In the Name of God

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OIL PLATFORMS

(ISLAMIC REPUBLIC OF IRAN V. UNITED STATES OF AMERICA)

FURTHER RESPONSE TO THE UNITED STATES' COUNTER-CLAIM

Submitted by the

ISLAMIC REPUBLIC OF IRAN

Volume I

24 September 2001

TABLE OF CONTENTS

PART I

INTRODUCTION

1.1 This Further Response to the United States' Counter-Claim is filed in accordance with the Court's Order of 28 August 2001, which has authorized Iran to submit an additional written pleading. In accordance with the Court's Order, this pleading relates solely to the United States' counter-claim.

CHAPTER I

PRELIMINARY PROCEDURAL ISSUES

1.2 At the outset, Iran must raise two procedural issues, with regard to certain aspects of which Iran has also addressed a separate letter to the Court.

1.3 The first issue relates to the attempt by the United States to introduce new claims in the Rejoinder and to reserve the right "to further develop all pertinent facts and arguments" regarding vessels which are not even covered by the counter-claim as set out in the Rejoinder[1]. Iran will show in Chapter V, below, that the new claims that are included in the Rejoinder are legally inadmissible[2], as would be any future new claims such as those foreshadowed by the United States' purported reservation of rights.

1.4 Iran submits moreover that the time has now passed for the United States to produce any new evidence. If the United States had had any further facts or arguments to develop, it should have done so in its Rejoinder, which was the United States' final written pleading in this case. The written phase should now be deemed to be closed, and the Court should refuse to admit any further evidence in this regard.

1.5 It must be stressed that this case does not concern recent or continuing events. On the contrary, the incidents complained of by the United States occurred a decade before the filing

---

1 U.S. Rejoinder, para. 6.05, fn. 404.

2 *See*, Chap. V, Section 3.B, below.

of the United States' Counter-Memorial. There can be no excuse for the United States' failure properly to specify its counter-claim at the outset. The United States' attempt to introduce new claims at this final stage of the written pleadings is symptomatic of the lack of seriousness of the counter-claim, which in Iran's submission is no more than a bargaining ploy aimed at securing the discontinuance of the case. Moreover it prejudices Iran's right of defence and should not be countenanced by the Court.

1.6 For these reasons, and for the reasons more fully developed in Chapter V, below, Iran has refrained from responding in detail either to the United States' new claims relating to two additional vessels or to its threat of new claims relating to further vessels.

1.7 The second preliminary procedural issue that arises concerns the apparent withholding of evidence by the United States.

1.8 In its Counter-Memorial[3] and again in its Rejoinder[4], the United States gives notice that unidentified "U.S. analysts" will give expert evidence in the oral phase of the case regarding satellite imagery. Neither the Counter-Memorial nor the Rejoinder, which was the United States' final written pleading in these proceedings, was however accompanied by any written report relating to such expert evidence.

1.9 In Iran's view, it is irregular and inappropriate for a party to proceedings before the Court to call expert evidence without the expert in question (a) being sufficiently identified in advance, with appropriate indications of the area of expertise; and (b) having first presented a written report in the regular course of the written procedure.

1.10 In the event the United States does seek to introduce new allegations or evidence in relation to either of the above two matters during the oral phase of the proceedings, and in the event the Court should deem such allegations or evidence to be admissible, Iran reserves the right to respond thereto both in the course of the oral proceedings and in writing.

---

3 U.S. Counter-Memorial and Counter-Claim, para. 1.75.
4 U.S. Rejoinder, para. 1.52.

CHAPTER II

STRUCTURE OF THIS PLEADING

2.1 Iran's Further Response is divided into four parts. Following this introductory Part I, Part II deals with the factual issues. Chapter III places the incidents which are the subject of the United States' counter-claim in their proper context - a context which the United States continues to ignore but which is of fundamental importance in considering the counter-claim. Chapter IV consists of a statement of facts with regard to the specific incidents relied upon by the United States in its counter-claim, demonstrating that the counter-claim is based upon mere allegations which are unsupported by evidence.

2.2 Part III addresses the legal issues raised by the counter-claim. Chapter V will deal with questions of jurisdiction and admissibility. Chapter VI will show that Iran did not breach its obligation under Article X(1) of the Treaty of Amity to guarantee freedom of commerce between the territories of the two Parties. In Chapter VII, Iran will show that even if the Court were to decide (contrary to the submissions in the preceding Chapters) that the counter-claim should not be dismissed, there are additional legal reasons which would exclude the responsibility of Iran. This is quite apart from the reservation concerning conduct "necessary to protect its essential security interests", covered by Article XX(1)(d) of the Treaty of Amity; this is discussed briefly in Chapter VIII, where Iran's reservation on the point is maintained.

2.3 Finally, Part IV presents Iran's submissions with regard to the United States' counter-claim.

2.4 In addition to the Further Response (Volume I) there is one volume of evidentiary materials attached to this pleading (Volume II).

PART II

FACTUAL ISSUES

CHAPTER III

THE GENERAL CONTEXT

Section 1. Introduction

3.1 The United States defines its counter-claim in this case as follows:

> "... in attacking vessels in the [Persian] Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty"[1].

3.2 The substance of this counter-claim appears to have two aspects: (i) a series of specific claims involving individual vessels; and (ii) a generic claim that Iran's alleged actions created conditions that were dangerous and detrimental to U.S. maritime commerce and navigation.

3.3 The focus of this Chapter will be on the allegations of fact pertaining to the generic claim. Chapter IV will address the United States' allegations concerning the specific incidents.

3.4 With regard to its generic claim, the United States' version of the relevant factual background completely fails to take into account the context of the war, in which Iran was acting in self-defence against unprovoked aggression from its neighbour, Iraq.

3.5 The United States' presentation avoids, *inter alia*, the following vital facts. First, the United States ignores Iraq's responsibility for the conflict as a whole and the fact that it was Iraq - and not Iran - which was responsible for the so-called "tanker war". Iran was a victim of

---

[1] U.S. Rejoinder, Submissions, p. 227.

Iraqi aggression and Iran was the main victim of the tanker war. Iran had no possible interest in endangering the Persian Gulf, through which nearly all its trade passes.

3.6 Second, the United States accuses Iran of attacking neutral shipping while contenting itself with the plainly false assertion that it was "clearly a neutral with respect to [the] conflict"[2]. It thus ignores its own non-neutral behaviour in the Persian Gulf, as well as the fact that certain States, in particular Saudi Arabia and Kuwait, were *de facto* allies of Iraq. The United States dismisses Iran's discussion of such facts as "diversionary tactics" which have "no legal effect on this case"[3]. On the contrary, as Iran will show below, these facts are central to the issues in this case.

3.7 Finally, the United States misrepresents Iran's actions in the Persian Gulf during the conflict. In this context, it ignores the evidence submitted by Iran showing that Iran's commerce was the major sufferer in the conflict, that Iran sought to protect its commerce by legitimate means, and that it did not target U.S. vessels.

3.8 Each of these points will be addressed below. As the Court will recall, Iran has already set out the relevant background facts in detail in its earlier pleadings[4]. Only the main points will be summarised below.

Section 2. Iraq's responsibility for the conflict

3.9 Iran has discussed in some detail in its earlier pleadings the scale and nature of Iraq's aggression, involving occupation of Iranian territory and the use of chemical weapons against civilian populations[5].

---

2 *Ibid.*, para. 5.10, fn. 316.

3 *Ibid.*, paras. 1.09-1.10 and 5.10.

4 *See*, Iran's Memorial, Part I, Chaps. II and III; Iran's Observations and Submissions on the U.S. Preliminary Objection, Annex; and Iran's Reply and Defence to Counter-Claim, Chap. 2.

5 *See*, Iran's Memorial, paras. 1.58-1.74; and Iran's Reply and Defence to Counter-Claim, paras. 2.8-2.14. *See*, also, *ibid.*, Freedman Report, paras. 57-66.

3.10 In this context the following points should be noted:

- Throughout the conflict Iran called on the Security Council to recognise the Iraqi aggression, to demand Iraqi withdrawal to internationally recognised boundaries, to condemn Iraqi chemical weapons attacks, and to condemn Iraq's attacks on shipping in the Persian Gulf.

- It was not until 1987, in Resolution 598, adopted under Articles 39 and 40 of the United Nations Charter, that the Security Council recognised that a breach of the peace had occurred. Iraq's initial attack had occurred seven years earlier[6].

- Subsequent to Resolution 598 negotiations for a cease-fire were pursued by Iran until January 1988, when Iran's Foreign Minister wrote to the Secretary-General agreeing to the Secretary-General's cease-fire implementation plan[7].

- Iran had repeatedly warned that Iraq would fail to abide by its purported commitment to a cease-fire, and would use the opportunity of any such cease-fire to repeat and further its aggression against Iran. This is exactly what happened. Iraq flouted the cease-fire by (i) carrying out further Scud missile attacks on Iranian cities; (ii) making further incursions into Iranian territory, and occupying even larger areas than in its September 1980 invasion; and (iii) renewing its chemical attacks on civilian populations[8]. It was not until August 1988 that a cease-fire was established. Iraqi occupation of Iranian territory did not end until August 1990 when Iraq invaded Kuwait.

3.11 The conclusion that Iraq was fully responsible for starting and continuing the conflict was borne out by the Secretary-General's Report rendered pursuant to paragraph 6 of Resolution 598. The inclusion of this paragraph in Resolution 598 had consistently been one of Iran's main demands. It called upon the Secretary-General:

---

6 *See*, Iran's Memorial, Exhibit 24.

7 *See, e.g.*, Iran's Memorial, paras. 1.64-1.69.

8 *See, ibid.*, paras. 1.69-1.71.

> "... to explore, in consultation with Iran and Iraq, the question of entrusting an impartial body with inquiring into responsibility for the conflict and to report to the Security Council as soon as possible"[9].

3.12 As a result of independent investigations carried out in implementation of paragraph 6 of Resolution 598, the Secretary-General issued a Report on 9 December 1991 which placed full responsibility for the entire conflict on Iraq. The Report noted that:

> "... the war between Iran and Iraq, which was going to be waged for so many years, was started in contravention of international law, and violations of international law give rise to responsibility for the conflict"[10].

It went on to note that the specific concern of the international community in this context was "the illegal use of force and the disregard for the territorial integrity of a Member State"[11].

3.13 The Report then gave its finding that the "outstanding event" under these violations was:

> "... the attack of 22 September 1980 against Iran, which cannot be justified under the Charter of the United Nations, any recognized rules and principles of international law or any principles of international morality and entails the responsibility for the conflict"[12].

The Report pointed out that Iraq's explanations for its actions on 22 September 1980 "do not appear sufficient or acceptable to the international community"[13] and added that Iraq's aggression against Iran "which was followed by Iraq's continuous occupation of Iranian territory during the conflict" was "in violation of the prohibition of the use of force, which is regarded as one of the rules of *jus cogens*"[14]. Iran's position, therefore, was eventually fully vindicated.

---

9 *See, ibid.*, Exhibit 24, para. 6.
10 *See, ibid.*, Exhibit 42, para. 5.
11 *Ibid.*
12 *Ibid.*, para. 6.
13 *Ibid.*
14 *Ibid.*, para. 7.

3.14 It is significant that Iraqi responsibility was established in a report rendered pursuant to a Security Council Resolution adopted under Articles 39 and 40 of the Charter. It is also significant that the report determined legal responsibility for the entire conflict, arising not only from the initial act of aggression but also from the subsequent continuous occupation of Iranian territory.

3.15 The Court will recall that this was probably the longest and most destructive conflict of the second half of the 20th century. The original Iraqi invasion extended along a 450-mile front into an area containing some 90 percent of Iran's oil production. Throughout the conflict Iran's civilian population was subject to repeated missile and chemical weapon attacks. As early as 1981 Iran protested Iraq's attacks, and in particular its chemical attacks, to the Security Council. Independent reports by an expert commission established by the Secretary-General were issued in 1984, 1985, 1986, 1987 and 1988. Each confirmed Iraqi use of chemical weapons against military and civilian targets. None found evidence of chemical attacks by Iran[15]. Casualties suffered by Iran during the course of the conflict were enormous, leaving a legacy of loss and injury which is still felt by its people. The overall economic cost of the war to Iran is incalculable; on highly conservative assumptions, the direct cost was in the order of U.S. $ 1,000 billion.

3.16 In Iran's submission, the scale and nature of Iraq's aggression are fundamental to an appreciation of this case. As will be seen below, they are legally significant in the context of the United States' counter-claim.

Section 3. Iraq's responsibility for the tanker war

3.17 Within the overall context of an aggression which Iraq started and maintained, it was also Iraq which initiated and pursued the tanker war. A Lloyd's Maritime Information Service report filed by the United States lists some 546 incidents throughout the conflict[16]. The same report indicates that more than 50 Iraqi attacks - and no Iranian attacks - occurred in the period from May 1981 until May 1984. These Iraqi attacks were against vessels trading with Iran,

---

15 Iran's Memorial, Exhibits 11 and 12.

16 U.S. Counter-Memorial and Counter-Claim, Exhibit 9.

and included vessels of various nationalities, including Saudi Arabian, British, Liberian, Panamanian and Iranian flagged vessels.

3.18 Iraq argued that its attacks were justified under rules of international law. Iraq's Permanent Representative at the United Nations stated in June 1986 Iraq's position that the rules of international law:

> "... permit attacks on vessels engaged in acts of trade or unneutral service with a belligerent in a situation of an armed conflict"[17].

Iraq also argued that:

> "... lifting Iranian oil, and consequently providing Iran with financial resources which enable it to continue its aggression... is impermissible trade under international law in the context of the armed conflict between Iran and Iraq"[18].

3.19 In response, Iran condemned the Iraqi attacks. Iran's Permanent Representative at the United Nations called on the international community to take steps to secure freedom of commerce and navigation in the Persian Gulf:

> "In order to internationalise the war, Iraq has been openly announcing its indiscriminate attacks on unarmed commercial vessels and oil tankers in the Persian Gulf with great pride and has disrupted the peace and security of the Persian Gulf, undermining the freedom of navigation and commerce in this most strategic part of the world, thereby endangering the security and interests of nations in the region.
>
> On the other hand, since the inception of the imposed war, the Islamic Republic of Iran has made every effort to prevent the spill-over of the war into the Persian Gulf, while maintaining full respect for the freedom of navigation. I wish to reiterate that since the initiation of Iraqi attacks on ships in the Persian Gulf, we have repeatedly announced in international fora the readiness of the Islamic Republic of Iran to co-operate in every possible way with the Secretary-General of the United Nations and/or other relevant international organisations in securing the freedom of navigation in and the security of the Persian Gulf"[19].

---

17 *See*, U.S. Counter-Memorial and Counter-Claim, Exhibit 2, p. 29.
18 *Ibid.*
19 *Ibid.*, p. 30.

3.20 In the event, as Sir Anthony Parsons, then British Permanent Representative at the United Nations, has noted:

> "... there was no specific, international condemnation of the Iraqi attacks and no serious attempts made to persuade or coerce Iraq into desisting from them"[20].

Proposals for condemnation of Iraqi attacks and for multilateral or U.N.-sponsored efforts to protect shipping foundered because it was felt that Security Council approval would not be forthcoming. The cardinal reason for this was U.S. opposition. Javier Perez de Cuellar, then Secretary-General, noted that the United States was "unremittingly hostile to Iran, and therefore it was not inclined to support any Security Council action that might be favorable to Tehran"[21].

3.21 Iraq was responsible for bringing the war to the Persian Gulf, and responsibility was attributed to Iraq at all stages of the conflict for the vast majority of attacks. A number of characteristics of these attacks should be highlighted:

- Iraqi attacks were carried out irrespective of the flag of the vessel. Vessels of many different flags are known to have been attacked by Iraq, including Saudi and Kuwaiti flagged vessels and even a U.S. warship, the *U.S.S. Stark*[22].

- Iraq's attacks occurred throughout the Persian Gulf, and not just in areas close to Iranian ports[23].

- Iraq had weapons capable of causing massive destruction, including Silkworm missiles[24].

---

20 Iran's Observations and Submissions on the U.S. Preliminary Objection, Exhibit 16, p. 19.
21 Iran's Reply and Defence to Counter-Claim, Exhibit 6, p. 178.
22 Iran's Reply and Defence to Counter-Claim, paras. 2.50, *et seq.*
23 *Ibid.*
24 *Ibid.*, paras. 4.57, *et seq.*

- The vast majority of attacks that occurred in the tanker war - especially those causing any substantial damage - involved attacks against Iranian shipping and vessels trading with Iran. It was commerce with Iran which was the prime target of the tanker war[25].

3.22 As noted above, Iran on several occasions called on the international community to take action against Iraqi attacks in the Persian Gulf. As Sir Anthony Parsons also noted, "Iran had no interest in endangering the sea lanes through which all her exports and most of her imports passed"[26]. This view is reflected by other commentators:

> "... the Iranians are the party most interested in keeping the [Persian] Gulf open to tankers... The United States could do far more to pacify the [Persian] Gulf, if that is what it really wants to do, by persuading Iraq to stop its attacks on Iranian shipping, which are what started and perpetuate the naval war in the [Persian] Gulf"[27].

Section 4. Kuwait and Saudi Arabia supported Iraq

3.23 It is a matter of notorious fact that both Kuwait and Saudi Arabia supported Iraq in its aggression against Iran, and Iran has cited substantial evidence to confirm this, including statements by senior U.S. officials. For example, a November 1987 Report to the U.S. Senate Committee on Foreign Relations noted that Kuwait had "chosen to serve as Iraq's entrepot and thus as its de facto ally"[28]. The same Report goes on to note:

> "Kuwait permitted the use of its airspace for Iraqi sorties against Iran, agreed to open its ports and territory for the transshipment of war materiel (mostly of French and Soviet origin), and joined with the Saudis in providing billions of dollars in oil revenues to help finance the Iraqi war effort. In clear and unmistakable terms, Kuwait took sides"[29].

---

25 *Ibid.*, paras. 2.15, *et seq.*
26 Iran's Observations and Submissions on the U.S. Preliminary Objection, Exhibit 16, pp. 19-20.
27 *See*, Iran's Memorial, Exhibit 34.
28 *Ibid.*, Exhibit 28, p. 27.
29 *Ibid.*, p. 37.

One commentator states that there were "500 to 1000 heavy trucks a day carting goods to Iraq" from Kuwait[30].

3.24 Kuwait's and Saudi Arabia's support was not just economic in nature. These countries also regularly allowed the use of their territory by Iraqi military forces. As noted above, the Senate Report refers to the use of Kuwaiti airspace for Iraqi attacks. Iran has submitted substantial evidence showing the use of Kuwait's Bubiyan island and Kuwaiti internal waters, ports and airbases by Iraqi forces[31]. Saudi Arabia also allowed Iraqi military aircraft to refuel in its territory[32]. Cordesman and Wagner, two U.S. commentators, note that Kuwait "seems to have allowed the Iraqi Navy to send small ships down the Sebiyeh waterway between Kuwait and Bubiyan Island" and thus gain access to the Persian Gulf[33]. There are numerous references to Saudi Arabia providing AWACS intelligence reports to Iraq[34]. Saudi Arabian forces even took part actively in the fighting. In 1984, apparently using U.S. intelligence data, the Saudi airforce downed an Iranian fighter[35].

3.25 Saudi Arabia and Kuwait also provided massive financial aid to Iraq for its war effort and under the War Relief Crude Oil Agreement committed themselves to providing to Iraq the proceeds of neutral zone crude sales[36]. By the end of the war "Baghdad owed the best part of 100 billion dollars to the oil-rich Arab states which had financed [its] war effort"[37].

3.26 These States were also direct or indirect suppliers of arms to Iraq. *Inter alia,* Saudi Arabia paid for five Super Etendard jet fighters delivered to Iraq by France. Both Kuwait and Saudi Arabia guaranteed the performance of foreign companies' defence contracts with Iraq[38]. The Report to the Senate Committee cited above refers to Kuwaiti ports being used for

---

30 Iran's Reply and Defence to Counter-Claim, Exhibit 4, p. 77.

31 *See, ibid.*, Statement of Gen. Fadavi, pp. 4-8.

32 *See, ibid.*, p. 8; and U.S. Counter-Memorial and Counter-Claim, Exhibit 1, p. 23.

33 Iran's Observations and Submissions on the U.S. Preliminary Objection, Exhibit 18, p. 278.

34 *See*, Iran's Reply and Defence to Counter-Claim, Freedman Report, para. 25(F).

35 Walker, G.K., "The Tanker War 1980-1988: Law and Policy", *International Law Studies*, Vol. 74, 2000, p. 53. *See*, Exhibit 1.

36 *See*, Iran's Memorial, Exhibits 25, 26 and 27, p. 105.

37 Iran's Reply and Defence to Counter-Claim, Exhibit 1, p. 55. Claims relating to some of these arrangements have been the subject of decisions rendered by the United Nations Compensation Commission. *See*, Exhibit 2.

38 Walker, *op. cit.*, p. 47. *See*, Exhibit 1.

transhipment of war material. Moreover, several States in the region were known to have issued end-user certificates for military material in fact destined for Iraq. Evidence produced in the Scott Report, an independent judicial enquiry into the British Government's arms sales practice to Iraq during this period, confirms this:

> "... the Iraqis have no problems over obtaining equipment thanks to the willingness of countries such as Saudi Arabia and Jordan to act as the notional end-user.
>
> ...
>
> An SIS Report dated 13 November 1986 reported information that end-user certificates had been supplied by Abu Dhabi (6 shipments), Jordan (11 shipments), Oman and Saudi-Arabia (1 shipment) for munitions which had been passed on to Iraq"[39].

In other words, not only were proceeds from the commercial maritime trade of a number of Persian Gulf States being used to finance the Iraqi war effort, but also there was significant trade in military equipment going to the ports of these countries, but destined ultimately for Iraq. Again, the United States is careful to avoid consideration of these issues.

3.27 Kuwait has repeatedly acknowledged and publicly apologized for its support of Iraq in the war. In an interview in September 1994, Kuwait's Foreign Minister stated:

> "I would like to use this opportunity for us to ask Iran publicly... for forgiveness for us having supported Iraq in the war against Iran from 1980 to 1988. We committed a great error then"[40].

Earlier, in August 1990 on a visit to Tehran, the Foreign Minister had expressed regret for the position taken by his Government in the war, as well as for the resolutions adopted by the Gulf Cooperation Council at the time, which he deplored and confirmed had been made under pressure from Iraq. A similar message was given in 1992 by another Kuwaiti official[41].

---

39 Iran's Reply and Defence to Counter-Claim, Exhibit 5, para. E2.14.
40 *Ibid.*, Exhibit 13.
41 *Ibid.*

Section 5. The United States' disregard of the obligations of a neutral

3.28 Notwithstanding Iraq's responsibility for the war and the nature of its attacks in the Persian Gulf, the United States supported Iraq both in the war and in its actions in the Persian Gulf. The United States adopted this position despite its profession of neutrality in the conflict.

3.29 It is well known, and widely confirmed by a variety of sources, including U.S. officials, that the United States supported Iraq diplomatically, politically, economically and militarily, while at the same time taking increasingly hostile actions against Iran. The United States also assisted Iraq in the tanker war.

3.30 Diplomatic and political support: The United States supported Iraq in the Security Council and elsewhere. As noted above, in the Security Council it opposed all attempts to identify Iraq as the aggressor or in any way to blame Iraq either for refusing to withdraw to internationally recognised boundaries, or for its actions in the tanker war, or for its use of chemical weapons[42]. The United States also acted to rehabilitate Iraq by taking it off its list of States supporting terrorism in 1982 and by resuming full diplomatic relations with it in 1984[43]. For the U.S. Defense Department's Director for Counter-Terrorism, there was no doubt about Iraq's continued involvement in terrorism. The true reason for removing Iraq from the list "was to help [Iraq] succeed in the war against Iran"[44]. Under U.S. law, the removal of Iraq from the list of States supporting terrorism and the renewal of full diplomatic relations allowed an increase in trade with Iraq, the granting of large U.S. financial credits, and the export to Iraq of dual-use equipment.

3.31 Economic assistance: As a result, trade between the United States and Iraq increased substantially during the course of the war. Between 1983 and 1989, trade between the two countries grew from $571 million to $3.6 billion[45]. Substantial U.S. Export-Import (EXIM)

---

42 *See*, also, Iran's Observations and Submissions on the U.S. Preliminary Objection, Annex, para. 10; and Iran's Reply and Defence to Counter-Claim, Freedman Report, para. 25(H).

43 *Ibid.*, para. 25(A) and (G).

44 Iran's Reply and Defence to Counter-Claim, Exhibit 7.

45 *Ibid.*

Bank and Commodity Credit Corporation credits were also granted to enable Iraqi purchase of U.S. goods, and as much as $730 million of direct exports of sensitive dual-use technology occurred[46].

