such an effect (1996 Judgment, p. 820, para. 51). The Court made *no* finding whatsoever that any impediment actually occurred. In fact, the Court said that "[o]n the material now before the Court, it is indeed not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil" (1996 Judgment, p. 820, para. 51).

15.13. Mr. President, Members of the Court, nothing has changed as a result of Iran's subsequent submissions to this Court. None of the materials now before the Court show that United States actions with respect to the platforms impeded the export trade in Iranian oil and, as such, there was no violation of Article X, paragraph 1.

15.14. First, did the United States military actions entail the destruction *of goods destined to be exported*? I think it is obvious that the platforms themselves were not goods destined to be exported. Moreover, it is obvious that the United States military actions did not destroy any oil at all. The oil itself was untouched. Yet, we would further submit that the platforms themselves did not even produce a good destined for export (Rejoinder of the United States, paras. 3.42-3.52). Let me explain.

15.15. As Iran acknowledges, the oil extracted by its offshore oil platforms was *not* in a form capable of being exported, either when it came onto or when it left the platforms (Reply and Defence to Counter-Claim of Iran, paras. 3.7-3.10; Exhibit 212, paras. 12-15). I direct your attention to the slide on the screen which also appears in tab 3 of the judges' folders. The crude oil was first extracted from the continental shelf and, after some initial processing, was piped from the platforms to Lavan and Sirri Islands. This is reflected in steps 1 and 2 on the slide. Only at that point is the crude oil subjected to extensive processing sufficient to transform the crude oil into a new and different product capable of being safely exported. Indeed, only at that point was enough gas, hydrogen sulphide, and water extracted from the crude oil so as to make a product less

flammable and far more stable for export. Moreover, this new product would then be blended with other oil extracted elsewhere in Iran before being exported, and this is reflected in "step 3". Given such extensive transformation after leaving the platforms, and given that the United States actions did not destroy any oil at all, Iran has not proven that damage to the platforms entailed the destruction of a good that was itself destined for export (Rejoinder of the United States, paras. 3.43-3.48).

15.16. Second, did the United States military actions affect the *means of transporting* a good destined for export? Well, on the contrary, the means of transporting crude oil from the Gulf were the very tankers that were subject to attack by Iran, not by the United States. It is true, as the Court noted in 1996, that the oil pumped from the platforms was transported by subsea pipeline to land terminals (1996 Judgment, p. 819, para. 50). However, the United States actions against the platforms were limited to the "jackets" of the platforms — that portion above the waterline — and it did not actions against the undersea pipelines (Rejoinder of the United States, para. 3.49). The United States has introduced evidence from an engineer highly experienced in Iranian oil extraction, Edward Price, which appears at tab 4 in the judges' folders. If you look at that statement at tab 4, and in particular at paragraph 16 of the statement by Mr. Price, you will see that he unambiguously states that damage to the "jackets" of these particular platforms "would not affect Iran's ability to use the undersea pipeline connected to those platforms to transport" the extracted oil (Exhibit 212, para. 16). Although Iranian counsel has insinuated that such transport would pose difficulties, Iran has introduced absolutely no evidence to support that insinuation. Thus, Iran has not proven that the damage to the "jackets" of the platforms affected the means of transport of goods destined to be exported (Rejoinder of the United States, paras. 3.49-3.51).

15.17. Third and finally, did the United States military actions affect the *storage* of goods destined to be exported? Well, the platforms had no storage function or facilities. Iran itself has admitted this. Storage of oil took place on Lavan and Sirri islands (Reply and Defence to Counter-Claim of Iran, para. 3.6, concerning Rostam; *ibid.*, Vol. IV, Statement of Mr. Alagheband, para. 10, concerning Sirri). Thus, Iran has not proven that damage to the platforms affected the means for storing goods destined for export.

15.18. If we return briefly to the slide summarizing the Court's test for what acts might impede "freedom of commerce", it is clear that acts damaging the platforms are not covered under Article X, paragraph 1. The United States military actions destroyed no oil at all. Indeed, the oil platforms themselves did not even produce a product capable of being exported. They did not store a product of any kind. And the platforms did not transport a product destined for export. On the facts now before the Court it would be unwarranted to expand the concept of "freedom of commerce" to reach the platforms. It would be like arguing that freedom of commerce covers not only a Persian carpet woven for export, but also the pair of clippers used to shear the wool from the Iranian sheep, even where the clippers are broken and not capable of use. It would be unreasonable to consider such broken clippers covered by the freedom of commerce, likewise, it is unreasonable to consider the platforms so covered.

B. The United States actions against the platforms did not impede freedom of commerce and navigation "between the territories" of Iran and the United States

15.19. Mr. President, allow me to turn to the second part of my presentation. Article X, paragraph 1, covers only the freedom of commerce *"between the territories of the two High Contracting Parties"*. Iran must not only prove that the United States military actions impeded Iran's freedom of commerce generally. Iran must also prove that the United States actions impeded freedom of commerce between the territories of Iran and the United States.

15.20. Here, too, is an issue that the Court did not decide in its 1996 Judgment. The Court said that, at the jurisdictional stage, the Court did *not* have to enter into the question of whether Article X is restricted to commerce "between" the Parties (1996 Judgment, p. 817, para. 44). The Court merely accepted Iran's argument that there was "to some degree" oil exports from Iran to the United States and thus a "potential" violation of Article X, paragraph 1 (*ibid.*, pp. 817 and 818, paras. 38 and 44). But the Court did not make factual determinations regarding whether the United States damage to these particular platforms in fact had any effect upon the export trade in oil to the United States (*ibid.*, p. 820, para. 51). That issue was left to the merits (see CR 2003/6, p. 32, para. 65).

