In The Name of God

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OIL PLATFORMS

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

OBSERVATIONS AND SUBMISSIONS ON THE U.S. PRELIMINARY OBJECTION

Submitted by the

ISLAMIC REPUBLIC OF IRAN

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INTRODUCTION

1. At the outset of its Preliminary Objection the United States seeks to distort totally the nature of Iran's claim:

> "In effect, Iran is seeking by these proceedings to have the Court do what Iran failed repeatedly to have the Security Council do - condemn the United States as a participant on the side of Iraq in its war with Iran[1]."

The main purpose of this distortion is to suggest to the Court how preferable it would be for the Court to decline jurisdiction, and thus avoid a situation in which the Court might be tempted to make the very condemnation which the Security Council had declined to make.

2. But, of course, this deliberate distortion of Iran's claim can be dismissed for what it is: a travesty of the truth! Iran's Submissions make it crystal clear that Iran seeks only:

(i) A finding that in attacking and destroying the Reshadat, Nasr and Salman Platforms the U.S. breached its obligations under Articles I, IV(1), and X(1) of the 1955 Treaty of Amity and international law;

(ii) A finding that the United States must make full reparation for the damage caused to Iran by these breaches[2].

It is in relation to those two basic findings, both firmly based on the Treaty of Amity, that Iran views the Court's jurisdiction as firmly established by Article XXI(2) - the compromissory clause - of the 1955 Treaty of Amity. The suggestion by the United States that this is a "political dispute" in which Iran has already failed in the Security Council, distorts the very nature of Iran's claim. The targets of the U.S. attacks were commercial, oil producing platforms, and those attacks were designed to produce - and did produce - great commercial damage to Iran. Iran's claim is for the enormous financial damage it suffered by those attacks.

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1 See, the Preliminary Objection of the United States of America filed on 16 December 1993 (hereinafter referred to as the "U.S. Preliminary Objection"), p. 2, para. 6 (footnote omitted).

2 See, the Memorial of the Islamic Republic of Iran filed on 8 June 1993 (hereinafter referred to as "Iran's Memorial"), p. 135.

Iran does not seek from the Court any judgment reflecting on overall U.S. policies during the Iran-Iraq war, nor does it seek redress for any political affront which Iran may have suffered at the hands of the United States. The claim is an orthodox, narrowly-confined legal claim for the loss and damage arising from destruction of tangible property in breach of treaty obligations.

3. There is yet a further distortion of Iran's claim in the suggestion by the United States that Iran's claim is really for a violation of customary international law, and that the claim's connection with the 1955 Treaty is artificial or tenuous[3]. On that basis, as the United States is anxious to point out, the Court has no jurisdiction[4].

4. Iran's Memorial makes absolutely clear that its claims are for violations of the Treaty of Amity. The context in which Iran refers to rules of customary international law is twofold: either as rules which may assist in the interpretation and application of the provisions of the Treaty of Amity[5], or as rules relevant to the determination of whether the U.S. plea of self-defence is validly invoked[6].

5. As regards the first context, Iran in its Memorial cited ample authority for the proposition that rules of general international law shall be taken into account in interpreting treaty provisions, starting with Article 31(3) of the 1969 Vienna Convention on the Law of Treaties, and including citations from the jurisprudence of this Court[7]. If the United States wishes to take issue with that

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3 U.S. Preliminary Objection, pp. 1-2, paras. 4-5, and p. 33, para. 3.01.

4 The Court will note the paradox in the vigorous assertion by the United States that its conduct was lawful and the anxiety of the United States lest the Court should have jurisdiction to rule on that assertion.

5 Iran's Memorial, pp. 72-75, paras. 3.10-3.19.

6 Ibid., pp. 95-105, paras. 4.08-4.41.

7 The citations were kept to the minimum because the point seemed so elementary and uncontroversial. But the authority for the proposition is in fact very wide, embracing arbitral decisions (e.g., Island of Palmas Case, (Netherlands/U.S.A.), 4 April 1928 (Sole Arbitrator, Huber), Reports of International Arbitral Awards, Vol. II, p. 845) and several decisions of this Court (e.g., Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion, I.C.J. Reports 1971, p. 31, para. 53; Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957, p. 142).

proposition it is free to do so. But it has not, in fact, attempted to counter that proposition; rather it has distorted Iran's use of customary international law so as to counter a quite different proposition which Iran does not in fact make.

6. As regards the second context, it is not disputed by the United States that it seeks to justify its attacks on the oil platforms on the basis of Article XX(1)(d) of the Treaty of Amity - which states that the Treaty shall not preclude the application of "measures necessary to protect [a Party's] essential security interests" - by reference to its customary law right of self-defence[8]. In these circumstances it is impossible to see how the central issue of a breach of the Treaty of Amity can be addressed without considering the validity of the U.S. plea of self-defence under general international law. But to suggest, as the United States now does, that the issue then becomes one of customary law, and not breach of treaty, is patently wrong. It simply confuses the delict - breach of the Treaty of Amity - with the U.S. defence to that breach - self-defence.

7. It is certainly true that, because the United States has now filed a preliminary objection, the present pleading as a response to that objection must, in conformity with Article 79(5) of the Rules of Court, confine itself to the jurisdictional issue before the Court - namely to showing that there is, in the words of the compromissory clause in the Treaty, a dispute "as to the interpretation or application of the present Treaty..." (Art. XXI(2)). Thus, the issues of customary law which relate to the U.S. plea of self-defence as an excuse for the breach have little or no relevance at this stage[9]. The same is true of all matters of quantification of the damages suffered by Iran. But this is not to concede in any way the U.S. argument that these matters of customary law fall outside the Court's jurisdiction.

8. It is common ground between the Parties that the 1955 Treaty is a treaty in force. The essence of the U.S. position is that the 1955 Treaty addresses "purely commercial and consular matters[10]", and is based on the quite erroneous belief that Iran is essentially charging the United States with

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8 U.S. Preliminary Objection, pp. 52-53, paras. 3.40-3.42.

9 See, Part I, paras. 1.01-1.02, below. It is for this reason that corrections to the errors of fact presented by the United States are given as an Annex, rather than embodied in the principal Chapters of this pleading.

10 U.S. Preliminary Objection, p. 33, para. 3.01.

"aggression". The United States finds the Iranian claim to be "a callous manipulation of the Treaty or the Court[11]".

9. As already suggested, the United States has totally failed to comprehend - and thus has distorted - the nature of Iran's claim: it is a claim for breach of the 1955 Treaty. Moreover, as this pleading will demonstrate, to characterise the Treaty of Amity as limited to "purely commercial and consular matters" flies in the face of the clear terms of the Treaty. "Amity" is not a purely commercial (and even less a consular) matter. The terms of Article I of the Treaty are:

> "There shall be firm and enduring peace and sincere friendship between the United States of America and Iran."

That provision contained a legal obligation which, as the first and paramount obligation of the Treaty, governs the whole treaty relationship. This is borne out by the Preamble which is equally incapable of the narrow construction the United States seeks to place on it. The bombardment by U. S. naval units of these offshore oil platforms is quite impossible to reconcile with a bona fide application of Article I.

10. Even on the basis that Article IV(1) of the Treaty is "commercial" in nature[12], it is difficult to comprehend why this would not apply to the present case. Article IV(1) provides that:

> "Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises...".

That the oil platforms destroyed were the property of a commercial entity, the National Iranian Oil Company, is beyond dispute. The notion that bombardment and destruction is compatible with according a fair and equitable treatment cannot be taken seriously.

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11 Ibid., p. 38, para. 3.12. This is the whole tenor of Part III, Chapter I of the U.S. Preliminary Objection.

12 A proposition Iran would not accept, for treatment of nationals which breached the obligation to accord "fair and equitable treatment" could take the form of arbitrary detention or expulsion, and have nothing whatever to do with their commercial or economic interests.

11. Equally, even if Article X(1) is limited to "commercial" matters[13], the moment that provision is given a broad and sensible interpretation, not limited strictly to actual transportation by sea "between the territories of the two High Contracting Parties", it would embrace measures which aimed at destroying all possibility of exports from an oilfield in the territory of one Party to the territory of the other. Hence, the conduct by the United States in question in this case properly falls to be judged within the terms of the obligations assumed under the express provisions of the 1955 Treaty.

12. The only remaining condition imposed by Article XXI(2) of the 1955 Treaty to the Court's jurisdiction is that the dispute be "not satisfactorily adjusted by diplomacy". That is a condition of fact and, as a fact, it can be asserted categorically that this dispute has not been "satisfactorily adjusted"[14]. As Iran has shown in its Memorial, the provision is not designed as a pre-condition of prior, diplomatic negotiations. It is designed purely to ensure that disputes already settled are not re-opened by way of recourse to the Court[15]. The analysis made by Iran in its Memorial has not been contested by the United States.

13. In Iran's view, therefore, the U.S. actions were breaches of Articles I, IV(1) and X(1) of the Treaty. However, the Court is not called to rule on whether the U.S. actions were or were not breaches of the Treaty at this stage of the proceedings. Rather, the Court is asked to rule on the U.S. Preliminary Objection. In this context, the mere fact that there are clearly genuine disputes between the Parties concerning the interpretation and application of these provisions of the Treaty must be sufficient to vest the Court with jurisdiction pursuant to Article XXI(2) of the Treaty, and shows why the U.S. objection should be rejected.

14. In the substantive Parts of this pleading that follow, Part I will begin by considering the facts relevant to the jurisdictional issue raised by the United States. Part II then takes up the legal basis of Iran's claims, focusing in

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13 Again, a proposition Iran would not accept. Article X(1) protects "freedom of commerce and navigation". The navigation need not be commercial for there to be a breach of Article X(1).

14 See, Part IV, para. 4.02, below.

15 Iran's Memorial, pp. 64-67, paras. 2.34-2.42.

turn on (i) the true nature of the violation of the Treaty by the United States which underlies Iran's claims, not the distortion thereof offered by the United States; (ii) the interpretation of the Treaty in the light of general international law and the U.N. Charter; and (iii) the difference between the Court's competence and that of the Security Council. The detailed analysis of the relevant Treaty provisions - Articles I, IV(1) and X(1) - follows in Part III, together with a rebuttal of the U.S. contention that Article XX(1)(d) of the Treaty somehow prevents the Court from exercising jurisdiction in the case. Part IV then proceeds to demonstrate that there is, indeed, a clear nexus between the claims of Iran and the 1955 Treaty so that the U.S. conduct does quite genuinely fall to be judged under the express terms of that Treaty. This Part goes on to show that if the U.S. Preliminary Objection is not to be rejected, it should be held not to possess "an exclusively preliminary character" under Article 79(7) of the Rules of Court. There is, finally, a short Part V setting out Iran's Conclusions to this pleading, followed by formal Submissions.

PART I

FACTUAL ISSUES RELEVANT TO THE PRESENT PROCEEDINGS

CHAPTER I THE U.S. PRESENTATION OF THE FACTS HAS NO RELEVANCE TO ITS PRELIMINARY OBJECTION

1.01 Article 79(5) of the Rules of Court requires the statement of facts in pleadings relating to a preliminary objection to be confined to matters relevant to that objection. The United States has ignored this requirement. The greater part of its Preliminary Objection, including the Annex thereto, consists of allegations about Iranian actions in the Persian Gulf - that Iran illegally attacked non-U.S. and U.S. flag vessels, and that Iran's commercial oil platforms were used to support such attacks - which have no relevance to the jurisdictional issues raised by the United States. On the contrary, such allegations can only be relevant to the U.S. argument that its attacks on Iran's oil platforms were a lawful exercise of the right of self-defence. In making such allegations, the United States is clearly seeking to show that there were prior armed attacks by Iran which forced the United States to attack the oil platforms in self-defence, and that action against the oil platforms was justified because these platforms had been used to support such Iranian attacks. Although these issues may ultimately be of importance, they are self-evidently for consideration at the merits phase. In Iran's view, if the United States wishes to present such arguments then it should withdraw its Preliminary Objection and allow the Court to consider them for what they are, a defence on the merits. The United States should not abuse the Court's Rules by presenting a defence on the merits while at the same time objecting to jurisdiction.

1.02 It is for this reason that Iran has chosen to respond in detail to the U.S. allegations only in an Annex to this pleading. Such a response is necessary because, in making such allegations, the United States has sought to prejudice appreciation of the merits of Iran's case, without assuming the burden of providing a substantiated defence. Iran's response is, however, made without prejudice to its view that such issues are strictly irrelevant to the jurisdictional questions before the Court.

1.03 It is appropriate here only to highlight three points which undermine the self-defence argument as it is presented in the U.S. Preliminary Objection. First, as noted above, the self-defence argument is premised on

allegations that there were prior armed attacks by Iran against the United States. Specifically, the United States alleges that Iran fired a Silkworm missile which hit a reflagged Kuwaiti tanker, the Sea Isle City, on 16 October 1987, and that Iran was responsible for laying the mine which damaged the U.S.S. Samuel B. Roberts on 14 April 1988.

1.04 The United States must bear the burden of proof with regard to such allegations, and show that it acted in self-defence, meeting all conditions. However, the truth is that the United States has never produced any independent evidence showing Iranian responsibility for either of these attacks, or indeed for any other attacks allegedly carried out by Iran against the United States. In its Preliminary Objection, the United States does no more than cite statements made at the time by U.S. Government officials, or secondary sources which themselves rely on statements by "Pentagon officials" or "Government sources". This is not evidence. Such statements are no more than self-serving assertions and were made at the time precisely with a view to justifying U.S. actions.

1.05 In the Annex hereto, Iran has done its best to prove a negative. Thus, with regard to the U.S. allegation that Iran fired a Silkworm at the Sea Isle City, Iran has sought to show that the Sea Isle City was well beyond the effective range of an Iranian Silkworm. It has also pointed to evidence that at the time the United States thought Iran's Silkworms were positioned around the Strait of Hormuz and that Iran had no Silkworms on the Fao peninsula. Finally, Iran points out that Iraq carried out Silkworm attacks on Kuwaiti vessels, so there is no prima facie reason why the attack should be assumed to be Iranian[16]. With regard to the allegation of minelaying, Iran has shown that Iraq is known to have placed mines throughout the Persian Gulf, and that there is no evidence that the mine which damaged the Samuel B. Roberts was Iranian or had been deliberately placed by Iran. Iran had no interest in minelaying. Its shipping was equally vulnerable to mines, and for that reason Iran's navy carried out extensive mine-sweeping operations[17].

1.06 The second point that needs to be highlighted here concerns the use made by the United States of alleged Iranian attacks on non-U.S. flag

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16 See, Annex, paras. 36, et seq..

17 Ibid., Annex, paras. 44, et seq..

vessels. The greater part of the U.S. Preliminary Objection consists of no more than a list of alleged Iranian attacks on non-U.S. flag vessels. The implication is that such attacks form part of the justification for the U.S. attacks on Iran's oil platforms - in other words, the United States appears now to be seeking to characterize its attacks on Iran's oil platforms as an exercise of collective self-defence.

1.07 As will be explained further in the Annex hereto[18], such a position cannot be sustained. None of the legal conditions for an act of collective self-defence can be met by the United States[19] - there was no declaration by a third State that it was the victim of an armed attack, no request for help made to U.S. forces, and the United States reported its attacks on Iran to the Security Council as acts of individual self-defence, not as acts of collective self-defence[20]. Indeed, the United States fails to point out that U.S. policy at the time was strictly limited to providing assistance only to U.S. flag vessels[21].

1.08 The United States is also unable to explain why alleged Iranian attacks justified an act of collective self-defence whereas Iraqi attacks did not. There is almost universal agreement among commentators that Iraqi attacks were the cause of violence in the Persian Gulf, and that such attacks were far more numerous and far more violent than the attacks for which Iran is allegedly responsible. Iraq followed a policy of "shoot first - identify later", attacking vessels of all nationalities trading throughout the Persian Gulf.

1.09 Despite such actions by Iraq, the United States supported Iraq in its war against Iran, a war in which Iraq was the aggressor and for which Iraq has been found to be wholly responsible. The United States took no action whatsoever to hinder Iraqi attacks and never found it necessary to respond in defence of third State vessels against such attacks. Even after the Iraqi attack on the U.S.S. Stark, there was no U.S. reaction against Iraq.

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18 Ibid., paras. 20, et seq..

19 See, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 103-105, paras. 195-200, and pp. 119-121, paras. 229-233.

20 See, Iran's Memorial, Exhibits 73 and 90 for the text of the U.S. reports of its attacks to the Security Council.

21 See, Annex, para. 24.

1.10 In Iran's view, it is pure hypocrisy for the United States to express concern now about the fate of commercial shipping in the Persian Gulf. At the time, Iran repeatedly called on the international community to condemn Iraqi attacks and to take action to cease the violence in the Persian Gulf[22]. These protests met with no success, and no response from the United States. In such circumstances, alleged Iranian actions cannot be used to justify the U.S. attacks on Iran's oil platforms.

1.11 A third and final point must be emphasized. The United States does not show that it acted in lawful self-defence simply by alleging that Iran attacked U.S. flag vessels. It must also show that such alleged Iranian attacks were illegal, as opposed to being themselves legitimate responses to violations of the norms of neutrality or prior armed attacks. Moreover, the United States must also show that an act of self-defence was "necessary" and that the action taken was proportionate and limited to the necessities of the case.

1.12 As explained in its Memorial, Iran believes that none of these conditions can be met by the United States[23]. In particular, Iran notes that the U.S. attacks occurred several days after the attacks of which Iran is accused. There was no "immediate necessity" to attack. The United States itself described its first attack as a "reprisal".

1.13 The U.S. attacks were also disproportionate. The alleged Iranian attacks are reported as having caused relatively minor damage with no casualties. The U.S. attacks, on the other hand, caused enormous economic damage and several casualties. The first attack totally destroyed both the R7 and R4 complex on the Reshadat field. In this context, it must be remembered that the first attack was accompanied by a further retaliatory measure - a total embargo on U.S. imports of Iranian oil (and other products) - explicitly designed

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22 See, Iran's Memorial, Exhibit 23, at p. 233. This extract from the Yearbook of the United Nations records Iran's protest in 1984 at Iraq's attempt to internationalize the conflict by attacking vessels of third States in the Persian Gulf, which also called on the U.N. to take measures to halt this development. In fact, Resolution 552(1984) made no condemnation of Iraqi attacks, which numbered some 71 attacks, as against 3-4 alleged attacks by Iran. As Iran pointed out, this Resolution was a licence for further Iraqi aggression. Ibid., p. 236.

23 See, in general, Iran's Memorial, Part IV.

to weaken Iran's position in the war[24]. This legislation was aimed directly at Iran's oil industry. Not only did Iran lose a major customer for crude oil but at that time Iran was seeking to buy oilfield equipment from U.S. companies to help replace machinery damaged by Iraqi air attacks, as was the case with the Reshadat and Salman fields[25]. Such purchases were prohibited under the sanctions[26].

1.14 The second attack was directed not only against Iranian oil platforms, but also against Iranian naval forces and resulted in the sinking of one frigate and two patrol boats and severe damage to a second frigate and two other patrol boats. There were several casualties. It must be recalled that, in contrast to the alleged Iranian attacks, the Iraqi attack on the U.S.S. Stark caused huge damage and great loss of life, yet the United States took no action against Iraq. In Iran's view, this shows that the U.S. attacks against Iran were neither necessary nor proportionate. Thus, at best, the U.S. actions would have to be characterized as illegal reprisals. The fact that such reprisals were illegal, however, means that the United States would not be able to excuse its violations of the Treaty of Amity.

CHAPTER II FACTS RELEVANT TO THE JURISDICTIONAL ISSUES BEFORE THE COURT

1.15 It has been shown above that the statement of facts in the U.S. Preliminary Objection is irrelevant to the jurisdictional issue before the Court. However, there are two aspects of the factual background which are relevant to the jurisdictional objection raised by the United States, but which are totally ignored in the U.S. Preliminary Objection.

1.16 The first aspect concerns the circumstances of the signing of the Treaty of Amity, which have already been described briefly in Iran's

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24 President Reagan formally approved such sanctions on 26 October 1987, less than one week after the first attack. The sanctions came into force at a time when the United States was importing about 250,000 barrels of Iranian crude oil per day. The legislation is quite explicit in stating its aim to punish Iran and weaken Iran's war effort. The text of the relevant legislation, together with the White House announcement of the President's approval of the legislation is included in Exhibit 1.

25 See, Iran's Memorial, p. 41, para. 1.101, and p. 47, para. 1.114.

26 The Washington Post, 24 October 1987. Exhibit 2.

Memorial[27]. This background will be discussed again in Section A below because it shows that the Treaty was a part of wider U.S. foreign policy objectives aimed at forging a political and strategic alliance with Iran. Precisely for this reason the Treaty was not limited to purely commercial and consular matters but was set in the general framework of a relationship of "Amity" and - unlike most FCN treaties entered into by the United States after World War II - included a specific provision, Article I, providing that "[T]here shall be firm and enduring peace and sincere friendship between the United States and Iran".