3.32 Military assistance: The United States also provided direct and indirect military assistance to Iraq. This included sharing of intelligence information, joint military briefings and providing assistance to Iraq in obtaining weapons from third countries. These facts have already been referred to in Iran's pleadings and have not been contested by the United States[47]. The intelligence-sharing arrangement has been referred to explicitly in U.S. Congressional Records, its purpose being described there as to provide Iraq with "intelligence and advice with respect to the pursuit of the war"[48]. The AWACS assistance, either direct or through Saudi Arabia, is also well-attested[49]. The U.S.-supplied data was said to include satellite reconnaissance photos of strategic Iranian sites for targeting bombing raids, data on Iranian air force and troop positions, communications intercepts, and other vital military information[50]. One commentator notes that Iraq received:

> "... reports every 12 hours on the Iranian military activity on the ground - culled from the information gathered from the many American satellites orbiting the [Persian] Gulf and from the American Awacs - which were passed on to Baghdad via Riyadh. This information played a vital role in aiding the effectiveness of the operations mounted by Baghdad"[51].

These facts are confirmed by Iraqi sources[52]. They have also been confirmed under oath in judicial proceedings in the United States by Howard Teicher, a staff member of the U.S. National Security Council from 1982 to 1987:

> "CIA Director Casey personally spearheaded the effort to ensure that Iraq had sufficient military weapons, ammunition and vehicles to avoid losing the Iran-Iraq war... the United States actively supported the Iraqi war effort by supplying the Iraqis with billions of dollars of credits, by providing U.S. military intelligence and advice to

---

46 *Ibid.*, Freedman Report, para. 25(B), (C) and (D).
47 *See, e.g.*, Iran's Observations and Submissions on the U.S. Preliminary Objection, Annex, para. 12.
48 Iran's Memorial, Exhibit 47.
49 Iran's Reply and Defence to Counter-Claim, Exhibit 4, p. 120. *See*, also, *ibid.*, Freedman Report, para. 25(F).
50 *Ibid.*, Exhibit 8, p. 46.
51 *Ibid.*, Exhibit 4, p. 160.
52 *Ibid.*, Exhibit 9.

the Iraqis, and by closely monitoring third country arms sales to Iraq to make sure that Iraq had the military weaponry required. The United States also provided strategic operational advice to the Iraqis to better use their assets in combat"[53].

3.33 Arms sales: Apart from military and intelligence assistance, observers also confirm that the United States specifically encouraged arms sales to Iraq. One author reports a senior U.S. diplomat in Baghdad proposing that there be a "covert selective lifting" of U.S. "restrictions on third-party transfers of U.S.-licensed military equipment to Iraq"[54]. According to the same author such arms apparently were received by Iraq from Egypt, Jordan, Kuwait and Saudi Arabia and "[a]mong the weapons so supplied were TOW anti-tank missiles, Huey helicopters, small arms, mortars, and one-ton MK-84 bombs"[55]. At the same time as it was pursuing this policy of support for Iraq, the United States had put into place Operation Staunch against Iran in the spring of 1983. The aim of this policy was to stop or discourage all third States as far as possible from selling arms to Iran. Caspar Weinberger, then Secretary of Defense, confirmed that the aim of this policy was to limit Iran's "ability to secure weapons, ammunition, and other supplies"[56]. All such actions by the United States have to be considered in the light of the fact that Iran was the victim of aggression and that Iraq was responsible for the conflict. At a minimum, the United States had the obligation to act neutrally - to treat each belligerent equally and impartially. It manifestly failed to do so.

3.34 U.S. actions in the Persian Gulf: The United States directly supported Iraqi attacks in the Persian Gulf:

- First, there is evidence that the Iraqi policy of taking the war to the Persian Gulf was instigated by the United States. As one author notes:

  "American foreign-policy specialists helped Iraq evolve the strategy that came to be known as 'the tanker war', arguing forcefully for Iraqi attacks on shipping to and from Iran"[57].

---

53 *Ibid.*, Exhibit 10, para. 7. This statement was filed in an action before the Florida District Court. The United States, which was a party to the action, challenged Mr. Teicher's statement largely on the grounds of its irrelevance to that action.

54 *Ibid.*, Exhibit 8, p. 45.

55 *Ibid.*

56 *See, ibid.*, Exhibit 11, p. 1449.

57 Iran's Reply and Defence to Counter-Claim, Exhibit 3, p. 166. *See*, also, *ibid.*, Freedman Report, para. 19, fn. 17.

- Second, the United States assisted Iraq in specific attacks on vessels:

  "What happened... was that as the Iraqis flew their airplanes down the [Persian] Gulf, they would talk to our officers. As the relationship grew on a daily basis, the petty officers would give them the bearings and range of tankers that were trading with Iran, thus helping the Iraqis to choose their targets"[58].

  Iran has submitted the text of various intercepted communications between Iraqi and U.S. forces which confirm this, together with details of vessels that were attacked by the Iraqi forces as a result[59].

- Third, as noted above, the United States opposed any attempt by the international community to condemn Iraq for its attacks.

The main effect of such U.S. policy was to damage Iranian commerce. In such circumstances it is quite extraordinary for the United States to seek to bring a claim in this Court concerning Iran's alleged impeding of Iranian-U.S. commerce.

3.35 The United States appeared to justify Iraqi attacks on the basis that international shipping trading with Iran was a legitimate military target. Professor Freedman refers to President Reagan's statement in 1984 that "the enemy's commerce and trade is a fair target", contrasting that with attacks on vessels trading with "neutrals" like Saudi Arabia and Kuwait[60]. This stance explains why the United States would not support multilateral efforts to protect international shipping, such as the proposal to allow reflagging under the flag of the United

---

58 Friedman, A., *Spider's Web - Bush, Saddam, Thatcher and the Decade of Deceit*, p. 41. *See*, Exhibit 3.

59 *See*, Iran's Reply and Defence to Counter-Claim, Statement of Col. Rezai and related annexes; *see*, also, *ibid.*, Statement of Gen. Fadavi, para. 25 and Annex H.

60 Iran's Reply and Defence to Counter-Claim, Freedman Report, para. 71. President Reagan's distinction between vessels trading with the belligerents and vessels trading with Kuwait and Saudi Arabia is, however, spurious. As shown above, Kuwait and Saudi Arabia were allies of Iraq, directly supporting Iraq's aggression, and both countries were exporting oil on behalf of Iraq and were allowing their ports to be used for Iraqi supplies.

Nations[61]. Any such protection would have hindered Iraq's attacks on shipping trading with Iran.

3.36 In this context the United States' decision to reflag Kuwaiti tankers can be seen as another example of support by the United States for Iraq. This has been recognised by senior U.S. officials. The Assistant Secretary of Defense at the time noted that in reflagging Kuwaiti ships the United States "became *de facto* allies of Iraq"[62]. Senator Sam Nunn, Chairman of the Senate Armed Services Committee, made the same point, noting as follows with regard to the Administration's claim that reflagging was designed to ensure the free flow of oil and to promote freedom of navigation:

> "1. ensuring the free flow of oil to protect U.S. and world supply - but the free flow of Persian Gulf oil is not now being seriously challenged. Only about 1 percent of [Persian] Gulf shipping has been disrupted. In addition, Iran exports more oil than Kuwait, yet the United States has not expressed concern about the free flow of Iranian oil.
>
> 2. promoting freedom of navigation - but the challenges to freedom of navigation originate with Kuwait's ally Iraq. It is difficult to justify U.S. actions on this principle when America is indirectly protecting the interests of Iraq who started the 'tanker war' and who has conducted about 70 percent of the ship attacks, including attacks on vessels of America's allies"[63].

As one Congressman noted in considering U.S. reflagging policy:

> "The reality is that not only we are tilting toward Iraq, but we are trying to help Iraq win the sea war by guarding Iraqi and Kuwaiti shipping"[64].

3.37 The United States also took military action against Iran. Here intimidation and direct action were used. On countless occasions, U.S. military forces violated Iran's territorial sovereignty, infringed its airspace and intercepted its aircraft and naval vessels in violation of international law[65]. The United States also carried out electronic jamming of Iran's

---

61 Professor Freedman refers to the proposals to provide international protection to shipping or reflagging under a U.N. flag. *Ibid.*, para. 55.

62 Iran's Memorial, Exhibit 51.

63 *Ibid.*, Exhibit 32, p. 1467.

64 Iran's Reply and Defence to Counter-Claim, Exhibit 12, p. 107.

65 *See*, Iran's Memorial, Exhibit 31.

communications while at the same time openly communicating with Iraqi forces engaged in attacks against shipping[66].

3.38 U.S. official recognition of support for Iraq: U.S. policy was not determined by concerns for international shipping or freedom of navigation. Rather, it was part of an overall policy of support for Iraq, about which U.S. officials have been explicit. In general terms, Mr. H. Kissinger has stated frankly and with characteristic realism that "the Reagan and Bush administrations supported Iraq against Iran"[67]. In July 1987, a U.S. spokesman admitted that the United States had "an important stake in Iraq's continuing ability to sustain its defenses"[68]. Vice-President Bush stated that at the time, the United States was looking for means "to bolster Iraq's ability and resolve to withstand Iranian attacks"[69]. Assistant Secretary Korb noted that in reflagging Kuwaiti vessels the United States had a hidden agenda:

> "... when we went in, we wanted to ensure that Iran didn't win that war from Iraq. That was our real objective, and so we were doing a lot of things to ensure that we could teach the Iranians a lesson"[70].

Such statements by U.S. officials are of particular probative value in this case. They stand in complete contrast with the United States' professions of neutrality in its pleadings before this Court.

Section 6. Iran's position in the Persian Gulf

3.39 By way of background to its counter-claim, the United States makes the following specific assertions about Iran's actions in the Persian Gulf:

- That the international community repeatedly condemned alleged Iranian attacks on vessels trading in the Persian Gulf;

---

66 *See, ibid.*, and Exhibit 48; *see*, also, Iran's Reply and Defence to Counter-Claim, Statement of Col. Rezai.

67 Iran's Memorial, Exhibit 45.

68 *Ibid.*, Exhibit 49, p. 66.

69 *Ibid.*, Exhibit 50.

70 *Ibid.*, Exhibit 51.

- That Iran's officials acknowledged carrying out such attacks;

- That various press reports confirm Iran's responsibility for such attacks;

- That Iran deliberately targeted neutral vessels and specifically U.S. vessels.

3.40 With regard to the international community's attitude to the tanker war, as noted above, Kuwait has stated that the Gulf Cooperation Council only condemned Iran at the time under pressure from Iraq, and Kuwait has subsequently repeatedly apologised to Iran for its support of Iraq[71]. Furthermore, no State has brought any claim or action against Iran as a result of Iran's alleged attacks.

3.41 As also noted above, Iran on several occasions called for international efforts to end Iraq's hostile actions in the Persian Gulf or at least for condemnation of such attacks. Iran itself had no interest in a tanker war - it had more to lose than anyone else. However, there was no Security Council condemnation of attacks by Iraq.

3.42 The United States alleges that various Iranian officials admitted responsibility for carrying out attacks in the Persian Gulf. Iran denies that the statements of such officials, if read carefully and in their original language, reflect such an admission. Such statements have to be understood in context. They were made at prayer meetings or in radio interviews for the home audience at a time when there was a major threat to Iran's territorial integrity and when Iran's civilian population was itself under attack.

3.43 The only document produced by the United States in this regard which appears to be more specific is an internal Norwegian communication reporting upon a conversation that allegedly occurred between Mr. Sheikoleslam, Iran's Deputy Foreign Minister in 1988, and the Norwegian Ambassador[72]. Referring to that communication, Mr. Sheikoleslam has attested

---

71 *See*, para. 3.27, above.

72 U.S. Rejoinder, Exhibit 198.

that, while having no recollection of the discussion reported in the Norwegian communication, his colleague Mr. Kamyab did meet with the Ambassador a few days earlier[73]. The minutes of that meeting are attached to Mr. Sheikoleslam's affidavit. They show that the tone of the meeting was friendly and that, far from claiming responsibility for attacks on neutral vessels, Mr. Kamyab expressed regret for the killing of the captain of a Norwegian vessel by Iraqi forces. Mr. Sheikoleslam further states that he would not, and to the best of his recollection did not, expressly or by implication, accept any responsibility on the part of Iran for any attacks on neutral shipping.

3.44 With regard to the U.S. assertion that Iran targeted neutral vessels and that various press reports confirm Iran's responsibility for such incidents, the following general comments should be noted:

- First, as shown above, Iraq was responsible for the tanker war, and any hindrance of commerce in the Persian Gulf was recognised to be against Iran's interests.

- Second, by far the greatest sufferers in the tanker war were Iranian vessels and vessels trading with Iran.

- Third, Iran was engaged in extensive stop-and-search activities throughout the war in order to stop the illegal transport of goods destined directly or indirectly for Iraq[74]. These actions were consistent with international law and were recognised to be so[75]. In many instances vessels resisted stop-and-search. In some cases, Iranian forces were able to arrest and search the vessel in question. In others, although the vessel did not show that the goods were destined for Iraq, it was known that Iraq was the "end-user"[76]. One author notes that in a

---

73 *See*, Exhibit 4.

74 *See*, Iran's Reply and Defence to Counter-Claim, Statement of Gen. Fadavi, paras. 33-39.

75 For the U.S. attitude, *see*, Iran's Reply and Defence to Counter-Claim, Freedman Report, para. 34, fn. 58.

76 *See*, Iran's Observations and Submissions on the U.S. Preliminary Objection, Annex, para. 28; *see*, also, Iran's Reply and Defence to Counter-Claim, Statement of Gen. Fadavi, paras. 33-39.

period of 18 months Iran had searched over 1200 vessels and seized the cargo of thirty[77].

- Fourth, even the tables alleging attacks by Iran attached to the U.S. pleadings show that out of 230 alleged Iranian attacks, in over half of these no damage or only very slight damage was caused. In almost 200 cases there is no evidence of any serious injuries. There are only a handful of allegations of vessels being severely damaged as a result of alleged Iranian attacks[78]. Exhibits filed with the United States' Counter-Memorial confirm that Iran neither had the weaponry nor the intention to inflict major damage on other vessels:

> "[The air launched missiles used by Iran] are... of little use against large ships and can be fired only by day. At sea, the Iraqis had weapons of destruction, while the Iranians had only weapons of harassment... The Iranian navy did not have many ships suitable for the attack of merchantmen"[79].

- Fifth, overall the United States' attitude to the conflict contributed significantly to the tendency of vessels not to allow lawful stop-and-search activities by Iran. By its presence in the Persian Gulf and by its interference with Iranian naval forces, the United States obstructed Iran in the exercise of rights which were lawful both in terms of the *jus ad bellum* and the *jus in bello*. The tables of alleged Iranian attacks fail to make any distinction on this basis.

3.45 The United States continues to assert that Iran made use of oil platforms in the Persian Gulf for purposes of carrying out attacks on vessels. In this context it seeks to attach great significance to an operation plan found on the *Iran Ajr*, which it alleges shows that Iran was using the platforms for these purposes[80]. The United States appears not to have read the document in question. The document is in fact an operation plan (or contingency plan) stating what actions are to be taken by Iranian forces in the event that foreign forces, in

---

77 Iran's Memorial, Exhibit 30.

78 *See*, Iran's Observations and Submissions on the U.S. Preliminary Objection, Annex, para. 29. At least 70 percent of all attacks were, according to U.S. sources themselves, attributed to Iraq. *See*, Iran's Memorial, Exhibit 32, p. 1467.

79 U.S. Counter-Memorial and Counter-Claim, Exhibit 18, pp. 5-6; emphasis in original.

80 U.S. Rejoinder, Exhibit 203.

particular U.S. forces, were to join Iraq by attacking Iranian islands and oil production facilities in the Persian Gulf. The document is not an operation order, which calls for effective, specific action to carry out an operation plan. This terminology is well recognised and is identical to the terminology used by the United States in its military manuals[81].

3.46 It was in the context of this contingency plan that the oil platforms which might be subject to attack were to report on such matters as the movement of foreign vessels in their vicinity, enemy mine-laying activity, steps to occupy the oil-producing areas or any direct attack[82].

3.47 The United States military no doubt has contingency plans even in peacetime for innumerable hypothetical eventualities, most of which are unlikely ever to occur. The justification for Iran having such a contingency plan was subsequently borne out: the United States did attack Iranian oil-producing facilities.

3.48 In any event, none of the vessels which are referred to in the United States' counter-claim is alleged to have been attacked from the platforms[83].

3.49 Finally, the United States asserts that Iran specifically targeted U.S. vessels or vessels in which the United States had an interest. The alleged attacks on the *Bridgeton*, *Sea Isle City* and *Samuel B. Roberts* - the only three U.S.-flagged vessels about which the United States has attempted to make such an allegation - will be discussed in the next Chapter. It is relevant however to recall here the testimony of the Commander of the *U.S.S. Sides*, who was in charge of a U.S. navy vessel in the Persian Gulf at the same time as these incidents took place:

---

81 *See*, Exhibit 5.

82 *See*, U.S. Rejoinder, Exhibit 203, pp. 23-24.

83 The United States has alleged three specific attacks on vessels from the platforms, against the *Chaumont*, the *Berge King* and the *Stelios*. Iran has already dealt with the alleged incident involving the *Chaumont* and the alleged use of the platforms by helicopters in its Reply and Defence to Counter-Claim, at paras. 3.74-3.88. The United States has failed to respond to the evidence submitted by Iran. With regard to the *Berge King* and *Stelios*, Iran denies such attacks and is submitting herewith Operational and Intelligence Reports for the days in question, which confirm that there was no Iranian helicopter activity in the relevant zones (Exhibit 6). By way of comparison, similar documents for other dates, also attached in Exhibit 6, do report upon helicopter activity. In any event, there is no evidence of any damage to either vessel.

"My experience was that the conduct of Iranian military forces... was pointedly non-threatening"[84].

Section 7. Conclusions

3.50 The United States' counter-claim is based on a fundamental contradiction: it seeks to blame Iran for harm done to commerce in the Persian Gulf, when all sources agree that it was Iraq which was responsible for the situation. Iran's own commerce was the main victim. This situation was exacerbated by the activities of purportedly neutral States, including the United States itself, which acted in a non-neutral manner by providing massive support to Iraq in various forms. Such support included assistance to Iraq in attacks on commerce.

3.51 Moreover, as the above discussion has shown, during the relevant time period Iran was fighting a defensive war against aggression on a massive scale. This war had been started by Iraq, and had also been carried into the Persian Gulf by Iraq. By contrast, the United States' Rejoinder presents the matter totally out of context and in a manner which bears no relationship to the facts. The United States discusses the events for which it tries to attribute responsibility to Iran as if they had taken place in peacetime, and not in the context of a major war where Iran was defending itself and its people. It fails to take into account the fact that where there is such a conflict, commercial activities must inevitably suffer disruption and run certain risks[85].

3.52 The United States also fails even to envisage the attribution to Iraq of any responsibility whatsoever for the conditions arising out of the existence of a state of war. For example, it seeks to attribute to Iran all responsibility for a rise in the cost of war risk insurance - despite the fact that it was Iraq which started the war, which carried it into the Persian Gulf, and which has since been declared responsible, in a report by the United Nations Secretary-General, for the entire conflict[86].

---

84 Iran's Memorial, Exhibit 55.

85 In this context, it is quite inappropriate - and even shocking - for the United States to try to draw an analogy between mines that were allegedly laid by Iran in a time of conflict and its own mining in peacetime of Nicaraguan internal waters and territorial sea. *See,* U.S. Rejoinder, paras. 6.18-6.19.

86 *See,* Iran's Memorial, Exhibit 42.

3.53 Finally, as has been noted above, Kuwait has apologised publicly to Iran for its support of Iraq during the war. Although in its written pleadings the United States has repeatedly asserted that it was a neutral in the conflict, Ms. M. Albright, when Secretary of State, remarked that:

> "... aspects of U.S. policy towards Iraq, during its conflict with Iran appear now to have been regrettably shortsighted, especially in light of our subsequent experiences with Saddam Hussein"[87].

While falling far short of an apology such as those given by Kuwait, this statement is significant. The implicit acknowledgement that it contains, confirming that the United States did not act as a neutral in the conflict, must be taken into account in any consideration of the United States' counter-claim.

---

[87] *See*, U.S. Rejoinder, para. 1.08, fn. 11.

CHAPTER IV

THE SPECIFIC INCIDENTS

Section 1. Introduction

4.1 In its Counter-Memorial and Counter-Claim filed on 23 June 1997, the United States referred to seven specific vessels allegedly attacked by Iran[1]. These were:

1. The *Bridgeton* (24 July 1987)
2. The *Texaco Caribbean* (10 August 1987)
3. The *Sea Isle City* (16 October 1987)
4. The *Lucy* (15 or 16 November 1987)
5. The *Esso Freeport* (16 November 1987)
6. The *Diane* (7 February 1988)
7. The *Samuel B. Roberts* (14 April 1988)

4.2 Iran will address in this Chapter the relevant facts in relation to each of these incidents. It is submitted that in each case the relevant questions are the following: (i) the extent, if any, of U.S. interests in the vessel in question; (ii) whether the vessel was engaged in commerce between Iran and the United States; and (iii) whether there is any sufficient basis to support the U.S. allegations that Iran was responsible for attacking these vessels.

4.3 The following factual discussion is without prejudice to the legal arguments made in subsequent Chapters, where it will be shown that (i) the claims based on these incidents are either outside the jurisdiction of the Court in this case or are inadmissible; (ii) none of the vessels apart from the *Texaco Caribbean* was engaged in Treaty-protected commerce; and (iii) in any event Iran cannot be held responsible for such attacks.

---

[1] These incidents are listed at para. 6.08 of the U.S. Counter-Memorial and Counter-Claim.

4.4 It is the incidents listed in paragraph 4.1, above, and these incidents alone, which were included in the original counter-claim, and which were the subject of Iran's filing dated 18 November 1997 objecting to that counter-claim. It is only these incidents which were dealt with in the Court's Order of 10 March 1998 relating to the counter-claim.

4.5 As noted in Chapter I above, in its Rejoinder the United States has added for the first time two further vessels to its list of specific incidents included in its original counter-claim, the *Sungari* and the *Esso Demetia*, both of which it alleges were U.S.-owned[2]. At the same time, in a footnote, the United States also refers to incidents involving three allegedly U.S.-operated vessels, the *Stena Concordia*, the *Stena Explorer* and the *Grand Wisdom*[3]. The United States purports to "reserve... the right to further develop all pertinent facts and arguments regarding U.S. operated vessels"[4].

4.6 For reasons explained elsewhere in this pleading, Iran submits that such late-filed or potential claims with regard to the additional five vessels identified above are not and cannot be properly before the Court. In the circumstances Iran limits itself to noting the following, which appears on the face of the evidence submitted by the United States in respect of these incidents:

- Of the two new vessels which the United States alleges were U.S.-owned - the *Sungari* and the *Esso Demetia* - the *Esso Demetia* was in fact U.K.-flagged and U.K.-owned[5]. The *Sungari* was Liberian-flagged but does appear to have been U.S.-owned.

- Even if relevant, which Iran denies, the U.S. statement that the *Stena Concordia*, *Stena Explorer* and *Grand Wisdom* were U.S.-operated is not proven[6].

---

2 *See*, U.S. Rejoinder, para. 6.06.
3 *Ibid.*, fn. 404.
4 *Ibid.*
5 *Ibid.*, Exhibit 234, refers to the *Esso Demetia* as being owned by Esso Marine UK Ltd.
6 The deck logs of the *Stena Concordia* and *Stena Explorer* have "Universe Tnkship Exec" typed on the top (U.S. Rejoinder, Exhibit 233). However, no evidence is provided to explain the significance of this as to how it shows U.S. management. In the case of the *Grand Wisdom*, the United States is only able to

- The U.S. allegation that one of the vessels, the *Esso Demetia*, was carrying U.S.-owned crude also appears to be wrong. Exhibits 234 and 249 to the U.S. Rejoinder show that the crude was in fact owned by non-U.S. companies.

- In any event, none of the five vessels was engaged in commerce between Iran and the United States.

Section 2. Specific incidents

A. The *Bridgeton* (24 July 1987)

4.7 On 24 July 1987, the *Bridgeton*, a reflagged Kuwaiti vessel, struck a mine approximately 18 nautical miles southwest of Farsi Island, at position 27°59'N, 49°50'E. The time of the incident was approximately 0700 hours[7].

4.8 The vessel was in ballast en route from the Netherlands to Kuwait and had departed from Khor Fakkan off the United Arab Emirates three days earlier. She was accompanied by three United States Navy warship escorts and another reflagged Kuwaiti vessel, the *Gas Prince*[8].

4.9 No serious damage was caused to the *Bridgeton* by the mine, there were no injuries or casualties, and the vessel was able to proceed on its voyage after the incident[9].

4.10 In its Reply, Iran has already demonstrated the flaws in the United States' claims that (i) the mine in question was Iranian, and (ii) the *Bridgeton* was specifically targeted by Iran[10].

---

produce a press report referring to the vessel being operated by a California-based company (*ibid.*). This cannot be considered as sufficient evidence to justify a claim.

