CR 2003/17

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting

held on Wednesday 5 March 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 mercredi 5 mars 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

———————

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

Mr. M. H. Zahedin-Labbaf, Agent of the Islamic Republic of Iran to the Iran-US Claims Tribunal, Deputy Director for Legal Affairs, Bureau of International Legal Services of the Islamic Republic of Iran, The Hague,

as Agent;

Mr. D. Momtaz, Professor of International Law, Tehran University, member of the International Law Commission, Associate, Institute of International Law,

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

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

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the English and Australian Bars, member of the Institute of International Law,

Mr. Alain Pellet, Professor at the University of Parix X-Nanterre, member and former Chairman of the International Law Commission,

Mr. Rodman R. Bundy, avocat à la cour d'appel de Paris, member of the New York Bar, Frere Cholmeley/Eversheds, Paris,

Mr. David S. Sellers, avocat à la cour d'appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

as Counsel and Advocates;

Mr. M. Mashkour, Deputy Director for Legal Affairs, Bureau of International Legal Services of the Islamic Republic of Iran,

Mr. M. A. Movahed, Senior Legal Adviser, National Iranian Oil Company,

Mr. R. Badri Ahari, Legal Adviser, Bureau of International Legal Services of the Islamic Republic of Iran, Tehran,

Mr. A. Beizaei, Legal Adviser, Bureau of International Legal Services of the Islamic Republic of Iran, Paris,

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

Mr. William Thomas, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley/Eversheds, Paris,

Mr. Leopold von Carlowitz, Research Fellow, Peace Research Institute, Frankfurt,

Mr. Mathias Forteau, docteur en droit, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,

as Counsel;

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

M. M. H. Zahedin-Labbaf, agent de la République islamique d'Iran auprès du Tribunal des réclamations Etats-Unis/Iran, directeur adjoint des affaires juridiques au bureau des services juridiques internationaux de la République islamique d'Iran à La Haye,

comme agent;

M. D. Momtaz, professeur de droit international à l'Université de Téhéran, membre de la Commission du droit international, associé à l'Institut de droit international,

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

M. Michael Bothe, professeur de droit public à l'Université Johann Wolfgang Goethe de Francfort-sur-le-Main, directeur de la recherche à l'Institut de recherche pour la paix à Francfort,

M. James R. Crawford, S.C., F.B.A., professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge, membre des barreaux d'Angleterre et d'Australie, membre de l'Institut de droit international,

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre, membre et ancien président de la Commission du droit international,

M. Rodman R. Bundy, avocat à la cour d'appel de Paris, membre du barreau de New York, cabinet Frere Cholmeley/Eversheds, Paris,

M. David S. Sellers, avocat à la cour d'appel de Paris, Solicitor auprès de la Cour suprême d'Angleterre et du Pays de Galles, cabinet Frere Cholmeley/Eversheds, Paris,

comme conseils et avocats;

M. M. Mashkour, directeur adjoint des affaires juridiques au bureau des services juridiques internationaux de la République islamique d'Iran,

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

M. R. Badri Ahari, conseiller juridique au bureau des services juridiques internationaux de la République islamique d'Iran, Téhéran,

M. A. Beizaei, conseiller juridique au bureau des services juridiques internationaux de la République islamique d'Iran, Paris,

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

M. William Thomas, Solicitor auprès de la Cour suprême d'Angleterre et du Pays de Galles, cabinet Frere Cholmeley/Eversheds, Paris,

M. Leopold von Carlowitz, chargé de recherche à l'Institut de recherche pour la paix à Francfort,

M. Mathias Forteau, docteur en droit, chercheur au Centre de droit international de Nanterre (CEDIN) de l'Université de Paris X-Nanterre,

comme conseils;

Mr. Robert C. Rizzutti, Vice-President, Cartographic Operations, International Mapping Associates,

as Technical Adviser.

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

Mr. William H. Taft, IV, Legal Adviser, United States Department of State,

as Agent;

Mr. Ronald J. Bettauer, Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Mr. Michael J. Matheson, Professor, George Washington University School of Law,

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

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

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

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

Mr. Prosper Weil, Professor Emeritus, University of Paris II, member of the Institut de droit international, member of the Académie des sciences morales et politiques (Institut de France),

as Counsel and Advocates;

Mr. Paul Beaver, Defence & Maritime Affairs Consultant, Ashbourne Beaver Associates, Ltd., London,

Mr. John Moore, Senior Associate, C & O Resources, Washington, D.C.,

as Advocates;

Mr. Clifton M. Johnson, Legal Counsellor, United States Embassy, The Hague,

Mr. David A. Kaye, Deputy Legal Counsellor, United States Embassy, The Hague,

Ms Kathleen Milton, Attorney-Adviser, United States Department of State,

as Counsel;

Ms Marianne Hata, United States Department of State,

Ms Cécile Jouglet, United States Embassy, Paris,

Ms Joanne Nelligan, United States Department of State,

M. Robert C. Rizzutti, vice-président des opérations cartographiques, International Mapping Associates,

comme conseiller technique.

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

M. William H. Taft, IV, conseiller juridique du département d'Etat des Etats-Unis,

comme agent;

M. Ronald J. Bettauer, conseiller juridique adjoint du département d'Etat des Etats-Unis,

comme coagent;

M. Michael J. Matheson, professeur à la faculté de droit de l'Université George Washington,

M. D. Stephen Mathias, directeur chargé des questions concernant les Nations Unies auprès du conseiller juridique du département d'Etat des Etats-Unis,

M. Michael J. Mattler, avocat-conseiller au département d'Etat des Etats-Unis,

M. Sean Murphy, professeur à la faculté de droit de l'Université George Washington,

M. Ronald D. Neubauer, assistant au bureau du conseiller juridique adjoint du département de la défense des Etats-Unis,

M. Prosper Weil, professeur émérite à l'Université de Paris II, membre de l'Institut de droit international, membre de l'Académie des sciences morales et politiques (Institut de France),

comme conseils et avocats;

M. Paul Beaver, expert consultant en questions de défense et affaires maritimes, *Ashbourne Beaver Associates, Ltd.*, Londres,

M. John Moore, associé principal, *C & O Resources*, Washington D. C.,

comme avocats;

M. Clifton M. Johnson, conseiller juridique à l'ambassade des Etats-Unis à La Haye,

M. David A. Kaye, conseiller juridique adjoint à l'ambassade des Etats-Unis à La Haye,

Mme Kathleen Milton, avocat-conseiller au département d'Etat des Etats-Unis,

comme conseils;

Mme Marianna Hata, département d'Etat des Etats-Unis,

Mme Cécile Jouglet, ambassade des Etats-Unis à Paris,

Mme Joanne Nelligan, département d'Etat des Etats-Unis,

Ms Aileen Robinson, United States Department of State,

Ms Laura Romains, United States Embassy, The Hague,

as Administrative Staff.

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

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

comme personnel administratif.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of the United States of America. The United States will be heard this morning and this afternoon. I shall now give the floor to H.E. Mr. Taft, the Agent of the United States of America.

Mr. TAFT: Thank you, Mr. President.

23. OPENING STATEMENT

23.1. Mr. President, Members of the Court. Today, the United States makes its presentation in rebuttal of the arguments put forward by Iran in this case. We will, as the Court has reminded us is good practice, not repeat the case we have already put. Instead, we will limit our presentation to responding to points raised directly by Iran in its oral pleading and clarifying aspects of the United States position that Iran has misrepresented. The Court has also reminded us that it is not necessary for a party to use all of the time allotted to it for the second round of pleadings. We expect to complete our presentation between 4.30 and 5 o'clock this afternoon.

23.2. Mr. President, the United States presentation today will be as follows. Mr. Bettauer will first review the factual issues in the case. As I mentioned in introducing the United States presentation 12 days ago, these facts are not complicated and, indeed, have for the most part been generally known for many years. However, Iran's habit of omitting to mention key facts and denying its responsibility for its actions requires us to clarify the record in a number of respects.

23.3. Mr. Bettauer will be followed by Mr. Murphy, who will discuss Article X, paragraph 1, of the 1955 Treaty. Iran has put forward essentially two interpretations of this provision in the course of its presentation. It has then applied the provision in one way to United States conduct, when considering its own claim, and in quite another way to its own conduct, when discussing the United States counter-claim. Mr. Murphy will show that, when Article X is correctly and consistently applied to the claims of both Parties, Iran has violated its obligations under the provision while no violation of those same obligations by the United States has been demonstrated.

23.4. During the afternoon, Mr. Mathias will respond to several points raised by counsel for Iran relating to the United States position that Iran's own conduct precludes its recovering on its claim.

23.5. After Mr. Mathias, Professor Weil will address the points made by counsel for Iran concerning the conceptual basis of Article XX of the Treaty. Professor Matheson will then address the applicability of Article XX and the right of self-defence to the facts of the case.

23.6. I will conclude the United States presentation.

23.7. These are the points that we will cover during the course of the day. I believe that they include all the points raised by Iran that are actually involved in this case. There are, however, a number of points that have been raised by Iran in its presentation — some of them, repeatedly — that are not involved in the case, and because Iran has — also repeatedly — called us to task for not responding to these items, I will say just a word about them here.

23.8. First, Iran refers frequently to the fact that not only at the time of the United States operations against the oil platforms that are the subject of its claim, but also for many years previous, it was engaged in a war with its neighbour Iraq — a savage war, in which it says its national survival was at stake; a war in which chemical weapons were used against it. It says, also repeatedly, that the United States supported Iraq in this war.

23.9. Now all this may just be a play for sympathy or, perhaps, an effort to embarrass the United States in light of Iraq's subsequent conduct. But Iran's repeated references to United States support for and collaboration with Iraq seem also to be aiming at something more from time to time. Iran insinuates that, because United States policy was allegedly to support Iraq, the United States was somehow virtually a partner of Iraq against Iran in the war. It evidently hopes by this tactic to gain some acceptance in this Court for its attacks on United States shipping. The Court should be in no doubt about this point. The United States was not a belligerent in the Iran-Iraq war, but neutral, and United States policy preferences were pursued in strict conformity with its neutral status. In these circumstances, as Professor Bothe recognized, Iran's requirements in its war with Iraq cannot in any way justify its attacks on neutral vessels. Neither the fact that Iraq was the original aggressor in the war, nor the fact that the United States and Iran had policy differences about the war, has any relevance to the case before the Court. This case is not about the Iran-Iraq war, however much Iran would like to create that impression. And it is not about Iraq's conduct in that war, much of which was certainly deplorable. This case is about Iran's attacks on

United States and other neutral shipping in the Gulf and the United States actions to bring those attacks to an end.

23.10. Second, Iran says repeatedly that the United States was unremittingly hostile to Iran throughout the 1980s. It asks the Court to conclude from this that the United States operations against the platforms were not undertaken to protect its essential security interests or in an exercise of its right of self-defence, but simply because the United States was hostile to Iran. In Iran's version, the United States alleged hostile motivation swallows up any other rights it may have under the Treaty or general international law. This is absurd. A State may not deprive another of its right to self-defence simply by declaring it hostile. Whether the United States essential security interests were endangered and whether steps taken to protect them were necessary are the questions the Court needs to decide in considering Article XX of the Treaty. Whether the United States or Iran, or both had cause to distrust or dislike each other tells us nothing about whether the measures taken by the United States were necessary to protect its essential security interests or necessary for its self-defence. The Court should not be distracted by this point with which Iran is so preoccupied.

23.11. A third matter is Iran's dramatic announcement at the end of the first round of argument, which was repeated more than once on Monday, that the United States operation against the oil platforms in 1988 took place on the same day, 18 April, as Iraq began a major offensive to retake Iranian-occupied territory in the Faw Peninsula. Iran suggests, without citing any evidence, that the operation and the offensive were co-ordinated by Iraq and the United States. As the Court knows, however, the timing of the United States operation in 1988 was actually dictated by the Iranian attack on the *Samuel B. Roberts*, which took place just four days earlier, on 14 April. Counsel for Iran's statement that the timing of the operation and the Iraqi attack was not a coincidence is without any basis. Even if it were true, however, it would not be relevant to the issues in this case. The United States rights to defend itself and to take measures to protect its essential security interests under Article XX of the Treaty do not depend on Iraq's war plans for any particular day. So the Court should also ignore this point.