1.17 In any event, even if the United States was correct in asserting that the Treaty of Amity was exclusively concerned with commercial relations, this would still not debar Iran's claims. For it is abundantly clear that Iran's claims arise out of the use of force against, and the destruction of, commercial oil platforms. As will be explained in Section B below, these platforms were engaged in the activity of producing and transporting petroleum when they were destroyed. Thus, even if the Treaty was solely concerned with commercial matters, which it was not, the Court would still have ample grounds for exercising its jurisdiction since there would still be a dispute as to the Treaty's interpretation and application resulting out of the use of armed force by the United States against commercial installations of Iran.

SECTION A The Historical Context Within Which the Treaty Was Negotiated Reveals that It Had a Broad Strategic Importance in Addition to Regulating Commercial Matters

1.18 With the emergence of the Cold War between the United States and the Soviet Union following World War II, the United States became increasingly concerned with keeping Iran out of the Soviet sphere of influence. The nationalization of the Anglo-Iranian Oil Company in 1951 by the Mossadegh Government and the subsequent British embargo on Iranian oil gave a special point to the U.S. concerns for two reasons: first, the United States was concerned that Mossadegh would turn away from the west towards the Soviet Union; second, the cutting off of Iranian oil supplies - which occurred at a critical time in the Korean war - accentuated the vital strategic importance of Iranian oil[28].

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27 See, Iran's Memorial, Chapter I, Section A.

28 See, Yergin, D.: The Prize, Simon & Schuster, New York, 1991, pp. 454, et seq.. Exhibit 3.

1.19 This situation led the United States to support the pro-American Shah over the Government of Prime Minister Mossadegh, and to make a concentrated effort to strengthen political, military and economic ties with Iran in order to draw Iran away from the Soviet Union. As a U.S. Government report stated in December 1953:

> "It is of critical importance to the United States that Iran remain an independent nation, not dominated by the USSR. Because of its key strategic position, oil resources, vulnerability to intervention or armed attack by the USSR, and vulnerability to political subversion, Iran must be regarded as a continuing objective of Soviet expansion[29]."

1.20 Countering Soviet influence in Iran and gaining access to Iranian oil became the main aims of U.S. policy. Iran's Memorial has already described the steps taken by the United States to support the Shah's rise to power. The United States also provided extensive military aid to Iran, and in October 1955 Iran became a signatory to the strategically oriented Baghdad Pact, largely as a result of U.S. initiatives.

1.21 At the same time, the United States took a major role in solving the Anglo-Iranian crisis, which resulted in 1954 in a new agreement, the Consortium Agreement, pursuant to which U.S. oil companies obtained a substantial stake in Iran's oil industry. Again and again before the Iran-U.S. Claims Tribunal, U.S. oil companies were at pains to show that the Treaty of Amity was entered into as a result of U.S. investments in Iran's oil industry. Again and again the close connection between the Treaty and the Iranian oil industry was stressed. The U.S. oil companies filed affidavits by U.S. negotiators of the Treaty testifying to this close connection[30]. As one negotiator pointed out, the Consortium Agreement was "an important part of the political background of the Treaty negotiations[31]".

1.22 What is less well-known, however, is that the motive for entering the Consortium Agreement - and hence the Treaty - was more for

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29 "Growing United States Strategic Interests in Iran; United States Policy Towards Iran: A Report to the National Security Council by the N.S.C. Planning Board", 21 December 1953, cited in Alexander, Y. and Nanes, A. (eds.): The United States and Iran, A Documentary History, University Publications of America, 1980, p. 265. Exhibit 4.

30 The Affidavits provided by the U.S. oil companies are filed in Exhibit 5.

31 Ibid., p. 3.

political and strategic reasons than for commercial reasons. In fact, U.S. companies were reluctant to go to Iran when their involvement elsewhere in the Middle East was sufficient to cover their supply requirements. Recounting a meeting with the King of Saudi Arabia, the Vice-President of Exxon gave the following explanation of why the Aramco partners agreed to participate in the Consortium:

> "... we were going in solely on the basis that there might be chaos out in the area if we didn't, and would he [King Saud] agree with this and recognize that we weren't doing this because we wanted more oil anywhere, because we have adequate oil in the Aramco concession, but we were doing it as a political matter at the request of our government...[32]".

This view was echoed in a letter to Secretary of State Dulles dated 4 December 1953 from the Vice-President of Standard Oil:

> "From the strictly commercial viewpoint, our Company has no particular interest in entering such a group but we are very conscious of the large national security interests involved[33]."

1.23 The position of the U.S. Government was made clear in a letter dated 28 January 1954 from the State Department to the Chairman of Standard Oil:

> "The National Security Council has been considering the Iranian oil situation for some period of time. After consultations with the Secretaries of State and Defense and the Chairman, Joint Chiefs of Staff, the National Security Council has determined that it is in the security interests of the United States that United States petroleum companies participate in an international consortium to contract with the Government of Iran, within the area of the former concession of the Anglo-Iranian Oil Company, Ltd., for the production, refining, and acquisition of petroleum and petroleum products, in order to permit the reactivation of the petroleum industry in Iran and to provide to the friendly Government of Iran substantial revenues on terms which will protect the interests of the Western World in the petroleum resources of the Middle East[34]."

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32 93rd Cong., 2nd Sess., Senate Committee on Foreign Relations, Subcommittee on Multinational Corporations, Hearings on Multinational Petroleum Corporations and Foreign Policy, 1974, Pt. 7, p. 304, cited in Blair, J.M.: The Control of Oil, Vintage Books, New York, 1978, pp. 44-45. Exhibit 6.

33 See, The International Petroleum Cartel, The Iranian Consortium and U.S. National Security, a report prepared for the Subcommittee on Multinational Corporations of the Committee on Foreign Relations of the U.S. Senate, 21 February 1974, p. 58. Exhibit 7.

34 Ibid., pp. 76-77.

The letter attached a "Proposed Iranian Consortium Plan", in which the State Department, referring to the Anglo-Iranian dispute, recalled that:

> "The United States has long recognized that a settlement of that dispute which would provide for the reopening of the Iranian oil industry on a sound and permanent basis is vital to its national security. For this reason the United States has sought such a solution since the inception of the dispute early in 1951[35]."

1.24 The political importance of the Consortium Agreement was such that the U.S. Government was ready to exempt the U.S. oil companies from antitrust laws which would normally have prohibited joint participation by the oil companies in such a Consortium Agreement. As the National Security Council stated in 1953:

> "It will be assumed that the enforcement of the Antitrust laws of the United States against the Western oil companies operating in the Near East may be deemed secondary to the national security interest to be served by:
>
> (1) Assuring the continued availability to the free world of the sources of petroleum in the Near East, and
>
> (2) Assuring continued friendly relationships between the oil producing nations of the Near East and the nations of the free world[36]."

It is significant that the enabling Statute granting the President of the United States power to negotiate the Treaty of Amity with Iran echoes this language, stating that the aim of such a Treaty was the achievement of "rising levels of production and standards of living essential to the economic progress and defensive strength of the free world[37]". The link between commercial and strategic interests in the face of the perceived Soviet threat was here made explicit.

1.25 It was in this context that the Treaty of Amity was signed on 15 August 1955. In the light of the importance which the United States attached to its overall relations with Iran at that time, it is clear that the Treaty was not "purely commercial". The Treaty constituted one of the cornerstones of U.S. policy, cementing relations - political, strategic, economic and consular - with Iran

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35 Ibid., p. 78.

36 Ibid., p. 52.

37 See, Iran's Memorial, Exhibit 1 (emphasis added).

during what was perceived by Washington to be a critical point in Iran's history. For Iran's part, the Treaty provided a reassuring counterbalance to the proximity of the Soviet Union on Iran's northern borders and the internal threat of the communist Tudeh Party[38].

1.26 In these circumstances, it is no accident that the Treaty was as much a treaty of amity as one of economic relations and consular affairs. This is borne out by the Treaty's title which makes it clear that it addresses three distinct subjects: "Amity, Economic Relations and Consular Rights". Nor was it a coincidence that the very first Article of the Treaty established a regime of peaceful and friendly relations between the Parties since this effectively reflected U.S. policy, which was intent on developing a wider political and strategic relationship with Iran at the time[39].

1.27 The idea that the inclusion of Article I was purely fortuitous and without significance - as the United States now pretends[40] - is plainly false. The historical context makes clear the vital strategic issues that were at stake in forging a friendly alliance with Iran. When negotiating a similar FCN Treaty with China in the same period, the United States was more honest about the importance of this provision. In negotiations with China, the U.S. State Department noted that the inclusion of such a provision was "not ... customary", but was "appropriate" in this particular case "in view of the close political relations between China and the United States"[41]. This fact alone totally contradicts the U.S. position on the significance of the Treaty[42].

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38 Dr. Henry Kissinger has underscored the importance of amity to the Iran-U.S. relationship: "Alone among the countries of the region... Iran made friendship with the United States the starting point of its foreign policy. That it was based on a cold-eyed assessment that a threat to Iran would most likely come from the Soviet Union, in combination with radical Arab States, is only another way of saying that the Shah's view of the realities of world politics paralleled our own". Kissinger, H.: The White House Years, Weidenfeld and Nicolson, London, 1979, p. 1262 (emphasis added). Exhibit 8.

39 As Professor M. Yapp has observed: "For the United States, policy towards Iran could only be considered in the general context of policy towards Russia, which involved the upholding of the independence of threatened countries in the spirit of the United Nations". See, Yapp, M.: "1942-1976: The Reign of Muhammad Reza Shah", in Amirsadeghi, H. (ed.): Twentieth Century Iran, Heinemann, London, 1977, p. 65. Exhibit 9.

40 U.S. Preliminary Objection, pp. 40-47, paras. 3.17-3.29.

41 See, Exhibit 10 (emphasis added).

42 See, further, Part III, Chapter I, below.

SECTION B Even if the Treaty of Amity Was Concerned with Commercial Activities, It Would Still Provide a Basis of Jurisdiction for Iran's Claims

1.28 Even if the United States was correct that the Treaty of Amity was purely, or even predominantly, a commercial treaty, Iran's claims would still be admissible on jurisdictional grounds. This is because the platforms which were destroyed by the United States and which form the subject matter of the present dispute were commercial installations entitled to protection under the terms of the Treaty.

1.29 As described in Iran's Memorial, the Reshadat and Resalat complexes consisted of drilling, service and production platforms which were linked to some 40 individual oil wells capable of handling up to 200,000 barrels of production a day[43]. These installations passed through a central producing platform (R7) on the Reshadat complex which in turn pumped oil via a subsea line to an oil terminal on Lavan Island. It was this platform which was the focus of the U.S. attack on 19 October 1987. By destroying it, the United States effectively crippled Iran's commercial production from the underlying fields.

1.30 The Salman facilities were broadly similar and were capable of producing approximately 220,000 barrels of petroleum a day, while the Nasr platforms had a capacity of 100,000 barrels a day[44]. These were the focus of the U.S. attacks on 18 April 1988.

1.31 There can be no doubt that these installations were commercial in nature. They were owned and operated by the National Iranian Oil Company, a joint stock company incorporated under the Iranian Commercial Code for the purpose of prospecting for, producing and selling petroleum products. The United States accepts that both the Salman and Nasr platforms were still producing oil at the time of the U.S. attacks, and does not dispute the fact that the only reason Reshadat was not producing was because it was undergoing repair work as a result of earlier Iraqi attacks[45].

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43 See, Iran's Memorial, pp. 9, et seq., paras. 1.14, et seq..

44 Ibid., p. 10, paras. 1.17-1.18.

45 U.S. Preliminary Objection, p. 17, para. 1.24.

1.32 It must also be stressed that at least up until the first U.S. attack on the Reshadat platform in October 1987, the United States was importing significant amounts of oil from Iran, up to 250,000 barrels of oil per day. Thus, there was commerce in oil between Iran and the United States, which further emphasizes why the attacks on the platforms violated the Treaty of Amity[46].

1.33 It is worth mentioning one final element which confirms the close connection between the oil platforms and the Treaty of Amity. As explained in Iran's Memorial[47], prior to the Islamic Revolution in Iran, the Reshadat, Resalat and Salman complexes had all been jointly operated by U.S. oil companies which, pursuant to Joint Structure Agreements entered into in 1965, had contractual rights to a portion of the oil produced until the end of the century. After the Iranian Revolution the U.S. Government and individual U.S. oil companies accused Iran of expropriating the oil companies' interests in these fields in violation of the Treaty of Amity. As the U.S. State Department alleged in a specially prepared "Memorandum on the Application of the Treaty of Amity to Expropriations in Iran", the halt of oil exports to the United States, much of which was produced from the platforms at issue here, violated Articles IV and X of the Treaty of Amity[48]. Similar arguments were advanced by the U.S. oil companies in numerous cases before the Iran-U.S. Claims Tribunal. The United States is thus clearly guilty of double standards. On the one hand, it does not hesitate to claim that Iran's alleged expropriation of its oil interests violated provisions of the Treaty of Amity when it suits U.S. interests to do so. On the other hand, now the United States argues that exactly the same provisions have no relevance to play in this case despite the fact that the same oil installations are at issue.

1.34 Whether one applies the strict provisions of the Treaty of Amity or the notion of equity infra legem, the U.S. arguments cannot be sustained. For the claims advanced by Iran concerning the destruction of its commercial oil platforms clearly fall within the scope of interests which are protected by the provisions of the Treaty of Amity, whether that Treaty is viewed

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46 See, para. 1.13 below and footnote 25.

47 Iran's Memorial, pp. 8-11, paras. 1.11-1.19.

48 See, Exhibit 94 to Iran's Memorial, p. 1409, note 21.

as being "exclusively commercial" as argued by the United States or, as Iran submits, covers wider obligations of peace and friendship as well.

PART II
THE LEGAL BASIS OF IRAN'S CLAIMS

CHAPTER I THE VIOLATION BY THE UNITED STATES OF THE TREATY OF AMITY

2.01 The United States concedes that Article XXI(2) of the Treaty of Amity confers jurisdiction upon the Court to decide disputes relating to the Treaty's interpretation or application[49]. The United States therefore does not contest the fact that the Treaty remains part of the corpus of law in force between the two States.

2.02 It was on the basis of this fact, which was not disputed in any manner by the United States in its pleading of 16 December 1993, that Iran seised the Court, as it was entitled under Article XXI(2) of the Treaty of Amity. Iran is perfectly well aware of the strict limits which are imposed upon the Court by the compromissory clause in Article XXI(2), given that it restricts its jurisdiction to the settlement of only those disputes between the Parties which concern "the interpretation or application of the present Treaty". For this reason, Iran has been careful not to bring before the Court the whole of its dispute with the United States insofar as it relates to questions other than those concerning the interpretation or application of the Treaty of Amity. Both in its Application filed on 2 November 1992 and in its Memorial of 8 June 1993, Iran requested the Court only to adjudge and declare that, by its conduct on 19 October 1987 and 18 April 1988, the United States breached Articles I, IV(1) and X(1) of the 1955 Treaty of Amity, and that compensation is due from the United States to Iran on account of such breaches of that bilateral treaty.

2.03 Iran has therefore not requested the Court, as has been wrongly maintained by the United States, to "condemn the United States as a participant on the side of Iraq in its war with Iran[50]". This allegation is clearly a flagrant distortion of the truth, since Iran's claim here concerns only the events of 19 October 1987 and 18 April 1988, and not the whole of U.S. conduct throughout the eight years of the armed conflict provoked by Iraq's invasion of Iran on 22 September 1980.

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49 U.S. Preliminary Objection, pp. 1-2, para. 4.

50 Ibid., p. 2, para. 6. See, also, ibid., pp. 38 and 41, paras. 3.12 and 3.18.

2.04 It goes without saying, however, that the facts which in Iran's view give rise to the international responsibility of the United States for breach of the 1955 Treaty of Amity can be neither analysed as to their substance nor evaluated from the legal point of view, if they are not placed in their proper context, i.e., if they are not examined as part of the chain between previous and subsequent events. But this indispensable reminder of the context - which in any event has been provided in some detail in the pleadings of both Parties - does not change the fundamental fact: Iran is asking the Court to do no more than rule that the U.S. actions against Iran on 19 October 1987 and 18 April 1988 were illegal in the light of the provisions of the 1955 Treaty, and to determine the consequences of such illegal actions.

2.05 In its Preliminary Objection the United States has also argued that Iran's claims do not fall within the scope, ratione materiae, of the compromissory clause contained in Article XXI(2). Thus, the United States argues, the Court does not have the necessary jurisdiction to entertain such claims, given that what Iran is really relying upon are violations by the United States of the principles and rules of general international law and the U.N. Charter, and not breaches of the terms of the 1955 Treaty[51].

2.06 It is true - and Iran does not dispute this - that questions concerning violations of general international law and the Charter do not as such fall within the jurisdiction of the Court in the present case, where the Court may be seised only in connection with the interpretation and application of the 1955 Treaty. On the other hand, however, it is absolutely incorrect to argue that Iran has tried to submit to the Court matters over which the Court has no jurisdiction because they are not covered by the Treaty of Amity.

2.07 The connection which must exist between a claim and the treaty upon which it is based, in order to found a tribunal's jurisdiction as delimited by the compromissory clause of the treaty in question, will be examined insofar as its general aspects are concerned in Part IV below. Here, Iran will demonstrate the fallacious nature of the U.S. objection to Iran's Memorial, although it was already explained in detail in that Memorial that the claims submitted to the Court by Iran are all strictly concerned with the interpretation

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51 See, U.S. Preliminary Objection, pp. 34, et seq., and, in particular, paras. 3.10-3.12.

and application of the 1955 Treaty, and not the interpretation and application of the U.N. Charter or of general international law.

2.08 For this purpose, Iran will be obliged, in Part III, to return to the scope of application of the 1955 Treaty as a whole in order to stress again that, contrary to what has been wrongly alleged by the United States, it does not cover only questions of a strictly commercial or consular nature. Iran will also return to the interpretation of the three provisions of the Treaty upon which it relied in its Application, in order to reply to the United States' specific arguments on this subject.

2.09 However, it appears indispensable as a preliminary matter to stress in this Part two aspects of a methodological nature concerning (i) the rules and criteria governing the interpretation of the terms of the Treaty which are under discussion and (ii) the different roles that the Court and the Security Council have to play with respect to the incidents in question. Since the Iranian Memorial has already dealt with the first of these subjects in some detail, it will be sufficient simply to recall briefly the relevant legal principles.

CHAPTER II INTERPRETATION OF THE TREATY OF AMITY IN THE LIGHT OF GENERAL INTERNATIONAL LAW AND THE U.N. CHARTER

2.10 It is necessary to determine precisely what role is to be played by general international law and the U.N. Charter in the interpretation of the Treaty of Amity. It is quite true that Iran's Memorial did make considerable reference to general international law in order to determine the illegality of the U.S. conduct which is in issue in the present case. But general international law was not used by Iran as an autonomous and exclusive parameter for judging the facts in question: it was used only as a means of interpretation of the 1955 Treaty, or as a starting point for the determination of the exact meaning of its terms. In doing so, Iran was applying the elementary concept that general international law is a kind of "background" for international treaties[52]; consequently,

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52 See, Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984, p. 291, para. 83.

> "[a]ny international convention must be deemed to refer tacitly to general international law for all questions which it does not resolve differently itself in express terms[53]."

2.11 In other words, Iran has not asked the Court to judge U.S. conduct on the basis of general international law and the U.N. Charter: it has requested it, and continues to request it, to apply only the 1955 Treaty, but to interpret that Treaty in the proper manner, i.e., in the light of "any relevant rules of international law applicable between the parties" in accordance with Article 31, paragraph 3(c), of the Vienna Convention.

2.12 The first thing to remember with regard to Article 31, paragraph 3(c), of the Vienna Convention on the Law of Treaties is that the criterion relating to the use of international law in order to interpret a treaty is one of the elements of the "general rule of interpretation" (as Article 31 is headed): an element which must be accorded the same status and degree of priority as the other criteria provided for in the same "general rule", i.e., the terms of the provision to be interpreted, its context, and the object and purpose of the treaty. This concept is made perfectly clear in the opening phrase of paragraph 3 of Article 31: "There shall be taken into account, together with the context..."(emphasis added). In other words, as an acknowledged authority has said:

> "[t]he words 'together with' indicated that the stipulations which follow are to be taken as incorporated in the basic statement of the rule, and not as norms of an inferior character[54]."

2.13 The second remark, to use the words of an author who has dwelt at length upon this question, is that:

> "... it can be said that subpara. 3(c) is declaratory of customary law. This means of interpretation was well established before the ILC took up the matter. For most ILC members, subpara. 3(c) contained a well recognized principle, and its interpretation rarely

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53 Georges Pinson (France) v. United Mexican States, Decision No. 1, 19 October , 1928, (Sole Arbitrator, Verzijl) Reports of International Arbitral Awards, Vol. V, p. 422. Unofficial translation provided by Iran. The original French text reads as follows:

> "Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne resout pas elle-même en termes exprès et d'une façon différente."

54 Jennings, Sir Robert J. and Watts, Sir Arthur (eds.): Oppenheim's International Law, Ninth Edition, Longman, London, Vol. I, p. 1274, footnote 17.

gave rise to controversy. In fact, the provision was generally taken for granted by States[55]."

