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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 1996

Public sitting

held on Tuesday 24 September 1996, at 10 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 24 septembre 1996, à 10 heures, 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

The Government of the Islamic Republic of Iran is represented by:

Mr. M. H. Zahedin-Labbaf, Agent of the Islamic Republic of Iran to the Iran-U.S. Claims Tribunal,

as Agent;

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

Mr. James R. Crawford, Whewell Professor of International Law, University of Cambridge, Member of the International Law Commission,

Mr. Luigi Condorelli, Professor of International Law, University of Geneva,

Mr. Rodman R. Bundy, Avocat à la Cour de Paris, Member of the New York Bar, Frere Cholmeley, Paris,

as Counsel and Advocates;

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor of International Law, Emeritus, University of Cambridge,

Dr. N. Mansourian, Legal Advisor, Bureau of International Legal Services of the Islamic Republic of Iran,

Dr. M. A. Movahed, Senior Legal Advisor, National Iranian Oil Company,

Dr. H. Omid, Legal Advisor, National Iranian Oil Company,

Dr. A. A. Mahrokhzad, Legal Advisor, National Iranian Oil Company,

Mr. David S. Sellers, Solicitor, Frere Cholmeley, Paris,

Ms Loretta Malintoppi, Avocat à la Cour, Frere Cholmeley, Paris

as Counsel.

The Government of the United States of America is represented by:

Mr. Michael J. Matheson, Acting Legal Adviser, U.S. Department of State,

as Agent;

Dr. John H. McNeill, Senior Deputy General Counsel, U.S. Department of Defense,

Professor Andreas F. Lowenfeld, Rubin Professor of International Law, New York University School of Law,

Le Gouvernement de la République islamique d'Iran est représenté par :

M. M. H. Zahedin-Labbaf, agent de la République islamique d'Iran auprès du Tribunal des réclamations Etats-Unis/Iran,

comme agent;

M. S. M. Zeinoddin, chef du service juridique, *National Iranian Oil Company*,

M. James R. Crawford, professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge,

M. Luigi Condorelli, professeur de droit international à l'Université de Genève,

M. Rodman R. Bundy, avocat à la Cour, Paris, membre du barreau de New York, cabinet Frere Cholmeley, Paris,

comme conseils et avocats;

M. Derek W. Bowett, C.B.E., Q.C., F.B.A., professeur émérite de droit international, ancien titulaire de la chaire Whewell à l'Université de Cambridge,

M. N. Mansourian, conseiller juridique, bureau du service juridique international de la République islamique d'Iran,

M. M. A. Movahed, conseiller juridique principal, *National Iranian Oil Company*,

M. H. Omid, conseiller juridique, *National Iranian Oil Company*,

M. A. A. Mahrokhzad, conseiller juridique, *National Iranian Oil Company*,

M. David S. Sellers, *solicitor*, cabinet Frere Cholmeley, Paris,

Mme Loretta Malintoppi, avocat à la Cour, cabinet Frere Cholmeley, Paris,

comme conseils.

Le Gouvernement des Etats-Unis d'Amérique est représenté par :

M. Michael J. Matheson, conseiller juridique en exercice du département d'Etat des Etats-Unis,

comme agent;

M. John H. McNeill, conseiller juridique principal adjoint du département de la défense des Etats-Unis,

M. Andreas F. Lowenfeld, professeur de droit international, titulaire de la chaire Rubin à la faculté de droit de l'Université de New York,

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, U.S. Department of State,

Dr. Sean Murphy, Counselor for Legal Affairs, United States Embassy, The Hague,

Mr. Jack Chorowsky, Special Assistant to the Legal Adviser, United States Department of State

Commander Ronald D. Neubauer, JAGC, United States Navy,

as Counsel and Advocates;

Mr. Allen Weiner, Attache (Office of the Legal Counselor), United States Embassy, The Hague

as Counsel.

M. John R. Crook, conseiller juridique adjoint pour les questions concernant l'Organisation des Nations Unies au département d'Etat des Etats-Unis,

M. Sean Murphy, conseiller pour les affaires juridiques à l'ambassade des Etats-Unis aux Pays-Bas,

M. Jack Chorowsky, assistant spécial du conseiller juridique du département d'Etat des Etats-Unis,

Le capitaine de frégate Ronald D. Neubauer, *Judge Advocate General's Corps,* de la Marine des Etats-Unis,

comme conseils et avocats;

M. Allen Weiner, bureau du conseiller juridique, attaché à l'ambassade des Etats-Unis aux Pays-Bas,

comme conseils.

The PRESIDENT: Please be seated. 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 call upon the distinguished Agent for the Islamic Republic of Iran, Mr. Mohammed Hussein Zahedin-Labbaf to open the reply of his Government.

Mr. ZAHEDIN-LABBAF: In the Name of God the Merciful and Compassionate.

1. Mr. President, Members of the Court, you have now heard the written and oral arguments on the question before you, which concerns the jurisdiction of the Court to entertain the dispute submitted by the Islamic Republic of Iran. In this morning's pleadings, counsel on behalf of Iran will try to be as brief as possible in highlighting Iran's responses to some of the points made by the distinguished counsel for the United States of America yesterday. If Iran does not take issue with each and every point raised, the Court will understand that this is not because any of these points are conceded, but because Iran takes the view that such matters are either not relevant or have already been adequately dealt with in Iran's earlier written and oral pleadings.

2. I would ask the Court first to call upon Mr. Bundy. He will respond briefly to certain comments made yesterday, concerning the general context in which the 1955 Treaty of Amity was signed. Mr. Bundy will show again that, far from being exclusively commercial, all the evidence points to the 1955 Treaty of Amity as having a distinct political and legal significance. Mr. Bundy will also briefly discuss the new characterization of the factual dispute before the Court presented by the distinguished Agent of the United States yesterday, and

will explain why, however the United States seeks to characterize this dispute, it still comes within the Court's jurisdiction.

3. Mr. President, Professor Condorelli will then revisit the question of the legal characterization of the Treaty of Amity, and its applicability to Iran's claims. He will show that - with respect to each of the provisions of the Treaty at issue in this case - a dispute exists as to the interpretation and application of that provision sufficient to vest the Court with jurisdiction.

4. Finally, Professor Crawford will show why the United States' ingenious attempts to distinguish the *Nicaragua* case from this case do not succeed and why the Court's findings in that case are fatal to the United States' preliminary objection here. Professor Crawford will also touch on Mr. Crook's analysis of Article XX (1) *(d)* of the Treaty of Amity. He will show again that the United States' position on Article XX (1) *(d)* is directly contrary to its position on the inapplicability of the Treaty to this case.

5. Professor Crawford will then conclude by briefly summarizing Iran's position, and I will then return to read to the Court Iran's final submissions.

6. In the course of their speeches, counsel will refer to the questions asked by Vice-President Schwebel and Judge Higgins, and Iran will, however, also respond in writing to the questions asked by Vice-President Schwebel and Judge Rigaux within the established time-limit.

7. With the Court's leave, I ask you, Mr. President, to call upon Mr. Bundy to take up Iran's reply. Thank you.

The PRESIDENT: Thank you very much, Mr. Zahedin-Labbaf for your statement. I now give the floor to Mr. Rodman Bundy.

Mr. BUNDY:

Factual Aspects Relevant to Jurisdiction

Thank you Mr. President, Members of the Court. In returning to the factual elements that are relevant to the question of jurisdiction, I shall start with the historical context within which the Treaty was signed, and I will respond in this connection to points that were raised by Professor Lowenfeld and Mr. Crook yesterday.

1. The Historical Circumstances in which the Treaty of Amity was Signed Confirm the Plain and Ordinary Meaning of the Treaty's Terms

With respect to that background, let me first comment on its legal relevance.

Under Article 32 of the Vienna Convention on the Law of Treaties, recourse may be had to the circumstances in which the Treaty was concluded as a supplementary means of interpretation to *confirm* the meaning which results from the application of Article 31, or when the interpretation according to Article 31 is either ambiguous or obscure, or leads to a manifestly absurd or unreasonable result.

As Professor Condorelli explained in Iran's first round presentation, Iran believes that the plain and ordinary meaning of the words that are used in the Treaty, in the light of its object and purpose, is clear for purposes of defining the scope of its application. In Iran's view, an analysis of the text of the Treaty shows unequivocally that the Court's jurisdiction is vested over Iran's claims in this case. To the extent that Iran has introduced historical circumstances in which the Treaty was concluded, this has been done to *confirm* the

interpretation that flows from the ordinary meaning of the Treaty's terms.

These circumstances cannot possibly support the virtually non-existent meaning that our colleagues on the other side of the bar attempt to impart to Article I of the Treaty. Nor can they confirm that Article X (1) of the Treaty was intended to deal exclusively with issues of maritime commerce to the exclusion of other kinds of commerce, moreover, this historical context also cannot possible support a restrictive interpretation of the compromissory clause. Instead, as we believe we have demonstrated in the first round, and I shall again review briefly in this presentation, the historical setting within which the Treaty of Amity was signed shows that the Treaty, in fact, had a much broader political and strategic purpose and application than the United States has sought to convey.

It is important to note at the outset that Professor Lowenfeld does not take issue with the geopolitical context within which the Treaty was signed. He admits to having no difficulty with the fact that Iran and the United States had just then entered into a new political relationship, and that the Treaty coincided with the conclusion of the strategically orientated Baghdad Pact, and that Iran's oil industry - including its off-shore oil industry - the platforms at issue here - had a strategic as well as an economic importance. His argument is rather that none of this history supports the contention that Iran and the United States consented to the jurisdiction of this Court regarding future disputes involving the use of force (CR 96/16, p. 16).

I would like to test this proposition against the background facts that are *not* in dispute between the Parties.

First, when the Treaty was signed in 1955 Iran was just emerging from the throes of a fundamental change of régimes which had been brought about by the direct intervention of the United States. The documentary evidence submitted with the written pleadings makes it abundantly clear that the United States wanted to do all it could at that time to prevent Iran from falling within the sphere of influence of the Soviet Union, and to insure the free flow of oil supplies to the West. This was the immediate context within which the Treaty was concluded.

Second - and this is an important point - the Treaty of Amity was the very *first* bilateral agreement entered into between the Iran and the United States following the overthrow of the Mossadegh government and the reinstatement of the Shah. It was entirely appropriate, therefore, that this Agreement set out the overall framework within which bilateral relations between the two countries were to be conducted. Other agreements dealing with specific issues would follow, but the Treaty of Amity was central in establishing a foundation based on peace and friendship for the parties' relations, and in providing for recourse to this Court, if any dispute over the Treaty's application or interpretation should arise.