23.12. A fourth matter to which Iran has managed to make more than a few references is the tragedy of 3 July 1988, in which a United States warship shot down an Iranian commercial airliner,

which it mistakenly believed was a hostile aircraft. This dreadful accident, which took place more than two months after the second United States operation against the oil platforms, obviously had nothing to do with those operations or this case. The incident does show, however, how differently Iran and the United States have conducted themselves following attacks on civilian aircraft or neutral shipping. The United States promptly expressed its deep regret and extended its sympathy and condolences to the passengers, crew and their families after the incident. It offered to pay compensation to the families of the victims, and it did so. This is not Iran's way, as we have seen. The most important difference between this incident and Iran's attacks on shipping in the Gulf is not, however, how the United States and Iran acted afterwards. The most important difference is that the shooting down of the airliner was an accident, while Iran's attacks on shipping were intentional.

23.13. These are four issues of fact that Iran has sought to introduce into the case that, simply put, have no place in it. There are others, but no purpose would be served by dwelling on them here. It is time to turn to the issues that the Court must consider in deciding the case. Mr. Bettauer will start, if, Mr. President, you will be pleased to call on him now. Thank you, Mr. President, Members of the Court.

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

Mr. BETTAUER:

24. IRAN WAS RESPONSIBLE FOR ATTACKS ON UNITED STATES AND OTHER NEUTRAL SHIPPING AND IRAN USED THE PLATFORMS TO ASSIST IN THESE ATTACKS, PRECIPITATING THE UNITED STATES MILITARY ACTIONS AGAINST THE PLATFORMS

Introduction

24.1. Mr. President, Members of the Court, you have now heard two radically different versions of the events that took place in the Gulf in the period preceding the United States actions against the platforms at issue. One version is supported by extensive evidence — by physical evidence, photographs, eyewitness reports, contemporaneous reports of independent shipping organizations, Iranian documents and public and private statements by Iranian officials that constitute admissions against interest. And that version is sustained by the judgments of the United Nations Security Council, the League of Arab States, and many States that made statements or

démarches calling on Iran to cease its attacks on United States and other neutral shipping. Thus, the United States put before this Court a version of events sustained not just by the United States. The United States put before this Court a version of events that is uniformly accepted around the world — except by one country.

24.2. That country is Iran. Iran has put before this Court a version of events based on hypothesis and speculation. To use Iran's own words, it is a version of events sustained by "might haves" and "could haves", and outright misrepresentations in fact. In its rebuttal argument, Iran has continued this approach. But this approach cannot shake the foundation of solid evidence, evidence that has been accepted as such by every relevant country and organization, except Iran.

24.3. Mr. President, in its rebuttal presentation, Iran has asserted that the mines laid throughout the Gulf were not Iranian, that the missiles that struck United States vessels were not Iranian, and that the platforms were not used to support attacks on United States and neutral shipping. It says that the United States actions against the platforms were designed to cause maximum economic damage and to assist Iraq in its war efforts. Iran's response is based on a series of speculations and outlandish theories to the effect that Iraq *could* have been responsible for the particular attacks at issue in this case.

24.4. Mr. President, these assertions are without foundation and cannot stand. They particularly cannot stand in the light of a description of events supported by evidence, not speculation, in the record of this case. I shall respond to Iran's points in each area in turn.

Iran's responsibility for mine attacks

24.5. Let me start with the minelaying incidents at issue in this case. In its written pleadings, Iran denied responsibility in categorical terms for any minelaying affecting commercial shipping in the Gulf, and Iran does not appear to have modified its position now. Rather, Iran's counsel has suggested that the United States has not taken sufficient account of the possibility that Iraq could have been responsible for the mines at issue in these attacks (CR 2003/15, pp. 34-35).

24.6. But, Mr. President, as Mr. Mathias demonstrated, it was Iran's mines, not Iraq's, that were found at or near the scene of each attack. United States and Kuwaiti naval forces discovered a total of ten Iranian mines anchored in place in the deep water approach to Kuwait's Al Ahmadi

Sea Island terminal. This was the location where the *Marshal Chuikov* was struck (CR 2003/9, paras. 3.27-3.28). United States naval forces discovered a total of 13 Iranian mines anchored in place off Iran's Farsi Island, near the location where the *Bridgeton* was struck (CR 2003/9, para. 3.29). British and French naval forces discovered at least five Iranian mines anchored in place off Fujayrah, and an additional four anchors bearing Iran's distinctive serial numbering system at the same location (CR 2003/9, para. 3.30). This is where the *Texaco Caribbean* and the *Anita* were struck. United States, Belgian, and Dutch naval forces discovered a total of seven Iranian mines anchored in place, and four additional Iranian mine anchors, near the Shah Allum Shoal in the central Gulf (Exhibits 37, 47, 65). This is where the U.S.S. *Samuel B. Roberts* was struck.

24.7. Finding Iranian mines at or near the scene of each of these attacks clearly establishes Iran's responsibility for each of these attacks, in addition to definitively disproving Iran's assertion that it did not lay mines in areas affecting neutral shipping in the Gulf. Iran has provided no evidence at all that would establish that Iraq was responsible for these attacks. Rather, Iran has offered this Court three unsustainable theories in this regard.

24.8. First, Iran has suggested that the mines that damaged these vessels could have been mines laid by Iraq in the northern Gulf that broke free of their anchors and floated down the Gulf. Iran cites Guidance Notes issued by the General Council of British Shipping noting the presence of floating mines in the Gulf, and that the area near Farsi Island, where the *Bridgeton* was struck, was perhaps the most likely location where such floating mines might interfere with neutral shipping (CR 2003/15, p. 35). It also cites an article appearing in *Lloyd's List* in this regard.

24.9. The sources Iran cites do not support this theory. The General Council of British Shipping and Lloyd's Maritime Information Service attribute to Iran responsibility not only for the mine attack on the *Bridgeton*, but also for the mine attacks on the *Marshal Chuikov*, the *Texaco Caribbean*, and the *Anita* (Exhibits 2, 9). Whatever the risk, these sources did not think that floating mines had anything to do with these attacks.

24.10. More basically, however, the type of damage done to these vessels, as well as to the U.S.S. *Samuel B. Roberts*, is inconsistent with that which a floating mine would have caused. For

this conclusion, we need look no further than the statement of Jacques Fourniol, Iran's own mine expert. In a general comment to his report, Mr. Fourniol makes the following statement:

> "This study is primarily devoted to moored contact mines. Bottom influence mines and drifting mines are not at the core of the discussion. Indeed, the type of damage inflicted to the various ships that were hit could only have been as a result of the impact of a moored contact mine." (Report of Jacques Fourniol, Vol. VI, Reply and Defence to Counter-Claim of Iran, p. 3.)

The "various ships" referred to in Mr. Fourniol's report include the *Marshal Chuikov*, the *Bridgeton*, the *Texaco Caribbean*, and the U.S.S. *Samuel B. Roberts*. So, in fact, Iran's own expert dismisses Iran's theory that floating mines could have been responsible for the damage to these ships. In fact, these were all anchored mines. Moreover, by establishing that the damage to the ships in question was of the kind produced by anchored mines, Iran's expert also disposes of Professor Bothe's suggestion that a question exists concerning the type of damage caused by the mines, which, he argues, would be relevant under the Court's analysis in the *Corfu Channel* case. As we have shown, the Court's analysis in the *Corfu Channel* case favours a finding against Iran on the evidence of mining before this Court (CR 2003/13, pp. 25-26).

24.11. Iran's second theory is that Iraq was responsible for laying the mines in these attacks. In this regard, Iran points to a single incident in June 1984, when it asserts that a Liberian tanker hit an Iraqi mine near the Straits of Hormuz. Iran leaps from this single incident, over three years before the mine attacks at issue here, to postulate, without a shred of evidence, a general Iraqi capability to lay mines anywhere in the Gulf at any time and to insinuate that Iraq laid the particular mines at issue here (CR 2003/15, p. 36).

24.12. As an initial matter, there is a question as to the accuracy of the report cited by Iran. Lloyd's Maritime Information Service, which catalogued all reported ship attacks in the Gulf during the Iran-Iraq war by both sides, reports no such attack. It does report Iraqi mine attacks in the area of Bandar Khomeini, in the far northern Gulf, which are also referred to in the source Iran cites (Exhibit 9). Three of these incidents occurred in 1982 and one of them occurred in 1984. None of this suggests that Iraq made extensive use of mines to attack shipping, or that it did so in the time period or in the locations of the attacks at issue here.

24.13. More fundamentally, Iran's suggestion of Iraqi responsibility for these attacks ignores the fact that *Iranian* mines, *not* Iraqi mines, were found at or near each of these attacks. In its

rebuttal, Iran argued that it sent its own minesweeping forces to Khor Fakkan, where the *Texaco Caribbean* and the *Anita* were struck, but Iran never asserts that it found Iraqi mines there (CR 2003/15, p. 36). Iran has given the Court no evidence that would support its theory that Iraqi mines were responsible for any of the mine attacks at issue in this case.

24.14. Finally, Iran's third and last line of defence is to suggest to the Court that Iraq could have captured Iranian mines and laid them at various locations in the Gulf to make it look like Iran was responsible for the ensuing damage to vessels caused by these mines (CR 2003/7, p. 19). Iran has produced absolutely no evidence of any type and no independent reports to support this supposition or to give reason to believe that Iraq ever did this. Its sole support for this theory is the statement of its mine expert, Mr. Fourniol, that Iraq "had the opportunity to recover" Iranian mines from locations in the Khor Abdullah channel (Fourniol Report, para. 1.32). This would have required Iraq to find the mines, disarm them in place, rearm them and lay them, all covertly. The difficulty and danger involved in such an operation explains why mine clearance forces detonate in place mines they find, rather than trying to recover them. Given that no fewer than 35 Iranian mines were found at or near the scene of the attacks in question, Iraq would have had to successfully perform this task not once or twice, but repeatedly. But, as I said, this is sheer speculation. Iran has provided the Court no evidence to support it.

24.15. So, none of these Iranian theories can be taken seriously. As the Court has seen, all informed sources in the Gulf concluded that Iran was responsible for the mine attacks on the *Marshal Chuikov*, the *Bridgeton*, the *Texaco Caribbean*, the *Anita*, and the U.S.S. *Samuel B. Roberts*, and all available evidence supports that conclusion. Unsupported speculation cannot stand in the way of the evidence.

24.16. Let me now turn to Iran's responsibility for missile attacks, and, in particular, the missile attack on the *Sea Isle City*. Again, Iran has suggested that this Court should look to Iraq, rather than Iran, as the party responsible for this attack. And again, its suggestion is based on unsupported speculation that is at odds with the evidence. As Mr. Neubauer explained, eyewitnesses observed this missile coming from Iranian-controlled territory in the Faw area, just as they had observed a series of Iranian missiles fired from this area in the preceding months. Analysis of fragments from these prior missile launches established that the missiles were HY-2

ground launched missiles (CR 2003/9, para. 4.19). As Mr. Moore explained, satellite imagery demonstrates that Iran had deployed HY-2 missiles in the Faw area at the time of the attack, and had missile launching sites there from which it could launch them. Mr. Moore also showed that Iraq could not have launched the missile that struck the *Sea Isle City* from territory it controlled (CR 2003/9, paras. 5.27-5.34).

24.17. How does Iran respond to this evidence? First, it asserts that the United States has not demonstrated that Iran maintained any operational missile launching sites in the Faw area. Iran simply ignores the evidence. In fact, Mr. Moore showed you one Iranian HY-2 missile launching site, with a missile on its launcher at one of the site's launch positions, ready to be launched. That image is now on the screen (judges' folders, Book One, tab 46L). I don't know how Iran defines the term "operational" but it would seem hard for a site to be more operational than this. In addition, Mr. Moore showed you that Iran deployed HY-2 missile launching equipment nearby, at additional Iranian missile launching sites in the Faw area in locations where the equipment could quickly be moved into place. These images leave no doubt that Iran maintained operational missile launching sites in the Faw area.

24.18. In its rebuttal on Monday, Iran again asserted that the sites that it controlled on the Faw peninsula were "bombed out" and therefore unusable for launching missiles (CR 2003/15, p. 27). As Mr. Moore demonstrated, the keyhole launch pads of the missile sites are clearly discernible on the images and they show no evidence of bomb damage. Just to look again at one of the slides demonstrating that Iran's sites were active, and not bombed out, here you see clearly vehicle traffic on the road providing access to these sites at the time of these attacks, contrary to previous Iranian assertions to this Court. Iran's missile sites were clearly capable of launching the missile that struck the *Sea Isle City* (judges' folders, Book One, tab 46I).