7 U.S. Counter-Memorial and Counter-Claim, paras. 1.25-26; U.S. Preliminary Objection, Exhibit 14.

8 U.S. Counter-Memorial and Counter-Claim, paras. 1.25-26 and Exhibit 9.

9 *Ibid.*, Exhibit 9; Iran's Memorial, Exhibit 56.

10 Iran's Reply and Defence to Counter-Claim, paras. 5.16-5.18.

4.11 In relation to the claim that the mine which struck the *Bridgeton* was Iranian, the United States asserted in its Counter-Memorial that shortly after the incident, U.S. forces located a field of Iranian mines "south of Iran's Farsi Island", which the United States described as "near the location where the ... *Bridgeton* was struck"[11]. However, as explained in Iran's Reply, the United States' own exhibits reveal that this minesweeping took place 17 miles away and some four months after the *Bridgeton* incident[12]. Irrespective of whether these allegations are true, which Iran denies, there has been no demonstration of any causal link between a minefield 17 miles away found four months later and the mine which struck the *Bridgeton*. No mines were discovered in the vicinity of where the *Bridgeton* incident occurred either at the time of the incident or thereafter. Nor is there any suggestion that either the *Bridgeton* or any of the other vessels in the convoy, nor indeed any other vessels, encountered any other mines in the vicinity at the time or thereafter. This is a clear indication that there was no minefield in the immediate area. The United States fails to address these facts in its Rejoinder.

4.12 The second allegation in the Counter-Memorial is that the *Bridgeton* was deliberately targeted by an Iranian small boat manoeuvring into its path and laying a single mine. Quite apart from the fact that this version is inconsistent with the previous allegation, it is entirely implausible. While Iran cannot prove a negative, it did ask an independent expert in mine warfare, Commander Jacques Fourniol, to consider this allegation. It is his opinion that such a hypothesis cannot be envisaged, not least because of the impossibility of handling a large mine on a small boat[13]. The United States once again fails to address this evidence in its Rejoinder.

4.13 The United States' two allegations are also inconsistent with its reaction at the time. The *Financial Times* noted that immediately after the incident "Washington... said it would not retaliate, since it was not sure who was responsible"[14]. No specific protest was made by the United States to Iran at the time in relation to the *Bridgeton* incident.

---

11 U.S. Counter-Memorial and Counter-Claim, para. 1.29, fn. 52.

12 *See*, Iran's Reply and Defence to Counter-Claim, para. 5.16, referring to U.S. Counter-Memorial and Counter-Claim, Exhibits 43, p. 1 and 49, p. 2.

13 *See*, Iran's Reply and Defence to Counter-Claim, Fourniol Report, pp. 28-32.

14 Iran's Memorial, Exhibit 57.

4.14 A more plausible explanation of the *Bridgeton* incident, and one which is consistent with the United States' reaction at the time and with the fact that no minefield was found in the area, is given in a report by the General Council of British Shipping, which is an exhibit submitted by the United States. This report states as follows:

> "Early in the war mines were laid by both sides at the head of the [Persian] Gulf. Some of these have occasionally been reported to have broken loose. These would drift SE on the SW side of the [Persian] Gulf and could, due to prevailing currents, drift anti-clockwise round the area. They are brown or rust coloured and, floating low in the water, would be difficult to see. The Farsi Island area is the most likely area where these mines would interfere with neutral vessels"[15].

The *Bridgeton* was struck close to Farsi island.

4.15 In any event, and as explained in subsequent Chapters, it is Iran's submission that the United States has no basis for a claim in relation to the *Bridgeton.*

B. The *Texaco Caribbean* (10 August 1987)

4.16 The *Texaco Caribbean*, a Panamanian-flagged tanker, struck a mine on 10 August 1987 at the Khor Fakkan anchorage in the Gulf of Oman off Fujairah, United Arab Emirates. The time of the incident is reported as 1530 hours[16].

4.17 At the time of the incident, the vessel was travelling to Rotterdam from the Iranian terminal at Larak Island, where she had been loaded with Iranian light crude oil[17].

4.18 In its Counter-Memorial, the United States alleged that the vessel was U.S.-owned, but produced no evidence of this[18]. In its Rejoinder, the United States admits that the vessel was in fact Panamanian-owned, but now asserts that it was "U.S. bareboat chartered"[19]. In fact, even this assertion is wrong. The documents submitted in evidence by the United States show

---

15 U.S. Counter-Memorial and Counter-Claim, Exhibit 2, p. 48.

16 U.S. Preliminary Objection, Annex 1, p. 65 and Exhibit 14; U.S. Counter-Memorial and Counter-Claim, para. 1.34.

17 U.S. Rejoinder, para. 6.06.

18 U.S. Counter-Memorial and Counter-Claim, para. 6.08(2).

19 U.S. Rejoinder, para. 6.06, and fn. 409.

that the vessel was "bareboat chartered" to Texaco Panama Inc., a Panamanian company, and was thus not "U.S. bareboat chartered"[20].

4.19 Ownership of the crude oil on board the *Texaco Caribbean* was stated in one report to be "shrouded in mystery"[21]. The United States claims in the Rejoinder that the cargo was owned by Texaco International Trader Inc., a U.S. company wholly owned by Texaco Inc.[22]. However, other reports, including a contemporary report of a statement by a Texaco spokesman, state that the *Texaco Caribbean* was "under a single-voyage charter to the Norwegian shipping and trading company Seateam and 'was under orders to proceed to Northwest Europe with a cargo belonging to that company'"[23].

4.20 With regard to the incident itself, the explosion of a mine created a hole in the hull and crude oil leaked into the sea, requiring the cargo to be off-loaded to another vessel (the *D'Artagnan*). The vessel then proceeded to Bahrain for repairs[24]. There were no injuries or casualties.

4.21 The United States again alleges that the mine was laid by Iran. This allegation is absurd for the following reasons:

- The *Texaco Caribbean* was carrying Iranian crude. Export of crude was Iran's life-line. The suggestion that Iran would target an area where vessels trading with Iran would normally pass, and thus put in danger the export of its crude and undermine its own economic interests, can be excluded. All Iran's efforts were directed towards protecting its oil exports. Iranian officials repeatedly referred at the time to the absurdity of the suggestion that mines were laid in this area by Iran[25].

---

20 *Ibid.*, Exhibit 211.
21 Iran's Observations and Submissions on the U.S. Preliminary Objection, Exhibit 25.
22 U.S. Rejoinder, para. 6.06 and Exhibit 211.
23 Iran's Observations and Submissions on the U.S. Preliminary Objection, Exhibit 25.
24 U.S. Counter-Memorial and Counter-Claim, para. 6.08(2) and Exhibit 169.
25 *See*, Iran's Observations and Submissions on the U.S. Preliminary Objection, Exhibit 26, and U.S. Counter-Memorial and Counter-Claim, Exhibit 55, p. S4.

- As recorded in the *Yearbook of the United Nations*, Iran also protested the incident to the Secretary-General of the United Nations in the following terms:

"Iran reported that on 10 August in the Gulf of Oman off the port of Fujayrah, the... Texaco Caribbean, flying a Panamanian flag and carrying Iranian crude oil, struck a mine. It stated the occurrence indicated that Iraq and the United States had not limited their tension-creating tactics to the Persian Gulf... and that United States policy in the [Persian] Gulf was contrary to the peace process and the safeguarding of navigation in international waters"[26].

In the week following the *Texaco Caribbean* incident, and following discussions with Oman, Iranian naval forces carried out minesweeping in the Gulf of Oman, destroying several mines[27].

- No evidence is produced by the United States as to the type of mine that hit the *Texaco Caribbean*[28]. However, as confirmed in the report of Commander Fourniol, Iraq had the capacity to lay mines anywhere in the Persian Gulf, and had similar mines to those possessed by Iran[29]. In addition, and contrary to what the United States would have the Court believe, there are contemporary reports of Iraqi minelaying in the southern Persian Gulf[30].

- In its attempt to show that Iran was responsible for this mining, the United States refers to a statement made by His Excellency Ali-Akbar Hashemi-Rafsanjani on 21 August 1987, only days after the incident[31]. His Excellency referred to Iraqi minelaying, and with regard to the *Texaco Caribbean* stated:

"In Khawr Fakkan - that was our lane, so you cannot say that Iranians mined it, because we ourselves use that course - a mine hit our own ship first"[32].

---

26 Iran's Memorial, Exhibit 58.
27 *See, e.g.*, Iran's Observations and Submissions on the U.S. Preliminary Objection, Exhibit 27.
28 There is only one incomplete U.S. exhibit which refers to mines being found in the Gulf of Oman in October 1987, several months later. *See*, U.S. Counter-Memorial and Counter-Claim, Exhibit 53.
29 Iran's Reply and Defence to Counter-Claim, Fourniol Report, pp. 19-23.
30 *See, e.g.*, Iran's Memorial, Exhibit 16, p. 165.
31 U.S. Counter-Memorial and Counter-Claim, para. 1.38.
32 *Ibid.*, Exhibit 55, p. S4.

C. The *Sea Isle City* (16 October 1987)

4.22 The *Sea Isle City*, a reflagged Kuwaiti tanker, was struck by a missile on 16 October 1987, while in ballast off Mina al-Ahmadi, Kuwait[33]. The vessel had been "proceeding from its anchorage to the oil loading terminal at Kuwait's Mina al-Ahmadi port"[34].

4.23 The United States asserts that the *Sea Isle City* was hit by a Silkworm missile fired from the Fao peninsula and accuses Iran of having a "shifting story" with regard to the alleged existence and use of Silkworm missile sites on Fao[35].

4.24 There were three Silkworm missile sites on the Fao peninsula. These were Iraqi sites captured by Iran. It was Iran in its Reply and Defence to Counter-Claim that introduced evidence on this subject, including photographic imagery of these sites. The United States had not previously discussed or even mentioned such sites. As pointed out by Mr. Youssefi, an Iranian expert in missile warfare, and as is even clear from the satellite photographs subsequently produced by the United States, these sites were heavily damaged during the fighting with Iraq on the Fao peninsula[36]. As a result they were inoperative throughout the period that Iranian forces held Fao[37].

4.25 The United States does not deny that these were originally Iraqi sites. Two of the sites were constructed by Iraq so that they were aligned for firing towards waters off Kuwait (although not on a trajectory which could have hit the *Sea Isle City*); the third site was directed towards Iran[38].

4.26 The United States does not allege that the missile which hit the *Sea Isle City* was fired from any of these three sites. The United States appears to suggest rather that the missile was fired from a fourth site on the Iranian side of the Arvand River, at a place called Nahr-e

---

33 U.S. Rejoinder, Exhibit 240.

34 U.S. Counter-Memorial and Counter-Claim, para. 6.08(3).

35 U.S. Rejoinder, title of Chap. III, Section 4.A.

36 *See*, Iran's Reply and Defence to Counter-Claim, Statement of Mr. Youssefi, p. 4. *See*, also, U.S. Rejoinder, Exhibit 208, Images 3, 4, 5, 10 and 11, where numerous traces of shell explosions are clearly visible.

37 Iran's Reply and Defence to Counter-Claim, Statement of Mr. Youssefi, para. 15.

38 *See*, U.S. Rejoinder, Exhibit 210.

Owyeh, which the United States alleges was pointed on a trajectory towards the *Sea Isle City*[39].

4.27 The only evidence submitted to support this is a number of satellite photographs of the alleged fourth site. While these are not very clear, they do appear to show that neither the alleged launching site at Nahr-e Owyeh nor the so-called staging area some 50 kilometres away bears any resemblance to the normal form of a Silkworm missile site. The normal form of such sites is shown in the manufacturer's manual and is even apparent from the satellite photographs of the other sites produced by the United States[40]. Iranian experts have also explained how the U.S. satellite photographs of the alleged fourth site bear no resemblance to a normal Silkworm missile site. Moreover the manuals recommend that the support site (or staging area) be located some 3-4 kilometres from the firing site. On the U.S. photographs the alleged support site appears to be some 50 kilometres away.

4.28 The U.S. assertions as to the existence and use of this fourth site are also inconsistent with contemporary evidence produced by the United States, specifically a document dated 16 October 1987 and labelled "Top Secret" which refers to the fact that Iran had occupied three abandoned Iraqi sites on the Fao peninsula and was "building a fourth"[41]. The clear implication of this report - made on the very day of the *Sea Isle City* incident - is that the fourth site was not yet completed, let alone operational.

4.29 Quite apart from the lack of evidence of the existence of a fourth missile site, the assertion by the United States that this alleged fourth site was used for the attack on the *Sea Isle City* is wholly at odds with other evidence before the Court, including documents from official U.S. sources and evidence submitted by the United States:

- *First*, at the time of the *Sea Isle City* incident the United States asserted that Iran only had operational Silkworm missile sites in the Strait of Hormuz area. This is confirmed in a number of U.S. documents, including the October 1987

---

39 *See, ibid.*, Exhibit 208, Images 1, 6, 7 and 8, and Exhibit 210.

40 *See*, Iran's Reply and Defence to Counter-Claim, Statement of Mr. Youssefi, Annex C, p. 4-9; compare also Images 4, 5, 10, 11 and 13 with Images 6, 7 and 8 in Exhibit 208 to the U.S. Rejoinder. *See*, also, the graphics in Exhibit 94 to the U.S. Counter-Memorial and Counter-Claim.

41 U.S. Counter-Memorial and Counter-Claim, Exhibit 92.

issue of the *Department of State Bulletin*[42]. In addition, on 20 October 1987, only a few days after the *Sea Isle City* was hit, the *Washington Post* reported U.S. "intelligence sources" as saying that there were "no Silkworm launch sites at Faw, making a military strike on the area pointless"[43]. However, in these proceedings the United States alleges that in fact it knew that Iran was using Silkworms from the Fao peninsula from early 1987. The fact is that contemporary statements by the United States contradict this, and to judge from the report of 20 October 1987, had such sites existed they would have been attacked in the aftermath of the incident.

- *Second*, both the sales brochure of the Silkworm and official U.S. documents contemporaneous with the attack state the maximum range of the Silkworm as 95 kilometres. The *Sea Isle City* was at a distance of nearly 100 kilometres from the alleged fourth Iranian site[44].

- *Third*, the U.S. assertion that a fourth site was used is at odds with the statement by two Kuwaiti officers produced in evidence by the United States. The Kuwaiti officers' statement is in large part hearsay, referring to alleged observations by other unidentified Kuwaiti military personnel[45]. The statement was prepared in 1997 and no contemporaneous records are presented to support it. Only one missile was allegedly seen by one of the authors of the statement, Major General Yacoub Al-Suwaiti. He states as follows:

> "At 0900, on 16 October 1987, while visiting the locations on Auhat Island, Colonel Al-Suwaiti observed while staying in Auha [*sic*] Island, a missile flying overhead, between Faylakah Island and Auhat Island, in a south-south-easterly direction... originating from the direction of the Faw peninsula...
>
> Minutes later in the morning on 16 October, the U.S. flag vessel *Sea Isle City* was struck by a missile"[46].

---

42 *See, e.g.*, Iran's Memorial, Exhibit 67.
43 *Ibid.*, Exhibit 69.
44 *See*, for a detailed discussion of this issue, Iran's Reply and Defence to Counter-Claim, paras. 4.33-4.45.
45 U.S. Counter-Memorial and Counter-Claim, Exhibit 82.
46 *Ibid.*, paras. 14-15.

> There are two fundamental inconsistencies in this statement. First, the *Sea Isle City* was hit at 0600 hours not 0900 hours[47]. Second, if the missile had been fired from any of the sites which the United States alleges were controlled by Iran they could not have been travelling in a "south-south-easterly direction". Only missiles fired from Iraqi territory or from areas used by Iraqi forces behind Bubiyan Island could have been travelling in a south-south-easterly direction at that point.

4.30 There are also unexplained gaps in the U.S. evidence. Thus, the United States alleges that the missile which hit the *Sea Isle City* was a Silkworm, but notes that it was unable to examine fragments of the missile to confirm this:

> "Because of the nature of the explosions that occurred when cruise missiles struck *Sungari* and *Sea Isle City*, military personnel were not able to collect sizable fragments from the October impacts which could be analyzed"[48].

Expert testimony submitted by Iran from an independent third party expert on missile defence systems, Mr. Jean-François Briand, has shown that it is implausible that sufficient fragments could not have been recovered from the attack on the *Sea Isle City*[49]. The United States' assertion in this regard is also at odds with a press report that the United States has itself submitted, which refers to U.S. military sources saying on 19 October 1987[50]:

> "Pieces of Silkworm missiles have been recovered from the SEA ISLE CITY and a second vessel (SUNGARI)".

4.31 Fragments were allegedly found from missiles that landed in or around Kuwait on 21 January 1987 and 4 September 1987, which were analysed by U.S. experts who determined that the missiles in question were Silkworms[51]. However, it is also stated that these fragments were removed by Iraq when it occupied Kuwait in 1990[52]. This would of course have been a natural thing for Iraq to do if they were fragments of Iraqi missiles.

---

47 *See, e.g., ibid.*, Exhibit 90.
48 U.S. Counter-Memorial and Counter-Claim, para. 1.71.
49 Iran's Reply and Defence to Counter-Claim, Briand Report, pp. 2-3.
50 U.S. Counter-Memorial and Counter-Claim, Exhibit 90.
51 *See*, U.S. Counter-Memorial and Counter-Claim, para. 1.71.
52 *See, ibid.*, Exhibit 82, para. 10.

4.32 Iran's expert Mr. Briand has pointed to another gap in the U.S. evidence. Mr. Briand expresses surprise that U.S. AWACS which, as the U.S. exhibits show, were covering the area when the *Sea Isle City* was hit, were not able to trace the flight path of the missile and that the United States has put in no evidence in this regard[53]. The United States provides no response on this issue. It is equally surprising that U.S. military vessels, apparently stationed just outside Kuwaiti territorial waters at the time, took no action against the missile. Silkworms can be shot down or deviated by electronic jamming. U.S. forces regularly used jamming against Iranian forces and were able easily to disable Iraqi Silkworms fired against U.S. forces during the Iraq/Kuwait conflict[54]. Again, the United States has not responded to this.

4.33 Effectively, the only evidence on which the United States relies are photographs of an alleged fourth Iranian site. However, as noted above, other U.S. intelligence reports recognize that there were no operational sites in the Fao area at the time, and that the fourth site was under construction. In any event, as also shown above, use of the fourth site would have been impossible in connection with the attack on the *Sea Isle City*.

4.34 On the other hand, Iraq had an arsenal of sophisticated missiles, including the Silkworm and variations thereof which could be used from naval vessels and from the air. It also had Styx missiles and Exocets. Iraq had carried out numerous missile attacks from land and vessel-based sites in or around the Fao peninsula, in particular from the waters around Bubiyan Island, which the Iraqis were given free use of by Kuwait. These sites were within closer range of the *Sea Isle City* than the alleged Iranian sites. The United States denies that Iraq had an operational Silkworm missile site on its side of the front in the Fao peninsula in 1987-1988. However, as Iran has shown, Iraq continued to carry out Silkworm missile attacks from the Fao area throughout 1987 and 1988[55]. In any event, the United States fails to address the fact that Iraq had "Osa" vessels and specially-equipped aircraft capable of firing Silkworms[56].

---

53 Iran's Reply and Defence to Counter-Claim, Briand Report, pp. 5-6.

54 *See*, Iran's Memorial, Exhibit 48; Iran's Reply and Defence to Counter-Claim, Statement of Gen. Fadavi, para. 25; and *ibid.*, Statement of Mr. Youssefi, p. 9.

55 *See*, Iran's Reply and Defence to Counter-Claim, Statement of Mr. Youssefi, para. 21 and Annex E.

56 *See*, *ibid.*, paras. 17-22.

4.35 It should also be noted that Iraq is reported as having developed extended range Silkworms in the mid-1980s, significantly called Faw 150 and Faw 200, with ranges of 150 km and 200 km, respectively. These designs were created by extending the Silkworm's liquid propellant tanks[57]. The fragments of missiles that were examined by U.S. experts - and which were subsequently removed by Iraq - appear to have been this type of missile[58].

4.36 Iraq also had free use of Kuwaiti airspace, and had carried out numerous attacks on supposedly friendly shipping, including the attack on a U.S. warship, the *Stark*. Iraq had also fired air-launched Silkworm missiles at neutral-flagged vessels trading with Saudi Arabia, and at U.S.-led convoys of reflagged Kuwaiti tankers. For example, *The Washington Post* reported incidents in February 1988 in which:

> "Iraqi bombers on successive nights dropped air-launched Silkworm missiles. One of them crashed into a fully loaded Danish supertanker that had just left the port of Iraq's ally, Saudi Arabia. Two other Silkworms dropped the following night roared past a U.S.-led convoy of reflagged Kuwaiti tankers before they crashed into the sea. Kuwait is also an Iraq ally"[59].

Such attacks may have been a function of Iraq's "shoot first - identify later" policy[60]. They may equally have been deliberate provocation designed to encourage third State support while pointing the finger at Iran[61].

D. The *Lucy* (15/16 November 1987)

4.37 The *Lucy*, a Liberian-flagged vessel, was allegedly attacked by gunboats near the Strait of Hormuz while travelling in ballast from Japan to Ras Tanura in Saudi Arabia[62]. It appears that the vessel sustained minor damage. After repairs in Dubai the vessel was able to continue its voyage[63]. There were no injuries or casualties.

---

57 *See, ibid.*, para. 4.45 and Exhibit 22.

58 *See*, U.S. Counter-Memorial and Counter-Claim, Exhibit 84, p. 2, where it is stated that the Silkworm examined had been stretched to increase its range, requiring additional fuel.

59 Iran's Memorial, Exhibit 68.

60 *See, ibid.*, para. 1.35.

61 *See*, Iran's Reply and Defence to Counter-Claim, paras. 4.67-4.73.

62 U.S. Rejoinder, Exhibit 240.

63 *See*, U.S. Counter-Memorial and Counter-Claim, Exhibit 170.

4.38 The Report of the Secretary-General of the United Nations refers to this attack taking place on 15 November 1987 at 0300 hours, at a position of 26°15'N, 56°05'E[64]. This is the date relied on by the United States[65]. As Iran noted in its Reply, other reports suggest the attack occurred on 16 November 1987[66].

4.39 The United States asserts that the *Lucy* was "U.S. owned"[67]. In fact the *Lucy* was owned by First Products Tankers, Inc., a Liberian company[68].

E. The *Esso Freeport* (16 November 1987)

4.40 According to the United States, the *Esso Freeport*, a Bahamian-flagged tanker, was attacked on 16 November 1987, near the Strait of Hormuz, off the coast of Oman. She was loaded with Saudi crude oil and en route from Ras Tanura, Saudi Arabia to Louisiana[69].

4.41 The *Esso Freeport* is alleged to have been attacked by grenades from small gunboats. The United States has previously asserted that she was "severely damaged"[70]. However, as the new exhibits to the United States Rejoinder show, the grenades allegedly fired did not even penetrate the hull, and the *Esso Freeport* was able to continue on her voyage[71]. There were no personal injuries.

4.42 In its Rejoinder, the United States also asserts that this vessel was U.S.-owned[72]. In fact, she was owned by Esso International Shipping (Bahamas) Co. Ltd., a Bahamian company[73].

---

64 U.S. Preliminary Objection, Exhibit 14, p. 15.
65 U.S. Rejoinder, para. 6.06.
66 *See, e.g.*, U.S. Preliminary Objection, Exhibit 6, p. 125 and Exhibit 11, p. 335.
67 U.S. Rejoinder, para. 6.06.
68 *Ibid.*, Exhibit 242.
69 U.S. Counter-Memorial and Counter-Claim, para. 6.08(5); U.S. Rejoinder, para. 6.06.
70 U.S. Counter-Memorial and Counter-Claim, para. 6.08(5).
71 U.S. Rejoinder, Exhibit 245; *see*, also, U.S. Counter-Memorial and Counter-Claim, Exhibit 9.
72 U.S. Rejoinder, para. 6.06.
73 *Ibid.*, Exhibit 234.

F. The *Diane* (7 February 1988)

4.43 The *Diane*, a Liberian-flagged tanker, was allegedly attacked on 7 February 1988, while sailing at position 25°49'N, 55°40'E, approximately 17 miles off Ras al-Khaimah, United Arab Emirates. She was carrying Saudi crude from Ras Tanura en route to Japan[74].

4.44 The vessel was allegedly attacked by a frigate[75]. The *Diane* was able to proceed to Fujairah for repairs. She then proceeded to Japan to discharge her cargo[76]. There were no personal injuries.

4.45 The United States asserts that the *Diane* was "U.S.-owned"[77]. In fact, the *Diane* was owned by Lake Superior Bulk Carriers, Inc., a Liberian company[78].

G. The *Samuel B. Roberts* (14 April 1988)

4.46 The *Samuel B. Roberts*, a United States warship, struck a mine on 14 April 1988. The vessel was returning to Bahrain at the time, having completed a mission escorting reflagged Kuwaiti tankers[79]. The incident occurred near Shah Allum Shoal off Bahrain[80].

