CR 2003/14

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Friday 28 February 2003, at 10 a.m., at the Peace Palace,

President Shi presiding,

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

VERBATIM RECORD

ANNÉE 2003

Audience publique

tenue le vendredi 28 février 2003, à 10 heures, au Palais de la Paix,

sous la présidence de M. Shi, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the end of the first round of oral argument of the Islamic Republic of Iran, with respect to the counter-claim of the United States. Thus, I shall now give the floor to Mr. Sellers.

Mr. SELLERS: Mr. President, Members of the Court.

IRAN'S RESPONSE TO THE UNITED STATES COUNTER-CLAIM — FACTUAL ISSUES

A. Introduction

1. This morning I will address briefly the factual aspects of the United States counter-claim. I will be followed by Professor Pellet who will address the issues of jurisdiction and admissibility raised by that counter-claim, issues which were not substantively addressed by the Court's Order of 10 March 1998. Professor Pellet will then be followed by Professor Crawford who will address the question of whether any of Iran's alleged actions can be considered to be a breach of Article X, paragraph 1, of the Treaty of Amity.

2. The United States defined its counter-claim in this case as follows:

> "in attacking vessels in the [Persian] Gulf with mines and missiles and otherwise engaging in military actions that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty" (Counter-Memorial and Counter-Claim of the United States, Submissions, p. 180).

In this regard, the United States has referred to specific examples of vessels which it alleges were either United States flagged or United States owned, and which it further alleges Iran attacked in breach of Article X, paragraph 1, of the Treaty of Amity. However, as counsel for the United States appeared to be saying on Wednesday afternoon, the United States counter-claim is not limited to, or may not even include, alleged damages to these specific vessels. The claim for damages apparently extends to items such as additional war-risk insurance premiums, freight charges and even to the costs of deploying military forces in the Persian Gulf, purportedly to protect such vessels (CR 2003/13, p. 13 and Rejoinder, para. 6.52).

3. I will begin by addressing the essential premise of the United States counter-claim, which is that it was Iran which was responsible for endangering and attacking treaty-protected commerce

in the Persian Gulf. I will then turn to the specific incidents referred to in the United States complaint.

B. The general context

4. Mr. President, Members of the Court, in the United States presentation last week and this week, the alleged Iranian conduct which forms the basis of the United States counter-claim was twice described as "by any standards, appalling" (CR 2003/9, p. 55; CR 2003/10, p. 11). Figures were cited referring to over 100, or sometimes as many as 200, Iranian attacks on allegedly neutral vessels, with some 63 fatalities (*ibid*., p. 55). These attacks were described as systematic in nature. The Court was warned repeatedly that any finding in favour of Iran in this case would be a signal to other aggressors that the Court "may be available to protect them from the consequences of their wrongful conduct and to advance their cause by finding liable those who seek to stop their aggression" (*ibid*., p. 19, para. 1.41). Finally, Iran was accused of engaging in fantasy, of passing over supposedly key facts in silence, and of misrepresentations to this Court. The United States promised to "fill in the gaps and correct the false statements in the story Iran has placed before the Court" (*ibid*., p. 12, para. 1.13). Silence, fantasy and misrepresentation. Mr. President, Members of the Court, let me test the record on these points in relation to the United States counter-claim.

5. First, where was Iraq in the United States presentation? There was almost no mention of Iraq or of the fact that there was a devastating war ongoing at the time of these events. Iran has provided to the Court the Secretary-General's finding that it was Iraq's aggression and its continued occupation of Iranian territory throughout the conflict which were the cause of the conflict and entailed responsibility for the conflict. This finding did not pertain to just part of the conflict, it referred to the whole conflict including the situation in the Persian Gulf. There is no mention of the Secretary-General's findings by the United States.

6. Mr. President, Members of the Court, this was no ordinary conflict. Iraq occupied areas containing a large proportion of Iran's oil production capacity and inflicted economic costs estimated at $1,000 billion. This was one of the most costly wars of the twentieth century. There were over 300,000 fatalities on the Iranian side.

7. And what about the United States support for Iraq in this illegal aggression in flagrant violation of the laws of neutrality? We hear nothing, not one word. Mr. Bundy has detailed the nature of this support. I will not repeat him here, except to note that the record shows clearly — and the United States has not denied — that the United States supplied direct military and intelligence assistance to Iraq in carrying out attacks, among other things giving Iraq almost real-time information as to Iran's military actions. The United States even allowed Iraq access to chemical products which were used in its chemical weapons attacks, although, as one commentator has recently noted "Washington knew Iraq was dumping 'boatloads' of chemical weapons on Iranian positions" (*Los Angeles Times*, 16 February 1998). Some 150,000 Iranians are still suffering the effects of Iraq's chemical weapons attacks. And we hear about appalling behaviour and of sending the wrong signals to aggressors.

8. Mr. President, Members of the Court, it is against this background of Iraqi aggression, of United States support for Iraq's aggression, and of United States efforts to undermine Iran that the facts and evidence before you should be judged. And it is against this background, passed under almost total silence by the United States, that the situation in the Persian Gulf in 1987 and 1988, on which the United States counter-claim is based, must also be considered. Again, however, the United States either refuses to address or misrepresents fundamentally the situation in the Persian Gulf. As I will show, the same pattern of Iraqi aggression, United States support for Iraq, and United States efforts to undermine Iran is relevant to events in the Persian Gulf. Despite all the rhetoric from counsel for the United States, they cannot escape one clear fact which is that the threat to commercial shipping — and above all to commerce between the Parties to *this* case — came from Iraq, and that Iraq was assisted in this by the United States.

9. Let me review some key aspects of the situation in the Persian Gulf which show this. First, it was Iraq which took the war into the Persian Gulf. This fact was acknowledged by counsel for the United States in the jurisdiction phase (CR 96/12, p. 23). It was not mentioned, however, during the course of the presentation in this phase. But the facts are — and United States sources confirm — that from 1981 to 1984 alone Iraq carried out some 56 attacks on vessels in the Persian Gulf (Counter-Memorial and Counter-Claim of the United States, Exhibit 9). These attacks were made against vessels of many nationalities including Saudi Arabian, British, Liberian, Panamanian

and many others. These attacks increased in intensity after 1984, continuing throughout the conflict.

10. Second, as both Professor Freedman and others have noted, Iraq's decision to take the war into the Persian Gulf — and thus to create dangerous conditions for shipping — appears to have been prompted or at least assisted by the United States. As one commentator notes: "American foreign-policy specialists helped Iraq evolve the strategy that came to be known as the 'tanker war', arguing forcefully for Iraqi attacks on shipping to and from Iran." (Reply of Iran, Exhibit 3, p. 166 and Freedman Report, para. 19, fn. 17.) In other words, the United States apparently encouraged Iraqi attacks on Iranian commerce, including commerce which could exist between Iran and the United States.

11. Third, contrary to what the United States alleges, Iran repeatedly supported diplomatic efforts to protect shipping in the Persian Gulf, whether by allowing vessels to fly the United Nations flag, or by agreeing that the Persian Gulf be kept free from the conflict. It was obviously in Iran's interests to promote such efforts as its trade, including its trade with the United States, depended on the Persian Gulf. A letter from Iran's Representative to the United Nations in 1986 is clear on this:

> "I wish to reiterate that since the initiation of Iraqi attacks on ships in the Persian Gulf, we have repeatedly announced in international fora the readiness of the Islamic Republic of Iran to co-operate in every possible way with the Secretary-General of the United Nations and/or other relevant international organisations in securing the freedom of navigation in and the security of the Persian Gulf." (Counter-Memorial and Counter-Claim of the United States, Exhibit 2, p. 30.)

12. However, proposals for condemnation of Iraqi attacks and for multilateral or United Nations-sponsored efforts to protect shipping foundered because it was felt that Security Council approval would not be forthcoming. A cardinal reason for this was United States opposition. Javier Perez de Cuellar, then Secretary-General, noted that the United States was "unremittingly hostile to Iran, and therefore it was not inclined to support any Security Council action that might be favourable to Tehran" (Reply and Defence to Counter-Claim of Iran, Exhibit 6, p. 178). In the event, as Sir Anthony Parsons, then British Permanent Representative at the United Nations, has noted: "there was no specific, international condemnation of the Iraqi attacks and no serious

attempts made to persuade or coerce Iraq into desisting from them" (Observations and Submissions on the United States Preliminary Objection of Iran, Exhibit 16, p. 19).

13. Fourth, there is no doubt that Iraq carried out attacks on shipping throughout the Persian Gulf, far from its exclusion zone, and even when such vessels were trading with Iraq's supposed allies. Iran has referred to a number of such incidents in its first-round presentation on Iran's claim. These incidents were not isolated, but continued from the beginning of the conflict in 1980 through to 1988. Iran will address these facts further on Monday.

14. Fifth, Iraq's attacks were carried out with mines, Exocets, various other missiles, including Silkworms, and other sophisticated weaponry. As two experts who provided a report on behalf of the United States confirm, "the Iraqis had weapons of destruction while the Iranians had only weapons of harassment" (Counter-Memorial and Counter-Claim of the United States, Exhibit 18, p. 6). Even United States sources confirm that the majority of attacks in the tanker war are attributable to Iraq, and that by far the greatest damage, loss of life and personal injury was inflicted by Iraq. Again, Iran will address this issue in more detail on Monday.

15. Sixth, the United States assisted Iraq in its attacks on shipping both directly and indirectly. On countless occasions, United States military forces violated Iran's territorial sovereignty, infringed its airspace and intercepted its aircraft and naval forces in violation of international law. The United States also carried out repeated electronic jamming of Iran's communications (see, for example, Memorial of Iran, Exhibit 31 and Exhibit 48). The evidence of these actions has not been disputed by the United States. Not only did such actions violate international law, but they also impeded Iran's right of self-defence against such attacks. More significantly, United States naval forces, as one author notes, "help[ed] the Iraqis to choose their targets" (Further Response to the United States' Counter-Claim of Iran, Exhibit 3).

16. Seventh, there was no doubt in the mind of informed observers at the time as to which party was impeding freedom of commerce in the Persian Gulf. Again, I quote Sir Anthony Parsons, "Iran had no interest in endangering the sea lanes through which all her exports and most of her imports passed" (Observations and Submissions on the United States Preliminary Objection of Iran, Exhibit 16, pp. 19-20). Senator Nunn, then Chairman of the United States Senate Armed Services Committee, noted in 1987 that: "the challenges to freedom

of navigation originate with Kuwait's ally Iraq" (Memorial of Iran, Exhibit 32, p. 1467). He also noted, even at that time, the incongruity of the United States position: "In addition, Iran exports more oil than Kuwait, yet the United States has not expressed concern about the free flow of Iranian oil."

17. Eighth, and finally, the United States used force against Iran repeatedly, blowing up three commercial oil platforms, destroying half the Iranian navy, and shooting down a civilian Iranian airliner. On 18 April 1988, 56 Iranians were killed in one day by United States forces, an attack made on the same day as a decisive Iraqi offensive in the war. On 3 July 1988, 290 people of many different nationalities were killed when a civilian airliner was shot down by United States forces. There were no United States fatalities in any incidents of which Iran is aware apart from the attack on the U.S.S. *Stark* which was carried out by Iraq, and no fatalities in any of the specific incidents relied on by the United States in its counter-claim.

18. Mr. President, the United States mentioned several times that other States sent their forces to the Persian Gulf. This is true, but they did so only to protect shipping, not to assist Iraq. None of them felt it necessary ever to use force against Iran, and none of them did so. It was only the United States. In this regard the Armilla patrol carried out by the United Kingdom was typical. Its role was described in a report to the Foreign Affairs Committee of the House of Commons, as fundamentally "de-escalatory" and its "low-key" approach was contrasted with the provocative operations mounted by the United States (see, Ronzitti and de Guttry, *The Iran-Iraq War* (1993), p. 296). No armed actions in alleged self-defence or otherwise were made by the Armilla patrol or indeed by naval vessels of any nations other than the United States.

19. However, the United States pretends that its use of force was justified to protect neutral shipping and that the attacks on the platforms succeeded in this by reducing the number of attacks so that they eventually came to an end after the destruction of the Salman and Nasr platforms in April 1988. Mr. President, the truth is that the threat to commercial shipping had continued for so long because of Iraqi attacks, and because of United States support for such attacks and the United States refusal to accept international efforts to condemn them or otherwise protect shipping. The threat came to an end — not because of the destruction of the oil platforms, but because of resolution 598 passed in July 1987 and the ceasefire that was agreed to in August 1988.

20. A number of the facts I have just outlined are not disputed by the United States. Others are simply ignored or dismissed as irrelevant. Yet they are vital to an appreciation of the United States counter-claim. The simple fact is that the threat to commerce in the Persian Gulf and above all to commerce between Iran and the United States, which is the basis of the United States counter-claim, stemmed from Iraq, not Iran.

C. Specific incidents

21. Mr. President, Members of the Court, I will now turn to the specific incidents which are given as examples in the United States counter-claim. I will take these incidents in chronological order in my presentation. However, before doing so, I believe it may assist the Court to consider them under a number of different categories.

22. In its original counter-claim filed on 23 June 1997, the United States cited seven incidents involving the *Bridgeton*, the *Texaco Caribbean*, the *Sea Isle City*, the *Lucy*, the *Esso Freeport*, the *Diane*, and the *Samuel B. Roberts* (Counter-Memorial and Counter-Claim of the United States, para. 6.08). Apparently, and as an afterthought, in the Rejoinder, the United States purported to add two more, the *Sungari* and the *Esso Demetia* (Rejoinder of the United States, para. 6.06). But in a footnote to its Rejoinder, the United States also reserved its right to develop facts and arguments relating to other unnamed United States-operated vessels, referring, however, to the *Grand Wisdom*, the *Stena Concordia* and the *Stena Explorer* as examples (Rejoinder of the United States, para. 6.05, fn. 4.04). Professor Pellet will address the admissibility of these various late-filed claims.

23. It is also useful to consider the nature of the vessels included in the counter-claim. One was a warship, the *Samuel B. Roberts*. In addition to the *Samuel B. Roberts*, the counter-claim as originally stated included two reflagged Kuwaiti tankers, the *Sea Isle City* and the *Bridgeton*. I will say a few words about reflagging in a moment. The other vessels in the original United States counter-claim were Panamanian, Liberian and Bahamian. The United States alleges, however, that these vessels were United States owned, or in the case of the *Texaco Caribbean*, that it was bareboat chartered to a United States corporation and carrying United States cargo (Rejoinder of

the United States, para. 6.06). These assertions of United States ownership are, however, incorrect, as Iran will show.

24. None of the vessels was engaged in commerce between the United States and Iran, except the *Texaco Caribbean*. The *Texaco Caribbean* was carrying Iranian crude from Iran to Rotterdam and, as Iran has explained in its first-round presentation, by reference to the expert report of Professor Peter Odell, it can thus be seen as being engaged in commerce between Iran and the United States. The majority of vessels were in fact trading between Kuwait or Saudi Arabia and third countries. Professor Crawford will return to this issue.