24.19. Notwithstanding this, Iran seeks to convince the Court that Iraq somehow was responsible for the attack on the *Sea Isle City*. Counsel for Iran asserted on Monday that the eyewitness statement of the path the missile flew supports Iran's theory that Iraq fired the missile (CR 2003/15, p. 28). It does not.

24.20. The Kuwaiti eyewitness states that he observed "a missile flying overhead, between Faylakah Island and Auhat Island, in a south-south-easterly direction — originating from the

direction of the Faw peninsula and flying in the direction of the Sea Island Terminal" (Exhibit 82). This statement describes the path of the missile in relation to four major landmarks which would have been well known to the observer: the Faw peninsula, Faylakah Island, Auhat Island, and the Sea Island terminal. These readily identifiable landmarks definitively establish the direction of the missile and are certainly a more reliable indication than a guess as to a compass reading.

24.21. On Monday, counsel for Iran displayed a map suggesting a course the missile might have taken if it had been fired from Iraqi territory or from an Iraqi frigate in the waters behind Bubiyan Island and suggested that it was consistent with the eyewitness statement. That map is now displayed on the screen. The Court will see that this route is not at all consistent with the statement. First, a missile following this route would not appear to be originating from the Faw Peninsula. The Faw Peninsula is well east of the launch location asserted on the map. Second, a missile following this route would not pass "between Faylakah Island and Auhat Island". This route involves the missile flying over the western portion of Faylakah Island, well west of Auhat Island.

24.22. The route suggested by counsel for Iran is not, of course, the route Iran's expert, Mr. Briand, asserted the missile could have taken if fired from Iraq. He asserted that the missile could have been fired from Iraqi territory and taken a sharp turn that would have allowed it to appear to have come from the Faw area and to pass between Faylakah Island and Auhat Island, as actually described by the eyewitness. But as Mr. Moore explained to the Court, the limitations of the HY-2 missile's guidance system made it impossible to make the sharp turn suggested by Mr. Briand (CR 2003/9, paras. 5.31-5.34).

24.23. Both the conjectural route proposed by counsel for Iran on Monday and Mr. Briand's route suffer from the further flaw that Iraq did not have a missile launching site in the area from which it could have launched the missile. Iran's counsel again asserted on Monday, based on a statement by Iran's expert Mr. Youssefi, that Iraq had such a site (CR 2003/15, p. 28). But as Mr. Moore has already demonstrated for the Court, United States satellite imagery taken at the time of these attacks shows no missile launching site at or near the location asserted by Mr. Youssefi (CR 2003/9, paras. 5.29-5.30). While Iraq built a missile launching site near this location in 1989, no such Iraqi-controlled site existed at the time of these attacks anywhere in the Faw area. The

map provided by Iran's counsel on Monday actually provides Iraq's alleged missile launching site at a different location, well to the west of the Faw Peninsula. Again, Iran has submitted no evidence that there was an Iraqi missile site there either, but the United States has submitted definitive, photographic evidence that is in the record that there was no site at that location (Exhibit 262, attachment T).

24.24. In sum, given the path followed by the missile, the limitations of its guidance system, and the absence of Iraqi launching sites in the area, only Iran could have been responsible for the attack on the *Sea Isle City*.

24.25. Nor should the Court find any more credible Iran's further suggestion that Iraq could have launched the missiles from the air (CR 2003/15, p. 25). The HY-2 ground launched missiles used in the attack on the *Sea Isle City* and in Iran's series of prior missile launches from the Faw area cannot be mistaken for air launched missiles. As Mr. Neubauer explained, HY-2 ground launched missiles have guidance systems and airframe mountings that are distinct from those of air launched missiles (CR 2003/9, para. 4.21). The missiles that were fired at the Sea Isle terminal between January 1987 and October 1987 could only have been fired from the ground. On Monday, Iran's counsel referred to air launched Silkworm missiles (CR 2003/15, p. 25), but this could only have been in reference to other missiles in the Silkworm family that can be launched from the air, not to the HY-2 missile which cannot (Exhibits 85 and 86).

24.26. Moreover, the HY-2 missile could not have been launched from any Iraqi surface vessel because the size and electronics of the HY-2 were not compatible with the missile launching capabilities of any such vessels (*Jane's Fighting Ships* (1985-1986); Exhibit 85).

24.27. Iran's theory of Iraqi responsibility for these attacks would not make sense in any event. Iran asserts that Iraq had a motive to "internationalize" the Iran-Iraq war, and that it thus would have had reason to attack shipping trading with Kuwait and Saudi Arabia even though they were sympathetic to Iraq in the war (CR 2003/15, p. 29). But even if this were so, it would not provide a motive for Iraq repeatedly to launch missiles in the direction of the Al Ahmadi Sea Island terminal, which was Kuwait's major oil export terminal. Doing so would risk hitting the terminal itself, thereby ending altogether its ability to generate the oil revenue on which Iran asserts Iraq was heavily dependent. Such an attack would not be a relatively low cost way of seeking to enlist

allies in the war with Iran, it would be tantamount to cutting off one of its principal economic lifelines.

24.28. Not surprisingly, Iran has been unable to find any source that believes that Iraq was, in fact, responsible for the missile attack on the *Sea Isle City*. The statement of its missile expert, Mr. Briand, is limited to opining that Iraq could have fired the missiles in question, but does not assert that it actually did so (report of Jean Francois Briand, Vol. VI, Reply and Defence to Counter-Claim of Iran, p. 2.13). As the United States has shown, Lloyd's Maritime Information Service, the General Council of British Shipping, the Norwegian Shipowners' Association, the International Association of Independent Tanker Owners, analysts writing in *Jane's Intelligence Review*, and others all attribute responsibility for this attack to Iran. Moreover, when an additional missile was fired from the Faw area one week later that struck the Al Ahmadi Sea Island terminal itself, there was again no question about Iran's responsibility. The President of Egypt referred to that missile attack as "Iranian aggression against Kuwait" and condemned it "with the utmost vigour" (Exhibit 191). In short, Iran's responsibility for these attacks was universally understood at the time. Iran's series of speculative theories have no foundation and are simply wrong; they give this Court no basis for doubting Iran's responsibility now.

Universal condemnation of Iran's attacks

24.29. Let me now turn to the next area — the diplomatic efforts to persuade Iran to cease its attacks and Iran's unsuccessful attempt here to discredit them.

24.30. I shall start with United Nations Security Council resolution 552, the relevant text of which is now on the screen, and at tab 2 of the judges' folders. Now, Iran suggested on Monday that United Nations Security Council resolution 552 somehow did not amount to a genuine condemnation of Iranian attacks on neutral shipping. This is nonsense. Iran chose solely to focus on paragraph 4 and said that it did not specifically refer to Iran. But let us look at the language — it cannot be misread. The condemnation of "recent attacks" in operative paragraph 4 and the demand that "such attacks" cease clearly refers to the "Iranian attacks on commercial shipping" mentioned in the preambular paragraph. That paragraph clearly refers to a complaint by Gulf States regarding Iranian attacks on neutral vessels.

24.31. And, if there were any doubt, let me put on the screen excerpts from two statements made during the discussion in the Council on the day the resolution was adopted. As you will see on the slide, which is at tab 3 in the judges' folders, the French representative said France found the complaint that Iran was responsible for the attacks "well grounded" and called for a condemnation of those attacks. Now, on the next slide, which is at tab 4 of the judges' folders, you will see a statement made by the President of the Council, the United Kingdom representative. He accepted the attribution of responsibility to Iran and called the attacks "reprehensible", "unjustifiable", and "clear breaches of international law".

24.32. On Monday, Iran asked the Court not to believe the universal view that Iran was responsible for these attacks because any State that condemned its attacks on neutral shipping did so only because it was aligned with Iraq in the war (CR 2003/15, p. 20). According to Iraq's theory, the 13 Members of the Council that voted for resolution 552 were aligned with Iraq. And, so were the some 35 countries that protested or condemned Iran's attacks (CR 2003/10 para. 8.2).

24.33. Iran's suggestion that all these countries were somehow aligned with Iraq is, of course, absurd. These countries did not protest Iran's attacks because they were trying to help Iraq; they did so because Iran's attacks threatened their vital interests. Iran's attacks killed and maimed their citizens. Iran's attacks destroyed their ships and property. Iran's attacks threatened their access to oil on which their economies depended. Iran's effort to diminish the significance and extent of the international community's judgment that Iran was responsible for the attacks on neutral shipping, and expressions of serious concern about the attacks, is wholly without basis.

24.34. It is notable that expressions of concern were of no consequence to Iran. Iran's attitude is clearly seen in its Deputy Foreign Minister's response to Norway's February 1988 protest over Iranian attacks on Norwegian shipping. As the Court will recall from Mr. Mattler's presentation, the Deputy Foreign Minister acknowledged Iran's responsibility for the attacks in question, indicating that the vessels had been attacked because they were carrying cargo to or from Kuwait or Saudi Arabia, acknowledging that the attacks violated international law, and admitting that Iranian forces specifically attacked portions of the vessels where crewmembers were located. Moreover, the Iranian Deputy Foreign Minister made clear Iran's determination to continue launching such attacks, whenever possible (CR 2003/10, para. 8.38).

24.35. Having little regard for the effects of such attacks on the interests of other States, Iran questions the motives of States that acted to protect their interests from such attacks. Iran has repeatedly asserted that the United States decision to reflag Kuwaiti tankers was taken, *not* for the purpose of protecting such tankers from further Iranian attack, but to aid Iraq in its war effort (CR 2003/15, p. 14). Iran presumably takes the same view of comparable parallel efforts taken by the Soviet Union and the United Kingdom. Iran also asserts that the "real" United States motive in taking military action against the oil platforms was not to prevent their further use in attacks on neutral shipping, and thereby protect essential United States security interests, but rather to cripple Iran's economy and prevent it from winning the Iran-Iraq war.

24.36. Mr. President, Iran can question United States motives all it likes, but the facts are clear. In less than three months prior to the United States actions against the Rostam platform complex, Iran attacked four United States vessels: the *Bridgeton*, the *Texaco Caribbean*, the *Sungari*, and the *Sea Isle City*. These attacks came as the United States was making repeated diplomatic efforts — including sending Iran five diplomatic notes over a five-month period — to resolve the threat Iran's attacks posed to United States interests (CR 2003/10, para. 8.30). Iran attacked four more United States vessels in the months preceding the United States action against the Sirri and Sassan platform complexes, including laying the mines that the U.S.S. *Samuel B. Roberts* struck immediately prior to those actions (CR 2003/10, paras. 8.35, 8.41). There is no room for doubt that such attacks threatened essential interests of the United States, including the safety and security of its citizens, ships, and property. Nor should there be any mystery about why the United States, or any other State, would take such action to protect such interests. I have explained this in some detail in the first round and will not repeat that explanation (CR 2003/10, paras. 10.34-10.40).

24.37. Mr. President, this was the background, the "context", against which the United States actions against Iran's offshore oil platforms occurred. The United States did not seek to use force against Iran. Its decision to do so came only after its repeated efforts to resolve through peaceful means the threat Iran's attacks posed to its interests bore no fruit. On Monday Iran characterized as "threats" the series of diplomatic notes the United States sent to Iran in an effort to make clear its concerns about Iran's attacks (CR 2003/15, p. 22). Iran has not made clear how it would have

preferred the United States to have phrased its concerns about Iran's attacks and the damage they caused to important United States interests.

24.38. These notes expressed these concerns in clear terms (see judges' folders, Book Two, tabs 9, 10, 13, 14). They noted the long-standing United States commitment to the principle of freedom of navigation in the Gulf and to the free flow of oil from the Gulf. They expressed concern at the danger Iran's attacks posed to United States sailors, vessels, and property. They made clear that United States vessels were neutral and posed no danger to Iran. They urged Iran to cease its attacks.

24.39. But, as the Court now knows well, Iran's attacks did not cease in response to these United States diplomatic efforts; and ultimately the attacks made necessary the measures taken by the United States against the oil platforms.

The oil platforms were used for offensive military purposes

24.40. This brings me, Mr. President, to the role the platforms played in Iran's attacks on United States and other neutral shipping. In its rebuttal on Monday, Iran again told this Court in categorical terms that its oil platforms were used exclusively for commercial purposes and had no role in offensive military operations (CR 2003/16, p. 26). These statements are false and are contradicted by the weight of evidence presented by the United States in this case.