4.47 In its Rejoinder, the United States largely repeats the presentation it had made in previous pleadings as to alleged Iranian mining of the Persian Gulf. It does not introduce any new argument or evidence in response to Iran's position on this issue[81].

4.48 The United States ignores the fact that there was no large-scale mining of the Persian Gulf during the conflict. Apparently, only 176 mines were discovered, of which 87 were floating mines - in other words mines which could have been laid anywhere but which had

---

74 *Ibid.*, para. 6.06 and Exhibit 248.
75 *Ibid.*, para. 6.06.
76 U.S. Counter-Memorial and Counter-Claim, Exhibit 171.
77 U.S. Rejoinder, para. 6.06.
78 *Ibid.*, Exhibit 242.
79 U.S. Rejoinder, para. 6.06.
80 *Ibid.*
81 *See*, Iran's Reply and Defence to Counter-Claim, paras. 5.14-5.34.

broken their moorings and were found floating with the current[82]. Only 89 moored mines were discovered. It should be recalled that during the Iraq/Kuwait conflict thousands of Iraqi mines were discovered in and around Kuwaiti waters.

4.49 Second, the United States ignores the evidence submitted by Iran that Iraq not only possessed similar mines to Iran but also had the capacity to lay such mines anywhere in the Persian Gulf[83]. Press reports also confirm the presence of Iraqi mines in the southern Persian Gulf[84].

4.50 The United States also ignores the following evidence concerning mines which it alleges were laid by Iran:

- Mines found off Kuwait's Al-Ahmadi port in May-June 1987: Reports of four vessels allegedly struck by mines in this area are contradictory. Two vessels are reported as having hit "free-floating or breakaway" mines. Another is stated to have been hit by an "unidentified warplane"[85]. In any event, it is implausible that Iran could have laid mines in Kuwaiti waters. Only Iraq had access to such waters.

- The *Bridgeton* incident in August 1987: This has been discussed above. It is more likely that the *Bridgeton* was struck by a floating mine, as no minefield was found in the area. Allegedly mines were found 17 miles away and four months later. No vessels were struck by such mines.

- Mines found off Fujairah in August 1987: These include the mine which hit the *Texaco Caribbean*. Again, this has been discussed above.

---

82 *See*, U.S. Preliminary Objection, Annex, fn. 57.
83 *See*, para. 4.21, above.
84 *See*, Iran's Reply and Defence to Counter-Claim, para. 5.28.
85 *Ibid.*, para. 5.15, and fn. 33.

- The *Iran Ajr* incident in September 1987: The United States ignores the evidence submitted by Iran that this vessel could not have been used for minelaying. It also ignores the testimony of the Commander of the *Iran Ajr*[86].

4.51 The United States moreover ignores contemporary evidence that Iranian officials rejected minelaying and supported minesweeping efforts. As stated by an Iranian Naval Commander in 1987:

> "For seven years, the Iranian Navy has maintained security in the Persian Gulf. For seven years, Iraq has laid mines and we have gathered them"[87].

4.52 In any event, Iran will show below that under the Treaty of Amity Iran can have no liability to the United States in respect of the *Samuel B. Roberts*.

---

86 *See, ibid.*, paras. 5.20-5.22, and Statement of Capt. Farshchian.

87 *See*, Iran's Observations and Submissions on the U.S. Preliminary Objection, Exhibit 26.

PART III

LEGAL ISSUES

CHAPTER V

JURISDICTION AND ADMISSIBILITY

Section 1. Introduction

5.1 Before entering into a discussion of issues of jurisdiction and admissibility, some elements of the procedural background to the present case should be recalled.

5.2 In its Judgment of 12 December 1996, the Court stated that:

> "... the question the Court must decide, in order to determine its jurisdiction, is whether the actions of the United States complained of by Iran had the potential to affect 'freedom of commerce' as guaranteed by [Article X(1) of the Treaty of Amity]"[1].

5.3 Following the Judgment, the United States filed its counter-claim, requesting the Court to adjudge and declare that alleged actions by Iran were "dangerous and detrimental to maritime commerce"[2].

5.4 In its Order of 10 March 1998, the Court repeated its earlier finding that "its jurisdiction in the present case covers claims made under Article X, paragraph 1, of the 1955 Treaty"[3]. It then recalled that the United States' counter-claim alleged certain actions "said to be 'dangerous and detrimental to maritime commerce'", and found that such facts "are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court"[4].

---

1 Judgment of 12 December 1996, para. 38.
2 U.S. Counter-Memorial and Counter-Claim, p. 180.
3 Order of 10 March 1998, para. 34.
4 *Ibid.*, para. 36.

5.5 With regard to admissibility, the Court held that "the counter-claim presented by the United States satisfies the conditions set forth in Article 80, paragraph 1, of the Rules of Court"[5]. Those conditions are (i) that the counter-claim should be "directly connected with the subject-matter of the claim of the other party" and (ii) that it comes within the jurisdiction of the Court.

5.6 The Court added that "a decision given on the admissibility of a counter-claim taking account of the requirements set out in Article 80 of the Rules in no way prejudges any question which the Court will be called upon to hear during the remainder of the proceedings"[6].

5.7 Iran is therefore at liberty to raise objections of jurisdiction and admissibility against the United States counter-claim, to the extent that such objections do not relate to aspects that have already been decided by the Court in its Order[7]. This right was recognised by the United States in its written observations of 18 December 1997, when it argued that "Many of Iran's objections to jurisdiction and admissibility involve contested matters of fact which the Court cannot effectively address and decide at this stage, particularly not in the context of the abbreviated procedures of Article 80(3)"[8].

5.8 Consequently, as has been shown in Iran's Reply and Defence to Counter-Claim, and as will be further developed below, objections remain open where:

- the counter-claim as now formulated goes beyond the limits of the Court's jurisdiction as laid down by the Court; or

---

5 *Ibid.*, para. 40.

6 *Ibid.*, para. 41.

7 There is no basis for the United States' suggestion that Iran should have filed separate "objections to admissibility" of the counter-claim, rather than a "Defence to counter-claim" (U.S. Rejoinder, para. 6.38, fn. 519). The Rules of Court make no provision for separate "objections to admissibility" in the event of a counter-claim and, in any event, Iran's Reply included objections to jurisdiction and admissibility, as preliminaries to the consideration of the counter-claim on the merits (Iran's Reply and Defence to Counter-Claim, paras. 9.7, *et seq.*).

8 *See*, Order of 10 March 1998, para. 22, referring to the introduction to the United States' written observations.

- the objections to admissibility are not covered by the grounds of Article 80, paragraph 1 of the Rules of Court.

Section 2. Jurisdiction

A. Jurisdiction *ratione materiae*

5.9 The Order of 10 March 1998 is clear in limiting to Article X(1) of the Treaty of Amity the basis of the Court's jurisdiction as regards the United States' counter-claim; Article X(1) is of course the sole remaining basis of Iran's claim against the United States. As a result, the Court does not have jurisdiction to entertain claims or counter-claims that do not fall within Article X(1) of the Treaty of Amity.

5.10 Moreover, the Court has jurisdiction to rule only on counter-claims alleging a violation by Iran of freedom of commerce as protected under Article X(1), and not on counter-claims alleging a violation of freedom of navigation as protected by the same paragraph. As was recognised by the Court in its Judgment, Iran's claim under Article X(1) relates only to freedom of commerce and not to freedom of navigation[9]. The United States' counter-claim, as originally formulated, similarly related only to freedom of commerce. In other words, each Party limited itself at the outset to a claim that the other's actions constituted violations of the freedom of commerce as protected under Article X(1), and not of protected navigation.

5.11 In its 1998 Order the Court held that it had jurisdiction to entertain the U.S. counter-claim because (and only insofar as) it was based on an allegation that conduct attributable to Iran was "dangerous and detrimental to maritime commerce"[10], and that "such facts are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court"[11]. In this connection it should be stressed that in its 1996 Judgment the Court had interpreted Article X(1) only with regard to "freedom of commerce".

---

9 Judgment of 12 December 1996, para. 38.
10 Order of 10 March 1998, para. 36.
11 *Ibid.*

5.12 Accordingly, the Court's jurisdiction with regard to the claim and the counter-claim is restricted to allegations concerning "freedom of commerce between the territories of the two High Contracting Parties". Other freedoms protected by Article X of the Treaty of Amity are not covered by the Court's jurisdiction as defined in the Court's two decisions[12]. Indeed, the United States itself accepts that the same interpretation of Article X(1) must be applied both to the original Iranian claim and to the subsequent U.S. counter-claim[13]. Thus, nothing falling outside the scope of the "freedom of commerce" guaranteed by Article X(1), as interpreted by the Court, is within the Court's jurisdiction in the present case.

5.13 As Iran has already shown in its Reply, the United States cannot reopen the argument on this point in an attempt unilaterally to extend the Court's basis of jurisdiction, a matter which is already *res judicata* between the Parties in this case[14]. The 1996 Judgment and the 1998 Order have together defined and circumscribed the scope of the Court's jurisdiction *ratione materiae* both for the Iranian claim and the U.S. counter-claim.

5.14 Nevertheless, having acknowledged at an earlier stage of the proceedings that Article X(1) "is expressly limited to trade between the territories of the two Parties"[15], the United States now seeks to ignore the terms of the Order and to extend the Court's jurisdiction to counter-claims based on Article X as a whole, or on a different sub-clause of Article X, or on alleged violations of freedom of navigation generally.

5.15 The counter-claim refers to alleged Iranian attacks on a number of U.S. owned, flagged, re-flagged, or chartered commercial and non-commercial vessels[16]. In order for the Court to have jurisdiction to entertain this counter-claim, the United States must prove that such alleged Iranian attacks impeded "freedom of commerce between the territories of the two High Contracting Parties". However, the United States has not demonstrated that these vessels were engaged in "commerce between the territories of the two High Contracting Parties".

---

12 *See*, Iran's Reply and Defence to Counter-Claim, paras. 9.9-9.11.

13 U.S. Rejoinder, para. 6.03.

14 Iran's Reply and Defence to Counter-Claim, para. 6.16.

15 U.S. Counter-Memorial and Counter-Claim, para. 6.18. *See*, also, Iran's Reply and Defence to Counter-Claim, paras. 6.8, *et seq.*

16 For the latter category, *see*, Chapter VI, Sections 1.B and 3.A, below.

5.16 On the contrary, the United States itself has referred (by way of a *lapsus calami*?) to "safety of navigation" in connection with alleged Iranian attacks in the Persian Gulf[17]. In the present case, however, the Court has not accepted jurisdiction over matters concerning freedom of navigation, as distinct from or in addition to freedom of commerce. Instead, as the Court has stated and reiterated, its jurisdiction - which is identical for both the Iranian claim and the U.S. counter-claim - covers only the "freedom of commerce" that is guaranteed under Article X(1).

5.17 Notwithstanding, the United States has claimed that, should the Court decide that alleged Iranian attacks were not a violation of the freedom of commerce as guaranteed by Article X(1) of the Treaty, such alleged attacks would constitute a breach of other provisions of the same article. According to the United States these "other provisions of Article X are not so limited"[18], *i.e.* they also protect "maritime navigation". It is then argued that the attacks wrongly attributed to Iran "violated this general freedom to conduct maritime navigation"[19].

5.18 At the same time, the United States has tried to show that Article X(1) is merely "aspirational" and does not provide for any specific and effective rights and duties. This unpersuasive argument, which has been addressed by Iran in its Reply[20], has already been rejected by the Court[21], and no new arguments have been adduced by the United States in its Rejoinder in this regard[22].

5.19 In sum, since an alleged violation of "freedom of commerce" as protected under Article X(1) constitutes the only possible basis for the Court's jurisdiction in the present case, no alleged violation of freedom of navigation or of any other provision of the Treaty of Amity can be entertained by the Court in the context of the counter-claim. This finding is *res judicata*, and is thus binding on the Parties. Moreover, it is consistent with Article 80,

---

17 U.S. Counter-Memorial and Counter-Claim, para. 4.30. *See*, also, U.S. Rejoinder, para. 4.14: "Iran's attacks on neutral shipping disrupted *freedom of navigation* in the [Persian] Gulf"; emphasis added.

18 U.S. Counter-Memorial and Counter-Claim, para. 6.18.

19 *Ibid.*, para. 6.19.

20 Iran's Reply and Defence to Counter-Claim, paras. 6.8, *et seq.*

21 *See*, Judgment of 12 December 1996, paras. 50 and 51.

22 *See*, in particular, Part III of the U.S. Rejoinder, where the United States' eloquent silence on Iran's arguments concerning the allegedly "aspirational" character of Article X(1) confirms the soundness of the position taken by Iran in its Reply and Defence to Counter-Claim.

paragraph 1 of the Rules of Court, which requires a counter-claim to be directly connected with the subject-matter of the claim of the other party. This provision is designed to prevent an unlimited expansion of the subject-matter of a case. It is clear that if the subject-matter in the present case were expanded to include violations of the freedom of navigation, this would have serious consequences. If any party suffered from violations of the freedom of navigation, it was Iran itself.

B. Jurisdiction *ratione personae*

5.20 The Parties are in agreement, and the Court has confirmed by its Judgment of 12 December 1996 and its Order of 10 March 1998, that the Court has jurisdiction to entertain claims between Iran and the United States based on Article X(1) of the Treaty of Amity, by virtue of Article XXI(2) of the Treaty.

5.21 The Court does not however have jurisdiction as between Iran and Liberia under Article XXI(2) of the Treaty. Iran raises this point after having reviewed Exhibit 258 to the United States' Rejoinder. This Exhibit contains a Diplomatic Note from Liberia dated 6 June 1997, exhibited in support of the United States' assertion that the flag State for each of the non-U.S.-flagged vessels identified in the counter-claim "has no objection to the presentation by the United States of such claim"[23]. This assertion will be dealt with in greater detail in Section 3 below, which deals with questions of admissibility. In the context of jurisdiction, what is significant is that the Liberian Note does not confirm that Liberia has no objection to the United States presenting a claim on the United States' own behalf, or on behalf of any hypothetical U.S. interests in the vessels concerned, which were listed in the United States' own Diplomatic Note to Liberia[24]. Instead, Liberia makes it clear that it expects any such claims to be advanced on Liberia's behalf:

> "... the Government of Liberia interposes no objections to the United States Government representing Liberia in this matter, provided this will incur no financial burdens to the Government of Liberia. However, whenever damages are awarded in the said matter by the Court, that the Government of Liberia be equitably benefited"[25].

---

23 U.S. Rejoinder, para. 6.34.
24 U.S. Counter-Memorial and Counter-Claim, Exhibit 179.
25 U.S. Rejoinder, Exhibit 258.

5.22 In these circumstances, the Court can have no jurisdiction to rule upon the United States' counter-claim insofar as it relates to the two Liberian vessels *Lucy* and *Diane*. A State cannot take advantage of another State's consent to jurisdiction, or of its bilateral treaty relations, and this rule applies equally to cases of espousal by consent as to any other cases. Indeed the very attempt to justify espousal in this way in and of itself demonstrates the absence of jurisdiction. If Liberian consent is necessary, by definition Liberian rights are at stake, and it is manifest that the Court lacks jurisdiction to consider those rights. A similar conclusion would have to be reached with regard to the Liberian vessel *Sungari* if, contrary to Iran's position set forth in Section 3.B, below, the United States' new claim relating to that vessel were held to be admissible.

Section 3. Admissibility

A. Introduction: issues of admissibility remain open

5.23 The United States makes much of the Court's determination, in its Order of 10 March 1998, that the counter-claim "is admissible as such and forms part of the current proceeding"[26]. It appears to interpret this phrase as meaning that there is no further scope for challenging the admissibility of the counter-claim. Iran submits, however, that this interpretation is incorrect.

5.24 When the Court issued its Order, it did so on the basis of Article 80, paragraph 1 of the Rules of Court, which requires a counter-claim to be directly connected with the subject-matter of the claim of the other party, and to come within the jurisdiction of the Court. The Court examined only these two questions and found that, because it could answer them in the affirmative, the United States' counter-claim was admissible *as such*. Questions that the Court did not examine and was not required to examine at that stage include the admissibility of new claims; the consequences of a failure properly to specify a claim; the United States' standing to file the claims; and requirements to be fulfilled before the filing of claims.

---

[26] *See, e.g., ibid.*, para. 6.01.

5.25 Iran will now turn to a discussion of these points and will demonstrate that they all constitute grounds upon which the United States' counter-claim should be held to be inadmissible.

B. New claims

1. The United States' attempts to include new vessels

5.26 In its Counter-Memorial, the United States referred to alleged Iranian attacks on seven specific vessels, but purported to reserve the right, at a subsequent stage of the proceedings, to "add further instances of Iranian attacks on U.S. vessels in the [Persian] Gulf in 1987-88"[27]. Iran responded to this reservation in its Reply, arguing that any such enlargement of the counter-claim would be inadmissible[28].

5.27 Nevertheless, the United States has now attempted to include two new vessels in its counter-claim: the *Sungari* and the *Esso Demetia*[29], and continues to reserve a purported right "to further develop all pertinent facts and arguments regarding U.S. operated vessels"[30]. While it identifies three such allegedly U.S.-operated vessels, it does not appear yet to have formally advanced a claim in regard to them.

5.28 Iran must therefore reiterate here what it said in its Reply. In application of Article 80 of the Rules of Court, a respondent must specify, no later than in its Counter-Memorial, the precise grounds on which it brings a counter-claim. The principle involved here was given effect by the Court, *mutatis mutandis*, when it held in the *Nauru* case that a claim that was cognate with the original claim but was not included in the Application was inadmissible[31].

5.29 In application of Article 80 of the Rules of Court, therefore, the United States' counter-claim may be dismissed without further examination, insofar as it relates to the *Sungari* and the *Esso Demetia*[32].

---

27 U.S. Counter-Memorial and Counter-Claim, para. 6.26.

28 Iran's Reply and Defence to Counter-Claim, paras. 10.40-10.42.

29 U.S. Rejoinder, para. 6.06.

30 *Ibid.*, para. 6.05, fn. 404.

31 *Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia) Preliminary Objections, I.C.J. Reports 1992*, p. 240.

32 Similarly, of course, any subsequent additions to the counter-claim should also be so dismissed.

2. The United States' attempt to enlarge the relevant time period

5.30 In addition to its attempt to include new vessels within the scope of its counter-claim, the United States now appears to have enlarged the scope of its submissions. While in its Counter-Memorial the United States requested the Court to adjudge and declare that certain alleged actions by Iran in 1987-88 constituted a breach of Iran's obligations to the United States, the corresponding submission in the Rejoinder contains no reference to the 1987-88 time period. This appears to be an attempt to open the door to counter-claims arising at any time outside this period.

5.31 This attempt must fail, however, in view not only of the terms of Article 80, paragraph 2 of the Rules of Court, but also of paragraph 1 of the same article, which requires a counter-claim to be directly connected with the subject-matter of the claim of the other party. It should be recalled in this connection that, in determining that the U.S. counter-claim was directly connected with the subject-matter of the claims of Iran, the Court held, *inter alia*, that "the facts relied on - whether involving the destruction of oil platforms or of ships - are alleged to have occurred in the [Persian] Gulf *during the same period*"[33]. Any attempt now by the United States to enlarge the scope in time of its counter-claim would fail to satisfy the conditions set forth in Article 80, paragraph 1 of the Rules of Court as applied by the Court in its 1998 Order.

5.32 This conclusion is supported by the Court's Judgment on the merits in the Case concerning the *Temple of Preah Vihear*. There, the Court held that in its Judgment on jurisdiction, the subject of the dispute had been defined as being confined to a difference of view about sovereignty over the region of the Temple of Preah Vihear[34]. On this basis the Court held that Cambodia's subsequent submissions calling for pronouncements on other matters could be entertained "only to the extent that they give expression to grounds, and not as claims to be dealt with in the operative provisions of the Judgment"[35].

---

33 Order of 10 March 1998, para. 38; emphasis added.

34 *Temple of Preah Vihear, Merits, I.C.J. Reports 1962*, p. 14.

35 *Ibid.*, p. 36.

5.33 It is Iran's position that any claim that the United States may attempt to put forward in relation to events occurring outside the 1987-1988 time period must be dismissed as inadmissible.

C. The United States' failure properly to specify its counter-claim

5.34 In its Reply, Iran pointed out that it was not clear whether the United States was seeking to espouse claims in respect of any or all of the specific incidents to which it referred[36]. The Rejoinder has done nothing to clarify the United States' position in this respect. On the contrary, the United States asserts, somewhat confusingly, that:

> "... first... the counter-claim is not dependent on an espousal of claims held by U.S. nationals and that the United States therefore has the right to bring this claim for breach of the 1955 Treaty without such espousal, and in its own right. Second, and in the alternative, the United States submits that it is espousing the claim for the U.S. shipping on behalf of the U.S. corporations who owned the vessels"[37].

As a result of the United States' indecision, Iran has been obliged to deal with the counter-claim both as if it were a direct claim by the United States and as if it were an espousal claim.

5.35 Iran also pointed out that it was not clear whether the United States was making a generic claim relating to alleged violations of freedom of commerce or navigation in the area at the time, or whether it was making a number of specific claims related to particular incidents involving certain identified vessels[38]. Again, this has not been clarified. In the Introduction to the part of its Rejoinder dealing with the counter-claim, the United States defines its claim as one for "damage done to U.S. flagged and U.S. owned vessels, as well as to U.S. owned cargo and U.S. personnel"[39]. Elsewhere, it appears that the United States is maintaining both its generic claim, leading to a claim for costs incurred "in deploying additional forces to the [Persian] Gulf to protect maritime commerce", and also its specific claims for "reparation for harm done to U.S. flagged and U.S. owned vessels and to U.S. cargo and U.S. personnel"[40]. Yet elsewhere there are suggestions - although these have not

---

36 Iran's Reply and Defence to Counter-Claim, para. 9.16.
37 U.S. Rejoinder, para. 6.32.
38 Iran's Reply and Defence to Counter-Claim, para. 9.22.
39 U.S. Rejoinder, para. 6.04.
40 *Ibid.*, para. 6.52.

been formulated into a claim - that the United States considers that Iran should be held responsible for additional costs incurred by merchant shipping because of the war conditions prevailing in the Persian Gulf[41], and the United States' reference to "general freedom to conduct maritime navigation"[42] supports this interpretation.

5.36 In this connection, Iran urges the Court to bear in mind its Judgment in the *Fisheries Jurisdiction (Merits)* case. There, the Federal Republic of Germany had included in its Memorial a submission, reminiscent of the United States' submissions on its counter-claim in the present case, that the Court should hold:

> "That the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic of Germany or with their fishing operations by the threat or use of force are unlawful under international law, and that Iceland is under an obligation to make compensation therefor to the Federal Republic of Germany"[43].

The Court took the view that it had jurisdiction to deal with this submission, since it arose directly out of the question which was the subject-matter of Germany's Application. Nevertheless, it stated that "the manner of presentation of this claim raises the question whether the Court is in a position to pronounce on a submission maintained in such an abstract form"[44]. After noting that Germany had stated - as has the United States in the present case - that while reserving its rights to claim full compensation, it was not at that stage submitting a claim for the payment of a certain amount of money as compensation for the damage, and that it was thus asking for a declaration of principle that Iceland was under an obligation to make compensation, the Court held that it was "prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence"[45].

5.37 Iran submits that this holding of the Court should apply with even greater force in the present case. In the *Fisheries Jurisdiction* case, the events complained of were still occurring and developing at the time of the proceedings before the Court. In the present case, the United

---

41 *Ibid.*, paras. 6.13, *et seq.*

42 U.S. Counter-Memorial and Counter-Claim, para. 6.19.

43 *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, I.C.J. Reports 1974*, p. 203, para. 71.

44 *Ibid.*, p. 203, para. 74.

45 *Ibid.*, p. 205, para. 76.

States is relying on events that are alleged to have occurred more than a decade ago. There can be no reason, therefore, for the United States' failure properly to specify its counter-claim, if there were any real basis for such a claim. The United States' counter-claim should be held to be inadmissible on this ground.

D. The United States' lack of standing to espouse claims

5.38 In its Rejoinder, the United States declares that its counter-claim is not dependent upon an espousal of claims. It nevertheless goes on to frame an alternative claim based on espousal[46].

5.39 Under customary international law a fundamental condition for espousal of claims is that the State espousing the claim must have standing to do so. This condition is linked to the question of nationality of claims. In order to determine whether the United States' contention that it has standing to espouse "the claim for the U.S. shipping on behalf of the U.S. corporations who owned the vessels"[47] is well-founded, it is therefore convenient to make a distinction between the U.S.-flagged vessels and the non-U.S.-flagged vessels identified in the counter-claim.

1. U.S.-flagged vessels

(a) The *Samuel B. Roberts*

5.40 As a U.S. naval vessel the *Samuel B. Roberts* by definition does not raise issues of espousal. It is therefore not dealt with in this sub-section.