15.21. Mr. President, Members of the Court, the Court cannot read the words "between the territories" out of Article X, paragraph 1. This Court previously has stated, in this very case, that

when interpreting the 1955 Treaty, we must follow norms of interpretation as established in customary international law (1996 Judgment, p. 812, para. 23). Customary international law, as embodied in Article 31 of the Vienna Convention on the Law of Treaties, provides that the *all* the words of a treaty provision must be given meaning, and this principle is reflected in international jurisprudence ranging from the *Cayuga Indians Claims* arbitration to this Court's decision in *the Anglo-Iranian Oil Co.* case. (See British-American Claims Commission in *Cayuga Indians Claims Case*, 6 *RIAA* 173, 184 (1926), "Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning"; *Anglo-Iranian Oil Co.* case, *I.C.J. Reports 1952*, p. 105, considering whether "a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text" and saying that this is a principle that "should in general be applied when interpreting the text of a treaty".)

15.22. So what, then, does this phrase mean? The ordinary meaning of the phrase clearly imposes a territorial restriction on the commerce covered by Article X, paragraph 1. The ordinary meaning is that the commerce or navigation must commence in the territory of one State and then proceed to the territory of the other State.

15.23. Reading this provision in context supports this ordinary meaning. The Court will recall that in its 1996 Judgment, the Court made a distinction between provisions in the 1955 Treaty that contained a territorial limitation and those provisions that did not. The Court said that the provisions of the 1955 Treaty containing a territorial limitation have a narrower scope (1996 Judgment, p. 816, paras. 34-35). Thus, Article X, paragraph 1, is like other provisions of the Treaty that, for instance, regulate the status of companies of one of the parties in the territory of the other, such as may be found in Article III of the Treaty. Such provisions are directed at a territorial limitation that the Court must take into account.

15.24. Now I note that Iran appears to concur that weight must be given to this phrase, at least when applied to the United States counter-claim. In that context, Iran says "there can be no doubt" that the language of Article X, paragraph 1, does "impose a territorial scope and limitation" on its application (Reply and Defence to Counter-Claim of Iran, para. 6.47). At the same time, Iran somewhat confusingly argues that the Court's 1986 Judgment in the *Nicaragua* case did not

concern "itself with verifying whether specific commercial activities were taking place" between the two countries at the time of the alleged attacks and mining in that case (Reply of Iran, para. 6.50). We submit that Iran misconstrues the Court's Judgment by failing to take into account the factual differences between the *Nicaragua* case and this case. In the *Nicaragua* case, the existence of United States-Nicaraguan commerce at the time the mines were laid and at the time of the attacks on Nicaraguan facilities was uncontested. The vessels and facilities at issue in that case were fully functioning and there was no United States embargo on trade with Nicaragua when those incidents occurred (see case concerning *Military and Paramilitary Activities in and against Nicaragua, Merits, I.C.J. Reports 1986*, paras. 76, 81, 125). As I shall soon discuss, those facts are not present in this case.

15.25. A further important aspect of the territorial limitation in Article X, paragraph 1, is that it is not sufficient simply to find that there was general commerce between the territories of the two States in the relevant time period, nor even that there was general commerce in oil. Rather, the Court must find that there was commerce in oil *from these particular platforms* between the territories of the two States in the relevant time period. The need to focus on oil exports from these particular platforms is evident in paragraph 50 of the Court's 1996 Judgment, in which the Court focused on whether the United States acts could potentially affect goods destined to be exported, or specifically to be the transported or stored. It is also evident in paragraph 51 of the 1996 Judgment. In that paragraph, the Court anticipated a decision at the merits phase on "to what extent *the destruction of the Iranian oil platforms* had an effect upon the export trade in Iranian oil" (emphasis added).

15.26. Indeed, Iran apparently agrees with this point when its argues with respect to the counter-claim that

> "it is insufficient for the United States simply to allege . . . that there was general commerce between the Parties during the relevant time period . . . The United States must also prove that *the vessels in question* were involved in commercial relations between the territories of Iran and the United States." (Further Response to the United States Counter-Claim of Iran, para. 6.31; emphasis added.)

15.27. Now, applying the facts as pled by Iran in this case to the language of Article X leads us to an unavoidable conclusion: the platforms were *not* engaged in commerce "between the territories" of Iran and the United States during the time period in question. This conclusion is

clear when one looks at both geographic ends of the alleged commerce and asks two questions: first, was there commerce from these platforms departing Iranian territory? And second, was there commerce from these platforms arriving in United States territory?

15.28. Taking the first question, one must immediately observe that the oil platforms do not even lie in Iranian territory. They are outside Iran's territorial sea, they are on Iran's continental shelf and within its exclusive economic zone (see, e.g., Memorial of Iran, paras. 1.13, 1.17-1.18; Reply of Iran, para. 3.4; CR 2003/ 5, p. 18; CR 2003/6, p. 40; 1996 Judgment, p. 808, para. 12).

15.29. The Court can see this fact for itself in the map displayed on the screen (Counter-Memorial and Counter-Claim of the United States, map 1.12) which is also at tab 6 in the judges' folders. If we focus on that area of the map where the three platforms lie, and then move in even closer, we can see the platforms' actual location. This close-up also appears at the same tab in the judges' folders.

15.30. The three oil platforms — Rostam, Sassan and Sirri — are at the lower portion of the map. The area shaded in light blue running along Iran's coast is the 12-nautical-mile limit of Iran's territorial sea.

15.31. As you can see, all three platforms are well outside Iran's territorial sea. Based on the evidence in the record, Rostam (which Iran refers to as Reshadat) is about 55 nautical miles from Iranian territory. Sassan (which Iran refers to as Salman) is about 69 nautical miles from the nearest Iranian land territory. And Sirri (which Iran refers to as Nasr) is about 17 nautical miles from the nearest Iranian land territory.

15.32. So there is already some initial difficulty with the idea that the products from these platforms are departing Iranian territory. But leaving that issue aside, commerce in a product "between the territories" of the two Parties cannot occur unless there is *movement of the product* from one territory to the other territory. Yet there was no movement of a product at all from two of the platforms at issue at the time of the United States actions. Let me show the Court a slide with the relevant dates; this also appears as tab 7 in the judges' folders.