In the light of this new political environment, can it seriously be disputed that the obligation of firm and enduring peace and sincere friendship, which appears in Article I of the Treaty, was essential to the development of this new relationship or was devoid of substantive meaning?

Third, evidence taken from US sources themselves reveal that the language used in Article I was designed to have a substantive meaning and was not simply intended to reflect "vague aspirations of friendship". This evidence also shows that the compromissory clause was intended to be

broad, not restrictive. To support this conclusion, I would like to refer to the following facts which are really uncontroverted.

(i) In negotiating a similar Treaty with China - one of *just three other* treaties to include Article I in the treaty's text as it appears in the Treaty of Amity with Iran - the State Department expressly confirmed that it was *not* "customary" to include such a provision in Friendship, Commerce and Navigation treaties to which the United States was a party. The only reason why such a provision was deemed to be appropriate in the China case was, as the State Department observed in its memorandum, "in view of the close political relations between China and the United States" (Iran's Observations, Exhibit 10).

I submit that this disposes of counsel's argument that Article I was routine, an argument which the United States did not come back to yesterday. If "close political relations" underlay the inclusion of Article I in the China treaty, when *a fortiori* they must also have dictated the inclusion of Article I in the 1955 Treaty with Iran. This is particularly the case in view of the sensitive political and strategic relationship that then existed between the United States and Iran.

(ii) The US negotiators of the Treaty also confirm that the American oil investments at that time in Iran were "extensively discussed" in the course of the Treaty negotiations and that the Consortium Agreement and other agreements "was an important part of the political background of the treaty negotiations" (Iran's Observations, Exhibit 5, pp. 2-3 of the Bray affidavit). As I already explained in my first round presentation, the Consortium Agreement was founded on strategic considerations as much as, if not more than, commercial ones - a conclusion which Professor Lowenfeld has not disputed. In other words, strategic issues

did play a role in the conclusion of the Treaty. It was not simply a commercial and consular document.

(iii) The Treaty was signed at precisely the time that the United States was working to establish the Baghdad Pact. In the light of the geopolitical situation that existed at the time, it was absolutely essential for the United States to have a firm and enduring commitment from Iran of peace and friendship. That appeared in Article I.

(iv) The United States had no hesitation, no hesitation whatsoever, in having Article I come within the scope of the Treaty's compromissory clause.

Last week, Professor Lowenfeld asked how it would have been possible for the United States to make its famous Connally Reservation with respect to Article 36, paragraph 2, of the Statute of the Court, yet make no similar reservation with respect to the Treaty of Amity (CR 96/12, p. 48). According to Professor Lowenfeld, the United States must have considered that matters covered by the Connally Reservation fell outside the scope of the Treaty, thus obviating the need to have a reservation.

Yet the US-China treaty, which I just discussed, shows exactly the opposite. As is apparent from Exhibit 52 to the United States' Preliminary Objection, the same issues arose in connection with the Senate debates over the compromissory clause in the China treaty. A State Department Memorandum prepared in connection with that treaty acknowledged that no such reservation, no Connally Reservation, was made in the treaty because:

> "The Department of State feels that questions arising under this treaty are matters which the United States would wish to see submitted to the International Court of Justice, and it would be in the public interest of the United States to be able to bring, *without restriction*, before that Court *any disputes* arising because of the interpretation or application by China

> of the provisions of the treaty in such a way as to be detrimental to the interests of the United States." (Preliminary Objection, Exhibit 52, p. 30; emphasis added.)

In other words, if China brought an issue of interpretation or application of its treaty with the United States, which the United States considered might be detrimental to its interests, the United States wanted to make sure that it was able to submit that dispute to this Court. Note the difference between the attitude of the State Department then, and the attitude exhibited by the United States now. In this case, Iran has submitted issues relating to the interpretation and application of the 1955 Treaty of Amity which, from the United States' reactions during these proceedings, are viewed as detrimental to the interests of the United States. Yet now, contrary to the position that the United States took in the China treaty, it feverishly attempts to prevent this dispute from going to the Court, and this is directly contradictory to the position that was adopted with respect to the identical language in the China treaty.

(v) Finally, there must be recalled that the only genuine piece of *travaux préparatoires* relating to the Treaty of Amity between the United States and Iran and forming part of the historical context within which it was concluded concern the proposal to delete the words "or application" from the Treaty's compromissory clause. Yet this proposal was firmly rejected by the United States at the time precisely because it might, and I use the words of the US Government, it might "seriously curtail" the means for the settlement of disputes, and because the United States "wanted to avoid any narrowing of the jurisdictional provisions" (*I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, US Annex 50, pp. 232-253 and p. 153, note 14).

In the light of these facts, it defies the record for the United States now to assert that the historical context within which the Treaty was signed supports its proposition that the Treaty was solely concerned with commercial and consular matters, or that the Treaty's compromissory clause must be read in a restrictive sense. At the end of the day, Iran submits that the historical context fully supports its interpretation of the Treaty.

Now let me turn next to the other Iran/US treaties that were cited by our opponents yesterday.

2. The Lack of Relevance of the other US-Iran Treaties Cited by the United States

In his first presentation, Mr. Crook contended that the 1955 Treaty of Amity was not an innovation, but rather part of a long "series" of agreements between the United States and Iran or Persia dating back to 1856 (CR 96/13, p. 10). Yesterday, Mr. Crook again referred to these agreements, and he chastised Iran for not having discussed them in our first round presentation (CR 96/16, p. 27). I should only note at the outset that the United States only raised these agreements for the first time in their first round oral presentation; it had never been discussed in the written pleadings. Nonetheless, let me respond with a few remarks that I trust will show that those agreements had nothing to do and give no support to the United States' position that it now adopts with respect to the Treaty's interpretation.

First of all, there was hardly a "long span" or "evolving series" of agreements between the two countries. There were just two such agreements that Mr. Crook referred to yesterday, separated by an interval of over 70 years.

The first was a very early treaty signed in 1856 which provided amongst other provisions that there would be "a sincere and good understanding" between the parties. No matter how one tries to dress up this kind of provision, it simply is not the same thing as providing for a positive obligation of firm and enduring peace and sincere friendship backed up by a compromissory clause. There was no compromissory clause is the 1856 Treaty, and bearing in mind the circumstances in which it was signed, this was hardly surprising. There was no Court to have recourse to, and third party adjudication was rare.

The 1928 Agreement, which Mr. Crook termed "a more modern agreement" (CR 96/13, p. 11), was in reality no more than a very rudimentary exchange of notes - in fact a "provisional" agreement - regarding commercial and consular matters. There was no provision in the 1928 agreement even remotely akin to Article I in the 1955 Treaty of Amity. Nor was there a compromissory clause.

What there was instead was a series of references in the exchange of notes, and particularly in paragraph 3 of that exchange, to the word "commerce". These references make it abundantly clear that the parties had *no* intention of limiting their agreement to "maritime" commerce. With the Court's indulgence, Mr. President, I would like to read a very brief extract from paragraph 3 of that exchange of notes which illustrates the point:

> "In respect to the régime to be applied to the *Commerce* of Persia in the matter of import, export, and other duties and charges affecting *commerce* as well as in respect to transit warehousing and the facilities accorded commercial travelers' samples . . . the United States shall accord to Persia, on a basis of complete reciprocity, a treatment not less advantageous than that accorded to the *commerce* of any other country." (Emphasis added.)

I trust the Court will see that this kind of arrangement might be viewed as a kind of precursor to a "freedom of commerce" provision. Yet

the paragraph which I have just cited is in no way limited to maritime commerce; its scope is obviously much wider and covers commerce in general.

So, if the 1955 Treaty is to be considered the "lineal descendent" - those were the words we heard yesterday from Mr. Crook - of the 1928 exchange of notes (CR 96/13, p. 11; CR 96/16, p. 27), then not only is there no reason to believe that the reference to "freedom of commerce" in Article X (1) of the 1955 Treaty is limited to "maritime commerce", but also the addition of a brand new Article I in the 1955 Treaty providing for firm and enduring peace and sincere friendship represented a *fundamental* innovation from what the parties had agreed in 1928 - it had no counterpart in the 1928 Treaty. Similarly, the addition of a compromissory clause providing for recourse to this Court represented a major change from both of the previous agreements that Mr. Crook referred to.

As for the treaties entered in *after* the Treaty of Amity was signed, these are the ones referred to by Professor Lowenfeld for the first time yesterday (CR 96/16, pp. 16-20), it is difficult to see how they provide any more solace to the United States than the earlier treaties.

In the first place, none of these agreements represent *travaux préparatoires* of the 1955 Treaty. Nor can they be viewed as relating to the circumstances in which the 1955 Treaty was concluded within the meaning of Article 32 of the Vienna Convention, simply because they all post-date the conclusion of that Treaty. Hence, I would suggest that their legal relevance for purposes of this case is really nil.

That being said, it is important to respond to Professor Lowenfeld's point that the 1959 Agreement between Iran and the United States, on cooperation, that was an agreement which dealt with certain security and

defence matters, did not contain a compromissory clause, and that this omission demonstrates that the parties did not intend to submit these kind of disputes to third party adjudication (CR 96/16, p. 18).

With respect, Mr. President, the 1959 Agreement shows nothing of the kind. That Agreement, as its Preamble and its text clearly show, was intimately related to a whole series of other agreements relating to the specific undertakings that had been accepted by all the members of the Baghdad Pact, a multilateral Pact. These agreements, and the corresponding declarations which the Baghdad Pact members had earlier signed, must be read together with the 1959 Agreement. As Article IV of the 1959 Agreement provided, Iran and the United States undertook to cooperate with the other Baghdad Pact members in accordance with a multilateral declaration that had been made in London the year before, the famous London declaration.

Because multilateral agreements were thus implicated, it would have been entirely inappropriate for the United States and Iran to have included a bilateral compromissory clause in that treaty. For that would have raised the possibility that the adjudicatory body, this Court or an arbitral tribunal, would have had to rule on obligations which directly affected the other members of the Baghdad Pact, who are not only not parties to the 1955 Treaty, but had certainly not given their consent.

So it follows that the mere fact that the 1959 Treaty had no compromissory clause in no way affects the scope of the 1955 Treaty's compromissory clause and has no bearing on the 1955 Treaty's interpretation or application.