25. However, as I mentioned there are two reflagged Kuwaiti tankers at issue. In December 1986, the Kuwait Oil Tanker Company expressed an interest in reflagging vessels under the United States flag. The subsequent reflagging of 11 Kuwaiti tankers was recognized at the time as a clear example of further United States alignment with Iraq and has been subsequently confirmed to have been entirely artificial in nature. As to the political alignment with Iraq, a November 1987 Report to the United States Senate Committee on Foreign Relations noted that Kuwait had "chosen to serve as Iraq's entrepôt and thus as its *de facto* ally" (Memorial of Iran, Exhibit 28). The same Report notes that "Kuwait . . . provid[ed] billions of dollars in oil revenues to help finance the Iraqi war effort. In clear and unmistakeable terms, Kuwait took sides." (*Ibid.* See also Memorial of Iran, Exhibits 31 and 51.) Professor Momtaz referred in the first round to the War Relief Crude Oil Agreement under which the proceeds of neutral zone crude oil sales were provided to Iraq (Memorial of Iran, Exhibits 25, 26 and 27). This was public knowledge at the time. Thus, while the United States was condoning attacks by Iraq on vessels of different nations trading with Iran, it was ready to protect trade with Kuwait even though it was equally clear that this trade supported Iraq's war effort. Again, there was almost no mention of these facts by the United States.

26. Apart from this alignment with Iraq, the reflagging was also entirely artificial. Ownership of the specially created United States shell company to which title over the vessels was transferred on paper in fact remained with the Kuwait Oil Tanker Company, which had no activities in the United States. It is significant in this context that the United States Court of Appeals for the Third Circuit found that internal United States laws could not be applied to these

reflagged vessels because of *(a)* the political and temporary purpose behind the reflagging and *(b)* the fact that the foreign character of the vessels was unaltered. As the Court of Appeals noted:

> "The technical formality of transferring the vessels to an American corporation for political purposes in no way altered the entirely foreign character of the shipping operations or the duties of the seamen." (Further Response to the United States Counter-Claim of Iran, Exhibit 7, pp. 2031 and 2036-2037.)

27. On Wednesday, counsel for the United States sought to argue that this judgment of the Court of Appeals in fact showed that "the eleven tankers were properly under United States flag", citing in support of this statement the court's finding that "the eleven reflagged tankers squarely meet the definition of an American vessel provided in the FLSA" — the United States Fair Labor Standards Act. With respect, the Court of Appeals' finding on this point cannot be dispositive of the question of whether the vessels were properly under the United States flag on the basis of a "genuine link" with the United States, which is a matter of international law.

28. However, the Court of Appeals' views on matters of fact are instructive and relevant to this issue. It noted that: "a demonstrable connection to the American economy is critical to a finding of FLSA coverage" (*ibid*., p. 2017). The court continued: "[h]ere, the American flag flew to give notice that these vessels were entitled to the military protection of the United States. Such symbolism is not a valid substitute for involvement in the American economy within the meaning of the FLSA" (*ibid*., pp. 2035-2036), and that: "[a]lthough these eleven ships [which included the *Bridgeton* and the *Sea Isle City*] flew the American flag, the goods they carried, the trading patterns in which they engaged, and the seamen they employed were entirely foreign" (*ibid*., p. 2036).

29. At this time, the State Department sought to justify the reflagging by noting that these vessels would not be trading with Iran or Iraq. I quote: "the shipping is not 'to and from' one of the countries at war" (Mr. Sofaer, *New York Times*, 16 August 1987). In this regard, it is important to note, as the Court of Appeals also noted, that the reflagged tankers were not and could not be regarded as engaged "in commerce" with the United States, because it was part of the agreement between Kuwait and the United States that they would not call at United States ports (Further Response to the United States' Counter-Claim of Iran, Exhibit 7, pp. 2019-2020). This fact must necessarily undermine the United States claim that such vessels should or could be afforded treaty

protection under Article X, paragraph 1, which relates to commerce between the territories of the two High Contracting Parties. Professor Crawford will address this point further.

30. Apart from the *Samuel B. Roberts*, and the two reflagged vessels, the other vessels had no external signs of any relationship to the United States, and the United States has no legal interest in such vessels.

31. Mr. President, I will now turn to the specific incidents, which, as I said, I will address in chronological order, beginning with the *Bridgeton.*

The *Bridgeton* (24 July 1987)

32. The *Bridgeton*, a reflagged Kuwaiti tanker, struck a mine some 18 miles south-west of Farsi Island on 24 July 1987. The vessel was in ballast from the Netherlands to Kuwait. It was not engaged in commerce between the territories of the United States and Iran, and indeed under the reflagging agreement with Kuwait, which I just described, it was prohibited from calling at United States ports.

33. As to the incident itself, at the time, the United States stated that it was unsure of the provenance of the mine which hit the *Bridgeton*. As the *Financial Times* noted some three weeks after the incident, "Washington . . . said it would not retaliate, since it was not sure who was responsible" (Memorial of Iran, Exhibit 57). However, the United States alleges in these proceedings that the mine was specifically placed in the route of the *Bridgeton* by an Iranian Revolutionary Guard speedboat. There is no allegation that the *Bridgeton* ran into a minefield: it was one single mine. The only suggestion that this was an Iranian attack comes from a CIA intelligence report of July 1987 referring to an alleged statement by an unnamed member of Iran's Revolutionary Guards. According to this report, the speedboat approached the *Bridgeton* within half a mile "under the cover of darkness" and laid a single mine in its path (Counter-Memorial and Counter-Claim of the United States, Exhibit 46). This is an unsourced report by an unnamed informant. The United States apparently itself gave it no credence at the time, since it had been made well before the statement by Washington that it was not sure who was responsible. In any event, even at face value, the report does not support the United States accusation. First, the *Bridgeton* was hit at 7 o'clock in the morning, which is already daylight in July in the Persian Gulf.

The mine could only have been laid within half a mile of the *Bridgeton* minutes before this time, and it could thus not have been laid "under cover of darkness". Second, an independent French mining expert Captain Fourniol, whose report is attached to Iran's Reply, regards speculations that Iran could have laid single mines in this way in the path of vessels as untenable: transport and handling of a mine in such a small boat would have been almost impossible; and the time needed for the mine to arm itself would have required the mine to be laid no less than 6,000 m from the ship concerned, at which distance targeting would also have been impossible. His findings have not been contested by the United States.

34. Iran will return to the United States accusations on mining on Monday. I would only note here the findings of the General Council of British Shipping, a source relied on by the United States, which reports the presence of floating mines in the Persian Gulf, noting that:

> "Early in the war mines were laid by both sides at the head of the [Persian] Gulf [that is, the northern end of the Persian Gulf]. Some of these have occasionally been reported to have broken loose . . . The Farsi Island area is the most likely area where these mines would interfere with neutral vessels." (Counter-Memorial and Counter-Claim of the United States, Exhibit 2, p. 48.)

The *Bridgeton* was struck close to Farsi Island. Out of the 176 mines found in the Persian Gulf during the conflict, some 87 were such floating mines (Preliminary Objection of the United States, Annex, fn. 57).

35. I would also note that there were no injuries in the *Bridgeton* incident. Indeed, the vessel was able to proceed on its way for repairs, despite the damage.

The *Texaco Caribbean* (10 August 1987)

36. The *Texaco Caribbean* was a Panamanian vessel which also struck a mine on 10 August 1987 in the Gulf of Oman. The vessel was travelling from Iran's Larak Island, carrying Iranian crude to Rotterdam when it was hit (see Further Response to the United States' Counter-Claim of Iran, paras. 4.16-4.21).

37. The United States originally stated in its Counter-Memorial that the vessel was United States owned, but produced no evidence of this (para. 6.08.2). In its Rejoinder, the United States acknowledged that the vessel was Panamanian owned, but asserted that it was under charter to a United States company (Rejoinder of the United States, para. 6.06, fn. 409). However, the

evidence actually presented by the United States shows in fact that it was also chartered to a Panamanian company (Rejoinder of the United States, Exhibit 211). Finally the United States asserted that the crude oil the vessel was carrying was United States owned, but again this is not demonstrated. According to Texaco sources, the vessel was in fact subleased "under a single voyage charter to the Norwegian shipping and trading company Seateam and was 'under orders to proceed to Northwest Europe with a cargo belonging to that company'" (Observations and Submissions on the U.S. Preliminary Objection of Iran, Exhibit 25).

38. Mr. President, this vessel was carrying Iranian crude. Nearly all vessels trading with Iran passed through this area of the Gulf of Oman. The United States failed to mention that Iran protested this incident to the Security Council (Memorial of Iran, Exhibit 58).

39. The United States also failed to mention that in the week following the incident, Iranian naval forces assisted in minesweeping efforts in the Gulf of Oman, destroying several mines (Observations and Submissions on the U.S. Preliminary Objection of Iran, Exhibit 27). The United States did refer to statements by His Excellency Ali-Akbar Hashemi-Rafsanjani that Iran had the capacity to lay mines. However, they failed to mention his comment after the *Texaco Caribbean* incident: "In Khawr Fakhan [the area of the Gulf of Oman where the vessel was hit] — that was our lane, so you cannot say that the Iranians mined it, because we ourselves use that course — a mine hit our own ship first." (Counter-Memorial and Counter-Claim of the United States, Exhibit 55.)

40. Again there were no injuries or fatalities in the incident, although the United States referred to this incident on Wednesday as a "disaster".

The *Sea Isle City* (16 October 1987)

41. The next incident is the *Sea Isle City*. Mr. President, both Parties have discussed the incident regarding the *Sea Isle City* at length, and we will revert to this issue in relation to the October 1987 attacks on the platforms on Monday. The *Sea Isle City*, however, like the *Bridgeton* was a reflagged Kuwaiti tanker and as such was prohibited from calling at United States ports. Therefore it was not and indeed could not be engaged in commerce between the two High Contracting Parties.

The *Lucy* (15 or 16 November 1987)

42. The *Lucy*, a Liberian tanker, was allegedly attacked while travelling in ballast to Saudi Arabia from Japan on 15 or 16 November 1987, reports differ (Further Response to the United States' Counter-Claim of Iran, paras. 4.37-4.39).

43. The vessel was owned, not by a United States company as the United States alleges, but by a Liberian company (Rejoinder of the United States, Exhibit 242). Again, there were no fatalities and no injuries. And after minor repairs in Dubai the vessel continued its voyage within a few days.

The *Esso Freeport* (16 November 1987)

44. The *Esso Freeport* was Bahamian, and was allegedly attacked on 16 November 1987, when loaded with Saudi crude and sailing from Saudi Arabia to the United States. Again, the vessel was not United States owned as originally asserted, but owned by a Bahamian company (Further Response to the United States' Counter-Claim of Iran, paras. 4.43-4.45).

45. There were no personal injuries, no fatalities and only minor physical damage to the vessel (Rejoinder of the United States, Exhibit 245).

The *Diane* (7 February 1988)

46. The *Diane* was Liberian and was allegedly attacked on 7 February 1988 while carrying Saudi crude from Saudi Arabia to Japan. The vessel was owned by a Liberian company, not a United States company. And the vessel was again able to resume its voyage within a few days. Again, there were no injuries or fatalities (Further Response to the United States' Counter-Claim of Iran, paras. 4.43-4.45).

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

47. Counsel for Iran will also address the incident involving the *Samuel B. Roberts* in more detail on Monday. Suffice it to say here that this vessel was engaged in the escort of reflagged Kuwaiti tankers. It was certainly not taking any action to protect Iranian-United States commerce. To the contrary, as various sources confirm, including United States commanders in the Persian Gulf at the time, such United States warships directly or indirectly assisted Iraq's disruption of Persian Gulf commerce (see, also, Memorial of Iran, Exhibit 55).

D. Concluding remarks

48. Mr. President, Members of the Court, to summarize: one vessel was a warship, two vessels were reflagged Kuwaiti tankers, and the other vessels were not United States vessels but were of various other nationalities. Only one was engaged in commerce between the two States. The United States has not shown that any of the other vessels had at any time before or since been engaged in such commerce. Nor has the United States shown that any vessels engaged in treaty-protected commerce were ever impeded by Iran.

49. The United States counter-claim is simply based on a false factual premise, which is that it was Iran which was endangering commerce between Iran and the United States. Quite apart from the fact that nothing could have been further from Iran's interests, the evidence is clear — as Iran has shown — that the threat to such commerce came from Iraq, not to mention the United States itself, which was ready to assist Iraq in such attacks, in numerous ways, both direct and indirect.

50. Mr. President, that concludes my presentation. I would be grateful if you would now call upon Professor Pellet.

The PRESIDENT: Thank you, Mr. Sellers. I now give the floor to Professor Pellet.

M. PELLET :

DEMANDE RECONVENTIONNELLE DES ETATS-UNIS — INCOMPETENCE DE LA COUR ET IRRECEVABILITE DE LA DEMANDE

1. Monsieur le président, Madame et Messieurs les juges, la demande reconventionnelle, en tout cas devant votre Cour, est une institution juridique bizarre. Envisagée par le seul article 80 de votre Règlement, elle constitue une procédure *incidente* — ce que les Etats-Unis ont quelque peu tendance à oublier — et, à maints égards, une procédure inaboutie, un peu «boiteuse» si j'ose dire.

2. D'abord, parce qu'elle introduit entre les Parties une inégalité procédurale qui a été souvent soulignée[1], y compris dans le cadre de la présente instance[2].

[1] Voir par exemple Charles de Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice*, Pedone, Paris, 1966, p. 114-116.

[2] Cf. les opinions individuelles des juges Oda (*C.I.J. Recueil 1998*, p. 211 et suiv.) et Higgins (p. 221 et suiv.) et dissidente du juge Rigaux (p. 224).

3. Ensuite, parce que l'ordonnance du 10 mars 1998 n'a pas tranché toutes les questions préliminaires liées à la demande reconventionnelle. A mon très humble avis, la Cour aurait pu le faire dès ce stade; mais, dans sa sagesse, elle en a décidé autrement et s'est bornée à dire «que la demande reconventionnelle présentée par les Etats-Unis dans leur contre-mémoire est *recevable comme telle* et fait partie de l'instance en cours»[3]. «Recevable comme telle», cela veut dire que l'ordonnance de 1998 n'a pas tranché les questions de recevabilité ne relevant pas directement de l'article 80 du Règlement, non plus que les questions de compétence liées aux demandes précises des Etats-Unis (alors que, comme on l'a souligné[4], la Cour a procédé différemment s'agissant de la requête elle-même dans l'arrêt sur l'exception préliminaire du 12 décembre 1996).

4. En conséquence, c'est à un stade très tardif de la procédure, celui où nous en sommes, qu'il convient de discuter les problèmes de compétence et de recevabilité qui n'ont pas été tranchés en 1998. Monsieur le président, jusqu'à avant-hier, nous pensions d'ailleurs qu'il y avait là un point d'accord entre les Parties puisque, dans leurs observations sur la demande iranienne tendant à ce que les Parties soient entendues sur la demande reconventionnelle, les Etats-Unis avaient fait valoir que l'article 80 du Règlement avait «un objet limité»[5] *(«a limited purpose»)* et ne se prêtait pas à l'examen par la Cour des questions de compétence et de recevabilité soulevées par l'Iran qui, selon eux, dépassaient «de loin les limites du paragraphe 3 de l'article 80»[6]; et les Etats-Unis de conclure : *«in any case, the only issue proper for consideration by the Court now is whether there is sufficient connection between claim and counter-claim… All remaining questions presented in the U.S. counter-claim should now be joined to the original proceedings»*[7]. L'intervention du professeur Murphy, mercredi après-midi a dissipé cette impression : il y a affirmé[8] que la Cour avait pris position sur les questions de compétence et de recevabilité liées à la demande reconventionnelle dans l'ordonnance de 1998, et il a prétendu que l'Iran vous demandait de revenir

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[3] *C.I.J. Recueil 1998*, p. 206, par. 46.A; les italiques sont de moi. Cf. CR 2003/13, p. 10, par. 19.2 (M. Murphy).

[4] Cf. l'opinion individuelle du juge Higgins (*C.I.J. Recueil 1998*, p. 221-223).