15.33. Iraqi aircraft attacked and completely disabled the Rostam platform in October 1986 and July 1987. As Iran itself acknowledges, at the time of the United States military action against Rostam in October 1987, the platform was still not functioning, and had not been for more than a

year (Reply of Iran, para. 3.13). If Rostam was not functioning, it follows that Rostam was not engaged in commerce at all, let alone commerce "[b]etween the territories" of Iran and the United States. And as such, there was no "freedom of commerce" that could be subject to Article X, paragraph 1.

15.34. Iran admits that the same situation prevailed with respect to the Sassan platform (see Reply of Iran, para. 3.14). Those dates are in the middle part of the slide. Iraq attacked and disabled the Sassan platform in October and November of 1986, and it was still not functioning 18 months later at the time of the United States action in April 1988. Again, if Sassan was not functioning, it follows that Sassan was not engaged in commerce at all, let alone commerce "[b]etween the territories" of Iran and the United States. And we submit as such, there was no "freedom of commerce" that could be violated by Article X, paragraph 1.

15.35. This, then, leads to the second question: was there commerce from the Iranian oil platforms arriving in United States territory? The only facility — the only facility — that Iran might claim was engaged in commerce of any sort whatsoever at the time of the United States military actions was the Sirri platform. Sirri, however, was not engaged in commerce between the territories of the two States for the simple reason that, at the time of the United States military action, there was no longer any commerce at all in oil between Iran and the United States.

15.36. As the United States written pleadings have explained, almost six months prior to the actions involving the Sirri and Sassan platforms, the United States banned the import of Iranian oil and oil products. The date of the embargo, 29 October 1987, is listed on the screen. And I note that the import ban did not cover goods that, prior to 29 October 1987, had been loaded on board vessels and were in transit to the United States, which accounts for the very minor 1988 imports reflected in the statistics presented to the Court by both Parties. Consequently, that ban meant that, after October 1987, there was no relevant commerce in oil from Iranian territory to United States territory at all (see Exhibit 225), let alone any commerce involving the one oil platform that was extracting any crude oil at the time of the United States military actions.

15.37. Iran has conceded this point. In Iran's words, "the sanctions adopted under Executive Order No. 12613 on October 29, 1987, effectively put an end to any imports of Iranian crude oil into the United States" (Reply of Iran, para. 3.22). Iran's oil-trade expert, Mr. Peter Odell, also

conceded this point. In his words: "The October 1987 US ban on direct Iranian oil imports completely destroyed Iran's trade with the United States." (Reply of Iran, Vol. III, Odell Statement, p. 19.) Therefore, on 18 April 1988, when it became necessary for the United States to take action against Sirri — as well as against Sassan for that matter — those platforms could not have been involved in commerce "between the territories" of the United States and Iran.

15.38. So in summary, on the facts of this case, the requirement that there be commerce *between* the territories of the two countries is not met at *either* geographic end. There were no products from these platforms going out of the territory of Iran. Due to Iraqi attacks, two of the three platforms were producing no products at all, let alone products entering into commerce with the United States. And commencing in October 1987, there were no products from any of these platforms coming into the territory of the United States.

15.39. So, given these incontrovertible points, how does Iran respond? Iran pursues three lines of argument, none of which sustain scrutiny.

15.40. One line of argument concerns the relevance of the United States embargo. Counsel for Iran has asserted that the embargo cannot be used as a basis for saying that the embargo prevented any impediment to commerce "between the territories" because, in Iran's view, the embargo itself was a violation of the 1955 Treaty. As Professor Crawford put it, the embargo "cannot justify the attack" on Rostam if the embargo was "a breach of the Treaty of Amity" (CR 2003/5, p. 38). Professor Pellet referred to the embargo as a "wrongful act," one that cannot, to use his words, "effacé les effects produits par la destruction des plate-formes" (CR 2003/6, p. 37, para. 80).

15.41. The United States position, is *not* that there was a violation of Article X which was then erased by the embargo. Rather, our position is that there was no violation of Article X to begin with, in part because of the embargo.

15.42. But the more important point is that Iran at this stage cannot ask this Court to rule that the embargo was a violation of the 1955 Treaty, such that the effects of that embargo cannot be taken into account by the Court. No claim by Iran that the embargo was unlawful has been placed before this Court, as Iran itself has conceded on several occasions (see, e.g., Reply of Iran, para. 6.57; CR 2003/5, p. 40, para. 27). The matter has not been briefed to this Court, either by

Iran or by the United States. Indeed, there is no record in this case of Iran ever having complained to the United States regarding the embargo. If the United States had been charged with violating international law by imposition of the embargo, the United States would have raised jurisdictional objections and, if required, would have shown to this Court that the embargo was entirely lawful under the 1955 Treaty for multiple reasons (see Counter-Memorial and Counter-Claim of the United States, p. 103, note 244). Indeed, application of Article XX to an economic embargo raises very different factual and legal issues than those presently before the Court. Iran could have included such a claim in this case, just as Nicaragua did in the *Nicaragua* case, but Iran chose not to: and Iran should not be permitted to do so now, indirectly. Moreover, the Court's 1986 Judgment in the *Nicaragua* case regarding the legality of the United States embargo would in no way be dispositive of the legality of the United States embargo against Iran since, as Mr. Matheson will explain later in our presentation, the circumstances in the two cases are quite different, especially as regards the application of Article XX.

15.43. In short, Professor Pellet has no licence before this Court to liken the United States to a common thief (CR 2003/6, p. 37, para. 80). Until proven otherwise in an appropriate tribunal, the United States embargo against Iran must be regarded as lawful. And as a lawful measure, it precluded any commerce in oil between the territories of the two States throughout the period in which the embargo was in place. Actions by the United States against Iran's oil platforms could not have impeded such commerce in that time frame because no such commerce existed.