Much can be said for the other agreements entered into after the 1955 Treaty and cited by Professor Lowenfeld yesterday. They all dealt with very specific issues, such as air transport or investment

guarantees. But as Professor Lowenfeld rightly pointed out : "Each agreement had its own modality for resolution of possible disputes." (CR 96/16, p. 20.) As Article V of the 1959 Agreement so clearly provided, these provisions were without prejudice to the parties' obligations under other pre-existing agreements. Consequently, neither the compromissory clause appearing in the Treaty of Amity, nor its other provisions were compromised in any way by the subsequent agreements entered into by the parties which were very specific agreements dealing with specific fields.

3. The Characterization of the Dispute

I turn next to the differences between the Parties over the characterization of this dispute. This is an important point because one of the central elements of the United States' thesis is that the Treaty does not regulate the outbreak of armed conflict or the use of armed force between the Parties (CR 96/13, p. 13).

The Court will have noted that the position of the United States on this issue has changed during the course of these hearings. In the first round, the distinguished Agent for the United States emphasized that the attacks on the oil platforms were part of a series of hostile encounters involving US and Iranian forces (CR 96/12, p. 17).

This description of events implied that there actually had been "engagements" between the forces of the two countries, a conclusion that was reinforced in Commander Neubauer' presentation when he described the events in question as "a series of military engagements . . . involving Iranian and US armed forces" (CR 96/12, p. 28).

It was based on these factual premises that Mr. Crook was then able, again in the first round, to advance an argument that the obligations set out in the Treaty of Amity "cannot coherently be applied to situations

involving armed conflict like those complained of here" (CR 96/13, p. 25).

When it became clear that Iran disputed this characterization of the dispute, particularly the view that there had been this series of military engagements between the armed forces of the two countries, because as you know Iran's position is that these were unilateral and unprovoked attacks by the United States. But when it became clear that Iran had challenged this characterization of the dispute, the United States had to change its position. That is what we heard yesterday. To the extent that its position that the Treaty of Amity did not apply to a situation of "armed conflict" depended on a showing that there actually *was* such a state of armed conflict at the time, this necessarily gave rise to a disputed issue of fact. How could it be proved that a state of armed conflict existed between the two countries without going into the merits of that issue?

Consequently, yesterday, Mr. Matheson advanced a very different proposition. He now says that it makes no difference, no difference whatsoever, how these incidents are characterized; whether it was the United States or Iran that initiated the incidents or whether any particular incident involved an exchange of fire or simply an undefended attack by one side on the other (CR 96/16, p. 9). It makes no difference. What is important, according to Mr. Matheson, is that the combat operations in question involved the use of armed force by at least *one* of the Parties (*ibid.*, p. 10). It does not have to be both, just one of the Parties. So that even if the use of armed force by the United States against the oil platforms in this case was unilateral and unprovoked, not really a case of armed conflict at all, the mere fact

that armed force was used by one of the Parties would remove these incidents from the scope of the Treaty of Amity.

Mr. President, this argument cannot be right. Taken to its logical conclusion, it would lead to manifestly absurd results.

For example, for many years, just down the hall, the United States and US companies have been arguing that Article IV, paragraph 2, of the Treaty of Amity is applicable in order to assess the standard of compensation that is required in the event of a nationalization, in the event of a taking of property belonging to a national of one party in the territory of the other. Under the United States' current theory, had that property been taken by armed force instead of by a legislative decree, a nationalization decree, then the Treaty would no longer apply since it could not be used in situations involving the use of armed force.

Similarly, if freedom of commerce or navigation under Article X, paragraph 1, of the Treaty was impaired by the implementation, let us say, of a trade embargo, then the Treaty in principle would apply. But, if the party that was impairing that freedom of navigation decided to use armed force - for example, by employing a military blockade or by forcibly interdicting the vessels of the other party, then this would no longer come within the scope of the Treaty for the simple reason that the use of force was involved.

Just as these propositions are clearly unreasonable, so also is it untenable to maintain that the Treaty's other provisions, such as Articles I, IV and X, do not apply when armed force is resorted to by one of the parties. As Professor Crawford will explain later this morning, the lack of merit in this aspect of the United States' argument has been clearly exposed by this Court in the *Nicaragua* case.

4. Discussion of Certain Disputed Facts

Mr. President, I turn now to the last part of my rebuttal which involves responding very briefly to certain factual allegations that were again raised by the United States at yesterday's session.

First, let me note for the record that Iran has not introduced in these hearings any new factual material and, in particular, any new diagrams. This was the gist of a complaint that was made against us yesterday (CR 96/16, p. 12).

With the exception of illustration No. 1 in your folders, this is the illustration you may recall showing the Baghdad Pact map, an illustration that was fully described in our written pleadings, every one of the other illustrations and diagrams that appear in the Court's folders was produced in Iran's written pleadings. There is nothing new.

Second, the United States seems particularly sensitive over the allegation that their attacks on the platforms were designed to cause maximum economic and commercial damage to Iran (CR 96/16, pp. 12-13). We will obviously come back to this issue if we proceed to the merits. Let me just remind the Court of the remarkable coincidence that exists for each attack: namely, that the United States forces happened to destroy precisely those platforms, and only those platforms, that would cause oil production from all of the other associated wells, platforms and oil fields to be halted. The Court will able to judge for itself the implications of this conduct.

As for the incident involving the *Sea Isle City* referred to by the Agent of the United States yesterday, this was the incident that was the precursor to the first set of attacks in October 1987, I was criticized for failing to point out that the Faw Peninsula, which is that bit of land in the northern Persian Gulf from which the United States says the

missile originated, was part of Iraqi territory. We say two things in response. First of all, I did note in my intervention last week that fighting existed on the Faw Peninsula between Iranian and Iraqi forces and it will obviously be an issue for the merits phase to sort out who was where at what particular time. And second of all, one needs only refer to illustration No. 10 in your folders - an illustration that has been presented to the Court and to the United States - to see very clearly that it is indicated on this illustration that the Faw Peninsula, or parts of it, were in fact held by Iranian forces at that time. What was more significant is what the Agent failed to address, for he declined to address any of the other five very specific arguments I had made regarding the *Sea Isle City* incident, including the fact that on the State Department's own evidence Iran had no missiles in the area and the fact that the *Sea Isle City* was out of range of an Iranian attack, in any event, no matter where Iranian forces were stationed on the Faw Peninsula (CR 96/14, pp. 49-50). Once again, Iran looks forward to returning to this issue if there is a merits phase.

Finally, we note that in response to Judge Higgins' question, the United States now contains that its jurisdictional case does not rest on the contention that the oil platforms were engaged or used for military purposes at the time they were attacked (CR 96/16, p. 10). This is a very different proposition from what we heard from Professor Lowenfeld and the distinguished Agent last week (CR 96/12, p. 55; CR 96/17, p. 63).

This subtle shift in the United States' position is a double-edged sword. If it can now be assumed for purposes of ruling on the preliminary objection that the platforms were engaged in commercial operations when they were attacked, then it is all the more difficult to understand why that does not give rise, at the very minimum, to a

justiciable issue under the Treaty of Amity involving, in particular, whether such attacks constituted a violation of Article X (1) of the Treaty providing for freedom of commerce.

In short, the United States cannot have it both ways. If the characterization of the platforms is relevant for the purposes of the preliminary objection, then the case must proceed to the merits where the facts can be fully briefed. But if it is not, it is conceeded for the purposes of argument that the platforms were involved in commercial operations, then the Treaty of Amity's freedom of commerce clause and other provisions are placed squarely in issue. Either way, the Court has jurisdiction.

5. Conclusion

Mr. President, at this stage of the proceedings, I dont't believe it is necessary for me to join issue with the United States over the rest of the factual allegations that we have heard during the course of the past week. These matters can await for further developments.

Let me simply thank the Members of the Court, and you Mr. President, very sincerely, for the patience with which you have heard my arguments, and ask, if you would, Mr. President, call on Professor Condorelli to continue Iran's presentation. Thank you very much.

The PRESIDENT: Thank you very much, Mr. Bundy, for your statement. Je prie maintenant le Professeur Luigi Condorelli de se présenter à la barre.

M. CONDORELLI : Merci beaucoup, Monsieur le Président.

Introduction

Monsieur le Président, Madame et Messieurs les Juges, Comme l'agent de la République islamique d'Iran l'a indiqué, la charge qui m'est confiée dans ce deuxième tour de plaidoiries est de répondre à nos éminents contradicteurs pour tout ce qui a trait à l'identification du domaine d'application du traité d'amitié et à l'interprétation de ses dispositions : notamment les trois auxquelles s'est référé l'Iran dans son instance, en alléguant qu'elles ont été violées par les Etats-Unis d'Amérique.

Il va de soi que le traité d'amitié — comme tous les autres traités internationaux — est un instrument consensuel, il n'existe et ne lie les parties que parce que celles-ci l'ont souverainement et librement accepté. Au vu de l'insistance avec laquelle les plaideurs de la Partie adverse reviennent sans cesse sur cette vérité élémentaire, qui fait partie du b.a-ba du droit international, en la répétant de mille manières différentes, vous pourriez penser qu'on fait grief à l'Iran de l'avoir tout simplement oubliée. Mais ce n'est pas du tout le cas. Pour le démontrer au-delà de tout doute, permettez-moi, Monsieur le Président, de centrer autour du consentement la liste des questions auxquelles j'ai l'intention de répondre dans le temps qui m'est imparti, en prenant en considération bien entendu les objections et les doutes soulevés par la Partie adverse.

Première question : Les Hautes Parties contractantes ont-elles consenti ou non à ce que la clause compromissoire du traité d'amitié couvre la totalité des différends entre les parties relatifs à l'interprétation ou à l'application du traité dans son ensemble ? Ont-elles voulu ou non que les différends portant sur les articles I, IV

paragraphe 1, et X, paragraphe 1, soient soustraits à la compétence de votre Cour ?

Deuxième question : Les Hautes Parties contractantes ont-elles consenti à ce que le traité d'amitié protège leurs intérêts (tels que contemplé par le traité lui même) contre tout agissement de l'autre Partie, ou bien ont-elles voulu qu'une telle protection cesse en cas d'emploi de la force ?

Troisième question : Les Hautes Parties contractantes ont-elles soustrait l'interprétation des clauses du traité d'amitié (ou l'une ou l'autre d'entre elles) aux principes normaux en matière d'interprétation et d'application des traités internationaux ?

Quatrième question : L'article I du traité, est-il un ectoplasme juridique, une pure apparence de règle de droit ? Les Parties n'ont-elles pas consenti, en lui donnant un libellé approprié, à ce qu'il engendre des droits et des obligations ?