2.14 The raison d'être for this indisputably fundamental criterion for interpretation was explained in a particularly effective manner by Charles de Visscher, who wrote as follows in his well-known monograph on interpretation:

> "The reference to general international law is the logical consequence of the idea that lies at the root of any treaty interpretation, i.e., that a text never exists in a vacuum and that unless there is a derogation resulting from precise terms, it must be seen as falling within the framework of common or general international law. This law thus appears as a reference system from which the interpreter will continually seek guidance[56]."

2.15 To underline the continuity of the approach to this subject in doctrine, it is sufficient to mention the most recent handbook of public international law, by Professors Combacau and Sur, who write as follows:

> "... the rule or situation to be interpreted should not be considered in isolation, but ... must be placed in the context of the applicable law as a whole. This principle of integration underlines the unity of international law and establishes a presumption as to the declaratory nature of special rules in relation to general rules. In other words, and failing any intention to the contrary, it must be considered that when a legal concept is used without further precision in a special rule, reference is made to its definition under general international law. Thus, treaties normally fall within the context of existing customary law[57]".

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55 Villiger, M.E.: Customary International Law and Treaties, Martinus Nijhoff Publishers, The Hague, 1985, p. 269. See, also, in this regard, Yasseen, M.K.: "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", Recueil des Cours de l'Academie de Droit International, Vol. 151, 1976, III, at p. 68.

56 de Visscher, C.: Problèmes d'interprétation judiciaire en droit international public, A. Pedone, Paris, 1963, p. 92. Unofficial translation provided by Iran. The original French text reads as follows:

> "La référence au droit international commun est la conséquence logique de l'idée qui est à la base de toute interprétation des traités, à savoir qu'un texte ne se situe jamais dans le vide et que, sauf dérogation résultant de termes précis, il doit être envisagé comme s'insérant dans les cadres du droit international commun ou général. Celui-ci apparaît ainsi comme un système de référence auquel l'interprète se reportera constamment".

57 Combacau, J. and Sur, S.: Droit international public, Montchrestien, Paris, 1993, pp. 175 et seq.. Unofficial translation provided by Iran. The original French text reads as follows:

> "... il ne convient pas de considérer isolément la règle ou la situation à interpréter, mais ...il faut les insérer dans le contexte de l'ensemble du droit applicable. Ce principe d'intégration souligne l'unité du droit international et

2.16 This criterion has not only been consistently stated in doctrine, but has also been applied on many occasions in international jurisprudence concerning numerous treaties dating from all periods[58]. However, it is of course particularly significant that it has already been applied in practice with respect to the 1955 Treaty of Amity between Iran and the United States, by the Iran-U.S. Claims Tribunal in the Amoco International Finance case. In its award of 14 July 1987, the Tribunal held as follows, with exemplary clarity:

> "As a lex specialis in the relations between the two countries, the Treaty supersedes the lex generalis, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions[59]."

2.17 Significantly, the United States itself has recognised that the terms employed in FCN treaties such as the 1955 Treaty of Amity must be

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> établit une présomption du caractère déclaratoire des règles particulières par rapport aux règles générales. En d'autres termes, et faute d'intention contraire, on doit considérer qu'une notion juridique utilisée sans autre précision par une règle spéciale renvoie à sa définition en droit international général. C'est ainsi que les traités s'inscrivent normalement dans le contexte du droit coutumier préexistant".

58 See, in this respect, for example, the references given in Oppenheim's International Law, op. cit., p. 1275, footnote 21.

59 Amoco International Finance Corp. v. the Islamic Republic of Iran, et al., Award No. 310-56-3 dated 14 July 1987 (Virally, Chairman), reprinted in 15 Iran-U.S. Claims Tribunal Reports, 1987-II, p. 189, at p. 222, and Esphahanian v. Bank Tejarat, Award No. 31-157-2 dated 29 March 1983 (Bellet, Chairman), reprinted in 2 Iran-U.S. Claims Tribunal Reports, 1983-1, p. 157, at p. 161. See, also, in this respect, Villiger, M.E. : op. cit., p. 270:

> "...if the terms of a rule are not defined in their context, the customary rule may add such definition. If the written rule is too general or phrased ambiguously, the customary rule may supply a plausible meaning for the terms. The customary rule may additionally fill lacunae in the conventional rules".

Similarly, the following passage, which is also worth reproducing in extenso, may be found in Oppenheim's International Law, op. cit., at p. 1275:

> "Account is taken of any relevant rules of international law not only as constituting the background against which the treaty's provisions must be viewed, but in the presumption that the parties intend something not inconsistent with generally recognised principles of international law...".

interpreted in the light of customary international law. As the Committee of Foreign Relations of the U.S. Senate stated in a report issued in connection with the FCN treaty entered into between the United States and China:

> "The treaty to be thus negotiated will be based upon the principles of international law and practice as reflected in modern international procedures[60]."

Much the same point has been made by one of the chief negotiators of FCN treaties at the time, Robert Wilson. He writes:

> "Even without express reference to the law, it would still be true... that 'treaty commitments are to be construed in the light of international law'[61]."

And, in an observation which underscores the lack of merit in the jurisdictional objection raised by the United States in this case, Wilson adds:

> "Provisions which entrust to the International Court of Justice the office of final, authoritative interpreter should provide safeguards against any party state's arbitrary or unreasonable constructions[62]."

2.18 It was, therefore, for the strict purpose of the proper interpretation of the clauses of the 1955 Treaty that Iran's Memorial referred to general international law and the U.N. Charter, in accordance with the indications and suggestions unanimously put forward in both doctrine and jurisprudence. Consequently, the Court clearly has full jurisdiction in the present case to apply any relevant rule of international law (including general custom, the U.N. Charter and other treaties which are binding upon the Parties), to the extent that such application facilitates the interpretation of the provisions of the Treaty of Amity and, in particular, makes it possible to "ascertain the meaning of undefined terms in its text".

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60 See, U.S. Preliminary Objection, Exhibit 56, p. 3.

61 Wilson, R. R.: "Property-Protection Provisions in United States Commercial Treaties", American Journal of International Law, Vol. 45, 1951, at p. 105. Iran's Memorial, Exhibit 97.

62 Ibid.

CHAPTER III JURISDICTION OF THE COURT AND ROLE OF THE SECURITY COUNCIL

2.19 At various points of its pleading of 16 December 1993, the United States puts forward another argument allegedly militating against the jurisdiction of the Court. According to the United States, by seising the Court of the present case, Iran is trying to obtain from the Court something that it did not succeed in obtaining from the Security Council in 1987 and 1988: a condemnation of the United States for having participated in the Iran-Iraq war on the side of Iraq[63]. With this aim in mind, Iran has allegedly dressed up as breaches of the 1955 Treaty the same allegations which it had already made unsuccessfully in the past in the Security Council against the United States, and this is "a callous manipulation of the Treaty or the Court[64]". To this is added another argument: that the fact that four years elapsed between the time when the incidents occurred and the date on which Iran filed its Application suggests that Iran "did not contemplate that the 1955 Treaty had any relation to the events at issue in these proceedings[65]".

2.20 It is in fact very difficult to understand what such arguments might mean. And it is even more difficult to grasp the legal consequences which, according to the United States, should flow from the so-called "manipulation" or "belated submission" of which Iran is allegedly guilty.

2.21 It could quite simply be a different way of stating the same objection as has been refuted above: namely, that Iran's claim in fact raises issues relating to a violation by the United States of the rules of the U.N. Charter and general international law (which are issues outside the Court's jurisdiction) and not a breach of the 1955 Treaty (with respect to which it has jurisdiction). It is of course unnecessary to return to this point, especially since, in the coming pages, it will be necessary to discuss further the interpretation of the relevant provisions of the Treaty of Amity.

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63 See, U.S. Preliminary Objection, p. 2, and the whole of Part III, Chapter I, pp. 34, et seq..

64 Ibid., p. 38, para. 3.12.

65 Ibid.

2.22 But perhaps the argument should be understood differently. Perhaps the United States wants to argue along the following lines: at the time of the events, the facts which are at issue (namely, the destruction of the Iranian oil platforms by the United States) had been submitted to the Security Council by Iran itself, who accused the United States of a violation of the U.N. Charter but did not obtain from the Council the adoption of the desired measures; and, given that the Security Council did not accept these accusations at the time, Iran cannot now turn to the Court to obtain from it something which the Security Council had refused it. In sum, the United States sees Iran's claim as in substance the equivalent of an appeal before the Court against a decision of the Security Council which was unfavourable for Iran[66].

2.23 If the United States is somehow trying to rely on the principle of ne bis in idem, this is clearly an outlandish theory which has no legal basis. First and foremost, at no time did Iran fomally request the Security Council to condemn the U.S. actions. Accordingly, the Security Council took no decision whatsoever on this subject; and no res judicata, which might place restrictions upon the findings of the International Court, has been created with respect to the facts at issue[67]. However, it must be mentioned, in addition, that even if the Security Council had taken a position, this would not have prevented the Court from ruling upon Iran's claims, so long as:

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66 It may be noted that a similar argument was used by the United States against the Court's jurisdiction in the Nicaragua case. It is well known that the Court rejected that argument after summarising it as follows: "Since Nicaragua's Application in effect asks the Court for a judgment in all material respects identical to the decision which the Security Council did not take, it amounts to an appeal to the Court from an adverse consideration in the Security Council" (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 432, et seq., para. 91, et seq.).

67 It goes without saying that, since the Security Council took no decision with respect to the U.S. actions against Iran in 1987 and 1988, there is no need to mention here the question which arises in the event a decision is adopted. As is well known, Art. 103 of the U.N. Charter gives priority to obligations arising out of the Charter (including the obligation to comply with Security Council decisions) over obligations arising out of any other international treaty. It is also well-known that the question is the subject of much debate at present, in particular since the Court's Order of 14 April 1992 in the Lockerbie case (Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 15). See, also, Bedjaoui, M.: "Du contrôle de la légalité des actes du Conseil de Sécurité", in Nouveaux Itinéraires en Droit, Hommage à François Rigaux, Bruylant, Brussels, 1993, pp. 69-109; and Bowett, D. W.: "The Impact of the Security Council Decisions on Dispute Settlement Procedures", European Journal of International Law, Vol. 5 (1994), No. 1, pp. 89-101.

> "[t]he Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations[68]".

2.24 Since the matter of the destruction of the Iranian platforms is no longer on the Security Council's agenda, it is clear that the question of litispendence, i.e., whether or not the Court may examine a dispute of which the Security Council is also seised, cannot even arise in the present case[69]. Without wanting to enter into a discussion which would be of no relevance here, it should be remembered that according to the Court's consistent jurisprudence, there is nothing whatsoever to prevent the Court and the Security Council from dealing with the same dispute at the same time. As the Court has stressed very clearly, for example in 1984[70], and as it repeated in 1993:

> "[t]he Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events[71]".

Moreover, the Court has also recalled that:

> "... as the Corfu Channel case (I.C.J. Reports 1949, p. 4) shows, the Court has never shied away from a case brought before it merely

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68 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 436, para. 98.

69 On this subject, which has been much discussed, see, for example, Rosenne, S.: The Law and Practice of the International Court, Martinus Nijhoff Publishers, The Hague, 1985, pp. 87 et seq.; Elsen, T.J.H.: Litispendence between the International Court of Justice and the Security Council, T.M.C. Asser Institut, The Hague, 1988, pp. 47, et seq.. See, also, the references given in footnote above.

70 Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 435, para. 95. See, also, United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, pp. 21, et seq..

71 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Order of 8 April 1993, I.C.J. Reports 1993, p. 19.

because it had political implications or because it involved serious elements of the use of force[72]".

2.25 This reminder of the difference between the functions of the two organs - political for the Council and judicial for the Court - allows a subsidiary argument put forward by the United States to be disposed of at the same time - an argument, however, which, once again, completely fails to identify the legal consequences which should flow from it. Thus, in its Preliminary Objection, the United States accuses Iran of never having claimed before the Security Council that the U.S. actions in 1987 and 1988 were breaches of the 1955 Treaty[73]. The answer is clear and simple: there is no reason why Iran should have relied on the 1955 Treaty before an organ like the Security Council, whose function ("of a political nature", as the Court stressed) is to ensure the maintenance and establishment of peace in application of the principles of the Charter, and not to ensure the correct interpretation and proper application of various bilateral treaties such as the Treaty of Amity. On the other hand, it is perfectly logical for that Treaty to be relied on before the Court, since the Court is a judicial organ of the United Nations which, under Article 38, paragraph 1, of the Statute of the Court, is called upon to settle disputes "in accordance with international law" This is all the more so in light of the fact that the Treaty itself gives the Court, and that organ alone, the task of settling disputes relating to its interpretation and application. In other words, the two Parties, in advance and by common agreement, designated the Court as the organ having exclusive jurisdiction (failing any subsequent agreement to the contrary) to settle their disputes concerning the Treaty: it is therefore most astonishing that the United States should now complain that Iran did not rely on the 1955 Treaty before the Security Council.

2.26 Given the different roles of the Security Council and the Court, there was nothing irregular about Iran's decision to file its Application in 1992. Indeed, as has already been seen, the destruction of the oil platforms by the United States in 1987 and 1988 was the culmination of an increasingly hostile attitude that the United States adopted towards Iran in the context of the Iran-Iraq war. Yet the Secretary-General's Report under Resolution 598 attributing

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72 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 435, para. 96.

73 U.S. Preliminary Objection, pp. 35 et seq., paras. 3.06, et seq..

responsibility for that conflict on Iraq - which was being assisted by the United States - was only issued in December 1991. Thereafter, as the United States freely admits, Iran attempted to negotiate the dispute but was flatly rebuffed[74]. In these circumstances, it was entirely appropriate for Iran to file its Application in November 1992 after the attempt at negotiations failed.

2.27 It is apparent, and the United States has not contested the fact, that Iran's Application fully complied with the Statute and Rules of Court and with the relevant provisions of Article XXI(2) of the Treaty of Amity, the compromissory clause. None of these instruments places any time-limit on the right of a party to institute proceedings before the Court. Indeed, in the circumstances enumerated above, a four-year time lag was in no way unreasonable[75]. In filing its Application, therefore, Iran was doing no more than exercising a right to which it was entitled. As the the Court held in the Corfu Channel case, it "cannot... hold to be irregular a proceeding which is not precluded by any provision [of the Statute and Rules][76]".

2.28 In conclusion, the Court's jurisdiction with respect to the present dispute cannot be questioned on the basis of an alleged conflict with the

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74 Ibid., p. 36, paras. 3.07-3.08.

75 If reference is made to the case concerning Certain Phosphate Lands in Nauru, where a twenty-year delay in the institution of proceedings by Nauru was not deemed excessive, it will be seen that the passage of a mere four years in this case was very modest in view of the circumstances and the state of relations between the two Parties. As the Court stated in the Nauru case, "given the nature of the relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by the passage of time". Certain Phosphate Lands in Nauru (Nauru v. Australia), Judgment, Jurisdiction and Admissibility, 26 June 1992, p. 16.

76 Corfu Channel, Preliminary Objections, Judgment, 1948, I.C.J. Reports 1947-1948, at p. 28. The situation which arose thus resembles to some degree the 1956 arbitration between the United Kingdom and Greece which followed the 1953 judgment in the Ambatielos case. In that arbitration, the United Kingdom advanced a procedural objection similar to that raised by the United States in the present case by contending that the Greek claim ought to be rejected by the Commission of Arbitration because Greece had belatedly introduced an 1886 Anglo- Greek commercial treaty as the basis of its legal action. The Commission looked at the conduct of Greece and found that the change of legal basis for its action could be explained "as being due to the anxiety of the Greek Government to submit the dispute to arbitration". (Ambatielos (Greece/United Kingdom), 6 March 1956, Reports of International Arbitral Awards, Vol. XII, p. 91, at pp. 103, et seq.). Since the 1886 Treaty was the appropriate legal instrument allowing a settlement by arbitration, the Commission rejected the U.K. objection and held that, "the Greek Government, by changing the legal basis of its action in order to obtain a settlement of the dispute by arbitration, only exercised the right to which it was entitled".

competence of the Security Council or the fact that the Application was filed in 1992, four years after the events in question occurred.

PART III

ANALYSIS OF THE RELEVANT PROVISIONS OF THE TREATY OF AMITY

3.01 It now remains to take into consideration the various remarks by the United States, according to which Iran's claims concern matters which - whatever Iran may argue - do not fall within any of the provisions of the 1955 Treaty. In particular, the United States argues that the three articles of the Treaty which are relied upon in Iran's Memorial - Articles I, IV(1) and X(1) - impose upon the Parties obligations of a strictly commercial nature, which have nothing to do with events "...involving hostile encounters between armed forces of the two Parties in the context of an ongoing armed conflict[77]".

3.02 It is clear that the two Parties are submitting to the Court two very different - even completely contrary - interpretations of the provisions of the Treaty. However, in order to respond to the U. S. Preliminary Objection to jurisdiction, there is no need for Iran to return in detail to its analysis of the U. S. conduct and to its demonstration - already made in its Memorial - that such conduct was in breach of the 1955 Treaty: these are matters upon which the Court will have to decide when it examines the merits of the present dispute. Instead, it is both necessary and sufficient, for the moment, to examine briefly once again the above-mentioned provisions, with the sole aim of confirming that, contrary to what the United States alleges, the present case does indeed involve their interpretation and application.

3.03 In determining the meaning of conventional provisions, it is of course necessary to apply the principles relating to the interpretation of international treaties. It is unanimously acknowledged that these principles are codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. As has already been pointed out above, such interpretation must be made in the light of general international law, the U.N. Charter, and the other treaties in force between the Parties: there is no need here to repeat this indisputable truth[78]. The requirements of the "general rule of interpretation" (Article 31) should also be remembered: each provision of the treaty must be interpretated in good faith, in accordance with the ordinary meaning to be given

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77 U.S. Preliminary Objection, p. 39, para. 3.14.

78 See, Part II, Chapter II, above.

to the terms of the treaty in their context and in the light of its object and purpose. On the other hand, the travaux préparatoires of the treaty and the circumstances of its conclusion may be used only as a "supplementary means of interpretation", i.e., with the sole aim of either confirming the interpretation as it results from the application of the criteria mentioned in Article 31, or determining the meaning when the application of those criteria leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable (Article 32).

3.04 In its Memorial, it was on these indisputable principles that Iran based its interpretation of the provisions of the 1955 Treaty upon which it relies, maintaining that they have been breached by the United States. In particular, it must again be stressed that it is true that Iran made much of the object and purpose of the 1955 Treaty, which it identified by referring in particular to the Preamble of the Treaty, in which the aim "...of emphasising the friendly relations which have long prevailed between their peoples" was explicitly highlighted. But Iran has not asked the Court to condemn the United States for having breached the object and purpose of the Treaty, independent of its breach of the above-mentioned provisions of the Treaty. To the contrary, Iran has requested the Court to adjudge that the U.S. actions in 1987 and 1988 were specific breaches of three provisions of the Treaty of Amity, which cannot be correctly interpreted without taking into consideration the object and purpose of the Treaty in question.

3.05 The United States is therefore completely mistaken when it assimilates the present Iranian claim to Nicaragua's claim based on the Treaty of Amity between Nicaragua and the United States in the Military and Paramilitary Activities case[79]. As Iran's Memorial had already fully clarified (whereas in its pleading of 16 December 1993 the United States maintains complete silence on this essential subject), Nicaragua had argued at the time that the United States had directly breached the object and purpose of the Treaty of Amity, over and above any violation of its specific terms[80]. In the present case, on the other hand, Iran has made reference to the object and purpose of the Treaty of Amity only in order to determine the exact meaning of the various provisions of the Treaty of Amity upon which it relies.

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79 U.S. Preliminary Objection, pp. 41, et seq., paras. 3.19, et seq..

80 Iran's Memorial, Part III, Chapter I, Section B, pp. 70, et seq..

3.06 It should moreover be remembered that in many cases international tribunals have used the preamble of a treaty in order to identify its object and purpose and to interpret its provisions in that light. Thus, to mention only two examples, in the Rights of Nationals of the United States of America in Morocco case, the International Court of Justice stated that, in order to interpret the terms of the 1906 Act of Algeria, it was necessary to take into account the purposes of that treaty, as set forth in its preamble[81]. Similarly, in its Judgment of 21 December 1962 in the jurisdictional phase of the South West Africa case, the Court referred to the preamble in order to identify the legal nature and interpretation of South Africa's mandate for South West Africa[82].

CHAPTER I INTERPRETATION OF ARTICLE I: LACK OF SUBSTANCE IN THE U. S. THEORY

3.07 In its Preliminary Objection the United States has protested against Iran's reliance upon Article I of the 1955 Treaty, according to which:

> "There shall be firm and enduring peace and sincere friendship between the United States of America and Iran".

Iran did indeed argue in its Memorial that this provision, whose wording suffers no ambiguity in view of the ordinary meaning of the terms used, lays down without any doubt obligations for the contracting Parties: obligations to conduct themselves in a peaceful manner in their reciprocal relations, in compliance with the principles governing friendly relations between States. Iran also argued that the conduct required or prohibited by this provision may be easily identified by using the relevant principles of general international law and of the United Nations Charter, i.e., by using the most usual and most unanimously accepted method in order to "ascertain the meaning of undefined terms" appearing in the text of a treaty. It may also be remembered that in the Amoco International Finance case the Iran-U.S. Claims Tribunal did not restrict itself to making general reference to the relevance of this method: in addition, it applied it in a very noteworthy manner, by referring to the principles of international law

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81 Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952, pp. 196, et seq..