15.44. A second line of argument that Iran pursues involves evidence of commerce in refined oil products between customers in the United States and suppliers in Western Europe (Reply of Iran, Vol. III, Report of Prof. Peter Odell). What is striking about this evidence, however, is that it is actually demonstrating the *absence* of commerce between Iranian and United States territories in the relevant time period. Indeed, Iran has repeatedly referred to this commerce as "indirect" in nature (e.g., CR 2003/6, p. 36), which certainly does not fit easily with the metaphor of a "bridge" between the two States suggested by counsel for Iran as the appropriate way to view Article X, paragraph 1 (CR 2003/5, pp. 37-39).

15.45. Let us consider the evidence submitted by Iran. The report prepared by Professor Odell and submitted to this Court accepts that Iranian *crude oil* shipped through Europe

to the United States dropped to *zero* by 1988 because of the United States embargo (Reply of Iran, Vol. III, Report of Prof. Peter Odell, table 2). But Professor Odell deploys various hypotheses and speculations so as to claim that at least some portion of the crude oil Iran sold to purchasers in Western Europe during the embargo was subsequently converted into *refined oil products*, some portion of which third parties *may* have sold to customers in the United States (Reply of Iran, Vol. III, Report of Prof. Peter Odell, p. 20).

15.46. Now, one is tempted to simply quote counsel for Iran to the effect that: "The report is nothing more than a collection of hypotheses — 'could haves'; 'might haves'. It is not evidence." (CR 2003/7, p. 27.)

15.47. But the more important point is that Professor Odell's report amply makes clear that the sale of crude oil from the territory of Iran to the territory of the countries of Western Europe had *no connection* with the territory of the United States. Once Iranian crude oil arrived in Europe, it was commingled with enormous amounts of crude oil from various other sources — other countries — it was stored, it was redistributed, it was ultimately transformed, through refinement in Western Europe, into an entirely new and far more valuable product, such as fuel oil.

15.48. I draw your attention to the screen and also to tab 8 in the judges' folders for here you will see that Iran's expert, Professor Odell, characterizes this process as follows:

> "As a result of this complexity of the European oil supply, storage, refining and distribution system, tracing a specific barrel of crude oil exported to Europe through to the final user of the oil products made from that barrel of crude becomes just about as difficult as tracing a grain of wheat from a particular field of an individual farmer, through to a specific miller and ultimately to a sack of flour!" (Reply of Iran, Vol. III, Odell Statement, p. 7.)

15.49. Indeed, it is, so much so that we submit the Court cannot find that any *Iranian* product entered into commerce in the territory of the United States from Western Europe after October 1987.

15.50. This point is illustrated by the flow chart now on the screen, which appears at tab 9 in the judges' folders. I displayed the first three steps earlier. After extraction, processing, and blending of the crude oil from the platforms in Iran, export quality crude oil was sold by Iran to buyers in Europe — that is step 4 on the chart. The crude oil underwent an even greater transformation in Europe, first being mixed with crude oil from other sources — that is step 5 —

and then being refined into oil products, such as fuel oil — step 6. At that point, the refined oil products, such as fuel oil, were capable of another sale, either for consumption in Europe or for export to other countries, including possibly the United States — that is step 7.

15.51. Mr. President, Members of the Court, does this constitute commerce between the territories of Iran and the United States? In the Court's 1996 Judgment, the Court viewed it as relevant, when interpreting Article X, paragraph 1, to consider the standards operating in international trade and business law (p. 818, para. 46). Well, as a matter of international trade and business law, it is beyond dispute that Iranian crude oil and European refined oil products are fundamentally different goods.

15.52. Consider first international trade law. In our Rejoinder, the United States provided documentation from the World Customs Organization, from the European Union and from the United States itself, demonstrating that this distinction between crude oil and refined oil products is maintained at all levels — international, regional, and national — for purposes of tariff classification or rules of origin (Rejoinder of the United States, paras. 3.66-3.68, Exhibits 226, 227, 228). That documentation confirms that the commerce engaged in by United States buyers regarding oil imports in the relevant time period concerned purchases of a European good, not an Iranian good.

15.53. Consider second, private international law. There are no bills of lading indicating that European oil products shipped to the United States originated in Iran. There are no letters of credit describing such exports as originating in Iran. There are no sales contracts or insurance contracts or, indeed, contracts of any kind whatsoever reflecting that this was Iranian oil destined for the United States. Iranian law, Iranian courts, Iranian sellers and insurers had no interest of any kind whatsoever in any of these European-United States transactions. No one involved in the oil business — not the buyers, not the sellers, the insurers, the bankers, the brokers, the analysts — no one would regard the shipment of Iranian crude oil to Europe for refining as a commercial transaction between Iran and the United States, regardless of whether any resulting petroleum products ultimately were sold to the United States (Rejoinder of the United States, para. 3.71).

15.54. We direct the Court's attention to the United Nations Convention on Contracts for the International Sale of Goods (1489 *UNTS* 3). We direct the Court's attention to the International

Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea (120 *UNTS* 155). We direct Court's attention to the International Chamber of Commerce's Uniform Customs and Practices for Documentary Credit (1993 Revision, ICC Pub. No. 500-842-1155-7). All of those régimes would regard Iran's so-called commerce "between" Iran and the United States as at least two mutually exclusive transactions: one between Iran and Europe; the other between Europe and the United States.

15.55. Perhaps Professor Odell makes the point best in the quote we include at tab 10 in the judges' folders, and which is up on the screen, when he vividly characterizes the European oil industry process as "most effectively 'de-nationalising' the crude oil moving into it" (Reply of Iran, Vol. III, Odell Statement, pp. 7-8). And the Court will recall that this is from a man Iran has put forward as "a renowned authority on the international oil economy" (CR 2003/6, p. 49).

