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YEAR 1996

Public sitting

held on Tuesday 17 September 1996, at 9.30 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case concerning Oil Platforms

(Islamic Republic of Iran v. United States of America)

Preliminary Objection

VERBATIM RECORD

ANNEE 1996

Audience publique

tenue le mardi 17 septembre 1996, à 9 h 30, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

en l'affaire des Plates-formes pétrolières

(République islamique d'Iran c. Etats-Unis d'Amérique)

Exception préliminaire

COMPTE RENDU

Present:	President	Bedjaoui
	Vice-President	Schwebel
	Judges	Oda
		Guillaume
		Shahabuddeen
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
		Ferrari Bravo
		Higgins
		Parra-Aranguren
	Judge *ad hoc*	Rigaux
	Registrar	Valencia-Ospina

Présents : M. Bedjaoui, Président
M. Schwebel, Vice-Président
MM. Oda
Guillaume
Shahabuddeen
Weeramantry
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Ferrari Bravo
Mme Higgins,
M. Parra-Aranguren, juges
M. Rigaux, juge *ad hoc*

M. Valencia-Ospina, Greffier

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The PRESIDENT: Today the Court will resume its public hearings on the preliminary objection of the United States of America in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*. I now give the floor to Mr. John Crook to continue the pleadings for the United States of America.

Mr. CROOK: Thank you, Mr. President. Mr. President, Members of the Court, it is a great honour for me to appear before you today on behalf of the United States.

Professor Lowenfeld yesterday showed how the 1955 Treaty simply does not regulate the events that the Islamic Republic of Iran has placed at issue here. This morning, I shall supplement Professor Lowenfeld's presentation by examining some of the history of the treaty, its structure, and the three specific provisions invoked by Iran. All of these will show that the 1955 Treaty does not regulate the issues of use of force between the parties placed in question here.

I. THE 1955 Treaty'S HISTORY SHOWS ITS LIMITED CHARACTER

As Professor Lowenfeld noted yesterday, this treaty was one of about twenty substantively similar treaties concluded by the United States with other countries in the years following the Second World War to promote trade and investment within the territory of each party by the others' nationals. A list of these and other similar treaties is to be found in *International Legal Materials*, Volume 20, at page 565 (1981). This particular treaty was signed in 1955, and entered into force in 1957. Its history indicates that there was nothing particularly remarkable about it, nor did it mark any drastic shift in the Parties' relations. Rather, this is one in a century-long succession of commercial and

consular treaties between the United States and Persia and then Iran. In substance, it was much like other post-war treaties. In form, it was a shortened and simplified version of the text generally used. Its history does not support the view that this treaty was the foundation of some grand alliance.

All of this is reflected in the United States Senate hearings on the treaty cited by the Islamic Republic of Iran as Exhibit 98 to its Memorial. These materials give a good explanation of the nature and scope of the treaty. They show that it was one of three treaties considered by the Senate at the same time; the other two being with The Netherlands and Nicaragua. The Department of State witness, whose views are also cited by the Islamic Republic of Iran, described these treaties to the Senate Foreign Relations Committee as being:

> "similar to others considered by the Committee during the past several years. They deal with the customary subjects, such as the right to carry on business, protection of persons and property, nondiscriminatory treatment of trade and shipping and, in the case of the Iran treaty, consular rights and privileges." (Commercial Treaties With Iran, Nicaragua and The Netherlands: *Hearings before the Senate Committee on Foreign Relations*, 84th Congress, 2nd Session 1 (1956), Exhibit 98 to the Memorial of the Islamic Republic of Iran.)

The State Department witness continued: "The three treaties now under consideration are of the traditional type, based upon existing precedents: they contain no innovations raising problems of reconciliation with domestic law." (*Id.* at 2.) The principal innovation reflected in the Iran treaty was perhaps its shortened and simplified form. The State Department witness described the treaty as: "an abridged and simplified version of the treaty type, but [it] incorporates, nevertheless, the substance of most of the protective

provisions of the longer treaties" *(id.)*. This material, as I noted, is in Iran's Exhibit 98 to the Memorial.

This background illustrates the 1955 Treaty's practical, commercial character. There is nothing here of high politics or strategy. This was not a grand political alliance. Rather, it was one of a century-long succession of commercial and consular treaties between the Parties. And this appears from Secretary Dulles' report explaining the treaty to the Senate. He said:

> "This treaty places economic relations between the United States and Iran on a bilateral basis similar to that which existed under the treaty of friendship and commerce between the United States and Persia signed at Constantinople on December 13, 1856 (11 Stat. 709), and terminated May 10, 1928. It replaces the provisional agreement relating to commercial and other relations, concluded at Tehran May 14, 1928 (47 Stat. 2644) [and had an associate provisional agreement which he describes] and thus establishes the relations of the parties on a more modern and adequate basis than has heretofore existed." (Message from the President of the United States, transmitting a treaty of amity, economic relations and consular rights between the United States of America and Iran, signed at Tehran on August 15, 1955. 84th Congress, 2nd Session, Executive E, at 2.)

Thus, the 1955 Treaty was not an innovation. Instead, it was part of an evolving series of commercial and consular agreements between the Parties. The first, that was signed at Constantinople in 1856, remained in force for 71 years, until 1928 (Treaty of Friendship and Commerce, 11 Stat. 709; TS 273; 8 Bevans 1254).

Article 1 of the 1856 Treaty declares that between the two governments and their citizens or subjects "There shall be hereafter a sincere and constant good understanding", a statement of aspiration that has regrettably not always been attained. The 1856 Treaty otherwise addresses practical matters: the exchange of diplomatic representatives, protection of travellers and merchants, the rights to import and sell

merchandise, and the roles of consuls. Its essence is commerce and consuls.

The 1856 Treaty was followed in 1928 by a more modern agreement on trade and commercial relations. It too was of a highly practical character (Agreement on Commercial Relations, effected by exchange of notes, May 14, 1928, 47 Stat. 2644; EAS 19; 8 Bevans 1263). It addressed the treatment of diplomats and consuls, protection of nationals, and reciprocal most-favoured-nation tariff treatment. Again, it was utilitarian to the core.

II. THE TREATY'S STRUCTURE CONFIRMS ITS LIMITED CHARACTER

Both of these earlier agreements show how the parties sought to promote friendly relations and commerce between them, through concrete and specific measures. The 1955 Treaty is the lineal descendent of these earlier texts.

The treaty contains 23 articles; Iran rests the substance of its case on three. However, the Court should consider the total structure of the 1955 Treaty, since it illuminates both the obligations contained in particular articles and those articles' limited territorial application. Each of the three provisions invoked by Iran must be examined in this total context. Each can be correctly understood only if read in harmony with the treaty's overall structure and with all of its other provisions.

Given the importance of this structure to understanding its specific provisions, I will take a little time to review that structure. I believe this may also help to illustrate how little Iran's claims here have to do with the actual substance of this treaty. The Islamic Republic of Iran places heavy reliance upon Article I, which introduces

the treaty and, together with the short preamble, is a precursor to the detailed provisions that follow.

Article II governs entry into the territory of a party to carry on trade and the rights of nationals of each country in the territory of the other.

Article III deals with recognition and rights of companies in the territory of a party.

Article IV (1) is the second provision relied upon by the Islamic Republic of Iran. It is a general obligation regarding fair and equitable treatment of nationals and companies of the other party. The rest of Article IV contains detailed rules protecting the property of nationals and companies of each party in the territory of the other.

Article V deals with acquisition and disposal of property and patent and trademark protection in the territory of a party.

Article VI regulates taxation there.

Article VII regulates exchange controls.

Articles VIII and IX lay down rules governing trade, including tariffs, and other measures affecting imports into the territory of a party.

Iran invokes Article X (1), a general provision regarding freedom of navigation and commerce. The rest of Article X prescribes specific rules regulating maritime navigation.

Article XI deals with State-owned enterprises and monopolies within the territory of a party.

Articles XII through XIX regulate consular questions.

Article XX contains certain exceptions, while Articles XXI through XXIII deal with settlement of disputes, entry into force and the like.

These provisions are inter-connected, each is part of a detailed and integrated structure for promoting and regulating commerce, investment and consular relations within each party's territory. Nothing in this structure, or in any specific provision, suggests any intent by the parties to replace or incorporate the rules of international law otherwise regulating any outbreaks of armed conflict between them.

Mr. President, Members of Court, in the next part of my argument I shall show how the specific Articles cited by Iran do not apply to the circumstances here.

III. THE SPECIFIC ARTICLES CITED BY IRAN DO NOT APPLY

In light of the history and structure I have described, let us examine the three brief treaty Articles on which this claim entirely depends.

A. Article I. The Islamic Republic of Iran first invokes Article I, a short provision stating that "there shall be firm and enduring peace and sincere friendship between the United States of America and Iran".

The expansive arguments that Iran rests on this short article are typical of all of its claims here. This whole case rests upon bits of treaty text isolated from context. These bits of text are then stretched to incorporate many other rules of international law, including the Charter and the law of armed conflict. Thus, Article I is asked to carry all of Iran's claims regarding the events of 1987 and 1988, including the many inter-linked factual and legal disputes we have described. With respect, this cannot be.

When we examine the specific wording of Article I several things appear.

First, this is not the sort of clear language used by States and careful international lawyers wishing to create specific international legal obligations. There are no specific rules nor standards. There are no specific calls for action. Instead, Article I uses language of aspiration. It describes circumstances the parties hoped would mark their future relations: they sought "firm and enduring peace and sincere friendship".