[5] P. 4, par. 7.

[6] *Ibid.*, p. 4, par. 6; traduction *in* ordonnance du 10 mars 1998, *C.I.J. Recueil 1998*, p. 200, par. 22.

[7] P. 24, par. 45.

[8] CR 2003/13, p. 11.A (M. Murphy).

sur votre décision[9]. Ce n'est pas le cas, Madame et Messieurs les juges, nous vous demandons simplement de vous prononcer sur les points, assez nombreux, sur lesquels vous n'avez pas pris position — et ceci conformément à la position claire (à l'époque) des Etats-Unis, qui ne peuvent, comme ils le font, souffler le froid après vous avoir incités à prendre la position que vous avez prise, en soufflant le chaud.

5. Ce sont ces problèmes préliminaires, que j'aborderai ce matin. Ils sont relatifs à la compétence de la Cour pour connaître de la demande reconventionnelle et à la recevabilité de celle-ci, dans la mesure où ils n'ont pas été tranchés par l'ordonnance de 1998. Je le précise, de l'avis de l'Iran, il s'agit bien de points *préliminaires*, ce qui veut dire que si, comme nous le pensons, la compétence de la Cour n'est pas établie ou si la demande n'est pas recevable pour des raisons autres que celles liées à l'article 80 du Règlement, la Cour n'a pas à se prononcer sur le fond de la demande[10].

6. Je m'attacherai d'abord à montrer que les Etats-Unis n'avaient aucun titre à introduire leur demande reconventionnelle (I). J'aborderai ensuite deux autres problèmes de compétence et de recevabilité que la Cour n'a pas non plus réglés dans son ordonnance de 1998 (II).

I. Les Etats-Unis n'ont aucun titre à introduire leur demande reconventionnelle

7. Monsieur le président, il est clair, et l'Iran ne le conteste pas, que, par son ordonnance du 10 mars 1998, la Cour s'est reconnue «une certaine mesure de compétence» pour connaître de la demande reconventionnelle des Etats-Unis, même si elle n'a pas pris expressément position sur ce point dans le dispositif. Nous admettons que ceci résulte du paragraphe 36 de l'ordonnance, dans lequel il est dit que la Cour «est compétente pour connaître de la demande reconventionnelle des Etats-Unis *dans la mesure où les faits allégués ont pu porter atteinte aux libertés garanties par le paragraphe 1 de l'article X*»[11]. Mais il doit être entendu que c'est *dans cette mesure* et dans cette mesure *seule*.

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[9] *Ibid.*, p. 12, par. 19.11; voir aussi p. 13, par. 19.16 et p. 17, par. 19.26 (M. Murphy).

[10] Voir notamment : arrêt du 28 février 1939, affaire du *Chemin de fer Panevezys-Saldutiskis, exceptions préliminaires, C.P.J.I. série A/B n° 76*, p. 16; voir aussi Shabtaï Rosenne, *The Law and Practice of the International Court of Justice, 1920-1996*, Nijhoff, La Haye, 1997, vol. II, p. 898.

[11] *C.I.J. Recueil 1998*, p. 204; les italiques sont de moi.

8. Or, les prétentions des Etats-Unis dépassent, et de beaucoup, cette mesure et n'entrent pas dans les prévisions de l'article X, paragraphe 1, du traité de 1955.

9. Je ne mentionne qu'en passant les conclusions de la duplique américaine qui demandent à la Cour-ci de dire et juger que *«the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty»*[12] — «de l'article X», et non, comme ils auraient dû l'écrire, «de l'article X, *paragraphe 1*». Mais nous avons noté que les Etats-Unis ont sans doute réalisé leur erreur à cet égard — *errare humanum est* —, car ils n'ont pas repris cette argumentation dans leur duplique, ni, avant-hier, dans leurs plaidoiries orales. Nul doute que leurs conclusions définitives seront modifiées en conséquence. De toutes manières, Madame et Messieurs les juges, vous ne sauriez faire droit à des conclusions qui iraient au-delà des prévisions du paragraphe 1 de l'article X.

10. Une parenthèse sur ce point, Monsieur le président. L'Iran ne conteste nullement — et n'a jamais contesté[13] — que l'article X, paragraphe 1, puisse et doive être interprété à la lumière des autres paragraphes de cette disposition, comme d'ailleurs, des autres articles du traité, qui font sans aucun doute partie du «contexte» au sens de la règle générale d'interprétation de l'article 31 de la convention de Vienne. Mais interpréter est une chose appliquer en est une autre.

11. Au demeurant, il est un point sur lequel, sans aucun doute, les Etats-Unis persévèrent dans l'erreur — *perserverare diabolicum*. Cette erreur obstinée concerne votre compétence *ratione personae*. En effet, dans la droite ligne de leur obstination à se vouloir gendarme universel, les Etats-Unis se posent en procureur et prétendent défendre les intérêts d'Etats qui ne sont pas parties à l'instance et d'intérêts privés à l'égard desquels ils ne peuvent pas se prévaloir d'un lien de nationalité. J'aborderai ces deux points successivement.

A. La Cour n'a pas compétence pour se prononcer sur les droits d'Etats tiers, non parties à l'instance

12. «Nul», Monsieur le président, «ne plaide par procureur» — et surtout pas devant votre haute juridiction dont la compétence, comme l'a rappelé le professeur Weil avec autorité mardi

[12] P. 227.

[13] Voir réplique, p. 189, par. 8.6 *(thirdly)*; voir aussi duplique, p. 203, par. 6.24.

dernier[14], est limitée par le consentement des Parties. En l'espèce, celui-ci a été donné dans l'article XXI, paragraphe 2, du traité d'amitié de 1955, c'est-à-dire dans un traité bilatéral, conclu *entre l'Iran et les Etats-Unis*, et dont, au surplus, en vertu de votre décision de 1996, seul le premier paragraphe de l'article X est applicable.

13. Or, en défenseurs auto-désignés de la licéité internationale, les Etats-Unis prétendent défendre non pas — en tout cas pas seulement — leurs propres droits, mais ceux de l'ensemble des Etats «neutres» — l'expression revient à pas moins de dix reprises dans la présentation initiale de M. Taft de vendredi dernier[15] — «neutres» ou supposés l'être. Mais, quoi qu'ils en pensent, les Etats-Unis ne sont pas les garants universels du droit international (tels qu'ils le conçoivent — et ils en ont souvent une conception singulière). Ils ne peuvent se prévaloir que de leurs propres droits, y compris, j'y reviendrai, de ceux qui leur appartiennent de «faire respecter le droit international en la personne de *[leurs] ressortissants*»; mais en aucune manière en la personne d'Etats étrangers, ou des ressortissants de ceux-ci ou des navires battant leur pavillon, je veux dire leur pavillon des Etats étrangers.

14. La Cour ne saurait «admettre une sorte d'*actio popularis* ou un droit pour chaque membre d'une collectivité d'intenter une action pour la défense d'un intérêt public»[16]. Et, s'il est vrai que cet énoncé trop absolu que l'on trouve dans l'arrêt de 1966 sur le *Sud-Ouest africain*, a été quelque peu nuancé par la suite, notamment dans l'affaire de la *Barcelona Traction*, le principe demeure dans tous les cas où l'Etat en cause ne peut faire valoir la violation d'une obligation *erga omnes* et, sans aucun doute s'agissant de la violation d'obligations nées exclusivement d'un traité bilatéral. Dans ce cas «tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que [les droits atteints de ce fait] soient protégés»[17].

15. Mais ce n'est certainement pas le cas dans la présente espèce où, comme l'a fait remarquer M. Weil à très juste titre (mais l'Iran l'avait écrit avant[18]),

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[14] Cf. CR 2003/11, p. 12-25, *passim* (M. Weil).

[15] Cf. CR 2003/9, p. 10-19, *passim*.

[16] Arrêt du 18 juillet 1966, *Sud-Ouest africain, deuxième phase, C.I.J. Recueil 1966*, p. 47.

[17] Arrêt du 5 février 1970, *C.I.J. Recueil 1970*, p. 32, par. 33.

[18] Voir par exemple réplique, p. 189, par. 9.6 ou réponse additionnelle, p. 47, par. 5.9; comp. CR 2003/11, p. 23-25 (M. Weil).

> «[l]a Cour n'est compétente pour examiner la compatibilité des actions reprochées aux Etats-Unis [et, incidemment, à l'Iran] avec le traité de 1955 qu'au regard d'une seule disposition de ce traité : celle de l'article X [paragraphe 1] relative à la liberté de commerce et de navigation»[19].

Et il ne viendrait à l'esprit de personne de considérer que cette liberté, qui plus est «entre les territoires des deux Hautes Parties contractantes», conventionnellement garantie dans un traité bilatéral, constitue l'une de ces «obligations *erga omnes*» visées par le célèbre *dictum* de la Cour de 1970, pas davantage qu'elle n'est due «à un groupe d'Etats dont [les Etats-Unis feraient] partie» ou à «la communauté internationale dans son ensemble»[20].

16. Or que voit-on en l'espèce ? D'abord que les Etats-Unis, je l'ai dit, prétendent se poser en défenseurs de la liberté du commerce et de la navigation dans le Golfe en général[21]; et ils vont jusqu'à vous demander la réparation *of the «significant costs [they] incurred in deploying additional forces to the Gulf to protect maritime commerce by escorting vessels [not U.S. vessels, just vessels], clearing minefields and other activities»*[22] (*not alleged <u>Iranian</u> laid minefields or <u>Iranian</u> activities, just «minefields and other activities»)*. Ce faisant, les Etats-Unis oublient d'ailleurs une fois de plus que ce n'est pas l'Iran qui a déclenché la guerre d'agression dans laquelle ils ont pris parti du côté de l'agresseur; et que ce n'est pas non plus l'Iran qui a déclenché la guerre des pétroliers, de même qu'ils omettent de démontrer toute relation de cause à effet entre les mesures pour lesquelles ils demandent réparation et les violations alléguées de l'article X, paragraphe 1. Vous n'avez évidemment pas compétence, Madame et Messieurs de la Cour, pour vous prononcer sur des demandes aussi vagues et aussi dépourvues de lien avec le traité qui fonde votre compétence.

17. De manière un peu plus spécifique, les Etats-Unis entendent aussi agir au nom de divers Etats dont, selon eux, les droits ont été violés par les actes qu'ils attribuent à l'Iran, à savoir, les Bahamas, Panama, le Royaume-Uni et le Libéria, dont des navires auraient été victimes d'«attaques» iraniennes. Ils ont adressé des notes à ces quatre Etats, par lesquelles ils leur

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[19] CR 2003/11, p. 16, par. 13.11 (M. Weil).

[20] Cf. l'article 48 du projet d'articles de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite, annexé à la résolution 56/83 de l'Assemblée générale du 12 décembre 2001.

[21] Voir par exemples : duplique, p. 116, par. 4.05 ou CR 2003/9, p. 16, par. 1.26 (M. Taft).

[22] Duplique, p. 226, par. 6.52. Voir aussi annexe 261, United States General Accounting Office, *Burden Sharing : Allied Protection of Ships in the Persian Gulf, in 1987 and 1988*, septembre 1990.

demandaient de confirmer «n'avoir pas d'objection à ce que les Etats-Unis présentent [une] réclamation en ce sens à la Cour internationale de Justice» *(«no objection to the United States' presenting the above claim to the International Court of Justice»).* Sans doute précisaient-ils que, ce faisant, ils agiraient «au nom des propriétaires [supposés américains] des navires» *[«on behalf of the [alleged] owners of the vessels»]*[23]; mais, en effectuant cette démarche, les Etats-Unis savaient bien qu'ils se substituaient aux droits des Etats intéressés eux-mêmes. Leur duplique en fait du reste l'aveu :

> *«This confirmation [that is the confirmation by the respective four States] is significant, for where the Court has found the nationality of the injured entity to be of relevance in precluding a claim, it has done so out of concern that the rights of the State of nationality be preserved.»*[24] [«afin de protéger *les droits de l'Etat de nationalité*»…]

18. Le Gouvernement du Libéria ne s'y est d'ailleurs pas trompé qui, dans sa réponse à cette demande, indique ingénument *that it «interposes no objections to the United States Government representing Liberia in this matter, provided this will incur no financial burdens to the Government of Liberia. However,» it adds, «whenever damages are awarded in the said matter by the Court, that the Government of Liberia be equitably benefitted»*[25]. Voici, Monsieur le président, une conception quelque peu originale d'une sorte de «protection diplomatique interétatique». Mais on aurait tort de s'en gausser : sur le fond, et malgré la «confusion» *(misunderstanding)* que le professeur Murphy lui reproche[26], c'est le Gouvernement libérien qui a raison : ce sont bien *les droits du Libéria* que les Etats-Unis entendent faire valoir — comme ils l'ont, eux aussi, reconnu.

19. Là où, cependant, le Gouvernement du Libéria comme celui des Etats-Unis se trompent, c'est sur la possibilité même d'une telle représentation : le traité de 1955, qui constitue la seule base de compétence en l'espèce, engage l'Iran non pas vis-à-vis du Libéria, (ou des Bahamas, ou du Panama, ou du Royaume-Uni) mais à l'égard des seuls Etats-Unis. Même si, *ratione materiae*, ces autres Etats pouvaient se prévaloir des mêmes droits que le défendeur, ce qui n'est pas le cas — nous plaidons sur un traité bilatéral — mais même dans ce cas, la Cour n'en serait pas moins

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[23] Voir contre-mémoire, annexe 179.

[24] P. 213, par. 6.34, c'est moi qui souligne.

[25] Duplique, annexe 258; c'est moi qui souligne.

[26] CR 2003/13, p. 13, par. 19.15.

dépourvue de toute compétence à leur égard *ratione personae*, et l'«autorisation» qu'ils ont pu donner aux Etats-Unis de les représenter ne change rien à l'affaire.

20. Du reste, le seul fait que les Etats-Unis aient jugé nécessaire de leur demander cette autorisation montre bien qu'ils savaient ne pas défendre «leurs propres droits»; pas non plus ceux de leurs ressortissants; mais bien ceux d'entités étrangères dont les réclamations ne peuvent être endossées que par l'Etat dont elles ont la nationalité. Ceci me conduit au point suivant de mon exposé :

B. Les Etats-Unis ne peuvent demander réparation de dommages subis par des entités étrangères

21. Les Etats-Unis, Monsieur le président, savent bien que ce que l'on pourrait appeler la «voie globalisante» est bouchée : ils ne peuvent agir *que* pour faire valoir leurs *propres* droits, leurs intérêts *juridiquement* protégés, pas ceux d'Etats étrangers. Et de déployer d'immenses efforts pour vous persuader que tel est le cas en faisant le détour par les victimes «directes», immédiates, des faits internationalement illicites qu'ils imputent à l'Iran.

22. D'abord, affirment-ils, «*this counter-claim is not dependent on an espousal of claims held by U.S. nationals. The United States itself has directly suffered by Iran's breach of its Article X, paragraph 1, treaty obligations*» *because, it says, «[w]hile many of the Iranian attacks were against vessels that were not flying a U.S. flag, that fact does not preclude the United States from asserting that it has suffered injury by Iran's failure to abide by a treaty that protects U.S. owned vessels and U.S. cargo»*[27]. Cette affirmation méconnaît entièrement la distinction fondamentale entre un simple intérêt d'une part et un droit d'autre part.