(b) The *Bridgeton* and the *Sea Isle City*

5.41 It is not disputed that, at the time of the incidents complained of by the United States, the two Kuwaiti tankers *Bridgeton* and *Sea Isle City* were sailing under the U.S. flag and were owned by a U.S. corporation, Chesapeake Shipping, Inc.

---

46 U.S. Rejoinder, para. 6.32.

47 *Ibid.*

5.42 The Treaty of Amity provides, under Article X(2), that vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party. In support of its claim relating to the *Bridgeton* and the *Sea Isle City*, the United States also relies upon the judgment in the *Saiga* case before the International Tribunal for the Law of the Sea[48], a section of which dealt with nationality of claims[49]. On this point, the Tribunal held that under the 1982 Convention on the Law of the Sea:

> "... the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant"[50].

5.43 On this basis it declared itself "unable to accept Guinea's contention that Saint Vincent and the Grenadines [the flag State] is not entitled to present claims for damages in respect of natural and juridical persons who are not nationals of Saint Vincent and the Grenadines"[51]. It therefore rejected Guinea's objection to admissibility in this regard.

5.44 Neither Iran nor the United States is a party to the 1982 Convention. Rather, the Parties are bound by Article X(2) of the Treaty of Amity. Under that provision, the United States would appear *prima facie* to be the proper State to bring a claim in respect of U.S.-flagged vessels.

5.45 However, in the present case it is necessary to take into consideration the particular circumstances surrounding the flagging of the *Bridgeton* and the *Sea Isle City*. As Iran has already shown in its Reply, these two vessels were Kuwaiti oil tankers which flew the Kuwaiti flag until, for purely political purposes, they were reflagged under the U.S. flag in mid-1987[52].

5.46 A convenient summary of the facts surrounding the reflagging of the Kuwaiti tankers is to be found in a judgment of the United States Court of Appeals for the Third Circuit, dated

---

48 *Ibid.*, para. 6.30.

49 *M/V "Saiga" (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea) (1999), 38 *I.L.M.* 1323, at p. 1346.

50 *Ibid.*, at p. 1347.

51 *Ibid.*

52 Iran's Reply and Defence to Counter-Claim, paras. 10.9, *et seq.*

29 April 1991, in the case of *Cruz et al. v. Chesapeake Shipping Inc., Kuwait Oil Tanker Company, Kuwait Petroleum Corporation, KPC (U.S. Holdings) Inc., et al.*[53]. The problem facing the Court was described as follows:

> "This appeal, arising in the context of the unanticipated juxtaposition of foreign policy decisions with domestic regulation of employee working conditions, presents the novel question of whether the temporary reflagging of former Kuwaiti oil tankers under the United States flag renders the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA" or "the Act"), applicable to foreign seamen employed on ships operating entirely outside the United States. In 1987, as a result of the hazards the Iran-Iraq war posed to neutral shipping operations in the Persian Gulf, eleven Kuwaiti vessels were reflagged *to gain the protection of the United States*. The plaintiffs, 228 Philippine seamen employed on these vessels, claim that the reflagging, which required compliance with extensive United States maritime statutes, entitled them to minimum wages and benefits under FLSA"[54].

5.47 The Court of Appeals then summarised the background to the case[55]. It noted, *inter alia*, that:

- Kuwait's assistance to Iraq in its war with Iran placed its shipping operations particularly at risk;

- Chesapeake Shipping, Inc. was chartered on 15 May 1987 for the specific purpose of satisfying the statutory requirement that, upon reflagging, ownership of the vessels be transferred to a U.S. entity;

- Kuwait Petroleum Corporation, wholly owned by the Kuwaiti Government, was at the apex of the corporate structure. It wholly owned Kuwait Oil Tanker Company ("KOTC"), which in turn wholly owned Chesapeake;

- Prior to the reflagging, KOTC owned all eleven vessels. In consideration for all of Chesapeake's stock, KOTC transferred title to the eleven vessels to Chesapeake. Upon transfer of the title to Chesapeake, Chesapeake immediately time-chartered all the vessels back to KOTC;

---

53 Exhibit 7.
54 *Ibid.*, pp. 2017-2018; emphasis added.
55 *Ibid.*, pp. 2018-2023.

- In order for Kuwait to benefit from an exception to the manning requirement regarding the employment of U.S. nationals, Congress exacted a promise from Kuwait that the vessels would remain in "foreign trade" so that the waiver of dry-docking and other requirements did not "skew the market place"; and, pursuant to this promise, none of the vessels ever did call at a United States port.

5.48 On the basis of these factual findings, the Court held that:

> "The technical formality of transferring the vessels to an American corporation for political purposes in no way altered the entirely foreign character of the shipping operations or the duties of the seamen"[56]

and that:

> "... foreign seamen employed on vessels engaged in foreign operations entirely outside of the United States, its waters and territories do not become subject to FLSA when their vessels are transitorily reflagged under the United States flag and transferred to a corporation chartered under the laws of an American state and immediately leased back to the foreign operating company"[57].

5.49 In addition to these findings by the U.S. Court of Appeals, it will be recalled that it was KOTC that performed repairs to the vessels when they were damaged during the Iran-Iraq war[58]. Chesapeake Shipping, Inc., on the other hand, played a purely notional role in the vessels' operations. This is unsurprising, given that in a statement by the Hon. John Gaughan, Maritime Administrator of the Department of Transportation, before the House Merchant Marine and Fisheries Committee on 18 June 1987, Chesapeake was described as a "paper company", formed by Kuwait in order to circumvent U.S. requirements for the registration of ships[59]. An article written at the time and commenting on this statement further indicated that

---

56 *Ibid.*, p. 2031.

57 *Ibid.*, pp. 2036-2037.

58 U.S. Counter-Memorial and Counter-Claim, Exhibits 45 and 89.

59 *See*, Mertus, J., "The Nationality of Ships and International Responsibility: The Reflagging of The Kuwaiti Oil Tankers", *Denver Journal of International Law and Policy*, Vol. 17, No. 1, p. 207, at pp. 209-210 and fn. 18; Exhibit 8.

"The address of Chesapeake is listed care of Prentice Hall Corporate Systems Inc., but Prentice Hall has been unable to supply any details of Chesapeake executives, thus adding weight to the hypothesis that the company is little more than a shell"[60].

5.50 While the rules relating to nationality of individuals are not directly applicable to the nationality of ships, analogies may be drawn from the Judgment of the Court in the *Nottebohm* case, where the Court held, in a statement echoed, *mutatis mutandis*, by the Tribunal in the *Saiga* case[61], that:

> "... it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain"[62].

However, the Court went on to state that, in order to appraise the international effect of a naturalization "it is impossible to disregard the circumstances in which it was conferred"[63]. After reviewing those circumstances, the Court concluded that:

> "Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein..."[64].

On this basis, the Court held that Guatemala, the respondent State, was under no obligation to recognize a nationality granted in such circumstances; as the Court held, the change of nationality in the circumstances was not opposable to Guatemala.

---

60 *Ibid.*, p. 210, fn. 18.
61 *M/V Saiga* case, *op. cit.*, p. 1340, paras. 63 and 65.
62 *Nottebohm, Second Phase, I.C.J. Reports 1955*, p. 4, at p. 20.
63 *Ibid.*, at p. 24.
64 *Ibid.*, at p. 26.

5.51 It is true that in the *Saiga* case, the International Tribunal for the Law of the Sea, basing itself on the 1982 Convention, held that Guinea could not "refuse to recognize the right of the *Saiga* to fly the flag of Saint Vincent and the Grenadines on the ground that there was no genuine link between the ship and Saint Vincent and the Grenadines"[65]. But the argument in that case concerned questions of the interpretation and application of the law of the flag State[66], and had nothing to do with the question whether ships engaged in non-neutral service, or enemy ships, can be protected under cover of a change of nationality unaccompanied by any underlying change in ownership or use. That issue was not raised by the facts of *Saiga*. Moreover the Tribunal held that a genuine link existed in that case.

5.52 In the present case, in marked contrast, the owner of the *Bridgeton* and the *Sea Isle City*, the Kuwait Oil Tanker Company, asked for the reflagging to enable its vessels to substitute for their status of vessels belonging to a State which was known to be assisting Iraq in its war effort, the status of vessels belonging to a purportedly neutral State, with the sole aim of coming within the protection of that State[67].

5.53 Mention may also be made in this connection of the *I'm Alone* case, which is relied upon by the United States in support of its contention that it has standing to espouse the claims of U.S. owners of foreign-flagged vessels[68]. In that case, an espousal claim by the flag State was rejected because the beneficial owners of the *I'm Alone* had artificially registered the vessel under a foreign flag for purposes of evading their own national law[69]. For that reason no compensatory damages were awarded in respect of the claim.

---

65 *M/V Saiga* case, *op. cit.*, p. 1343, para. 86.

66 By contrast, in *Nottebohm*, the Court expressly refrained from considering "the validity of Nottebohm's naturalization according to the law of Liechtenstein". *I.C.J. Reports 1955*, p. 4, at p. 20.

67 As this Court noted, the purpose of Nottebohm's change of nationality was "to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of ... assuming the obligations - other than fiscal obligations - and exercising the rights pertaining to the status thus acquired"; *I.C.J. Reports 1955*, p. 4, at p. 26. *Mutatis mutandis* that is precisely the position with the reflagged Kuwaiti vessels.

68 U.S. Rejoinder, para. 6.35. As will be shown below, the United States' arguments in this regard are unfounded.

69 3 *R.I.A.A.*, p. 1609.

5.54 Iran submits, therefore, given the wholly artificial and political nature of the reflagging, undertaken with the sole aim of allowing non-neutral Kuwaiti interests to come under the protection of the United States, that Iran is under no obligation to recognise a reflagging granted in such circumstances, and that no claim can be made by the United States with regard to the vessels concerned. Moreover, the reflagging policy was adopted with respect to a State which was clearly engaged in non-neutral behaviour in an armed conflict. By clear analogy from the *Nottebohm* decision, the reflagging was not and is not opposable to Iran. A similar conclusion may be reached on the basis of the United States' own *Manual of Naval Warfare*, discussed below at paragraph 7.12.

5.55 It is a further requirement for espousal of claims that the claimant should have the nationality of the espousing State both at the time of the incident that gives rise to the claim and at the time of introduction of the claim. It is also generally held that a claimant should retain that nationality until the end of the case, unless the change of nationality is beyond the control of the claimant. The rule is stated by Oppenheim as follows:

> "From the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or series of persons (a) having the nationality of the State by whom it is put forward, and (b) not having the nationality of the State against whom it is put forward"[70].

5.56 The principle of continuity appears to be recognised by the United States as applying at least until the date of presentation of the claim. In 1982, the Assistant Secretary of State for Congressional Relations wrote a letter to the Chairman of the House Committee on Foreign Affairs, in which he stated that "under the long-established rule of international law of continuous nationality, no claimant is entitled to diplomatic protection of the state whose assistance is invoked unless such claimant was a national of that state at the time when the claim arose and continuously thereafter until the claim is presented"[71].

---

70 Jennings, R.Y. and Watts, A. (eds.), *Oppenheim's International Law*, 9th ed. (1992), p. 512.

71 76 *A.J.I.L.*, p. 836.

5.57 The United States has however provided no evidence that the *Bridgeton* and *Sea Isle City* remained U.S.-flagged as of the date of the counter-claim and remain so today; or indeed that Chesapeake Shipping, Inc., the U.S. company that was specially created to take over ownership of the tankers in order to permit their reflagging, was and is still in existence.

5.58 In sum, the apparent U.S. nationality of the reflagged tankers was not their real nationality, as has been confirmed by the United States courts and others. As a consequence, such apparent and artificial nationality cannot be opposable to Iran, and the counter-claim must be dismissed insofar as it relates to the *Bridgeton* and *Sea Isle City*.

2. Non-U.S.-flagged vessels

5.59 As noted above, the *Saiga* judgment held that:

> "... the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant"[72].

5.60 In the light of this decision, it may be questioned whether under modern international law a State has standing to espouse claims of its nationals when such nationals are the owners of a vessel flying the flag of another State[73]. The same question would arise if the United

---

72 *See*, para. 5.42, above.

73 This judgment appears to supersede the determinations made in the much earlier *Alliance* and *I'm Alone* cases, dating from 1903 and 1935. In any event, as noted above in paragraph 5.53, in the *I'm Alone* case the nationality of the owners was only held to be relevant because they had artificially registered the vessel under a foreign flag for the purpose of evading their national law. In this regard, *cf.* by analogy the Court's Judgment in *Barcelona Traction*, where it was held that "... the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 39, para. 57). *See*, also, the *IMCO* case, where the Court held that the term "largest ship-owning nations" in the IMCO Convention referred to registered tonnage and not to beneficially owned tonnage (*Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 170). As a commentator has stated, "After the *IMCO* Opinion, there can be little doubt that irrespective of ownership, registration alone is sufficient to determine the nationality of ships as far as international law is concerned" (Mertus, J., *op.cit.*, p. 218; Exhibit 8). *See*, finally, the U.S. case of *Lauritzen v. Larsen*, relied upon by the United States, which declares that "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag... Nationality is evidenced to the world by the ship's papers and its flag" (U.S. Rejoinder, Exhibit 256).

States, as it suggests elsewhere, also purported to espouse claims of U.S. owners of cargo, U.S. personnel and U.S. operators of vessels[74].

5.61 As will be shown, however, the debate is largely academic in the present case, since even if it were admitted that the United States could espouse the claim of an owner of a non-U.S.-flagged vessel, such an espousal would remain inadmissible.

5.62 It is a requirement of international law that, with certain specific exceptions[75], a State may only present a claim in respect of an injury to its nationals. The Permanent Court expressed this rule as follows:

> "... it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse"[76].

5.63 The present Court referred to this "traditional rule that diplomatic protection is exercised by the national State" in its Advisory Opinion in the *Injuries* case[77]. The Court went on to find in that case that as an exception to this rule the United Nations was nevertheless entitled to exercise diplomatic protection on behalf of individuals in its service. In his Dissenting Opinion on that point, Judge Hackworth stated the principle that:

> "Nationality is a *sine qua non* to the espousal of a diplomatic claim on behalf of a private claimant... If the private claimant is not a national of the State whose assistance is sought, the government of that State cannot properly sponsor the claim, nor is the respondent government under any legal duty to entertain it"[78].

---

74 U.S. Rejoinder, para. 6.04.

75 As has been seen at para. 5.42 above, according to the *Saiga* judgment this principle is derogated from when the flag State of a vessel has the right to present a claim on behalf of persons involved or interested in the vessel's operations. *See*, also, para. 5.63, below.

76 *Panevezys-Saldutiskis Railway*, *P.C.I.J.* Series A/B, No. 76, p. 16.

77 *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, *I.C.J. Reports 1949*, p. 174, at p. 181.

78 *Ibid.*, Dissenting Opinion by Judge Hackworth, at pp. 202-203.

A similar statement of principle was made by Judge Badawi Pasha in his Dissenting Opinion in the same case[79].

5.64 The United States appears to acknowledge the existence of this principle[80], but asserts that all the vessels in respect of which it is claiming are either U.S.-flagged or U.S.-owned[81] (although it later retracts this statement in respect of one vessel[82]).

5.65 As regards the four non-U.S.-flagged merchant vessels[83], however, and as has been shown in greater detail above[84]:

- *Texaco Caribbean* was owned by a company incorporated in Panama, and was bareboat chartered to another Panamanian company (not to a U.S. company, as the United States asserts);

- *Lucy* and *Diane* were owned by companies incorporated in Liberia; and

- *Esso Freeport* was owned by a company incorporated in the Bahamas.

As the *Restatement (Third), Foreign Relations Law of the United States* acknowledges:

> "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized"[85].

The counter-claim regarding all four non-U.S. flagged vessels is therefore inadmissible not only on its face and under international law, but also under the United States' own law.

---

79 *Ibid.*, Dissenting Opinion by Judge Badawi Pasha, at p. 206.

80 U.S. Rejoinder, para. 6.32.

81 *Ibid.*, para. 6.05.

82 *Ibid.*, paras. 6.06 and 6.33, where the United States acknowledges that the *Texaco Caribbean* was Panamanian-owned, but contends that it was bareboat chartered by a U.S. corporation and was carrying U.S.-owned cargo when it was attacked.

83 Of the other vessels which are the subject of the United States' inadmissible new claims, or with regard to which the United States reserves a purported right to bring new claims, only the *Sungari* appears to have been U.S.-owned. The *Esso Demetia* was U.K.-owned, and the United States does not even allege that the three other vessels were U.S.-owned.

84 *See*, paras. 4.18, 4.39, 4.42 and 4.45, above.

85 *Restatement of the Law, Third, The Foreign Relations Law of the United States*, Vol. I, § 213, Exhibit 9.

5.66 However, the United States appears to suggest that the corporate veil can be pierced to allow it to bring a claim on behalf of the ultimate holding company of each of the non-U.S. companies that actually owned the vessels.

5.67 This runs directly counter to the Court's Judgment in the *Barcelona Traction* case. The language of that Judgment could not have been clearer in finding (as the United States admitted in its Counter-Memorial[86]) that under customary international law one State did not have standing to bring a claim on behalf of shareholders for injury to a company formed under another State's law[87]. In its Judgment, the Court set out the principle as follows:

> "Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets"[88].

The Court further held that:

> "Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected"[89].

While the Court did canvass the possibility of adopting a theory of diplomatic protection of shareholders, it firmly rejected it, since "by opening the door to competing diplomatic claims, [it] could create an atmosphere of confusion and insecurity in international economic relations"[90].

---

86 U.S. Counter-Memorial and Counter-Claim, para. 6.24, fn. 398.

87 *See*, in addition to the passages relied on by the United States, *I.C.J. Reports 1970*, p. 34, paras. 39, *et seq.*, outlining the consequences of separate corporate personality.

88 *Ibid.*, p. 34, para. 41.

89 *Ibid.*, p. 36, para. 46.

90 *Ibid.*, p. 49, para. 96.

5.68 A solution similar to the *Barcelona Traction* Judgment was reached in the *Arbitration between the Reparations Commission and the Government of the United States*[91]. There a number of vessels had been delivered to the Reparations Commission under the terms of the Treaty of Versailles as being the "property of German nationals". The ships belonged to the Deutsch Amerikanische Petroleum Gesellschaft, a company with registered offices in Hamburg. This was, however, a wholly-owned subsidiary of the Standard Oil Company of the United States. The Standard Oil Company claimed that it had beneficial ownership in the vessels, that they were accordingly not the property of German nationals, and that they had therefore been incorrectly handed over to the Reparations Commission. The matter was submitted to arbitration, and the U.S. contention was rejected: the mere fact that virtually the entire interest in the German company was held by a U.S. concern did not entitle the United States to espouse the company's case[92].

5.69 Despite the clear consequences of the *Barcelona Traction* Judgment for the U.S. counter-claim, the United States relies on this Judgment to argue that "where the Court has found the nationality of the injured entity to be of relevance in precluding a claim, it has done so out of concern that the rights of the State of nationality be respected"[93]. It makes this argument in support of its alleged right to bring a claim on behalf of the "U.S. owners" of the non-U.S.-flagged vessels, asserting that the flag States in question have consented thereto[94]. In fact, given that the non-U.S.-flagged vessels did not have "U.S. owners", the *Barcelona Traction* judgment appears to be more directly relevant to consideration of whether the United States is entitled to bring a claim on behalf of the U.S. shareholders of a foreign corporation. Yet nowhere did the Court suggest in *Barcelona Traction* that a State should be allowed to

---

91 8 *B.Y.B.I.L.*, p. 156.

92 *See*, Watts, A.D., "The Protection of Merchant Ships", 33 *B.Y.B.I.L.*, p. 52, at p. 81.

93 U.S. Rejoinder, para. 6.34, referring to *I.C.J. Reports 1970*, paras. 85-103.

94 U.S. Rejoinder, para. 6.34, and Exhibits 179 and 258. Exhibits 179 and 258 purport to contain such consent by the national State of the respective owners of the vessels. As has already been pointed out above, Exhibit 258, which is presented as Liberia's consent, is no such thing (*see*, paras. 5.21-5.22, above). Moreover, while the communications in Exhibit 179 from the United Kingdom, the Bahamas and Panama do indicate those States' consent to the presentation of claims on behalf of the owners of the vessels, the United States' communications which elicited these responses were misleading, in that they referred to U.S. owners of the vessels, and made no mention of the fact that the owners of the vessels were in fact nationals of the States concerned.

exercise diplomatic protection of the shareholders of a company if the company's national State consents to the exercise of such protection[95].

5.70 The United States has also relied on the *Elettronica Sicula S.p.A. (ELSI)* case for the proposition that "the jurisprudence of this Court recognizes that it is appropriate to protect *ownership* interests under contemporary commercial treaties in appropriate circumstances"[96].

5.71 Reference to the *ELSI* Judgment shows, however, that the facts and the treaty provision that had allegedly been violated were not in an way analogous to those in the present case. The facts related to the requisition by the Italian Government of the Italian subsidiary of two U.S. corporations. The relevant treaty provision concerned the freedom of nationals, corporations and associations of either party to "acquire, own and dispose of immovable property or interests therein" within the territories of the other party[97], and the argument turned largely on the question of whether "interests" in this particular context could be interpreted as including indirect ownership of property rights held through an Italian subsidiary. No such questions arise in the present case.

5.72 Moreover, in the *ELSI* case, the State against which the complaint was filed was the State in which the company concerned had been incorporated. As the Court stated in *Barcelona Traction*, "a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company"[98]. Regardless of the correctness of this "theory" in other cases (a matter on which Iran specifically reserves its position), it is clearly

---

95 A further observation of the Court in *Barcelona Traction* may be noted:
"It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders". *I.C.J. Reports 1970*, p. 50, para. 99.
In the present case a similar observation might be made regarding the decision of U.S. companies to incorporate their ship-owning subsidiaries in foreign jurisdictions.

96 U.S. Counter-Memorial and Counter-Claim, para. 6.24 (emphasis in original), referring to *I.C.J. Reports 1989*, para. 132.

97 *I.C.J. Reports 1989*, p. 77, para. 131.

98 *I.C.J. Reports 1972*, p. 48, para. 92.

inapplicable here. Again, therefore, there can be no analogy in the present case which would require the corporate veil to be pierced.

E. The question of prior negotiations

5.73 In its Reply, Iran pointed out that the United States has not met its obligations, under Article XXI(2), to make a *bona fide* attempt to adjust the dispute by diplomacy before submitting it to the Court, and that this makes the counter-claim inadmissible[99]. The United States has failed to respond to this point in its Rejoinder. Iran will therefore not repeat here what has already been said in its Reply, but would simply reiterate that the counter-claim must be declared inadmissible also on this ground.

---

[99] Iran's Reply and Defence to Counter-Claim, paras. 9.18, *et seq.*

CHAPTER VI

"FREEDOM OF COMMERCE BETWEEN THE TERRITORIES OF THE TWO HIGH CONTRACTING PARTIES" IN THE CONTEXT OF ARTICLE X(1): IRAN DID NOT BREACH ARTICLE X(1) OF THE TREATY

6.1 In this Chapter, Iran will demonstrate that the contentions of the United States in its Rejoinder with respect to Iran's alleged infringements of Article X(1) - contentions that are entirely false, on factual grounds, as has been shown in Chapters III and IV above - are also unfounded on legal grounds. Iran will base this demonstration on an analysis of Article X(1), and in particular of the words "freedom of commerce between the territories of the two High Contracting Parties" as interpreted by the Court itself in its two previous decisions in the present case.

6.2 Iran will show, once again: first, that the United States' allegations must be considered and dismissed in the light of the Court's own interpretation of the concept of "freedom of commerce" embodied in Article X(1); second, that the United States' interpretation of the phrase "between the territories of the two High Contracting Parties" is incorrect and, moreover, inconsistent with its own arguments with regard to Iran's claims; and finally, that neither the United States' generic counter-claim nor its specific counter-claims fall within the ambit of the protection granted by Article X(1) of the Treaty of Amity.

6.3 Iran will repeat here only to the extent necessary the assertions that it has made previously during these proceedings before the Court.

Section 1. The alleged Iranian attacks on vessels owned, flagged, re-flagged or chartered by the United States or its nationals do not constitute a breach of "freedom of commerce" as guaranteed by Article X(1) of the Treaty of Amity

6.4 In its Reply, Iran explained in detail its understanding of the term "freedom of commerce" as incorporated in Article X(1) of the Treaty of Amity. Since this point is also relevant to the counter-claim, some further analysis is required in order to shed light on the

divergence (and also the convergence) between the Parties in their interpretation of this expression. In this Section, Iran will demonstrate the inconsistency of the position taken by the United States in defining freedom of commerce. As will be seen, while the United States argues for a strict and limited conception of such freedom when faced with Iran's claims, it inconsistently argues for a broad interpretation of the same provision in relation to its own counter-claim.