Cinquième et dernière question : Qu'en est-il de l'article IV, paragraphe 1, et de l'article X, paragraphe 1 ? Les Parties ont-elles consenti à ce que ces dispositions soient la source de droit et d'obligations entrant en jeu dans la présente affaire ?

Voilà, Madame et Messieurs les juges, la liste des questions auxquelles j'ai, avec votre permission, l'intention de répondre, et ce dans l'ordre dans lequel je viens de les énoncer.

1. Première question : Les Hautes Parties contractantes ont-elles consenti ou non à ce que la clause compromissoire du traité de 1955 couvre la totalité des différends entre les parties relatifs à l'interprétation ou à l'application du traité dans son ensemble ?

J'en viens donc à ma première question : Les Hautes Parties contractantes ont-elles consenti ou non à ce que la clause compromissoire du traité d'amitié couvre la totalité des différends entre les parties

relatifs à l'interprétation et à l'application du traité dans son ensemble ?

Monsieur le Président, je ne pense pas me rendre coupable de la moindre audace interprétative si j'affirme que rien ne saurait justifier une réponse, je ne dis pas négative, mais même seulement hésitante. Il est indiscutable que les parties ont voulu que la clause compromissoire ait exactement la même sphère d'application que le traité lui même : c'est ce qu'elles ont dit *apertis verbis*, sans qu'aucune sorte d'indice ne fasse transparaître une intention différente. Autrement dit, les différends portant sur les articles I, IV, paragraphe 1, et X, paragraphe 1, ne sont pas soustraits à la compétence de votre Cour, et cela tout simplement parce que les parties l'ont voulu.

Je rappelle au passage, Monsieur le Président, qu'il existe des traités dont les dispositions en matière de règlement des différends ont une portée beaucoup plus restreinte. Par exemple — et c'est le cas le plus connu — les articles 65 et 66 de la convention de Vienne sur le droit des traités s'appliquent seulement aux différends portant sur la partie V de la convention, et l'article 66 *a)* accorde à votre Cour la compétence uniquement pour ce qui est des différends en matière de *jus cogens*. Par contre, dans le traité de 1955, aucune restriction n'a été prévue. L'article XXI, paragraphe 2, s'applique donc à toutes les dispositions du traité, sans exception : c'est sur cela que les Hautes Parties contractantes ont librement et souverainement convenu.

2. Deuxième question : les Hautes Parties contractantes ont-elles consenti à ce que le traité de 1955 protège leurs intérêts (tels que contemplés par le traité lui-même) contre tout agissement de l'autre partie, ou bien ont-elles voulu qu'une telle protection cesse en cas d'emploi de la force ?

Il est temps que je me penche sur ma deuxième question. Je vous la rappelle : les Hautes Parties contractantes ont-elles consenti à ce que

le traité d'amitié protège leurs intérêts (tels que contemplés par le traité lui-même) contre tout agissement de la Partie adverse, ou bien ont-elles voulu qu'une telle protection cesse en cas d'emploi de la force ?

Comme vous l'avez entendu, la Partie adverse répond maintenant à cette interrogation d'une façon qui, grâce à la question heureusement posée par Madame le Juge Higgins, est devenue bien plus claire qu'auparavant. Et j'ajoute : encore plus étonnante qu'auparavant. Pour les Etats-Unis, le seul fait qu'il y ait emploi de la force, même par l'une seulement des Parties contre l'autre (et indépendamment de tout état de guerre entre elles), ferait en sorte que cet emploi de la force échapperait à l'emprise du traité d'amitié. Ceci même si les personnes ou les biens frappés étaient par ailleurs sous la protection du traité.

Monsieur le Président, Madame et Messieurs les juges, il convient de s'entendre au moyen de quelques exemples très simples sur les implications littéralement incroyables d'une telle thèse. Des exemples qui s'ajoutent à ce que vient de vous proposer Me Bundy. Prenons l'article II, paragraphe 4 : chacune des Hautes Parties contractantes doit assurer "the most constant protection and security" aux ressortissants de l'autre et doit leur accorder "reasonable and human treatment" s'ils sont "in custody". Bien. Mais doit-on comprendre, semble-t-il, que si l'une des parties décidait tout à coup de lancer une opération militaire afin d'exterminer tous les ressortissants de l'autre qui sont sous sa juridiction, cela ne poserait aucun problème du point de vue du traité d'amitié ! Un autre exemple : d'après l'article IV, paragraphe 2, les biens des ressortissants de l'une des parties doivent être protégés sur le territoire de l'autre, et ne peuvent être expropriés qu'à certaines conditions. Mais si ces biens sont détruits, par exemple

au moyen de bombes lancées par des avions militaires appartenant au souverain territorial, le traité d'amitié ne pourrait-il pas être invoqué !

Monsieur le Président, avec tout le respect, je dois avouer que la conception de la Partie adverse m'apparaît carrément absurde. De plus, elle est insoutenable pour diverses raisons que j'avais évoquées, à vrai dire, dans ma précédente plaidoirie. Je suis surpris de constater que nos honorables contradicteurs n'ont pas dédié un seul mot pour y répondre. La Cour voudra bien, je l'espère, en prendre acte.

Il s'agit de deux arguments que je rappelle rapidement.

Le premier est que, dans leur exception préliminaire, les Etats-Unis ont reconnu la pertinence du traité d'amitié pour évaluer des actes d'emploi de la force, ceci dans le contexte de leur analyse de l'article X, paragraphe 1 du traité. En effet, les Etats-Unis ont allégué que le principe de la liberté de navigation, tel que prescrit par l'article X, aurait été violé par l'Iran du fait du prétendu mouillage de mines dans des eaux internationales; par contre, "all the actions by the United States were taken to advance freedom of navigation"[1]. Ces propos, avais-je souligné, impliquent clairement l'admission que tout au moins certaines dispositions du traité sont applicables afin d'apprécier la légalité ou l'illégalité d'actes d'emploi de la force.

Quant au deuxième argument auquel la Partie adverse n'a pas daigné répondre, le voici : dans l'arrêt du 27 juin 1986 votre Cour a décidé — c'est un fait incontestable — que l'article XIX du traité d'amitié entre les Etats-Unis et le Nicaragua (dont le libellé est identique à celui de l'article X de notre traité) avait bel et bien été violé par les Etats-Unis, lors d'attaques armées en territoire nicaraguayen. Monsieur

[1] USPO, p. 49 et suiv.

le Président, cela sert peu d'ergoter maintenant si dans ce cas-là les attaques violaient la liberté de commerce ou la liberté de navigation commerciale, ou si les dépôts de pétrole détruits faisaient partie d'installations portuaires ou non : ce qui compte est que votre Cour a interprété une disposition du traité d'amitié avec le Nicaragua (qui est la soeur jumelle de notre article X) comme couvrant des actes d'emploi de la force. Cette analyse de votre Cour contredit si frontalement la thèse américaine suivant laquelle les traités d'amitié ne seraient pas applicables aux actes d'emploi de la force, qu'on comprend bien pourquoi nos contradicteurs ont préféré glisser sur ce point !

Je n'en dirai pas davantage concernant votre arrêt en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, et concernant son influence quant à la présente affaire : le Professeur Crawford reviendra sur certains autres de ses aspects. Je voudrais en revanche dire deux mots concernant les critiques que m'a lancées mon éminent collègue et ami, le Professeur Lowenfeld, lorsqu'il m'a accusé d'avoir découpé le traité d'amitié comme un puzzle, pour en assembler ensuite quelques éléments en laissant de côté les autres, de sorte que le résultat de l'opération ne ressemblerait pas du tout à l'original. Monsieur le Président, l'assemblage que vous propose à la place le Professeur Lowenfeld oublie des passages hautement significatifs du préambule, comme celui qui fait référence aux "high principles in the regulation of human affairs" auxquels les Parties se déclarent liées. Mais surtout oublie carrément — et bien arbitrairement — l'article qui ouvre le traité et qui, de par sa position prioritaire, son libellé ferme, sa portée large, affiche clairement et efficacement la volonté des Hautes Parties contractantes de donner à leur traité une sphère d'action dépassant celle des relations purement commerciales et consulaires. Je

veux parler, bien entendu, de l'article I, qu'il est trop commode de laisser de côté quand il s'agit de décrire de quoi le traité s'occupe.

Avec ou sans l'article I, reste toutefois la question fondamentale que j'ai déjà posée : les biens et les personnes dont le traité se soucie sont protégés par rapport à toute mesure que pourrait adopter à leur encontre l'autre partie contractante. Reste cependant à celle-ci la possibilité d'alléguer que cette mesure se justifie en l'espèce, au regard de l'article XX, par exemple parce qu'elle est "necessary to fulfill the obligations for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests". Ce serait là — comme le Professeur Crawford l'a déjà démontré et comme la Partie adverse le reconnaît désormais — une question de fond : ainsi, par exemple, l'allégation de la légitime défense. Mais il va de soi que, si la légitime défense justifie certaines mesures, c'est que des actes d'emploi de la force, qui ne seraient pas par contre en règle avec le régime de la légitime défense, pourraient fort bien constituer des violations du traité d'amitié. C'est justement cela que soutient l'Iran devant vous.

3. Troisième question : les Hautes Parties contractantes ont-elles soustrait l'interprétation des clauses du traité d'amitié (ou l'une ou l'autre d'entre elles) aux principes normaux en matière d'interprétation des traités internationaux ?

Ayant terminé de discuter de la question n° 2 je passe à ma troisième question.

Monsieur le Président la réponse est assurément négative. Et la Partie adverse — du moins à première vue — ne prétend pas le contraire : elle a d'ailleurs parfaitement raison, puisque le traité qui nous intéresse ici est un accord comme un autre, qui doit être interprété en

utilisant tous les principes et critères habituels, tels qu'on peut les dégager de la convention de Vienne sur le droit des traités.

Cependant, si l'on examine plus à fond les allégations de nos contradicteurs, on s'aperçoit qu'il en va bien autrement. La Partie adverse fait en effet des efforts désespérés pour convaincre votre Cour que le principe de l'effet utile ne serait pas applicable dans notre cas. Ces efforts sont à la mesure de la crainte — parfaitement justifiée, je le dis en passant — qu'ils éprouvent à l'égard de ce principe, vu qu'il rend difficilement acceptable leur thèse, non seulement pour ce qui est de l'article I, mais aussi pour les articles IV, paragraphe 1, et X, paragraphe 1.