Such language is hardly unique to this treaty. Such texts are to be found in many treaties involving countries in all regions of the world. For example, Article I of the 1950 Treaty of Friendship between Italy and Turkey states that: "There shall be everlasting peace and friendship between Turkey and Italy." (Treaty of Friendship, Conciliation and Judicial Settlement between the Turkish Republic and the Italian Republic, signed at Rome on 24 March 1950, 96 *UNTS* 209 (1951).) Article I of the 1957 Treaty of Friendship between Japan and Ethiopia requires that: "There shall be perpetual peace and friendship between Japan and Ethiopia and between the nationals of the two countries." (Treaty of Friendship between Japan and Ethiopia, signed at Addis Ababa on 19 December 1957, 325 *UNTS* 99 (1959).) Article I of the 1948 Treaty between Hungary and Czechoslovakia bound the parties to "join forces in a policy of lasting friendship" (Treaty of Friendship, Co-operation and Mutual Assistance between the Hungarian Republic and the Czechoslovak Republic, signed at Budapest, 16 April 1949, 477 *UNTS* 190 (1963)). Article I of the 1953 Treaty between the United Kingdom and Libya provided that: "There shall be peace and friendship and a close alliance between the

High Contracting Parties." (Treaty of Friendship and Alliance between the United Kingdom and Libya, signed at Benghazi, 29 July 1953, 186 *UNTS* 190 (1954).) There are many such treaties, some providing for referral of disputes to this Court. Nevertheless, no disputes regarding such clauses have previously come here.

Whether found in preambles or introductory articles, such texts are understood to set out goals sought by the parties. They are part of the context within which other provisions must be construed and applied. However, such language standing alone is not a sufficient basis for concrete claims giving rise to the jurisdiction of this Court.

Article I contains no standard. This is because the general, aspirational language of Article I does not contain standards by which a party's actions can be measured. We agree in this respect with Iran's Memorial (at p. 76, para. 3.24) which notes that "Article I does not give specific details as to exactly what conduct is prescribed or forbidden." However, we do not agree that this lack of precision in Article I can be overcome by reading into the Article other large bodies of law over which this Court lacks jurisdiction.

Rather, we agree with this Court's analysis in 1980 of this very treaty. It is this treaty's specific articles that create standards by which compliance with it can be measured. It is these specific articles that give enforceable legal content to goals such as "friendship". As this Court said in its Judgment in the case of the *United States Diplomatic and Consular Staff in Tehran*, the very purpose of such a treaty

> "is to promote friendly relations between the two counties concerned and between their two peoples, *more especially by mutual undertakings to ensure the protection and security of*

their nationals in each others territory" (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 28, para. 54; emphasis added)).

This Court employed comparable reasoning regarding the FCN treaty between the United States and Nicaragua. *Nicaragua* v. *United States of America* has been noted by Professor Lowenfeld and will be considered further this morning by Dr. Murphy. For our purposes now, it is enough to recall that the matters then before the Court included Nicaragua's claim that the United States had acted contrary to the object and purpose of the US-Nicaragua FCN Treaty. Now Iran contends that it is not making such an object and purpose claim here, presumably because it knows the claim was rejected by the Court in the *Nicaragua* case. It is in fact effectively making such an argument in a different guise but in any case in determining the "object and purpose" of the treaty, the Court said that it lay in "the effective implementation of friendship *in the specific fields provided for in the Treaty, not friendship in a vague, general sense*" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 137; emphasis added). The same approach should again be applied in construing this provision. Its content is to be found in the specific undertakings contained in the treaty, not in broad notions external to it.

Thus, as this Court has recognized, treaties like this - indeed this very treaty - promote friendly relations through specific commitments safeguarding foreign nationals and their property and not through vague expressions of hopes for the future. It is through compliance with such specific provisions that compliance with Article I must be determined.

The role of Article I. We do not suggest that Article I has no role or that the Court must disregard it. Clearly, it has a role. It is part of the overall framework of the treaty. It sets goals which should illuminate the construction and application of other detailed provisions. However, the Article does not entail a legally binding requirement, judicially enforceable by this Court, and ultimately enforceable through recourse to the Security Council under the Charter, that there shall be "peace and sincere friendship" between the United States and Iran. As Professor Lowenfeld indicated, such an interpretation would vastly expand this treaty, and the scope of potential disputes thereunder, in ways the Parties did not intend.

This view of the character of Article I is reinforced by the practice of the parties under the treaty, and by the general practice of States.

The practice of the Parties. Certainly, the practice and relations of the United States and the Islamic Republic of Iran in the years since 1979 do not reveal any mutual understanding that Article I creates legally binding rules directing their relationship. It is an unfortunate but compelling truth that relations between these Parties since 1979 have been marked by many periods of tension and even hostility. However, it was not until the Islamic Republic of Iran decided to file this case that it accused the United States of violating Article I. Iran did not invoke Article I in its claims against the United States in the case concerning the *Aerial Incident of 3 July 1988,* Iran's discussion of its treaty claims in its Memorial in that case cites several provisions, but not Article I (*Aerial Incident of 3 July 1988,* Memorial of the Islamic Republic of Iran, Vol. I, 24 July 1990, pp. 137-138 and 179-184). The

United States, for its part, did not invoke Article I in its arguments in the case concerning *United States Diplomatic and Consular Staff in Tehran*, instead presenting claims based on other articles of the Treaty (*United States Diplomatic and Consular Staff in Tehran*, Memorial of the Government of the United States of America, January 1980, p. 41). Thus, in their practice, the Parties have not previously referred to Article I as a legal standard controlling their relationship.

State practice generally. The general practice of States also reinforces the conclusion that provisions like Article I do not give rise to separately enforceable legal obligations. A few moments ago, I mentioned some of the many treaties that contain such provisions. The Islamic Republic of Iran has cited no cases in which the Court, or another international tribunal, has granted relief on the basis of such provisions or indeed where such relief has been applied for. For our part, we have unearthed no clear State practice suggesting that such provisions are viewed by States as giving rise to specific legal obligations enforceable by an international tribunal.

Indeed, the practice of States, and of these very Parties shows little consistency regarding the inclusion of such provisions. This suggests to us that such provisions may be included in particular treaties, or not included, for reasons having to do more with style or with national practice than with law. Thus, Article I of Iran's 1968 Treaty with Malaysia provides that "there shall be perpetual peace and everlasting amity between the two peoples" (Treaty of Friendship between Iran and Malaysia, signed at Kuala Lumpur on 15 January 1968, 787 *UNTS* 172 (1971)). By contrast, Iran's treaty with France - a relationship that is surely of no less importance to the parties - contains no such

language (Convention on establishment and navigation, signed at Tehran on 24 June 1964, 747 *UNTS* 179 (1970)).

As the Islamic Republic of Iran rightly points out in its Memorial (p. 77, paras. 3.27 *et seq.*), there is no particular pattern regarding such clauses in US practice. The goal of friendly and peaceful relations is regularly mentioned in the preambles of post-World War II US FCN treaties. However, as Iran's Memorial rightly notes, it is cited in the initial article of only four such treaties - this one and the US treaties with China, Nicaragua, Muscat and Oman. Thus, the goal appears in the first article in a handful of treaties, but remains in the preambles of far more. These include treaties with countries with which the United States has extensive and amicable relations - France, Italy, Japan, Germany, to name a few. This suggests that the negotiators of these texts did not see the difference in the location of this wording as materially affecting the overall character of obligations under the Treaty. Certainly this view is reflected in the comments of the US State Department officer who explained the treaty to the Senate Foreign Relations Committee, as contained in Iran's Exhibit 98.

Our written preliminary objection explains further how US officials at the time this treaty was ratified did not believe that Article I made any substantive change from normal US FCN treaty texts. This discussion is to be found in the US preliminary objection at page 44. The Islamic Republic of Iran disputes the relevance of the domestic US materials cited. It is for the Court to decide whether such materials assist it, as indications of the Parties' practice under the Treaty or otherwise. However, I think the value of such materials is clearly indicated by the fact that both Parties here have relied upon them. In this regard, I

refer the Court to such materials as Exhibit 98 to Iran's Memorial and to Exhibit 10 to Iran's Observations and Submissions.

Article I does not sweep in the law of friendly relations. In light of the considerations I have advanced, the Court should reject the contention of the Islamic Republic of Iran that Article I should be construed in a sweeping way to make it into a sort of universal obligation. In its Observations and Submissions (pp. 46-47), Iran makes the remarkable suggestion that Article I incorporates into the treaty, and thus brings into its dispute settlement clause, "the principles of general international law concerning peaceful and friendly relations between States".

This Treaty did no such thing. Its words cannot be read in this expanded or artificial way. Neither the words used nor any accepted guide to interpretation suggests that the Parties agreed to have virtually all disputes between them subject to this Court's jurisdiction. Had the Parties intended this remarkable result, they surely would have said so explicitly. They did not. The Court should not construe such language in a way that will discourage States from concluding future agreements that express the noble aspiration for peaceful relations.

Article 31 (3) of the Vienna Convention. I am nearing the end of my discussion of Article I. I appreciate the Court's continued indulgence. However, I must here add a brief word about Article 31 (3) of the Vienna Convention on the Law of Treaties, because the Islamic Republic of Iran has made much of it.

Article 31 (3) does not support the wish to read Article I and the other articles of the 1955 Treaty in the expansive ways urged by Iran. As it applies her, Article 31 (3) is a limiting principle, not a license

to expand the text of a given treaty. As the Court well knows, Article 31 provides that in interpreting treaties, "there shall be taken into account, together with the context . . . any *relevant* rules of international law applicable in the relations between the parties" (emphasis added).

The effect of this is far narrower than Iran contends. The word "relevant" is key here. This word performs several functions in the text, so some commentary on it concentrates on its application in intertemporal situations (Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Second ed. 1984, pp. 138 *et seq.*). However, the term also makes clear that there must be a sufficient connection between the treaty being construed and other treaties which are being looked at to aid in interpretation. As one commentator described it, "relevant" means that "the rules must . . . concern the subject matter in question" (Mark Villiger, *Customary International Law and Treaties*, 1985, at 268). The subject-matter of the 1955 Treaty is investment and similar matters, not the use of force or "friendship" in some broad sense.