24.41. Since this point is important, I will summarize the nature of the evidence without repeating the details. That evidence includes the accounts of eyewitnesses who saw helicopters take off from the Rostam platform and attack their ships. It includes the reporting of authoritative shipping information services, including the International Association of Independent Tanker Owners and *Jane's Defence Weekly*, each of which reported Iran launching at least 14 helicopter attacks on neutral ships from the Rostam platform. It includes information reported by the General Council of British Shipping and the Norwegian Shipowners' Association of Iran's use of the Rostam, Sirri, and Sassan platforms to launch attacks on neutral shipping. It includes the assessment of shipping companies that Iran was using its platforms to attack shipping, and their costly decisions to change the routes they followed through the Gulf so as to put as much distance as possible between their ships and all three of Iran's platforms. All these sources make clear that

the story Iran has told this Court about the exclusive commercial use of its platforms is false (CR 2003/10, paras. 10.6-10.16).

24.42. The evidence also includes Iran's own documents, communications, and military records — all of which confirm its use of the platforms for military purposes. They show the platforms were part of the Iranian navy's Joint Sea-Coast One Combat Group. They show that the platforms were tasked with gathering intelligence on the movements of any foreign vessels transiting the Gulf and with communicating this information to Iranian military authorities. They show that the platforms were in communication with the Iranian military. They show that the platforms monitored and reported to the Iranian military on the movement of United States commercial shipping transiting the Gulf, including on the movement of the United States flag tanker, the *Sea Isle City*. They also show that Iran sought to keep the military role of its platforms secret by having its military personnel pose as oil company employees rather than as uniformed military officers (CR 2003/10, paras. 10.17-10.33).

24.43. Confirmation of Iran's offensive military use of the platforms is found in the number of Iranian attacks that took place in the immediate vicinity of the platforms (see judges' folders, Book Two, tab B5).

24.44. In spite of Iran's best efforts at concealment, the world was not fooled at the time by Iran's claims that its oil platforms were used exclusively for commercial purposes. Nor should this Court be misled today, because the evidence leaves no room for doubt that Iran used the platforms in its attacks on shipping.

The April 1988 United States action was necessary

24.45. I would now like to turn to one point Iran's counsel reiterated on Monday. Iran again argued that the United States explanation for its actions against the Sassan and Sirri platforms on 18 April 1988, should be rejected because those actions occurred at the same time as an Iraqi offensive against Iran and because, according to Iran's reading of an article by a participant in that day's events, the platforms were "*not* the principal intended target of the United States actions" (CR 2003/15, pp. 39-40).

24.46. Iran's first argument seems to be that the Sassan and Sirri actions must have been designed to support the Iraqi war effort and not intended to protect United States essential security interests because they took place at the same time as a major Iraqi attack (CR 2003/15, p. 39). This argument is based on pure speculation, speculation that is inconsistent with the facts. Why did the United States take action on 18 April 1988? It is apparent that the United States action was triggered by events extraneous to the Iraqi war effort. I would note there has been no suggestion of any significant Iraqi offensive, or defensive, action at the time of the first United States action, on 19 October 1987. Rather, what the 19 October and 18 April events have in common is that they were each immediately preceded by an Iranian attack on a United States vessel, and more specifically a vessel involved in the United States efforts to protect neutral shipping in the Gulf. It was those attacks that made the United States response against the platforms necessary (CR 2003/10, pp. 43-47).

24.47. Iran also asks the Court to reject the United States explanation for its 18 April military actions because it asserts that the Sirri and Sassan platforms were not the intended targets and, thus, that the actions could not have been necessary to protect United States essential security interests (CR 2003/15, pp. 39-40). In support of this argument, Iran relies exclusively on an article by Captain J. B. Perkins III (Exhibit 132).

24.48. The sentence Iran cites is shown on the screen and is at tab 5 of the judges' folders. Iran places great stress on its reading of this sentence. There are two ways to read the sentence — a sentence in the article, not from the actual order. One way is Iran's — that the final clause — "if sinking a ship was not practicable" — refers to all of the platforms in the sentence. The other is that this clause refers only to the Rahkish platform, which is mentioned immediately before the clause. For a number of reasons, the latter reading is the correct one.

24.49. First, if the United States operation had been complete and successful upon the sinking of the *Sabalan* alone, Captain Perkins would not have spoken of the operations as having multiple objectives — in the plural.

24.50. Second, Captain Perkins explains in his article that several groups of vessels were assigned to each of the three original targets, the *Sabalan*, Sassan and Sirri. That would not have been done if the Sassan and Sirri platforms were only fallback targets. Moreover, all three groups

began their operations at the same time. According to Iran's theory, two of those groups were acting contrary to orders as they were to wait to see if the *Sabalan* could be found before taking action against the platforms. That too is incorrect.

24.51. Iran's interpretation is also inconsistent with an article by two other participants in the United States operation against the platforms. In that article, Captain Bud Langston and Lieutenant Commander Don Bringle stated that various United States military aircraft were tasked with support for United States vessels in "the initial surface action against the Iranian oil platforms in the Persian Gulf and the sinking of a major Iranian naval combatant" (Exhibit 133, p. 54).

24.52. In sum, the accurate reading of Captain Perkins's article is that which is consistent with the statements of Admiral Less (Exhibit 48) and General Crist (Exhibit 44), and Captain Langston and Lieutenant Commander Bringle — that the platforms were primary intended targets of United States operations from their beginning.

24.53. Iran's counsel also suggests that the United States explanation of its actions on 18 April 1988, is inconsistent with the fact that a number of Iranian vessels were damaged during the day, not simply the *Sabalan*. However, United States forces fired on additional Iranian vessels only after these vessels attacked United States civilian and military vessels and aircraft (Exhibit 132, pp. 69-70; Statement of Admiral Less, Exhibit 48, para. 19; Statement of General Crist, Exhibit 44, para. 18; Tehran Domestic Service (Persian language), 1630 GMT 18 Apr 1988, FBIS LD181719).

24.54. Before I conclude my discussion of this issue, I would like to address one additional point. Iran makes repeated use of the remark by Secretary Weinberger that the United States forces destroyed "nearly half the Iranian navy" on 18 April 1988. Until Monday, the United States had assumed that Iran did not intend by its repetition of this phrase to mislead the Court into believing that Secretary Weinberger's statement was anything more than rhetorical. Iran has supplied no actual evidence that the totality of United States actions on 18 April 1988, affected anywhere near 50 per cent of its navy. Yet counsel for Iran stated at least twice on Monday that the United States in fact destroyed "half of Iran's navy", omitting even to say "nearly half" as Secretary Weinberger did (CR 2003/15, p. 41; CR 2003/16, p. 29). We have checked this. According to the 1989-1990 edition of *Jane's Fighting Ships* — a publicly available source that provides statistics for 1988 —

Iran's navy had approximately 250 ships, ranging from a submarine, destroyers and frigates to coastal patrol craft. Obviously, it is nonsense to say that sinking three ships and disabling one additional vessel is tantamount to destroying half the Iranian navy. And it is irrelevant to our case in any event.

Conclusion

24.55. Mr. President, Members of the Court, the Court should not be misled by Iran. Iran's attempts to deny responsibility for the pattern of sustained attacks against United States and other neutral shipping in the Gulf cannot be sustained. Even Iran's counsel does not believe that version of the events. Let me read to you from a commentary by Professor Momtaz in a book published in 1993 entitled *The Iran-Iraq War (1980-1988) and the Law of Naval Warfare* — and this is on the screen now, and may also be found at tab 6 of the judges' folders:

> "With the aim of drying up its principal source of revenue and to force it to accept its peace offers, Iraq attacked tankers heading for or leaving Iranian terminals. *Iran was led to respond by attacking neutral shipping, thereby disrupting exports of oil from other countries through the Persian Gulf.* This was in the context of Iran having recourse to the principle of indivisibility of security in the Persian Gulf in order to justify its actions. Indeed, the promoters of this new policy, *lacking in any legal basis*, nourished the hope that the victims would end up by putting pressure on Iraq to end its attacks." (P. 63; emphasis added.)

24.56. Mr. President, Professor Momtaz's view in this passage is consistent with the abundance of evidence I have just reviewed. Iran conducted a brutal campaign of attacks in the Gulf against United States and other neutral shipping. The United States refrained from the use of force and engaged in a vigorous diplomatic effort to stop those attacks without success. The United Nations, the Arab League, and many other countries joined in that effort also without success. Iran's attacks merely continued and intensified. Those attacks precipitated the United States military action against oil platforms, platforms that were clearly used to support Iran's attacks.

24.57. This is the true story — the only story consistent with the evidence before the Court.

24.58. Mr. President, Mr. Murphy is next, but you may wish to call the break at this time, since his statement is the only remaining one for our morning presentation. Thank you, Mr. President.

The PRESIDENT: Thank you, Mr. Bettauer. I think this is the time for a break, after which I will give the floor to Professor Murphy. The hearing is suspended for 15 minutes.

The Court adjourned from 11.15 a.m. to 11.30 a.m.

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

Mr. MURPHY: Thank you, Mr. President.

25. APPLICATION OF ARTICLE X OF THE 1955 TREATY TO THE FACTS WITH RESPECT TO IRAN'S CLAIM AND THE UNITED STATES COUNTER-CLAIM

25.1. Mr. President, the United States listened closely to the presentations by the Government of Iran regarding the application of Article X, paragraph 1, to the facts of this case, both with respect to Iran's claim and with respect to the counter-claim. The United States does not believe that any of the arguments made by the Government of Iran affects the soundness of the United States position (see CR 2003/11, pp. 35-60; CR 2003/13, pp. 10-44). Indeed, if anything, Iran's positions strengthen the United States case.

25.2. My presentation will proceed in four parts. First, I will suggest areas where the Parties agree on the interpretation of Article X, paragraph 1. Second, I will apply those areas of agreement in a consistent manner to both Iran's claim and the United States counter-claim: and in doing so I will explain why it is that the former should fail and the latter should succeed. Third, I will address various points raised by Iran this past Monday in support of its claim under Article X. And finally, I will address various points raised by Iran last Friday in opposition to the United States counter-claim.

I. The Parties' approach to interpretation of Article X, paragraph 1

25.3. Let me turn to the first part of my presentation. Fortunately, Mr. President, the two Parties are in agreement on core aspects of the manner in which Article X, paragraph 1, should be interpreted.

25.4. First, both Parties agree that the Court needs to find the existence of specific "commerce", or the existence of specific "commerce and navigation", the "freedom" of which has been impeded by the other Party (CR 2003/11, pp. 36-37, paras. 15.6-15.12; CR 2003/13,

pp. 24-28; CR 2003/14, p. 45, para. 3). Indeed, both Parties agree that focusing on commerce and navigation does not mean commerce or navigation in some abstract sense but, rather, commerce and navigation that *actually* exists and hence that can be related to particular commercial or navigational activities (CR 2003/11, p. 36, para. 15.11; CR 2003/14, p. 51, para. 17; p. 53, para. 20). The Court, too, recognized this in its 1996 Judgment at paragraphs 50 and 51 (anticipating a merits decision on "to what extent *the destruction of the Iranian oil platforms* had an effect upon the export trade in Iranian oil"; emphasis added).

25.5. Thus, in the context of Iran's claim, the Court should focus on whether there existed commerce flowing from the three oil platforms, the freedom of which was impeded by the United States actions. In the context of the United States counter-claim, the Court should focus on whether there existed commerce and navigation relating to neutral vessels, the freedom of which was impeded by Iran's mines, missiles, gunboats, and other attacks in the Persian Gulf, the Straits of Hormuz, and the Gulf of Oman.

25.6. Second, the Parties agree that, in determining whether there has been an impediment to "commerce" within the meaning of Article X, paragraph 1, the Court must focus on whether there has been: first, an act entailing the destruction of goods destined to be exported: second, an act capable of affecting their transport; or third, an act capable of affecting their storage with a view to export (CR 2003/11, pp. 36-37, paras. 15.10-15.12; CR 2003/15, p. 44, para. 5).

25.7. Third, the Parties agree on the importance of the Court finding that actual commerce and navigation was "between the territories" (CR 2003/11, pp. 39-41; CR 2003/13, pp. 28-31; CR 2003/14, p. 45, para. 3; p. 50, para. 13). As counsel for Iran quite rightly stated, "Article X, paragraph 1, does not guarantee freedom of commerce or navigation in general . . . but the freedom of commerce and navigation bilaterally, between the territories of the [two] parties." (CR 2003/14, p. 47, para. 6.)