Pour atteindre leur but, nos contradicteurs n'hésitent pas a adopter une interprétation totalement erronée de l'opinion exprimée par votre Cour dans son arrêt du 22 juillet 1952 en l'affaire de l'*Anglo-Iranian Oil Co.* : il s'agit de l'arrêt sur lequel a attiré l'attention des Parties M. le Vice-Président Schwebel. Pour M. Crook,

> "The Court was there urged by one Party to give a particular effect to a provision of an instrument on the basis of the principle of effectiveness urged here by Professor Condorelli. This Court did not agree, concluding that the principle of effectiveness cannot supplant clear intention. The same principle should control here ..."

Dans son intervention d'hier, M. Matheson a fait écho à cette analyse.

Monsieur le Président, avec tout le respect, ces propos ne tiennent pas la route. L'Iran répondra bien entendu par écrit plus en détail à la question posée par le Vice-Président Schwebel : je me limite donc ici à une remarque rapide et essentielle.

Dans l'affaire en question, il ne s'agissait pas de l'interprétation d'une clause d'un traité, mais bien de l'interprétation d'une déclaration unilatérale d'acceptation de la juridiction obligatoire de la Cour basée sur l'article 36, paragraphe 2, de votre Statut.

S'agissant d'une déclaration unilatérale, la Cour a logiquement trouvé indispensable de se pencher sur la détermination exacte de l'intention de l'Etat qui l'avait émise, à savoir l'Iran. Le Royaume-Uni, par contre, avait fait valoir que l'interprétation à choisir devait être basée sur le principe d'après lequel "un texte juridique doit être interprété de manière qu'une raison d'être et un sens puissent être attribués à chacun de ses mots" (*C.I.J. Recueil 1952*, p. 105). C'est en somme le principe de l'effet utile qu'on demandait à la Cour d'appliquer. La Cour, on le sait, a répondu par la négative à cette demande. Mais attention! Elle l'a fait en précisant très soigneusement ce qui suit:

> «On peut dire que ce principe [le principe de l'effet utile] *doit s'appliquer en général quand il s'agit d'interpréter le texte d'un traité*. Mais le texte de la déclaration de l'Iran n'est pas un texte contractuel résultant de négociations entre deux ou plusieurs Etats. Il résulte d'une rédaction unilatérale.» (Les italiques sont de nous.)

En somme, s'agissant de déterminer la portée d'une déclaration unilatérale par laquelle un Etat s'engage à se soumettre à la juridiction obligatoire de votre Cour, il est naturel qu'on se préoccupe d'identifier ce que l'auteur de la déclaration a vraiment voulu. Mais il en va bien autrement pour un traité, où il s'agit de déterminer l'intention commune, telle qu'elle est consignée dans le texte négocié : un texte qui doit être interprété objectivement, comme chacun le sait, et comme le proclame le principe général d'interprétation figurant à l'article 31 de la convention de Vienne. Le principe de l'effet utile est l'un des critères d'interprétation — justement — objective et ne saurait donc être placé en position subordonnée par rapport à l'interprétation subjective qui relève des moyens complémentaires d'interprétation (article 32 de la convention de Vienne). Je m'excuse, Monsieur le Président, de devoir énoncer devant votre Cour de pareilles évidences.

4. Quatrième question : l'article I est-il un ectoplasme juridique, une pure apparence de règle de droit ? Les parties n'ont-elles pas consenti, en lui donnant un libellé approprié, à ce qu'il engendre des droits et des obligations ?

J'en viens, après avoir épuisé les questions générales relatives au traité d'amitié dans son ensemble, à ma quatrième question.

Monsieur le Président, j'ai déjà dit ce qu'il fallait au sujet du principe de l'effet utile et de la nécessité de le prendre en compte afin d'interpréter l'article I : je ne reviendrai pas sur cela, sinon pour noter que la Partie adverse continue à refuser de voir dans l'article I rien de plus qu'un simple "statement of aspiration". Autrement dit, un souhait pour l'avenir, ayant à peu près la même valeur qu'un vœu de bonne santé ... !

En revanche, je voudrais attirer l'attention de votre Cour sur l'effort véritablement démesuré que mènent les plaideurs de la Partie adverse pour tenter d'effacer, de faire disparaître, le caractère contraignant de l'article I, tel qu'il se dégage, pourtant, tout naturellement de sa formule énergique : "There shall be firm and enduring peace and sincere friendship between the United States of America and Iran." M. Crook s'est même exhibé dans une sorte, qu'il ne soit permis de le définir ainsi, de double saut périlleux, consistant à soutenir que "there shall be" signifie "there will be". Le raisonnement est quelque peu laborieux : "there shall be" en anglais pourrait être, semble-t-il, un simple futur, dépourvu du sens de l'obligation. La traduction française «il y aura» le confirmerait. *Ergo*, "there shall be" veut dire "there will be".

Monsieur le Président, tous les passages de ce raisonnement surprenant sont erronés. Les membres anglophones de l'équipe iranienne sont catégoriques, quant au premier point : "there shall be", à la troisième personne, ne peut signifier autre chose qu'obligation. Le

texte du traité d'amitié le confirme d'ailleurs amplement, vu qu'il regorge littéralement, dans divers articles, de "shall", "shall be", "shall not be", etc., toujours avec le sens de l'obligation. Une formule exactement identique à celle de l'article I se rencontre — j'y insiste — dans l'article X : "there shall be freedom of commerce and navigation" : j'aurais bien aimé un commentaire de la Partie adverse sur ce parallélisme parfait entre les deux dispositions. Mais ce n'est pas tout : la traduction française du traité d'amitié de 1955, publiée dans le *Recueil des traités des Nations Unies*, porte toujours le futur pour exprimer l'obligation (ce qui correspond d'ailleurs, comme chacun le sait, à l'usage courant). De plus, la traduction française n'est pas authentique et ne fait pas foi, alors que fait foi la version en Persan, comme le prescrit la clause finale de notre traité. Or, on m'assure dans l'équipe iranienne que la formule utilisée à l'article I n'est absolument pas équivoque en Persan et exprime sans conteste, en Persan aussi donc, l'idée de l'obligation : au prochain stade de la procédure votre Cour voudra sans doute s'assurer de l'exactitude de cette affirmation, si elle décide de repousser l'exception préliminaire de la Partie adverse.

Il ne vaut pas la peine d'insister encore sur la lettre de l'article I, tellement les choses sont évidentes. Il faut par contre que je m'arrête un instant sur l'argument avancé par le Professeur Lowenfeld au sujet de l'interprétation contextuelle de l'article I. Comme vous le savez, la position de l'Iran est que l'article I impose aux parties de se conduire chacune à l'égard de l'autre, au minimum, comme le requiert le droit international général relatif aux relations amicales et pacifiques. Dans son analyse, l'Iran s'est appuyé sur la décision *Amoco International Finance* du Tribunal des réclamations Etats-Unis/Iran. Mon éminent collègue, le Professeur Lowenfeld, vous suggère que cette décision se

référait à l'article IV, paragraphe 2; or, dans le cas de l'article IV le renvoi au droit international en matière de conditions de légalité de l'expropriation dépend d'une indication figurant dans le même article, alors que dans l'article I un tel renvoi n'existe pas, d'après le Professeur Lowenfeld.

Je voudrais suggérer à votre Cour que celle ainsi proposée n'est rien d'autre qu'une pétition de principe. Le point de vue que l'Iran a exposé est justement que l'article I impose, à la lettre, l'obligation de maintenir des relations amicales et pacifiques, ce qui ne peut vouloir dire autre chose sinon que les Hautes Parties contractantes se sont engagées à ce que leurs relations soient, d'une part, conformes aux principes de droit international sur les relations amicales et, d'autre part, respectueuses de l'interdiction de la menace et de l'emploi de la force. Ce sont là des standards de comportement parfaitement identifiables pour les Etats, vu qu'ils sont prescrits par le droit international en vigueur. Et ces standards de comportement, les parties ont voulu les incorporer dans leur traité, du seul fait d'avoir souverainement décidé d'en faire l'objet d'un engagement conventionnel.

Monsieur le Président, le traité d'amitié utilise d'ailleurs fréquemment cette technique du renvoi afin de déterminer le contenu des obligations qu'il prescrit : et ceci dans un nombre de cas bien plus large que ceux des seuls articles I et IV, paragraphe 2. Ainsi, par exemple, quand l'article X, paragraphe 2, parle de «haute mer», il ne définit certes pas de quoi il s'agit : il fait donc renvoi au droit international en vigueur pour que l'on détermine ce qu'est la haute mer, aux fins de l'application du traité. La même chose quand diverses dispositions du traité parlent d'agents diplomatiques et consulaires, ou précisent (art. XVI, par. 3) qu'aux diplomates doivent être accordées

"all exemptions allowed them under general international usage". Enfin, dernier exemple : quand l'article XX spécifie que le traité ne fait pas obstacle à l'adoption de mesures "necessary to fulfill the obligations for the maintenance or restoration of international peace and security", il ne détermine pas quelles sont ces obligations et fait donc renvoi à la Charte des Nations Unies. Dans tous ces cas votre Cour, dans le cadre de sa compétence telle que fixée par la clause compromissoire, devra bien évidemment, en cas de différend, prendre en considération et appliquer les diverses dispositions du droit international auxquelles le traité se réfère. Ce point — je le rappelle à la Partie adverse — a été très bien mis en évidence, exactement dans ces termes, par sir Robert Jennings, dans son opinion dissidente jointe à l'arrêt de la Cour de 1986 sur l'affaire des *Activités militaires et paramilitaires* (*C.I.J. Recueil 1986*, p. 539).

5. Cinquième question : qu'en est-il des articles IV, paragraphe 1 et X, paragraphe 1 ? Les parties ont-elles consenti à ce que ces dispositions soient la source de droit et d'obligations entrant en jeu dans la présente affaire ?

J'en suis, Monsieur le Président, à ma dernière question. La voici : qu'en est-il de l'article IV, paragraphe 1 et de l'article X, paragraphe 1 ? Les Parties ont-elles consenti, oui ou non, à ce que ces dispositions soient la source de droit et d'obligations entrant en jeu dans la présente affaire ?

La réponse que donne à cette question la Partie adverse n'est pas à vrai dire très claire, quant au point de savoir si les dispositions en discussion peuvent être considérées comme établissant des obligations : je rappelle à ce sujet les propos de M. Crook suivant lequel en fait l'article IV, paragraphe 1, ne serait pas "free-standing" et, semble-t-il, l'article X, paragraphe 1, non plus : ce qui pose, à mon sens, de sérieux problèmes au regard du principe de l'effet utile. Je ne

reviens pas sur ce point, sinon pour observer que les Hautes Parties contractantes ont bien consenti à ce que les dispositions en question reçoivent le libellé contraignant qui les caractérise.