In the interest of timing, Mr. President, I will omit part of my argument but move on to what seems to me the fundamental point with respect to Article 31 (3), and that is this: the Court here lacks jurisdiction over the rules of international law that do apply to these incidents. Namely the law governing armed conflict on the use of force. Article 31 (3) of the Vienna Convention is an interpretative principle, not a jurisdiction conferring one. Article 31 (3) does not give a licence to transplant into general phrases of this treaty whole bodies of unrelated international law. It does not create legal obligations that are fundamentally different from those contained in the treaty being

construed. It does not give rise to jurisdiction that has not been agreed by the Parties.

Mr. President, Members of the Court, this concludes my discussion of Article I. I have dealt with it at some length because the Islamic Republic of Iran's approach to this Article is characteristic of all its treaty claims. Article I has been treated as though it is made of rubber which can be stretched to cover and confer jurisdiction over a wide universe of claims. This simply does not work. Article I and the jurisdiction of this Court cannot be stretched in this way.

B. Article IV (1)

1. Introduction. The Islamic Republic of Iran next seeks to rely on Article IV (1) of the Treaty. This provision was not referred to in Iran's Application but was added in the Memorial.

In invoking Article IV (1) Iran takes an article carefully phrased to limit certain kinds of actions by one party essentially affecting businesses and investments of the other party's nationals and again seeks to stretch and reshape it to cover totally different circumstances. As with Article I the attempt does not work.

Article IV (1) contains several detailed obligations. It requires that each party:

> "accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with applicable laws".

Article IV is at the heart of this Treaty's complex system to protect investments by one party's nationals and the jurisdiction of the

other. It contains several of the most important provisions protecting such investments. Article IV (2) regarding full compensation for its expropriation has been important in the Iran-US Claims Tribunal. However, the Islamic Republic of Iran does not rely on Article IV (2) or on any of Article IV's other powerful rules.

Why is only Article I cited? We do not know. We can speculate that the other parts of Article I are not mentioned because the geographic field of application of each is expressly limited to actions by a party within its territory and clearly the actions of the United States that Iran complains of here did not take place within the territory of the United States.

Thus, Iran is left with only Article IV (1), apparently believing that it has global application. For the reasons I shall show, this interpretation does not stand. This provision does not operate independently of the rest of the Treaty nor does it regulate the conduct of the two Governments every place in the world. Moreover, it cannot sensibly be applied to the matters involving the use of force placed at issue here by the Islamic Republic of Iran.

2. Article IV (1) regulates activities of an internal administrative, regulatory and legal character, not use of force

The first notable feature of Article IV (1) is the specific and limited nature of the Government activity that it affects. This Article does not address every form of activity by a party wherever it occurs. Instead the Article deals with activities taken by parties internally in the context of their domestic legal administrative or regulatory systems. The Article deals with internal regulatory measures or similar government action all taken in the context of a national legal system.

Now, several features of the text underscore this point. For example, the Article points to certain "measures" that impair the lawfully implied interests of foreign investors and businesses. The term used is "measures". This word does not describe every form of government activity. Rather it is used to describe action taken by a State in a domestic legal administrative or regulatory context.

Article IV (1) also requires that foreign investors have the right to enforce their contracts. Again, this relates to aspects of the domestic legal system. The Article also requires "fair and equitable treatment". This requirement operates coherently only in the context of the domestic, administrative or regulatory measures of a party.

All of the other provisions of Article IV, with which Article IV (1) must be read in harmony are similar. Article IV (2) speaks of "constant protection and security" for investments. Article IV (3) protects foreign businesses' premises from improper inspection or disturbance. Article IV (4) is a general guarantee of foreign investors' rights to establish and carry on their businesses.

Each of these parts of Article IV clearly operates only in the context of domestic legal administrative or regulatory activities of a party within the framework of its internal legal system.

Thus, Article IV (1) does not affect every form of government activity. It deals only with those activities that a party carries on within its internal legal administrative regulatory régimes. This article does not address other kinds of government action. it does not regulate actions taken internationally by a party in conducting its foreign relations. It certainly has no relevance to actions involving

the use of force. Article IV (1) does not apply to the events complained of by the Islamic Republic of Iran.

3. Article IV (1) cannot be applied to armed conflict

There is a second fundamental problem with the Islamic Republic of Iran's attempt to apply Article IV to the circumstances of this case. The obligations it imposes cannot coherently be applied to situations involving armed conflict like those complained of here. Iran's claim apparently involves two legal concepts in the Article: "fair and equitable treatment" and "unreasonable and discriminatory measures". These concepts cannot be applied in an intelligible way to these disputes regarding the legality of the use of force.

If uses of force in particular situations are consistent with the Charter and with the rules of armed conflict - as we would show should this matter proceed to the merits - it is meaningless to claim that use of force must also be "fair and equitable". And what can it possibly mean that the lawful use of force must not be "discriminatory" in the sense of this Treaty? These concepts were clearly intended to affect government regulation of personal and property rights, and not to regulate the use of force in armed conflict. They cannot sensibly be applied to the events that are at the heart of Iran's claims here.

4. Article IV (1) is an additional safeguard for business and investments otherwise covered by the Treaty

Third, the Islamic Republic of Iran's efforts to apply this article in this case must fail because the article does not apply to the particular events – actions by the United States affecting Iranian

installations presumably located on Iran's continental shelf – involved in this case.

Article IV (1) applies only to those businesses or investments that otherwise fall within the scope of the treaty. These events, involving Iran's platforms located "at home" on the continental shelf of Iran, simply do not fit within the bilateral structure to protect international business and investment created by the 1955 Treaty.

As I have noted, Article IV (1) is just one part of an integrated structure for the protection of business and investment *in the territory of one party* by the nationals and companies *of the other*. Article IV (1), as part of this inter-connected structure, is not free-standing, it does not operate independently of the rest of the treaty, it cannot be construed without reference to the treaty's other provisions.

The Articles of the Treaty that lie on either side of Article IV show how this whole system revolves around the protection of businesses and investments of one party's nationals and companies in the territory of the other party. Article II allows nationals of one party to come to the territory of the other to carry on trade. Article III gives those nationals the right to go to local courts in the other country to enforce their rights. Article V allows them to lease real estate and to acquire and use other kinds of property there. Article VI bars discriminatory taxation of those foreign nationals and companies in the other jurisdiction. Other articles round out this structure of the rights of nationals and companies of one party to do business in the territory of the other.

Article IV (1) is simply an additional safeguard designed to supplement this system of specific protections for foreign investments

and overseas businesses. A study of the standard form FCN treaty, prepared by Mr. Charles Sullivan, the State Department negotiator of many of these treaties, explains that this language was conceived as an additional layer of protection for businesses and investments otherwise covered by the Treaty. Mr. Sullivan explained that the general requirement that each party accord "equitable treatment" provides a basis for making representations against actions detrimental to United States interests that may not be covered by any specific rule in the treaty, as for example "a measure that is superficially non discriminatory but is so framed as to harm only United States' interests" (Charles Sullivan, *Department of State, Treaty of Friendship, Commerce and Navigation, Standard Draft (Analysis and Background)*, p. 67).

Thus, in our view, Article IV (1) only addresses businesses or investments that otherwise fall within the system of protection created by the 1955 Treaty. These events involving Iran's platforms on Iran's continental shelf do not fall within the protection of this system.

5. The language of Article IV (1) confirms its limited territorial application

I will conclude this discussion by noting some features of the text of Article IV (1) that I think under-score its limited territorial application.

Thus, its first clause requires each party to accord "fair and equitable treatment" to nationals and enterprises of the other party. This general obligation seems most logical in a territorial sense. Iran's contrary suggestion notwithstanding, the parties surely did not intend that they would treat the enterprises of the other party "equitably" in relation to actions outside their borders. They could not

have agreed to include the nationals and companies of the other country in measures they take to promote trade with third countries. Similarly, they surely are not required to protect the other's nationals and companies in bilateral investment treaties with third countries.

The second clause of Article IV (1) is similar. It requires that the parties avoid "unreasonable or discriminatory measures" that might impair foreign investors' property rights. This obligation too operates in a limited territory field; the *Encyclopedia of Public International Law* describes the typical clause of this kind as one which "forbids either party to take any unreasonable or discriminatory measures that would impair the legally acquired rights or interests *within its territory* or nationals and companies of the other party" (D. Blumenwitz, Treaties of Friendship, Commerce and Navigation, 7 *Encyclopedia of Public International Law* (R. Bernhart ed.), 480, 486; emphasis added).

The limited territorial scope or Article IV (1) is perhaps most apparent in the Article's final clause. It requires the parties to ensure that foreign investors' lawful contractual rights "are afforded effective means of enforcement, in conformity with applicable laws". This can only be understood to govern the conduct of a party within its own territory. Neither party could ensure the enforcement of contractual rights within the territories of other countries. Neither party could assure the world-wide availability of means for the other's nationals to enforce their contracts. This obligation can only be read in a territorial sense. Each party agreed to provide for enforcement of the other's nationals contract rights within its territory – not every place in the world.

Thus, the specific obligations contained in Article IV (1) can sensibly operate only within the territory of the party affected by the article. Article IV (1) is a carefully worded text that promotes and protects investments and businesses conducted by nationals and companies of one party in the territory of the other, not every place in the world.

For all these reasons, Article IV (1) provides no basis for the Court's jurisdiction here.