23. Il n'est pas douteux que le propriétaire américain d'un navire ou d'une cargaison a un «intérêt» à ce que celui-ci ou celle-ci bénéficie effectivement de la liberté de commerce garantie à l'article X, paragraphe 1, du traité de 1955. Mais il n'en résulte nullement que la Cour soit compétente pour connaître de sa réclamation éventuelle par le biais de la demande reconventionnelle des Etats-Unis : peu importe que ceux-ci entendent endosser formellement de telles réclamations ou non; de toutes façons, ils n'ont aucun titre à se prévaloir du dommage que

[27] Duplique, p. 212, par. 6.34.

leurs ressortissants pourraient avoir subi, en qualité de propriétaires de navires ou de cargaisons, du fait des actes imputés à l'Iran. Si, en effet, violation il y a, elle n'a pas été commise à l'encontre des Etats-Unis, qui ne peuvent dès lors s'en prévaloir en tant qu'Etat lésé, ni à quelque autre titre que ce soit[28].

24. Ici encore, il n'est pas inutile de se reporter à la position de la Cour dans l'affaire de la *Barcelona Traction*. Dans son arrêt de 1970, elle a déclaré que lorsqu'un Etat qui se plaint de la violation d'une obligation autre qu'*erga omnes* (et nous avons vu qu'il ne saurait être question de telles obligations dans l'affaire qui nous réunit), cet Etat :

> «ne peut présenter une demande de réparation du fait de la violation de l'une de ces obligations avant d'avoir établi qu'il en a le droit, car les règles en la matière supposent deux conditions [et la Cour précise ces conditions en citant son avis consultatif de 1949 dans l'affaire du *Comte Bernadotte*] :
>
> > «Premièrement, l'Etat défendeur a manqué à une obligation envers l'Etat national, à l'égard de ses ressortissants. Deuxièmement, seule la partie envers laquelle une obligation internationale existe peut présenter une réclamation à raison de la violation de celle-ci.» (*Réparation des dommages subis au service des Nations Unies, avis consultatif, C.I.J. Recueil 1949*, p. 181 et 182.)»[29]

25. Autrement dit, il convient de rechercher si un droit des Etats-Unis a été violé du fait que des droits appartenant à des ressortissants américains, propriétaires d'un navire n'ayant pas la nationalité américaine, auraient été enfreints[30]. «C'est donc [et je paraphrase toujours l'arrêt de 1970] l'existence ou l'inexistence d'un droit appartenant [aux Etats-Unis] et reconnu comme tel par le droit international qui est décisive en ce qui concerne le problème de la qualité [des Etats-Unis]». «Ce droit», ajoute la Cour, citant l'arrêt de son prédécesseur dans l'affaire du *Chemin de fer Panevezys-Saldustiskis*,

> «ne peut nécessairement être exercé [par un Etat] qu'en faveur de son national, parce que, en l'absence d'accords particuliers, c'est le lien de nationalité entre l'Etat et l'individu qui seul donne à l'Etat le droit de protection diplomatique. Or, c'est comme partie de la fonction de protection diplomatique que doit être considéré l'exercice du droit de prendre en mains une réclamation et d'assurer le respect du droit

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[28] Voir l'article 42 du projet d'articles de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite (voir note 20, *supra*) et *supra*, par. 15; voir aussi Riad Daoudi, *La représentation en droit international public*, *LGDJ*, Paris, 1980, p. 299.

[29] Arrêt du 5 février 1970, *C.I.J. Recueil 1970*, p. 32, par. 35.

[30] Cf. *ibid.*, p. 32-33, par. 35.

international.» (*Chemin de fer Panevezys-Saldutiskis, arrêt, 1939, C.P.J.I. série A/B n° 76*, p. 16.)[31]

26. Je sais bien, Monsieur le président, que les Etats-Unis soutiennent ne pas agir à titre principal en vertu de la protection diplomatique[32] — et je les comprends car ils entrent alors dans une zone pleine d'embûches juridiques pour eux. C'est pourtant, comme l'a rappelé la Cour, le seul biais par lequel ils peuvent prendre en mains ces réclamations. Il leur faut donc montrer qu'un dommage immédiat leur a été causé par des actes précis attribuables à l'Iran; or, ce ne sont pas les allégations très vagues de préjudice général résultant de l'insécurité de la navigation dans le Golfe, qui peuvent tenir lieu de fait générateur de la responsabilité qu'ils imputent à l'Iran. Ne reste donc, décidément, que la protection diplomatique et, après tout, ceci n'a rien d'illogique puisque, s'agissant en tout cas des dommages précis qu'ils invoquent, ils ont, selon les Etats-Unis, été subis par des ressortissants américains (et, dans un cas, sur lequel je reviendrai, par un navire de guerre battant leur pavillon[33]). Mais, dans ce cas, il est apparent que les conditions *sine qua non* de la protection diplomatique ne sont pas remplies :

— les voies de recours internes n'ont pas été épuisées, ni même tentées; et

— la nationalité des personnes lésées par les prétendus faits internationalement illicites attribués à l'Iran et pouvant ouvrir droit à réclamation n'est pas la nationalité américaine.

27. Monsieur le président, qui a subi les dommages que les Etats-Unis affirment avoir résulté des prétendues attaques iraniennes ? Des navires. Quels navires ? Le professeur Murphy est resté prudemment vague sur ce point mercredi après-midi :

> *«Some vessels were U.S.-flagged and thus the U.S. interest includes concern for ¾ among other things ¾ the nationality of the vessel. Other vessels attacked or mined by Iran were owned or operated by U.S. companies. Some vessels contained cargos owned by U.S. nationals. Many other vessels were simply engaged in commerce and navigation between Iran and the United States.»*[34]

28. Fort bien — mais, concrètement, les Etats-Unis, sous réserve d'un problème de recevabilité *ratione temporis* dont je parlerai tout à l'heure, étaient leurs dires sur sept «exemples» : un navire de guerre américain, le *Samuel Roberts*; deux navires koweïtiens réimmatriculés

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[31] *Ibid.*, p. 33, par. 36.

[32] Cf. duplique, p. 211-212, par. 6.32 et 6.34.

[33] Voir *infra*, par. 38.

[34] CR 2003/13, p. 31-32, par. 21.28.

américains, le *Bridgeton* et le *Sea Isle City*; un pétrolier panaméen, le *Texaco Caribbean*, deux navires libériens, le *Lucy* et le *Diane*; et un septième bahamien, l'*Esso Freeport*.

29. Commençons, si vous le voulez bien, Monsieur le président, par les quatre derniers. Ils ne sont pas sous pavillon américain. Au début de la procédure, les Etats-Unis avaient affirmé que tous ces navires étaient la propriété de personnes morales ou physiques américaines[35]. Ce n'est pas le cas : chacun appartient, en réalité, respectivement, à des sociétés ayant la nationalité de l'Etat dont il bat le pavillon[36]. De plus, en ce qui concerne cette fois les cargaisons, le *Lucy* est endommagé alors qu'il est à vide[37]; le *Texaco Caribbean* avait, semble-t-il, été affrété par une société norvégienne au moment des faits[38], et les cargaisons de l'*Esso Freeport* et du *Diane* transportaient du pétrole brut saoudien[39]; alors que les Etats-Unis avaient, dans un premier temps, approprié toutes ces cargaisons à des intérêts nord-américains[40].

30. Tout ceci montre que les Etats-Unis sont souvent un peu … insouciants dans leur présentation des faits. Mais l'essentiel est ailleurs : il tient à ce que la nationalité des propriétaires des navires ou de la cargaison qu'ils transportent le cas échéant n'a, pour ce qui est du droit de former une réclamation internationale, aucune espèce d'importance : seul l'Etat du pavillon est en droit de le faire.

31. Les Etats-Unis prétendent le contraire en se fondant sur une jurisprudence constituée de deux décisions anciennes[41] : celle rendue en 1903 par la commission mixte Etats-Unis/Venezuela au sujet du navire *Alliance*[42] et la sentence arbitrale du 5 janvier 1935 dans l'affaire du *I'm Alone*[43]. La première est de peu de secours pour les Etats-Unis : la décision est fondée sur le fait que la nationalité du pavillon avait été acquise par fraude. La seconde va davantage dans le sens de leur

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[35] Voir contre-mémoire, p. 165-166, par. 6.08-2, 4, 5 et 6; duplique, p. 186-187, par. 6.06, p. 186 et 187, sauf p. 184 pour le *Texaco («Panamanian owned»)* et CR 2003/13, p. 20-21, par. 20.09 et 20.10.

[36] Voir réponse additionnelle de l'Iran, p. 31-32, par. 4.18 *(Texaco)*; p. 40, par. 4.39 *(Lucy)*; p. 41, par. 4.45 *(Diane)*; et p. 40, par. 4.42 *(Esso Freeport)*.

[37] Voir réponse additionnelle, p. 30, par. 4.37.

[38] Voir réponse additionnelle, p. 32, par. 4.19 et annexe 25.

[39] *Ibid.*, p. 31, par. 4.40 et 4.43.

[40] Voir contre-mémoire, p. 166, par. 6.08; duplique, p. 186-187, par. 6.06.

[41] Duplique, p. 213, par. 6.35; voir aussi CR 2003/13, p. 32-33, par. 21.31 (M. Murphy).

[42] *RSANU*, vol. IX, p. 141-142. Pour une interprétation autorisée de la sentence, voir G. H. Hackworth, *Digest of International Law*, U.S. Government Printing Office, Washington, 1941, vol. II, p. 757.

[43] *RSANU*, vol. III, p. 1616.

argumentation puisque les arbitres ont estimé que le Canada n'était pas en droit de recevoir réparation pour la destruction de l'*I'm Alone* et de sa cargaison par les Etats-Unis du fait que ce bateau battant pavillon canadien était la propriété exclusive d'intérêts américains — toutefois, et ceci n'a peut-être pas été suffisamment souligné lors de la procédure écrite — il s'agissait d'une affaire très particulière : les Etats-Unis avaient coulé un navire appartenant à des ressortissants *à eux*, à des ressortissants américains; du reste la responsabilité de ce pays a été reconnue et le Canada a reçu une indemnité forfaitaire et une réparation pour les dommages subis par l'équipage.

32. Au fond, la décision rendue dans l'affaire du *I'm Alone* correspond à la thèse, mentionnée par la Cour dans l'affaire de la *Barcelona Traction*, selon laquelle «l'Etat des actionnaires [ici des propriétaires du navire] aurait le droit d'exercer sa protection diplomatique lorsque l'Etat dont la responsabilité est en cause est l'Etat national de la société»[44]. Mais nul ne prétend que les quatre navires dont je parle soient iraniens… Dès lors, la prétendue règle invoquée par les Etats-Unis selon laquelle ils seraient en droit de demander réparation des dommages subis par ces pétroliers ne repose sur aucun précédent. Au contraire, pour refuser d'exercer sa protection diplomatique en faveur de navires étrangers, le département d'Etat des Etats-Unis a invoqué *«the general rule with regards to vessels, that their national character is determined by their flag»*[45]. Et la jurisprudence est fermement établie en ce sens malgré les dénégations de M. Murphy[46] :

— dans l'affaire *Saiga (2)*, le Tribunal du droit de la mer admet la recevabilité de la requête de Saint-Vincent-et-les Grenadines en se fondant exclusivement sur la nationalité du navire résultant de son immatriculation et écarte les arguments de la Guinée fondés sur le contrôle effectif[47];

— l'arrêt relatif à la *Barcelona Traction*, va, je l'ai montré[48], clairement à l'encontre de la thèse avancée par M. Murphy; et s'il est exact que la Cour a réservé l'hypothèse d'exceptions

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[44] *C.I.J. Recueil 1970*, p. 48, par. 92.

[45] The Under Secretary of State (Grew) to Vogelsang, Brown, Cram and Feely, 2 July 1924, MS. Department of State, file 612.11245 Tiblow Mills Co. cité *in* G.H. Hackworth, *op. cit.*, p. 755; voir aussi p. 756-757.

[46] CR 2003/13, p. 33, par. 21.32.

[47] Arrêt du 1er juillet 1999, *Recueil TIDM 1999*, par. 55-88.

[48] Voir *supra*, par. 24.

conventionnelles au principe qu'elle pose[49], je ne vois pas très bien en quoi l'article X du traité de 1955 y déroge — non plus d'ailleurs qu'aucune autre de ses dispositions;

— quant à l'affaire *ELSI*, elle est de nature très différente puisque la requête était dirigée contre l'Etat dont la société avait la nationalité — ce qui correspond à l'hypothèse que j'évoquais il y a un instant à propos du *I'm Alone*[50]; en outre, dans l'affaire *Elletronica Sicula*, il existait bien une disposition conventionnelle réglant la question; ce n'est pas le cas ici.

33. Les Etats-Unis ne peuvent donc faire valoir aucun titre à exercer leur protection en faveur du *Texaco Caribbean*, du *Lucy*, de l'*Esso Freeport* et du *Diane* non plus qu'en celui de leurs propriétaires, qui ne sont d'ailleurs pas américains, comme l'Iran l'a montré. Mais, l'eussent-ils été, ceci n'aurait strictement rien changé dès lors que la nationalité du pavillon n'a pas été obtenue de manière illicite, ce que les Etats-Unis ne prétendent pas.

34. Qu'en est-il, Monsieur le président, du *Bridgeton* et du *Sea Isle City*, les deux navires koweïtiens «repavillonnés» ou «réimmatriculés» (il paraît que les deux mots existent en français) par les Etats-Unis ?

35. Ici, au contraire, on peut avoir plus que des doutes sur la licéité et la véracité de la nationalité de ces navires, dont il est acquis qu'ils appartenaient à des intérêts koweïtiens[51]. L'Iran ne conteste pas que, dans son principe, la réimmatriculation puisse être licite; encore faut-il qu'elle réponde à une réalité et à des motifs légitimes. Ni l'une ni l'autre de ces conditions ne sont remplies en l'espèce. Comme l'Iran l'a montré dans sa réponse additionnelle et comme M. Sellers l'a rappelé tout à l'heure[52],

— d'une part, il n'a jamais existé de «lien substantiel»[53] entre les Etats-Unis et les deux navires en question : aucun intérêt américain n'a été associé de quelque manière que ce soit à la nouvelle société propriétaire des navires; ceux-ci n'avaient pas le droit, non seulement de commercer avec les Etats-Unis, mais même de mouiller dans un port de ce pays; et une législation

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[49] Arrêt du 5 février 1970, *C.I.J. Recueil 1970*, p. 47, par. 90.

[50] Voir *supra*, note 44.

[51] Voir le rapport du Secrétaire général de l'Organisation des Nations Unies, S/16877/Add.5; annexe 168 au contre-mémoire des Etats-Unis, p. 9 et 14.

[52] P. 56-62, par. 5.41-5.48.

[53] Voir les articles 5, paragraphe 1, et 10 de la convention de Genève sur la haute mer du 29 avril 1958 et les articles 91, paragraphe 1, et 94 de la convention des Nations Unies sur le droit de la mer du 10 décembre 1982.

particulière avait opportunément été adoptée pour faire échapper les propriétaires fictifs des navires à la législation sociale américaine; et, d'autre part,

— toute l'opération a été montée dans le but avoué de dissimuler la véritable nationalité des navires repavillonnés, car il était avéré que le Koweït était un allié *de facto* de l'Iraq que les Etats-Unis entendaient aider tout en conservant leur statut d'Etat neutre.

36. Une nationalité fictive et fondée sur une véritable «fraude à la loi», comme c'est le cas en l'espèce, n'est pas opposable aux tiers. Le repavillonnage du *Bridgeton* et du *Sea Isle City* a été effectué dans le but unique de permettre à ces deux navires de substituer à leur nationalité alors périlleuse (du fait de l'alignement du Koweït sur l'Iraq) la qualité, plus rassurante, de navires «américains». Pour paraphraser l'arrêt *Nottebohm* (dont l'Iran n'a jamais prétendu qu'il fût transposable en tant que tel à des navires, contrairement à ce que le professeur Murphy a laissé entendre[54]), l'Iran, «n'est pas tenu de reconnaître une nationalité ainsi octroyée», et, en conséquence, les Etats-Unis n'ont aucun titre à se prévaloir des dommages que ces navires ont subis, quelle que soit l'origine de ces navires[55].