15.56. Nor is it conceivable that Iran and the United States, when drafting the 1955 Treaty, intended Article X, paragraph 1, to cover transactions with the territories of third countries, in this case countries in Europe. Indeed, Iran's argument would sweep almost all exports emanating from the territories of either Iran or the United States within the scope of Article X, paragraph 1, because of the possibility that the exported product or some *de minimis* portion of it might be resold to the other party. As a result, both States would be obliged to extend the protections of Article X, paragraph 1, to virtually all of their trading partners to avoid, inadvertently, impeding indirect United States-Iranian trade. Such a result was clearly not intended by the United States or by Iran, or by any of the parties to these types of treaties. And, thus, the Court — consistent with the many international instruments touching on this question — should conclude that Iranian sales to Western Europe and European sales to the United States do not involve commerce "between the territories" of the two Parties.

15.57. Having run into these difficulties, Iran advances a third line of argument. Iran asks the Court to forget about *actual* commerce from the oil platforms to the United States and instead focus on *potential* commerce. As counsel for Iran put it, Article X is not interested in "actual commerce on a given day" but rather on "freedom of commerce on a continuing basis" (CR 2003/5, p. 39, para. 25; see also CR 2003/6, pp. 33-34, paras. 70 and 73; "Admittedly, there

was no guarantee that the oil concerned was in fact destined to be exported to the United States, but that is of no relevance.").

15.58. To sustain this argument, Iran asserts that the platforms at some earlier time had been engaged in commerce between the two territories and therefore at some later stage would again become engaged in such commerce (Reply of Iran, paras. 3.23, 3.29, and 6.48; Further Response to the United States Counter-Claim of Iran, para. 6.30). This is supposedly demonstrated by a number of contractual arrangements purportedly "concluded with American oil companies for the export of Iranian oil to the United States both before and after the US attacks on the Iranian oil platforms" (Reply of Iran, Vol. III, Hosseini Statement, para. 16). Since the United States actions purportedly impeded this potential for later commerce, then according to Iran, the United States violated Article X, paragraph 1. This argument has no merit, for several reasons.

15.59. First, this extraordinarily expansive interpretation of freedom of commerce is out of step with the Court's 1996 Judgment. In that Judgment, as I have discussed, the Court was interested in evidence of actual commerce between Iran and the United States. The Court did not interpret "freedom of commerce" as encompassing all possible, future hypothetical exports. Indeed, if "freedom of commerce" were read so expansively, then virtually all United States actions of any kind — such as cessation of economic aid — that diminishes Iran's capacity to use its infrastructure or to use its land would fall within the scope of Article X, paragraph 1, since the action has the potential to preclude use of Iran's resources for future export trade. In 1996, the Court did not regard Article X in the manner now viewed by Iran, and the Court should not do so today. To do so reads the phrase "between the territories" right out of Article X.

15.60. Second, Iran's factual predicate for this argument is completely inadequate. Despite counsel for Iran's assertion that these platforms had historically been used for the purpose of engaging in oil trade with the United States (CR 2003/5, para. 25), Iran has not proven that oil from these particular platforms was exported to the United States. Certainly, prior to October 1987, there were Iranian oil exports to the United States, but Iran has not shown that any of the oil came *from these platforms*. The NIOC documents submitted by Iran regarding crude oil exports from Lavan and Sirri Islands only list as destinations countries such as India, Japan, and Singapore — not the United States (Reply of Iran, Vol. III, Hosseini Statement, paras. 10 and 11). Even more to

the point, there is no evidence in the record to establish that these particular platforms were going to be engaged in the export of oil to the United States at some hypothetical point in the future (see Exhibit 225). Although Iran has taken the trouble to place in the record assorted contractual arrangements, none of those arrangements identify these platforms as the origin of the oil.

15.61. Third, this argument is inconsistent with Iran's own position with respect to the counter-claim. There, Iran goes to great length to challenge whether specific vessels carrying specific cargo "between the territories" of Iran and the United States had such cargo at the time of their attack (Further Response to the United States Counter-Claim of Iran, paras. 6.31, 6.39-6.42, "those vessels were not conducting trade between the territories of the two Parties"). The obvious fact that such vessels may have carried cargo between the two countries previously, or could have carried cargo between the two States at some future point, including oil cargo under the very contractual arrangements cited by Iran, is viewed as completely irrelevant. If Iran believes that specific goods must be identified as moving between the territories of the two States, then Iran's position on unsubstantiated and hypothetical future Iranian oil exports is all the more untenable.

15.62. Fourth, Iran's argument is, at its heart, grounded in mere speculation, and thus cannot serve as a basis for this Court to find a violation of Article X, paragraph 1.

15.63. For example, Iran alleges that, but for the United States attacks on the platforms, Iran would have returned the disabled Rostam and Sassan platforms to production prior to the imposition of the United States embargo. Yet the unavoidable fact is that for a long time the platforms had not been repaired and were not functioning. Assertions that they might soon have been repaired are sheer speculation.

15.64. Indeed, Iran has provided no contemporaneous records of its repair efforts or of its allegedly imminent preparations to resume production from the platforms to support its assertion. With respect to the Rostam platform, the best Iran can do is to have two NIOC officials baldly assert in their statements that "based on the works schedule" it was "expected" that normal production would resume (Reply of Iran, Vol. IV, Hassani Statement, para. 16; Sehat Statement, para. 16). Both officials attach to their statements identical copies of the only document — the only document — that Iran has submitted to support this assertion, a document entitled "Production Commissioning of Platforms R4 & R7" (Reply of Iran, Vol. IV, Hassani Statement, Ann. D; Sehat

Statement, Ann. C). This document appears only to be a planned schedule of improvements and repairs. There is no indication of when this schedule for repairs was created; it could have been created well before October 1987. There is certainly no indication that any of the repairs were actually carried out or carried out on time. And finally, the document contains no date for the actual resumption of oil production. If Rostam really was on the verge of being operational, surely Iran could have produced better evidence than this.