C. Article X (1)

Finally, in scouring the FCN Treaty seeking possible bases for its claims, the Islamic Republic of Iran identifies Article X (1). This is a seventeen word paragraph introducing other paragraphs regulating maritime matters. It reads: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

As with the other two articles invoked by Iran, Article X (1) provides no logical basis to bring Iran's claims within the jurisdiction of this Court. This article addresses maritime commerce between the two parties. It lends no plausible support to Iran's very different claims involving the legality of the use of force. Indeed, it seems to us quite remarkable that, in the circumstances here, Iran attempts to base its claim on a provision intended to promote the freedom and safety of maritime commerce. Article X (1) must be read in light of the other provisions of Article X. Read in this way, it is apparent that it lays down a general goal of peaceful and efficient maritime commerce between the parties, to be implemented through other detailed provisions in the Article.

Writers on these treaties make clear that this provision and similar provisions in other treaties like it, refer especially to maritime matters. In his study of the Standard Draft of the Treaty of Friendship, Commerce and Navigation, Charles Sullivan, who was one of the negotiators of these treaties, writes that the counterpart to Article X (1) in the standard draft is "considered as having special relevance to seaborne traffic" (Charles Sullivan, *Department of State, Treaty of Friendship, Commerce and Navigation. Standard Draft (Analysis and Background)*, pp. 286-87).

Other commentators agree that the purpose of the navigation article in such treaties is to regulate shipping, not matters of commerce generally. Treaty negotiator Herman Walker, described the standard article on these matters as "a navigation article" that:

> "reaffirms a liberal regime of treatment to be applied to international shipping. The rules set forth reflect the practices which have historically been developed by leading maritime nations . . ." (Herman Walker, The Post-War Commercial Treaty program of United States, LXXIX *Political Science Quarterly* 57, 73.)

Piper's study of the navigation provisions in US commercial treaties is similar. His analysis of the standard shipping provisions in post-war FCN treaties, like this one, shows that the purpose of articles like Article X, is to regulate shipping, not commerce generally (Don C. Piper, "Navigation Provisions in United States Commercial Treaties", 11 *American Journal of Comparative Law* 184 (1962)).

In Article X (1), the parties did not agree to protect commerce in the abstract sense of all economic activity. Rather through the totality of Article X, they agreed to take specified practical steps in operating their ports and in regulating navigation. These are spelled out in the

five specific paragraphs, in Article X, which give concrete meaning to the general goal set by Article X (1). None of these specific paragraphs has anything to do with Iran's claims here.

Moreover, as with the other articles Iran invokes, this introductory language has an important territorial limitation. It does not apply every place in the world. Rather, each element of Article X deals with actions taken by each party within its jurisdiction to promote or facilitate maritime commerce between them.

Now, the Islamic Republic of Iran seeks (Observations and Submissions, pp. 50-51) to stretch Article X (1) into a blanket guarantee of free commerce "independent of navigation". As with the similar efforts to stretch Articles I and IV (1), this cannot be correct. Article I promotes and regulates maritime commerce in specific ways, through specific and carefully worded undertakings. Article X (1)'s brief reference to freedom of commerce and navigation cannot reasonably be stretched to become a guarantee of unimpeded commerce in every respect. It certainly cannot be stretched to encompass facilities for the exploitation of natural resources simply on the assumption that those resources might someday become part of commerce between the parties.

The Court should not accept Iran's novel interpretation of the article, which, to our knowledge, has not previously been asserted between the Parties. Certainly, the practice of the Parties since 1979 shows that they have not construed the Treaty in this way. The Court should not give credence to this opportunistic new reading.

Now, in this regard, it is perhaps worth noting that the Islamic Republic of Iran did not find it necessary to refer at all to this Article in its Memorial when it sought to defend the legality of Iran's

military actions impairing the freedom of navigation in the Gulf. Instead, Iran's Memorial (Memorial p. 25, para. 1.54) argued that "in the circumstances the actions of its naval forces in the Persian Gulf were fully justified by the laws of neutrality". This statement correctly identifies, part at least, of the body of international law that must be applied in assessing Iran's military actions - and the military responses of the United States. These matters are regulated by the law of neutrality and by the law of armed conflict, and not by this or any other article of the 1955 Treaty. They are not within the jurisdiction of this Court.

I will conclude this part of my argument with a final point that follows closely from what I have just said. As with the previous article, Article X (1) simply cannot intelligibly be applied in situations regulated by the law of armed conflict. The essence of Article X is the regulation of peaceful maritime commerce between the parties. It does not replace the law of armed conflict where that law applies.

D. Article XX (1)(d)

Mr. President, Members of the Court, I have imposed upon the Court for a long time, and I am grateful for your continued attention. I will conclude with a brief comment regarding the Islamic Republic of Iran's detailed arguments (Observations and Submissions at 51-59) about Article XX (1) *(d)*, which excludes certain matters from the operation of the Treaty. Now here, confusion seems to have arisen in the exchange of written pleadings as to the issues now actually before the Court for decision. Today, the core question is the Court's jurisdiction. In this

connection, the interpretation and application of Article XX (1) *(d)* are not now at issue.

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

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

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

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

Mr. President, I am at the end. I am grateful for the Court's close attention as I have reviewed the history and structure of this treaty to

show that it does not regulate the matters placed at issue by the Islamic Republic of Iran. I have also addressed each of the three specific articles relied upon by Iran. In each case I have shown that the cited provision cannot reasonably be interpreted to sustain the claims submitted. Article I's affirmation that there shall be peace and friendship between the parties cannot be stretched to bring into the treaty, and into the jurisdiction of this Court, all of the law of war and peace. Article IV (1) has no relevance to the use of force, nor does it cover actions and installations that are not otherwise within the scheme of the 1955 Treaty and finally, Article X (1)'s undertakings regarding maritime commerce are likewise not relevant to Iran's actual claims. None of these claims has any reasonable connection to the treaty provisions on which they are supposedly based. This Court therefore lacks jurisdiction over them.

This concludes my presentation. Now, or after the Court's morning recess, I would invite the Court to hear my colleague, Dr. Sean Murphy, Counsellor for Legal Affairs of the United States Embassy at The Hague.

I thank the Court.

The PRESIDENT: Thank you very much, Mr. Crook. I now give the floor to Dr. Sean Murphy.

Mr. MURPHY: Mr. President, Members of the Court, it is a great privilege to appear once again before this Court.

As Professor Lowenfeld stated yesterday, the United States does not believe that the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 4 (27 June) provides the appropriate guidance for the

disposition of the case before the Court today. However, in view of Iran's repeated references to the *Nicaragua* case in its effort to establish jurisdiction of the Court in this case (Iran Observations and Submissions on the US preliminary objection, 1 July, 1994, paras. 2.22 note 66, 2.23 note 68, 2.24 note 70, 3.05, 3.18-20, 3.39, 3.49-51, 3.55, 3.57, 3.60-64, 4.03, 4.24, 4.28), it is important to address squarely the relevance of the *Nicaragua* case to the case before you today.

In reading the pleadings of the *Nicaragua* case, it is readily apparent that Nicaragua's claim under the bilateral FCN Treaty was something of an afterthought. Indeed, when Nicaragua filed its Application, it did not even allege that the United States had violated the FCN Treaty, nor did it raise such a claim throughout the interim measures phase during which questions of jurisdiction were strenuously argued. Rather, Nicaragua invoked exclusively the Court's jurisdiction under Article 36 (2), claiming that the United States had violated certain treaties, notably the charters of the United Nations and of the Organization of American States, and further had violated customary rules of international law.

Only in its Memorial on jurisdiction did Nicaragua first allege violations of the FCN Treaty, even then devoting just a few pages to the issue. Similarly, the United States only briefly responded to those allegations in its lengthy Counter-Memorial. The lack of attention to the FCN Treaty during the jurisdiction phase was particularly apparent during the oral proceedings. Nicaragua did not refute any of the arguments made by the United States in its Counter-Memorial concerning the FCN Treaty. In fact, Nicaragua's only mention of the FCN Treaty during the oral proceedings occurred during the closing statement of the

Nicaraguan Agent, who simply stated that the FCN Treaty constituted a subsidiary basis for the Court's jurisdiction (*Nicaragua* v. *United States of America*, oral proceedings on jurisdiction, 10 October 1984, CR 84/15 at 74). Given Nicaragua's lack of attention to the FCN Treaty, the United States, in turn, did not mention the FCN Treaty at all in its oral argument, nor did the Court ask any questions of the parties regarding the FCN Treaty.

So, I think it fair to say that the issues posed by the FCN Treaty were not fully addressed by the parties at the jurisdictional phase due to their attention to other issues. Only a few pages of the Court's decision on jurisdiction address the FCN Treaty (*I.C.J. Reports 1984*, paras. 77-83) and those few pages do not address certain key issues. Some of these issues were addressed by the Court in its decision on the merits, but at that phase the Court only had the benefit of Nicaragua's views when reaching its decision.

What were the acts of the United States which Nicaragua claimed violated the FCN Treaty? While Nicaragua allege that all the US actions complained of in its Application violated the FCN Treaty, including the alleged mining of Nicaraguan ports in early 1984 and certain attacks on Nicaraguan ports and port installations in late 1983 and 1984. Of particular relevance to this case were Nicaragua's allegations that the United States twice attacked an underwater oil pipeline and two oil storage facilities associated with its ports (*I.C.J. Report 1986*, paras. 75, 81 and 85).

The Court passed judgment on three of Nicaragua's claims involving the treaty - the claim that these acts violated the object and purpose of the FCN Treaty and claims that they violated two specific provisions of

the FCN Treaty - Article I (concerning equitable treatment of nationals) and Article XIX (concerning freedom of commerce and navigation).