37. Il en va d'autant plus ainsi que la réimmatriculation des navires koweïtiens a été, dès l'origine, prévue comme devant être temporaire (il s'agissait de : «*temporary reflagging*»)[56] et que, deux ans après cette mesure fictive, l'opération inverse de remise sous pavillon koweïtien a commencé[57]. Dès lors, la recevabilité de toute réclamation formulée en 1997 par les Etats-Unis au titre des dommages subis par ces deux navires est, de toute manière, exclue, faute de continuité de leur prétendue nationalité américaine[58].

38. Ne reste alors, Monsieur le président, que le *Samuel B. Roberts*. Voici enfin un navire indiscutablement américain et pour lequel, en principe, les Etats-Unis ont certainement un titre à demander réparation en cas de dommages consécutifs à un fait internationalement illicite. Seulement voilà : le *Samuel B. Roberts* est un navire de guerre; or, en vertu du paragraphe 6 de

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[54] CR 2003/13, p. 34, par. 21.34; comp. réponse additionnelle, p. 60, par. 5.50.

[55] Cf. l'arrêt du 6 avril 1955, *C.I.J. Recueil 1955*, p. 26.

[56] Voir U.S. Court of Appeals of the Third Circuit, Judgment, 29 April 1991, *Cruz* et al. v. *Chesapeake Shipping Inc.* et al., annexe 7 à la réponse additionnelle, p. 2017.

[57] *Ibid.*, p. 2023.

[58] Voir réponse additionnelle, p. 62-63, par. 5.54-5.56.

l'article X du traité de 1955, «le terme «navires» … ne vise … pas, sauf en ce qui concerne l'application des paragraphes 2 et 5 du présent article, les … bâtiments de guerre» — «sauf en application des paragraphes 2 et 5 du présent article», cela veut dire clairement qu'en revanche, *a contrario*, cette exclusion s'impose lorsqu'il s'agit d'interpréter le paragraphe 1 de l'article X. Et je ne pense pas que l'on puisse sérieusement soutenir que cette disposition ne couvre pas les navires de guerre, sous prétexte qu'elle n'utilise pas le mot «navires»[59]. A moins, Monsieur le président, que les Américains pratiquent la navigation sans navires ? Il n'est guère besoin de le rappeler, c'est ce paragraphe et lui seul qui fonde la compétence de la Cour pour se prononcer sur la demande reconventionnelle des Etats-Unis.

39. Pas davantage que les Américains ne peuvent se prévaloir d'un titre quelconque pour introduire une réclamation en réparant des préjudices subis par un Etat tiers, les Etats-Unis ne peuvent endosser celles résultant des dommages causés à des navires étrangers ou à leurs propres bâtiments de guerre.

40. Monsieur le président, conscients sans doute des obstacles juridiques qui s'opposent à ce que la Cour connaisse, individuellement, de chacun des incidents qu'ils lui ont présentés, les Etats-Unis expliquent qu'il ne s'agit que d'exemples, parmi d'autres, et que leur demande reconventionnelle vise non pas ces incidents, ou plutôt pas *seulement* ces incidents, mais l'atteinte générale que les actes imputés à l'Iran ont porté à la liberté de commerce et de navigation[60]. Mais ces incidents n'en font pas moins partie de la demande. Or, *aucun* n'ouvre droit à action, tous échappent à la compétence de la Cour. Je ne sais comment l'on chante cela au carnaval de Cologne[61], mais cette curieuse arithmétique est tout de même bien troublante : cinq (navires étrangers) + deux (navires irrégulièrement réimmatriculés) + un (bâtiment de guerre) = zéro; zéro titre pour agir. Il serait bien surprenant que d'autres *faits* justifient votre compétence : on peut penser que les «exemples» qu'ont donnés les Etats-Unis sont les «meilleurs» que leurs habiles et compétents conseils ont pu trouver.

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[59] Voir CR 2003/13, p. 26-27, par. 21.10 (M. Murphy).

[60] Voir notamment CR 2003/13, p. 32, par. 21.29-21.30 (M. Murphy).

[61] Cf. CR 2003/7, p. 32, par. 10 (M. Bothe).

41. Or, Madame et Messieurs les juges, il ne suffit pas qu'il existe, sur le papier, une base de compétence — en l'espèce, l'article XXI, paragraphe 2, du traité de 1955 — pour que vous soyez valablement saisis; il ne suffit pas non plus qu'une demande reconventionnelle soit «en connexité directe» avec la demande principale et soit dès lors, «recevable comme telle», pour que sa recevabilité soit assurée à tous égards. Il faut encore que l'auteur de la demande ait établi qu'il a, vis-à-vis de l'autre Partie, «un droit ou un intérêt juridique au regard de l'objet de la demande [lui] permettant d'obtenir» les décisions qu'il sollicite, ou, en d'autres termes, qu'il est une partie à l'égard de laquelle l'autre Etat «est responsable en vertu de l'instrument pertinent»[62]. En l'espèce, les Etats-Unis ont sans doute un intérêt, mais ils n'ont pas établi que celui-ci s'analysait en un intérêt *juridique* ouvrant droit à saisir la Cour.

42. En d'autres termes, ils n'ont établi l'existence d'aucun titre, d'aucune *cause of action*, et tous les soi-disant exemples qu'ils en ont donnés se révèlent juridiquement erronés. Il y a là, nous semble-t-il, Madame et Messieurs de la Cour, un obstacle dirimant à votre compétence. Cet obstacle est fondamental mais il n'est pas le seul.

Mr. President, I still have 20 minutes, or maybe even more, to go. Would you like me to go on, or would you prefer to have a break now ?

The PRESIDENT: Thank you so much. The hearing is suspended for 10 minutes.

The Court adjourned from 11.20 to 11.30 a.m.

Le PRESIDENT : Please be seated. Professor Pellet, will you please continue.

M. PELLET : Thank you Mr. President. Monsieur le président après avoir montré que les Etats-Unis n'avaient aucun intérêt pour agir en la présente affaire, j'en viens maintenant à deux autres problèmes de compétence et de recevabilité qui n'ont pas été réglés par l'ordonnance de 1998.

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[62] Arrêt du 18 juillet 1966, *Sud-Ouest africain, deuxième phase*, *C.I.J. Recueil 1966*, p. 34, par. 48; voir aussi au sujet d'un autre type de procédure incidente (interventions) : arrêt du 14 avril 1981, *Plateau continental (Tunisie/Jamahiriya arabe libyenne) requête à fin d'intervention*, *C.I.J. Recueil 1981*, p. 19, par. 33; arrêt du 21 mars 1984, *Plateau continental (Jamahiriya arabe libyenne/Malte), requête à fin d'intervention*, *C.I.J. Recueil 1984*, p. 9; Chambre, arrêt du 13 septembre 1990, *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention*, *C.I.J. Recueil 1990*, p. 114, par. 52.

II. Les autres problèmes de compétence et de recevabilité non réglés par l'ordonnance de 1998

43. S'en tenant strictement aux termes de l'article 80, paragraphe 1, du Règlement, votre ordonnance de 1998 a en effet laissé sans réponse plusieurs autres problèmes relatifs soit à la compétence de la Cour, soit à la recevabilité de la demande reconventionnelle des Etats-Unis. J'aborderai, successivement mais brièvement, deux objections, tardivement préliminaires, que l'on peut lui opposer; la première est globale et fait obstacle à l'examen de la demande dans son ensemble; la seconde est partielle et ne porte que sur certains aspects de celle-ci :

1) la demande reconventionnelle a été formée au mépris des dispositions de l'article XXI, paragraphe 2, du traité de 1955; en outre,
2) les Etats-Unis ne peuvent élargir l'objet même de leur demande au-delà des conclusions énoncées dans leur contre-mémoire.

1. La demande reconventionnelle a été formée au mépris des dispositions de l'article XXI, paragraphe 2, du traité de 1955

44. La requête de l'Iran comme la demande reconventionnelle des Etats-Unis ont été formées, respectivement en 1992 et en 1997, sur le fondement de l'article XXI, paragraphe 2, du traité d'amitié de 1955. Aux termes de cette disposition :

> «Tout différend qui pourrait s'élever entre les Hautes Parties contractantes quant à l'interprétation ou à l'application du présent traité *et qui ne pourrait pas être réglé d'une manière satisfaisante par la voie diplomatique* sera porté devant la Cour internationale de Justice, à moins que les Hautes Parties contractantes ne conviennent de le régler par d'autres moyens pacifiques.»

45. Comme l'a relevé le professeur Murphy mercredi[63], la Cour, dans son arrêt du 12 décembre 1996 sur l'exception préliminaire des Etats-Unis, s'est bornée à constater que «plusieurs des conditions fixées par ce texte» étaient remplies, notamment que le différend qui lui était soumis n'avait «pu être réglé par la voie diplomatique»[64]. Mais d'une part, alors que les Etats-Unis avaient soulevé une exception préliminaire, elle ne portait pas sur ce point et, d'autre part, la requête avait été formée en 1992, à une époque où les relations entre les deux pays étaient exécrables et où tout règlement amiable semblait hors de portée, si bien qu'il était tout à fait clair

[63] CR 2003/13, p. 16, par. 19.24.

[64] *C.I.J. Recueil 1996 (II)*, p. 809, par. 16.

que le «différend «ne pourrait être réglé d'une manière satisfaisante par la voie diplomatique» au sens de l'article XXI du traité[65].

46. Mais le problème se pose différemment en ce qui concerne la demande reconventionnelle :

— en premier lieu, elle a été formée cinq années plus tard, à une époque où les relations entre les deux pays n'étaient assurément pas bonnes, mais des efforts pour trouver des solutions aux problèmes juridiques pendants commençaient à porter leurs fruits; du reste, l'affaire relative à l'*Incident aérien du 3 juillet 1988* a été retirée du rôle par une ordonnance du 22 février 1996, avant la demande reconventionnelle, à la suite d'un arrangement amiable intervenu entre les Parties[66];

— en deuxième lieu, contrairement aux Etats-Unis, l'Iran a immédiatement réagi positivement en faisant valoir qu'il ne s'était pas opposé, et ne s'opposait pas à des négociations; et, en dépit de ce que M. Murphy a affirmé mercredi[67], dans son ordonnance de 1998, la Cour n'a pas écarté l'argument : elle a signalé la position de l'Iran[68] mais, s'en tenant strictement à la recevabilité de la demande «en tant que telle», elle s'est abstenue de statuer sur ce point;

— enfin et en troisième lieu, il est patent que, comme l'Iran l'avait, en effet, fait valoir en réaction à la demande[69], des négociations, non seulement n'étaient pas exclues, mais étaient effectivement engagées entre les deux Etats sur les questions mêmes sur lesquelles porte la demande reconventionnelle.

47. Comme l'atteste l'échange de lettres reproduit en annexe 24 à la réplique de l'Iran, celui-ci a répondu positivement à la proposition américaine de négociations. L'agent de la République islamique d'Iran a écrit à deux reprises[70] à son homologue américain : *«my Government would be ready to accept your proposal for negotiations»*. C'était clair. Réponse de

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[65] Cf. arrêt du 26 novembre 1984, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, *C.I.J. Recueil 1984*, p. 428, par. 83; voir aussi l'arrêt du 24 mai 1980, *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, *C.I.J. Recueil 1980*, p. 27, par. 51.

[66] *C.I.J. Recueil 1996 (I)*, p. 9.

[67] CR 2003/13, p. 15, par. 19.22.

[68] *C.I.J. Recueil 1998*, p. 194, par. 6 et p. 196, par. 12.

[69] Voir *ibid.*

[70] Cf. *ibid.* les lettres de M. Zahedin-Labbaf, agent de la République islamique d'Iran, à M. Matheson, à l'époque agent des Etats-Unis, en date des 3 avril et 12 juin 1997.

l'agent des Etats-Unis à la première de ces lettres : *«you decline the U.S. proposal»* — c'était clair aussi; et c'est parce que l'Iran avait proposé une négociation globale sur les problèmes juridiques opposant les deux pays en relation avec l'affaire des plates-forme que M. Matheson réagit ainsi. L'agent américain n'a pas répondu à la seconde lettre de M. Zahedin-Labbaf. C'est ainsi, Monsieur le président, que les Etats-Unis négocient !

48. Il n'en reste pas moins qu'une négociation était possible, que l'Iran était disposé à s'y prêter et que ce sont les Etats-Unis qui s'y sont refusés. Ils ne peuvent, dans ces conditions, s'abriter derrière *leur* propre refus d'ouvrir les négociations prévues à l'article XXI, paragraphe 2, du traité de 1955 et saisir la Cour sur ce fondement. L'Iran s'est heurté au même *veto* des Etats-Unis que celui auquel s'était heurté le Nicaragua et qui avait conduit sir Robert Jennings à considérer que la Cour pouvait valablement être saisie de la requête nicaraguayenne[71]. Le professeur Murphy s'est référé mercredi à cette opinion[72] mais il en tire des enseignements erronés car il oublie que c'est *le Nicaragua*, c'est-à-dire *la victime* du refus américain, qui avait saisi la Cour et non l'auteur de cette fin de non-recevoir, les Etats-Unis, comme c'est le cas ici.

2. Les Etats-Unis ne peuvent élargir l'objet même de leur demande au-delà des conclusions énoncées dans leur contre-mémoire

49. Il est enfin un dernier point qui s'oppose — mais seulement partiellement, contrairement à ceux que je viens d'évoquer — à la recevabilité de la demande reconventionnelle des Etats-Unis.

50. Monsieur le président, aux termes du paragraphe 2 de l'article 80 du Règlement : «La demande reconventionnelle *est présentée dans le contre-mémoire* de la partie dont elle émane et figure parmi ses conclusions.» (Les italiques sont de moi.) Il s'en déduit que les prétentions de la Partie qui s'en prévaut sont fixées à ce stade et ne peuvent faire l'objet de modification substantielle par la suite. Or, malgré les dénégations de mon contradicteur[73], les Etats-Unis procèdent à de telles modifications à au moins deux points de vue.

51. D'une part, ils ajoutent à leurs allégations initiales concernant la violation par l'Iran de la liberté de commerce garantie par l'article X, paragraphe 1, des accusations (tout aussi infondées au

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[71] Opinion individuelle jointe à l'arrêt du 26 novembre 1984, *C.I.J. Recueil 1984*, p. 556.

[72] CR 2003/13, p. 15-16, par. 19.23.

[73] CR 2003/13, p. 13-15, par. 19.16-19.20 (M. Murphy).

fond, je le précise) relatives à de prétendues violations de la liberté de navigation entre les territoires des Parties contractantes. D'autre part et surtout, les Etats-Unis, qui avaient, dans leur contre-mémoire[74], limité les «exemples» de violations de la liberté du commerce maritime aux sept navires que j'ai mentionnés tout à l'heure, ont, progressivement, subrepticement, tenté d'en ajouter de nouveaux.

52. Ainsi, dans leur duplique, ils se fondent sur deux nouveaux incidents, concernant des navires prétendument américains, le *Sungari* et l'*Esso Demetia*[75], et ils en mentionnent trois autres dans une note de bas de page[76] : le *Grand Wisdom*, le *Stena Concordia* et le *Stena Explorer*. A nouveau, durant la procédure orale, les avocats des Etats-Unis ont mentionné les deux premiers de ces navires à plusieurs reprises[77].