15.65. With respect to the Sassan platform, one NIOC official again baldly asserts in his statement that "works were about to be completed at the time of the U.S. attack", but this time Iran submits no supporting documentation whatsoever (Reply of Iran, Vol. IV, Emami Statement, para. 6). Again, if Sassan really was on the verge of being operational, surely Iran could have produced better evidence.

15.66. A further reason this Court should not enter into the world of speculation is that, on the facts of this case, it is not at all clear where that speculation should lead. Iran's alleged plans to complete repairs on Rostam and Sassan assumes the absence of subsequent Iraqi attacks. Yet, as Iran admits, Iraq was fully capable of attacking these particular platforms, had already repeatedly attacked these platforms, and was intent upon keeping the platforms non-operational (Reply of Iran, paras. 3.16 and 3.31-3.32; CR 2003/6, pp. 52-53). In fact, Iran's own evidence shows that Iraq conducted dozens of attacks upon Iranian oil facilities in the Lavan and Sirri areas up through mid-1988 (see Reply of Iran, Vol. IV, Hassani Statement, Ann. B). There is every reason to believe that, if the platforms had been repaired, Iraq would have attacked them again to keep them from producing oil. So, if we are to speculate, why not speculate that Iran's failure to make these platforms operational was due to an Iranian concern that Iraq would then immediately attack them? Or why not speculate that Iran's failure to make these platforms operational was because Iran was unable to maintain its repair schedules at all the facilities Iraq had attacked prior to the United States actions? Or why not speculate that Iran did not need the platforms for oil exports given the limitations on Iran from its OPEC quota, which Mr. Bettauer will discuss later?

15.67. In sum, Iran contends, without offering any serious supporting evidence, that the Rostam and Sassan platforms *might* have resumed operations and that those operations *might* have resulted in exports to the United States. This is an entirely speculative and undocumented

contention, and it is characteristic of Iran's entire claim that there was commerce between the territories of Iran and the United States that was impeded by the attacks on the platforms.

15.68. Should the Court give credence to such speculation? Under this Court's jurisprudence, Iran has the burden of proving its claim. Mere speculation of this type cannot provide the basis for a finding that a State has violated its international legal responsibilities. In the 1989 *ELSI* case, the United States claimed that two of its corporations were deprived of the right to place their subsidiary through an orderly liquidation, but a Chamber of this Court found that the treaty in that case — a treaty much like the 1955 Treaty in this case — was not violated because Raytheon's lost opportunity was "purely a matter of speculation" (*Elettronica Sicula, S.p.A. (ELSI), I.C.J. Reports 1989*, p. 62, para. 101). In light of the *ELSI* case, this Court should not accept Iran's theory that a violation of Article X may be predicated on "potential" oil commerce with the United States.

Conclusion

15.69. Mr. President, Members of the Court, allow me briefly to summarize my presentation. The United States military actions did not destroy any oil at all. Moreover, the oil platforms at issue in this case did not produce a product capable of being exported, and did not transport or store a product of any kind. As such, the facts pled by Iran regarding the United States actions against the platforms have not met the Court's 1996 test regarding the type of actions capable of impeding the "freedom of commerce".

15.70. Moreover, Iran has not proven that any crude oil from these platforms actually entered into commerce "between the territories" of Iran and the United States. In fact, no crude oil did, either because the relevant platforms were not operational or because the United States oil embargo precluded such commerce. Any crude oil sold by Iran to Europe was commingled with crude oil from other sources, it was refined, it was transformed into an entirely new product. Thereafter, some of those European products may have reached the United States, but only as the result of commercial transactions regarded under international law as solely between Europe and the United States.

15.71. In the end, Iran's whole claim under Article X rests on speculation: speculation about specific crude oil leaving these three oil platforms before and after the United States actions; speculation about repairs to the platforms and about there being no further Iraqi attacks; speculation that Iranian crude oil in Europe, after this extensive reprocessing would then make its way as refined oil products to the United States.

15.72. In short, Mr. President, Iran's claim is no more substantial than Mr. Odell's tiny grain of wheat. And as such, Iran's claim clearly cannot be sustained.

15.73. Thank you, Mr. President. I now ask you to call on Mr. Bettauer to continue our presentation.

The PRESIDENT: Thank you, Professor Murphy. I now give the floor to Mr. Bettauer.

Mr. BETTAUER:

16. UNITED STATES CONDUCT DID NOT VIOLATE ARTICLE X, PARAGRAPH 1 PART II

Introduction

16.1. Thank you Mr. President. Professor Murphy has just explained to the Court two important reasons why United States actions in relation to the oil platforms did not violate Article X, paragraph 1. As Professor Murphy mentioned, there are two other important reasons for concluding that United States actions did not violate this provision.

— *First*, even if there were any effects on Iranian oil commerce that might potentially have been caused by the United States actions against the platforms, Iran has not shown and cannot show that such incidental effects are a legally sufficient basis for a finding of breach.

— *Second*, it is clear that the oil platforms — regardless of whether their traditional use constitutes "commerce" — were in fact being used in support of ongoing offensive military activity directed against United States interests and the interests of other States as well. Such non-commercial activities cannot be shielded by, and benefit from, the "freedom of commerce and navigation" clause in Article X, paragraph 1.

I will explain these two points in my presentation today.

United States actions had no relevant or legally cognizable effect on Iran's international commerce in oil

16.2. First, not only has Iran submitted no evidence that the United States military actions impeded oil exports from these particular platforms to the United States, it has submitted no evidence that these actions affected *any* Iranian oil exports. Rather, the United States has provided documentation demonstrating that, in reality, the overall level of Iranian oil exports was not affected in any way by the events at issue in this case.