Deux remarques seulement au sujet des dernières affirmations de nos contradicteurs à ce sujet.

La première concerne l'article IV. M. Crook nous fait le grief de ne pas avoir répondu à son observation d'après laquelle il serait inconcevable que cette disposition s'applique en cas d'emploi de la force. Si l'emploi de la force est licite, observe-t-il, il serait illogique de demander qu'il soit, par exemple, "reasonable". Franchement, Monsieur le Président, cet argument est difficile à saisir : n'est-il pas vrai que tant le *jus ad bellum* que le *jus in bello* prévoient toutes sortes de limitations et de conditions concernant l'emploi de la force, afin d'éviter tant que faire se peut qu'il ne soit excessif, disproportionné, causant des maux superflus, etc. : en un mot, qu'il ne soit déraisonnable ?

La seconde remarque concerne l'article X, paragraphe 1. Contrairement à ce qui résulte clairement de la lettre de cette disposition, les Etats-Unis soutiennent que celle-ci ne couvre pas le commerce, mais seulement le commerce maritime. Voilà une question d'interprétation typiquement appartenant au nombre de celles que votre Cour a la mission de régler grâce à l'article XXI, paragraphe 2, du traité. Pour sa part, l'Iran continue à penser que, sinon dans la suite de l'article X, dans beaucoup d'autres dispositions le traité regorge littéralement d'applications diverses du principe de la liberté de commerce : ainsi, par exemple, aux articles IV, paragraphe 4, V, VI, VII, VIII, XI, etc. Quant à la question de savoir si ce principe, sur lequel indiscutablement les Parties ont consenti à l'instar des de tous les

autres articles du traité, peut être appliqué lors d'actes d'emploi de la force, je l'ai déjà discutée auparavant. Je n'ai donc pas besoin d'y revenir.

Conclusion

Monsieur le Président, Madame et Messieurs les Juges, j'en suis à ma conclusion. La conclusion est que le traité d'amitié a été souverainement accepté par les Parties tel qu'il est : à savoir, pourvu d'une clause compromissoire large, qui couvre tout différend relatif à l'interprétation et à l'application de la totalité de ses dispositions, sans exception aucune : y compris donc l'article I, l'article IV, paragraphe 1, et l'article X, paragraphe 1.

Je terminerai par une observation concernant la première plaidoirie du Professeur Lowenfeld, qui a essayé de tirer l'eau au moulin de la thèse de nos adversaires en se basant sur un court passage de votre avis consultatif du 8 juillet dernier sur la *Licéité de la menace ou de l'emploi d'armes nucléaires*. Il s'agit du paragraphe 33, dans lequel votre Cour a indiqué que le droit applicable qui était le plus directement pertinent pour traiter la question *sub judice* est le droit de la Charte et le droit applicable dans les conflits armés. Dans notre cas, dit le Professeur Lowenfeld, "the most directly relevant applicable law" à la prétention de l'Iran n'est pas le traité de 1955, mais le droit des conflits armés.

Avec tout le respect, cet argument n'en est pas un : il confond, à mon sens, le rôle de la Cour dans les procédures contentieuses et dans les procédures consultatives. Je m'en explique.

Dans le cas de l'avis consultatif, votre Cour devait chercher dans tout l'univers du droit international toutes les normes susceptibles d'être prises en considération afin de juger de la licéité ou non de

l'arme nucléaire, que celles-ci soient plus ou moins directement pertinentes : c'est bien ce qu'elle a fait.

Dans notre cas, il en va bien autrement : votre Cour n'est pas appelée ici à connaître de toutes les règles qui pourraient théoriquement fonder les prétentions iraniennes. Votre Cour ne peut faire application en l'espèce que d'un seul traité, le traité d'amitié de 1955, et elle doit dire si celui-ci est pertinent ou non, sans se préoccuper de la question de savoir si d'autres règles, par exemple découlant d'autres traités ou de la coutume internationale, seraient éventuellement mieux appropriés pour régler le différend.

On revient donc à la case départ. L'Iran a invoqué le traité d'amitié, que la Cour est indiscutablement compétente à interpréter et appliquer parce que les Parties contractantes ont souverainement voulu ainsi. La Cour ne saurait donc se soustraire à sa mission qui est, au stade présent de la procédure, de dire si le traité d'amitié de 1955 est pertinent ou non pour évaluer la demande de l'Iran. En cas de réponse positive à cette question, je ne vois pas ce que la Cour pourrait faire d'autre sinon décider de passer à l'examen de fond : et ceci qu'il existe ou non d'autres règles théoriquement applicables, mais dont l'application ne relève pas de la compétence de votre haute juridiction.

Merci beaucoup, Monsieur le Président, Madame et Messieurs les Juges, de votre bienveillante attention. Je voudrais vous prier, si vous le voulez bien, de donner la parole au moment que vous jugez opportun au Professeur Crawford.

Le PRESIDENT : Merci, Monsieur le Professeur Condorelli. L'audience est suspendue pour une pause d'une quinzaine de minutes. Après quoi je donnerai la parole au Professeur Crawford.

L'audience est suspendue de 11 h 30 à 11 h 40.

The PRESIDENT: Please be seated. I now give the floor to Professor James Crawford.

Mr. CRAWFORD: Thank you, Mr. President. Mr. President, Members of the Court:

1. In this concluding part of Iran's reply, I will deal with three matters which go to the jurisdiction of the Court under the compromissory clause, Article XXI, paragraph 2, of the Treaty. **First**, I will discuss the United States' presentation of the *Nicaragua* case, in order to show that that decision, in conformity with the general jurisprudence of the Court, supports the Court's jurisdiction in the present case. **Secondly**, I will refute the United States' arguments as to the threshold test for jurisdiction in the light of the *Bosnia* case, and show how the United States here persistently confuses issues of jurisdiction and justification. **Thirdly**, I will address the persisting United States argument based on what might be called lack of "subjective intent" on the part of the United States to the adjudication of this dispute. In conclusion, I will briefly summarize Iran's arguments at this stage.

I turn then to the United States' treatment of Nicaragua.

A. The United States Treatment of the **Nicaragua** *decision*

2. Mr. President, Members of the Court, different United States counsel dealt with *Nicaragua* in different ways. Professor Lowenfeld was rather dismissive. When a common lawyer refers to a decision of a court and then immediately cites the leading book on precedent in that court, one can easily infer that the decision was just wrong. Evidently Professor Lowenfeld thought so (CR 96/12, p. 52), although the book he cited, Judge Shahabuddeen's Lauterpacht Lectures, contains no hint of

that view (see M. Shahabuddeen, *Precedent in the World Court* (Cambridge, 1996) pp. 122-127 *et passim*).

3. I note in passing that Judge Nagendra Singh, whose "wise and eloquent" words on jurisdiction Professor Lowenfeld also quoted (CR 96/12, p. 57), presided over both the jurisdiction and merits phases of *Nicaragua* and voted with the majority on both occasions.

4. Faced with this overwhelming difficulty, Dr. Murphy took a more subtle line. As a common lawyer he sought to *distinguish Nicaragua*, to show that it does not say what to all the world it appears to say. It may have been rightly decided, he inferred, but rightly understood it supported the United States' position here (CR 96/13, pp. 44-48).

5. I should note that on one point Professor Lowenfeld and Dr. Murphy agreed. The Court's decision on the FCN treaty in *Nicaragua* was, they implied, an accident. The Court, carried away with the excitement of the optional clause arguments, took its eye off the ball of the FCN treaty. Distracted by the larger, the majority failed to focus on the smaller instrument (CR 96/12, p. 52, Professor Lowenfeld; CR 96/13, pp. 35-47, Dr. Murphy). Mr. President, advocates are natural egotists, and they sometimes appear to think that the Court is incapable of giving independent attention to any point which has not been expansively argued. If counsel ignores a point but the Court dealt with it, the Court must have got it wrong. What impertinence! In fact, of course, no fewer than five of the judges expressly distinguished between the two sources of jurisdiction, upholding it under one and not the other - and the point was obviously present to the mind of the whole Court.

6. Turning to more serious arguments, three points need to be made. The first relates to the Court's decision on Nicaragua's "object and purpose" claim, and its relevance to the present case. The second relates to the distinction between jurisdiction and merits in *Nicaragua*. And the third relates to the Court's application of the FCN Treaty to military operations and the use of force.

1. Nicaragua's "Object and Purpose" Claim

7. Much of Dr. Murphy's argument was vitiated by his equation of Nicaragua's object and purpose claim and Iran's claim under Article I of the Treaty of Amity (CR 96/13, p. 38). There was of course no equivalent to Article I in the FCN Treaty with Nicaragua. I note first that anyone reading paragraphs 275 and 276 of the 1986 Judgment could have had no doubt what the Court's decision would have been, that it would have favoured Nicaragua, *had* Nicaragua been able to rely on an article like Article I. But it could not, and it sought to make up for that deficiency by formulating a claim in terms not of any clause of the treaty but of its generalized object and purpose. The Court held that such a claim fell outside the compromissory clause in the FCN Treaty (*I.C.J. Reports 1986*, at pp. 135-136, para. 271), but it went on to uphold it under the optional clause by reference to general international law.

8. The present case is quite different. Iran relies on specific clauses of the Treaty of Amity, including Article I. There is simply no analogy between a generalized object and purpose claim under general international law and a specific claim under a specific article of a treaty. For that short but sufficient reason the whole of Dr. Murphy's elaborate argument on the point (CR 96/13, pp. 37-39, 44-46) fails.

2. The distinction between jurisdiction and merits in *Nicaragua*

9. Dr. Murphy further argued that on the basis of the Court's decision in *Nicaragua*, this 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" (CR 96/13, p. 48). Now, this is the language of the common law strike-out application, and it finds no support whatever in what the Court said or did. It is significant that all six references to *Nicaragua* in the United States Preliminary Objection on this point are references to the merits phase (viz., USPO, paras. 3.19, 3.20, 3.32, 3.39, 3.40, 3.41); there is not a single reference by the United States on this point to the 1984 decision on jurisdiction.

10. It is useful to go back to the Court's jurisdictional finding on the FCN Treaty in *Nicaragua*. Dr. Murphy complained that the relevant passage was "cursory" (CR 96/13, p. 47), and it was certainly brief. After reciting the arguments of the parties, and the articles of the Treaty on which Nicaragua had, however faintly relied, the Court said:

> "Taking into account these articles of the Treaty of 1956, particularly the provision in, *inter alia*, Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia*, as to the 'interpretation or application' of the Treaty." (*I.C.J. Reports 1984*, at p. 428, para. 83.)