6.5 Iran will first briefly recall its position relating to the definition of "freedom of commerce" (both *per se* and in relation to the freedom of navigation) as interpreted by the Court. It will then show that, contrary to what the United States argues, the provision of a military escort to commercial navigation cannot be considered as an activity ancillary to commerce and thus does not fall within the scope of Article X(1) of the Treaty of Amity.

A. The notion of "freedom of commerce" as interpreted by the Court

6.6 As Iran stated in its Reply, the Court has already provided a definitive definition of "freedom of commerce" in its 1996 Judgment[1] (as reiterated in its 1998 Order[2]), thereby confirming the position taken by Iran in this regard[3]. The Court has made it clear that Article X(1) does not protect "commerce" as such, but "*freedom* of commerce"[4]. In this context, the Court has defined the word "commerce" in broad terms:

> "... it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general - not merely

---

1 Judgment of 12 December 1996, paras. 45-52.

2 Order of 10 March 1998, para. 35.

3 *See*, also, Judge Shahabuddeen's Separate Opinion appended to the 1996 Judgment, at pp. 1, 12 and 13. Subsequent doctrinal commentaries further strengthen the view that in its 1996 Judgment, the Court made a definitive interpretation of the relevant provisions of the Treaty of Amity. *See, e.g.*, Jos, E., "Affaire des plates-formes pétrolières, Iran c. Etats-Unis", *AFDI*, Vol. 42 (1996), p. 408; Bekker, P.H.F., "International decisions. Oil Platforms", *A.J.I.L.*, Vol. 91 (July 1997), p. 522: "Although a preliminary holding on jurisdiction cannot decide or prejudge the merits, some of the Court's far-reaching and definitive statements on the interpretation of Article X(1) of the Treaty may create serious disadvantages for the United States when defending its actions at the merits stage"; Ruiz-Fabri, H., Sorel, J.-M., "Jurisprudence. Cour internationale de Justice. Affaire des plates-formes pétrolières", *Journal du droit international* (*Clunet*), Vol. 124 (1997), p. 869; Evans, M.D., "Oil Platforms (Islamic Republic of Iran v. United States of America) Preliminary Objection", *International and Comparative Law Quarterly*, Vol. 46 (1997), p. 699.

4 Judgment of 12 December 1996, para. 50; emphasis in original.

> the immediate act of purchase and sale, but also the *ancillary activities integrally related to commerce*"[5].

6.7 The following passages of the Judgment reveal what exactly the Court meant by "ancillary activities integrally related to commerce". For instance, it is stated that unless the freedom of commerce protected under Article X(1) is to be rendered illusory:

> "... the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their *transport* and their *storage* with a view to export"[6].

The Court also noted that:

> "Iran's oil *production*, a vital part of that country's economy, constitutes an important component of its foreign trade [*commerce extérieur* in the French version]"[7].

6.8 It follows that the Court has clearly interpreted the "freedom of commerce" that is protected by Article X(1) and has precisely circumscribed the scope *ratione materiae* of this provision. When dealing with the United States' counter-claim, the Court explicitly referred to its previous interpretation and accepted jurisdiction only insofar as the alleged actions said by the United States to be "dangerous and detrimental to maritime commerce" were "capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty *as interpreted by the Court*"[8]. In the context of its counter-claim, the United States cannot contest this definitive finding with regard to the interpretation of "freedom of commerce" as guaranteed under Article X(1).

6.9 In an attempt to circumvent the limitation of the Court's jurisdiction to "freedom of commerce" under Article X(1), the United States has argued in its Rejoinder that the freedoms of commerce and navigation "are tightly interconnected and should be considered together"[9].

---

5 *Ibid.*, para. 49; emphasis added.

6 *Ibid.*, para. 50; emphasis added. This passage and the preceding passage were quoted by the Court itself in its 1998 Order (para. 35).

7 *Ibid.*, para. 51; emphasis added.

8 Order of 10 March 1998, para. 36; emphasis added.

9 U.S. Rejoinder, para. 6.10, fn. 441.

This assertion is simplistic, in that it seeks to assimilate freedom of navigation to maritime commerce, while the latter is conceptually narrower than the former. Many examples could be envisaged of vessels *prima facie* protected by a guarantee of freedom of navigation but obviously excluded from the guarantee of freedom of commerce[10]. For example, pleasure craft or vessels conducting scientific investigation (such as oceanic research) would fall under freedom of navigation but would not be included under the heading of freedom of commerce. *A fortiori*, this line of reasoning must apply to warships. Accordingly, freedom of commerce and freedom of navigation cannot be assimilated or systematically linked to each other; they must be envisaged separately.

6.10 This being said, Iran has always recognised that the maritime transport of commercial goods, as well as other ancillary activities integrally related to commerce (such as - but not limited to - production and storage) fall within the scope of Article X(1). Thus, it is indisputable - and Iran has never sought to dispute - that maritime commerce between the territories of the two High Contracting Parties falls within the scope of freedom of commerce under the relevant provision. This point has been made in relation to the oil platforms, which undoubtedly perform both production and transportation activities in the seas and are thus wholly incorporated in the notion of maritime commerce[11]. Accordingly, Iran acknowledges that commercial navigation is potentially within the jurisdiction of the Court in the present case. On the other hand - and the two Parties disagree on this specific point - non-commercial navigation is distinct and is excluded from the scope of the jurisdiction of the Court on the basis of Article X(1) of the Treaty of Amity as interpreted by the Court.

6.11 The United States' attempts to include freedom of navigation within the jurisdiction of the Court are closely intertwined with its contention that paragraph 1 of Article X must be "viewed within the context of Article X as a whole, and specifically through reference to Article X, paragraph 5"[12]. Iran will not return here to the United States' argument that paragraph 1 must be read in conjunction with the other paragraphs of Article X. This question

---

10 As in the present case, since Article X(6) of the Treaty of Amity expressly excludes vessels of war and fishing vessels from the benefit of Article X(1).

11 *See*, Judgment of 12 December 1996, paras. 50-51, quoted in para. 6.7, above.

12 U.S. Rejoinder, para. 6.28.

has already been addressed several times in the past and, above all, as noted in Chapter V above, because the Court has already dealt with this issue.

6.12 However, it is necessary briefly to comment upon the United States' contention that Iran has infringed paragraph 1 of Article X since, by allegedly attacking non-commercial vessels, it has breached the obligation embodied in paragraph 5 of the same Article[13]. By virtue of this paragraph, each Party's vessels are entitled to "receive friendly treatment and assistance". The United States has claimed that since Iran allegedly attacked U.S. owned, chartered, flagged, or re-flagged vessels, the latter were deterred from seeking safe harbour in Iranian ports. Iran has already highlighted the weaknesses of this argument in its Reply[14]. As Iran pointed out at the time, paragraph 5 contains an independent guarantee concerning only vessels in distress; it is thus irrelevant in the present proceedings, that are clearly limited to claims based on paragraph 1. This discussion need not be repeated in detail, since no new facts and no new legal arguments have been put forward by the United States in its Rejoinder.

6.13 The claim concerning the *Samuel B. Roberts* is discussed in further detail below[15]. This claim is no more than an *in extremis* attempt abusively to stretch the Court's jurisdiction to include "freedom of navigation". As Iran has already noted, it is clear that in the context of Article X as a whole, vessels of war only benefit from the discrete guarantee in paragraph 5; they are expressly excluded from paragraph 1[16]. By definition, military vessels do not conduct commerce and are not even indirectly engaged in commerce. Thus the only way of bringing the alleged Iranian attack on the *Samuel B. Roberts* within the Court's jurisdiction in the present case would be by reference to "freedom of navigation". Consequently, the United States' claim with regard to the *Samuel B. Roberts* is doomed to failure, since "freedom of navigation" does not fall within the jurisdiction of the Court in the present proceedings.

---

13 *Ibid.*

14 Iran's Reply and Defence to Counter-Claim, paras. 9.6 and 9.11.

15 *See*, Sections 1.B. and 3, below.

16 *See*, Iran's Reply and Defence to Counter-Claim, para. 9.11.

6.14 *A fortiori*, there is no basis for the United States' contention that Iran's alleged violation of rules of international humanitarian law constitutes *per se* an infringement of the Treaty of Amity, let alone of Article X(1), protecting freedom of commerce. It is clear that the elements to be proved in order to establish that Article X(1) of the Treaty of Amity has been violated are independent and cannot be directly inferred from a violation of any norm of international humanitarian law. The United States' contention is no more than an attempt to escape its burden of demonstrating a breach of "freedom of commerce between the territories of the two High Contracting Parties"[17]. The argument that other specific rules of international law were indirectly incorporated into provisions of the Treaty of Amity was made by Iran but rejected by the Court in the jurisdictional phase of the present case. The attempt by the United States to achieve similar results by reference to Article X(1) must likewise fail.

6.15 On some occasions, the United States seems to admit, albeit involuntarily, that this is its aim, for example when it declares: "Since Iran's method of warfare was designed to target neutral shipping, Iran blithely disregarded the legitimate uses of the high seas"[18]. Leaving aside the question of the truth of this allegation (which has already been dealt with comprehensively), it must be stressed that the United States is quite clearly focusing on an alleged violation of generic rules related to *jus in bello*, while failing to demonstrate any

---

[17] In this respect, it should be noted that the U.S. Rejoinder refers to Judge Koroma's Separate Opinion in the *Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v. India) (Jurisdiction)*, 21 June 2000 (*see*, U.S. Rejoinder, para. 4.37). According to that distinguished Member of the Court, "Thus formulated, there can be no doubt that the acts complained of by Pakistan, and their consequences, raise legal issues involving a conflict of the rights and obligations of the Parties, a conflict capable of being settled by applying international law, which the Court, as a court of law, would have been entitled to do were it competent to do so (Article 38 of the Statute). However, it is to be observed that it is one thing whether a matter before the Court is justiciable and quite another whether that matter is properly before the Court for it to be entitled to exercise its jurisdiction. In this regard, whether the Court should perform its judicial function in a given dispute or whether it should adjudicate such a dispute on its merits depends entirely on the consent of the parties, which they must have given prior to the institution of the proceedings or in the course of the proceedings themselves. In other words, the issue whether there is a conflict of legal rights and obligations between the parties to a dispute and the application of international law (justiciability) is different from whether the Court has been vested with the necessary authority by the parties to a dispute to apply and interpret the law in relation to that dispute. The Court is forbidden by its Statute and jurisprudence from exercising its jurisdiction in a case in which the parties have not given their consent". In the present proceedings, the Court's jurisdiction is indeed limited by the mutual consent of the Parties, which covers only "freedom of commerce" under Article X(1) of the Treaty of Amity.

[18] U.S. Rejoinder, para. 6.51.

breach of Article X(1) of the Treaty of Amity, which is now the only basis of the Court's jurisdiction[19].

B. Military escort cannot be conceived of as an activity ancillary to maritime commerce

6.16 The United States' assertion that the mine, allegedly laid by Iran, that hit the *Samuel B. Roberts* "impeded an ancillary activity supporting the protected commerce of U.S. flagged vessels"[20] could not be sustained even if one were to admit the broadest meaning of "ancillary activity". The United States' claim in this respect seems to go even further than the example it gives in its Rejoinder, where it argues that Iran's claim with respect to the United States' attacks on oil platforms is "akin to a wheat farmer claiming responsibility for the baking and sale of a loaf of bread"[21]. But in that case there is co-substantiality (*i.e.* the wheat produced by the farmer is present in the bread), whereas there is no natural link at all between the *Samuel B. Roberts* and "freedom of commerce between the territories of the two High Contracting Parties". By analogy to a domestic situation, the United States' line of reasoning would imply that a policeman in charge of ensuring the protection of customers in a public market is himself engaged in trade and is therefore protected by commercial regulations. This is clearly unsound.

6.17 In any event the *Samuel B. Roberts* was assisting non-neutral activities of third States; it was during nothing whatever to protect or enhance trade between the territories of the High Contracting Parties. Even if the argument were correct in principle, therefore, it would fail on the facts.

6.18 In addition, the Court did not refer simply to "activities ancillary to maritime commerce" as the United States suggests[22]. According to the Court, only "ancillary activities *integrally related* to commerce"[23] are covered by Article X(1). Iran demonstrated in its Reply

---

19 Having successfully opposed any form of interpretation of Article I of the Treaty of Amity which incorporated elements of general international law into that provision, the United States takes precisely the contrary position with respect to Article X.

20 U.S. Rejoinder, para. 6.17.

21 *Ibid.*, para. 3.66.

22 *See, ibid.*, title of Part VI, Chapter II, section 1.C, and the discussion under this heading.

23 Judgment of 12 December 1996, para. 49; emphasis added. The original French version reads: "activités accessoires qui sont *intrinsèquement* liées au commerce"; emphasis added.

that production or transportation activities are intrinsically linked to commerce and the Court fully accepted this contention[24]. But the United States has fallen far short of providing any convincing argument that escorting commercial vessels has any "integral" relation to commerce.

6.19 It is plain that military vessels can never be deemed to engage in commerce. The United States' contention that "attacks on United States warships protecting United States commercial vessels must 'be viewed as endangering and denying access to those commercial vessels as well'"[25] should not be accepted. In accordance with the relevant customary rules of international law, the right of convoy means merely that "[neutral] vessels are immune from visit and search"[26]. This rule does not entitle warships to be considered as commercial vessels; they remain military objectives and their own activity is not commercial in character[27]. Even if they are escorting neutral commercial vessels, they cannot be considered as conducting commerce themselves.

6.20 As Iran has already stated in its Reply, non-commercial vessels (*i.e.*, vessels of war) are not protected by Article X(1), as is expressly provided in Article X(6)[28]. Since the Court's jurisdiction is limited to alleged breaches of "freedom of commerce" as protected by Article X(1) (with regard to both the claim and the counter-claim), the United States counter-claim related to the *Samuel B. Roberts* must be dismissed.

---

24 *See, ibid.*, paras. 50-51 quoted at para. 6.7, above.

25 Order of 10 March 1998, para. 26.

26 *See*, 1909 London Declaration, Arts. 61-62; *U.S. Commander's Handbook of the Law of Naval Operations (NW)*, 1987, U.S. Department of the Navy, Art. 76.

27 The United States has not contested this point. Indeed, it states that "[a]ll but one of the vessels [*i.e.*, the *Samuel B. Roberts*] for which the United States seeks damages in its counter-claim were merchant vessels that cannot be characterized as military objectives under the law of armed conflict" (U.S. Rejoinder, para. 6.46). *Ergo*, the United States expressly recognised that the *Samuel B. Roberts* cannot be considered as a merchant vessel, since it is a military vessel and thus a military objective. In any case, it cannot be qualified as a vessel conducting commerce protected under Article X(1) of the Treaty of Amity.

28 *See*, Iran's Reply and Defence to Counter-Claim, para. 9.11.

Section 2. The meaning of "between the territories of the two High Contracting Parties" in Article X(1), with regard to the United States' counter-claim

6.21 In Chapter 6 of its Reply, Iran discussed the meaning of the words "between the territories of the two High Contracting Parties" in Article X(1) of the Treaty of Amity[29]. In this Section, Iran will further consider the interpretation of this phrase, with regard to the United States' counter-claim. Iran's position is entirely consistent, since it argues for exactly the same interpretation as in its previous written pleadings in this case, and for the same interpretation in relation to both its own claim and the United States' counter-claim.

6.22 By contrast the position of the United States with regard to the interpretation of this part of the provision is patently contradictory. While putting forward an unacceptably restrictive interpretation of the expression in its defence to Iran's claims, the United States adopts quite different reasoning in support of its counter-claim. It thus asks the Court to condemn alleged Iranian actions against vessels that were not engaged in commerce between the territories of the two High Contracting Parties - actions that, even if they were to be attributed to Iran (which is not the case), would clearly fall outside the scope of Article X(1) of the Treaty of Amity.

6.23 The interpretation of the expression "between the territories of the two High Contracting Parties" has particular relevance in this case[30]. This is so not only with regard to Iran's own claim, but also with regard to the United States' counter-claim. The words "between the territories of the two High Contracting Parties" impose a definite territorial scope upon the freedom of commerce guaranteed under Article X(1).

6.24 Article X(1) guarantees freedom of commerce between the territories of Iran and the United States. Commercial activities carried on by U.S. citizens (or by U.S.-flagged or U.S.-chartered vessels, or by vessels carrying U.S. personnel) between the territories of the United

---

29 *Ibid.*, paras. 6.44-6.57.

30 *See*, Iran's Memorial, para. 3.62; Iran's Reply and Defence to Counter-Claim, para. 6.46.

States (or Iran) and a third State (and, *a fortiori*, between the territories of third States) clearly do not fall within the scope of Article X(1).

6.25 The United States simply ignores this requirement of Article X(1). In the introduction to Part VI of its Rejoinder, the United States announces that:

> "This part first will review the facts giving rise to the counter-claim and supporting the U.S. claim for damage done to U.S. flagged and U.S. owned vessels, as well as to U.S. owned cargo and U.S. personnel"[31].

In so doing, the United States proceeds as if such criteria were sufficient to found a claim under Article X(1).

6.26 In its discussion of what it alleges were "Iran's illegal attacks on neutral shipping"[32], it repeatedly refers to such criteria, while failing to show that the vessels in question were in any way engaged in commerce between the territories of the Parties[33]. In sum, the United States ignores the obvious territorial limitation of Article X(1).

6.27 The position of the United States on this point is in clear contrast with its own response to the original Iranian claim. For instance, in its Counter-Memorial, the United States argued (incorrectly) that "Iran's Memorial urge[d] the Court to dispense with the territorial restrictions of Article X(1)"; it thus stressed that the plain wording of that provision was limited to commerce and navigation "between *the territories of* the High Contracting Parties"[34] and stated that the Court "should not rewrite clear treaty language"[35]. Similarly, in its Rejoinder (but only with regard to the Iranian claim), the United States repeatedly

---

31 U.S. Rejoinder, para. 6.04.

32 *Ibid.*, paras. 6.05-6.09.

33 *See*, for a detailed discussion, Section 3, below. The United States goes so far as to introduce Part VI, Chapter II in the following terms: "Article X, paragraph 1, ensures 'freedom of commerce and navigation'" (U.S. Rejoinder, para. 6.10), symptomatically omitting the words "between the territories of the two High Contracting Parties".

34 U.S. Counter-Memorial and Counter-Claim, para. 2.31 (emphasis in original). The United States had already pointed out the territorial scope of this provision at para. 2.19: "if Article X(1) is regarded as having independent legal effect, it can apply only to commerce and navigation '[b]etween the territories' of the Parties. The phrase 'between the territories' of the Parties (instead of 'between the Parties') is a significant limitation. It makes clear that the article does not encompass, for example, goods that transit through or are modified in third countries. Instead, Article X(1) addresses only trade moving directly from the territory of one country to the territory of the other". *See*, more broadly, *ibid.*, paras. 2.17-2.19.

35 *Ibid.*, para. 2.31.

emphasises the territorial limitations inherent in Article X(1), requiring Iran to demonstrate the existence of commerce between the territories of the two Parties[36]. In other words, the contradictions that the United States claims to find in Iran's arguments are patent in the United States' own contentions before the Court.

6.28 The United States goes even further in relation to Iran's claim, attempting to restrict the scope of Article X(1) to the protection of goods *directly* exchanged between the territories of Iran and the United States. As explained in Iran's Reply, such an interpretation adds a supplementary condition which is not found in the actual terms of the provision[37]. In Iran's submission, any claim under Article X(1) is justified if the claimant proves that the commerce of goods departing from the territory of one of the Parties, even if transiting through or being modified in third countries, and then reaching the territory of the other Party is obstructed or prevented without justification by conduct attributable to the respondent. This is exactly what Iran has shown with regard to its claim. Iran applies the same interpretation to the United States' counter-claim. However, it insists on the necessity for the United States to prove that such commerce existed and that it was unjustifiably obstructed or prevented by Iran. This the United States has manifestly failed to do.

6.29 In the introduction to Part VI of its Rejoinder, the United States accuses Iran of further inconsistency. It asserts that:

> "... in connection with its claim, Iran argues that it does not need to prove that U.S. actions impeded commerce or navigation taking place between the Parties at the time of the attacks; whereas in its defense to the counter-claim it states that the United States must prove that each ship was engaged in commerce or navigation between Iran and the United States at the time of the Iranian attack"[38].

---

36 For instance, the United States states: "Article X, paragraph 1, does not provide that there shall be freedom of 'commerce' generally but, rather, that there shall be freedom of commerce 'between the territories of the two High Contracting Parties'. Consequently, in order to carry its burden of proving a violation of this provision, Iran must show not just that the extraction of oil at the three platforms is properly characterized as 'commerce' within the meaning of Article X, paragraph 1, but also that such commerce was 'between' Iran and the United States" (U.S. Rejoinder, para. 3.53). Later, the United States attempts to argue against one of Iran's strong contentions on the basis that the refined petroleum products from Western Europe "did not transit Iran's territory on their way to the United States" (U.S. Rejoinder, para. 3.65). *See*, also, the introduction to the U.S. argument, *ibid.*, para. 3.02.

37 Iran's Reply and Defence to Counter-Claim, para. 6.53.

38 U.S. Rejoinder, para. 6.02 (footnotes omitted).

The U.S. contention that there is a contradiction in Iran's position in this respect again betrays a misunderstanding of the reasoning put forward in the Reply, which is relevant equally to the United States' counter-claim[39].

6.30 Iran's first step in establishing that the U.S. attacks breached Article X(1) was to show that the platforms were protected under that provision at the time[40]. For that purpose, Iran demonstrated that the platforms were valuable elements of an existing complex of Iranian oil production intended for foreign trade, including trade with the United States[41], *i.e.*, that they were permanent and indispensable components in a system of Iran/United States commercial relations[42]. This involved evidence, provided by Iran in the Reply, that the oil production of the platforms did indeed find its way from the territory of Iran to the territory of the United States, thus constituting trade "between the territories of the two High Contracting Parties" protected under Article X(1) [43]. This preliminary determination justifies the conclusion that the U.S. attacks against the platforms constituted a breach of this provision.

6.31 Clearly the United States must assume a similar burden of proof with regard to its own counter-claim. This being so, it is insufficient for the United States simply to allege - as it does in its Rejoinder - that there was general commerce between the Parties during the relevant period. This statement does not demonstrate in any way that the alleged attacks against specific vessels navigating in the Persian Gulf constituted a breach of freedom of commerce between the territories of the two High Contracting Parties as protected under Article X(1). 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. In fact those vessels were not conducting trade between the territories of the two Parties.

---

39 Incidentally, it must be emphasised that the above-quoted passage also demonstrates that the United States disregards some of the contentions that lie at the core of the Iranian position. In fact, Iran has never asserted that "the United States must prove that each ship was engaged *in ... navigation* between Iran and the United States at the time of the Iranian attack" (emphasis added), since Iran takes the position that issues concerning freedom of navigation fall outside the scope of the jurisdiction of the Court in the present case (*see*, Chap. V, Section 2.A, above).

40 Iran's Reply and Defence to Counter-Claim, paras. 6.58-6.67.

41 *Ibid.*, para. 6.64.

42 As the Court explicitly recognised: "Iran's oil *production*, a vital part of that country's economy, constitutes an important component of its foreign trade [*commerce extérieur* in the French version]" (Judgment of 12 December 1996, para. 51; emphasis added).

43 Iran's Reply and Defence to Counter-Claim, Chap. 3, Section 2 and the exhibits referred to therein.

6.32 The United States builds its whole case with regard to the counter-claim on two discrete statements: (a) that there was substantial commerce between Iran and the United States during the period 1984-1988, and (b) that the alleged Iranian attacks "increased the cost of doing business in the [Persian] Gulf for U.S. companies"[44]. True, these generic allegations are made in a rather confused manner in the Rejoinder, being implied in various places in the pleading rather than being expressly stated in Part VI as the basis for a claim. Nevertheless, it is necessary to address the potential argument that could be inferred from them.

6.33 *First*, the contention that the alleged attacks "increased the cost of doing business in the [Persian] Gulf for U.S. companies" is not *per se* relevant to the present case. As demonstrated above, the United States must prove that there was a hindrance to freedom of commerce *between the territories of the two High Contracting Parties*, and not simply for U.S. companies operating in the region. On the contrary, as Iran has already shown in its Reply, the United States' own figures show that U.S. exports to Iran actually increased considerably in 1988 and that most of such exports were carried on ships travelling through the Persian Gulf[45]. The long discussion contained in the U.S. Rejoinder, devoted to the extraordinary measures and supplementary costs incurred by U.S. companies in the Persian Gulf in general, is futile if it is not accompanied by a clear demonstration that Article X(1) is applicable in this respect[46]. Once again, the generic contention that there was commerce between the United States and Iran at the time fails in itself to satisfy this requirement.