It is our contention that the Court's disposition of Nicaragua's claims does not support The Islamic Republic of Iran's position in this case. To the contrary, as I will show, the Court's disposition supports the United States position. My presentation will proceed as follows. First, I will explain why the *Nicaragua* case does not support a finding of jurisdiction over the individual articles of the 1955 Treaty relied upon by Iran in this case. Second, I will explain why the Court's overall reasoning in the *Nicaragua* case supports the thrust of the United States' presentation in this case and finally I will explain why the *Nicaragua* case does not support the notion that these issues should be held over to the merits.

I. THE ARTICLES OF THE 1955 Treaty INVOKED BY THE ISLAMIC REPUBLIC OF IRAN ARE NOT SUPPORTED BY THE NICARAGUA COURT'S REASONING WITH RESPECT TO THEIR COUNTERPARTS

So, let me begin by briefly explaining why the *Nicaragua* decision provides no support for a finding of jurisdiction concerning the individual articles of the 1955 Treaty pled by Iran in this case.

Friendly Relations

The first article of the 1955 Treaty that Iran claims the United States violated is Article I, which, as Mr. Crook has discussed, exhorts the parties to maintain friendly relations. The *Nicaraguan* case does not provide any support for a finding of jurisdiction in this case with respect to an argument based on "friendly relations".

In the *Nicaragua* case, the Court decided that it did not have jurisdiction under the FCN Treaty to address a general claim that the United States was acting in an unfriendly manner - a broad claim that seems, in many respects, similar to Iran's sweeping claim in this case. In its memorial on jurisdiction, Nicaragua claimed that the United States' actions were contrary to "the entire spirit of the Treaty" (Nicaragua Memorial on jurisdiction, 30 June 1984, para. 175). At the merits phase, Nicaragua recast this general claim as a claim that the United States had defeated the object and purpose of the Treaty (Nicaragua Memorial on merits, 30 April 1985, paras. 410-413). The Court was quite clear, however, that its jurisdiction to address that claim did not arise under the FCN Treaty. Rather, the Court reasoned that a State's obligation not to deprive a treaty of its object and purpose was an obligation arising under customary international law, separate of the treaty (*I.C.J. Reports 1986*, paras. 270-71).

While the Islamic Republic of Iran concedes that Nicaragua's generalized claim was outside the jurisdictional clause of the FCN Treaty, it tries to argue that the presence of Article I in the 1955 Treaty makes this a different case than the *Nicaragua* case (Iran Observations and Submissions on the United States preliminary objection, 1 July 1994, para. 3.20). As Mr. Crook has shown, however, Article I cannot be regarded as setting forth a discrete legal obligation upon which a claim may be brought. In the context of the *Nicaragua* case, two further points may be made. First, Article I in the 1955 Treaty cannot be equated with an obligation arising under customary international law not to defeat the "object and purpose" of the 1955 Treaty. Article I of the 1955 Treaty is quite different than any such obligation, as the

Islamic Republic of Iran itself appears to concede (Iran Memorial, 8 June 1993, para. 3.09). Article I speaks to the desire of general friendship between Iran and the United States, whereas an obligation not to defeat the "object and purpose" of a treaty, as the Court stated in *Nicaragua*, speaks to "the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in the vague general sense" (*I.C.J. Reports 1986*, para. 273). Second, in the *Nicaragua* case, the Court speculated that two parties might write a sweeping treaty provision by which each party "binds itself, for so long as the Treaty is in force, to abstain from any act toward the other party which could be classified as an unfriendly act, even if such act is not in itself the breach of an international obligation" (*I.C.J. Reports 1986*, para. 274). That language is not the type of language present in Article I of the 1955 Treaty, nor is there any evidence in the *travaux préparatoires* or in the subsequent conduct of the Parties that supports such a reading of Article I. In short, Article I of the 1955 Treaty fits neither the *Nicaragua* Court's conception of an article designed to create a legal obligation to refrain from all actions of any kind, even if unlawful, nor the Court's conception of object and purpose. So, in our view the *Nicaragua* case provides no support for Iran's claim based on Article I of the 1955 Treaty.

Equitable Treatment

The next article of the 1955 Treaty that Iran claims the United States has violated is Article IV (1), which among other matters addresses equitable treatment by one party of the nationals and companies of the other party. The equitable treatment provision of Article IV (1)

had a counterpart in the *Nicaragua* case - Article I of the FCN Treaty - but, again, it is clear that the Court's disposition of Nicaragua's claim provides no support for Iran in this case.

In its pleadings, Nicaragua claimed that a wide array of actions violated Article I of the FCN Treaty, including certain attacks on oil installations that were servicing Nicaraguan ports (Memorial of Nicaragua on questions of jurisdiction, June 30 1984, para. 174; *Nicaragua* v. *United States of America* oral proceedings on the merits, 20 September 1985, CR 85/27, pp. 6-8). In the course of its decision, the Court found that some of those actions, including the attacks on the oil installations, were in fact attributable to the United States. The Court, however, did not find that those actions fell within the scope of Article I on "equitable treatment". The Court analyzed the "equitable treatment" provision only with respect to a narrower category of acts specifically directed against Nicaraguan citizens, such as kidnapping (*I.C.J. Reports 1986*, para. 277). Evidently the Court did not believe that the requirement of "equitable treatment" had anything to do with naval attacks on ports and oil installations at those ports. By the same token, the requirement of equitable treatment has nothing to do with the attacks at issue in this case.

Now, as I noted, the Court in the *Nicaragua* case did regard a narrow class of acts specifically directed against Nicaraguan nationals as potentially relevant under the treaty. The Court rejected Nicaragua's claims in that respect because it found that this narrow class of acts could not be imputed to the US Government. In doing so, the Court noted that even if such actions could be imputed to the US Government, there would be a further issue of whether a provision for "equitable treatment"

can be read as addressing actions by the US Government against Nicaraguans *in Nicaragua*. The Court did not need to address that issue, but it suggested that, regardless of whether Nicaragua on the merits could prove that the US Government committed such actions, there was a threshold legal issue as to whether the "equitable treatment" provision covered such actions at all. As Mr. Crook has shown, Article I (1) does not cover such actions, and therefore the Islamic Republic of Iran's claims with respect to this article have no reasonable connection.

Freedom of Commerce and Navigation

The final article of the 1955 Treaty that Iran claims the United States violated is Article X (1) concerning the freedom of commerce and navigation. Iran has pointed out that, in the *Nicaragua* case, the Court accepted Nicaragua's allegations that certain US actions, including attacks on oil pipelines and oil storage installations, had violated the analogous article of the FCN Treaty, Article XIX (*I.C.J. Reports 1986*, para. 192 (7) and (11)). In the *Nicaragua* case, however, the facts underlying the Court's decision regarding freedom of commerce and navigation were quite different than the facts pled by the Islamic Republic of Iran here. In determining that the United States had violated Article XIX of the FCN treaty, the *Nicaragua* Court directed its attention solely to actions by the United States that impeded maritime commerce.

In finding that the mining of Nicaraguan ports violated the freedom of navigation and commerce guaranteed by Article XIX, the Court stated that

> "where the vessels of one State enjoy a right of access to ports of another State, if that right of access is hindered by the laying of mines, this constitutes an infringement of the

> freedom of communications and of maritime commerce" (*I.C.J. Reports 1986*, paras. 253 and 278).

Thus, the relevance to Article XIX of the laying of mines was the impediment they posed to maritime commerce.

Second, the Court also found that the United States had attacked Nicaragua's ports and port facilities associated with the off-loading of goods from ships, such as fuel and weapons, and had prevented Nicaraguan ships from calling at US ports (*I.C.J. Reports 1986*, para. 292 (7) and (11)). The Islamic Republic of Iran is correct that these Nicaraguan port installations included oil pipelines and storage tanks. Those installations, unlike the Iranian platforms in this case, were not being used to conduct military operations. Moreover, even on the facts as stated by Iran in this case, it is clear that the Iranian platforms should be distinguished from the oil installations in the *Nicaragua* case. In that case, the oil pipelines were part of Nicaragua's port facilities and were used by foreign oil tankers to off-load oil; similarly, the storage tanks were used to store the off-loaded oil and were part of the port facilities (see Nicaragua Memorial on the merits, 30 April 1985, Annex F, pp. 92-93, 169-70 and Annex J, Att. 1, at 3; *Nicaragua* v. *United States of America*, oral proceedings on the merits, 18 September 1985, CR 85/24, p. 52). Thus, the attacks that served as the basis for the Court's decision in the *Nicaragua* case were inextricably related to, and were specifically directed at, maritime commerce, and not to Nicaragua's internal exploitation or development of resources.

The Court also found that the US economic embargo violated Article XIX. In that respect, the Court did not rest its decision on paragraph 1 of the article, but felt it necessary to quote from paragraph

3 of the article, which focuses in on an obligation that states that vessels of one party have the right to bring their cargo to the ports of the other party. The Court then quoted a provision within the US Executive Order establishing the embargo which denied Nicaraguan vessels this right (*I.C.J. Reports 1986*, paras. 279). In other words, the Court did not accept the view advanced by Nicaragua that the economic embargo as a whole violated Article XIX of the FCN Treaty (Nicaragua Memorial on the merits, 30 April 1985, para. 425) but, rather, narrowed the scope of its finding to actions by the United States that directly affected maritime commerce.

The Court's emphasis on the issue of maritime commerce is consistent with scholarly analyses of such provisions (see, e.g., D. Piper, "Navigation Provisions in United States Commercial Treaties", 11 *Am. J. Comp. L.* 184, 189-203 (1962); H. Walker, "The Post-War Commercial Treaty Program of the United States", 73 *Pol. Sci. Q.* 57, 73). Further, the Court's reasoning was no doubt dictated by the structure of Article XIX, which parallels that of Article X of the 1955 Treaty. In both treaties, the first paragraph asserts a general principle regarding the freedom of commerce and navigation between the territories of the parties, but, as Mr. Crook explained, the article as a whole addresses specific benefits to be accorded to *maritime commerce*.