25.8. Fourth, the Parties largely agree on what is meant by commerce "between the territories" of the two States. Iran and the United States agree that this clause entails the movement of a product from one country to the other country (CR 2003/11, p. 40; CR 2003/15, p. 46) ("le produit concerné . . . doit partir du territoire de l'une des Parties . . . pour être acheminé vers l'autre"). Now, Iran further stated, on Monday, that the product can either proceed directly

between the States or can transit through one or more third States (CR 2003/15, p. 47, para. 14). Even if one accepts Iran's formulation concerning transit, it is clear from that formulation that the *same product* must depart from one territory and then eventually make its way to the other territory.

25.9. Fifth, the Parties agree that the Court has not yet made any such findings in this case. Thus, as Professor Pellet noted, the Court, in 1996, did not decide whether, in fact, the United States attacks on the platforms actually impeded commerce between Iran and the United States (CR 2003/15, p. 44; see CR 2003/11, p. 37, para. 15.12), just as the Court, in 1998, did not decide whether, in fact, Iran's attacks on neutral vessels actually impeded commerce or navigation between Iran and the United States. Those are the tasks now before this Court.

25.10. Finally, the Parties agree that each bears the burden of proof in establishing that the commerce or navigation, upon which its claim is based, was impeded between the territories of the two States (CR2003/11, pp. 11-12, para. 12.13; CR 2004/14, pp. 44-45, para. 2). If either or both Parties have failed to place before the Court evidence sufficient to establish that actual commerce or navigation was impeded between the territories of Iran and the United States, then this Court should dismiss the claim.

II. Applying this approach consistently, Iran's claim fails and the counter-claim succeeds

25.11. Let me turn now to the second part of my presentation. Having agreed on these core elements of Article X, paragraph 1, and on the burden of proof, the Parties are, of course, in disagreement on how the Court should apply Article X, paragraph 1, to the facts of this case. In our view, a consistent application of the law to the facts pled by Iran and by the United States must lead the Court to the following conclusions.

25.12. With respect to Iran's claim, Iran has not proven that there was specific and actual commerce in Iranian crude oil from these three oil platforms to the United States at the time of the United States attacks or thereafter. Either the platforms were non-functional — were non-functional — at the time of the attacks — the Rostam and the Sassan platforms — or the platforms were attacked at the time when there was an embargo on the export of Iranian-origin crude oil to the United States — that is the Sirri and Sassan platforms (CR 2003/11, pp. 41-44,

paras. 15.27-15.38). Consequently, it was impossible for the United States actions against the platforms to impede oil commerce between the territories of the two States, since no such commerce existed. Moreover, Iran has not proven that the United States attacks impeded any actual "commerce" of the Iranian platforms at all, in that the platforms themselves were not producing a good that was yet capable of being exported and the attacks did not affect either the means of transporting or of storing goods destined for export (CR2003/11, pp. 37-39, paras. 15.13-15.18).

25.13. By contrast, the United States has proven, and Iran has not refuted, that there were actual and extensive exports and imports between the territories of the two States in products other than oil throughout the relevant time period, with a significant portion of that commerce occurring via maritime transport (see Exhibits 139-140, 164-165). For example, the evidence before you shows that the United States exported to Iran in 1988 fertilizers and fertilizer material valued at US$50.7 million, all of which travelled from the United States to Iran by ship (see Exhibit 165, p. 789). In the same year, the United States imported from Iran US$1.7 million of fresh or dried fruit, virtually all of which travelled from Iran to the United States by ship (see Exhibit 39, p. 552). Moreover, the United States has proven that vessels travelling from United States ports or territorial waters to Iranian ports or territorial waters, even if to pass innocently through Iranian territorial waters to another destination, were clearly in jeopardy because of Iran's acts (CR 2003/13, pp. 28-29, paras. 21.18-21.20). As such, the evidence establishes that there was commerce and navigation between the territories of the two States which the Iranian attacks on maritime shipping could impede. And, as I will briefly discuss later, our evidence shows that this commerce and navigation was, in fact, impeded.

25.14. Before turning to a more detailed look at Iran's comments on the claim and counter-claim as they relate to Article X, I am obliged to comment generally on two points made by counsel for Iran last Friday. First, the United States position is not that Iranian oil went to other countries and then at some point came to the United States (CR 2003/14, p. 49, para. 13). Our position is that nothing that could be deemed an *Iranian* oil product came to the United States *at all* in the relevant time period and, as such, there was no commerce in oil between the two States. Further, with respect to the counter-claim, we are not asserting that Article X, paragraph 1, covers

general freedom of commerce and navigation, "irrespective of the destination of the vessels or their cargoes" (CR 2003/14, p. 50, para. 13). Rather, our evidence proves that there was extensive commerce and navigation directly between the two States as evidenced by detailed data and the reports of shipping companies in the relevant time period.

III. There was no commerce in Iranian crude oil from the three platforms to the United States that could have been impeded by the United States actions

A. There was no concrete impediment to the export of Iranian crude oil

25.15. Let me turn to the third part of my presentation, which addresses some of Iran's specific comments regarding its claim under Article X of the 1955 Treaty. Among other things, the United States is struck by how Iran's own interpretation of Article X, paragraph 1, as it relates to the counter-claim completely undermines Iran's own claim.

25.16. For example, counsel for Iran said that:

> "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." (CR 2003/14, p. 51, para. 17.)

To that end, when discussing the counter-claim, counsel for Iran are very focused on whether specific vessels carrying specific cargo went between Iran and the United States (CR 2003/14, pp. 16-22).

25.17. But what "concrete impediment or impairment" of protected commerce underlies Iran's claim? As we demonstrated in the opening round, the attacks on the platforms did not destroy goods destined for export. The attacks on the platforms did not affect the means of transporting or storing such goods (CR 2003/11, pp. 37-38, paras. 15.14-15.18). Counsel for Iran responded on Monday by saying that we were making a wrong assumption; that we were not focusing on whether the product was *capable* of being exported (CR 2003/15, pp. 44-45, paras. 7-8) ("susceptible d'être exporté"). Yet that is precisely our point; the oil extracted from the platforms was not — was not — capable of being exported; it had to undergo certain processes on Iranian territory before being transformed into a different product, and only then was *that different product* capable of being exported. Hence, the United States actions were not a concrete

impediment to protected commerce. Professor Pellet seeks to expand the idea of a "product capable of being exported" to all the constituent elements that comprise production. Under his approach, broken clippers really are protected by Article X (see CR 2003/11, p. 39, para. 15.18), because some day those broken clippers might be fixed, they might shear the sheep, the wool of the sheep might be made into a carpet, the carpet might be exported, and that export might make its way to the United States. But the Court should not read Article X so expansively.

25.18. Counsel for Iran on Monday also asserted that, by attacking the topsides of the platforms, the United States made it impossible to transport oil from the oilfield by subsea pipelines to Lavan and Sirri Islands (CR 2003/15, p. 40, para. 35, pp. 45-46). But the evidence before the Court, from an engineer experienced with Iranian offshore oil platforms, is to the contrary and is unrefuted. That evidence — which could not have been missed by Iran since we also placed it in the judges' folders in the opening round — shows that the attacks on the topsides of the platforms "would not affect Iran's ability to use the undersea pipeline connected to these platforms to transport" the extracted oil (Exhibit 212, para. 16). Iranian counsel's only response to this evidence is to point to their own personal opinions, which, of course, are always interesting, but not evidence. As such, even assuming that the oil extracted by the platforms is an exportable good, there is no basis for saying that the attacks on the topsides of the platforms constituted a concrete impediment to the oil's movement.

25.19. Moreover, since the Rostam and Sassan platforms were not functioning, the attack on those platforms did not result in any "concrete impediment or impairment" of any commerce at all, let alone commerce with the United States. The Sirri platform was functioning, but not engaged in any commerce with the United States due to the United States oil embargo; thus, the attack on that platform also did not result in any "concrete impediment or impairment" of commerce with the United States. Iran continues to make much about the overall history of Iranian oil exports to the United States, but Iran has presented no evidence that any crude oil originating from these platforms was ever transported by vessel or otherwise to the United States.

B. The platforms were either not functioning or were prevented by the United States embargo from producing goods for export to the United States

25.20. Counsel for Iran also reiterated on Monday that Rostam and Sassan platforms were on the verge of being repaired, stating that this was supported by "a contemporary work report and affidavits of NIOC personnel actually on the platforms and responsible for them at the time of these attacks" (CR 2003/15, p. 32, para. 23; see CR 2003/15, pp. 49-50). Mr. President, with all due respect, this is simply not true. Neither of the two affidavits submitted by Iran regarding the allegedly imminent completion of repairs were from persons stationed on the platforms, let alone on them at the time of the attacks (see Reply of Iran, Vol. IV, Hassani Statement; Sehat Statement). As for the "contemporary work report" attached to both affidavits, it's hard to know if it was "contemporary" or not since there is no date on it. It may be a work report of some sort, but it appears to be just a schedule for repairs reflecting no actual date for resumption of oil production.

25.21. Thus, Iran asks us to believe that these particular platforms just happened to be on the verge of operating at the time of the United States attacks, not on the basis of any serious documentary evidence from October 1987 or April 1988 but, rather, on the basis of two affidavits completed almost a dozen years later, in 1999, for purposes of this litigation. The evidence produced by Iran is inadequate to support a finding by this Court, and it is absurd for Iran to seek to escape its burden by arguing that the United States has failed to produce intelligence reports to prove the negative.

25.22. Iran also addressed on Monday the fact of the United States oil embargo. Iran agrees that the Court cannot rule on the legality of that embargo, at least in the sense of its being addressed in the Court's *dispositif* (CR 2003/15, pp. 50-52). Iran also appears to agree that the United States embargo is a *fact*, a fact that the Court can take into account in the course of its decision (*ibid*., p. 52, para. 26). To put the issue clearly, imagine the following scenario. Imagine that the United States imposed an embargo on both Iran and Iraq in 1980, at the beginning of the Iran-Iraq war. Suppose the United States then maintained that embargo right up until the present day. In such a case, the United States actions against the Iranian oil platforms in 1987 and 1988 could not be regarded as a violation of Article X, paragraph 1, because those acts could not impede any actual commerce between the two States. This must be the case, in light of the agreements between the Parties on how one interprets Article X, which I outlined earlier. Such oil commerce simply would

not exist as a factual matter. Now, Iran might try to challenge the legality of the United States embargo itself as an impediment to such commerce, but that would entail fully addressing the facts and the law *of imposing an embargo* in response to the Iran-Iraq war, not the facts and the law relating to the attacks on the platforms.

25.23. Applying that reasoning to this case, the Court is faced with the fact of the embargo, and an embargo that precluded oil commerce between the two States in the relevant time period. Such a fact is precisely the kind of information that the Court in 1996 did not have before it, and that the Court now must consider in determining "to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 820, para. 51). The United States is not asking the Court to declare the embargo to be lawful or unlawful; indeed, the Court does not have before it the legal and factual pleadings to do so. Rather, the United States is asking the Court to regard the embargo as a fact, consistent with the Court's prior jurisprudence (CR 2003/15, p. 52, fn. 67), and to take that fact into account in determining whether actual commerce from the platforms was impeded. Iranian counsel can label this reasoning as cynical if he so wishes, but this is the posture in which the Court finds itself given the case that Iran has brought.

25.24. Iran has also argued that the embargo was lifted in "1990-1991" (CR 2003/6, p. 37, para. 81), suggesting that, at least at this point, there was oil commerce between Iran and the United States. This, however, is not correct. In 1991, the United States decided to make a narrow exception to the embargo for a limited purpose (56 *Federal Register* 11100, 15 March 1991). That exception resulted in the issuance of a small number of licences for the import of Iranian oil, on a case-by-case basis, with the proceeds of the transaction paid into the Security Account established by the Algiers Accords to secure payment of awards rendered against Iran by the Iran-United States Claims Tribunal. The exception assisted Iran in partially meeting its unmet obligation to replenish the Security Account. Thus, in 1991, the embargo was not lifted and general commerce in oil between Iran and the United States did not recommence. Moreover, it is obvious that the United States actions against the platforms had no effect on Iran's ability to supply the small amount of oil that was the subject of the licences that were issued.