16.3. As a member of the Organization of Petroleum Exporting Countries, or OPEC, Iran agreed to restrict its production capacity by accepting certain quotas. In spite of damage to its oil platforms resulting from United States actions, Iran continued to export oil at the approximate level of its OPEC quota throughout the period (Exhibit 212). And in spite of Iran's inability to use the Rostam, Sassan, and Sirri platforms to produce oil, Iranian officials insisted that Iran continued to have the capacity to produce more oil than it could sell. Mr. Aghazadeh, Iran's Oil Minister, stated at the 10 December 1987 press conference that Iran had excess oil capacity, indeed, "a substantial potential for higher production" (Exhibit 212, Exhibit C). He reaffirmed this position nearly three years later, noting that Iran could increase its oil production if desired by 500,000 barrels (Exhibit 212, Exhibit D). Since Iran abided by its quota and did not increase its exports despite asserting that it had the capacity to do so, Iran cannot claim that its exports were adversely affected because it was denied additional excess capacity that would have lain idle.

16.4. Now, Iran responded last week that the United States argument was "very curious" because, in its view, Iran should have the choice among local sources for its production of crude oil and because the United States is not in a position to invoke OPEC quotas because they are undertakings that Iran had with third parties. These arguments miss the point. We make no legal assertion concerning Iran's OPEC undertakings, nor do we contest that the Sirri platform became unavailable as a source for extraction of crude oil after the United States action in April 1988. Rather, our point is that Iran itself, in authoritative contemporaneous statements, said that it had excess unused oil production capacity. The fact that Iran had excess capacity may be explained, in whole or in part, by the OPEC quota. Whatever the case, Iran simply has not shown that it would have exported any more oil than it in fact exported had the United States actions not occurred.

There is every reason to think that it would not have exported more oil, if you read Mr. Aghazadeh's statements.

16.5. Since Iran cannot show an overall adverse effect on its oil trade, it attempts to show more limited disruptions in its foreign commerce in oil. For example, Iran has stated "Iran's oil would often have been sold prior to its actual production under long-term contracts" (Reply of Iran, para. 3.11). Iran went so far as to say "the oil from these oilfields was assigned to supply sales under specific contractual arrangements to specific customers (for example, customers would buy a specific number of tons of Salman crude, or Nasr crude)". According to Iran, "[t]he destruction of the platforms necessarily interrupted these contracts and thus prevented Iran from exercising its freedom of commerce" (Memorial of Iran, para. 3.68).

16.6. Mr. President, if these assertions are true, then why has Iran not produced any examples of contracts that it was unable to perform because of United States actions? There is no evidence before this Court that Iran was unable to meet its contractual obligations or, in fact, not able to sell much more oil than it actually did during the relevant period. As Professor Murphy explained, moreover, an adverse effect on its trade with countries other than the United States would not be enough to sustain a violation of Article X, paragraph 1.

16.7. It seems clear, therefore, that there was no adverse effect on Iranian overall oil exports as a result of damage to the platforms — let alone any adverse effect on commerce between the territories of Iran and the United States.

16.8. Indeed, as Iran appears to recognize, any actual effects on commerce in oil between the territories of Iran and the United States resulted from the imposition of the 1987 United States oil embargo, not from the destruction of the platforms at issue in this case. Iran's Reply emphasizes the damage it suffered as a result of the embargo: "when sanctions were imposed by the United States in October 1987, Iran found itself with a surplus crude oil production of approximately 345,000 bpd (barrels per day), which until then had been imported to the United States" (Reply of Iran, para. 3.24). That, however, is irrelevant to this case — as Professor Murphy noted earlier, the legality of the United States embargo is not at issue here.

16.9. The fact that Iran has not proven any effects at all of the United States actions on United States-Iranian commerce, let alone on Iranian trade in oil in general, should put Iran's claim

to rest. However, even if, purely for the sake of argument, we assume that there may have been some minimal or indirect effect of the United States actions on commerce between the territories of the two countries, any such effect would be too remote and inconsequential to constitute a violation of Article X, paragraph 1.

16.10. It is not enough to allege simply a linkage between United States military action against the oil platforms and a purported adverse effect to its oil exports. Even if there is a conceivable relationship, that is not enough. Rather, Iran must show that the relationship is direct and consequential, and that it is not remote. Iran agrees with this principle, since Iran's counsel stated last Wednesday that it views the United States as responsible for all the consequences flowing from conduct engaging State responsibility "which are not too indirect or remote" (CR 2003/8, p. 42, para. 6).

16.11. It is well established that State responsibility will not lie for speculative, remote or inconsequential impacts. In a different context, an arbitral tribunal constituted under the North America Free Trade Agreement recently said:

> "The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable." (Partial Award, 7 August 2002, Methanex Corp. *v.* United States of America, para. 138, 14 *World Trade and Arbitration Materials* 109 (2002), also available at http://www.state.gov/documents/organization/12613.pdf (tribunal chaired by Van Vecten Veeder; other members were William Rowley and Warren Christopher).)

16.12. The International Law Commission took the same view — that State responsibility is not determined simply on the basis of "factual causality" — when it adopted its Draft Articles on State Responsibility in 2001.

16.13. In its Commentary on Draft Article 31, the Commission states that: "[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too 'remote' or 'inconsequential' to be the subject of reparation." (*Report of the International Law Commission*, fifty-third session, United Nations doc. A/56/10, Chap. IV (E) (2), p. 227 (2001); *see also* J. Crawford, Special Rapporteur, Third

Report on State Responsibility, United Nations International Law Commission, fifty-second session, at 15-16, para. 28, United Nations doc. A/CN.4/507 (2000).)

16.14. The same view has been explicitly acknowledged by numerous international tribunals, including the German-United States Mixed Claims Commission, which applied the rule in treaty interpretation (*Administrative Decision No. II (U.S.* v. *Germany)*, 7 *RIAA* 23, 29-30 (1923)).