Now the facts underlying Iran's claim before this Court under the navigation article is very different in nature. The Islamic Republic of Iran does not claim that the United States engaged in attacks on Iranian ports or port facilities, or even Iranian vessels. Even if one accepts the facts as stated by Iran, those facts involve only attacks on Iranian platforms engaged in the internal exploitation of petroleum resources;

the oil purportedly exploited by these platforms was pumped by sub-sea lines to other facilities in the Islamic Republic of Iran (Iran Memorial, 8 June 1993, paras. 1.11-1.19).

We submit that the Court's reasoning in *Nicaragua* is most properly read for jurisdictional purposes as requiring a reasonable connection between the allegedly unlawful conduct and some impediment to maritime commerce between the territories of the two parties. In this case, Iran has not shown any such connection between the attacks on the three oil platforms and maritime commerce.

II. THE OVERALL THRUST OF THE US PRESENTATION IS SUPPORTED BY THE COURT'S REASONING IN THE NICARAGUA CASE

Let me turn now to the second part of my presentation, which involves relating the *Nicaragua* case to the overall thrust of the US presentation in this case. While the Islamic Republic of Iran says its claims fall within the 1955 Treaty, at their core those claims in fact relate to the law on the use of armed force. The claims are governed by other sources of law, such as the United Nations Charter, treaties on the use of armed force, and customary and general rules of international law relating to *jus ad bellum* and *jus in bello*.

In the *Nicaragua* case, the Court also faced a claim by Nicaragua that was purportedly associated with the FCN Treaty, but which in fact derived from customary and general rules of international law. As I previously noted, Nicaragua initially claimed that various acts by the United States were unfriendly, which it then recast as a claim that the United States had undermined the "object and purpose" of the FCN Treaty. Yet the Court found that it had no jurisdiction over this claim pursuant to the FCN Treaty because such an obligation arose under customary

international law, independent of the treaty (*I.C.J. Reports 1986*, paras. 270-71). It is entirely consistent with the Court's holding in the *Nicaragua* case to recognize that Iran's claims here are for what they are and to acknowledge that there is no jurisdiction over them under the compromissory clause of the FCN Treaty. Iran may protest that it only seeks to bring claims under specific articles of the 1955 Treaty (Iran Observations and Submissions on the US preliminary objection, 1 July 1994, para. 3.05), but this is no different than the Government of Nicaragua asserting that its generalized claim regarding the FCN Treaty fit within the four corners of that treaty (Nicaragua Memorial on jurisdiction, 30 June 1984, paras. 164, 175-76). The fact is that in both cases the claimant is trying to use a commercial treaty to get at norms that arise elsewhere in international law, norms over which the Court does not have jurisdiction under that treaty. In the *Nicaragua* case, the Court declined to accept that approach; in the current case, the Court should likewise find that it does not have jurisdiction under Article 36 (1).

There is another overall point in the *Nicaragua* Court's analysis that is relevant here, although it did not deal specifically with the FCN Treaty. In the *Nicaragua* case, the Court found that it had broad jurisdiction under Article 36 (2) of its Statute deriving from the US acceptance of compulsory jurisdiction. However, the Court also found that the so-called "multilateral treaty reservation" to the United States' acceptance of the Court's compulsory jurisdiction barred Nicaragua's claims that were based on multilateral treaties. Yet, the Court found it could nevertheless adjudicate Nicaragua's claims under Article 36 (2) using the relevant rules of customary international law

but only because those rules had an independent status and essentially contained the same content as the relevant multilateral treaties. The Court stated that the "essential consideration is that both the United Nations Charter and customary international law flow from a common fundamental principle outlawing the use of force in international relations" (*I.C.J. Reports 1986*, para. 181).

The relevance of that finding to this case is as follows. In this case, the Court clearly has no general jurisdiction to adjudicate a claim by Iran against the United States for violation of the UN Charter, other treaties governing the use of force, or even customary rules outlawing the use of force in international relations. The question then becomes whether, in light of the lack of that general jurisdiction, the Court may nevertheless exercise jurisdiction over such claims pursuant to a bilateral treaty conferring specific jurisdiction over commercial disputes. In our view, the *Nicaragua* decision makes clear that such an exercise of jurisdiction is inappropriate. The commercial treaty does not flow from the same fundamental principles as the norms on the use of force. The Islamic Republic of Iran's claims require this Court either to interpret a body of law that does not contain the relevant principles of law, or to go outside that body of law over which it has jurisdiction. As Professor Lowenfeld and Mr. Crook made abundantly clear, the 1955 Treaty does not contain the relevant principles of law to address the claims brought by Iran in this case. Therefore, the Court, consistent with its approach in the *Nicaragua* case, should decline to adjudicate this matter under the 1955 Treaty.

III. THE NICARAGUA DECISION DOES NOT SUGGEST THAT SUCH MATTERS SHOULD BE ADDRESSED AT THE MERITS STAGE

Now, at this stage, one might challenge my analysis by noting that, even if I am correct, some of the points I am arguing from the *Nicaragua* case were only decided at the merits phase, and therefore should not be applied at the jurisdiction phase in this case (see Iran Observations and Submissions on the US preliminary objection, 1 July 1994, para. 3.39).

I will briefly respond to that challenge. First, as I noted from the outset, the parties' treatment of the FCN Treaty at the jurisdiction phase in the *Nicaragua* case was cursory and no doubt influenced the Court's decision to hold over certain matters so as to have a fuller briefing. For instance, at the jurisdiction phase, it was not at all clear that Nicaragua was alleging that the United States had violated the FCN Treaty's object and purpose. This only became clear at the merits phase and, thus, it is no surprise that only at the merits phase did the Court find that it had no jurisdiction under the FCN Treaty over that claim. Moreover, the Court was no doubt also influenced at the jurisdiction phase by its finding that it had jurisdiction under Article 36 (2) of its Statute over Nicaragua's claims concerning the use of force as they arose under customary international law. There was little to be gained by dismissing the FCN claims immediately.

Second, and this is perhaps a more substantive point, because the *Nicaragua* Court at the jurisdiction phase found that it had jurisdiction over Nicaragua's claims concerning the use of force as they arose in customary international law, the Court was not forced at that phase to consider the impact of a *lack* of such jurisdiction on its jurisdiction under the FCN Treaty. In other words, the Court was not obliged to

address the implication of a lack of jurisdiction under Article 36 (2) over its ability to proceed with the same claims under a much narrower basis under Article 36 (1). In this case, our view is that the Court is obliged to consider the lack of such jurisdiction at this phase in the proceedings.

IV. CONCLUSION

Allow me to conclude, Mr. President, by reiterating that the majority opinion in the *Nicaragua* case contains certain elements that are of relevance to the case now before the Court. It is our contention that the overall reasoning of the Court, as well as its analysis of individual articles in the FCN Treaty, inferentially support the United States' position in this case. Moreover, in our view the manner in which the *Nicaragua* case developed suggests that, after full argument by both sides on the specific provisions of a commercial treaty that are at issue, the Court can and ought to determine at the jurisdiction phase whether - accepting the facts as pled by the claimant - a claim has been stated that fits those provisions.

That concludes my presentation, Mr. President. Mr. Chorowsky is the next speaker who would appear on our behalf to discuss in some greater detail why under the rules and jurisprudence of the Court make it appropriate for the Court to dismiss Iran's claims at this stage. Thank you.

The PRESIDENT: Thank you very much Dr. Murphy. The hearings are suspended for a break of 15 minutes.

The Court adjourned from 11.05 to 11.20 a.m.

The PRESIDENT: Please be seated. I now give the floor to Mr. Jack Chorowsky.

Mr. CHOROWSKY: Thank you Mr. President. Mr. President, Members of the Court, it is my honour and my privilege to appear before you. This segment of the US presentation will address a number of issues relating to the interpretation of Article 79 of the Rules of Court. I will demonstrate in this discussion that the US objection possesses an exclusively preliminary character and that the Court should therefore rule in this preliminary phase on its substance.

I will also return briefly to a related point first raised by my colleague, Professor Lowenfeld, regarding the standards which the Court should employ to determine whether it is properly vested with jurisdiction in this matter. In the view of the United States, the Court's jurisdiction obtains only if Iran succeeds in establishing that its claims are reasonably related to the provisions of the 1955 Treaty which it has invoked.

I.

The Islamic Republic of Iran has asserted in its Written Submission that the US objection does not possess an exclusively preliminary character within the meaning of Article 79. It bases this assertion upon a fundamental misinterpretation of that Article. Moreover, Iran fails to identify with specificity those legal and factual components of the US objection which purportedly render it not exclusively preliminary.

Before refuting Iran's assertions directly and in greater detail, I would like to take a closer look at the relevant paragraphs of Article

79, and the circumstances surrounding the original drafting of these paragraphs which was accomplished, of course, in the 1972 amendments to the Rules of Court. This is, to be sure, ground well familiar to the Court; nonetheless, with the Court's indulgence, I would like to review just a bit of this background very briefly to help frame the US argument.

A.

Prior to their revision in 1972, the Rules of Court provided that jurisdictional objections could be sustained, rejected, or joined to the merits. Paragraph 7 of what is now Article 79, originally enacted as part of Article 67 in 1972, eliminated the express option of joining an objection to the merits, providing instead that the Court could declare that an objection did not possess an exclusively preliminary character.

This change followed criticism of the Court's earlier practice of joining objections to the merits. In 1970, for example, the view was expressed in the United Nations Sixth Committee that

> "it would be useful for the Court to decide expeditiously on all questions relating to jurisdiction and other preliminary issues which might be raised by the parties. The practice of reserving decisions on such questions pending consideration of the merits of the case had many drawbacks and had been sharply criticized in connection with the *South West Africa* cases and the *Barcelona Traction* case." (Report of the Sixth Committee, UNGA (25th session, Dec. 1970), UN Doc. A/8238, p. 19.)