82 South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, pp. 330, et seq.. See, also, the 1984 Judgment in the Nicaragua case (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 428).

relating to expropriation in order to determine the meaning of Article IV(2) of the 1955 Treaty[83].

3.08 The United States challenges this analysis head-on; but it does so without attributing any other meaning whatsoever to Article I. In substance, for the United States, this provision is tamquam non scripta since it allegedly gives rise to no obligation for the Parties in addition to those flowing from the other articles of the 1955 Treaty: thus, it is argued that it quite simply has no legal effect of any kind.

3.09 In particular, the United States does not dispute the accuracy of Iran's observations concerning the fact that most of the treaties of amity concluded by the United States do not contain a provision analogous to Article I of the Treaty with Iran, but simply make reference to peace and friendship only in their respective preambles. Nor does the United States deny that only in a very small number of those treaties (and in particular in the case at issue here) is there a reference to peace and friendly relations not only in the preamble, but in the body of the treaty itself, and that it is spelt out there in words which make clear the mandatory nature of the provision ("there shall be"). The United States even acknowledges that such claims "serve to emphasize the essentially friendly character of the treaty[84]", just as it had previously admitted that they are designed to express the existence of "close political relations" between the contracting Parties[85]. But despite all this - and in a remarkably self-contradictory fashion - the United States persists in maintaining that such a provision in fact has no legal value or effect, and adds nothing to the obligations otherwise resulting from the Treaty. In other words, the mandatory scope of a treaty would be totally unaffected, whether or not it contains a clause stating that the relations between the parties must be peaceful and friendly.

3.10 This theory is not only wrong: it is, quite frankly, astounding. First, no serious evidence has been provided to show that the Parties negotiated and adopted Article I with the aim of... saying nothing! Second, it ignores one of

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83 Amoco International Finance Corp. v. The Islamic Republic of Iran, et al., Award No. 310-56-3 dated 14 July 1987 (Virally, Chairman), reprinted in 15 Iran-U.S. Claims Tribunal Reports, 1987-II, p. 223, para. 115.

84 U.S. Preliminary Objection, p. 43, para. 3.22.

85 See, paras. 3.14 and 3.15 below, and Exhibit 10.

the most classic rules of interpretation of international treaties: the rule of effectiveness or "effet utile" (ut res magis valeat quam pereat).

3.11 With respect to the first aspect, the United States essentially relies upon the absence of any declarations or statements of position by the U.S. side during the ratification process of the four treaties of amity which contain the clause under discussion, which might show that the clause was intended to be mandatory.

3.12 This argument is quite obviously devoid of any relevance, not to say frankly absurd. First, it presupposes that a treaty provision should be interpreted in the light of a single party's perception of it at the time of ratification. Next, the argument in question tries to make elements which arguably might fall within the history of the treaty and the circumstances of its conclusion prevail over the clear terms of the treaty: yet this is excluded by Articles 31 and 32 of the Vienna Convention. Finally, the United States has not demonstrated in any way that the U.S. authorities at the time excluded the possibility of any legal effect resulting from Article I: all that can be concluded from the alleged facts is that the U.S. officials who were responsible at the time did not say that it was a mandatory provision. But it is quite obvious that such silence (since it was indeed a silence) can prove absolutely nothing whatsoever; still less can it be relied upon against Iran and be binding upon Iran.

3.13 In any event, it is instructive to examine how the U.S. State Department viewed the inclusion of a similar provision in a 1946 FCN Treaty between the United States and China. Unlike the "standard" form of treaty, Article I, paragraph 1, of the U.S. - China Treaty contains a specific provision stating that "[T]here shall be constant peace and firm and lasting friendship between the Republic of China and the United States of America[86]". As can be seen, this is much the same language as is used in Article I of the 1955 Treaty of Amity with Iran.

3.14 In the course of the discussions which led up to the signing of the U.S. - China treaty, the State Department forwarded a Memorandum to the U.S. Embassy at Chungking for use in the negotiations[87]. The Memorandum

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86 A copy of the relevant extract from the U.S.-China Treaty is attached in Exhibit 11.

87 Exhibit 10.

set forth a detailed analysis of the provisions of the treaty including the following with respect to Article I, paragraph 1:

> "Par. 1. Although there have been comparable provisions in many of the older treaties of the United States and in some recent executive agreements, it has not been customary to include such a paragraph as this one in treaties of friendship, commerce and navigation to which the United States is a party. However, the inclusion of the paragraph is appropriate in view of the close political relations between China and the United States[88]."

3.15 This analysis directly contradicts the U.S. thesis that the inclusion of such provisions in the body of FCN treaties made no difference. Clearly, the United States considered the provision "appropriate" for policy reasons: i.e., in order to emphasise and give effect to the close political relations between the two countries.

3.16 Exactly the same considerations underlay the Treaty of Amity between Iran and the United States. Since it must be presumed that the State Department was not in the habit of including provisions of such importance in treaties for no particular purpose, and given that it was the intention of the United States to strengthen its ties with Iran at the time the Treaty was signed, the conclusion is clear that the United States wished to emphasise its close political relations with Iran at a particularly sensitive time when there was a risk that Iran would fall out of the Western orbit. This political intent was thus translated into the legal commitment of peace and friendship contained in Article I[89].

3.17 As for the studies by U.S. lawyers, which do not identify the legal effects of Article I and have no official character, it is even more absurd to try to base upon them any argument whatsoever which might be relied upon against Iran or used before the Court in order to interpret the 1955 Treaty[90].

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88 Ibid. (emphasis added).

89 See, Schwarzenberger, G.: International Law as Applied by International Courts and Tribunals, Stevens & Sons, London, 1957, at p. 517 where the author discusses the functional aspect of interpretation based on the object that the parties intended to fulfil in regulating their relations in a treaty.

90 U.S. Preliminary Objection, p. 45, paras. 3.26, et seq.. The various commentaries and comparative tables on other FCN treaties produced by the United States in its Preliminary Objection do not alter the picture. It is quite true that many FCN treaties entered into by the United States in the post-war period were broadly similar. But this does not mean that they were identical or gave rise to the same rights or obligations in each instance. As the note to the comparative table on FCN treaties appearing at Exhibit

3.18 There is also no sense in trying to interpret Article I of the 1955 Treaty in the light of the interpretation which the International Court of Justice put upon another Treaty of Amity (between the United States and Nicaragua) which does not contain an analogous provision[91]. The United States is quite clearly short of serious arguments if it has to put forward arguments which are so obviously lacking in substance.

3.19 Moreover, it should be noted that in its Preliminary Objection the United States has completely distorted the thinking of the Court as expressed in its 1986 Judgment in the Nicaragua case. It is true that the Court did make a distinction between "the broad category of unfriendly acts, and the narrow category of acts tending to defeat the object and purpose of the Treaty[92]". It is also true that the Court stated that "[t]hat object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense[93]". But despite this strict approach, the Court did not hesitate in the slightest to hold that certain acts involving the use of force - although not explicitly covered by the terms of the Treaty - were in direct and clear contradiction with the Treaty's object and purpose. Thus, it clearly stated that -

> "...there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two States parties to it. These are: the direct attacks on ports, oil installations, etc...; and the mining of Nicaraguan ports... . Any action less calculated to serve the purpose of 'strengthening the bonds of peace and friendship traditionally existing between' the Parties, stated in the Preamble of the Treaty, could hardly be imagined[94]".

3.20 It is therefore clear that, in the Court's view, the general principle of international law pacta sunt sevanda, applied to the Treaty, carries

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53 to the U.S. Preliminary Objection cautions, not all variations in the individual treaties were compiled because "in all likelihood [this] would not eliminate the need for careful textual comparison when close questions were at issue".

91 Ibid., p. 44, para. 3.24.

92 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 137, para. 273.

93 Ibid.

94 Ibid., p. 138, para. 275.

with it prohibitions which go beyond what is explicitly provided by the various terms of the Treaty: such prohibitions cover, in particular, conduct which is in direct contradiction with the object and purpose of the Treaty. But this is not all: when in 1986 the Court based its reasoning on the object and purpose of the Treaty of Amity between the United States and Nicaragua, this was for the simple reason that the Treaty contained no provision similar to Article I of the U.S. - Iran Treaty and the Court was empowered to decide the matter on the basis of customary international law by virtue of the parties' adherence to the Court's Optional Clause. However, the Court explicitly allowed for cases where there would be no need to rely exclusively on the object and purpose of the Treaty in order to identify the prohibited unfriendly acts, i.e., where the Treaty in question provides in its own provisions for the duty to abstain from any act toward the other party which could be classified as an unfriendly act. Indeed, the Court admitted de plano that:

> "[s]uch a duty might of course be expressly stipulated in a treaty, or might even emerge as a necessary implication from the text[95]";

and this is precisely the case with respect to the 1955 Treaty between Iran and the United States, in view of Article I of the Treaty.

SECTION A The Principle of Effectiveness ("Effet Utile")

3.21 It is time now to turn to the second aspect mentioned above. As has already been noted, the U.S. theory is tantamount to a deletion of Article I of the text of the Treaty: the article is devoid of all legal effect since it gives rise to no obligations for the Parties. But this theory is not only unsupported by any evidence, as has just been pointed out: it is also in flagrant contradiction of the principle of interpretation referred to as effectiveness (or "effet utile").

3.22 In 1926, for example, the United States had put forward a similar theory before a British-American Claims Commission, concerning a provision of a treaty which it considered as "a nominal provision not intended to have any definite application". The arbitrator responded as follows:

> "We can not agree to such interpretation. Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between

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95 Ibid., p. 137, para. 273.

> possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do ...[96]."

The International Court of Justice has followed similar reasoning, for example in the Corfu Channel case, when it stated that:

> "[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect[97]";

and, in order to emphasise the consistency of the jurisprudence in this regard, it cited the famous obiter dictum of the Permanent Court of International Justice in its Order of 19 August 1929 in the Free Zones case, as follows:

> "...in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects[98]".

3.23 This rule of interpretation, which has been widely approved in doctrine[99], is generally considered as a corollary of the principle of good faith in treaty interpretation. Indeed, it is for this reason that it has not been specifically spelt out in the 1969 Vienna Convention, as the International Law Commission explicitly mentioned in its 1966 Report[100]. It is true, however, that the principle must be used with caution, because of the limits which are put upon it. The Court indicated these limits in its 1950 Advisory Opinion in the Interpretation of Peace Treaties case, where the following is stressed:

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96 Cayuga Indians Claim, 22 January 1926, American Journal of International Law, Vol. 20, 1926, p. 587.

97 Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 24.

98 Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 13. With respect to these extracts from decisions of the Permanent Court and the present Court, it is appropriate to cite the remark made by Sir Gerald Fitzmaurice in: The Law and Procedure of the International Court of Justice, Grotius, Cambridge, 1986, Vol. I, p. 60, footnote 1: "Although these passages related to a special agreement between two parties to a dispute for its reference to, and adjudication by, the Court, the principle involved is quite general".

99 See, for example, Fitzmaurice, Sir Gerald: op. cit., pp. 59-61; Lord McNair: The Law of Treaties, Clarendon Press, Oxford, 1961, pp. 383-385; Yasseen, M. K.: op. cit., pp. 71-75; and de Visscher, C.:, op. cit., pp. 89-92.

100 Yearbook of the International Law Commission, 1966, Vol. II, pp. 238, et seq..

> "The principle of interpretation expressed in the maxim: Ut res magis valeat quam pereat, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which ... would be contrary to their letter and spirit[101]."

3.24 It is clear that in the present case the limit mentioned by the Court in 1950 does not come into play, since Iran's interpretation of Article I of the 1955 Treaty is perfectly in harmony with the letter and the spirit of the provision, where it is explicitly indicated that there are obligations ("there shall be") concerning the Parties' compliance with the rules relating to peaceful and friendly relations between the States. In short, there is no question that the interpretation advanced by Iran runs contrary to the letter and spirit of the Treaty. Thus, the U.S. theory, according to which Article I has no legal effect, must be held to be unacceptable because it contradicts the ordinary meaning of the terms contained in Article I and is tantamount "to reject[ing] the apparent meaning and to hold[ing] that the provision has no meaning[102]".

3.25 The truth of the matter is that in its Preliminary Objection the United States is insinuating that it is Iran's interpretation of Article I that makes this provision unnecessary. What was the use of introducing in the 1955 Treaty "some sort of substitute for or supplement to the rules of armed conflict and the use of force contained in the U.N. Charter, the laws of war and general international law"? Indeed, according to the United States, "there was no conceivable need for such a substitute in a commercial treaty since these general rules already were applicable to the two parties[103]".

3.26 This objection had already been taken into account and refuted in Iran's Memorial, in the light of highly relevant international jurisprudence[104]; and it is astonishing that the United States has not said one word in this respect. Thus, the International Court of Justice has found that there are many international treaties which oblige the parties thereto to comply with

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101 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 229.

102 See, para. 3.22, above.

103 U.S. Preliminary Objection, p. 46, para. 3.28.

104 Iran's Memorial, p. 63, para. 2.31. See, also, p. 75, para. 3.18.

rules of international law which are already binding upon them, regardless of the treaty. And the Court has emphasised that one of the reasons which may lead to the conclusion of a treaty containing such clauses, and one of the effects of such clauses, may very well be that the mechanism for the settlement of disputes arising out of the treaty is put at the service of the norms of international law which are incorporated in the treaty by express reference[105].

3.27 In the present case, this is indeed what happens as a consequence of Article I. Thus, disputes relating to the interpretation and application of the rules of general international law referred to in Article I would in themselves escape the Court's jurisdiction. But it is precisely because of the incorporation of these rules in Article I that the Court may be seized of such disputes, by virtue of the compromissory clause contained in Article XXI(2).

SECTION B The Position Taken by Iran in the Amoco International Finance Case

3.28 In its Preliminary Objection the United States has argued that in another context Iran itself has admitted that acts involving the use of force do not fall within the scope of the 1955 Treaty. This assertion is based on a passage from a pleading submitted by Iran to the Iran-U.S. Claims Tribunal in the Amoco International Finance case, which is presented separately by the United States, in isolation from the claims as a whole which Iran submitted to the Tribunal at the time[106]. However, a full examination of the position taken by Iran in the Amoco International Finance case demonstrates the inaccuracy of the U.S. allegation. Indeed, Iran had unsuccessfully requested the Tribunal to hold that the 1955 Treaty was no longer in force, and to this end had put forward a whole series of arguments which were not upheld by the Tribunal. The main argument was that the Treaty had been breached so fundamentally and substantially by the United States, including by acts involving the use of force, that it had to be considered as defunct. In its pleadings, therefore, Iran was asserting exactly the opposite of what the United States alleges it asserted.

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105 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports 1986, pp. 95-96, para. 178.

106 U.S. Preliminary Objection, p. 46, para. 3.29.

3.29 For example, in the Respondents' Rebuttal of 5 February 1985, immediately after mentioning, inter alia, both Article I of the Treaty and the U.S. armed raid on Iranian territory on 24 April 1980 - the abortive "rescue" operation - Iran had stated:

> "The actions of the U.S. described above are clearly incompatible with the view that the Treaty was still in effect at the relevant time. Alternatively, they may be viewed as material breaches of the Treaty... giving rise to the rescission thereof...[107]."

Again, and also very clearly, in the Respondents' Supplemental Pleading of 1 October 1985, Iran had stated - again after mentioning the 1980 U.S. raid - that "...the Treaty is unavailing since the Treaty had been unilaterally breached by the United States[108]".

3.30 The fact that the Tribunal rejected Iran's position and held that the 1955 Treaty is still in force clearly implies that Iran is entitled to rely on that Treaty today; and this is in any event not disputed by the United States. In particular, Iran is indisputably entitled to rely on Article I with respect to the U.S. actions in 1987 and 1988, since there is nothing in its prior conduct to constitute an obstacle to the admissibility of this claim. Indeed, not only has Iran not excluded the possibility of acts involving the use of force falling within the scope of Article I: but on the contrary, it has expressly stated that acts of this kind may be characterised as serious breaches of that provision.

SECTION C Conclusion as to the Court's Jurisdiction to Determine whether the U.S. Actions in 1987 and 1988 were a Breach of Article I of the 1955 Treaty

3.31 In conclusion, it is indisputable that Article I of the 1955 Treaty, interpreted in accordance with the ordinary meaning of its terms and in the light of its context and of the object and purpose of the Treaty, imposes upon the contracting Parties the obligation to conduct themselves in compliance with the principles of general international law concerning peaceful and friendly relations between the States. The violation of one of these principles is therefore

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107 See, the extract from the Respondents' Rebuttal of 5 February 1985 in Amoco International Finance Corp. v. Iran et al., Case No. 56 before the Iran-U.S. Claims Tribunal, at pp. 29, et seq. (emphasis added). Exhibit 12.

108 See, the extract from Respondents' Supplemental Pleading of 10 October 1985, ibid., p. 69. Exhibit 13.

an internationally illegal act on two grounds: from the point of view of both the Treaty and general international law.

3.32 In its Application to the Court, Iran maintained that Article I has been breached by the United States, which used force against Iran in violation of its obligations as laid down by both general international law and Article I of the Treaty. This claim clearly concerns a dispute relating to the interpretation and application of the 1955 Treaty, and the Court therefore enjoys full jurisdiction to entertain it, in accordance with the compromissory clause set out in Article XXI(2) of the Treaty of Amity.

CHAPTER II INTERPRETATION OF ARTICLE IV(1)

3.33 In its Memorial, Iran argued that the U.S. actions in 1987 and 1988 were breaches of Article IV(1) of the Treaty which, inter alia, requires the Parties to "...accord fair and equitable treatment to the nationals and companies of the other High Contracting Party, and to their property and enterprises", and prohibits them from imposing "...unreasonable and discriminatory measures that would impair their legally acquired rights".

3.34 In its Preliminary Objection, the United States has used just one argument to dispute the validity of Iran's position. According to the United States, Article IV(1), like other provisions of the Treaty, concerns only the rights of nationals and companies of one Party in the territory of the other; in other words, the purpose of Article IV(1) was not to prohibit all injury to the nationals and companies of the other Party regardless of location of their nationals and companies[109].

3.35 It goes without saying that this theory requires an extremely restrictive interpretation of the provision: thus, the obligations arising out of Article IV(1) are allegedly subject to a territorial restriction, which does not appear in the Article and which, therefore, cannot be justified by the text of the Article. According to this interpretation, then, the Treaty would not be breached if, for example, one Party seized goods belonging to nationals or companies of the other Party which were situated in a third State or on the high seas: this would be astonishing, to say the least, and hardly compatible with the spirit of a treaty of amity. Moreover, the U.S. pleading has not shown on the basis of what criteria or

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109 U.S. Preliminary Objection, pp. 47, et seq., paras. 3.30, et seq..

reasons such a restriction - which was not included in the text by the Parties - must be inferred. In contrast, Iran's Memorial has shown that the absence of any territorial condition is in line with the object and purpose of the Treaty and is confirmed by an interpretation in its context.

3.36 The first remark that must be made with respect to this difference in views is the following: it is quite obvious that the two Parties are proposing to the Court two different interpretations of the same provision. In other words, as the United States itself admits, there is indisputably a dispute between the Parties concerning the interpretation of Article IV(1) and more precisely, its scope ratione loci; and it is exactly this type of dispute that gives the Court jurisdiction under Article XXI(2) of the Treaty.

3.37 At this stage the above remark would suffice, since it makes it clear that there is no remaining obstacle to prevent the Court from holding that it has jurisdiction and deciding to move on to an examination of the merits of Iran's claim. But it is appropriate nevertheless to stress here and now the erroneous nature of the analysis proposed by the United States, since Article IV(1) protects individual economic rights, as do other conventional provisions with similar characteristics. In essence, Article IV(1) is very reminiscent of the clauses contained in conventions on human rights which require the contracting States to respect such rights for individuals within their jurisdiction. This is usually interpreted as meaning that the States concerned are bound by the obligations flowing from these conventions in respect not only of individuals located in their territory, but also of those who may be subject to their power outside the national territory (for example, in the high seas or on the premises of an embassy abroad, etc). It must be noted that this point of view is widely accepted in both doctrine and jurisprudence concerning human rights[110], and that it was particularly well explained in the very evocative position adopted by the European Commission of Human Rights in a 1975 decision:

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110 See, in this regard, Widdows, K.: "The Application of a Treaty to Nationals of a Party outside its Territory, in International and Comparative Law Quarterly, Vol. 35, 1986, pp. 729, et seq.; Meron, T.: Human Rights in Internal Strife: Their International Protection, Grotius, Cambridge, 1987, pp. 40, et seq.; Condorelli, L.: "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", Recueil des Cours de l'Académie de Droit International, Vol. 189, 1984, VI, pp. 91, et seq.. For the latest jurisprudence on this question, see, Dipla, H.: La responsabilité de l'Etat pour violations des droits de l'homme, A. Pedone, Paris, 1994, pp. 45, et seq..