6.34 *Second*, even if the United States were to prove that commerce between the territories of Iran and the United States was indeed hindered, in general terms, by the situation of insecurity in the Persian Gulf, it would be unfair and contrary to international law to attribute responsibility to Iran on these grounds. Iran's responsibility under Article X(1) could only be engaged if it were demonstrated that Iran adopted conduct to obstruct or prevent freedom of commerce between the territories of the two High Contracting Parties. However, as recalled above, the Persian Gulf was affected by an armed conflict at the time, an armed conflict that

---

44 U.S. Rejoinder, para. 6.09.

45 Iran's Reply and Defence to Counter-Claim, para. 11.5 and U.S. Counter-Memorial and Counter-Claim, paras. 6.06-6.07.

46 Iran can only recall once again its earlier assertion that Article X(1) is not to be read as a general guarantee of freedom of commerce in the vicinity of Iran, or in the Persian Gulf region (Iran's Reply and Defence to Counter-Claim, para. 9.6).

was not caused or provoked by Iran. No doubt the resulting situation provoked insecurity and may have obliged companies to take additional measures to ensure the safety of their commerce. But it is absurd to attribute this general situation to Iran, in the absence of any demonstration of a specific link between harm or expense incurred and alleged Iranian measures targeting trade between Iran and the United States. Evidently there was no such link and no such targeting - and certainly the United States has demonstrated none. Moreover, in that conflict, Iran was the victim of an act of aggression on the part of Iraq and the United States itself contributed by its actions to the general situation of insecurity in the Persian Gulf[47]. In other words, on the hypothesis adopted by the United States, Iran is to be blamed for a situation which the United States itself had helped to create and in which Iran itself was the main victim. This hypothesis is clearly untenable.

6.35 *Third*, the United States attempts to justify its generic claim on the basis of a contorted reading of the Court's decision in the *Nicaragua* case[48]. The United States again takes a contradictory position. On the one hand, it challenges the use of the *Nicaragua* precedent in Iran's Reply with regard to the claim while, on the other hand, it relies upon the same precedent in support of its own counter-claim. Iran rejects both facets of this reasoning. In fact, Nicaragua's claim at the time was analogous to Iran's claim in the present instance, and was substantially different from the United States' counter-claim.

6.36 As recalled in Iran's Reply, in the situation dealt with in the *Nicaragua* case, the United States' activities had directly damaged Nicaragua's infrastructure (ports, oil terminals, etc.), which infrastructure was directly engaged in the external commerce of Nicaragua, especially with the United States (which had been one of its traditional and important commercial partners)[49]. In those circumstances there could be no doubt that the United States' conduct involved a violation of freedom of commerce between the territories of the two High Contracting Parties as protected by the bilateral Treaty of 1956, regardless of whether the facilities attacked were actually being utilised for the purposes of commerce with the United States at the particular time of the attacks. Similarly, in the present case, the United States

---

47 *See*, Chapter III, above.
48 U.S. Rejoinder, paras. 6.21-6.23.
49 Iran's Reply and Defence to Counter-Claim, paras. 6.49-6.53.

attacked Iranian oil platforms which, as Iran has shown, were essential parts in a system of commerce between the territories of Iran and the United States[50]. In other words, on the basis of the *Nicaragua* precedent, it is unnecessary to prove that specific commercial activities were being conducted at the precise time of the attacks, because Iran has already shown that those attacks were directed against Iranian infrastructure which was integrally involved in the conduct of commerce between the territories of the two Parties.

6.37 On the other hand, the United States has failed to show any equivalent relationship to commerce between the territories of the two Parties with regard to its counter-claim. Since the United States does not base its case on this ground, the only way its counter-claim could succeed would be for it to demonstrate that specific Iranian actions obstructed or prevented a commercial activity conducted by specific vessels in the Persian Gulf between the territories of the two High Contracting Parties. As will be shown below, the United States fails to meet this test with regard to the vessels allegedly attacked by Iran.

Section 3. There is no basis for the United States' counter-claims under Article X(1) of the Treaty of Amity

A. The specific counter-claims: the vessels allegedly attacked by Iran were not protected under Article X(1) of the Treaty of Amity

6.38 In Chapter IV, Iran has reviewed the facts with regard to each of the incidents specifically referred to by the United States in its Rejoinder. As has been shown there, the United States has failed to demonstrate that the alleged attacks are to be attributed to Iran. On this basis alone, the United States' counter-claim should be rejected on its merits. In Chapter V, Iran has further demonstrated that, in any event, the counter-claims concerning these same specific incidents fall outside the scope of the Court's jurisdiction in the present instance and/or are inadmissible. As a consequence, the counter-claim should also be set aside on these grounds.

---

50 In Iran's opinion, and in response to arguments in the U.S. Rejoinder (paras. 3.40 and 6.22), the fact that the existence of a system of Iran/United States commercial relations has been substantially proven in these proceedings must allow the Court to follow the same reasoning as it followed in the *Nicaragua* case, in spite of the United States' contention that such trade was not taking place.

6.39 In the light of the preceding discussion, Iran will briefly return to these specific incidents to show that the United States' counter-claims must also be dismissed by virtue of the terms of Article X(1) of the Treaty of Amity as interpreted by the Court.

6.40 It has been shown in Chapter IV that none of the commercial vessels referred to by the United States (with the exception of the *Texaco Caribbean*) was engaged in commerce between the territories of Iran and the United States. Moreover, the United States has expressly acknowledged that the reflagged Kuwaiti tankers, including the *Bridgeton* and the *Sea Isle City*, were not scheduled to and in fact did not call at Iranian ports, on the particular voyage concerned[51]. Indeed there is no evidence before the Court that these vessels were ever, at any stage, engaged in commerce between the United States and Iran or that they ever called at an Iranian port. Iranian oil was not at the time and has at no relevant time been transhipped through Kuwait.

6.41 Reference has been made in Chapter V above to a judgment of the United States Court of Appeals dated 29 April 1991[52]. That judgment dealt with the question of whether U.S. domestic labour law ("FLSA") applied to the seamen on board the eleven reflagged tankers. In deciding that it did not, the Court of Appeals held that "FLSA defines 'in commerce' to include only those economic activities which 'touch' the United States at some point" and that the seamen on board the reflagged vessels failed to satisfy this "in commerce" requirement[53]. It further held that "The technical formality of transferring the vessels to an American corporation for political purposes in no way altered the entirely foreign character of the shipping operations or the duties of the seamen"[54], and that "Congress exacted a promise from Kuwait that the vessels would remain in 'foreign trade'"[55]. The Court further held that Chesapeake Shipping Company, Inc., the U.S. corporation created specifically for the purpose of taking title to the reflagged tankers, was similarly not engaged in commerce within the meaning of the FLSA[56]. It was certainly not engaged in commerce with Iran!

---

51 U.S. Rejoinder, para. 6.29.
52 Exhibit 7.
53 *Ibid.*, pp. 2028 and 2029, fn. 10.
54 *Ibid.*, p. 2031.
55 *Ibid.*, p. 2032.
56 *Ibid.*, pp. 2034, *et seq.*

6.42 As a consequence of the vessels' non-involvement in commerce, direct or indirect, between the territories of Iran and the United States, these vessels were not protected under Article X(1) of the Treaty of Amity, no matter what the colour of their flag or the nationality of their owner or of the owner of their cargo. The counter-claim with regard to the *Bridgeton*, the *Sea Isle City*, the *Lucy*, the *Esso Freeport* and the *Diane* must be rejected on this basis[57]. A few further words should be said, however, about the *U.S.S. Samuel B. Roberts*.

6.43 The *Samuel B. Roberts*, which was struck by a mine allegedly laid by Iran on 14 April 1988, is a U.S. military vessel. For the reasons explained above, when escorting merchant vessels in the Persian Gulf, it was not conducting an ancillary activity integrally related to commerce and therefore it was not protected under the "freedom of commerce" provision of Article X(1). Consequently, the United States' counter-claim with regard to the *Samuel B. Roberts* must be rejected.

6.44 Even if it were possible in principle to consider that the *Samuel B. Roberts* when convoying commercial vessels was conducting an ancillary activity integrally related to commerce, the simple point is that at the relevant time it was returning to Bahrain after escorting a convoy of U.S.-flagged merchant vessels which did not call, and which were never scheduled to call, at any Iranian port[58]. Whatever view were to be taken of the "ancillary" activities of warships such as the *Samuel B. Roberts*, in the present case that vessel would not be protected, in any event, by Article X(1) regarding freedom of commerce (or even freedom of navigation) *between the territories of the two High Contracting Parties*. The United States' counter-claim with regard to the *Samuel B. Roberts* must therefore be rejected also on this ground.

---

[57] The same would apply to the other commercial vessels referred to by the United States (the *Sungari*, the *Esso Demetia*, the *Stena Explorer*, the *Stena Concordia* and the *Grand Wisdom*) if the Court, contrary to Iran's submissions, were to declare a counter-claim admissible with regard to these new vessels.

[58] U.S. Rejoinder, paras. 6.06 and 6.29. *See*, also, para. 6.40, above.

B. The generic counter-claim: the alleged creation by Iran of conditions that were dangerous and detrimental to U.S. maritime commerce and navigation

6.45 The United States' generic counter-claim is based on an assertion that Iran created conditions of navigation in the Persian Gulf that obliged shipping companies to take extraordinary and expensive measures to ensure the safety of their vessels and crews and led to a dramatic increase in the cost of war risk insurance contracts[59]. The United States appears to contend that Iran thereby violated its conventional obligations under Article X(1).

6.46 At the outset, it should be noted that the United States' evident inability to prove any violation of the freedom of commerce between the territories of the two High Contracting Parties casts serious doubt upon the relevance of the United States' generic counter-claim[60]. If the specific incidents dealt with above, which were singled out by the United States for the purposes of demonstrating an alleged Iranian pattern in obstructing freedom of commerce between the territories of the United States and Iran, do not involve protected commerce (and it is clear that they do not), how is it possible, for the purposes of the counter-claim, to rely upon activities of other (unidentified) vessels whose voyages were allegedly interfered with or otherwise wrongfully impaired by Iran? If the United States, given ample opportunity, completely fails to specify any particular protected case, how can its generic claim succeed? In the light of the incidents referred to in the Rejoinder, the United States' generic counter-claim is no more than an empty shell, unrelated to Article X(1), and it should equally be dismissed.

6.47 In any event, there is no doubt that armed conflict in any part of the world increases insecurity, and commerce in a region may be made more difficult or expensive by reason of the presence of such conflict. Third States cannot expect the same level of freedom and security in the affected region in time of war as in time of peace[61]. Third States may have to take protective measures that would be unnecessary in times of normal peaceful relations. These indirect consequences of the state of war cannot be regarded as a hindrance to commerce attributable to one of the belligerent parties and therefore as a breach of its

---

59 U.S. Rejoinder, para. 6.09. *See*, also, *ibid.*, paras. 6.12, 6.14 and 6.16.

60 *See*, paras. 6.38-6.44, above.

61 *See*, Iran's Reply and Defence to Counter-Claim, para. 11.2.

obligation to ensure freedom of commerce under specific treaties - and still less to the party which is acting in self-defence in the conflict. Since the dangerous and detrimental conditions invoked by the United States were an inherent result of the use of force between the conflicting parties in the region, uncaused and unprovoked by Iran, it is unacceptable for Iran to be deemed responsible for any impairment of commerce resulting from conditions not of its own making.

6.48 Even if the United States' reasoning were correct at some level of principle, an assessment of the circumstances which gave rise to the conflict would be necessary in order to determine responsibility between the belligerent parties. In this respect, it must be recalled again that the 1980-1988 war was launched by Iraq, which attacked Iran without any justification whatsoever. Even when cease-fires were agreed, Iraq remained in occupation of substantial parts of Iranian territory. There were flagrant violations of neutrality on the part of other States in the region; throughout the conflict, Iran did nothing but exercise its inherent right of self-defence enshrined in Article 51 of the Charter of the United Nations. Iran was and remained the victim of a blatant act of aggression. Iran was thus forced into an urgent conflict situation threatening its territorial integrity, against its will and against the fundamental principles of international law. It cannot be considered as in any way responsible for the negative and indirect impact caused by that situation to foreign States or private companies.

6.49 Indeed, if responsibility for the conflict is to be distributed, the United States shares its part of responsibility for the dangerous and detrimental conditions that existed for maritime navigation in the Persian Gulf at the time. The United States' illegal and disproportionate use of force (including against the oil platforms) and the publicity given to its military actions certainly contributed to an important extent to the feeling of insecurity that prevailed in the region.

6.50 The United States' counter-claim is based on the contention that the legitimate military activities conducted by Iran in reaction to Iraq's aggression had, globally, an indirect impact on the freedom of commerce in the Persian Gulf. By contrast, Iran's claims are founded on specific military activities undertaken by the United States against particular Iranian facilities

Section 1. The law of naval warfare

7.3 The events which are the subject of the counter-claim have to be analysed in the light of the following areas of the law of naval warfare:

- the law relating to the distinction between the enemy or neutral character of vessels;
- the law relating to the distinction between civilian objects and military objectives;
- the law relating to the laying of mines.

7.4 It is helpful to consider in this context the work of a group of international lawyers and naval experts within the framework of the International Institute of Humanitarian Law in San Remo, the *San Remo Manual*[1]. Although the work was a private endeavour not carried out under any governmental auspices, both the expertise and the diversity of origin of those who participated in it give it a certain authority. This does not dispense with the need to question whether a specific rule formulated in the *Manual* really constitutes existing international customary law, but it provides a useful starting point.

7.5 A further starting point is that Iran was at all relevant times a belligerent in a long and bitter war with Iraq in which its territorial integrity was at stake and for which it was not responsible. This does not, in principle, render lawful for Iran any conduct in self-defence which is unlawful under the *jus in bello*[2], but it is relevant in the assessment of the situation and in particular in relation to issues of necessity and proportionality arising under international humanitarian law.

---

1 International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, 1994.

2 *See, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66.

A. The enemy or neutral character of vessels

7.6 The legal yardstick for evaluating the legality or otherwise of attacks against vessels during the course of an armed conflict depends on the qualification of the vessel in question as "neutral" or "enemy". It will be shown in this sub-section that certain vessels which were attacked, allegedly by Iran, were indeed to be characterised as enemy vessels from an Iranian point of view.

7.7 In order to arrive at this conclusion, three questions have to be answered:

- Are there any States which, in addition to Iran and Iraq, are to be considered as parties to the conflict?
- To the extent that this is the case, what type of link between a vessel and the State in question is necessary in order to establish that the vessel belonged to a State which was a party to the conflict?
- Under what circumstances does a vessel, although belonging to a neutral State, lose its neutral status so that it may be assimilated to an enemy vessel?

1. Parties to the conflict and neutral States during the Iran-Iraq War

7.8 As shown in Chapter III above, there is ample evidence that both Saudi Arabia and (in particular) Kuwait gave substantial assistance to Iraq in various ways. In particular, they made their land, waters and airspace available to Iraq for its military activities against Iran[3]. This support was so regular and massive that it was no longer possible to consider these two States as neutral, even technically. They were so deeply involved in the conflict on the side of Iraq that they must be treated as Iraq's allies in the sense that they had become parties to that conflict. As also shown in Chapter III above, United States officials considered Kuwait, in particular, to be a *de facto* ally of Iraq[4]. In this regard it should be stressed that the characterisation of a State's behaviour in an existing international armed conflict is not to be determined solely or even principally by that State's professions at the time, or by mere

---

3 *See*, paras. 3.23-3.24, above.
4 *See*, para. 3.23, above.

declarations of intent. The question is one of substance and has to be looked at in the light of the facts. A State cannot, while professing neutrality, act in a non-neutral way and then rely on its professions to avoid the consequences of its action; beyond a certain point, the reality of its conduct is what matters.

7.9 The United States, too, assisted Iraq in various ways. It pursued a political goal which was premised on the consideration that an Iranian victory in the war would be detrimental to United States interests. It took a political attitude which was characterised as a "tilt" in favour of Iraq, and which became more and more pronounced. This tilt manifested itself in a number of ways, *inter alia*:

- by facilitating the acquisition of war materials by Iraq;
- by giving Iraq access to U.S. intelligence data relevant for Iraq's military effort;
- by providing guidance for Iraqi attacks against Iran;
- by reflagging Kuwaiti ships in an attempt to make them appear neutral, in order to shield their efforts to foster the Iraqi war effort.

Again, these points have been fully addressed in Chapter III, above. It should be stressed that the United States took these actions in relation to a conflict in which, transparently, Iraq was the aggressor, in which Iraq was seeking to overturn duly concluded treaties, and in which at all relevant times it was illegally occupying Iranian territory.

7.10 These are clear violations of the duties of abstention and impartiality which a neutral State has to respect[5]. Nevertheless, neither the United States nor Iran has drawn the conclusion that the United States had become so deeply involved in the conflict that it had to be considered as a party thereto. As to the United States, the following statement may be quoted among others:

> "We do not wish to see an Iranian victory in that terrible conflict. Nevertheless, the United States remains formally neutral in the war"[6].

---

5 For details, *see*, Section 2, below.

6 Statement by Under Secretary for Political Affairs, Michael H. Armacost, before the Senate Foreign Relations Committee, 16 June 1987, reprinted in 26 *I.L.M.*, 1429, at 1430.

Thus, ships belonging to the United States must, as a matter of principle, be considered as neutral. It does not follow, however, that individual vessels were not acting in breach of the obligation of neutrality, and the legal consequences of such unneutral service must be analysed further.

2. The nationality of vessels

7.11 In the light of the different status that various States may have in relation to an armed conflict, the actual nationality of the vessels concerned has to be ascertained. As a matter of principle, the flag of a vessel is the prime indicator of nationality[7]. But it is not the determinative factor, particularly in the context of the law of neutrality and the *jus in bello*. The *San Remo Manual* expresses the same rule:

> "The fact that a merchant vessel is flying the flag of a neutral State ... is *prima facie* evidence of its neutral character"[8].

The use of the term "*prima facie*" clearly indicates that this presumption is rebuttable in particular cases.

7.12 Two questions have to be distinguished in this respect, namely:

(a) whether a neutral State has indeed granted, to a particular ship, the right to fly its flag, and

(b) whether this grant effectively founds the neutral character of the ship.

According to the United States *Handbook on the Law of Naval Operations*:

> "... the fact that a merchant ship flies a neutral flag ... does not necessarily establish neutral character. Any vessel ... owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag..."[9].

---

7 Caron, D.D., "Flags of Vessels", in: Bernhardt, R., (ed.), *EPIL*, Vol. II, 1995, p. 405.

8 *San Remo Manual*, para. 113.

9 Exhibit 10, para. 7.5.

The footnote to this provision explains:

> "A neutral nation may grant a merchant vessel ... the right to operate under its flag, even though the vessel ... remains substantially owned or controlled by enemy interests. According to the international law of prize, such a vessel ... nevertheless possesses enemy character and may be treated as enemy by the concerned belligerent"[10].

This does not exclude the possibility that a *bona fide* transfer of ownership of a vessel from a person or enterprise belonging to a belligerent State to one belonging to a neutral State may occur, entailing the consequence that the vessel effectively acquires neutral status. On this question, the United States *Handbook* continues:

> "Despite agreement that such transfers will not be recognized when fraudulently made for the purpose of evading belligerent capture, nations differ in the specific conditions that they require to be met before such transfers can be considered as *bona fide.* However, it is generally recognized that, at the very least, all such transfers must result in the complete divestiture of enemy ownership and control"[11].

7.13 Thus, the true nationality of the vessels which are the subject of the United States' counter-claim remains to be established for the purposes of determining their enemy or neutral status. Two of these vessels, the *Sea Isle City* and the *Bridgeton*, were reflagged Kuwaiti tankers. They met none of the above conditions for a *bona fide* transfer to the United States.

7.14 Whether or not, on a technical level, the tankers met the condition of U.S. ownership which U.S. law requires for the grant of the right to fly the U.S. flag, the real economic interest in those tankers was never transferred into U.S. hands. This rather transparent fact has been recognised by the United States courts themselves, as has been shown in Chapter V, above[12].

---

10 *Ibid.*, fn. 110.
11 *Ibid.*
12 *See*, paras. 5.46, *et seq.*, above.

7.15 Furthermore, it was openly declared that the only purpose of the reflagging operation was to protect such non-neutral vessels against Iranian attacks[13]. According to the rules just described, such a purpose is contrary to the principles applying to a *bona fide* transfer. In a Report to the United States Congress dated 15 June 1987, the then Secretary of Defense Weinberger explained this operation as follows:

> "As a result of the Iranian policy to target shipping serving Kuwaiti ports, the Government of Kuwait began efforts to protect its interests ... In January [1987], the Government of Kuwait formally queried our Embassy about the use of U.S. flags and whether reflagged Kuwait vessels would receive U.S. Navy protection equal to that provided other U.S.-flag vessels. At this time, we were also informed of Soviet agreement to provide protection to Kuwaiti tankers under the Soviet flag ... Kuwait was assured that, if its vessels met standard U.S. requirements, it could apply for reflagging and we would consider what protection could be afforded"[14].

This statement clearly shows that the whole reflagging operation did not correspond to any *bona fide* transfer of ownership, but was only a means of giving the vessels in question a neutral appearance. A change of flag operated in such circumstances cannot be opposed to a belligerent[15]. Iran was entitled to treat these vessels as Kuwaiti and hence, as already explained, as enemy vessels.

B. Merchant vessels as military targets

7.16 In relation to the lawfulness of attacks against certain targets, a twofold distinction has to be made, namely between neutral and enemy objects and between civilian objects and military objectives. As a matter of principle, this rule applies also to the law of naval warfare. But as a practical matter, the two distinctions are to a certain extent merged as far as merchant vessels are concerned. Normally, neither neutral merchant vessels nor enemy civilian vessels may be attacked. But the conditions under which a vessel loses its protection either as a neutral object or as a civilian object are very similar. These two questions can thus be treated together.

---

13 McNeill, J.H., "Neutral Rights and Maritime Sanctions: The Effects of Two Gulf Wars", 31 *Virginia Journal of International Law* 631 (1991), at 635.

14 26 *I.L.M.* 1433, at 1451.

15 *See*, paras. 5.45-5.54, above.

7.17 The conditions for loss of protection as a neutral merchant vessel are formulated in the *San Remo Manual* as follows:

> "Merchant vessels flying the flag of a neutral State may not be attacked unless they:
>
> (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
>
> *... or*
>
> (f) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions"[16].

7.18 The corresponding provisions for enemy merchant vessels read as follows:

> "Enemy merchant vessels may only be attacked if they meet the definition of a military objective...
>
> The following activities may render enemy merchant vessels military objectives:
>
> ...
>
> (e) refusing an order to stop or actively resisting visit, search or capture;
>
> ...
>
> (g) otherwise making an effective contribution to military action, e.g., carrying military materials"[17].

7.19 The essential question which remains to be answered, and which is relevant in the present context, is what constitutes an "effective contribution to military action".

7.20 The explanations given by the United States *Handbook* seek to add some precision to the content of these rules. The corresponding provision on the definition of military objectives in naval warfare uses the following phrase:

---

16 *San Remo Manual*, para. 67.
17 *Ibid.*, paras. 59 and 60.

> "if integrated into the enemy's war-fighting/war-sustaining effort..."[18].

A footnote to this provision adds:

> "Although the term 'war-sustaining' is not subject to precise definition, 'effort' that indirectly but effectively supports and sustains the belligerent's war-fighting capability properly falls within the scope of the term"[19].

7.21 It must be concluded that, from this U.S. perspective, oil exports which provide the necessary revenues for financing a war effort do indeed "effectively support and sustain the belligerent's war-fighting capability", provided at least that the level of support exceeds some threshold of sufficiency or materiality. That this is the basic attitude of the United States becomes even clearer when one analyses the comments on neutral trade contained in the same *Handbook*, to which the footnote just mentioned also refers. The definition of "neutral commerce" includes:

> "... all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise sustain the belligerent's war-fighting capability"[20].

With regard to what can be considered as commerce that sustains the belligerent's war-fighting capability, a footnote explains:

> "Examples include ... *exports* of products the proceeds of which are used by the belligerent to purchase arms and armaments"[21].

7.22 The *Handbook* goes on to define such exports as "economic targets":

> "that indirectly but effectively support and sustain the enemy's war-fighting capability..."[22].

The footnote to this provision expressly states that the United States considers this rule to be part of customary law and quotes with approval an arbitral award which considered the destruction of the cotton fields on Confederate territory by the armed forces of the Union to

---

18 Exhibit 10, para. 8.2.2.
19 *Ibid.*, fn. 52.
20 *Ibid.*, para. 7.4.
21 *Ibid.*, fn. 90.
22 *Ibid.*, para. 8.1.1.

be lawful because the Confederacy financed its war effort by the sale of cotton[23]. In the present case there can be no doubt that Iraq's war effort was entirely dependent upon proceeds from Kuwaiti and Saudi commerce, and that any threshold of sufficiency or materiality is more than met.