Likewise, in 1971, the Sixth Committee reported the view that "the Court should be encouraged to take a decision on preliminary objections as quickly as possible and to refrain from joining them to the merits unless it was strictly essential" (Report of the Sixth Committee, UNGA (26th session, Dec. 1971), UN Doc. A/8568, p. 21).

Following these debates, the Rules of Court were revised in 1972. In the aftermath of the revision, then President of the Court Jiménez de Aréchaga authored an article discussing the changes that had been made, and reiterating the views that had been expressed in the Sixth Committee. He wrote that the increased possibility of the joinder of preliminary objections "has been criticized in many quarters because by such an action the Court merely postpones its decision on the matter and the same question is pleaded twice over" (E. Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, vol. 67, p. 14 (1973)). President de Aréchaga noted that the need for the Court to reach a preliminary decision on those objections that affect its jurisdiction was advocated both by experts and States (*id.* at p. 12).

Paragraph 7, which eliminated the express option of joining a jurisdictional objection to the merits, was not the only notable change made to the Rules in 1972. Paragraph 2 established as a foundational matter that "the preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of documents in support; it shall mention any evidence which the party may desire to produce". And to enable the Court to give due consideration to jurisdictional objections at a preliminary stage, paragraph 6 established that the Court "whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue".

Thus, if one takes paragraphs 2, 6 and 7 together, it is clear that the Rules contemplate objections of an exclusively preliminary character that may indeed require the Court's consideration of certain issues of

law and fact. As Professor Rosenne states in his treatise on Procedure, the Rules of Court as revised in 1972 "emphasize the Court's desire to dispose of [preliminary] objections at as early a stage as possible, even if this involves some discussion of the merits" (Sh. Rosenne, *Procedure in the International Court* (1983), p. 163). Similarly, President de Aréchaga wrote in 1973 that paragraph 6 "announces the intention of pronouncing upon the Court's jurisdiction at the preliminary stage of the proceedings" (E. Jiménez de Aréchaga, *supra*, p. 12).

Examined plainly, the intent animating Article 79 is to dispose of jurisdictional objections preliminarily whenever possible. To facilitate doing so, the Court is empowered to adjudicate relevant, factual and legal questions, so long, of course, as such adjudication does not entangle the Court in the merits of a case.

B.

The crux of the US preliminary objection is that the Islamic Republic of Iran's Application and Memorial do not present claims that give rise to a dispute under the 1955 Treaty; as you have heard, it is our view that the 1955 Treaty does not regulate - and was never intended to govern the conduct of - military hostilities between the parties. If the Treaty does not apply to such conduct, then the Court does not have jurisdiction to hear Iran's claims.

Iran asserts that this objection requires the Court to examine the conduct that is the subject of its claims. In doing so, Iran contends, the Court would effectively be treating the merits of the Iranian Application, and thus it is said that the US jurisdictional objection is not of an exclusively preliminary character. Indeed, it is Iran's

position that for a preliminary objection to be exclusively preliminary in character, it must be "patently independent" of the other issues in the case (Islamic Republic of Iran, Observations and Submissions on the US preliminary objection, p. 73, para. 4.30). Further, Iran has contended that the question of whether a treaty applies to particular conduct and therefore vests this Court with jurisdiction will "rarely if ever" be an exclusively preliminary matter because such inquiries, it is said, require the consideration of the relevant factual circumstances (*id.*, p. 71, para. 4.25*(c)*).

Iran has failed in its written pleadings to invoke any support for this narrow, novel, and entirely unjustified construction of Article 79. Nor could it have marshalled any such authority. The suggestion that an objection must be "patently independent" of *all* other issues in order to be considered "exclusively preliminary" is fundamentally inconsistent with the express terms of Article 79. Paragraph 6 provides that the Court "whenever necessary, may request the parties to argue *all questions* of law and fact, and to adduce all evidence, which bear on the issue". Thus, Article 79 provides for consideration of various criteria which bear on the preliminary objection; "patent independence" is not required.

Neither is it true, as Iran has suggested, that any objection which requires the consideration of any facts bearing on the question of jurisdiction cannot be considered exclusively preliminary. At a minimum, those facts that are not disputed are perfectly suitable for consideration by the Court in ruling on preliminary jurisdictional objections. Indeed, as I have noted, Article 79 expressly contemplates

that the Court may consider factual submissions, and adjudicate factual questions in considering preliminary objections.

It is thus clear that Iran's interpretation of Article 79 is not faithful to that provision's express terms. Iran's reading would substantially constrain the Court's ability to dispose of preliminary objections. It would limit the Court to considering only a narrow class of the most abstract and most theoretical of objections at the preliminary stage — a result contrary to both the text and design of Article 79.

In the view of the United States, the only legitimate reason for the Court not to rule on the US objection would be if doing so would prejudge the merits of the case. In fact, consideration of the US jurisdictional objection would not lead the Court to do so. Such consideration would not require the Court to adjudicate questions of fact that are in dispute or questions of law which are not necessary to the resolution of our jurisdictional objection.

As my colleagues have noted, the US objection is based upon the undisputed fact that the events in question were part of a series of hostile engagements involving US and Iranian forces, which occurred during the course of a major international armed conflict.

This cannot reasonably be disputed and has not been here. We have not asked the Court to resolve any factual questions which are, concededly, in dispute and which are at the heart of the merits — for example, whether Iran was responsible for the attacks on the ships *Sea Isle City* and *USS Samuel B. Roberts*. Iran has not pointed to any other specific factual questions which must be resolved to deal with the US

objection, and none which cause the Court to prejudge the merits of the case.

Nor does the US jurisdictional objection require the Court to prejudge questions of law that should be addressed if – and only if – this case reaches the merits phase. The legal element of our jurisdictional claim is that the 1955 Treaty was not intended to regulate the use of force and does not do so. The Court can rule on this issue without difficulty, and without addressing any issues of law relating to the merits of Iran's Application. Among those legal issues to be considered at a merits phase would be the proper interpretation and application of the 1955 Treaty's "essential security interests" clause contained in Article XX (1), and other legal questions relating to the law of armed conflict and the exercise of the right to self-defense. The resolution of these issues is not implicated by the US objection.

The recent decision of the Court in the *Genocide* case provides a model for this proceeding (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina* v. *Yugoslavia*), *Preliminary Objections*, 11 July 1996, General List No. 91). As in this case, there the claimant asserted that the Court had jurisdiction by virtue of a treaty, and the responding State asserted that the treaty was not applicable. Specifically, the respondent Federal Republic of Yugoslavia argued, *inter alia*, that the allegations of genocide contained in Bosnia's Application did not present a dispute between the parties within the meaning of the Genocide Convention's compromissory clause, because the acts in question occurred in the context of an internal conflict, rather than an international conflict.

The Court considered the Federal Republic of Yugoslavia's jurisdictional objection appropriate for resolution at the preliminary stage, just as the Court should do here. The Court compared the claims made to the text of the treaty and found a reasonable connection between them. When the Court engages in the same analysis in this case, it will find that Iran's claims are not reasonably connected to the 1955 Treaty.

Similar precedent can be found in the case concerning *Certain Phosphate Lands in Nauru* (*Nauru* v. *Australia, Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240). In that case, the Republic of Nauru claimed that Australia was obligated to make reparations for having depleted phosphate lands during Australia's administration of the Nauru trusteeship prior to its termination in 1967. Australia, in turn, submitted a number of preliminary objections, contending, *inter alia*, that Nauru authorities waived all claims to the rehabilitation of the phosphate lands by virtue of a 1967 Agreement, and that the termination of the Trusteeship by the United Nations in 1967 precluded the Court some 25 years later from examining allegations that the Trusteeship had been breached.

These objections raised a number of questions regarding the interpretation of the Agreement which terminated the Trusteeship, the content of discussions leading up to the conclusion of that Agreement, and the content and meaning of related debates in the United Nations and in the Trusteeship Council. In short, the resolution of Australia's objections required the Court to delve into various facts and circumstances and into the interpretation of an Agreement that would be the subject of much debate and dispute during the merits phase of the case. The Court did not respond to these Australian objections by ruling

that they did not possess an exclusively preliminary character; it did not defer the consideration of those objections to the merits phase. Rather, it ruled on their substance. So too should the Court do in this case.

We believe the proper approach to resolving preliminary objections was articulated by Judge Petren in his separate opinion in the Court's 1974 *Nuclear Tests* case. There Judge Petren stated that in exercising its discretionary power to resolve objections at the preliminary phase the Court should

> "assess the degree of complexity of the preliminary question in relation to the whole of the questions going to the merits. If the preliminary question is relatively simple, whereas consideration of the merits would give rise to lengthy and complicated proceedings, the Court [he said] should settle the preliminary question at once." (*Nuclear Tests* (*Australia* v. *France*), *Judgment*, *I.C.J. Reports 1974*, p. 489.)

The case now before the Court is precisely the type of case to which Judge Petren referred. The jurisdictional question before the Court is narrow and discrete. By contrast, the merits phase of this case would, if reached, prove extensive, elaborate, and enormously fact-intensive, in view of the subject matter and the nature of Iran's allegations. Under Judge Petren's analysis, the disproportionate burdens that would attend the merits phase of this case — burdens on the Parties, and on the Court — further militate in favour of the resolution of the US jurisdictional objection during the preliminary phase.

To summarize, the US objection presents a classic, threshold, preliminary question: whether the treaty instrument upon which jurisdiction is predicated governs the conduct in question. To be sure, one can conceive of a hypothetical case in which this question could be answered only by engaging in a detailed analysis of facts that lie at the

heart of the merits of a claim. But this case is not such a case. The relevant facts that support the US jurisdictional objection are of a general, obvious character; they are not in dispute, and they would not be at issue during the Court's consideration of the merits of Iran's Application.