That was all. But economy of speech does not entail economy of thought. In *Nicaragua*, the reason why the Court was brief was because it could be. The situation was, as the Court pointed out in its concluding passage, "quite clear" (at p. 441, para. 111). It was equally clear to most of the Judges who, while disagreeing with the Court on the optional clause, agreed with it on the FCN Treaty. Judge Ago expressed his "conviction"

that the Treaty provided "a fully adequate basis to enable the Court to move forward to the next stage of the proceedings" (at pp. 531-532). Judge Jennings, while foreshadowing issues that would arise at the merits, including under the security interests clause, equally had no doubt about jurisdiction under the FCN Treaty (at pp. 556-557). Similarly Judge Mosler (at p. 172). Judge Oda had more doubts, but was prepared - if he will forgive the colloquialism - to go along with the majority on the FCN Treaty (at p. 472). So the simple fact is that the great majority of the Court thought that jurisdiction in that case was clear. It is even clearer here, because of Article I of the Treaty of Amity.

11. It is relevant to note that only one member of the Court dissented on the basic principle of the Court's jurisdiction under the FCN Treaty (see *I.C.J. Reports 1984*, pp. 339-348, Judge Schwebel). The argument in that dissent closely resembles the United States argument here, which gives an indication of the difficulties Dr. Murphy faced in seeking to uphold but distinguish *Nicaragua*. By contrast Judge Ruda, the only other Judge to dissent on jurisdiction under the FCN Treaty, did so for reasons that have no relevance to the present case (see *I.C.J. Reports 1984*, pp. 163-165), and he voted with the majority on the FCN Treaty at the stage of the merits (see *I.C.J. Reports 1986*, pp. 176-177).

12. The remaining point to be made concerns Dr. Murphy's valiant attempts to argue that despite *Nicaragua* the Court has a discretion to deal at the jurisdictional stage with issues of the merits, at least if they have been fully argued and do not require the determination of controversial facts (CR 96/13, pp. 47-48) - I am giving to the relevant passage of Dr. Murphy's argument the only meaning I could discern, he will forgive me if I have read it wrong. There are two answers, anyway,

to the argument. First, the points have not been fully argued - Iran has simply shown that its case clears - I would say, vaults over - any threshold test for jurisdiction the United States wishes to erect, quite apart from being transparently sufficient under the *Court's* threshold test. Secondly, the facts *are* in dispute. But anyway, the Court has no such discretion. To the contrary, under Article 79, paragraph 3, of the Rules the merits are formally suspended once a preliminary objection is made and until it is disposed of - another provision of Article 79 Mr. Chorowsky forgot to mention. The Rules thus *preclude* the Court from dealing with the merits while it is faced with a preliminary objection. There is no question of any discretion to deal with any merits issue. Or, as it were, to join the merits to the jurisdiction, which is essentially what the United States asks you to do.

3. The Court's Application of the FCN Treaty in *Nicaragua*

13. For completeness, I should refer briefly to the way in which the Court applied the FCN Treaty to the use of force. For the United States' argument that the Treaty of Amity has, *a priori*, no application to the "combat operations of armed forces" (CR 96/16 p. 10, Mr. Matheson) is also inconsistent with *Nicaragua*. It is obviously inconsistent with the Court's decision on jurisdiction; as I have shown, the Court treated its jurisdiction as clear. But it is also inconsistent with the decision on the merits. In that case the Court went ahead and applied the relevant provisions of the FCN Treaty to the facts, without any reference to the character of the US forces involved or the means of warfare adopted (*I.C.J. Reports 1986*, pp. 48, 50-51, 52-53, paras. 80, 81-86, 91). It is true that *Nicaragua* involved the CIA, not US naval forces, and that the acts imputable to the United States involved mining, clandestine attacks and overflight, not outright assaults by capital ships. But that cannot

make a difference, and there is no suggestion that the Court thought it did. A State is not free to violate an FCN Treaty if it does so by its regular armed forces, as distinct from through covert operations, or if it does so by sufficiently massive force. *A fortiori*, it is not free to violate *this* Treaty of Amity, with its Article I.

14. In the context of discussing the character and scope of the Treaty of Amity, I should note, in passing, Professor Lowenfeld's observation that the recent US sanctions legislation directed against Iran - the D'Amato Act as it is called - could not possibly be said to be in breach of the Treaty of Amity (CR 96/12, p. 53). It may be thought that, like a good advocate, Professor Lowenfeld was trying to win not just one case but two. Mr. President, Members of the Court, Iran does take the view that that legislation violates the Treaty of Amity - in rather the same way as the United States in 1983 took the view that the projected oil embargo by Iran against the United States - an embargo never in fact implemented - was a clear violation of the Treaty (see "Memorandum of Department of State Legal Adviser on the Application of the Treaty of Amity to Expropriations in Iran", 13 October 1983, reprinted in (1983) 22 *International Legal Materials* 1406 at pp. 1407-1409, note 21; reproduced in Iran's Memorial, Exhibit 94). Similarly this Court held that the US trade embargo against Nicaragua violated the provisions of the FCN Treaty in that case (*I.C.J. Reports 1986*, pp. 69-70, 140-141, paras. 123-5, 279, 282). For the Court's information, I should add that Iran last month commenced proceedings in respect of the D'Amato Act before the Iran-United States Claims Tribunal under the terms of the Algiers Accords, while expressly reserving its rights under other instruments. I make the point here, Mr. President,

for the record and to avoid the possibility that silence by Iran following Professor Lowenfeld's statement could be taken as acquiescence.

B. The Threshold Test for Jurisdiction and the Distinction between Jurisdiction and Justification

15. Mr. President, Members of the Court, I move now to the second part of my presentation, concerning the appropriate threshold test for jurisdiction under a compromissory clause. The United States more or less reiterated its position in its reply, repeating its formula of "reasonable connection". I say "more or less" because yesterday some greater effort was made to distance the preliminary objection from controversial factual assertions - at least as compared with the first round. So the United States says, in response to Judge Higgins' question, that it makes no difference to the Court's jurisdiction whether the platforms were in exclusively commercial use or not (CR 96/16, p. 10, Mr. Matheson). It had to say that, of course - otherwise we would have been treated to the spectacle of a party abandoning a preliminary objection in response to a question from a judge!

16. But by parity of reasoning the United States has to accept that the Court's jurisdiction does not depend on whether the United States behaved neutrally in the Iran-Iraq war, whether its attacks on the platforms were or were not provoked, whether Iran was acting in self-defence, and so on (CR 96/16, p. 9, Mr. Matheson; p. 21, Professor Lowenfeld). Thus the case was - like Grotius' great work - withdrawn from every modern fact (cf. *De Jure Belli ac Pacis*, Prolegomenon, 26). But the withdrawal from consideration of all relevant facts made the United States' *legal* position at this stage even less plausible - since it amounts now to the claim that an unprovoked attack by naval forces of one State party on a civilian commercial installation of the other State

party, while that other State party is acting in self-defence against the aggression of a third State, does not even get over the jurisdictional threshold for a breach of the Treaty of Amity. The Court can decide for itself on that.

17. In parenthesis, Mr. President, I should say that in Iran's view too the Court's jurisdiction does not depend on any finding as to the commercial or other use of the platforms. The Court has jurisdiction to apply the Treaty of Amity to the facts as it finds them, including the facts relating to the use of the platforms to the extent that they may be relevant. The use of the platforms is not a jurisdictional fact: it is a matter for the Court to consider in the exercise of its anterior jurisdiction conferred in relation to the dispute as a whole by Article XXI, paragraph 2, of the Treaty.

18. There has also been a change in the authority relied on by the United States for its "reasonable connection" test. Last week I showed that the earlier United States mainstay in this regard - the *Ambatielos* case - did not support the reasonable connection test (CR 96/15, p. 49). The United States made no reply to this. Rather than returning to *Ambatielos*, it relied on *Bosnia*. In the course of doing so, Professor Lowenfeld accused Iran of quoting only paragraph 29 of the *Bosnia* Judgment (CR 96/16, p. 23). In fact, however, we did refer to the central paragraph, paragraph 33 (CR 96/15, p. 50). The point is important because in paragraph 29 the Court was holding that there was a dispute, whereas in paragraph 33 it held that the dispute arose under, or "within the provisions of", the Genocide Convention (cf. also *Bosnia, Judgment of 11 July 1996*, para. 30).

19. In the *Bosnia* case, Bosnia-Herzegovina pointed to a treaty, the general language of which was arguably violated by alleged acts of the

respondent State. The respondent State took issue with the facts, but the Court simply referred the factual issues to the merits (*Bosnia*, *Judgment of 11 July 1996*, para. 31, sub-para. 4). The respondent State also took issue with the treaty provision relied on, arguing that despite its general language there were unexpressed limitations in it: either it did not apply in internal armed conflict, or it did not apply to violations outside the respondent's territory, or it did not provide a basis for State responsibility. The Court rejected these arguments summarily. There was simply no textual basis for them, having regard to the actual language of the Convention. As to the first, Article 1 of the Convention applies to acts of genocide "whether committed in time of peace or in time of war"; there was simply no basis for any exclusion for cases of internal armed conflict (*ibid.*, sub-para. 3). As to the second, similarly there was no basis for a territorial limitation, which was nowhere expressed in the Convention (*ibid.*, sub-para. 5). As to the third, the reference in the Convention to state responsibility did not "exclude any form of State responsibility" as the Court said (*ibid.* para. 32).

20. In deference to Judges Oda, Vereshchetin and Shi, I should note that they disagreed on this latter point, at least. But they did so on the basis - as I read their declarations - of considerations special to the Genocide Convention.

21. Now turning to the present case, it is Iran which calls in aid general language in an applicable treaty to which the general language of a compromissory clause applies. The United States seeks to exclude jurisdiction by reading down that language by reference to unexpressed limitations concerned with the "combat operations of armed forces". It is the United States that is in the position that the respondent State

was in Bosnia. Iran says that it has crossed the threshold of an arguable case in relation to this dispute, the threshold test as articulated by the Court in *Ambatielos* and *Nicaragua*. It does not ask the Court for a definitive interpretation of the relevant provisions of the Treaty, that will be a matter for the merits. It simply says that as to the dispute - and I repeat for Professor Lowenfeld's benefit, the words in paragraph 33 of the *Bosnia* Judgment - I hope I read them slowly enough now - "the Parties not only differ as to the facts of the case . . . and the applicability to them of the provisions of the [Treaty], but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions", including the jurisdictional clause. There is - as the Court said in *Bosnia*, "accordingly" - a dispute covered by that clause.