25.25. As shown by Iran's arguments on Monday, the only way — the only way — Iran can argue that the attacks on the platforms impeded any commerce with the United States is to make a "general allegation" about unspecified oil commerce — or about the "freedom" of such oil commerce (see CR 2003/15, p. 47) — from these platforms, precisely the kind of general allegation that Iran last Friday said could not be sustained under Article X, paragraph 1 (CR 2003/14, p. 51, para. 17: "It is not enough to make a general allegation, unsupported by any actual case of the impairment of protected maritime commerce."). Iran's general allegation follows two paths: a general allegation that Iranian crude oil exports to Europe thereafter transited onward to the United States; and a general allegation about potential future Iranian oil exports to the United States. Let me touch briefly on each in turn.

C. Iran has failed to prove that any Iranian crude oil exported during the United States embargo then transited through Europe to the United States

25.26. In the opening round, the United States addressed in detail Iran's general allegation about Iranian crude oil exports *to Europe* (CR 2003/11, pp. 45-48, paras. 15.44-15.56). I will not repeat those arguments today. But I do observe that Iran's own counsel said repeatedly on Friday that a vessel carrying oil cargo that cannot call at United States ports with that cargo is not engaged in commerce between the territories of Iran and the United States (CR 2003/14, p. 18, para. 29; p. 19, para. 32; p. 20, para. 35; p. 21, para. 41). Yet vessels carrying Iranian crude oil to Europe also could not call at United States ports with that cargo as of 29 October 1987, nor could any Iranian crude oil be imported into the United States from any third countries. Hence, when that fact is combined with the fact that the Rostam platform was producing no crude oil at all at the time the United States took action against it, Iran itself, in effect, has admitted that there was no commerce between the territories of Iran and the United States in crude oil at the time of the United States attacks.

25.27. Counsel for Iran also stated clearly and unambiguously that a vessel "sailing from . . . Abu Dhabi to the United States . . . carrying goods originating in Abu Dhabi . . . is [not] engaged in commerce between the territories of the High Contracting Parties" (CR 2003/14, pp. 46-47, para. 6). Yet, if that is the case, then a vessel sailing from Europe to the United States carrying goods that originated in Europe is not engaged in commerce "between the territories" of Iran and

the United States. And, by the same logic, a vessel sailing from Iran to Europe carrying goods originating in Iran, and that are destined for sale in Europe, is also not engaged in commerce "between the territories" of Iran and the United States.

25.28. We have established that the Iranian crude oil that originated in Iran was completely different from the refined oil products produced in Europe; these were not products originating in Iran that "transited" through Europe. If the phrase "between the territories" means that goods must either proceed directly between the two States or "transit" through third States (see *supra*, para. 25.8), then we have demonstrated that no one in the international business community would regard United States imports of refined oil products from Europe as imports of Iranian origin products that merely "transited" through Europe (CR 2003/11, pp. 47-48, paras. 15.51-15.54). Iran failed to respond to that argument. Hence, we are left with that lone voice of Iran's oil expert, who declared Iran's crude oil to have been "denationalised" after it arrived in Europe (Reply of Iran, Vol. III, Odell Statement, pp. 7-8). In short, using Iran's own interpretation of Article X, paragraph 1, we have zero commerce "between the territories" regarding vessels going from Iran to Europe, and we have zero commerce "between the territories" regarding vessels going from Europe to the United States. Perhaps there is an old carnival song somewhere that "Two times zero is zero, and remains zero!" (see CR 2003/7, p. 32, para. 10).

25.29. Indeed, Iran last Friday emphasized that "[t]his is a bilateral treaty", and thus commerce involving third States is not at issue before the Court (CR 2003/14, p. 47, para. 6). If that is the case, then sales of refined oil products from European sellers to United States purchasers are not before this Court for purposes of Article X, paragraph 1.

D. Iran cannot sustain a violation of Article X based on speculation about potential future oil commerce

25.30. The United States has already addressed in detail Iran's general allegation about *potential* Iranian crude oil exports to the United States (CR 2003/11, pp. 48-52, paras. 15.57-15.68; pp. 54-57, paras. 16.2-16.15). I will not repeat those arguments today, except to respond to Iran's argument from Monday. On the one hand Iran says that Article X, paragraph 1, "n'est pas fondé[e] sur une réalité de l'instant; elle implique une *faculté* pour l'avenir" (CR 2003/15, p. 47, para. 15 (Pellet)). At the same time, Iran accepts that you must find an example of actual impediment of

commerce (*ibid*., pp. 47-48, para. 16). But, with all due respect, Iranian counsel still cannot point to *any* transaction involving exports of crude oil from any of these platforms to the United States that was impeded by the United States actions against the platforms. There is simply no such evidence in the record on that point. To borrow from Professor Crawford's language, from his discussion of the counter-claim, Iran "has to be able to point to *actual* cases of *actual* impairment of the freedoms protected by Article X, paragraph 1" (CR 2003/14, p. 53, para. 20). This Iran has not done. Moreover, Iran "cannot improve the situation by continually repeating" (*ibid*., para. 19), in a silken voice, that freedom of Iranian commerce from these platforms to the United States was impaired, or potential commerce was impaired, by the United States actions. In short, again borrowing from our opponents: "Not to be able to point to any actual cases of loss or damage to that commerce . . . suggests that the [claim] as a whole lacks substance." (CR 2003/14, p. 52, para. 18.) Iran's failure to provide detailed evidence concerning any impediment to oil commerce from these platforms resulting from the United States operations again must lead this Court to find against Iran's claim (see *Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 204, para. 76).

25.31. Now, counsel for Iran noted on Friday that the Court can only act on the basis of the information before it (CR 2003/14, p. 58, para. 32). On the basis of that information, no breach of Article X, paragraph 1, with respect to commerce between the United States and Iran has been proved by Iran in support of its claim. In this key respect, the Iranian claim must be dismissed entirely for want of proof. Again, to borrow Professor Crawford's felicitous phraseology: even if there "might have been" such crude oil commerce, a judgment of State responsibility cannot be founded on a "might have been" (CR 2003/14, p. 58, para. 32).

25.32. The Court's jurisprudence fully supports the dismissal of a claim that is speculative or remote, whether one looks early in the tenure of this Court at the *Ambatielos* case (*Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 18; "[i]t is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty" upon whose compromissory clause it relies) or looks to the more recent decision of this Court's Chamber in the 1989 *ELSI* case (*Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 62, para. 101; finding that the claim was "purely a matter of speculation"). The same is true of the jurisprudence of the Iran-United States Claims Tribunal, where Iran itself — indeed, the NIOC itself with respect

to harm allegedly caused by products derived from the exports of Iranian crude oil — has successfully argued in favour of the dismissal of cases on grounds that the law declines to trace a series of events beyond a certain point (see, e.g., *Hoffland Honey Co*. v. *Nat'l Iranian Oil Co.*, Award No. 22-495-2, 2 Iran-U.S. Cl. Trib. Rep. 41, 42 (Jan. 26, 1983; dismissing claim by United States national against the NIOC for alleged harm from agri-chemicals produced using Iranian crude oil exports).

E. Since Iran was using the platforms for offensive military activities, the platforms cannot be viewed as protected under Article X

25.33. I have two final points with respect to Iran's claim under Article X. Notwithstanding Iran's protests, the oil platforms — regardless of whether their traditional use constituted "commerce" — were in fact being used in support of ongoing offensive military activity directed against United States interests and the interests of other States as well. Assuming that the United States has proven this to the satisfaction of the Court, such non-commercial activities cannot possibly be shielded by, and benefit from, the "freedom of commerce and navigation" clause in Article X, paragraph 1 (see CR 2003/11, pp. 57-59).

25.34. As for the issue of reparations for Iran's claim, we stand by the comments we made in the opening round (CR 2003/13, pp. 43-44, para. 21.66). I do need to correct, however, a statement made by the Iranian Agent on Monday. Mr. Zahedin-Labbaf asserted that United States oil companies had relied on the 1955 Treaty to obtain compensation in the Iran-United States Claims Tribunal for lost profits that would have been earned for future production of the very platforms at issue in this case (CR 2003/16, pp. 33-34, para. 4). With all due respect, this is simply not true. In not a single case did the Iran-United States Claims Tribunal award lost profits in relation to the production of oil at offshore oil platforms. There was one case where the Tribunal awarded compensation for lost profits for expropriated oil equipment, but even there the lost profits were limited to a seven-month period ending on 1 May 1981, more than six years prior to the United States operations against the three oil platforms (see *Sedco I*, Award 309-129-3, 15 Iran-United States Claims Trib. Rep. 23, para. 86).

IV. Iran's attacks on neutral vessels in the Gulf violated Article X, paragraph 1

A. Jurisdiction and admissibility

25.35. Mr. President, allow me to turn to the fourth part of my presentation, which addresses Iran's presentation last Friday regarding the United States counter-claim. Taking first the issue of jurisdiction and admissibility, Iran's statements last Friday disclose no infirmities in the United States position that, in 1998, the Court resolved the issue of jurisdiction over the counter-claim, as well as various issues of admissibility (see CR 2003/13, pp. 10-17). It is true that the United States letters to the Court prior to the 1998 Order urged the Court to consider solely the issue of the connection of the counter-claim to Iran's claim. Yet, it is equally true that Iran's letters to the Court urged the Court to consider broader issues relating to jurisdiction and admissibility (see Iran letter of 2 October 1997; Iran letter of 27 October 1997; Iran request for a hearing of 18 November 1997). And, in fact, in the 1998 Order the Court *did* reach the issues of jurisdiction and admissibility (see *I.C.J. Reports 1998*, p. 204, para. 36, stating that the Court "has jurisdiction to entertain the United States counter-claim"; *I.C.J. Reports 1998*, p. 206, para. 46, stating that "the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings"). Thus, in our view, none of Iran's challenges to the Court's jurisdiction should now be revisited. In this regard, the United States would like to stress three basic points.

25.36. First, Iran has continued to suggest that the counter-claim is inadmissible because there might be a further negotiation for settlement. To be candid, Mr. President, this is not a serious argument. We have fully addressed this point previously during this hearing (CR 2003/13, pp. 15-16, paras. 19.21-1924). Iran's interpretation of what the compromissory clause requires is inconsistent with this Court's position on this issue in 1996 in this very case with respect to Iran's claim. Iran's interpretation is also inconsistent with what this Court said in 1984 on this issue in the *Nicaragua* case (*I.C.J. Reports 1984*, pp. 427-429, paras. 81 and 83, finding the Nicaraguan claim under the 1956 Treaty admissible, despite the United States argument that "Nicaragua has never even raised in negotiations with the United States the application or interpretation of the [FCN] Treaty to any of the factual or legal allegations in its Application"; see Counter-Memorial on Questions of Jurisdiction and Admissibility of the United States, *I.C.J. Pleadings*, Vol. II, p. 55,

para. 182). In light of the Court's prior rulings, the United States counter-claim cannot be deemed inadmissible on grounds that there might have been some further efforts at negotiating a settlement of the United States claim.

25.37. Second, Iran continues to maintain that the United States is precluded from providing to the Court information beyond that contained in the counter-claim as filed in 1997. This, too, is not a serious argument. Our claim is that Iran violated Article X by various acts in the 1980s. We have provided evidence of that violation as a part of our various written pleadings to the Court, just as Iran has provided evidence over the course of its written pleadings to the Court that Iran believes develops and substantiates its claim. There is nothing inadmissible about providing such additional evidence, either up to this point or in the future with respect to the determination of appropriate reparations.

25.38. Third, Iran maintains that there is a problem with the Court's *jurisdiction ratione materiae,* because the United States evidence in part relates to vessels that are not under United States flag. This argument is raised both as a jurisdictional point and as a grounds for there not being a violation of Article X, paragraph 1. I will address this issue in a moment in the course of discussing whether there was a breach of Article X, paragraph 1. But for now, let me just note that — as we made clear in our prior oral pleading — the United States counter-claim seeks to protect the legal rights and interests *of the United States and its nationals* (CR 2003/14, pp. 20-21). The United States is not acting as a "universal guarantor" of the rights of other States or of non-United States nationals (see CR 2003/14, p. 27, para. 13), nor is the United States advancing rights held *erga omnes* (see CR 2003/14, p. 31, para. 24). Rather, the United States is protecting its own rights and interests under Article X; indeed, protecting the very interests Article X was crafted to address. Further, our claim is predicated on wrongful *Iranian* acts; the United States does not seek any reparations for acts of other States, such as Iraq.