53. Je m'empresse d'ajouter que, comme on le voit sur le tableau qui est projeté derrière moi (et qui figure sous l'onglet 24 du dossier d'audience), ils ne sont pas davantage susceptibles de justifier des réclamations que les sept navires que j'ai présentés tout à l'heure. Ils sont sous pavillons libériens pour trois d'entre-eux, panaméens pour l'un d'eux et britannique pour le dernier.

54. Il n'en reste pas moins, Monsieur le président, que les Etats-Unis ne peuvent ainsi, plusieurs années après la date limite posée par le Règlement, ajouter de nouvelles demandes à celles formulées initialement — ne fût-ce que parce qu'il n'est évidemment pas acceptable de prétendre, comme le fait M. Murphy[78], que : *«[i]f the Court proceeds to a damage phase, it will be perfectly equipped to determine which type of damages in what time frame are justified as a matter of law»* ! C'est dans le contre-mémoire que la demande reconventionnelle doit être fixée. Et c'est à la lumière de la demande ainsi formulée que la Cour peut non seulement apprécier s'il existe un lien de connexité directe suffisant avec la demande de l'Etat requérant, ce qu'elle a fait dans l'ordonnance de 1998, mais aussi examiner si, au vu du préjudice invoqué, elle a compétence pour se prononcer sur le fond, ce qu'elle doit faire maintenant — et qu'elle ne peut faire *que* en

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[74] Contre-mémoire, p. 164-167, par. 6.08.

[75] P. 184 et 188.

[76] P. 183, note 404.

[77] Voir CR 2003/9, p. 25, par. 2.37 *(Sungari)* et p. 26, par. 2.39 *(Esso Demetia)* (M. Beaver); CR 2003/9, p. 37 et suiv. *(Sungari)* (M. Neubauer); CR 2003/13, p. 20, par. 20.09 *(Sungari)* et p. 21, 20.11 *(Esso Demetia)* (M. Mattler); voir aussi p. 20, par. 20.07 pour un renvoi général à la duplique (M. Murphy).

[78] CR 2003/13, p. 15, par. 19.20.

s'assurant que l'auteur de la demande peut faire valoir un intérêt *juridiquement* protégé, se prévaloir d'un *droit* lui appartenant et lui permettant de saisir la Cour.

55. Je résume, Monsieur le président :

1) la Cour a tranché, dans son ordonnance de 1998 les questions relatives au lien de connexité directe exigé par l'article 80, paragraphe 1, de son Règlement; mais elle ne s'est pas prononcée sur d'autres objections soulevées par l'Iran à l'encontre de sa compétence et de la recevabilité de la demande reconventionnelle; il lui appartient de le faire maintenant;
2) limitée à la prétendue responsabilité de l'Iran pour la violation de la liberté de commerce garantie au paragraphe 1 de l'article X du traité de 1955, la compétence éventuelle de la Cour est, en tout cas, exclue à l'égard de toutes les prétentions que les Etats-Unis ont tenté de faire valoir après le 23 juin 1997, date du dépôt de leur contre-mémoire;
3) de toute manière, la demande reconventionnelle est irrecevable dans son ensemble du fait que les Etats-Unis ont refusé, au mépris des dispositions de l'article XXI, paragraphe 2, du traité, de mener des négociations visant à régler le différend alors même que l'Iran avait clairement manifesté sa volonté de s'y prêter;
4) les Etats-Unis n'ont pas établi, même *prima facie*, un intérêt juridique leur appartenant susceptible de fonder en droit la compétence de la Cour : ils ne peuvent protéger des intérêts privés liés aux navires endommagés dès lors que ceux-ci n'ont pas, ou n'ont que fictivement, leur nationalité; et ils ne sauraient agir au nom d'Etats tiers ou de la communauté internationale dans son ensemble — surtout dans une affaire, étroitement circonscrite par l'arrêt de 1996 et l'ordonnance de 1998, à la question de savoir si une clause commerciale du traité de 1955 a été violée.

56. Pour paraphraser la conclusion de la plaidoirie prononcée ici même mardi dernier par mon respecté collègue et ami, Prosper Weil[79], ce que l'Iran soutient, c'est que, même s'il avait violé la liberté de commerce garantie par l'article X, paragraphe 1, du traité de 1955 (ce qui n'est pas le cas), la Cour n'aurait pas pour cette seule raison compétence pour se prononcer sur la demande reconventionnelle des Etats-Unis, si ceux-ci ne peuvent établir l'existence d'un intérêt

[79] CR 2003/11, p. 21-22, par. 13.22.

pour agir leur donnant un titre à actionner la clause juridictionnelle de l'article XXI, paragraphe 2. Et cela, ils ne l'ont pas fait, et ils ne peuvent assurément pas le faire.

Ceci, Madame et Messieurs les juges, clôt mon intervention de ce matin. Je vous remercie de votre attention. *And Mr. President, I would ask you to give the floor to Professor Crawford, who will conclude our presentation for this morning.*

The PRESIDENT: Thank you, Professor Pellet. I now give the floor to Professor Crawford.

Mr. CRAWFORD:

3. THE MERITS OF THE UNITED STATES COUNTER-CLAIM UNDER ARTICLE X, PARAGRAPH 1, OF THE TREATY

1. Mr. President, Members of the Court, as Mr. Sellers has explained, it is my task to address you on the merits of the United States counter-claim. I propose to do so under four headings. First, I will address the legal basis for the Counter-Claim, Article X, paragraph 1, of the Treaty. For the purposes of the counter-claim, the United States seeks to ignore the qualifying phrase "Between the territories of the High Contracting Parties", but this is of course illegitimate, as I will show. Secondly, I will deal with the facts underlying the counter-claim, both in terms of the individual vessels put forward by the United States as those affected by alleged Iranian action contrary to Article 10, paragraph 1, and in terms of the more general allegations made by the United States, and will ask whether on the basis of the facts before the Court there is a basis for finding a breach of that paragraph. Thirdly, I will discuss the extent of claims to reparation which the United States is entitled to make in respect of any established breach of Article X, paragraph 1, especially in the context of the claims to military expenses and increased war risk insurance premiums. Fourthly and finally, I will make some brief remarks about the question of overall responsibility in respect of the claims and counter-claims before the Court, in response to some of the remarks made by the Agent for the United States earlier this week.

2. Before turning to these issues, I should stress that each Party bears the onus of proof in relation to its own claims. You said this in the *Cameroon/Nigeria* case, which is the first time in recent history where the Court has dealt with the merits of a State responsibility claim and counter-claim. I think it is fair to say that you were rather summary in your dismissal of the State

responsibility claims and counter-claims, holding that, and I quote more or less in full, "neither of the Parties sufficiently proves the facts which it alleges, or their imputability to the other Party" and that the Court was "therefore unable to uphold either Cameroon's submissions or Nigeria's counter-claims based on the incidents cited"[80]. I would only observe that in *Cameroon/Nigeria* the State responsibility claims and counter-claims were mere incidents to the main case — that case concerned land and maritime boundaries — and I suppose, I hope, that this may have had an influence on the Court's rather summary approach. The present case — by contrast — is all about State responsibility. But the Court's reminder of the burden of proof remains valid, and that is true, whether (as here) the State responsibility claim stands alone or (as in *Cameroon/Nigeria*) it is merely ancillary.

A. The basis for the counter-claim: Article X, paragraph 1, of the Treaty of 1955

3. I turn to the only basis for the United States counter-claim, as for Iran's claim, which is of course Article X, paragraph 1, of the Treaty of Amity. "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation." There are two key elements here: first, there is to be freedom of commerce and navigation; secondly that freedom is to exist "between the territories of the two High Contracting Parties". This may be contrasted with other provisions of Article X, paragraph 1, provisions which, the Parties agree, are not in issue in the present case but which are relevant for the purposes of interpretation. Thus Article X, paragraph 3, gives vessels of each High Contracting Party liberty to come with their cargoes to the ports of the other party, even when they are trading with third States. There is no requirement under paragraph 3 that the commerce or navigation be between the territories of the High Contracting Parties. And paragraph 4 which applies to vessels with respect to carriage of products "to or from the territories of" the other High Contracting Party: I stress the disjunctive "or". And in paragraph 5, which gives vessels of either party, if they are in distress, the right to take refuge in the nearest port or haven of the other party: such vessels may well be trading and/or navigating entirely between third parties, and there is, again, no requirement that they be engaged in commerce or navigation between the territories of the High Contracting Parties.

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[80] Judgment of 10 October 2002, para. 324; see also para. 322.

4. Thus the territorial scope of each substantive paragraph of Article X is different. The qualifications *written* into each paragraph were evidently carefully considered and have to be given effect. Article X, paragraph 1, provides for a general freedom and as such it has to be broadly construed — but still the freedom for which it provides is a freedom "between the territories of the High Contracting Parties".

5. Now on this point the United States complains that Iran has changed its position since its Memorial[81]. The truth is — we have heard a bit about truth in these cases — that both Parties have clarified and modified their positions, in the light of the Court's Judgment of 1996 and having regard to arguments put forward by the other side. In this respect it should not be forgotten that Iran's initial argument focused just as much, or more, on Article I and Article IV as it did on Article X, paragraph 1, and this explains some of the earlier Iranian insistence on general international law and the Charter, which we said were incorporated into Article I. But now the focus is on Article X, paragraph 1, which provides the only basis of claim available to either Party, and as a result the position is considerably simplified. And the essence of it is as follows: in accordance with your decision of 1996, a broad view is taken of freedom of commerce — but still that commerce has to be between the territories of the High Contracting Parties. You were not called on in 1996 to discuss freedom of navigation — but, assuming that freedom of navigation is separately in issue in the counter-claim, still it must be navigation between the territories of the High Contracting Parties. That is the position, and United States exercises in forensic anthropology in relation to earlier stages of the written pleadings are beside the point.

6. Article X, paragraph 1, refers to "freedom of commerce and navigation". It appears that these are distinct freedoms, and in your Order of 1998 you referred to them in the plural, as Professor Murphy rightly said[82]. Thus there could be navigation between the territories of the High Contracting Parties without any commerce between those territories, even if there could not be navigation without any boat! For example a pleasure craft could sail from a United States port to an Iranian port; it would be engaged in navigation, but not in commerce. Alternatively there could be commerce between the territories of the High Contracting Parties without navigation between

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[81]CR 2003/13, pp. 30-31, paras. 21.23-2.24.

[82]*I.C.J. Reports 1998*, p. 204, para. 36; see CR 2003/13, pp. 12-13, para. 19.13 (Professor Murphy).

those territories. In either case, we have to ask whether the commerce or navigation in question is between the territories of the High Contracting Parties. If it is, it is protected by Article X, paragraph 1; if not, then not. So for example, a United States vessel sailing from one third State port to another — say Abu Dhabi to Kuwait — is not engaged in treaty-protected commerce for the purposes of this case, even though it could avail itself of paragraph 5. Nor if it is sailing from Kuwait or Abu Dhabi to the United States: and if it is carrying goods originating in Abu Dhabi to the United States, neither is it engaged in commerce between the territories of the High Contracting Parties. This is a bilateral treaty. Article X, paragraph 1, does not guarantee freedom of commerce or navigation in general — freedom of commerce and navigation in the Persian Gulf, for example — but the freedom of commerce and navigation bilaterally, between the territories of the parties.

7. This approach is entirely consistent with your 1996 decision on the Preliminary Objection. You took a broad view of freedom of commerce, not limited to the purchase and sale of goods but including "the ancillary activities integrally related to commerce"[83]. And you said that it was not necessary to develop the interpretation of the phrase "between the territories of the High Contracting Parties", since "it is not contested . . . that oil exports from Iran to the United States were — to some degree — ongoing at least until after the destruction of the first set of oil platforms"[84].

8. It is true that in the *Nicaragua* case, your Court did not place much emphasis on the same phrase occurring in Article XIX of the 1956 FCN Treaty between the United States and Nicaragua. There were two measures held to be in breach of Article XIX, the mining of ports and the embargo. In relation to the embargo, the Court emphasized not paragraph 1 of the Treaty but paragraph 3. Under that embargo, Nicaraguan vessels were prohibited from entering United States ports, and it did not matter whether the vessels were coming from Nicaragua or from a third State. Thus the Court was able to find "that the embargo constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty"[85], without going further into interpretation of paragraph 1. As to the mining

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[83] *I.C.J. Reports 1996*, p. 819, para. 49.

[84] *Ibid.*, pp. 817-818, para. 44.

[85] *I.C.J. Reports* 1986, p. 140, para. 279.

of ports, you said only that this was "in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty"[86]. This is perfectly understandable: the ports were by definition part of Nicaraguan territory; they were extensively used for commerce and navigation between the two States; they were mined, in peacetime and without the slightest justification: this was manifestly in contradiction with the freedom of commerce and navigation between the territories of the High Contracting Parties, and for the purposes of giving a declaratory judgment for breach of Article XIX, the Court needed to go no further. Your decision in the *Nicaragua* case supports a broad interpretation of the concept of freedom of commerce and navigation. But it is not authority for the proposition that the phrase "between the territories of the High Contracting Parties" is to be ignored.

9. Mr. President, Members of the Court, your decision on the merits in the *Nicaragua* case calls for two further observations. First, it will be evident that this decision did not resolve a number of issues about the scope of protection afforded by paragraph 1 of that Treaty. These were effectively postponed until the quantification stage, when the question whether particular vessels were engaged in commerce or navigation between the two States would have arisen. What is quite clear is that vessels which were never destined *for* the Nicaraguan port affected by the mining would not have been entitled to benefit from the Court's finding of a breach, and this would have been true even if insurance premiums for ships sailing in Nicaraguan waters had increased — as one might have expected that they would have done — following the incidents which had occurred. It also seems clear that a Nicaraguan ship leaving such a port for, say, Chile, and not carrying goods from or for the United States, could not be claimed to be engaged in treaty-protected commerce or navigation. So a whole range of issues remained as to the scope of the reparation payable. One can imagine what the United States would have had to say on these issues.

10. And this brings me to my second observation. As the Court is well aware, the quantification phase never occurred. Nicaragua submitted Memorials; the United States absented itself. The case never reached a hearing, for reasons you are aware of. So you never ruled on the actual consequences of your general finding that the mining of the ports breached paragraph 1 of

[86] *I.C.J. Reports* 1986, p. 139, para. 278.

Article XIX of the 1956 Treaty. Thus, for example, you never ruled on the consequence of that finding for vessels owned by nationals of third States, or of United States vessels sailing from the ports in question to third States.

11. The United States observes that a third State vessel could be engaged in Treaty-protected commerce and navigation, and an impairment of the freedom of that vessel could infringe Article X, paragraph 1[87]. Iran agrees. But the reason is that the vessel would be covered by the actual terms of Article X, paragraph 1, not that the Treaty confers legal rights on, for example, Liberia or Panama and their nationals and corporations. If, for example, Iran had insisted that the export trade from Iran to the United States be conducted exclusively in vessels registered in the United States or Iran, the United States could have complained. But this does not mean that third States or third State vessels are themselves given rights under the Treaty; they are simply the indirect beneficiaries of a régime of freedom of commerce and navigation established on a bilateral basis between the territories of Iran and the United States, and establishing rights exclusively between those two States.

12. The reason for this is clear and elementary. The only rights under a bilateral treaty are those of the States parties. There is no indication that the 1955 Treaty intended to confer rights or impose obligations on third States, as envisaged as a possibility in the Vienna Convention on the Law of Treaties. Indeed, the United States appears not to argue otherwise.