22. If in the *Bosnia* case the Court actually affirmed the general language of the Convention, i.e., if it went on to interpret that language in the face of implausible arguments to the contrary - and I would point out that Bosnia-Herzegovina had urged it to do that - this cannot detract from the decision that there was in that case a dispute under the compromissory clause. And similarly here.

23. It remains to note the attempt by Mr. Crook to avoid the consequences of the United States concession with respect to the security interests clause, Article XX, paragraph 1 *(d)*. I will not repeat what I said on this on Friday (CR 96/15, pp. 57-61), since the only response Mr. Crook now makes is to say that the Treaty "does not regulate the conduct of military hostilities" (CR 96/16, pp. 35-36). Well, that begs the question. If the Treaty has been violated and Article XX, paragraph 1 *(d)*, does not provide an excuse, then the United States will discover that to that extent the Treaty *does* regulate such conduct, in

the sense of rendering it unlawful - just as it discovered this, albeit *in absentia*, as to the FCN Treaty in *Nicaragua*. What is implausible is to suggest that there is an unexpressed stipulation - like the unexpressed stipulation as to internal armed conflict on which the respondent State relied in the *Bosnia* case - which excludes "military hostilities" from your jurisdiction. And that implausibility becomes total once one accepts - as the United States now does - that certain military hostilities can be justified, at the level of the merits, under paragraph 1 *(d)*. The United States finds Iran's argument "dramatic" and "creative" (CR 96/16, p. 35, Mr. Crook). To the aspiring advocate these are satisfying words, but I would prefer to use the terms "elementary", "obvious" and "logical". The Court had no difficulty with the point in 1984, so I regret to say that it is hardly creative to make it now.

24. Moreover the United States argument pointedly ignores the key word "necessary" in paragraph 1 *(d)*, on which the Court placed such emphasis in *Nicaragua* (*I.C.J. Reports 1986*, p. 141, para. 282). It is only *necessary* measures which are not precluded by that paragraph; by clear implication, unnecessary measures of the use of force may well be precluded. And thus the other provisions of the Treaty can extend to, can cover, *pro tanto* can regulate, such unnecessary measures. Of course, whether the United States measures here were "necessary" we shall have to wait and see.

C. The United States Restrictive Theory of Subjective Intent

25. Mr President, Members of the Court, I should in this third part of my reply make a brief reference to Mr Matheson's repeated invocation of a restrictive principle of consent to jurisdiction, based on the intent of the parties and invoking the *Anglo-Iranian Oil Co.* case (CR 96/16, p. 40). But as my colleague Professor Condorelli has explained,

Anglo-Iranian concerned the interpretation of a unilateral declaration made under Article 36, paragraph 2, of the Statute, not the interpretation of a treaty. The subjective intent of one or other party to a treaty is essentially irrelevant to the interpretation of that treaty. What matters is their common intent as expressed in the treaty itself or, in a subsidiary way, in admissible extrinsic materials. Here the compromissory clause is as broad as the Treaty itself, and there is no rule of the restrictive interpretation of treaties generally. Such a rule was expressly rejected in the drafting of the Vienna Convention on the Law of Treaties.

26. In short, what the parties "actually intended" - in the sense of jointly intended - is to be extracted from the terms of the treaty interpreted in accordance with international law. The only item of *travaux préparatoires* of the treaty that either party referred to in these proceedings was the debate over the inclusion of the words "or application" in Article XXI, paragraph 2 (see CR 96/15, p. 44). The eventual inclusion of those words speaks in favour of the broad interpretation of Article XXI paragraph 2. The US Senate debates were not and are not part of the *travaux préparatoires*, whether of this treaty or any other, because they were internal to one party and were not communicated to - let alone agreed by - that other party, as the Vienna Convention on the Law of Treaties, Article 31, paragraph 2 *(b)*, requires. Iran has cited them here simply to show that the *ex post* assertions by the United States as to its understanding of the Treaty, or as to what it "really intended", do not stand with the internal records of the United States itself. But those records cannot contradict the actual language of the Treaty read in accordance with the applicable rules of treaty interpretation.

D. Summary of Conclusions

27. Finally, Mr. President, in the fourth part of this reply, let me briefly summarize the position of the Islamic Republic of Iran in this phase of the case. Mr. Matheson yesterday identified and helpfully identified three "basic questions" on which, he said, the debate turns (CR 96/16, pp. 14-15). His third question logically comes first. It asks what is the standard or threshold for establishing jurisdiction under a compromissory clause. On this point I have already shown that the Court need only decide that the issues between the Parties raise *bona fide* questions of interpretation or application of the treaty. The actual task of interpretation and application, and any associated issues of fact-finding, have to wait until the merits.

28. Mr. Matheson's other two questions have to be answered in the light of this answer to his third question - although, as I pointed out on Friday, the answers the Court should give to those questions would be the same even if, hypothetically, the Court were to adopt the "dress rehearsal" theory of jurisdiction propounded by the United States, the "reasonable connection" or "close relationship" theory.

29. Mr. Matheson's first question relates to the scope and character of the Treaty. Here it is the United States which seeks to make the argument that the Treaty of Amity is both narrow in scope and routine in character, and that, globally, it does not cover situations involving the use of armed force by the regular forces of a State party. The United States reclassifies this Treaty, one might say, as a Treaty of Vague Aspirations, Maritime Commerce and Consular Rights. Iran says the Treaty is what it proclaims itself to be, a Treaty of Amity, Economic Relations and Consular Rights, and that it contains provisions responding fully to each of its proclaimed objects. Iran also says that, if an apparent

breach has occurred of any particular clause of the Treaty by way of a use of armed force by a State, that breach has to be justified or excused under Article XX (1) *(b)* or by reference to general international law. It is not excluded at the threshold, either from the scope of the Treaty or from its compromissory clause. Justification of an apparent breach of the Treaty is a matter for the merits. It is quite different from jurisdiction.

30. But Iran also says that the very existence of the disagreement between the Parties which I have just summarized is itself sufficient in the circumstances to attract the Court's jurisdiction. The issue of the scope of the Treaty arises on the facts of this case, and Iran's position with respect to it is an arguable one. That is enough.

31. The same answer can be given to Mr. Matheson's second question, which is whether the specific provisions of the Treaty invoked by Iran "regulate combat operations of armed forces" (CR 96/16, p 15). The answer is that those provisions have apparently been breached by the actions of the United States, or at the least, that it is arguable that they have been so breached. It is true that precisely which provisions have been breached and precisely why will be a matter for the Court to determine at the merits phase, in the light of its determination of the facts. But genuine questions as to the breach of each of those provisions have been raised. That being so, the United States' argument that its conduct does not violate the treaty because it involved "combat operations of armed forces" is a question of justification, and not of jurisdiction.

32. Mr. President, Members of the Court, Mr. Crook suggested yesterday that on the Iranian view of the Treaty of Amity, the maintenance of friendship between the United States and Iran "becomes a

matter for the Court" (CR 96/16, p. 28). I suppose no two people ever became friends as a result of a judgment of the Court deciding in favour of one and against the other. No doubt the same is true for States. But Mr. Crook misunderstands the role of the Court in the pacific settlement of disputes. The relations between the United States and Iran are less troubled today, one would suggest, because Iran was able to bring the *Airbus* case before this Court and because it was eventually resolved by the parties "under the shadow of the law", as the phrase has it, but amicably resolved. One at least of the calendar of issues between the Parties has been resolved and the fact that there are other items on that calendar does not affect that matter. This is the role of the Court under the compromissory clause, to contribute to the settlement of disputes by its pacific means. Iran is confident that the Court will not shirk that role in this important case.

Mr. President, I would ask you to call on the Agent to conclude the case on behalf of Iran.

Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you very much, Professor Crawford, for your statement. I now can give the floor once again to the distinguished Agent of the Islamic Republic of Iran, Mr. Zahedin-Labbaf, to make his final statement and to give the Court his Government's final submissions.

Mr. ZAHEDIN-LABBAF:

1. Mr. President, distinguished Members of the Court, that concludes Iran's presentation.

2. On a personal note, I would like to say that Iran has regretted in these proceedings the absence of Professor Bowett, who is listed as part of Iran's delegation and who assisted Iran throughout the written

phase. Unfortunately, he was prevented from attending. Even without Professor Bowett's assistance, however, I trust that Iran has shown conclusively that there are genuine questions of interpretation and application of the Treaty at issue in this case, that the Court has jurisdiction to deal with them, and that accordingly, justice will best be served if this case proceeds to the merits so that the disputes relating to the destruction of the oil platforms in question can be resolved once and for all.

3. On behalf of the Government of the Islamic Republic of Iran and of its delegation during these oral hearings, I would like to thank you, Mr. President, and all the Members of the Court, for their patience and attention. I would also like to thank the Registry and other members of the Court's staff who have assisted in the good functioning of these important proceedings.

4. It only remains for me to read out the final submissions of the Islamic Republic of Iran in accordance with Article 60, paragraph 2, of the Court's Rules. These submissions are the same as those appearing on page 77 of Iran's Observations and Submissions filed on 1 July 1994 and are as follows:

* * *

In the light of the facts and arguments it has presented, the Government of the Islamic Republic of Iran requests the Court to adjudge and declare:

1. That the preliminary objection of the United States is rejected in its entirety;

2. That, consequently, the Court has jurisdiction under Article XXI (2) of the Treaty of Amity to entertain the claims submitted by the Islamic Republic of Iran in its Application and Memorial as they relate to a dispute between the Parties as to the interpretation or application of the Treaty;
3. That, on a subsidiary basis in the event the preliminary objection is not rejected outright, it does not possess, in the circumstances of the case, an exclusively preliminary character within the meaning of Article 79 (7) of the Rules of Court; and
4. Any other remedy the Court may deem appropriate. Thank you.

The PRESIDENT: Thank you Mr. Zahedin-Labbaf. The Court takes note of the final submissions which you have presented in the name of the Islamic Republic of Iran. This brings us to the end of this series of hearings. I thank the Agents, Counsel and Advisors for both Parties for the help they have given to the Court as well as the spirit of courtesy they have shown throughout these hearings. In conformity with the usual practice, I would ask the two Agents to remain at the disposal of the Court to provide any further assistance which it might need and, subject to this, I declare that all proceedings on the preliminary objection in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* closed. The Court will now withdraw to deliberate. The Agents of the Parties will be notified in due time of the date when the Court will give its Judgment. There will be no other matters before the Court today. The hearings are closed.

The Court rose at 12.20 p.m.