> "...the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad;... nationals of a State, including registered ships and aircraft, are partly within its jurisdiction wherever they may be, and ...that authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad, but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged[111]".

3.38 In the light of the above, it may be concluded that the general obligations of the High Contracting Parties provided for in Article IV(1) of the 1955 Treaty of Amity are applicable every time one of them is in a position to exercise State powers over nationals of the other High Contracting Party or over their goods, either inside or outside the national territory. The case of armed forces of a State acting outside the national territory is particularly relevant here.

3.39 It must be added, further, that in support of its theory the United States relies upon the opinion expressed by the Court in its 1986 Judgment in the Nicaragua case concerning the corresponding provision in the Treaty of Amity between the United States and Nicaragua. However, it puts words in the Court's mouth which the Court was careful not to say. Thus, it is completely untrue to state that the Court "...expressly declined to accept Nicaragua's assertion that the provision for 'equitable treatment' creates an obligation on the part of the United States in regard to Nicaraguan citizens in Nicaragua[112]"; to the contrary, the Court "expresse[d] no opinion" on this subject as it freely stressed itself[113]. What is clear is that at the jurisdictional phase of the proceedings, the Court had no problem determining that a dispute over the treaty's interpretation or application existed. In 1986, at the merits stage, it was simply because the Court was not able to impute to the United States the acts in issue (which had been committed by the Contras), that it did not need to decide whether they were breaches of the Treaty of Amity. On the other hand, in the present case the conduct which is at issue is indisputably imputable to the United

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111 Decision of 26 May 1975 (Cyprus v. Turkey), Yearbook of the European Convention on Human Rights, 1975, p. 119.

112 U.S. Preliminary Objection, p. 48, para. 3.32.

113 Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 139, para. 277.

States, and therefore the Court must now necessarily express an opinion on the question of whether or not such conduct constitutes a breach of Article IV(1), in view of the fact that it occurred outside U.S. territory. While this remains an issue for the merits, it is certainly plausible at this stage of the proceedings that the killing of persons and destruction of property caused by the U.S. attacks on the oil platforms cannot be regarded as equitable. This is sufficient to give rise to a genuine dispute as to the Treaty's interpretation or application and thus to vest jurisdiction in the Court.

CHAPTER III INTERPRETATION OF ARTICLE X(1)

3.40 In its Memorial, Iran has argued that the U.S. actions in 1987 and 1988 were a violation of Article X(1) of the 1955 Treaty, which provides that:

> "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

In its Preliminary Objection the United States disputes Iran's conclusions in this regard, but does so in a contradictory, hasty and incomplete manner[114].

3.41 First, the United States asserts that its conduct in no way affected the "freedom of maritime commerce". However, this is obviously a very loose and erroneous reading of the provision, which protects not only freedom of navigation (including, of course, maritime commerce), but also freedom of commerce independent of navigation. Now, the U.S. actions, because they involved the destruction of industrial facilities producing goods for international trade, were seriously prejudicial to the freedom of commerce which Iran must be allowed to enjoy under Article X(1).

3.42 The United States also argues that Iran's claim does not involve commerce between the territories of the two Parties. However, this apodictic assertion neither takes into account nor criticises in any way the observations put forward in this regard in Iran's Memorial on the basis of highly relevant international jurisprudence[115]. Until the United States condescends to

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114 U.S. Preliminary Objection, pp. 49, et seq., paras. 3.34, et seq..

115 Iran's Memorial, p. 90, para. 3.66.

explain to the Court the reasons for its disdain of this instructive jurisprudence, Iran will do no more than confirm the argument put forward previously.

3.43 In any event, at least until the end of October 1987 - after the first U.S. attack - there was direct commerce in crude oil between Iran and the United States. Until the U.S. import bans came into force on 26 October 1987, the United States was importing over 250,000 barrels of Iranian crude oil per day[116]. Although direct imports may have ended after 26 October 1987, given the nature of the oil market it is almost certain that Iranian crude oil continued to find its way to the United States after this date. In any event the United States can hardly argue that there was no commerce in oil between Iran and the United States when the United States itself - by imposing import bans as additional retaliatory measures against Iran - had made such commerce impossible.

3.44 Finally, the United States accuses Iran of having itself breached Article X(1), by having laid mines in international waters and attacked vessels attempting to engage in innocent shipping. These assumptions are completely unfounded, as Iran has already shown and reserves the right to show further at a later stage in these proceedings. But what is important to highlight is the fact that the United States, by its very accusation that Iran has breached the Treaty (and Article X in particular) by military actions, acknowledges that this kind of action falls within the scope of the 1955 Treaty. This is an obvious contradiction, which deprives the U.S. Preliminary Objection of all credibility. In sum, there is an implicit recognition by the United States that the Court has jurisdiction in the present case, since the case indisputably poses questions of interpretation and application of the 1955 Treaty.

CHAPTER IV ARTICLE XX(1)(d) DOES NOT PRECLUDE THE COURT FROM EXERCISING JURISDICTION IN THE CASE

3.45 Article XX(1)(d) of the Treaty of Amity reads as follows:

"1. The present Treaty shall not preclude the application of measures:

* * *

116 See, Part I, para. 1.13, above.

(d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

3.46 The United States contends that the inclusion of this article in the Treaty of Amity confirms that the Treaty is not intended to address questions relating to the use of force by a Party during armed conflict[117]. More specifically, the United States argues that since the actions it took in destroying Iran's oil platforms were taken in self-defence and thus corresponded to measures necessary to protect its essential security interests, these actions should be excluded from the Court's review by virtue of Article XX(1)(d).

3.47 The Court will appreciate that there are two related legs to the U.S. argument. The first concerns the scope of the Treaty itself and whether, as the United States contends, a whole category of actions relating to the use of armed force are excluded ab initio from any review by the Court. The second is essentially a plea on the facts: that in the specific circumstances of the U.S. attacks on the oil platforms, these attacks were "necessary" to protect "essential security interests" of the United States.

3.48 As to the first point, it should be stressed at the outset that the mere existence of Article XX(1)(d), and the Parties' decision to include it in the Treaty of Amity, is evidence of the fact that the Treaty, in the Parties' own view, encompasses the kind of incidents which form the subject of this dispute. This conclusion is confirmed by the general tone of the Section of the U.S. Preliminary Objection concerning Article XX(1)(d)[118]. This provision is presented by the United States as a kind of "escape clause" - a specific exception said to remove certain subjects, notably "essential security interests", from the Court's jurisdiction. The logical consequence of such an approach must be that, but for the "escape clause" contained in Article XX(1)(d), these subjects are included within the purview of the Treaty since, otherwise, the clause would be superfluous. However, the United States has also argued that the Treaty is exclusively concerned with commercial matters. If that were the case, then there would be absolutely no need for a clause such as Article XX(1)(d). In other

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117 See, U.S. Preliminary Objection, pp. 50, et seq..

118 Ibid.

words, the mere existence of Article XX(1)(d) in the Treaty contradicts the U.S. thesis that the Treaty only addresses commercial or consular affairs.

3.49 It is also clear that the Court has already rejected the notion that Article XX(1)(d) precludes it from exercising its jurisdiction under the compromissory clause of the Treaty. As the Court held in the Nicaragua case in response to exactly the same argument raised by the United States:

> "This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provision in Article XXIV [the compromissory clause - equivalent to Article XXI(2) of the Iran-U.S. Treaty of Amity] that any dispute about the 'interpretation or application' of the Treaty lies within the Court's jurisdiction[119]."

The Court went on to observe:

> "Article XXI [Article XX(1)(d) in the Iran-U.S. Treaty] defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV [Article XXI(2)][120]."

3.50 The Court's finding flows naturally from the ordinary meaning of Article XX(1)(d), taken in the context of the Treaty as a whole including the compromissory clause, Article XXI(2). Neither Article XX(1)(d) nor Article XXI(2) provides that measures taken in relation to the subjects listed under Article XX(1)(d) are excluded from the purview of the compromissory clause. To the contrary, Article XX(1)(d) only states that the Treaty "shall not preclude" the application of certain measures. It follows that a Party may take such measures under the Treaty, including measures that it considers are necessary to protect its essential security interests, but this will always be subject

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119 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 116, para. 222. This holding makes it clear that the Treaty of Amity extends to issues involving the use of force, and is not simply a "commercial" treaty as the United States contends.

120 Ibid. It follows that when the Court noted that it could not "entertain" the claims of Nicaragua alleging conduct breaching specific articles of the treaty unless it was first satisfied that this conduct did not represent "measures... necessary to protect" essential security interests, it meant that such claims could not be entertained at the merits stage without making such a determination. The United States' use of this language to suggest that the Court has no competence at the jurisdiction phase to decide whether such conduct was "necessary" is completely misplaced. U.S. Preliminary Objection, p. 51, para. 3.38.

to the possibility of judicial review by the Court since the compromissory clause clearly anticipates that a dispute might arise between the Parties over the interpretation or particularly the application of the provisions of Article XX(1)(d).

3.51 In such an event, as the Court noted in the Nicaragua case, it is not the subjective view of one Party alone that determines whether the measures taken in are in fact necessary to protect that party's essential security interests. Rather, the facts have to be examined objectively by the Court to determine whether essential security interests requiring protection were at issue and whether the measures taken were necessary. As the Court stated in the Nicaragua case:

> "The Court has therefore to assess whether the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'[121]."

3.52 In a sense, it is the United States itself which has underlined the need for the Court to decide these issues by virtue of its arguments on Article XX(1)(d). For the United States claims that its actions in destroying the platforms were taken in self-defence and were thus equated to measures necessary to protect its essential security interests under Article XX(1)(d). In so doing, the United States has chosen to cast its arguments exclusively under the Treaty of Amity rather than under general principles of customary international law. As a consequence, the United States itself raises the issue as to whether its actions were lawful under the Treaty which, in turn, confirms the existence of a dispute between the Parties as to the interpretation and application of, amongst other things, Article XX(1)(d). As shown above, such a dispute is a matter falling within the Court's jurisdiction, and not an issue to be determined unilaterally by the United States.

3.53 Given that the ordinary meaning of Article XX(1)(d) is unambiguous in this respect, there is no need to resort to any supplementary means of interpretation such as the travaux préparatoires of the Treaty. Nonetheless, the United States has attempted to bolster its position by reference to two State Department memoranda submitted to the U.S. Congress, which

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121 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 116, para. 222.

address the scope of the compromissory clauses in FCN treaties concluded with China, Belgium and Vietnam[122].

3.54 On the juridical level, these memoranda are without relevance, not simply for the reasons stated above, but also because the memoranda in question do not represent genuine travaux préparatoires under Article 32 of the Vienna Convention on the Law of Treaties. They are no more than unilateral statements issued by one of the Parties to the Treaty which do not represent the agreed views of both Parties and are not germane to the question whether Article XX(1)(d) excludes certain subjects from the scope of the compromissory clause.

3.55 The memorandum dealing with the U.S. treaty with China, for example, addresses a clause which refers to "the essential interests of the country in time of national emergency[123]". At the time the United States attacked Iran's oil platforms, there was no "national emergency" confronting the United States. Moreover, even if there had been, the language of the Treaty, as the Court's holding in the Nicaragua case makes clear, leaves no doubt that any dispute over whether the measures taken were necessary in the circumstances would still be a matter for the Court to rule on.

3.56 It is also striking that the wording of the Treaty of Amity differs from the language used by the United States upon adhering to the Optional Clause of the Court's Statute in 1946. That language made the U.S. declaration accepting the Court's jurisdiction subject to a condition that it would not apply to -

> "(b) disputes with regard to matters which are esentially within the domestic jurisdiction of the United States of America as determined by the United States of America[124]."

In other words, the United States retained the right to determine unilaterally whether a matter was within its jurisdiction and thus excluded from the purview of its declaration.

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122 U.S. Preliminary Objection, pp. 50-51, para. 3.37.

123 Ibid., Exhibit 52, p. 30.

124 Yearbook of the International Court of Justice, 1984-1985, No. 39, 1985, The Hague, p. 100 (emphasis added).

3.57 In this case, however, there is no such limiting language - an omission which the Court has found to be significant. In the Nicaragua case, for example, when the Court was faced with the same provision as appears in Article XX(1)(d) of the Treaty of Amity and the same U.S. argument as to why matters relating to its essential security interests should preclude the Court from exercising its jurisdiction in the case, the Court ruled that it did have jurisdiction. The Court supported its decision in part by referring to Article XXI of the General Agreement on Tariffs and Trade (GATT), which stipulates that the terms of the GATT should not prevent any contracting Party from taking any action which it "considers necessary for the protection of its essential security interests". That wording led the Court to observe that the fact that it did have -

> "... jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear a contrario from the fact that Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade[125]".

The Court went on to add that:

> "The 1956 Treaty, on the other hand, speaks simply of 'necessary' measures, not of those considered by a party as such".

3.58 The absence in Article XX(1)(d) of the Treaty of Amity of any language permitting a Party to make a unilateral determination whether a matter falls within its essential security interest has also been noted by U.S. commentators. As Robert Wilson, one of the U.S. negotiators of FCN treaties at the time, has observed: "This omission of reservations was not inadvertent[126]". Indeed, the State Department memorandum on the U.S. - China treaty expressly states that:

> "There is, of course, no provision similar to this in the treaty [an exception as in the U.S. adherence to the Optional Clause]. The Department of State feels that questions arising under this treaty are matters which the United States would wish to see submitted to the International Court of Justice, and that it would be in the public interest for the United States to be able to bring, without restriction, before that Court any disputes arising because of the

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125 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 116, para. 222.

126 Wilson, R.R. : Commercial Treaties and International Law, Hauser Printing Co., 1960, p. 24. Exhibit 14.

> interpretation or application by China of the provisions of this treaty in such a way as to be detrimental to the interests of the United States[127]."

3.59 Thus, the absence of any self-judging restrictions to the Court's jurisdiction in the compromissory clause of the Treaty of Amity confirms that any dispute over its interpretation or application may be submitted to the Court which is the final arbiter of the matter.

3.60 Finally, the United States also blatantly misquotes from the Court's Judgment in the Nicaragua case in a last ditch attempt to salvage its argument under Article XX(1)(d). After asserting that the attacks against the Iranian oil platforms of 17 October 1987 and 18 April 1988 were taken in the exercise of the inherent right of self-defence and suggesting that measures taken in self-defence correspond to measures taken to protect essential security interests, the Unites States then claims that, with respect to the provision of the Treaty dealing with essential security interests, the Court stated:

> "The Court does not believe that this provision... can apply to the eventuality of the exercise of the right of individual or collective self-defence[128]."

3.61 This citation is taken completely out of context as even a cursory review of paragraph 223 of the Court's Judgment reveals. For when the Court stated that it did not believe that "this provision" can apply to the eventuality of the right of self-defence, it was not referring to the second part of Article XX(1)(d) dealing with essential security interests, but rather to the first part of the article which deals with measures "necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security". As the Court explained, these kinds of measures, "signify measures which the State in question must take in performance of an international commitment of which any evasion constitutes a breach", such as commitments "accepted by Members of the United Nations in respect of Security Council decisions taken on the basis of Chapter VII of the United Nations Charter (Art. 25)"[129].

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127 See, U.S. Preliminary Objection, Exhibit 52, p. 30.

128 U.S. Preliminary Objection, p. 53, para. 3.41, citing Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 116-117, para. 223.

129 Ibid. (emphasis added).

Members of the United Nations in respect of Security Council decisions taken on the basis of Chapter VII of the United Nations Charter (Art. 25)"[129].

3.62 It was only in the next paragraph of its Judgment, paragraph 224, that the Court proceeded to examine the second category of measures provided for by Article XX(1)(d) - measures taken to protect a party's essential security interests. On this point, the Court concluded that actions taken in self-defence might be considered as part of this wider category of measures, yet it was precisely these kinds of measures that the Court held it had jurisdiction to review at the merits stage of the proceedings.

3.63 Incidentally, the measures taken by the United States against Iran's oil platforms in this case were not taken pursuant to any international commitment or Security Council resolution. This is particularly significant in light of the very different attitude shown by the United States after the Iraqi invasion of Kuwait, where the U.S. was at pains to ensure that its actions met with the approval of the international community and were carried out pursuant to Security Council resolutions.

3.64 On the basis of the foregoing, therefore, it is abundantly clear that nothing in Article XX(1)(d) of the Treaty bars the Court from exercising its jurisdiction in the present case. To the contrary, the ordinary meaning of the Treaty's provisions, as recognised by the Court's holding in the Nicaragua case and the State Department's own memoranda, all confirm that disputes over the application or interpretation of the provisions of the entire Treaty, including Article XX(1)(d), are fully admissible.

3.65 The second leg of the U.S. argument - that the measures taken by the United States were in fact necessary to protect its essential security interests - involves the kinds of issues that the Court will need to address at the merits stage, i.e., whether such "interests" were at stake and whether the U.S. protective measures were "necessary". For present purposes, all the Court has at its disposal is the bald assertion at page 52 of the U.S. Preliminary Objection that "Iranian attacks on U.S. and other neutral vessels in the Persian Gulf clearly threatened U.S. national security interests".

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129 Ibid. (emphasis added).

3.66 Unfortunately, the United States does not offer a single piece of evidence to support this assertion. We are not told, for example, what national security interests were being threatened, and why, even if they were, the U.S. attacks against virtually defenceless commercial oil platforms were "necessary" to protect those interests.

3.67 This is, of course, a showing that the United States will have to attempt to make at the merits stage since the burden clearly falls on the United States to justify its use of armed force which was prima facie illegal under the Treaty of Amity. However, the complete lack of any evidence to support its claims at this stage underlines the lack of merit in the U.S. Preliminary Objection.

PART IV

THE VALIDITY OF THE OBJECTION AND ITS CHARACTER: EXCLUSIVELY PRELIMINARY OR NOT?

4.01 In its Memorial of 8 June 1993, Iran went to considerable lengths to demonstrate that the conditions of the compromissory clause - Article XXI(2) of the Treaty of Amity - had been fully satisfied in this case[130]. Certain of these conditions are mainly procedural, such as the requirement that the dispute not be one "satisfactorily adjusted by diplomacy" or agreed to be settled by some other pacific means, while others touch on the nature of the Treaty and whether a genuine question of its interpretation and application arises in connection with the claims introduced by Iran. Each of these issues will be considered in turn below.

CHAPTER I THE DISPUTE BETWEEN THE PARTIES HAS NOT BEEN "SATISFACTORILY ADJUSTED BY DIPLOMACY"

4.02 In this case, the United States has not contested Iran's showing that the dispute was not satisfactorily adjusted by diplomacy or agreed to be settled by some other means[131]. Indeed, the United States explicitly recognises that Iran did raise its claims under the Treaty with the United States in July 1992 - claims which the United States rejected.[132] Thus, there can be no possible basis for a U.S. argument that Iran has failed to pursue diplomatic means to settle its case.

4.03 In any event, as explained in Iran's Memorial, the plain language of Article XXI(2) does not place any positive obligation on the Parties to attempt to negotiate a dispute over the Treaty's interpretation or application before bringing a case before the Court. For the Court to exercise jurisdiction, all that is required is that the dispute not be one satisfactorily adjusted by diplomacy. As several Judges observed with respect to identical language that was at issue in the Nicaragua case, the wording of Article XXI(2) is expressed in a purely negative form and does not require prior negotiations to be undertaken[133].

130 See, Iran's Memorial, pp. 55-68.

131 Ibid., pp. 64-67.

132 U.S. Preliminary Objection, p. 36, para 3.08.

133 See, the references given at pp. 65-66, paras. 2.36-2.38, of Iran's Memorial.

Moreover, as the Court itself noted in the Diplomatic and Consular Staff case, Article XXI(2) simply "establishes the jurisdiction of the Court as compulsory for such disputes unless the Parties agree to settlement by some other means[134]". Since it is self-evident that the dispute was not satisfactorily adjusted by diplomacy before Iran filed its Application, or settled by some other means, this element of Article XXI(2) is clearly satisfied in this case[135].

4.04 Of course, even if prior negotiations had been a prerequisite under the terms of Article XXI(2), which Iran has shown is not the case, Iran has demonstated that the attempts it made to negotiate the dispute were rebuffed by the United States[136]. In these circumstances, particularly where the respective positions of the Parties showed such sharp and irreconcilable differences, a prolonged attempt at negotiations, or even any negotiations at all, would not have been a precondition for invoking the Court's jurisdiction[137]. Accordingly, there are no procedural obstacles to the Court's jurisdiction to hear Iran's claims in this case.

CHAPTER II THE DISPUTE BEFORE THE COURT CONCERNS THE INTERPRETATION AND APPLICATION OF THE 1955 TREATY

SECTION A The Existence of a Dispute

4.05 The Court's jurisdiction under the Treaty covers "Any dispute" "as to the interpretation or application of the present Treaty"[138]. Article XXI(2) permits either Party to submit such a dispute to the Court if it has not been satisfactorily adjusted by diplomacy. It is Iran's contention that a dispute

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134 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 27, para. 52 (Emphasis supplied by the Court).

135 There is no disagreement between the Parties that the dispute has not been settled by some other pacific means.

136 See, Iran's Memorial, p. 60, para. 2.18, to which the United States has not taken issue.

137 See, Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 13; South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 346; and see, Separate Opinion of Judge Ago in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 515-516.