13. The Court will have noticed that, while accusing Iran of inconsistency[88], the United States itself has veered between narrow and broad interpretations of Article X, paragraph 1, depending on whether it is dealing with the claim or the counter-claim. It has veered between treating Article X, paragraph 1, for the purposes of our claim, as a disposable bilateral matter and for the purposes of its counter-claim, as a general guarantee. So far as the claim was concerned, it took a narrow view: one reason the platforms were not protected by Article X, paragraph 1, is that the oil in them went somewhere else first — to Sirri or Lavan Island — then it often went to a third State port, before eventually arriving in the United States[89]. On the other hand, when it comes to

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[87]CR 2003/13, p. 32, para. 21.30.

[88]See e.g., CR 2003/13, pp. 30-31, paras. 21.23-21.25.

[89]See e.g., CR 2003/11, pp. 41-44, paras. 15.27-15.38; pp. 45-47, paras. 15.45-15.50.

the counter-claim, the United States refers quite simply to "freedom of navigation in the Gulf", or indeed even outside it, irrespective of the destination of the vessels or their cargoes. Iran for its part calls on the Court to adopt a consistent interpretation of the two freedoms — assuming, as I will assume, that both are engaged here. But any interpretation you adopt must give effect to all the words in Article X, paragraph 1, and the phrase "Between the territories of the High Contracting Parties" must be given effect. These are two bilateral freedoms conferred by a bilateral treaty, and they are expressly conferred in limited geographical terms.

14. This approach is consistent with the notion of the injured State as defined in Article 42 of the ILC Articles on State Responsibility. Article 42, which is itself inspired in significant part by Article 60 of the Vienna Convention on the Law of Treaties, provides in relevant parts:

> "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to
>
> *(a)* that State individually . . ."

Article 42 *(b)* goes on to deal with the notion of the injured State in the case where the obligation is owed to a group of States or to the international community as a whole. Obviously, as Professor Pellet has said, this has nothing to do with the present case, nor does Article 48, which deals with obligations in the general interest, have any relevance here. Our concern is with the elemental case of an obligation owed to the State individually, and the ILC's Commentary confirms that this is the first and most obvious case where a State can invoke responsibility in respect of its own rights. As the Commentary notes, a State may have "an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has vis-à-vis the other State party"[90]. This is an individual right of the particular State; no other State is implicated, and it covers only the relations of the two States *inter se* in accordance with its terms.

15. Thus, in order to establish that there has been a breach of Article X, paragraph 1, entitling a State to claim damages, three things have to be shown:

(a) first, that there was commerce, or as the case may be, navigation, between the territories of the High Contracting Parties;

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[90]ILC, Commentary to Article 42 (5), in J. Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, 2002) p. 257.

(b) secondly, that the freedom of this commerce or navigation was unjustifiably impaired by Iran — and I include Article XX within the scope of justification;

(c) thirdly, that the claimant State itself suffered loss as a direct result of the breach. For this purpose, losses actually suffered by nationals or corporations of the claimant State are included, but subject to the requirements for the State for diplomatic protection with respect to those nationals or corporations. Professor Pellet has discussed those requirements and I will not repeat what he has said.

16. Now as the Court will be aware, there has been a long running controversy as to whether a claimant State must have suffered actual loss before it can bring a claim for State responsibility, or whether the question of actual loss is primarily relevant to the issue of reparation. This was a question in the *Rainbow Warrior* arbitration between New Zealand and France, which the Tribunal there resolved by reference to the concept of moral injury[91]. In its work on State responsibility, the ILC refused to take any position on this question, observing that there is no general rule as to whether actual damage or harm is necessary in order for a breach to exist[92]. Instead, it concluded, the question depends on the interpretation of the particular obligation.

17. Now, in the present case the obligation is that entailed by Article X, paragraph 1, of the Treaty of Amity. In Iran's view, in the context of a general guarantee of freedom such as that in Article X, paragraph 1, it is necessary to point to some concrete impediment or impairment of protected commerce or navigation before responsibility is engaged. It is not enough to make a general allegation, unsupported by any actual case of the impairment of protected maritime commerce. It is not enough, as Mr. Mattler tried to do, to make insinuations of chilling effects, or of vague threats[93]. For example, the United States asserts that there were general threats from Iranian sources to close the Straits of Hormuz[94]. Even if in the heat and fury of war threats may have been made, what is quite clear is that nothing was ever done to carry them out: indeed, Iran made formal undertakings to the Secretary-General that it would do its utmost to keep the Straits

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[91](1990) 20 *UNRIAA* 217, pp. 266-267, paras. 107-110.

[92]ILC, Commentary to Article 2 (9), in Crawford, p. 84.

[93]CR 2003/13, pp. 17-23, *passim.*

[94]CR 2003/10, p. 26, para. 8.51.

open[95]. No doubt the closure of the Straits could have been a breach of Article X, paragraph 1; but that remains pure speculation. In short, in this respect there was no concrete act in respect of protected commerce and navigation and therefore no breach of Article X, paragraph 1.

18. In practice, however, it does not matter much in the present case whether you see damages as the gist of the breach or as an essential element in the process of determining reparation. This case *is* principally about reparation, that is to say, damages. And in this respect it is not enough for the United States to assert that ships of neutral States suffered as a result of the Gulf War; it has to point to breaches of Article X, paragraph 1, of this Treaty, and to damages caused to the United States by such a breach. Professor Murphy argued that all the Court should do at this stage is to issue a general declaration against Iran, leaving all other questions to the next phase of the case[96]. Now Iran of course agrees that detailed questions of quantification should be left to the next phase, as I have said[97]. But the United States cannot avoid the burden of proof incumbent on it as a counter-claimant simply by the expedient of incanting that Iran impaired freedom of navigation "in the Gulf"[98]. No doubt Article X, paragraph 1, concerns a general freedom existing in the bilateral relations of the parties, and a claimant or counter-claimant State may elect to set out a claim in general terms. But the claim still has to be substantiated in relation to the specific right relied on, the specific obligation said to have been infringed. In this case the obligation is one limited to commerce and navigation between the territories of Iran and the United States. And — except perhaps in one case — the United States has not produced any valid example of the impairment of protected commerce and navigation. Commerce and navigation between Iran and the United States was not a mere abstraction; it was a real and continuing process. Not to be able to point to any actual cases of loss or damage to that commerce, to that navigation, suggests that the counter-claim as a whole lacks substance — that it is advanced merely as a tactical advice in aid of a zero-sum settlement, or an inducement to the Court to offset one claim against the other in what we may call, following recent precedent, a zero-sum judgment.

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[95]CR 2003/5, p. 46, para. 9 (Mr. Momtaz).

[96]CR 2003/13, p. 43 (para. 21.65).

[97]CR 2003/8, p. 40 (para. 2).

[98]See, e.g., CR 2003/13, p. 20 (paras. 20.7), p. 20 (paras. 20.15, 20.16), p. 26 (para. 21.10).

19. Mr. President, Members of the Court, if all a State can do in respect of the alleged impairment of a general freedom is to set out a claim in general terms, there must be a serious question whether it has actually established a breach. If a State complains that its conduct infringes the freedom of commerce with the territory of another State, the latter is entitled to insist on valid examples. If the claimant State cannot give any valid examples, then surely it has not proved its general case. It cannot improve the situation by continually repeating in a loud voice that anyway freedom of commerce with third parties was impaired, or that there were problems in this overheated region which had a "chilling effect" on trade. Yet that is what the United States has effectively done with its endless references to freedom of navigation in the Persian Gulf — a general term — and with its endless references to neutral States, another general term. Article X, paragraph 1, does not cover commerce between the territories of third parties. It does not protect freedom of commerce and navigation in the Persian Gulf as a whole, irrespective of the origin and destination of the ships and cargoes involved. And it does not entitle the United States to bring claims on behalf of third parties — as distinct from its own nationals —, even if those third parties may have been engaged in treaty-protected trade.

20. To summarize, to prove its case at this stage, to make its counter-claim credible as a basis even for a declaratory judgment in general terms, the United States has to be able to point to *actual* cases of *actual* impairment of the freedoms protected by Article X, paragraph 1. And it is significant that its attempts to do so have — as I will show — failed almost entirely. Of course the principle of merely declaratory relief in State responsibility cases is well established, and the Court has a certain freedom as to the terms in which it formulates declarations of responsibility. But as you emphasized in the *Fisheries Jurisdiction* cases and the case between the Federal Republic of Germany and Iceland, there is a problem with your giving an abstract declaration on the subject of reparation, divorced from consideration of any actual facts. In that case you declined to make a declaratory award in respect of compensation for a series of well evidenced instances involving damage to fishing vessels. You said:

> "In order to award compensation the Court can only act with reference to a concrete submission as to the existence and the amount of each head of damage. Such an award must be based on precise grounds and detailed evidence concerning those acts which have been committed, taking into account all relevant facts of each incident and their consequences in the circumstances of the case. It is only after receiving

> evidence on these matters that the Court can satisfy itself that each concrete claim is well founded in fact and in law."[99]

Now that was at the merits stage. It was a refusal to deal with the claim at the merits stage. And as I said, there was good evidence in that case that German fishing vessels in Icelandic waters had been damaged without apparent justification. Indeed there was much better evidence than there is here that treaty-protected American vessels have had their freedoms unjustifiably impaired. Nonetheless, in *Germany* v *Iceland* you dismissed the claim for a declaration of reparation, you declined to grant such a declaration in the abstract.

21. So faced with this highly generalized and often repeated allegation that Iran impaired freedom of commerce and navigation "in the Gulf" — that is to say in the Persian Gulf as a whole —, the Court can only say that this freedom is not protected by paragraph 1. And if the United States then tries to substantiate its claim by putting forward examples of impairment, whether they concern specific ships or specific categories of harmful conduct — increases in insurance premiums, costs of naval patrolling —, the Court has to ask the three questions I have identified in relation to *each* of the examples put forward. If none of the examples qualify for treaty protection under paragraph 1, then the Court is justified in saying that the United States has not made out its general claim; that the claim must be dismissed *in toto*. That flows from the basic principle that the counter-claimant must prove its case. The Court should not by Professor Murphy's device of a generalized declaration excuse the United States from failing to provide adequate proof that the freedoms actually protected by paragraph 1 have actually been impaired.

B. Has a breach or breaches of Article X, paragraph 1, been established?

22. Mr. President, Members of the Court, I turn then to the question whether any of the United States assertions of breaches of protected commerce or navigation have been established. I will take them one by one, asking for each the three key questions I have identified.

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[99] *I.C.J. Reports 1974*, p. 204, para. 76.

(a) ***The 12 ships specifically mentioned by the United States in its pleadings***

23. Now we start with the 12 ships. The United States mentions 12 ships by name as examples of ships attacked in violation of Article X, paragraph 1. Seven of these were initially included in the counter-claim, five were referred to later, three of them in a footnote[100].

24. Let me start with the original seven ships initially included in the counter-claim. Both Mr. Sellers and Professor Pellet have referred to them, so I can be very brief. I will deal with the *Samuel B. Roberts*, the only warship and the only indisputably United States ship, separately.

Would you like me to speak slower, Sir.

The PRESIDENT: May I interrupt you for a moment. Interpreters, there is no translation into French.

Mr. CRAWFORD: I am relieved that on this occasion it is not my fault.

The PRESIDENT: Thank you, Professor Crawford, you may continue.

Mr. CRAWFORD: Let me start, as I said, with the seven ships initially included in the counter-claim. I will deal with the *Samuel B. Roberts*, the only warship and the only indisputably United States ship, separately.

25. Turning to the six merchant ships, my first question is whether any of these ships were engaged in commerce or navigation between Iran and the United States at the time of the incident in question. As to commerce, the answer is that only one was so engaged, the *Texaco Caribbean*, which was carrying Iranian crude oil from Iran to the Netherlands. For reasons we have explained and which are set out in Professor Odell's report[101], Iran accepts that this cargo of oil, or at least a material portion of it, was part of the flow of trade in oil between Iran and the United States, and that the *Texaco Caribbean* was therefore engaged in commerce between the territories of the two parties even if its own voyage stopped in Rotterdam. As to the others, none of them were carrying goods whose origins or destination, direct or indirect, was Iran, and none were sailing to or from Iran. Accordingly none are protected by the Treaty. Nor were the ships in ballast engaged in

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[100]See Counter-Memorial and Counter-Claim of the United States, para. 6.08 and Rejoinder of the United States, para. 6.06 and fn. 404.

[101]Reply of Iran, Vol. III.

navigation between the two States. Moreover the two reflagged vessels were positively prohibited by the terms of their reflagging from entering the territory of the United States: not merely were they not engaged in fact in protected commerce, the very terms on which they were reflagged prevented them from being so. Thus the only merchant vessel which survives this first stage of the analysis is the *Texaco Caribbean*.

26. Turning to the *Samuel B. Roberts,* Professor Pellet has already shown that it is excluded from the scope of Article X, paragraph 1, of the Treaty of Amity by Article X, paragraph 6. Let me assume, for the sake of argument, however, that this is wrong, and that under the Treaty, warships enjoy freedom of commerce and navigation. Of course, the *Samuel B. Roberts* was not engaged in commerce, nor was it navigating between the territories of Iran and the United States. It is true that very many United States warships violated Iranian territorial waters during the war, but there is no evidence that the *Samuel B. Roberts* was among them. It never entered Iranian territory. The United States argument appears to be that it was protecting freedom of commerce and navigation and therefore engaged in "ancillary activities integrally related to commerce" within the meaning of your 1996 Judgment[102]. Now, in fact there is no indication in your Judgment that by this phrase you intended to include warships engaged in escort duties, because you prefaced the phrase by referring to "commercial activities in general". You said:

> "The Court concludes from all of the foregoing that it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce."

27. Now the United States cannot claim that warships engage in commercial activities. But it does seem to say that because freedom of commerce was endangered and the *Samuel B. Roberts* was engaged in protecting commerce, an attack on it therefore impaired the freedom of commerce and navigation in which the vessels that it was escorting were engaged[103]. Well, there are various responses to this — but the clear and conclusive one is that none of the convoyed vessels, so far as the record showed, was engaged in navigation or commerce between the United States and Iran —

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[102] *I.C.J. Reports 1996 (II)*, p. 819, para. 49.

[103] CR 2003/13, p. 27, para. 21.12 (M. Murphy). The United States relied on this argument in its Rejoinder, pp. 196-197, para. 6.17 and see Iran's reply in its Further Response to the United States' Counter-Claim, p. 77, para. 6.16.

in other words, none of them was engaged in treaty-protected commerce. Therefore no ancillary activity of the *Samuel B. Roberts* could be protected either — even if such an argument about escort vessels could be entertained under Article X, paragraph 1.

28. Thus with the exception of the *Texaco Caribbean*, the other six ships mentioned by the United States do not get past the first hurdle on the merits. And exactly the same is true of the other five ships belatedly mentioned by the United States in its later pleadings. Not one of them is even arguably protected by Article X, paragraph 1, because not one of them was engaged in commerce or navigation between Iran and the United States.

29. The second question is whether the *Texaco Caribbean* — by now, the sole survivor of the fleet of ships that set out in the United States pleadings — was the subject of a breach of Article X, paragraph 1. In this respect it should be noted: first, that there is no direct evidence that the mine it struck was Iranian; second, that Iran protested the mining incident; third, that Iran obtained permission from the coastal State to assist in minesweeping in the area of the mining; and fourth, that neither the shipowner nor the cargo-owner made any claim against Iran. In these circumstances, there is no basis for attributing the limited damage done by the mine to Iran[104].