B. The facts supporting the counter-claim

25.39. Let me turn from issues of jurisdiction and admissibility to issues relating to the facts underlying the counter-claim. These facts are fully before the Court in the written and oral

pleadings (see CR 2003/13, pp. 17-23; CR 2003/17, paras. 24.1 *et seq.*). I will not repeat them here. However, I wish to make two general points and one detailed point.

25.40. The first general point relates to Iran's treatment of the evidence underlying the counter-claim. Counsel for Iran went so far last Friday as to say that, before this Court, there is "one clear fact" — "one clear fact" —that the threat to commercial shipping in the Gulf came from Iraq (CR 2003/14, p. 12, para. 8). He also said "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", and that party was Iraq (CR 2003/14, p. 14, para. 16).

25.41. Mr. President, in what sense is this the "one clear fact" before you? The record before this Court is replete with evidence of those who viewed Iran as a threat to commercial shipping in the Gulf and as impeding freedom of commerce in the Gulf. Our evidence shows that a variety of reputable shipping companies reported on and reacted to *Iran's* attacks against neutral vessels (see CR 2003/9, pp. 20-26; CR 2003/10, pp. 27-33). Our evidence includes reports of eyewitness accounts of crew members who were on board merchant vessels attacked by *Iran*, including an account that witnesses saw helicopters lifting from *Iran's* Rostam platform and firing missiles on neutral vessels (see, e.g., Rejoinder of the United States, para. 1.23). Our evidence shows that numerous governments complained about and reacted to *Iran's* attacks on neutral vessels. Those governments brought those complaints concerning *Iran*'s attacks to the United Nations Security Council, as Mr. Bettauer emphasized this morning (see Exhibits 181, 193, 201, 202). The Security Council condemned *Iran's* attacks (Exhibit 27: "*The Security Council, Having considered* the letter dated 21 May 1984 from the representatives of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (S/16574) complaining against Iranian attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia . . . *[c]ondemns* these recent attacks . . ."). The Arab League condemned *Iran's* attacks (Exhibit 182: "The Conference expressed its support for Kuwait in confronting the threats and aggressions of the Iranian regime"). The Gulf Co-operation Council condemned *Iran's* attacks (Exhibit 183: reviewing "Iran's aggression against shipping to and from the ports of the GCC member countries" and expressing "its denunciation of those attacks") .

25.42. What is it about any of this evidence that makes it a "clear fact" or of "no doubt" that it was Iraq and only Iraq who threatened neutral shipping in the Gulf? If there is one clear fact in this case, Mr. President, it is that everybody viewed Iran's attacks as a threat to commercial shipping in the Gulf. Whether they also considered Iraq's acts to be a threat is not before this Court. Iran's characterization of the condemnation of its attacks as some grand global conspiracy against Iran rings very hollow. Indeed, the comments by Iran's own officials at the time indicate that Iran celebrated such attacks as a threat to commercial shipping (CR 2003/13, p. 19, para. 20.4), for that was the very purpose of undertaking them.

25.43. My second general point concerns the nature of some of the evidence before the Court. Counsel for Iran on Monday referred to *Lloyd's List* as "one of those so-called 'authoritative third party sources'" relied on by the United States (CR 2003/15, p. 35, para. 9). Now it is not clear whether Iran is challenging the veracity of such sources, which would be odd since Iran itself uses and relies upon such sources in its own pleadings (see, e.g., CR 2003/15, p. 41, para. 37). What we would like to observe, however, is that this Court has relied on sources such as *Lloyd's List* previously in its decisions, such as in the course of finding that United States mines had harmed vessels in the *Nicaragua* case (see, e.g., *I.C.J. Reports 1986*, p. 14, para. 77; see also Keith Highet, "Evidence, the Court, and the Nicaragua Case", 81 *AJIL*, p. 1, pp. 49-50 (1989)). So, it appears that this Court views such publications by authoritative and responsible industry sources as having evidentiary significance.

25.44. My more specific point on the facts relates to the vessel *Texaco Caribbean*. Last Friday, on two occasions, counsel for Iran asserted that the evidence before this Court demonstrated that the crude oil carried by the *Texaco Caribbean* was owned by a Norwegian shipping company (CR 2003/14, pp. 20-21, para. 37; p. 57, para. 30). I am quite certain that counsel for Iran are not seeking to mislead the Court on this point but, rather, that they are simply having trouble keeping up with the extensive evidence that the United States has placed before the Court in support of the United States counter-claim. But let us be very clear about what that evidence says on this point. In their assertions regarding the ownership of the *Texaco Caribbean*'s cargo, counsel for Iran direct the Court's attention solely to Exhibit 25 of Iran's Observations and Submissions on the U.S. Preliminary Objection, which was filed back in July 1994. Exhibit 25 is

an excerpt from a 1987 publication entitled *Middle East Economic Survey* (see also Further Response to the United States' Counter-Claim of Iran, 24 September 2001, paras. 4.18-4.19). That excerpt contains a footnote which states that the ownership of the *Texaco Caribbean*'s cargo is "shrouded in mystery" and that an unnamed spokesman for Texaco said that the *Texaco Caribbean* "was under orders to Northwest Europe with a cargo belonging to" a Norwegian company.

25.45. But the submission of evidence to this Court did not cease in 1994. In the United States Rejoinder, filed in March 2001, the United States lifted the "shroud of mystery" — so to speak — regarding the provenance of the *Texaco Caribbean* and its cargo. United States Exhibit 211 is the February 2001 statement of Mr. Robert Phillips, Senior Counsel at Texaco Inc., who had been employed by Texaco Inc. or a subsidiary since 1972. In that statement, Mr. Phillips notes that on 10 August 1987, the *Texaco Caribbean* was under a bareboat charter arrangement to a Texaco subsidiary. Further, Mr. Phillips's statement unequivocally states that the cargo of Iranian light crude oil on the *Texaco Caribbean* was owned by Texaco International Trader Inc., a United States company incorporated under the laws of Delaware, which was itself a wholly owned subsidiary of Texaco Inc., also organized under the laws of Delaware.

25.46. In the final pleading on the counter-claim, Iran did nothing to dispel the veracity of this evidence. There can be no doubt, therefore, on the evidence before the Court, that the cargo of the *Texaco Caribbean* was United States-owned.

C. There was commerce and navigation directly between the two States that Iran's acts impeded in violation of Article X, paragraph 1

25.47. Now let me move from the facts underlying the counter-claim to a few points regarding the application of Article X of the 1955 Treaty to those facts.

25.48. As the Court knows, the United States counter-claim asserts that Iran violated Article X, paragraph 1, with respect to the freedom of commerce and navigation. We demonstrated that last Wednesday (CR 2003/13, pp. 12-13, paras. 19.12-19.14), and in its response Iran did not challenge that both freedoms are at issue and instead they assumed that they were at issue (see, e.g., CR 2003/14, p. 46, para. 5: "assuming that freedom of navigation is separately in issue in the counter-claim").

25.49. So, while Iran now apparently accepts that the freedoms of commerce and navigation are both at issue in the counter-claim, nevertheless Iran's defence is predicated almost exclusively on the issue of freedom of commerce. Thus, all three Iranian counsel on Friday went to great lengths to address whether cargo on particular vessels was part of trade between Iran and the United States. Yet those points do not speak to the issue of navigation between the territories of Iran and the United States. All of the vessels discussed in the United States counter-claim, as well as others operating in the region, enjoyed the right under the 1955 Treaty to pass innocently through Iranian territorial waters en route to or from the United States. Yet Iran forced those vessels out of its territorial waters and into a narrow channel, where they were threatened with attack by Iran, forcing them to take extreme measures for their protection. These actions by Iran denied those vessels the ability to engage in freedom of navigation between the territories of the two States. Further, United States military vessels engaged in protecting convoys of such vessels were acting in a manner ancillary to such protected navigation and, as such, were themselves protected by Article X, paragraph 1.

25.50. Similarly, such actions violated the freedom of commerce between the territories of Iran and the United States, whether the goods originated in Iran or in other Gulf States but were to pass through Iranian waters en route to the United States (or vice versa). We recounted for you in the opening round and in the written pleadings the myriad and significant ways that such "freedom of commerce" was impeded, through damage to vessels, through higher navigational risks, delayed passages, more expensive insurance premiums, costs incurred in modifying the vessels, and increased labour costs (CR 2003/13, pp. 20-21, paras. 20.7-20.14; pp. 28-29, paras. 21.18-21.20). The Court in the *Nicaragua* case found such types of impediments relevant in finding the United States to have violated the "freedom of commerce and navigation" (see, e.g., *I.C.J. Reports 1986*, pp. 47-48, paras. 79-80: "some shipping companies stopped sending vessels to Nicaraguan ports"; "personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates").

25.51. Further, the Court in the *Nicaragua* case did not find it necessary to establish at the merits phase whether the particular vessels harmed by the mines in that case were carrying cargo between the United States and Nicaragua. Counsel for Iran seeks to set aside the result in the

Nicaragua case by arguing that the "mining of ports" is different from the case now before this Court (CR 2003/14, pp. 47-48). Of course, the mining in Nicaragua was not just in ports; it was also in territorial waters. Yet, more importantly, the sweep of the Court's decision in that case is broader than that suggested by Iran. In the *Nicaragua* case, the existence of maritime commerce and navigation between the two States, combined with the specific impediment to that commerce from the deployment of United States mines in waters used for that commerce and navigation, was sufficient to sustain Nicaragua's treaty claim at the merits phase. The Court should do no less in this case with respect to Iran's mines and attacks.

25.52. In Professor Momtaz's presentation on Monday, he criticized the United States for referring to Iran as having a wartime "exclusion" zone as opposed to having just a "war zone" ("zone de guerre") through which, he asserted, neutral vessels could pass. He said that any vessels that travelled outside the zone did so by their own choice, and thus there was no "exclusion". With all due respect, Members of the Court, no matter what one calls the zone, it is clear that non-Iranian bound vessels did not believe they had much of a "choice" in the matter. Our evidence is replete with information that vessels stayed out of the zone to avoid Iranian attacks.

25.53. Moreover, consider the excerpts from Professor Momtaz's own commentary on the zone that were published in 1993 (see D. Momtaz, "Commentary on Iran", in *The Iran-Iraq War (1980-88) and the Law of Naval Warfare*, pp. 19-20: A. de Guttry & N. Ronzitti, eds., 1993)), which appear now on the screen and also at tab 7 in the judges' folders. In that commentary, Professor Momtaz states that "the dereliction of their duty of neutrality by certain countries bordering on the Persian Gulf caused Iran to attack tankers travelling to and from those countries more or less openly" *(ibid.)*. That posture by Iran, of course, is not exactly an invitation to enter Iran's "zone de guerre". Professor Momtaz's commentary then goes on to state that if such a vessel wanted to pass through Iran's zone, it had to request prior authorization from Iran and had to provide Iran with information on their destination, time of departure, route, speed, and means of visual identification (*ibid.*, p. 20). Again, given that Iran was "more or less openly" attacking such vessels, the "option" of giving Iran such extensive information on their voyage would not have been wise. Finally, Professor Momtaz's commentary says that while Iran did not forbid entry into the zone, it disclaimed "responsibility for any damage which might be incurred on passing through

the zone. Thus warned of the risk, ships which persisted in navigating their way through it did so at their own risk." Put all this together, Mr. President, and the terms of Iran's war zone left little real "choice" to neutral vessels. They knew it, and they stayed out.

D. The relevance of the nationality of the vessels presented to the Court by the United States as examples of Iran's impediment of the freedom of commerce and navigation

25.54. In its response last Friday, Iran continued to devote considerable attention to the nationality of the various vessels identified to the Court by the United States as examples of Iran's impediment to the freedom of commerce and navigation. With respect to that issue, I would like to make a few points.

25.55. First, for a violation of Article X, paragraph 1, it is not required that the United States show a link of nationality to the vessels whose freedom of commerce or navigation was impeded. Counsel for Iran conceded this point when he agreed 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" (CR 2003/14, p. 49, para. 11). Counsel for Iran then went on, however, to speak in terms of those third State vessels being "indirect beneficiaries" of the treaty protections. With respect, that is not the issue. The United States itself directly benefited from the ability of vessels, whether flying a United States or a foreign flag, to travel and carry commerce directly between United States waters and Iranian waters, whether to call at Iranian ports or not. Iran's acts impeded that direct benefit enjoyed by the United States.