138 Emphasis added.

clearly exists and that the Court has jurisdiction over this dispute. The United States, on the other hand, in denying that the Treaty applies to the U.S. conduct in destroying Iran's oil platforms, appears to be denying that there is a dispute as to the interpretation and application of the Treaty.

4.06 The U.S. denial of the existence of a dispute is obviously not enough to settle the issue. In numerous decisions, the Court has held that the existence of a dispute is a matter for objective determination and that "[t]he mere denial of the existence of a dispute does not prove its non-existence[139]". Instead, the Court has looked at the facts, deciding that when confronted with "a situation where the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations... the Court must conclude that international disputes have arisen[140]". As the Court held in the South West Africa case:

> "It must be shown that the claim of one party is positively opposed by the other[141]."

4.07 This line of reasoning was fully adopted by the United States in its pleadings in the Diplomatic and Consular Staff case. One of the jurisdictional issues presented there hinged on whether there was a dispute arising out of the interpretation or application of the same Treaty or Amity. In the oral hearings in that case, Counsel for the United States argued that the mere fact that the United States had charged Iran with violating various provisions of the Treaty of Amity "inevitably requires the interpretation or application of the Treaty[142]".

4.08 The U.S. Memorial in the Diplomatic and Consular Staff case made the same point. There the United States stated -

> "...if the Government of Iran had made some contention in this Court that the United States interpretation of the Treaty was incorrect or that the Treaty did not apply to Iran's conduct in the

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139 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.

140 Ibid..

141 South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328.

142 Oral argument of Mr. Schwebel, I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), p. 285.

manner suggested by the United States, the Court would clearly be confronted with a dispute relating to the 'interpretation or application' of the Treaty[143]".

4.09 Similar arguments were advanced by the United States with respect to the application and interpretation of the two Vienna Conventions on Diplomatic and Consular Relations. The United States claimed that Iran's conduct condoning the seizure of the U.S. Embassy in 1979 violated several provisions of these Conventions. From this, the United States concluded: "If Iran had disputed these claims, there would obviously be a 'dispute' as to the 'interpretation and application' of the two Conventions[144]".

4.10 From the pleadings before the Court, it is quite apparent that there are disputes between Iran and the United States concerning the interpretation and application of the Treaty. These disputes concern not only the general character of the Treaty - whether or not it is purely commercial in nature or whether it can also apply to acts involving the use of force - but also detailed aspects of individual provisions of the Treaty: for example, the question whether there is a territorial limitation to the obligations in Article IV(1) as well as the differences that have emerged between the Parties over the scope and meaning of Articles I and X(1). All such questions inevitably involve the interpretation and application of the Treaty, and are thus questions clearly within the jurisdiction of the Court under the terms of the compromissory clause. On this basis, Iran submits that the U.S. objection should be rejected at this preliminary stage.

SECTION B The Existence of a "Sufficiently Plausible" Link between Iran's Claims and the Treaty

4.11 Surprisingly, the U.S. position in this case is rather different from the position it took in the Diplomatic and Consular Staff case. The United States now argues that Iran must show something more than the existence of a dispute as to the interpretation and application of the Treaty. It must also show - in the jurisdictional phase - that a "reasonable connection" or "sufficiently plausible" link exists between the U.S. conduct complained of and the Treaty. It is the U.S. contention that no such connection exists.[145]

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143 U.S. Memorial, ibid., p. 153.

144 Ibid., pp. 142-143.

145 U.S. Preliminary Objection, p.2, para. 5.

4.12 Iran has no doubt that it can meet such a test, as will be shown in the next Chapter. However, it must question whether such a test, at least as framed by the United States, is appropriate for the jurisdictional phase, as the Court may be obliged to engage to some degree in the interpretation and application of the Treaty at this stage when such matters really fall for the merits phase of the case.

4.13 What is clear is that the United States does not deny that it destroyed the Iranian oil platforms; nor does the United States deny that the 1955 Treaty was, and is, a treaty in force between the Parties. Thus, if an issue of jurisdiction is to be posed to the Court, it ought to be in quite simple terms: does the destruction of these oil platforms raise a question as to the interpretation and application of the Treaty's provisions and whether the United States is in breach[146]. It can be no more than a "question" - if the Court is confined to the jurisdiction issue - for the Court's jurisprudence establishes clearly that any decision as to jurisdiction does not prejudge the merits[147].

4.14 From this it follows that Iran does not have to prove at this stage that there is a breach of the Treaty, for the Court cannot at this stage rule there is a breach. The most that Iran need do is to demonstrate that there is a sufficient nexus, or relationship, between the conduct of the United States and the obligations of the 1955 Treaty to raise a genuine question as to the interpretation and application of the Treaty in connection with the U.S. conduct. The ultimate question of whether a breach has in fact occurred belongs to the merits and it is at the merits stage that the burden of proof on Iran changes from showing that there is a question of interpretation and application to be examined (the jurisdictional

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146 The U.S. Preliminary Objection poses a different question: "It is the contention of the United States that there is no relationship between the Treaty and the claims contained in Iran's Application, which focuses exclusively on the exercise by... the United States of its inherent right of self-defence..." (Para. 5). This is firstly not true (Chapters I, II, III and IV of Part III of Iran's Memorial focussed exclusively on the 1955 Treaty). And, secondly, it confuses the issues of whether there is a prima facie breach of the 1955 Treaty and whether the U.S. has a defence to, or can justify, that breach by a valid plea of self-defence. In so far as Iran discussed the second issue - which raises questions of general international law - this does not mean that its allegation of breach of the Treaty can be ignored.

147 See, Borchgrave, Judgment, 1937, P.C.I.J., Series A/B, No. 72, pp. 169-70; Anglo-Iranian Oil Co., I.C.J. Reports 1952, Dissenting Opinion of Judge Read, pp. 149-150. Abi-Saab, G.: Les exceptions préliminaires dans la procédure de la Cour Internationale, A. Pedone, Paris, 1967, p. 243; Rosenne, S.: The Law and Practice of the International Court, A. W. Sijthoff, Leyden, 1965, Vol. 1, p. 460.

stage) to showing that there is a breach (the merits stage). In short, Iran must at this stage show a plausible connection between the United States conduct and the Treaty, simply to satisfy the Court that there is a genuine question arising under the Treaty: the task of demonstrating an actual breach comes later, on the merits.

4.15 The Court faced a somewhat similar situation in the Ambatielos case[148] in which the Greek Government sought to show that its claim against Great Britain was based on a Treaty of 1886, and that Great Britain was committed to an obligation to arbitrate disputes arising from that treaty by a compromissory clause within that treaty. The Court required Greece only to show that its claims had a sufficient connection with the 1886 Treaty, and it rejected the argument of the United Kingdom that Greece must show there had been a breach.

> "In order to decide, in these proceedings,... The Court must determine,..., whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886. On the other hand, it is not necessary for that Government to show, for present purposes, that an alleged treaty violation has an unassailable legal basis.
>
> ... In other words, if it is made to appear that the Hellenic Government is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails, then there are reasonable grounds for concluding that its claim is based on the Treaty[149]."

4.16 While Ambatielos contains a useful analogy, it must be remembered that it concerned the jurisdiction of another body and jurisdictional

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148 Ambatielos, Merits, Judgment, I.C.J. Reports 1953, p. 10; see, also, Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952, p. 28.

149 Ambatielos, Merits, Judgment, I.C.J. Reports 1953, p. 18 (emphasis added). The dissent of Judges McNair, Basdevant, Klaestad and Read, following the Mavrommatis Palestine Concessions case (Judgment No. 2, 1924, P.C.I.J., Series A, No. 2), had argued that Greece should provide sufficient proof of breach as to allow the Court to reach a definitive conclusion: Ambatielos, Merits, ibid., pp. 25-35. The notion that, on a Preliminary Objection, the Court should reach a definitive conclusion seems wrong, if only because it conflicts with the principle that decisions at this stage do not prejudge the merits. Indeed, in the Barcelona Traction case the Court went so far as to say "the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits "(Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 44).

provisions using quite different language from that in question in the present case. In the Ambatielos case, the Court was concerned with whether a Greek claim was "based on" a treaty, thus requiring the United Kingdom and Greece to arbitrate that claim. In other words, in that case Greece had to show more than just a dispute over the interpretation and application of the treaty, it had to show its claim was "based on" the treaty. It was only in that context that the Court held that it had to enter into the merits of Greece's claim in order to establish that a "sufficiently plausible" connection existed between Greece's claim and the Treaty[150].

4.17 Thus, if the matter is treated as a Preliminary Objection, and the Court is at a purely jurisdictional stage, Iran does not have to prove breach of the 1955 Treaty. Iran has simply to show that its claims give rise to a genuine question as to the interpretation or application of the Treaty, and this Iran has done. The question whether Iran's interpretation of the Treaty is correct, and whether a breach is proven, would remain matters for the merits[151]. It is Iran's submission that, in its Memorial of 8 June 1993, especially in Part III, as well as in the sections above, it has fully satisfied the test of "sufficiently plausible" or close, connection between the facts it alleges and the Treaty. For this reason the U.S. Preliminary Objection should be dismissed.

4.18 At the same time, the Court also has another alternative. It may consider that in deciding whether the U.S. test is met it is already engaging in matters which touch on the merits, and which are thus not appropriate for treatment during the jurisdictional phase. The United States itself calls on the Court in dealing with the U.S. objection to "rely on a reasonable interpretation of the 1955 Treaty[152]". However, "interpretation" of the Treaty is precisely a matter within the Court's jurisdiction for the merits. In such circumstances, the Court may deem that the U.S. objection does not have an "exclusively preliminary character" within the terms of Article 79(7) of the Rules of Court.

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150 Ambatielos, Merits, Judgment, I.C.J. Reports 1953, p. 18. Similarly, the ILO case relied on by the United States did not involve the Court's jurisdiction but the jurisdiction of the Administrative Tribunal of the ILO under a quite different clause to that at issue here. See, Judgment of the Administrative Tribunal of the ILO upon Complaints made against UNESCO, Advisory Opinion, I.C.J. Reports 1956, pp. 88-89.

151 Abi-Saab, G: Les exceptions préliminaires dans la procédure de la Cour internationale, A. Pedone, Paris, 1967, p. 193.

152 U.S. Preliminary Objection, p. 32, para. 2.10

4.19 Certain objections will be clearly separable and logically resolvable prior to any consideration of the merits, so that their "exclusively preliminary character" is beyond dispute. Thus, in the present case, if the United States contested the validity of the 1955 Treaty by way of preliminary objection[153], that issue could be resolved by the Court without touching upon any of the issues that relate to the merits[154]. However, in many cases - and the present case may be an example - the objections may not be such as to raise issues completely antecedent to the merits. Where the objection is that particular conduct is not subject to certain treaty obligations the Court is necessarily bound to examine that conduct and interpret to some extent the treaty provisions: it cannot do otherwise if it is to decide - as the United States asks the Court to decide - whether the claimant has made out a plausible case that the conduct breaches the treaty. Yet, in undertaking that examination the Court may already be embarking down the road of the merits of the case at least insofar as the Treaty's interpretation is concerned, if not its application.

4.20 Such a procedure could not only prejudge the merits phase but could also compel the Court to hear and decide upon similar arguments twice[155]: the first time to show that the conduct in question was covered by treaty obligations, and the second time to show the conduct was in breach of those obligations. Thus, it also becomes in part a question of the most economic use of the Court's time.

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153 Similar objections challenging the instrument conferring jurisdiction can be seen in Temple of Preah Vihear, Preliminary Objections, Judgment, I.C.J. Reports 1961, p.17; the Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 3, and Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 175. Thirlway, H.: "Preliminary Objections", Encyclopaedia of Public International Law, Vol. 1, 1981, pp. 179-187, identifies some 10 cases in this category.

154 In the Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 4, Judge Morelli, in his Dissenting Opinion, suggested that the true preliminary objection raised issues which, by necessary logic, had to be resolved prior to the merits (ibid., p. 98). This may be true in some cases, but not in all.

155 The Court's jurisprudence clearly establishes that any decision as to jurisdiction should not prejudge the merits. See, the references given in footnote 147 above. Indeed, in the Barcelona Traction case the Court went so far as to say "the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits" (Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964, p. 44).

4.21 Iran would accept that it must be shown that there is a genuine - as opposed to purely artificial - question in dispute involving the interpretation and application of the Treaty in order for the Court to have jurisdiction. In Iran's submission, this can be shown without involving the Court in merits issues. For the benefit of the Court, the principal elements of the dispute between the Parties as to the Treaty's interpretation and application will be summarised in the next Chapter. Subsidiarily, however, Iran submits that in the event that the U.S. Preliminary Objection is not rejected at this stage, it may be ruled not to have an "exclusively preliminary character".

CHAPTER III THE CLAIMS ACTUALLY MADE, AND THE OBJECTIONS RAISED, IN THE PRESENT CASE

4.22 Iran will show in this Chapter that there exists a "sufficiently plausible" link between its claims and the Treaty. In short, it will be demonstrated that the issues in question evidence a fundamental dispute between the Parties over the Treaty's application or interpretation sufficient to vest jurisdiction in the Court.

SECTION A Article I of the Treaty

4.23 Article I it will be recalled, requires ("there shall be") "firm and enduring peace and sincere friendship" between the Parties. In its Memorial Iran has shown that, in incorporating this provision in the first, substantive Article, the Parties intended to create legal obligations, and there is nothing untoward in the notion that "friendly relations" can be expressed in terms of legal obligations. Iran further made clear that it was not claiming before the Court that Article I was breached by the overall U.S. policy of support for Iraq in its war of aggression against Iran[156], but that its claim rested on the specific attacks in 1987 and 1988 against the Iranian oil platforms. It would seem difficult to deny that an obligation to demonstrate "firm and enduring peace and sincere friendship" is totally incompatible with such attacks. On that basis alone, Iran has met the requirement of showing a "sufficiently plausible" claim of breach. Has the plausibility of that claim been negated by the U.S. Preliminary Objection?

4.24 As shown above[157], the observations by the United States on Article I are singularly unconvincing. They rest largely on the assertion that

156 Iran's Memorial, p. 84, para. 3.49.

157 See, Part III, Chapter I, above.

the 1955 Treaty is "purely commercial and consular[158]", an assertion contradicted by the plain terms of the provision, by the historical context of the Treaty, and by U.S. Government statements about similar treaties[159]. Moreover, in citing the Court's Judgment in the Nicaragua case[160], the United States totally ignores the express finding by the Court that the United States did breach its FCN Treaty with Nicaragua by "the direct attacks on ports, oil installations etc...[161]". Unless the United States can show that attacks on Iranian oil installations are somehow different from attacks on Nicaraguan oil installations, this finding forcefully confirms the plausibility of Iran's claim. In the final analysis, what the United States has offered is a different interpretation of the Treaty of Amity. Yet this is just the kind of issue which the Court is called upon to decide at the merits stage.

4.25 Assuming, then, that Iran has a plausible claim, can it be said that the United States has shown reasons to dismiss that claim which the Court can deal with on an "exclusively preliminary" basis? The answer is decidedly negative for the following reasons.

(a) An abstract finding that the 1955 Treaty was the same as other FCN treaties concluded by the United States, or that it had a "purely commercial and consular" purpose would not resolve the issue, for the Court would still have to consider (as it did in the Nicaragua case) whether the specific attacks in 1987 and 1988, which were directed at commercial installations, might breach the Treaty;

(b) That would inevitably lead the Court into an interpretation of the scope of the treaty provision and its application to the conduct in question, so that, even if the Court refrained from an actual finding on the question of breach, the Court would have gone some of the way towards interpreting the article in question. In other words, the Court would already be partially engaged in the merits of the dispute. Iran's

158 U.S. Preliminary Objection, pp. 40 -47, paras. 3.17-3.29.

159 See, Part III, Chapter I, paras. 3.13-3.14, above.

160 U.S Preliminary Objections, p. 41, para. 3.19.

161 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 138, para. 275.

primary submission is, of course, that its interpretation of the Treaty is sufficiently plausible to warrant the Court's rejecting the Preliminary Objection and proceeding to the merits. At the very least, however, it can be said that the Preliminary Objection does not have an exclusively preliminary character;

(c) The application of a treaty provision - as opposed to its interpretation or to the question of its validity - will rarely, if ever, be a matter of an "exclusively preliminary character". For by its very nature any question of application can only be decided in relation to concrete facts, and these facts are part of the merits. Thus, it is possible to determine at this stage that there is a dispute over the Treaty's interpretation or application, but any actual decision on the merits of these questions is more appropriately left to a subsequent phase of the proceedings.

SECTION B Article IV(1)

4.26 Here the U.S. argument is simply that the obligation to afford "fair and equitable treatment" to each other's nationals is confined to such nationals as are within its territory[162]. As pointed out above[163], Article IV(1) does not say so and whilst in the majority of cases nationals invoking this provision may be located in the other State's territory, there may be important exceptions. A United States company seeking to bid for contracts put out to tender by the Iranian Government - but not actually present in Iran - could well seek the protection of this provision against arbitrary action to reject its bid. Countless other examples come to mind. Thus, the case put by Iran is perfectly "plausible", and the U.S. objection can be rejected because a genuine question of interpretation and application of the provision arises.

4.27 Whether or not the Court accepts Iran's case will require an interpretation of the Article plus, if the Court rejects the narrow U.S. interpretation, an application of the Article to the facts of the present case. In effect the United States asks the Court to separate out the "interpretation" phase

162 U.S. Preliminary Objection, pp. 47-49, paras. 3.30-3.33.

163 See, Part III, Chapter II, above.

- as having an exclusively preliminary character - and the "application" phase, as belonging to the merits. However, this is plainly inappropriate - the Court's jurisdiction under the compromissory clause extends to the interpretation or application of the Treaty. Moreover, as with Article I of the Treaty the separation of "interpretation" from "application" is highly artificial and is likely to lead the Court into an extensive duplication of work. Once the "interpretation" is resolved, the Court will have gone part of the way towards resolving the question of its "application". At the very minimum, this negates the "exclusively preliminary character" of the first phase.

SECTION C Article X(1)

4.28 Here the U.S. argument is very similar[164]. It is essentially that the "freedom of commerce and navigation" protected by the provision is confined to commerce and navigation between the territories, and that "commerce" means only maritime commerce" - i.e, an alternative interpretation of the relevant provision. Iran has shown that, at least at the time of the first attack, there was such commerce in oil between the United States and Iran - commerce that was only ended by the punitive embargo measures imposed by the United States on Iran in late October 1987[165]. Iran has also shown that in the Nicaragua case, the Court did not interpret this clause as requiring a strict territorial limitation of this clause[166]. In such circumstances, Iran's claim must be more than plausible and the U.S. objection can be rejected.

4.29 However, once again the U.S. argument raises issues of the interpretation and application of the Treaty which are self-evidently within the jurisdiction of the Court. Any attempt to separate the interpretation of a provision from its application could well be artifical and wasteful. Once again, therefore, the U.S. argument cannot be said to have an exclusively preliminary character.

4.30 In all of this the word "exclusively" needs to be emphasised. That word contained in Article 79(7) of the Rules is important - and in this case decisive. It is not enough for the United States to show that there are issues

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164 U.S. Preliminary Objection, pp. 45-50, paras. 3.34 -3.35.

165 See, Part I, Chapter I, para. 1.13, above.

166 See, Iran's Memorial, pp. 89-90, paras. 3.65-3.66.

which can be dealt with on a preliminary basis. The word "exclusively" suggests that the issues ought to - even must - be dealt with separately because they are so patently independent of, or exclusive of, the other issues in the case. That is clearly not so with any of the Iranian claims, and the United States has totally failed to discharge its burden of showing that its objections have an "exclusively preliminary character".

PART V
CONCLUSIONS

5.01 It is the nature of a Preliminary Objection to impose on both Parties the burden of supporting their respective positions.

5.02 Both in its initial Memorial and in these written Observations Iran has shown that the destruction by the United States of Iran's oil platforms has given rise to a genuine dispute over both the interpretation and the application of the 1955 Treaty of Amity. Accordingly, Iran's primary submission is that the Preliminary Objection should be rejected.

5.03 Despite the fact that, prima facie, the compromissory clause in the Treaty of Amity vests jurisdiction in the Court to decide these questions, the United States has challenged that jurisdiction by raising a Preliminary Objection. It follows that the United States has the burden of proving that there is no arguable link between Iran's claims and the Treaty. It has attempted to do so on essentially two grounds:

(a) On the argument that the 1955 Treaty is concerned with purely commercial and consular matters, and;

(b) On the argument that Iran's claims are essentially political, designed to charge the United States with aggression, and based on customary international law rather than the 1955 Treaty.

5.04 As demonstrated earlier, the second of these grounds is devoid of substance. It cannot be supported by a careful reading of Iran's Memorial, and it is based on a confusion between that part of Iran's arguments which shows the United States was in breach of Articles I, IV(1) and X(1) of the Treaty, and the quite separate part which shows that the United States cannot excuse these clear breaches by relying on a plea of self-defence. It is essentially in this latter part of its arguments that Iran has, necessarily, invoked the U.N. Charter and customary law.