For these reasons, the US jurisdictional objection clearly manifests an exclusively preliminary character and should be ruled upon by the Court.

II.

In ruling upon the US objection, the Court will be required to determine whether the Iranian Application presents claims that give rise to a dispute under the 1955 Treaty. My colleagues have already addressed this question in considerable detail.

But one point merits brief emphasis, because it speaks to an important legal standard not contained in Article 79 which properly informs the Court's consideration of the US objection.

In considering this objection, the Court must decide as a threshold matter what constitutes a dispute within the meaning of the 1955 Treaty's compromissory clause. In the view of the United States, a dispute under the compromissory clause exists if — and only if — the claims submitted by Iran manifest a reasonable connection to the 1955 Treaty. This is the same approach that was taken by the Court in the *Ambatielos* case, where the Court emphasized that "[i]t is not enough for the claimant government to establish a remote connection between the facts of the claim" and the instrument upon which jurisdiction was founded (*Ambatielos (Greece* v. *United Kingdom), Merits, I.C.J. Reports 1953*, p. 18).

Iran appears to take a very different view — a view which has significant implications for this Court's jurisdiction and for the interpretation of compromissory clauses in other contexts. Iran asserts that a dispute exists under the 1955 Treaty giving rise to the Court's jurisdiction whenever two parties disagree over the interpretation of its provisions — no matter the nature of the claim in question, and no matter how attenuated the claim may be from the Treaty's text. This is not consistent with the Court's stated position in previous cases that a reasonable connection must be demonstrated between the claims embodied in an application to the Court, and the treaty instrument upon which such claims are founded.

Indeed, to say that the Court's jurisdiction obtains whenever two States disagree, regardless of the nature of the disagreement and the content of the relevant treaty provision, would allow any individual State party to a treaty to manufacture a dispute, and to manufacture jurisdiction in this Court, by making a manifestly unreasonable claim under the instrument in question. An unreasonable claim — one that is patently unsound — would, in a literal sense, lead to a dispute between the parties, and in turn, under Iran's theory, to jurisdiction in this Court. This approach to the interpretation of the 1955 Treaty's compromissory clause would undermine the principle of consent that forms the basis of, and imparts legitimacy to, this Court's exercise of jurisdiction. It would prevent the Court from taking reasonable steps to conserve its time and its resources, as well as to protect the interests of other States with claims before the Court.

The interpretative approach advocated by the United States is by no means novel. The Permanent Court took a similar view, for example, in

the *Mavrommatis Palestine Concessions* case (*Mavrommatis Palestine Concessions, P.C.I.J., Series A; No. 2* (1924)). There the United Kingdom objected to the Permanent Court's exercise of jurisdiction, asserting that the claim submitted by Greece fell outside the category of disputes covered by the compromissory clause of the Palestine Mandate. The Permanent Court did not however resolve this jurisdictional question in the manner that Iran has suggested — that is, by simply concluding that the existence of a dispute concerning the interpretation of the Mandate gave rise to jurisdiction. Rather, the Permanent Court explained in the following passage that it could assume jurisdiction only if it was established that the claim submitted indeed fell within the scope of the relevant clauses of the Mandate:

> "The Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent, and only exists in so far as this consent has been given, cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate. The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it . . . falls to be decided by application of the clauses of the Mandate. For the Mandatory has only accepted the Court's jurisdiction for such disputes." (*Id.* at p. 16.)

In sum and in conclusion, a treaty reflects an understanding between State parties. And the compromissory clause contained in a treaty manifests an agreement to adjudicate disputes that relate reasonably to this understanding. The Court should not endorse the notion that any claim, no matter its nature, engenders a dispute that gives rise to jurisdiction. Such a view would only encourage the filing of unjustified claims; it would encourage the abuse of this Court's processes, and it would compel respondent States to shoulder the burden of preparing a defense on the merits to allegations that are not within the Court's

jurisdiction. Such a result would diminish the authority and the credibility of the Court.

Mr. President, Members of the Court, this completes my presentation. Thank you for your attention. I would ask that the Court invite the Agent of the United States, Mr. Matheson, to conclude the US argument.

The PRESIDENT: Thank you very much Mr. Chorowsky for your statement. I now give the floor to Mr. Matheson.

Mr. MATHESON: Mr. President and Members of the Court. You have now heard the case for upholding the preliminary objection of the United States. We contend that the issues raised in this preliminary objection are of an exclusively preliminary character and can be decided by this Court during this phase of the case. In this regard, the Court does not have to decide the factual and legal questions that would be at the heart of the merits phase of this case, if such a phase should be necessary.

First, we do not ask the Court to resolve any disputed questions of fact. The factual assertions of both Parties confirm that the actions which form the basis of the complaint of the Islamic Republic of Iran were combat operations of the military forces of the United States, and that these operations were part of a series of hostile engagements between US and Iranian forces that occurred during the course of an international armed conflict. This, in our view, is a sufficient factual predicate to uphold the US preliminary objection.

Second, we do not ask the Court to determine which of the Parties was at fault – in particular, whether the United States was acting in legitimate self-defense in response to Iranian attacks, whether the Iranian platforms were legitimate military targets, or whether the US

response was necessary and proportionate and consistent with the rules of warfare. All this would be at issue in a merits phase but is not at issue in the current phase of the proceedings.

Instead, we have asked the Court to decide, as a preliminary matter, that Iran's claims have no reasonable connection to the 1955 Treaty. As Mr. Chorowsky has shown, the lack of such a connection has been recognized by the Court as a valid ground for preliminary objection. The Court's jurisprudence clearly establishes that if there is no reasonable connection between an applicant's claims and the treaty in question, then the Court should sustain the preliminary objection.

If, as we maintain, there is in fact no reasonable connection in the present case, then the Court should uphold the preliminary objection of the United States. Rule 79 was drafted in order to conserve the Court's resources by avoiding unnecessary merits proceedings. We believe the present case is a perfect one for the use of Rule 79 to serve this purpose.

Let me briefly recall our line of reasoning. Professor Lowenfeld demonstrated that the United States could not be found to have consented, through this treaty on commercial and consular matters, to the jurisdiction of the Court over all aspects of friendly US-Iranian relations, as the Islamic Republic of Iran argues.

In particular, as Professor Lowenfeld pointed out, there is quite simply no reason at all to believe that the two Parties agreed to subject controversies about armed conflict to adjudication in this Court pursuant to the 1955 Treaty, which contains no standards by which to judge such a controversy.

Mr. Crook established that none of the specific provisions of the 1955 Treaty has any reasonable connection with the combat operations of military forces during the course of an international armed conflict. He showed that the general, aspirational language of Article I does not impose legal obligations on the parties, and certainly does not sweep the law of armed conflict into this commercial treaty. Article IV deals with the regulation by one party of investments by nationals of the other party, and plainly has nothing to do with military operations. Article X deals with the particulars of maritime commerce between the two countries, and also clearly does not address military operations.

Finally, Dr. Murphy rebutted the Iran reliance on the Court's *Nicaragua* decision. He showed that this decision does not support the arguments of the Islamic Republic of Iran in the present case. The Court did not find that it had jurisdiction under the US-Nicaragua FCN Treaty to deal with Nicaragua's general claim that the United States was acting in an "unfriendly" manner. Rather, it regarded this as an aspect of a duty under customary international law that lay outside the jurisdictional clause of the Treaty. The Court did not accept the Nicaraguan argument that the US attacks were a violation of the "equitable treatment" provisions of the FCN Treaty. The Court's decision on the shipping article of the Nicaragua treaty has no application to the actions at issue here. Here we are dealing with platforms that have no relationship to maritime commerce and were in fact being used for military purposes.

But the clearest proof that Iran's claims have no reasonable relationship to the 1955 Treaty lies in the fundamental nature of the claims themselves. The Islamic Republic of Iran is not complaining that

the United States had violated some rule for the protection of trade and investment, such as one would naturally expect in a treaty of this character.

The Iranian complaint is in fact that the United States has violated the rules of the United Nations Charter and customary international law on the use of force. Its attempt to attach these allegations to the 1955 Treaty are simply a matter of a need to find some basis – however implausible – to bring them within the Court's jurisdiction.

The fundamental implausibility of this attempt was well described by Professor Lowenfeld. Is it plausible that the United States, after carefully defining and limiting its acceptance of the Court's jurisdiction in its 1946 declaration under Article 36 (2) of the Statute of the Court, would then agree to unconstrained jurisdiction over the entirety of its friendly relations with just a few of its FCN partners? Is it plausible that two governments negotiating a fairly standard treaty on commercial and consular matters would, by implication, and with no notice whatever to the Senate and the Majlis, radically expand the scope of the treaty to encompass not only the conduct of armed hostilities but also any other aspect of their relationship that might be deemed to be a feature of friendly relations?

With respect, we do not believe the governments had any such intention. We do not believe that the 1955 Treaty produces any such result. We believe there is no reasonable connection between that Treaty and the claims brought before the Court in this case.

We therefore believe that the Court should uphold the preliminary objection of the United States in this proceeding. Accordingly, we

maintain the formal Submission set forth on page 54 of the US preliminary objection.

Mr. President, this concludes the initial argument of the United States. As always, we are very grateful for the attention and consideration given by the Court to our presentations. We would of course be happy to respond to any questions which any Member of the Court might wish to pose to us. Thank you, Sir.

The PRESIDENT: Thank you very much Mr. Matheson for your statement. That concludes the first round of the oral argument of the United States of America. The Court will now adjourn and the hearing will resume on Thursday morning at 10.00 a.m. when the Islamic Republic of Iran will make its opening statements. Thank you.

The Court rose at 12 p.m.