7.23 In the context of this conflict, the United States clearly took the view that Iraq's attacks on vessels engaged in trade with Iran were lawful. As noted in Chapter III, above, President Reagan stated in 1984 that "the enemy's commerce and trade is a fair target"[24]. Certain U.S. authors holding official positions have come to the conclusion that this would apply to attacks on the commerce of both belligerents. Commenting on the provisions of the *Handbook* just mentioned, one author states[25]:

> "Under this rationale, the oil transportation system of both belligerents in the Iran-Iraq war were legitimate military objectives".

The same author sets out the practical consequences to be drawn from this rationale, albeit only for Iraqi attacks:

> "The tankers docking at Kharg could reasonably have been assumed to be taking on Iranian oil for export, and such ships and their war-sustaining cargoes were legitimate objects of attack. ... [T]he ships carrying Iranian crude oil ... were legitimate objects of attack by Iraqi forces, particularly since they were located either within Iranian or international waters.
>
> ...
>
> Is there a different appraisal of Iraqi attacks on *Iranian* flag tankers than of Iraqi attacks on tankers flying national flags of *other countries* moving Iranian oil? Perhaps that question can be answered by inquiring whether Iran could reasonably be expected to put her oil export capability, upon which she depended to continue the war against Iraq, beyond the lawful reach of Iraqi interdiction, by the simple expedient of using neutral flag shipping? I submit that the answer to both questions is no"[26].

---

23 *Ibid.*, fn. 11.

24 *See*, para. 3.35, above.

25 Roach, J.A., "Missiles on Target: Targeting and Defense Zones in the Tanker War", 31 *Virginia Journal of International Law* 593 (1991), at 597. The author is a leading lawyer of the U.S. Navy.

26 *Ibid.*, p. 607.

If these conclusions apply to Iraq as the aggressor in the conflict, *a fortiori* they must apply also to Iran. The basic principle in the field of the law of war (*jus in bello*) is that of reciprocity.

7.24 It would be a logical consequence to apply the same standard to tankers integrated into the war effort of Iraq, because they carried oil the proceeds of which were used to finance Iraq's war effort, either directly or indirectly through the financing by Kuwait and Saudi Arabia of Iraq's arms purchases. In accordance with the rationale adopted by the United States, Kuwaiti exports could not be brought "beyond the lawful reach of [Iranian] interdiction by the simple expedient of using neutral flag shipping". On the basis of the United States' stance concerning lawful targets in naval warfare, the alleged Iranian attacks on vessels carrying oil from Kuwaiti and Saudi Arabian ports would be lawful.

7.25 The United States' view in this regard is not uncontroversial[27]. It may be considered as giving belligerents excessive licence to harass neutral trade. But for the purposes of the present proceedings, vis-à-vis the United States, Iran can claim the benefit of those very standards the United States would claim for itself in a similar situation and that it claimed, with respect to the Iran-Iraq war, for Iraq.

C. Mines

7.26 Undoubtedly, the laying of mines at sea as a means of warfare is not illegal *per se*. Thus, the question which has to be answered for each of the incidents where damage was caused by mines is whether this particular damage derives from a violation of the particular rules which govern the use of mines in naval warfare.

7.27 Iran admittedly used sea mines during the conflict for two lawful purposes, namely for protecting its coastlines against enemy attacks and as a means of barring Iraq's access to the waters of the Persian Gulf, *i.e.*, as a means of enforcing a legitimate blockade. For both purposes, mines were laid at the Northern end of the Persian Gulf.

---

27 For a critique, *see*, Politakis, G.P., *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality*, 1998, p. 633; Fenrick, F.J., "The Merchant Vessel as Legitimate Target in the Law of Naval Warfare", in: Delissen, A.J.M. and Tanja, G.J. (eds.), *Humanitarian Law of Armed Conflict – Challenges Ahead. Essays in Honour of Frits Kalshoven*, 1991, p. 425, at 442.

7.28 In relation to allegations of other Iranian mine laying, it must be emphasised again that Iran was the major victim of activities which blocked sea lanes in the Persian Gulf. It depended on those lanes for the export of its own oil which was necessary to finance its war effort. It would have been illogical for Iran to obstruct those sea lanes by mines, and for that very reason Iran undertook mine-sweeping operations.

7.29 In this context it should be borne in mind that the United States acknowledges that Iraq laid mines in and around Iranian ports and export facilities and that such mines hit vessels trading with Iran. It appears that the United States regarded such mining as lawful. In the light of this, even had Iran laid mines which were intended to affect commerce with Kuwait and Saudi Arabia, the United States could not, consistently with the rules it itself professes to apply in these matters, treat such mining as unlawful.

7.30 Another issue on which the United States relies in its Rejoinder is the duty of notification as a requirement for lawful mine laying[28]. Once more, it is impossible for Iran to explain the non-notification of mines it did not lay. It can, thus, only point to the fact that this duty is not absolute. The duty was first formulated in Article 3 of Hague Convention VIII where it is subject to the proviso "as soon as military exigencies permit". The same is true for the relevant provision of the United States *Handbook*[29]. It is quite obvious that mines laid in order to damage enemy warships could not be made the subject of a general notice to the shipping community. The pronouncements of the Court which might be understood to impose a stricter obligation to notify (the *Corfu Channel*[30] and *Nicaragua*[31] cases) relate to peacetime mining where, obviously, the military exigencies which exist in wartime are not relevant[32]. The fact that the *San Remo Manual* does not mention the said proviso probably reflects a wish of its authors to extend the scope of protection *de lege ferenda*[33]. In the present case, there was an armed conflict and the proviso thus applies.

---

28 U.S. Rejoinder, para. 6.49.

29 Exhibit 10, para. 9.2.3.

30 *I.C.J. Reports 1949*, p. 22.

31 *I.C.J. Reports 1986*, pp. 46, *et seq.*, 112 and 147, *et seq.*

32 *See*, Exhibit 10, para. 9.2.3, fn. 19.

33 The explanation given in the commentary is not very precise. It does not express a conviction that the omission of the proviso takes into account a development of customary law which had already occurred (para. 83.3 of the Commentary).

7.31 In conclusion, the United States has failed to show, in relation to the specific events which are the subject of its counter-claim, any unlawful conduct involving the responsibility of Iran.

Section 2. Consequences of the breach of the law of neutrality by the United States

7.32 This Section will show that the material breaches of the law of neutrality committed by the United States exclude the possibility for the United States to claim compensation for any damage sustained as a consequence of the conflict.

7.33 The fundamental obligation of neutral States is that of abstention and non-participation. In the words of a well-known specialist in this area of the law of war:

> "The supreme precept is that the neutral State may not, by governmental measures, intervene in the conflict to the advantage of one of the belligerents. Measures that would assist a belligerent and those that would harm it are alike forbidden"[34].

Assistance to one of the belligerents can take many forms. One of them is placing at the disposal of the belligerent means of communication which are relevant to belligerent activities and to which it does not otherwise have access[35]. Giving information which is specifically relevant to the conflict and not otherwise available to a belligerent is a clear example of a non-neutral activity. As far as the provision of war materials is concerned, State practice has modified the former treaty rule that a neutral State was not bound to prohibit export and transit of war materials by private persons[36]. If and to the extent that a State can control the delivery of war materials to a party to a conflict, the duty of abstention requires a neutral State to prevent such delivery[37].

7.34 This obligation was violated by the United States in various ways.

---

34 Bindschedler, R.L., "Neutrality, Concept and General Rules", Bernhardt, R., *EPIL*, Vol. III, 1997, 549, at 551.

35 Joint Service Regulation 15/2 for the Armed Forces of the Federal Republic of Germany, para. 1116 (English translation in Fleck, D., (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, 1995, p. 500).

36 *Ibid.*, para. 1112.

37 For a thorough analysis of State practice, *see*, Oeter, S., *Neutralität und Waffenhandel*, 1992, conclusion, pp. 225 *et seq.*

7.35 Intelligence sharing was a major form of U.S. assistance to Iraq from as early as 1982[38]. The CIA gave satellite pictures to Iraq showing the weak points of Iraqi defence lines and enabling Iraq to better prepare for Iranian counter-attacks. American aerial and satellite reconnaissance on possible Iranian targets for Iraqi bombing raids was also given to Iraq. These were not single incidents. Intelligence sharing was systematic from the early phases of the conflict until its end[39].

7.36 As to the provision of war materials, the United States systematically allowed the export of sensitive technology and "dual use" equipment to Iraq, knowing that this was to be used (and it was in fact used) in the ongoing armed conflict[40]. The United States also systematically encouraged other States to provide weapons to Iraq. At the same time, the United States put into place "Operation Staunch" which was designed to prevent Iran receiving war materials from anywhere in the world.

7.37 These are only the most obvious manifestations of the United States' policy of tilt towards Iraq. They were clearly in violation of the law of neutrality.

7.38 Under the traditional law of neutrality, these violations would have entitled the aggrieved State to resort to reprisals against the State violating its obligations, including armed reprisals. However, as pointed out in Iran's Reply, the Charter of the United Nations forbids armed reprisals[41]. Iran does not claim a right of armed reprisals, but it is entitled to the benefit of all the legal consequences that flow from the non-neutral and unlawful activity of States that assisted Iraq in the conflict.

7.39 In this regard, all the consequences of the law of State responsibility apply to the United States' violations of the law of neutrality. This includes the duty to pay compensation for damages sustained as a consequence of these violations, which are enormous. For example, as pointed out above, the United States provided targeting information to Iraq in violation of the law of neutrality. The vast damages caused by those attacks are the direct

---

38 *See*, Iran's Reply and Defence to Counter-Claim, Freedman Report, para. 25(F).
39 *See*, para. 3.32, above.
40 *See*, Iran's Reply and Defence to Counter-Claim, Freedman Report, para. 25(D).
41 Iran's Reply and Defence to Counter-Claim, paras. 7.57, *et seq.*

consequence of illegal acts committed by the United States. These damages dwarf the total damage which might have been caused by any alleged Iranian attacks against U.S. vessels.

7.40 In such circumstances, any claim for compensation for damages which the United States might have sustained as a result of incidents where Iran is alleged to have violated applicable restraints on action against neutral States (which it categorically denies) constitutes an *abus de droit*. The prohibition of *abus de droit* follows from the principle of good faith and takes various forms. One form is the *exceptio doli specialis*: "*Dolo qui petit quod redditurus est*"[42] is a Roman Law rule first mentioned by Julius Paulus which, in one form or another, has become part of the law of many countries[43] and constitutes a general principle within the meaning of Article 38, paragraph 1(c) of the Court's Statute. In the light of the scale of Iran's own claims the United States can have no legitimate interest requiring legal protection[44]. *Malitiis non est indulgendum*[45]. The United States should be barred from claiming for the alleged damages which are the subject of its counter-claim.

7.41 A further variation of the same principle is the rule *Nullus commodum capere de sua injuria propria*, which is the basis for the clean hands principle[46]. The United States relies

---

42 L. 8 D de doli exc. 44, 4. Dig. 50, 17, 173, 3; *see*, also, *Dolo facit, qui petit quod restituere oportet eundem*, Bonifacius VIII., reg. 59, Liber Sextus 5, 12 ; *see*, also, regarding the development of the *dolo facit* rule: Kaser, *Römisches Privatrecht* 13th ed., 1983, p. 157; and Kegel, "Verwirkung, Vertrag und Vertrauen", in: Hofmann (ed.), *Festschrift Pleyer*, 1986, pp. 513, *et seq.*

43 In Germany, "*dolo facit qui petit quod redditurus est*" is a legal principle reflected in § 242 BGB: "Der dolo petit-Einwand (wie man ihn kurz nennt) ist auch ein allgemeiner Fall des Verstoßes gegen Treu und Glauben im Sinne unseres § 242 BGB" (Wacke, "Dolo facit, qui petit quod (statim) redditurus est", *JA* 1982, pp. 477, *et seq.*). *See*, also, Wacke, *Münchner Kommentar zum BGB*, 1981, § 894, note 30; Roth, *Münchner Kommentar zum BGB*, 1979, § 242, note 390, *et seq.*; Teichmann, *Staudinger Kommentar zum BGB*, Berlin 1983, § 242, note 298, *et seq.*; Schmidt, *Staudinger Kommentar zum BGB*, 13th ed., Berlin 1995, § 242, marg. note 777, *et seq.*; Gadow, "Die Einrede der Arglist", *JHerJb* 84 (1934), 175, *et seq.*; Wendt, "Die exceptio doli generalis im heutigen Recht oder Treu und Glauben im Recht der Schuldverhältnisse", *ACP* 100 (1906), 1, *et seq.*; *RGZ* (*Reichsgericht* Private Law Reports) 84, 212; 126, 383; 143, 277; 160, 312; 166, 113; *BGHZ* (Federal Court Private Law Reports) 10, 69, 75; 38, 122, 126; 47, 266, 269; 74, 293, 300; 94, 240, 246; 110, 30, 33. In other countries the principle is included in the general principle of good faith, which is part of the legal system in Belgium, France and Luxembourg, *see*, *Code Civil* Art. 1134(3); Greece: CC Art. 288; Italy: CC Art. 1375, and *see*, also, Art. 1175; Netherlands: BW Arts. 6.2 and 248; Portugal: CC Art. 762(2); and Spain: CC Arts. 7 and 1258 and Commercial Code Art. 57. A comparative review can be found in: Kegel, "Verwirkung, Vertrag und Vertrauen", in: Hofmann (ed.), *Festschrift Pleyer*, 1986, pp. 513, *et seq.* As an example, one may also cite Art. 7 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), *see*, Najork, *Treu und Glauben im CISG*, 2000, pp. 96, *et seq.*

44 Regarding the French concept of "absence d'intérêt légitime", *see*, Marty et Raynaud, *Droit civil* I, 2nd ed., Paris, 1972, p. 302.

45 Digest: VI.i. De rei vindic, 38. *See*, Cheng, B., *General Principles of Law as applied by International Courts and Tribunals*, Cambridge, 1987, p. 122.

46 *See*, Iran's Reply and Defence to Counter-Claim, para. 8.7.

heavily on this principle, asserting that Iran has come to the Court with "unclean" hands. This is turning the facts upside down. It is the United States which, by its assistance to Iraq's aggression and the ensuing numerous violations of the law of neutrality, has made its own hands "unclean".

7.42 As to the content of this rule, it has to be noted that the notion embodied in the phrase "*capere de*" demands a causal link between *injuria propria* and *nullus commodum*. The advantage (*commodum*) must be caused by the unlawful action (*injuria*). The same link of causality is expressed by the legal rule *ex delicto non oritur actio*[47].

7.43 Such a link of causality exists between the unlawful behaviour of the United States and the advantage it seeks by its counter-claim. The United States' claim is not only a result of the situation arising out of the Iraqi aggression against Iran, but also of the United States' own support for the aggressor. By violating the obligation not to give assistance to one of the belligerents, the United States shares responsibility for the continuance of the conflict. Acting wrongfully, the United States caused the situation that is the basis of its claim, and its claim thus violates the rule *nullus commodum capere de sua injuria propria.* By its violations of the law of neutrality, the United States unlawfully created a situation in which Iran was under extreme pressure to defend itself against the aggressor, and similarly against those who assisted the aggressor and promoted its cause. The United States would reap the fruits of this illegal conduct if it were entitled to claim damages for incidents which (if they had happened as alleged) the United States provoked by its own illegal behaviour. This principle, too, bars the United States from claiming the damages which are the subject of its counter-claim.

Section 3. The prohibition of the use of force – its impact on the duty to pay compensation

7.44 The principles outlined above apply *a fortiori* in circumstances where non-neutral behaviour assists an aggression.

7.45 Where there is an armed conflict, the question of the legal yardstick of the behaviour of the States involved arises on two levels: that of the *jus ad bellum*, or rather *jus contra*

---

[47] This rule is generally upheld by international tribunals, *e.g.* Brit.-U.S. Cl. Com. (1853); The Lawrence (1855), *Hornby's Report*, p. 397; Cheng, *op. cit.*, pp. 155, *et seq.*

bellum, *i.e.*, the prohibition of the use of force, and that of the *jus in bello*, the law applicable in international armed conflict. As the standards of behaviour are of a different character, those two levels are in principle separate. This is so because the functioning of the *jus in bello* requires that equal standards be applied to both parties. No distinction can be made, in this respect, between aggressor and victim[48]. This principle of the equality of the parties in respect of the *jus in bello* is recognised by the fifth preambular paragraph of Protocol I Additional to the Geneva Conventions[49].

7.46 But this principle does not affect the international responsibility of the aggressor on a different level, that of the *jus ad bellum*[50]. This means that when it comes to the question of an overall settlement after the conflict, it is the yardstick of the *jus ad bellum* which must prevail.

7.47 In relation to the armed conflict triggered by Iraq's invasion of Kuwait, the Security Council stated in its armistice resolution that Iraq was responsible for all damage caused by that armed conflict:

> "The Security Council
>
> ...
>
> 16. Reaffirms that Iraq ... is liable under international law for *any* direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals or corporations, as *a result of Iraq's unlawful invasion and occupation* of Kuwait"[51].

This implies, correctly, that it does not matter whether the damage was caused by actions which were legal under the *jus in bello*[52]. This is a clear practical application of the principle that the aggressor is responsible for the entire damage caused by the unlawful act of aggression.

---

48 For a discussion of this principle, *see*, Meyrowitz, H., *Le principe de l'égalité des belligérants devant le droit de la guerre*, 1970, conclusion, p. 400.

49 Partsch, K.J., in Bothe, M., Partsch, K.J., and Solf, W., *New Rules for Victims of Armed Conflicts*, 1982, p. 33.

50 Meng, W., "War", in: Bernhardt, R., (ed.), *EPIL*, Vol. IV, 2000, p. 1334, at 1337; Meyrowitz, *op.cit.* p. 299.

51 S.C. Res. 687 (1991), para. 16; emphasis added.

52 *See*, Conclusions by the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, in: *UNEP, Liability and Compensation for Environmental damage*, 1998, pp. 119, *et seq.*

7.48 Applied to the war between Iran and Iraq, this principle means that Iraq is responsible for all damages caused by that war, even if they were caused by acts which were in conformity with the *jus in bello*. The qualification of aggression as an internationally wrongful act which gives rise to the international responsibility of the aggressor State does not depend on any determination made or not made by the Security Council. It is a rule of general international law.

7.49 The Iran-Iraq war started with a massive invasion of Iranian territory by Iraq on 22 September 1980 and was followed by the continuous occupation of Iranian territory throughout the conflict. Iran acted during the entire conflict in the exercise of its right of self-defence while Iraq violated Article 2(4) of the United Nations Charter by its continuing aggression. As noted in Chapter III, above, the report of the Secretary-General of the United Nations dated December 1991 stated that Iraq's aggression "entail[ed] the responsibility for the conflict"[53].

7.50 International law not only prohibits the use of force, it also prohibits assistance to any unlawful use of force. This is based on the general principle of law that participation in a violation of the law committed by a different actor itself constitutes a violation. In the words of Article 16 of the 2001 ILC Draft Articles on State Responsibility:

> **"Aid or assistance in the commission of an internationally wrongful act**
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that State"[54].

7.51 The activities of the United States described above were not only violations of the law of neutrality; they also constituted unlawful assistance to an aggression, *i.e.*, a violation of the prohibition of the use of force. This violation engages the international responsibility of the United States. This means that the United States is liable to make compensation for any

---

53 *See*, para. 3.13, above.
54 Exhibit 11.

damage sustained by the victim of that aggression. At the very least, as already explained above, the existence of this legal duty must be a bar to any claim for compensation raised by the United States in this case[55].

---

55 *See*, paras. 7.39, *et seq.*, above.

CHAPTER VIII

RESERVATION AS TO FURTHER IRANIAN RIGHTS AND CLAIMS

8.1 Iran refers to and does not need to repeat the reservations set out in Chapter 12 of its Reply, in particular its reservation with respect to "essential security interests" under Article XX(1)(d) of the Treaty of Amity[1].

8.2 In its Rejoinder, the United States says only that it "agrees that Article XX, paragraph 1(d) provides a measure of discretion for a party to apply measures 'necessary to protect its essential security interests'", and that "Accordingly, the United States accepts that Article XX, paragraph 1(d) may provide a defense to Iran's violations of Article X, paragraph 1, in the same manner and to the same extent that it provides a defense to the United States with respect to U.S. actions against the oil platforms"[2].

8.3 There is thus some agreement between the Parties on this question. In particular the phraseology used by the United States - "a measure of discretion" - clearly implies that Article XX(1)(d) is not, in effect, a self-judging reservation. On the contrary, the question whether a party can rely on this proviso is a matter for the Court and is determined applying the relevant legal standards, as Iran has already demonstrated[3].

8.4 Unfortunately the agreement between the Parties on this issue goes only so far. In the passage from its Rejoinder cited above, the United States implies that Iran could rely on Article XX(1)(d) in respect of its counter-claim only if and to the extent that the United States can do so in respect of Iran's principal claim concerning the attacks on the platforms. Formally this is true: the proviso applies to both Parties and both can rely on it. But in fact, for the reasons already given in this and earlier pleadings, in the present case the standard of

---

1 *See*, Iran's Reply and Defence to Counter-Claim, paras. 12.3 and 12.5. The issue of clean hands (dealt with *ibid.*, para. 12.4) has already been discussed in further detail; *see*, paras. 7.41-7.43, above.

2 U.S. Rejoinder, para. 6.40.

3 *See*, Iran's Reply and Defence to Counter-Claim, para. 12.2, and, for further discussion based on the Court's decision in the *Nicaragua* case, *see*, *ibid.*, paras. 7.65-7.96.

the necessity of the action concerned, the crucial aspect of the proviso, would be met by Iran in respect of the United States' counter-claim, even though (for reasons already given) it is certainly not met by the United States in respect of its own conduct.

PART IV

SUBMISSIONS

Based on the facts and legal considerations set forth in Iran's Reply and Defence to Counter-Claim and in the present pleading, and subject to the reservations set out in Chapter 12 of its Reply and Defence to Counter-Claim and in Chapter VIII above and, in view of the present uncertain nature of the United States' counter-claim, further subject to the reservation of Iran's right to amend these submissions, Iran requests the Court, rejecting all submissions to the contrary, to adjudge and declare:

That the United States' counter-claim be dismissed.

Date: 24 September 2001

[*Signed*]
M. Zahedin-Labbaf
Agent of the Government of
the Islamic Republic of Iran

LIST OF EXHIBITS

VOLUME II

1. Walker, G.K., "The Tanker War, 1980-88: Law and Policy", *International Law Studies*, Vol. 74, 2000, pp. 47 and 53

2. Report and Recommendations made by the Panel of Commissioners concerning the Second Instalment of "E1" Claims, United Nations Compensation Commission Governing Council, 24 June 1999 (extract)

3. Friedman, A., *Spider's Web - Bush, Saddam, Thatcher and the Decade of Deceit*, p. 41

4. Affidavit of Mr. Hossein Sheikoleslam (in Farsi with translation)

5. United States manual NWP11B (extracts): definitions of "Operation Plan" and "Operation Order"

6. - Operation and Intelligence Periodic Report from 1700 hours on 28 March 1986 to 1700 hours on 29 March 1986 (in Farsi with translation)

   - Operation and Intelligence Periodic Report from 1700 hours on 29 March 1986 to 1700 hours on 30 March 1986 (in Farsi with translation)

   - Operation and Intelligence Periodic Report from 1700 hours on 22 March 1986 to 1700 hours on 23 March 1986 (in Farsi with translation)

   - Operation and Intelligence Periodic Report from 1700 hours on 31 March 1986 to 1700 hours on 1 April 1986 (in Farsi with translation)

   - Operation and Intelligence Periodic Report from 1700 hours on 10 April 1986 to 1700 hours on 11 April 1986 (in Farsi with translation)

7. Judgment of the United States Court of Appeals for the Third Circuit, dated 29 April 1991, in the case of Cruz *et al.* v. Chesapeake Shipping Inc., Kuwait Oil Tanker Company, Kuwait Petroleum Corporation, KPC (U.S. Holdings) Inc., *et al.*

8. Mertus, J., "The Nationality of Ships and International Responsibility: the Reflagging of the Kuwaiti Oil Tankers", *Denver Journal of International Law and Policy*, Vol. 17, No. 1, pp. 209-210 and p. 218

9. *Restatement of the Law, Third, The Foreign Relations Law of the United States*, Vol. 1, § 213

10. Department of the Navy, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, NWP (Rev. A) FMFM 1-10, paras. 7.4, 7.5, 8.1.1, 8.2.2 and 9.2.3

11. International Law Commission, Draft Articles on State Responsibility, A/CN.4/L.602/Rev. 1, 26 July 2000, Article 16

CERTIFICATION

I, the undersigned, M. Zahedin-Labbaf, Agent of the Islamic Republic of Iran, hereby certify that the copy of each document attached in Volume II of the Further Response to the United States' Counter-Claim submitted by the Islamic Republic of Iran is an accurate copy; and that all translations prepared by the Islamic Republic of Iran are accurate translations.

[*Signed*]
M. Zahedin-Labbaf
Agent of the Islamic
Republic of Iran