16.15. While Iran has actually proved no adverse effect to freedom of commerce between the territories of Iran and the United States, even the adverse effect it alleges without proof is clearly too remote to sustain its claim. Upon close scrutiny, Iran's allegations are that the United States military actions had some minimal or indirect effect on Iranian oil exports. For the reasons I have stated, such allegations must fail.

The use of the platforms for offensive military activities precludes recovery under Article X, paragraph 1

16.16. Let me now turn to the second point of this presentation. Iran's claim against the United States under the "freedom of commerce" clause cannot be sustained because Iran's use of the platforms for offensive military purposes deprives Iran of the ability to sustain such a claim. Let me explain.

16.17. Iran has repeatedly argued that Article X, paragraph 1, must protect the platforms from damage because they were "commercial installations" (Observations and Submissions of Iran on the United States Preliminary Objection of Iran, para. 1.28; Reply and Defence to Counter-Claim of Iran, para. 3.1; CR 2003/8, p. 45, para. 15). Mr. President, at the time in question, Iran was using the oil platforms for offensive military purposes against neutral shipping interests. I demonstrated this yesterday. As such, the platforms cannot be considered solely, or in the case of the non-functioning Rostam and Sassan platforms, even primarily, commercial installations. Whatever their civilian or possible defence use, my point is that they were in fact put to an offensive military use. It would be unwarranted to read Article X, paragraph 1, to provide a guarantee that offensive military activities in which Iran engaged could be conducted without interference. A guarantee of "freedom of commerce" between two States cannot have been

intended to shield one of those State's military activities against the other. That would turn completely on its head the meaning and purpose of the provision.

16.18. Nor does the fact that Sirri was commercially operational or that other platforms were allegedly under repair change this conclusion. Indeed, even if the Court considered that the platforms were used for both commercial and military purposes at the time of the United States actions, it should not read Article X, paragraph 1, so that any commercial activity or dormant commercial purpose could shield offensive military activity. And, indeed, a shield they were, as is evidenced by Iran's own Naval Orders for Deployment of Observers to the Oil Platforms, which we have submitted as Exhibit 115. As we saw yesterday, those military orders provide that the military personnel on the platforms "will pass as NIOC (National Iranian Oil Company) employees and not use military uniforms".

16.19. Moreover, despite its claims that these were commercial installations, as I demonstrated yesterday, Iran itself regarded these platforms as military facilities. Iran's own documents submitted as evidence in this case and Iran's own pleadings make this clear. Iran regarded the platforms as part of its military infrastructure, with the objective of tracking the movement of all foreign vessels in their vicinity, communicating about them with military headquarters and other military units, and facilitating, supporting and conducting offensive military operations. The evidence is overwhelming and there just can be no doubt about this.

16.20. In addition, Iran's own pleadings leave no doubt that the platforms had both personnel and equipment to operate as offensive military facilities (Reply and Defence to Counter-Claim of Iran, Vol. IV: Statement of Mr. Hassani, para. 25, concerning all three platforms; Statement of Mr. Sehat, paras. 20-21, concerning Rostam; Statement of Mr. Salmanian, para. 1, concerning Rostam; Statement of Mr. Ebrahimi, paras. 5-6, concerning Sassan; and Statement of Mr. Alagheband, paras. 12-13, concerning Sirri; CR 2003/6, p. 46, paras. 34-35).

16.21. As I have already noted, the United States submits that the "freedom of commerce" cannot be used to shield such offensive military activities. Iran makes a similar point with respect to pleasure craft and vessels conducting scientific investigations (Further Response to the United States Counter-Claim of Iran, para. 6.13; Reply and Defence to Counter-Claim of Iran, para. 6.9). Of course, such vessels can be used for commercial, pleasure, or scientific purposes, on

the one hand, or military purposes, on the other — what matters is how a vessel or facility is used, *not* its normal function. Thus, if military personnel and equipment are stationed on a platform merely to protect it, that would support the commercial purpose of the platform. But where military personnel and equipment are deployed to conduct offensive military activities against neutral shipping, it would be completely at odds with logic to think that their unlawful activities can be immunized by Article X, paragraph 1.

16.22. The concept of considering the use to which a facility is put is not novel. Take, for example, by way of analogy, the law of war. Under both conventional and customary international law, civilian objects may not be made the object of attack. However, under customary international law, a civilian object may be attacked if it is used to make an effective contribution to military action (see Art. 52, para. 2, of Additional Protocol I to the 1949 Geneva Conventions). Likewise, the Annex to the Fourth Hague Convention of 1907 provides that civilian objects may be targeted when used for a military purpose (Art. 27 of the Annex, Regulations Respecting the Laws and Customs of War on Land, to the 1907 Hague Convention (IV); Art. 5 of the 1907 Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War). For similar reasons, this Court should recognize that the platforms, even if it is determined that they are in part commercial in character, lost any status they may have had under Article X, paragraph 1, when they were used to attack United States and other neutral vessels in the Gulf.

16.23. In sum, the evidence presented precludes extending the coverage of Article X, paragraph 1, to the oil platforms in question, since they were being used to launch and support offensive military attacks on neutral shipping.

Conclusion

16.24. Mr. President, we are coming to the end of our presentation on Article X, paragraph 1. I respectfully submit that the United States has demonstrated today, and in its pleadings, that the Court should reach but one conclusion with respect to Iran's remaining claim in this case: that there is no basis for United States liability under Article X, paragraph 1, of the 1955 Treaty. The Court should conclude that the United States has not violated this provision for the reasons set out

in our written pleadings and the reasons Professor Murphy and I have reviewed for you this morning.

16.25. Mr. President, this concludes the United States presentation for today. I ask that you give the floor to my colleague, Professor Weil, tomorrow morning. Thank you.

The PRESIDENT: Thank you, Mr. Bettauer. The Court now adjourns until tomorrow morning, when it resumes at 10 o'clock.

The Court rose at 1 p.m.