5.05 The first argument by the United States is equally mistaken. The terms of the 1955 Treaty do not support it and, in any event, a finding that the Treaty was "commercial" in nature would, as an abstract finding, scarcely resolve the issue. The installations destroyed were commercial, owned by a commercial enterprise (NIOC), and the whole purpose of the attack was to damage the foundations of Iran's commercial and economic relations. This demonstrates the artificiality of the distinction made by the United States in supposing that the "interpretation" of the Treaty can be divorced from its "application".

5.06 Thus, there is a genuine issue to be tried here, and it is the kind of issue for which Article XXI(2) was expressly designed. The compromissory clause must therefore be allowed to fulfil its intended role, and the United States has failed to discharge its burden of showing that Iran has not made out a plausible claim.

5.07 However, the above arguments go to the question whether the U.S. Preliminary Objection should be upheld or rejected. If rejected, that is an end to the matter and the United States would not be expected to renew them at the merits stage.

5.08 But there is another possibility open to the Court under the Rules, and that is to decide that the objections do not have "an exclusively preliminary character", with the result that the case proceeds to the merits, but allowing the United States to maintain its objections at that stage. The extraordinary feature of the U. S. Preliminary Objection is that it does not appear to contemplate this alternative. It might have been supposed that there was an obligation on the United States to demonstrate that its objections had an "exclusively preliminary character", but apparently the United States does not see this demonstration as part of its task. That, in Iran's view, is an error.

5.09 Nonetheless, Iran has sought in these written observations to show that the issues raised cannot be characterised as "exclusively preliminary", and it is for this reason that Iran makes a second submission. This is that, if the Court decides not to reject the Preliminary Objection, either in whole or in part, such parts of the objection which are not rejected should be held not to have an exclusively preliminary character.

SUBMISSIONS

In the light of the facts and arguments set out above, the Government of the Islamic Republic of Iran requests the Court to adjudge and declare:

1. That the Preliminary Objection of the United States is rejected in its entirety;

2. That, consequently, the Court has jurisdiction under Article XXI(2) of the Treaty of Amity to entertain the claims submitted by the Islamic Republic of Iran in its Application and Memorial as they relate to a dispute between the Parties as to the interpretation or application of the Treaty;

3. That, on a subsidiary basis in the event the Preliminary Objection is not rejected outright, it does not possess, in the circumstances of the case, an exclusively preliminary character within the meaning of Article 79(7) of the Rules of Court; and

4. Any other remedy the Court may deem appropriate.

.....
Ali H. Nobari
Agent of the Government of
the Islamic Republic of Iran

CERTIFICATION

I, the undersigned, Ali H. Nobari, Agent of the Islamic Republic of Iran, hereby certify that the copy of each document attached in Volume II of the Observations and Submissions on the U.S. Preliminary Objection submitted by the Islamic Republic of Iran is an accurate copy and that the translations included in or accompanying such documents are accurate and complete translations of the original language text of such documents.

(Signed) _____

Ali H. Nobari
Agent of the Islamic Republic of Iran

ANNEX

RESPONSE TO THE U.S. STATEMENT OF FACTS

A. Introduction

1. As explained in Part I of this pleading the greater part of the U.S. Preliminary Objection, rather than addressing jurisdictional issues, consists of no more than a list of alleged Iranian actions in the Persian Gulf - alleged attacks on commercial shipping, and on U.S. shipping and U.S. military forces, and the alleged use of offshore oil platforms to support such attacks. Such allegations have no relevance to the jurisdictional question raised by the United States. The only relevance such allegations could possibly have is to the question of whether or not the U.S. attacks on the oil platforms were legally justified, which is self-evidently a question for the merits. For this reason, Iran has chosen to make a response to the U.S. allegations in this Annex. The Court is also referred to Iran's Memorial, which quite properly addressed the merits of the case, and which in Part I contains a detailed presentation of the facts that anticipates many of the U.S. allegations. In what follows, Iran will not attempt to summarise everything that was said in its Memorial, nor will it attempt to respond to every allegation made by the United States. This does not mean that Iran admits the truth of any allegation to which it does not respond. Such response will be left to the appropriate time.

2. Iran will consider below five general issues: first, the overall context of the Iran/Iraq war and the U.S. tilt towards Iraq; second, the war as it affected the situation in the Persian Gulf, and U.S. policy in the Persian Gulf; third, the general accusation that Iran attacked non-U.S. flag commercial vessels; fourth, the specific allegations that Iran attacked U.S. vessels; and, finally, the attacks on Iran's oil platforms.

B. The Context: Iraq's War on Iran and U.S. Support for Iraq

3. The United States argues that it is "important for the Court to appreciate that each of these events [the U.S. attacks on Iranian oil platforms on 19 October 1987 and 18 April 1988] occurred during the eight-year war

between Iraq and Iran[1]". Iran strongly agrees. It is vital to appreciate not only Iran's position in the war but also the U.S. attitude to the war. It is only against this factual background that the legality of the U.S. attacks on the platforms can properly be judged.

4. The overall context of the war was set out in some detail in Chapters II and III of Part I of Iran's Memorial. Certain key points will be recalled here. At the time of the events in question in this case, Iran had for over seven years been subject to continuous aggression from Iraq, threatening the very existence of Iran, in one of the longest and most destructive conflicts of this century. Iran's civilian population, including its major cities, had been subject to repeated missile and chemical attack.

5. Since the beginning of the conflict, Iran had called on the international community to acknowledge and condemn the acts of aggression committed by Iraq. However, it was not until 1987 that the Security Council even acknowledged the existence of a breach of the peace between the two States and demanded a cease-fire by introducing Resolution 598.[2]. This Resolution still did not recognize Iraq as the aggressor. The United States had apparently made it clear in negotiating the Resolution that it would not accept any language that named Iraq as aggressor[3].

6. Iran has been accused of being the recalcitrant party in bringing about a peace settlement pursuant to Resolution 598 (1987), while Iraq is alleged to have been willing to negotiate. This is plainly untrue. When Iran did make steps towards peace, Iraq cynically disregarded its earlier promises, as Iran had always predicted it would. For example, after moves by Iran to implement Resolution 598 (1987) in late 1987 and early 1988, Iraq responded with a massive Scud missile and bombing attack. Similarly, when Iran unconditionally agreed to a cease-fire on 18 July 1988, Iraq responded by a further invasion of Iranian territory, taking over even larger areas that in its 1980 invasion[4].

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1 U.S. Preliminary Objection, p. 4, para. 1.01.

2 See, in general, Iran's Memorial, pp. 26-32, paras. 1.58-1.74. Resolution 598 (1987) was the first adopted under Articles 39 and 40 of the Charter.

3 Sick, G.: "Trial by Error: Reflections on the Iran-Iraq War", Middle East Journal, Vol. 43, No. 2, 1989, p. 240. Iran's Memorial, Exhibit 9.

4 See, Iran's Memorial, pp. 30-31, paras. 1.69-1.71.

7. It was not until eleven years after the conflict began that Iran's position was vindicated. It suffices to recall here the conclusions of the Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987). This Report, dated 9 December 1991, placed full responsibility for the conflict on Iraq. The Report began by noting that:

> "... the war between Iran and Iraq, which was going to be waged for so many years, was started in contravention of international law, and violations of international law give rise to responsibility for the conflict[5]".

It went on to note that the specific concern of the international community in this context was "the illegal use of force and the disregard for the territorial integrity of a Member State[6]". The Report then gave its finding that the "outstanding event" under these violations was:

> "... the attack of 22 September 1980 against Iran, which cannot be justified under the Charter of the United Nations, any recognized rules and principles of international law or any principles of international morality [and thus] entails the responsibility for the conflict[7]".

The Report pointed out that Iraq's explanations for its actions on 22 September 1980 "do not appear sufficient or acceptable to the international community" and added that Iraq's aggression against Iran "which was followed by Iraq's continuous occupation of Iranian territory during the conflict" was "in violation of the prohibition of the use of force, which is regarded as one of the rules of jus cogens[8]".

8. Iran believes that both its actions and those of the United States should be judged in this context. As explained in Iran's Memorial, the United States had both general and special obligations towards Iran in the context of the war - under the U.N. Charter, under Security Council Resolutions relating

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5 Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987), 9 December 1991 (S/23273), para. 5. Iran's Memorial, Exhibit 42.

6 Ibid.

7 Ibid., para. 6.

8 Ibid., para. 7 (emphasis added).

to the war, and under the Treaty of Amity[9]. It is true that there had been a crisis in the relations of the two States after the Islamic Revolution, but the Algiers Declaration of 19 January 1981 purported to be "a mutually acceptable resolution of the crisis[10]", and the United States had withdrawn the Diplomatic and Consular Staff case from the Court. There was thus no impediment to Iran-U.S. relations.

9. At a very minimum, therefore, the United States had a duty to remain strictly neutral. In Iran's view, U.S. obligations both under Article I of the Treaty of Amity and under the U.N. Charter might have required more than neutrality from the United States. However, for the purposes of the following discussion, U.S. actions will be considered in the light of the obligations of a neutral.

10. On the diplomatic and political front, the United States gave its full support to Iraq in the Security Council and in the international community as a whole. It reestablished full diplomatic relations with Iraq in 1984, in the middle of the conflict. In the Security Council it opposed all attempts to name Iraq as the aggressor in the war[11].

11. Economic assistance to Iraq was equally important. The United States took Iraq off its list of States supporting terrorism in 1982. The U.S. Defence Department's Director for Counter-Terrorism pointed out that there was no doubt about Iraq's continued involvement in terrorism. The real reason "was to help [Iraq] succeed in the war against Iran[12]". This step was important because it allowed an increase in trade between Iraq and the United States, also allowing dual use equipment (equipment that could have military or civilian use) to be exported from the United States to Iraq. Trade with Iraq increased substantially during the war and massive loans were made to Iraq which

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9 Iran's Memorial, pp. 32-33, paras. 1.75-1.79.

10 See, the Preamble of the General Declaration. The full text of the Declaration is printed in 1 Iran-U.S. Claims Tribunal Reports, 1981-82, pp. 3, et seq..

11 See, for example, Sick, G.: "Trial by Error: Reflections on the Iran-Iraq War", Middle East Journal, Vol. 43, No. 2, 1989, p. 240. Iran's Memorial, Exhibit 9.

12 The Washington Post, 16 September 1990. Iran's Memorial, Exhibit 46.

were known to be used by Iraq for military acquisitions[13]. In contrast, economic sanctions on exports to Iran remained in force throughout the conflict.

12. The United States also provided direct and indirect military assistance to Iraq. Thus, the United States re-flagged Kuwaiti tankers although it was known that Kuwait was an ally of Iraq and was using its oil revenues to support the Iraqi war effort. The United States put in effect "Operation Staunch" which was designed to prevent arms from anywhere in the world from reaching Iran. This was combined with a near blockade of Iranian ports and coastlines together with comprehensive monitoring and surveillance of vessels going to and from such ports[14]. On the other hand, the United States took no action to prevent the sale of arms to Iraq, itself providing Iraq with both military and dual use equipment[15]. Perhaps most significantly, the United States entered into an agreement to provide Iraq with military intelligence during the war. This programme was begun in 1984 and extended in scope in 1986. Its purpose was expressly to provide "intelligence and advice [to Iraq] with respect to the pursuit of the war[16]". U.S. Airborne Warning and Control Aircraft (AWACS) were deployed "to supply Iraq with intelligence information ... on Iranian military movements[17]".

13. The above elements of U.S. policy are only what have appeared in the public record, and have been publicly acknowledged by U.S. officials. Apart from these general aspects of U.S. policy, Iran was also subject to constant harassment and provocation by U.S. forces in the Persian Gulf. On hundreds of occasions, U.S. forces violated Iran's territorial sovereignty, infringed Iran's airspace, and intercepted Iranian aircraft and naval vessels, both civil and

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13 Ibid.

14 See, Weinberger, C.W.: Fighting for Peace: Seven Critical Years in the Pentagon, New York, Warner Books, 1990, p. 358. Iran's Memorial, Exhibit 44.

15 See, Boyle, F.A.: "International Crisis and Neutrality: U.S. Foreign Policy toward the Iraq-Iran War", in Leonhard, A.J. (ed.): Neutrality-Changing Concepts and Practices. University Press of America, 1988, pp. 73-74. Exhibit 15. This article contains a detailed review of non-neutral U.S. actions during the war. See, also, The Washington Post, 16 September 1990. Iran's Memorial, Exhibit 46.

16 Congressional Record - House of Representatives, 9 March 1992, H1109. Iran's Memorial, Exhibit 47.

17 See, Boyle, F.A.: op. cit., p. 71. Exhibit 15.

military. Iran lodged repeated protests with the U.N. Security Council against such actions[18]. There is no evidence of any such hindrance of Iraqi attacks. To the contrary, as explained above, the United States was supplying Iraq with information about targets. Iran also had reason to believe that the United States supported Iraqi attacks by electronic jamming of Iranian communications and early warning electronic surveillance systems, assisting Iraqi planes in finding targets, and timing U.S. attacks to coincide with Iraqi offensives[19].

14. It is these facts which give substance to the statement made by the U.S. Assistant Secretary of Defence at the time that by its actions in the Persian Gulf the United States became "de facto allies of Iraq" while at the same time "doing a lot of things to teach the Iranians a lesson[20]".

15. Thus, while the United States officially proclaimed its neutrality throughout the conflict, in fact it intervened in many different ways - politically, diplomatically, economically and militarily - on behalf of Iraq. At the same time the United States was taking a series of actions to undermine Iran's war efforts, which unlike Iraq's were a lawful exercise of the right of self-defence. Examples of such actions were already given in Iran's Memorial[21]. The information given there is supported by statements of U.S. government officials and has not been questioned in any way by the United States in its Preliminary Objection. In the words of Henry Kissinger, to take just one example, the United States "supported Iraq against Iran[22]". Iran took the view that this support clearly violated the rules of neutrality. In some instances, the United States went further, effectively carrying out a series of armed attacks against Iran. Among these actions should be included the U.S. attacks on Iran's oil platforms[23].

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18 Copies of these protests are included in Iran's Memorial, Exhibit 31.

19 Electronic jamming occurred on several occasions. See, for example, the statement by Iran's War Information Spokesman on 17 December 1987. Iran's Memorial, Exhibit 48.

20 Interview with Laurence Korb, Former Assistant Secretary of Defence, on CNN's Larry King Live, 2 July 1992. An extract from the transcript of this interview is included in Iran's Memorial, Exhibit 51.

21 Iran's Memorial, pp. 34, et seq., paras. 1.80, et seq..

22 Kissinger, H.A.: "Clinton and the World" in Newsweek, 1 February 1993, p. 12. Iran's Memorial, Exhibit 45.

23 "Armed attacks" both in the sense of the actual use of force but also in the wider definition referred to by Judge Jennings in his Dissenting Opinion in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 542-544.

C. U.S. Policy in the Persian Gulf

16. The U.S. policy of support for Iraq and hostility towards Iran was most evident in U.S. actions in the Persian Gulf. Understood in this sense, Iran can agree with the statement in the U.S. Preliminary Objection that events in the Persian Gulf help to explain why U.S. forces attacked Iran's oil platforms[24]. There are three important points about the situation in the Persian Gulf during the Iran/Iraq war which help to place Iranian and U.S. actions in context. First, the danger to commercial shipping was created by Iraq. Second, Iran's sole interest was in keeping the Persian Gulf free of danger because nearly all Iran's trade went by sea to and from ports on the Persian Gulf. Third, if the United States (or other third States) had really wanted to protect commercial shipping in the Persian Gulf they could have done so by bringing pressure on Iraq to stop its attacks or by taking action through the Security Council. By contrast, in the Kuwait crisis, the United States went out of its way to obtain Security Council approval for all its actions.

17. Sir Anthony Parsons, British Ambassador to the United Nations at the time, makes all three points succinctly:

> "... there was no specific, international condemnation of the Iraqi attacks and no serious attempts made to persuade or coerce Iraq into desisting from them, this in spite of the fact that all members of the international community must have realized that, if Iraq stopped attacking shipping Iran would follow suit immediately. Iran had no interest in endangering the sea lanes through which all her exports and most of her imports passed[25]".

Another expert on the Iran/Iraq war confirms fully this analysis with particular reference to the attitude of the United States:

> "... the Iranians are the party most interested in keeping the [Persian] Gulf open to tankers. It has been Iraq, not Iran, that over the years has attacked and disrupted by far the most shipping, for the simple reason that Iran depends completely on the [Persian] Gulf and the Strait of Hormuz to export all its oil, while Iraq sends its oil abroad by pipeline. The United States could do far more to pacify the [Persian] Gulf, if that is what it really wants to do, by

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24 U.S. Preliminary Objection, p. 5, para. 1.03.

25 Parsons, Sir Anthony: "Iran and the United Nations, with particular reference to the Iran-Iraq War" in Ehteshami, A. and Varasteh, M. (eds.): Iran and the International Community, Routledge, London, 1990, pp. 19-20. Exhibit 16.

> persuading Iraq to stop its attacks on Iranian shipping, which are what started and perpetuate the naval war in the [Persian] Gulf[26]".

18. Finally, Senator Sam Nunn, Chairman of the Committee on Armed Services of the U.S. Senate, spelt out the reality of the situation in a Report of 29 June 1987. He noted that the United States was supporting Iraq by its actions in the Persian Gulf:

> "... the challenges to freedom of navigation originate with Kuwait's ally Iraq. It is difficult to justify U.S. actions ... when America is indirectly protecting the interests of Iraq who started the 'tanker war' and who has conducted about 70 per cent of the ship attacks, including attacks on vessels of America's allies. ... The U.S. decision to protect Kuwaiti tankers is viewed in the region as a clear alignment with Iraq and its Gulf allies[27]".

19. The "alignment" spoken of by Mr. Nunn was really an alliance. In July 1987, a U.S. spokesman admitted that the United States had "an important stake in Iraq's continuing ability to sustain its defenses[28]". Vice-President Bush admitted that the United States was looking for means "to bolster Iraq's ability and resolve to withstand Iranian attacks[29]". This support included financial aid, the provision of arms and dual-use equipment to Iraq as well as access to U.S. military intelligence[30]. The U.S. Assistant Secretary of Defence at the time, Laurence Korb, was explicit, stating in an interview on CNN on 2 July 1992 that:

> "... when the United States went into the [Persian] Gulf it was not simply ... to escort Kuwaiti tankers. We wanted to ensure that Iran did not win that war. In other words, we became de facto allies of Iraq[31]".

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26 Keddie, N.R.: "Iranian Imbroglios: Who's Irrational?", World Policy Journal, Winter 1987-88, p. 46. Iran's Memorial, Exhibit 34.

27 26 I.L.M. 1464 (1987), at pp. 1467 and 1469. Iran's Memorial, Exhibit 32.

28 Department of State Bulletin, July 1987, p. 66. Iran's Memorial, Exhibit 49.

29 Congressional Record - House of Representatives, 2 March 1992, H860. Iran's Memorial, Exhibit 50.

30 Ibid., 9 March 1992, H1109. Iran's Memorial, Exhibit 47. See, also, The Washington Post, 16 September 1990. Iran's Memorial, Exhibit 46.

31 Interview with Laurence Korb, Former Assistant Secretary of Defence, on CNN's Larry King Live, 2 July 1992. An extract from the transcript of this interview is included in Iran's Memorial, Exhibit 51.

As Assistant Secretary Korb also noted, the United States had a hidden agenda:

> "Iraq was destroying many more ships trying to get out of the [Persian] Gulf than Iran was at that time. But when we went in, we wanted to ensure that Iran didn't win that war from Iraq. That was our real objective, and so we were doing a lot of things to ensure that we could teach the Iranians a lesson[32]."

It is this situation and this policy which really explains the U.S. attacks on Iran's oil platforms. The United States was trying to find ways to "teach the Iranians a lesson".

D. The United States Cannot Justify Its Attacks on Iran's Oil Platforms by Reference to Alleged Iranian Attacks on Commercial Shipping

20. The United States now protests that its policy aim in the Persian Gulf was "to protect merchant ships flying the U.S. flag, and later to protect U.S.-owned and other merchant ships flying other flags[33]". Before turning to the consideration of alleged Iranian attacks on U.S. flag vessels (discussed in the next Section), it is appropriate to consider the U.S. emphasis on alleged attacks on non-U.S. flag vessels.

21. The greater part of the U.S. statement of facts consists of a list of alleged Iranian attacks on non-U.S. flag vessels. It is never made clear by the United States what is supposed to be the relevance to this case of this material. Implicitly, the United States appears to want to use such attacks to justify its own attacks on Iran's oil platforms - in other words, to characterize its attacks on the oil platforms as in part an act of collective self-defence.

22. The attacks on the oil platforms were not and cannot be characterized as an act of collective self-defence by the United States, and, for a number of reasons, the United States cannot use alleged attacks on commercial shipping - even if Iran were responsible for such attacks - as a justification for its own attacks against Iran.

23. First, the United States never felt it necessary to defend shipping against Iraqi attacks. As already shown, the source of the violence in the

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32 Ibid.