25.56. Second, even if one were to assign some relevance to Iran's emphasis on the flag of the vessel, there is something of a contradiction in Iran's approach to the so-called "genuine link" issue. For the tankers that were reflagged to the United States, Iran wishes to focus on who actually owns the tanker. Iran says that the United States does not have a "genuine link" to the tankers and therefore the United States cannot advance a claim based on damage to the reflagged tankers. But for other vessels, which are clearly United States owned, either directly or through wholly-owned subsidiaries, but which fly a flag of convenience, Iran says the United States cannot advance its claim because the vessel is not under United States flag. This is simply not a sustainable position. But more to the point, the United States did have various types of interests in all of these vessels, and those interests were protected by Article X, paragraph 1.

25.57. Third, what Iran is really talking about when it raises the issue of nationality of the vessel or of its cargo, is not whether there has been a violation of Article X, paragraph 1. Rather, what Iran is talking about is whether there was any harm suffered by the United States from Iran's attacks on the specific vessels presented by the United States to the Court. The interests of the United States in these vessels is indicated on the chart now on the screen, which also appears at tab 8 of the judges' folders.

25.58. From this chart, you can see that the first three vessels — the *Bridgeton*, the *Sea Isle City*, and the U.S.S. *Roberts* — were under United States flag and so the United States interests include, among other things, the interest in protecting vessels flying the United States flag. But there were other interests in these vessels, since the United States government or its nationals owned the vessels, and United States nationals were on the vessels at the time they were attacked and suffered injury.

25.59. For the next five vessels — the *Lucy*, the *Esso Freeport*, the *Diane*, the *Sungari*, and the *Esso Demetia* — a United States corporation either owned the vessel directly or owned the subsidiary that owned the vessel. Thus, the United States interests in these vessels included harm to ownership interests, but there were also United States nationals and cargo on several of these vessels, and so United States interests extended to harm against those interests as well.

25.60. The final vessel on the chart is the *Texaco Caribbean*. We heard a bit about the *Texaco Caribbean* from Iran because Iran has designated this as the one vessel that, in Iran's view, was engaged in commerce or navigation between Iran and the United States. Mr. Bettauer this morning dealt with Iran's erroneous assertion that there was insufficient evidence that Iran mined the *Texaco Caribbean*, and, as I previously stated, the *Texaco Caribbean* was under bareboat charter to a subsidiary of a United States company and carrying United States owned cargo.

25.61. Iran asserts that these various interests are not ones protected by the 1955 Treaty. In that regard, let me briefly supplement our initial presentation on this issue, with some comments on the *ELSI* case and on the *Nicaragua* case.

25.62. Iran incorrectly asserts that the only relevant treaty provision in the *ELSI* case concerned the "freedom of nationals, corporations and associations of either party to 'acquire, own and dispose of immovable property or interests therein' within the territories of the other party . . ."

(Further Response to the United States' Counter-Claim of Iran, para. 5.71). Actually, there were three treaty provisions at issue in that case, including a general provision requiring each party to provide to the nationals of the other party "the most constant protection and security for their persons and property, and the . . . full protection and security required by international law" (Treaty of Friendship, Commerce and Navigation, Art. V (1), Feb. 2, 1948, U.S.-Italy, 20 *UNTS* 43). The Chamber in that case accepted that such provisions protected United States companies from acts taken by a foreign government against property directly owned by a foreign subsidiary that was in turn owned by the United States companies. Moreover, the Chamber did not adopt the line of reasoning advanced by Italy in that case — and by Iran in this case — calling for a narrow and rigid approach to the protection of ownership interests. Nor did the Chamber's decision turn solely on the fact that the subsidiary was incorporated in the respondent State.

25.63. In the case now before this Court, the approach taken in the *ELSI* case is all the more compelling. The treaty provision at issue in this case — providing for "freedom of commerce and navigation" between the two parties — does not turn on the protection of specific property "rights" or "interests" of nationals. Rather, it turns on freedoms to engage in certain activities between the two States independent of issues concerning the nationality of vessels; denial of those freedoms results in harm to the United States and its nationals.

25.64. Similarly, the Court's approach in the *Nicaragua* case supports the Court's ability to find a breach of the 1955 Treaty based on harm to vessels regardless of the nationality of the vessel. In the *Nicaragua* case, Nicaragua's Application asserted that the United States "impaired" Nicaragua's "international maritime commerce" by the deployment of mines. Rather than identify any specific vessels, let alone any specific Nicaraguan-flagged vessels, the Application simply stated that the mines had harmed five "foreign commercial vessels", while "many others have cancelled scheduled shipments to and from Nicaragua for fear of the mines" — that is all that the Application said (see Application, para. 3, at *I.C.J. Pleadings*, Vol. I, pp. 3-4: "U.S. directed forces announced they had mined Nicaragua's principal ports . . . Five foreign commercial vessels have already been damaged by exploding mines, and many others have cancelled scheduled shipments to and from Nicaragua for fear of the mines. As a consequence of this infringement on freedom of the

high seas, Nicaragua's ability to assure its essential imports and to engage in peaceful international maritime commerce has been severely impaired.")

25.65. Thereafter, Nicaragua did not identify any specific vessels at all throughout the interim measures phase of the case, nor did it do so throughout the jurisdiction and admissibility phase of the case. If there was a need to identify Nicaraguan-flagged vessels at the jurisdiction stage in order to maintain the treaty claim, presumably the Court would have said so in its 1984 Judgment, but the Court did not.

25.66. Only when Nicaragua filed its Memorial on the merits did Nicaragua identify, in paragraph 98, and present evidence on, nine specific vessels damaged by mines or attacked by speedboats. Now, based on the theories advanced by counsel for Iran, one would expect that all of these vessels would have to be of Nicaraguan flag. Yet, of the nine vessels, one was Dutch, two were Panamanian, one was Soviet, one was Japanese, and one was Liberian. There were also five Nicaraguan flag vessels, all of which appear to have been fishing vessels — the very kind of vessel that Iran claims is excluded from a treaty provision protecting the "freedom of commerce and navigation".

25.67. Thus, based on Iran's approach to the United States counter-claim, one would have expected the Court in the *Nicaragua* case to reject the evidence of the nine vessels, since either they were foreign flag vessels or they were expressly excluded from the terms of the relevant treaty provision. Yet the Court did no such thing. Instead, the Court noted the foreign flag vessels were damaged by the mines (para. 79), determined that "personal injury and material injury was caused by the explosion of the mines" (para. 80), determined that Nicaragua's claim was justified as to both damage to vessels and consequential damage to trade and commerce (para. 278), and then, in its *dispositif*, found that by laying the mines, the United States had violated the Treaty's provision on "freedom of commerce and navigation".

25.68. To a certain extent, Iranian counsel conceded that establishing the exact status of the damaged vessels was not regarded as necessary in the merits phase in the *Nicaragua* case. He quite rightly noted that the *Nicaragua* Judgment did not resolve a number of issues about the scope of protection afforded by Article X, paragraph 1. Rather, he said: "[t]hese 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" (CR 2003/14, p. 48, para. 9). The United States agrees that detailed consideration of issues concerning nationality and ownership interests should figure in these proceedings only as a part of the damages phase concerning the counter-claim.

E. The laws of war

25.69. Mr. President, as best the United States can determine, counsel for Iran on Monday said that Iran now agrees that the attacks on vessels carrying oil from Kuwaiti and Saudi ports were not lawful under the laws of war (CR 2003/15, p. 54, para. 3). We welcome that concession, as it obviates any further discussion of the extensive and erroneous Iranian arguments advanced in Chapter VII of Iran's final pleading (see Further Response to the United States' Counter-Claim of Iran, para. 7.1: stating that "the alleged attacks would have been lawful under the applicable rules of the law of naval warfare"). I do note that there continues to be some dissension among Iranian counsel on some issues concerning the laws of naval warfare. On the one hand, Mr. Bundy charges that United States convoy of United States flag vessels was a denial of "Iran's fundamental rights as a belligerent" to engage in search and visit (CR 2003/15, p. 14, para. 21), while Professor Bothe, in his writings, unambiguously states that visit and search "shall not apply to merchant ships flying neutral flags and escorted by a neutral warship convoy" (Michael Bothe, "The Law of Neutrality", in *The Handbook of Humanitarian Law in Armed Conflicts*, p. 508, Dieter Fleck, ed., 1995). Professor Bothe, on this point at least, is quite right.

F. Reparation for the counter-claim

25.70. This, then leads to the last part of my presentation, on the issue of reparations for the counter-claim. Last Friday, Iranian counsel said that this case is principally about "damages" and that the United States must prove a particular loss or injury before a breach of an international obligation can found (CR 2003/14, pp. 50-52, paras. 15-18).

25.71. It is not for the United States to characterize what Iran seeks in vindication of its claim, but the United States counter-claim seeks "reparations" for Iran's breach and those reparations are not limited to just monetary compensation. Indeed, the United States has, from the time it filed the counter-claim to the present, maintained that it seeks reparations "in a form and an

amount" to be determined by the Court. Other forms of reparation, such as satisfaction, are fully within the scope of the United States claim before this Court. It is not necessary at this time, for the United States to prove to the Court what reparations the United States is entitled to for Iran's breach of Article X, paragraph 1. In particular, the United States is not required at this stage to establish or quantify compensatory damages.

25.72. Moreover, there is no requirement under the law of State responsibility for a claimant to show damages prior to establishing the existence of an internationally wrongful act. To the extent that the ILC Articles on State Responsibility are of relevance to this issue, Article 2 is quite clear: an internationally wrongful act occurs when conduct is, first, attributable to the respondent State and, second, when that conduct constitutes a breach of an international obligation of that State. In short, Article 2 does not contain a third requirement that loss must be shown. If one departs from the ILC Articles and considers the ILC Commentary, that Commentary does envisage the possibility of a primary obligation that requires damage before a breach occurs. But Article X, paragraph 1, of the 1955 Treaty contains no such primary obligation. Indeed, the ILC Commentary itself references this Court's decision in the *Diplomatic and Consular Staff* case, apparently as demonstrating types of obligations where loss need not be shown. In that case, the Court found, among other things, that Iran had violated Article II, paragraph 4, of the 1955 Treaty by allowing Iranian militants to seize American hostages. The Court said that Iran's failure to protect the hostages violated Iran's obligations under Article II, paragraph 4, to ensure the "most constant protection and security" to United States nationals in Iranian territory. Thus, the Court found a breach of the very treaty now before this Court *without* any requirement that the United States first show that it "suffered . . . as a direct result of the breach" (CR 2003/14, p. 51, para. 15 *(c)*).

25.73. In any event, even under Iran's test for proving a breach, Iran seemed to imply that it was enough, for purposes of finding a breach, that there be some valid example of an impairment of protected commerce and navigation (CR 2003/14, p. 17, para. 24; p. 52, para. 18). Indeed, Iranian counsel appears to concede that so long as at least one valid example exists, the Court can issue a general finding of liability, and leave to later consideration all the specific acts that occurred that impeded commerce and navigation and the resulting damages (CR 2003/14, p. 58, para. 32: "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"). Well, the United States has provided several specific examples of such impairment, and Iran seems to be conceding that the *Texaco Caribbean* was such an impairment so long as the Court finds that Iran was responsible for mining the *Texaco Caribbean*. As such, the Court certainly should find that a violation of Article X, paragraph 1, occurred even on the test advanced by Iran.

25.74. Iranian counsel engaged in extensive remarks about whether the United States can recover for the costs of patrolling in the Gulf and for the increased costs of shipping there, as well as whether one may recover for costs of war risk insurance premiums (CR 2003/14, pp. 59-62). I will not enter into a discussion on these matters since they, too, are ones to be considered at the reparations phase. I do note, however, that at the merits phase in the *Nicaragua* case, the Court acknowledged evidence submitted by Nicaragua concerning a rise in marine insurance rates and then issued a finding that the minelaying "created risks causing a rise in marine insurance rates" (*I.C.J. Reports 1986*, pp. 47-48, paras. 79-80). The Court did not dismiss such evidence as irrelevant to the Court's judgment at the merits phase, nor to the ensuing reparations phase of the case.

25.75. Mr. President, Members of the Court, the application of Article X, paragraph 1, to the facts now before you leads to the conclusion that Iran's claim should be dismissed, and the United States counter-claim sustained. That concludes my presentation. I thank you for your attention. Mr. President, I ask you to call upon Mr. Mathias after the lunch break to continue the United States presentation.

The PRESIDENT: Thank you, Professor Murphy. This marks the end of this morning's sitting. The hearing will be resumed at 3 o'clock this afternoon. The Court is adjourned.

The Court rose at 12.50 p.m.