30. That being so, the third question does not arise: the Court does not need to determine the extent of the damage suffered by the United States arising from the breach of Article X, paragraph 1, because there was no breach. But if that is wrong, Iran has shown in its pleadings that the *Texaco Caribbean* was a Panamanian-owned ship carrying a Norwegian-owned cargo[105]. There is simply no basis for the suggestion that the United States suffered any loss as a result of the mine incident.

31. To conclude, 11 of the 12 vessels mentioned by the United States are not even arguably protected by Article X, paragraph 1. With respect to the remaining vessel, there was no breach of the Treaty and, in any event, no proof of loss to the United States.

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[104]See Reply and Defence to Counter-Claim of Iran, paras. 10.19-10.22; Further Response to the United States' Counter-Claim of Iran, paras. 4.16-4.21.

[105]See Further Response to the United States' Counter-Claim of Iran, paras. 4.18-4.19.

(b) ***The United States reservation of the right to add still further ships***

32. Now, there is a second category of allegations made by the United States which is even more indefinite than the first. It relates to the assertion that shipping in general between Iran and the United States was affected by unlawful Iranian activity, and in that regard the United States reserves the right to give further examples of ships engaged in maritime commerce between the territories of the High Contracting Parties which were affected by alleged unlawful attacks[106]. Professor Pellet has already dealt with the issues of admissibility raised by this reservation; but let us put admissibility to one side. My point is a more basic one: the United States could only introduce more examples in order to further particularize a claim for breach of Article X, paragraph 1, if that breach had already been established. But the United States, in two rounds of written argument and one of oral argument has been unable to give any more examples, not even in further footnotes. One is entitled to ask, 15 years after the end of the conflict, when these further examples will emerge and why they have not already been disclosed? The Court can only act on the basis of the information before it, and on the basis of that information no breach of Article X, paragraph 1, with respect to ships engaged in commerce and navigation between the territories of the United States and Iran has been proved. In this key respect, the United States counter-claim must be dismissed entirely for want of proof. Even if there "might have been" such ships, a judgment of State responsibility cannot be founded on a "might have been".

33. This being so, it is not necessary for me to detail the various positive measures taken by Iran to try to protect and to ensure the safety of vessels sailing to Iranian ports. These included the ferrying of oil down to Sirri Island to avoid exposing foreign tankers to risks of Iraqi air attack, the general measures taken by Iran with respect to its War Zone (inaccurately termed by the United States an Exclusion Zone), as well as minesweeping and other measures. Professor Momtaz will discuss some of these on Monday.

34. Nor is it necessary to discuss possible Iranian defences for breaches of Article X, paragraph 1, including self-defence, the lawful — and I stress the word lawful — exercise of belligerent rights and, eventually, Article XX, paragraph 1 *(d)*. Evidently it is only possible to consider whether and to what extent such defences might be available in relation to the specific

[106]See Rejoinder of the United States, fn. 404.

facts of a given case, and not at a general level. This is yet another reason why the Court cannot find a breach of Article X, paragraph 1, with respect to vague allegations of a general character. Until these are particularized, no consideration can be given to possible defences available to a State which was, globally, in a situation of attempting to defend itself against sustained aggression by Iraq. And they have not been particularized. You cannot issue a declaration subject to the possibility of a subsequent finding of justification. Since you cannot find justification on the basis of a vague allegation, the declaration cannot be issued at all. The United States claim with respect to the treatment of merchant ships accordingly fails entirely.

(c) ***The United States claim relating to United States patrolling and increased costs of shipping***

35. Two further United States allegations of a general character do, however, need to be briefly considered: these concern alleged Iranian responsibility for United States patrolling and convoy activities in the Persian Gulf, and alleged Iranian responsibility for increases in insurance premiums and similar costs to shipping.

36. Now it is necessary to make a distinction here between, on the one hand, establishing a breach and, on the other hand, establishing the extent of recovery for a breach already determined. If by some action Iran breached Article X, paragraph 1, questions could well arise about the increased costs to a United States shipowner or shipper which were entailed as a direct result. For example, in the S.S. *Wimbledon*, the French charterer had to take the long way around to Danzig because of Germany's refusal to allow it to transit through the Kiel Canal: it was entitled to recover the costs of delay and rerouting; in short, "the expenses connected with the refusal of passage", although no further indirect losses were recoverable[107]. But there the breach was already established by reference to a specific article of the Treaty of Versailles. By contrast, in the present case, for the reasons I have already given, the United States has been able to provide only one concrete example of a vessel covered by Article X, paragraph 1, and cannot prove breach or loss in relation even to that vessel.

37. So far as the United States claim for convoying costs is concerned, I can be very brief. Even if convoying and similar costs of military vessels were recoverable in principle — which for

[107] *1923, P.C.I.J., Series A, No. 1*, pp. 31-32.

reasons I will give shortly, is not the case — it would be necessary to show that the convoying activities involved treaty-protected commerce and navigation, and that the expense of convoying was incurred as a direct result of the Iranian breach. The United States does not begin to establish either of these facts.

38. First, and obviously, the United States convoying activities concerned, without exception, vessels travelling to or from non-Iranian ports with cargoes bound for States other than Iran. There is no evidence that a single treaty-protected ship was included in these convoys. Secondly, the United States activity in general was incidental to the war as a whole, specifically to the tanker war, which was started and perpetuated by Iraq. There was simply no causal link between any breach by Iran of Article X, paragraph 1, and the United States convoying activities. Thirdly, many of the ships which were convoyed were engaged in direct or indirect support of the Iraqi war effort, a situation presumably not chargeable to Iran.

39. So far as concerns additional expenses incurred by shipping in the Persian Gulf, similar points apply. First, none of the examples given by the United States concerns shipping protected by Article X, paragraph 1, and the claim accordingly falls outside the scope of the present proceedings. In any event, those costs were much more the result of the conflict as a whole, than they were even arguably the result of Iranian activity. And thirdly, these costs were taken by the ships concerned as part of their general activities; those ships may have run risks (at a time of a glut in world shipping capacity); but they were able to charge much higher rates because this was a war zone. There was no lack of shipping in the Persian Gulf; in an average month there were more ships transiting the Persian Gulf than were damaged by military action in the entire course of the war. Those decisions were made on a commercial basis by the carriers and the shipping lines, and so were the profits taken; claims were made on insurance policies in the small minority of cases where actual damage was incurred — we don't know the nationality of the insurance companies — and the files were closed. Not one State (until this counter-claim was belatedly made) thought that these costs were chargeable to Iran, and as far as the record shows not one State made any claim against Iran for costs of prevention or insurance. In their context, these claims are unsustainable in terms of supporting a breach of Article X, paragraph 1, even if they had concerned hypothetical

ships covered by that paragraph for whose costs the United States was hypothetically entitled to claim.

C. The scope of reparation

40. Mr. President, Members of the Court. In view of what I have said it is not necessary to consider in any detail questions of the scope of reparation available to the United States on the hypothesis that it had established a breach of Article X, paragraph 1. It has not done so. However I want to make one or two general remarks concerning the non-recoverability of indirect losses, in particular preventive or precautionary action taken by a State on its own initiative.

41. The basic principle here is clear. Under international law, compensation is not awarded where the expense in question results from the conduct of the claimant itself. The point was made in fact by promising young counsel — I'm sorry he is not here — pleading before this Court in the *Barcelona Traction* case way back in 1969. I refer of course to Professor Prosper Weil, who accurately observed that international arbitral practice "*considère comme non susceptibles de réparation les dépenses occasionnées à la victime par des mesures de protection que la victime elle-même cru devoir prendre librement et de sa propre initiative*"[108]. Indeed the principle is even a venerable one. In the *Alabama* arbitration[109], the United States initially demanded damages not just for direct losses but also for "the national expenditures in the pursuit of [the Confederate] cruisers" as well as for a variety of claims for indirect expenses. The Tribunal rejected these claims, and decided that the national expenditures in pursuit of the cruisers "were not properly distinguishable from the general expenses of the war carried on by" the United States, and hence likewise would not be addressed[110]. In the case concerning *British Claims in Spanish Morocco*, Max Huber held that the claimants could not demand reparation for losses which was sustained as a result of their precautionary decision to stop farming because of concerns about looting, in a situation of general insecurity allegedly attributable to the Spanish authorities. The relevant passage reads as follows:

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[108] *I.C.J. Pleadings, 1958, Barcelona Traction, Light and Power Company, Limited*, Vol. IX, p. 546.

[109] Moore, Digest, Vol. IV, pp. 4112-4115.

[110] *Ibid.*, p. 4115,

> "Even if one could attribute . . . to the authorities of the Protectorate responsibility for insecurity, the damages concerned would not constitute direct damages, but indirect damages, their immediate cause being the decision of the proprietor to give up an agriculture, the chances of success of which did not appear to him sufficiently great to justify the risks to be run."[111]

And I would refer the Court to the general analysis of this problem in the classic work by Professor Brigitte Stern[112].

42. Similar principles apply to the war risks insurance premiums which have universally been held not to be recoverable even when a breach is established — and *a fortiori* not to be an independent basis of claim. The point is obvious enough: insurance premiums, including war risk premiums, are part of the costs of doing business and they are recovered in higher freight rates, often much higher freight rates. Making profits out of war is an old and may well be honourable profession, but the idea that one particular aspect of these transactions is to be subsequently unwound without reference to other aspects such as increased freight rates and charged to one of the belligerents is bizarre, and has never been entertained by arbitral tribunals.

43. For example in the case of the *Eastern Steamship Lines* v. *Germany*, the claimant claimed for war risk insurance premiums, arguing that the purchase of such insurance was a direct consequence of the German Navy's unlawful sinking of a number of other Eastern Steamships Line vessels. The Tribunal rejected this argument, on the basis that:

> "Because of this fear [of further ships being sunk], claimant's president, acting on his own volition, and in the exercise of what, it is assured, was business prudence, bought and paid for insurance against the threatened losses. The procuring of this insurance was not Germany's act, but that of the claimant."[113]

The same result was reached in a series of cases involving war risk insurance premium claims before the Mixed Arbitral Tribunals[114].

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[111] *UNRIAA*, Vol. II, 615 at p. 658.

[112] B. Boellecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1073, pp. 344-351.

[113] *RIAA*, Vol. VII, 71 at p. 73. The decision was discussed by Professor Weil in his pleadings in the *Barcelona Traction* case: Pleadings, Vol. IX, pp. 546-547.

[114] *US Steel Products Co.* v. *Germany*, *Costa Rica Union Mining Co.* v. *Germany*, *South Porto Rico Sugar Co.* v. *Germany*, *RIAA*, Vol. VII, 44, at 62-63. See further: *Helmer claim* (German-French Mixed Arbitral Tribunal), *Receuil des décisions des TAM*, Vol. VI, 791 at p. 792; *Dix* claim, *RIAA*, Vol. IX, 119; *Giulini* v. *Germany*, Receuil des TAM, Vol. VI, 406.

D. The responsibilities of the Parties

44. Mr. President, Members of the Court, I cannot conclude this morning's presentation without referring briefly to the remarks made by the distinguished Agent of the United States, Mr. Taft, in closing on Wednesday. In the context of this litigation, he called on Iran in effect to admit responsibility for its conduct — on the basis of the case presented by the United States. Apparently your judgment is not necessary. He implicitly contrasted the United States willingness to face the facts with Iran's unwillingness to do so. It was, if I may say so with respect, a powerful presentation[115].

45. It was also, I do not say "partisan" but entirely partial. For in what, before this Court, lies Iran's refusal to admit responsibility? It was Iran, which after careful consideration, brought this carefully limited claim before the Court. It was advised by the finest international counsel of my experience never to reach the Bench, Professor Sir Derek Bowett. Iran was fully aware at the time of Article 80 of the Rules of Court. It brought the case in the first place under Article I of the Treaty of Amity, a provision which had underpinned United States-Iranian relations, in different versions — Dr. Movahed reminds me — since the 1820s. It argued that Article I, adopted in the post-Charter era, incorporated and underwrote, in the context of Iran's relations with the United States, the rules of conduct embodied in the Charter. It was the United States which sought to avoid your jurisdiction. It was the United States which successfully argued that Article I did not have any substantive effect and which persuaded the Court to confine this claim to the narrow — though for Iran's purposes still sufficient — basis of Article X, paragraph 1, of the Treaty. Iran brought this case to judgment, believing that in relation to the United States conduct vis-à-vis Iran during the terrible years from 1980 to 1988 it was more sinned against than sinning. It is Iran that seeks judgment, and the United States that seeks to evade it; it is the United States which brings these counter-claims which, while they may have fitted within the framework of Article I of the Treaty on the basis of which Iran was prepared to go to judgment, certainly do not fit within the framework of Article X, paragraph 1. As I have said, unlike *Cameroon/Nigeria*, this case is all about responsibility. Iran is prepared to face the accounting that this involves, including pursuant to Article 80 of your Rules.

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[115]CR 2003/13, pp. 51-52 (Mr. Taft).

46. But when it comes to facing facts, to facing judgment, the United States has no monopoly of virtue. Let me mention two facts, a small one and a large one. The small one the Court will have noticed; it is perhaps a peculiarity. It is this. The United States continues to use the names for the oil platforms which they had before 1980. The platforms are Iranian owned but the names are apparently still to be chosen by the Americans: the United States treated the platforms as theirs to name and to destroy. That is the small fact. The big fact is this: the second set of attacks on the oil platforms, presented this week by the United States as an entirely independent impartial operation, which had no incidence on the war and which was carried out as far as possible in such a way as to maintain neutrality and balance[116]. And yet it was carried out on the very same day as the second largest Iraqi offensive of the war — the first having been the initial invasion of 1980. Did the United States not know that Iraq was planning this offensive, on the very day when it destroyed the Nasr and Salman platforms and a significant portion of the Iranian navy? Did it not know of the Iraqi plans? In the first round presentation of the United States, there was not a word about this fact, not a word. And yet Iran, which calls on you to give judgment on claim and counter-claim, is accused of failure to face the facts.

Mr. President, Members of the Court, thank you for your attention.

The PRESIDENT: Thank you very much, Professor Crawford.

This marks the end of today's sitting. I wish to thank each of the Parties for the statements presented in the course of this first round of oral argument. The Court will meet again on Monday 3 March 2003, from 10 a.m. to 1 p.m. and from 3 p.m. to 4.30 p.m. to hear the second round of oral argument of the Islamic Republic of Iran on its own claims. At the end of the afternoon sitting on Monday, Iran will present its final submissions on its claims.

For its part, the United States will present its oral reply, both on the claims of Iran and on its own counter-claim on Wednesday 5 March, from 10 a.m. to 1 p.m. and from 3 p.m. to 6 p.m. At the end of the afternoon sitting on Wednesday, the United States will present its final submissions, both on the claims of Iran and on its own counter-claim.

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[116]See, e.g., CR 2003/12, pp. 43-44 , paras. 18.32-18.33, (Professor Matheson).

Iran will then conclude its second round of oral argument on Friday 7 March, from 10 a.m. to 11.30 a.m. with respect to the counter-claim of the United States and will present its final submissions thereon.

Therefore, each Party will have a total of two full sessions of three hours for the whole of its oral reply. I should nevertheless like to remind you that pursuant to Article 60, paragraph 1, of the Rules of Court, the oral presentations must be as succinct as possible. The purpose of the second round of oral argument, I would add, is to enable each of the Parties to reply to the arguments advanced orally by the other Party. The second round must not, therefore, constitute a repetition of past statements. It therefore goes without saying that the Parties are not obliged to avail themselves of the entire time allowed to them. Thank you.

The Court is adjourned.

The Court rose at 12.50 p.m.

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