33 U.S. Preliminary Objection, p. 10, para. 1.11.

Persian Gulf was Iraq. Iraq carried out attacks on commercial shipping of all nations. It did not restrict its attacks to any prescribed exclusion zone, nor did it limit its attacks to vessels trading with Iran. Iraq followed a policy of "shoot first - identify later". Iraq was responsible for the great majority of all attacks, and its attacks - carried out with sophisticated missiles, like the Exocet - were violent and destructive. Iraq also carried out a direct attack on a U.S. warship, the U.S.S. Stark, causing great damage and tragic loss of life[34]. Iran neither did carry out, nor could have carried out, an attack on this scale. However, despite all these circumstances, the United States never once tried to hinder Iraq in its attacks nor did anything to seek to protect commercial shipping from such attacks. Even after the attack on the Stark, the United States felt no need to carry out an act of self-defence or retaliation against Iraq. To the contrary, as has already been explained, the United States continued to do as much as it could to support Iraq. In such circumstances, the United States cannot use its alleged concern for commercial shipping to justify its attacks on Iran.

24. Second, U.S. policy was strictly limited at this time only to providing assistance to U.S. flag vessels, hence the need to reflag Kuwaiti vessels as U.S. flag vessels in order to qualify them for U.S. protection. At the time of the attacks on Iran's platforms, the United States was not prepared to defend third States' shipping. It was not until 29 April 1988 - after the second attack on the platforms - that this policy was widened, when U.S. Secretary of Defence Carlucci announced:

> "Aid will be provided to friendly, innocent, neutral vessels flying a non-belligerent flag outside declared war-exclusion zones that are not carrying contraband or resisting legitimate visit and search by a Persian Gulf belligerent. Following a request from the vessel under attack, assistance will be rendered by a U.S. warship or aircraft if this unit is in the vicinity and its mission permits rendering such assistance[35]."

25. Third, quite apart from U.S. policy, this is simply not a case where collective self-defence can be invoked. The conditions required by international law for an act of collective self-defence are alluded to in Secretary Carlucci's statement cited above: aid would only be given to vessels "under attack"

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34 See, Iran's Memorial, pp. 17-20, paras. 1.33-1.40.

35 See, O'Rourke, R.: "Gulf Ops" in Proceedings/Naval Review 1989, p. 42, at p. 47. Exhibit 17.

and only "after a request" from such a vessel. Neither of these conditions are present as justifications of the U.S. attacks on Iran's oil platforms.

26. Finally, Iran cannot but recall that in the Kuwait crisis the United States waited not only for a request from Kuwait but also for explicit U.N. approval before using force in defence of Kuwait. In this case the United States made no attempt to request U.N. approval for action against Iran. To the contrary, U.N. Security Council Resolutions required third States to exercise the "utmost restraint" in relation to the conflict[36]. In any event, in the circumstances of the Iran/Iraq war any Security Council approved act of collective self-defence should have been in support of Iran, not against Iran.

27. In the light of the above, the United States cannot use alleged Iranian actions against neutral shipping as a justification for its attacks on Iranian oil platforms. Without prejudice to this position, Iran will make the following comment on the U.S. allegations. As already noted, Iran's main concern was to keep the Persian Gulf free of conflict since all its oil exports and the majority of its trade went by sea, using ports on the Persian Gulf. It was Iraq which had an interest in taking the war into the Persian Gulf. Iran's concern was not only to protect its own trade and shipping, but also to dissuade third States from violating the laws of neutrality. It became increasingly apparent that allegedly neutral States like Kuwait and Saudi Arabia were not only financially supporting Iraq, but were also opening up their ports to Iraq, and providing other forms of military assistance to Iraq. These facts are well known[37]. A number of these points, insofar as they concerned Kuwait, were borne out by a November 1987 Report to the U.S. Senate Committee on Foreign Relations, which stated explicitly that Kuwait had "chosen to serve as Iraq's entrepot and thus as its de facto ally[38]". The same Report noted that "from the beginning of hostilities ... Kuwait put aside its past differences with Iraq" and entered into a "'strategic marriage of convenience' with Baghdad[39]":

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36 See, for example, Resolution 479 (1980) of 28 September 1980. Iran's Memorial, Exhibit 24.

37 See, Iran's Memorial, pp. 21, et seq., paras. 1.43, et seq..

38 See, "War in the Persian Gulf: The U.S. Takes Sides", Staff Report to the Committee on Foreign Relations of the U.S. Senate, November 1987, 100th Congress, 1st Session, Washington, U.S. Government Printing Office, 1987, p. 27. Iran's Memorial, Exhibit 28.

39 Ibid., p. 36.

> "Kuwait permitted the use of its airspace for Iraqi sorties against Iran, agreed to open its ports and territory for the transshipment of war material (mostly of French and Soviet origin), and joined with the Saudis in providing billions of dollars in oil revenues to help finance the Iraqi war effort. In clear and unmistakable terms, Kuwait took sides[40]."

Kuwaiti aid was not just financial, it was also military and logistic. Cordesman and Wagner note:

> "Kuwait had also increased the risk of Iranian attacks ... by allowing Iraqi planes to overfly Kuwait so that they could fly down the southern coast of the [Persian] Gulf and attack Iranian shipping without warning. It also seems to have allowed the Iraqi Navy to send small ships down the Sebiyeh waterway between Kuwait and Bubiyan Island and may have allowed Iraqi helicopters to stage out of Kuwaiti territory[41]."

Iran found this situation doubly unacceptable because the war had been started and was being continued by Iraq's aggression.

28. In response to this situation, Iran exercised the right of visit and search. This right was exercised throughout the latter years of the war, with Iran often visiting and searching, or at least asking for identification from, vessels on a daily basis[42]. A copy of the Iranian Navy's operational instructions for exercising these rights is attached as Exhibit 20. In carrying out these actions, Iran was concerned primarily with goods heading towards Kuwait and Saudi Arabia, both States which were known to be violating the laws of neutrality by their support of Iraq.

29. Iran has analysed the specific incidents referred to in the U.S. pleading as examples of Iranian attacks on commercial shipping, using in this

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40 Ibid., p. 37.

41 Cordesman, A. H. and Wagner, A. R.: The Lessons of Modern War, Vol. II, The Iran-Iraq War, Westview Press, Boulder and San Francisco, 1990, p. 278. Exhibit 18.

42 See, for example, Peace, D. L.: "Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis", Virginia Journal of International Law, Vol. 31, 1991, pp. 549-551. Iran's Memorial, Exhibit 30. Peace notes that over 18 months, Iran said it had searched over 1200 vessels and seized the cargo of thirty. In November 1987, Iran reported that it was searching up to twenty vessels a day. SWB (BBC Monitoring), ME/0011, A/2, 27 November 1987. Exhibit 19.

analysis the sources given by the United States[43]. On the basis of U.S. sources, in only 6 out of 60 incidents referred to by the United States is there a suggestion that there were crew casualties. More importantly, only 3 incidents involving crew casualties are confirmed in the United Nations' reports, and there must be serious doubts about the accuracy of two of these reports[44]. In only 5 other cases are there reports of crew injuries. The majority of incidents report no damage or only minor damage to the vessel.

30. Nearly all the alleged "attacks" referred to by the United States concern vessels trading with Kuwait and Saudi Arabia (i.e., trade with States militarily and financially supporting the Iraqi war effort). The Security Council never condemned Iraqi attacks on vessels trading with Iran, despite Iran's repeated protestations that this effectively legitimised such attacks[45]. If third States had wanted to, or now want to, present claims against Iran for its alleged attacks on their shipping, they could have done so. They could also have sought U.N. support at the time for joint action against Iran. No such step was or has been taken. In fact, one State, Kuwait, has since expressed its regret for positions it adopted during the Iran-Iraq war.

31. In such circumstances, the United States cannot pretend its attacks on Iran's oil platforms were justified by alleged Iranian attacks on non-U.S. flag shipping. It can be seen that the United States showed no concern for non-U.S. flag commercial shipping - positively supporting Iraq and taking no

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43 Alleged Iranian Silkworm missile and mine attacks are considered separately in Section E below.

44 The three vessels which suffered crew casualties according to the United Nations' reports were the Wu Jiang (4 crew killed) on 26 February 1987, the Gentle Breeze (1 crew killed) on 21 September 1987, and the Estelle Maersk (1 crew killed) on 5 December 1987. However, Sreedhar and Kaul, another source relied on by the United States, give no report of an attack on the Gentle Breeze, and both Sreedhar and Kaul and other sources suggest that the "attack" on the Wu Jiang caused no damage and no casualties. Even the United Nations suggests that this attack was unsuccessful. See, Sreedhar and Kaul: Tanker war: Aspect of Iraq-Iran War (1980-88), ABC Publishing House, New Delhi, 1990. U.S. Preliminary Objection, Exhibit 6. See, also, the Report of the Secretary-General in pursuance of Security Council Resolution 552, U.N. Doc. S/16877/Add. 5, 31 December 1987. U.S. Preliminary Objection, Exhibit 14. With regard to the alleged attack on the Wu Jiang, see, also, Middle East Economic Survey, 9 March 1987, p. A8, which also states that 3 missiles were fired at this vessel but all missed. Exhibit 21.

45 See, Part I, Chapter I, para. 1.10, above.

action to hinder Iraqi attacks. In any event, none of the conditions for an act of collective self-defence are fulfilled.

E. Alleged Iranian Actions against the United States

32. Iran has shown above that the United States cannot justify its attacks on Iran's oil platforms by reference to alleged Iranian attacks on non-U.S. flag commercial shipping. The remaining question is whether such attacks can be justified by alleged Iranian attacks on the United States. The United States argues that its own attacks on Iran's oil platforms must be seen "in the context of a long series of attacks by Iranian military and paramilitary forces on U.S. ... vessels engaged in peaceful activities in the [Persian] Gulf[46]".

33. In fact, there was no such "long series of attacks" nor was there even any hostility shown to U.S. forces. Such a description of the situation totally conflicts with statements made by U.S. officials at the time. Caspar Weinberger, U.S. Secretary of Defence, stated that Iranian forces demonstrated "a decided intent to avoid American warships[47]", another U.S. official pointing out that "Iran has been careful to avoid confrontations with U.S. flag vessels[48]". The Commander of the U.S.S. Sides, a U.S. warship stationed in the Persian Gulf, commented that the conduct of Iranian forces was "pointedly non-threatening[49]".

34. Iran is only aware of two incidents involving Iranian and U.S. forces. The first took place on 21-22 September 1987, when the United States destroyed the Iran Ajr. The second occurred on 8 October 1987 when U.S. helicopters attacked and sank three Iranian patrol boats near Farsi island. The United States also refers to these incidents, but seeks to qualify them as Iranian attacks[50]. Iran denies that either the Iran Ajr or the patrol boats had engaged in any illegal action that might have justified the U.S. attacks[51]. Iran also notes that

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46 U.S. Preliminary Objection, p. 4, para. 1.01.

47 Weinberger, C.W.: Fighting for Peace: Seven Critical Years in the Pentagon, Warner Books, New York, 1990, p. 401. Iran's Memorial, Exhibit 44.

48 Department of State Bulletin, July 1987, p. 60. Iran's Memorial, Exhibit 54.

49 Carlson, Commander D.: "The Vincennes Incident", Proceedings/Naval Review, September 1989, p. 87. Iran's Memorial, Exhibit 55.

50 See, U.S. Preliminary Objection, pp. 12-13, para. 1.15, and p. 15, para. 1.21.

51 Iran's record of these events is given at pp. 39-41, paras. 1.97-1.100 of Iran's Memorial.

the United States has provided no independent evidence showing such illegal action. The evidence that the Iran Ajr was laying mines or that the patrol boats had earlier fired on a U.S. helicopter is based solely on assertions made at the time by U.S. government sources in order to justify the U.S. attacks. This is scarcely independent evidence. If the United States can produce no better evidence, Iran suggests that it would be more appropriate to view these attacks as part of the wider policy of U.S. support for Iraq. They would help to explain what the U.S. Assistant Secretary of Defence meant when he said that the United States was "doing a lot of things" in the Persian Gulf "to ensure that we could teach the Iranians a lesson[52]". In any event, such incidents - involving destruction of Iranian vessels and loss of life, with no damage of any kind to U.S. forces - can not justify the U.S. attacks on the oil platforms as self-defence.

35. Apart from these incidents, Iran is alleged to have laid the mines which damaged the U.S.S. Bridgeton on 24 July 1987 and the U.S.S. Samuel B. Roberts on 14 April 1988. Iran is also alleged to have fired the missile which hit the Sea Isle City on 16 October 1987. These are the only incidents allegedly involving Iranian attacks on U.S. vessels. Each of these incidents will be discussed below: first, the question of Silkworm missile attacks; and second, the question of minelaying.

(i) Silkworm Missiles

36. The United States alleges that Iran fired a number of Silkworm missiles at Kuwait in September and October 1987, and that in one such attack a Silkworm hit a U.S. flagged vessel, the Sea Isle City. The U.S. allegation is again based on bald assertions and no independent evidence is produced to support these assertions. Anticipating such assertions, Iran has already made its position clear on this question in its Memorial[53]. It will thus only respond here to a number of specific points made by the United States.

37. The United States asserts that Iran had Silkworms on Fao. No attempt of proof is made by the United States. It is difficult for Iran to prove a negative. Iran can only point out that the Fao peninsula is almost entirely

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52 See, Iran's Memorial, Exhibit 51.

53 Iran's Memorial, pp. 42, et seq., paras. 1.104, et seq..

marshland, often subject to flooding, and throughout the period Iran held the peninsula it was under near constant bombardment from Iraq. A Silkworm missile - which requires some 40 lorries of equipment and a large area of stable ground to be fired - would have been virtually impossible to use on Fao, would have been vulnerable to Iraqi attack and would have served no useful tactical purpose. Iran can also note that all U.S. military analyses of the time contained graphic diagrams showing Iran as having its Silkworm missiles around the Strait of Hormuz, hundreds of miles to the south of the Fao peninsula[54]. Moreover, when explaining why the United States had not carried out retaliatory action against the alleged Silkworm missiles sites on Fao, The Washington Post notes that "intelligence sources" had reported on 20 October 1987 - only a few days after Iran's alleged Silkworm attacks - that there were "no Silkworm launch sites at Fao, making a military strike on the area pointless[55]".

38. The United States also addresses the question of the range of a Silkworm. Measuring from a tower on the Fao peninsula, it states that the Sea Isle City lay at a distance of 94 kilometers from this tower, thus within the range of a Silkworm, which the U.S. asserts is 95 kilometers[56]. This statement is inaccurate on every point. First, the tower is an observation tower built by the Iraqis. It is not a Silkworm missile site. This tower is shown on an extract from a map which has been attached as Exhibit 22. It can be seen that it is in the middle of an area of land subject to inundation. A Silkworm could not even have been fired from the vicinity of the tower.

39. Second, with regard to the question of range. It is true that the "maximum effective range" of a Silkworm is stated by the manufacturers as 95 kilometers. However, no expert actually believes it could be fired accurately to anything like that distance. The United States gives the design specifications from Jane's Weapon Systems but fails to mention the views of experts stated in Jane's Defence Weekly[57]. Thus, one expert notes:

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54 See, Department of State Bulletin, October 1987, p. 43. Iran's Memorial, Exhibit 67.

55 The Washington Post, 20 October 1987. Iran's Memorial, Exhibit 69. It was suggested that the missile sites might have been moved after the attack, although how 40 lorries of equipment (including missile launchers, etc.) could have been moved from the Fao marshlands across the Shatt al Arab is not explained.

56 See, U.S. Preliminary Objection, Annex, p. 69, para. A1.19.

57 Ibid., footnote 67.

> "In its sales brochure, the missile's range is stated as 95 km, although Western analysts credit the range as no more than 80 km[58]."

Cordesman and Wagner, perhaps the source on which the United States most extensively relies on almost every other issue, states as follows:

> "The Silkworm is most effective at ranges under 40 kilometers, but it has an effective range of 70-80 kilometers if a ship or aircraft can designate the target and allow the Silkworm to reach the point where its on-board guidance can home in on the target[59]."

This is the true position. Iran, however, did not have the necessary equipment to allow it to designate a target for the missile at a range of over 40-50 kilometers. Thus, it was impossible for Iran to target vessels at any greater range. It would be a matter of sheer chance if a missile hit a target at any greater range. The United States itself believed at the time that the maximum range of a Silkworm was 85 kilometers. This is the range given in the Department of State Bulletin of October 1987 (i.e., contemporaneous with Iran's alleged attacks), which also shows Iran's Silkworms positioned around the Strait of Hormuz[60].

40. Finally, it is necessary to consider the specific Silkworm attacks of which Iran is accused. The United States alleges that Iran fired three Silkworms at Kuwait on 4-5 September 1987. The United States states one hit an area of uninhabited coastline but does not indicate where. A second was supposed to have hit near "Failaka Island" - presumably, this means it is alleged to have landed in the sea. Finally, the third is alleged to have hit near the port of Mina Abdullah, 30 miles south of Kuwait City. The United States does not mention that Mina Abdullah is some 105 kilometers from the tower on the Fao peninsula, well beyond the Silkworm's range even as stated by the United States. As far as Iran is aware, none of these Silkworms are alleged to have caused any damage.

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58 Jane's Defence Weekly, Vol. 7, No. 22, 9 June 1987, p. 1113. Exhibit 23. An article on 28 March 1987 was even more pessimistic, only crediting the Silkworm with a range "up to 80 km". Jane's Defence Weekly, Vol. 7, No. 12, 28 March 1987, p. 531. Exhibit 24.

59 Cordesman, A. H. and Wagner, A. R.: op. cit., p. 274. Exhibit 18.

60 Department of State Bulletin, October 1987, p. 43. Iran's Memorial, Exhibit 67.

41. Three other alleged attacks are mentioned - against the Sungari on 15 October 1987, against the Sea Isle City on 16 October 1987, and against the Sea Island oil terminal on 22 October 1987. All three of these vessels were beyond the effective range of a Silkworm. The Sungari was at a distance of 95.67 km, the Sea Isle City at 94.88 km, and the Sea Island terminal at 91.88 km[61].

42. Iran has made its best efforts above to prove a negative - that it did not carry out these attacks. As explained in Iran's Memorial, Iraq also had Silkworms, including Silkworms that could be fired from the air, which Iran did not possess. Iraq had no hesitation about carrying out attacks on Kuwaiti, Saudi and U.S. vessels. Moreover, it is known to have carried out other Silkworm missile attacks on Kuwaiti and Saudi ships[62].

43. In any event, it is not enough - in the circumstances facing Iran during the war - for the United States simply to state that Iran was responsible for attacking the Sea Isle City and assume that, if this is the case, its attack on Iran's oil platforms was justified. The United States has not shown that Iran would have been wrong to attack Kuwait, given Kuwait's role in the war. The United States has not shown that Iran would have been wrong to attack a reflagged Kuwaiti tanker (even if reflagged under the U.S. flag). The United States has certainly not shown that an attack on Iran's oil platforms hundreds of miles away, some four days later was, in the circumstances, either necessary or proportionate. At best, the U.S. action would be an illegal retaliation, designed mainly to further Iraq's cause and put pressure on Iran.

(ii) Iran's Alleged Minelaying

44. Again, it is the United States which must bear the burden of proof to show that Iran engaged in minelaying in the Persian Gulf. It is the United States which alleges that Iran carried out the mine attack on the U.S.S. Samuel B. Roberts and that this attack justifies the U.S. attack on the oil platforms as an act of self-defence. Nevertheless, the United States has never produced independent evidence of any kind to show Iran's involvement in

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61 This distance is calculated from the tower pinpointed by the United States and relying on U.S. coordinates for the positions of these vessels.

62 See, Iran's Memorial, pp. 42-43, para. 1.105, and Exhibit 68 thereto.

minelaying. Most reports assert Iran's responsibility for minelaying on the basis of the Iran Ajr incident discussed above. Iran's position on this incident was stated in Iran's Memorial. The United States has never produced any evidence to support its allegations that the Iran Ajr was engaged in minelaying.

45. Iran can only make the following comments. First, Iraq is known to have laid mines in the Persian Gulf. For example, on 14 February 1982, an Iranian tanker, the Mokran, hit an Iraqi mine near the port of Bandar Mahshahr[63]. A Greek freighter, the Evangelia-S, hit an Iraqi mine on 11 September 1982[64]. A Cypriot freighter, the City of Rio, struck an Iraqi mine close to Bandar Khomeini on 1 February 1984[65]. A Liberian freighter, the Dashaki, is reported as having struck an Iraqi mine some four miles from the Nasr oil fields on 7 June 1984[66]. Iraq thus had mines and could lay them from the air almost anywhere in the Persian Gulf. Indeed, as the experience during the Kuwaiti crisis shows, Iraq had a large arsenal of mines and had no hesitation in using them[67].

46. Second, Iraq at least had an interest in laying mines, whereas Iran had none. Mines were a threat to Iranian shipping as much as to any other shipping. In particular, the areas in the southern part of the Persian Gulf and in the Gulf of Oman, where Iran is alleged to have laid mines, were regularly used by Iranian shipping or shipping trading with Iran. Thus, the Texaco Carribean, which hit a mine off the port of Fujairah in the Gulf of Oman on 10 August 1987, was carrying Iranian crude oil[68]. It was out of concern for the danger of mines to its shipping that Iran engaged in extensive minesweeping operations. As one Iranian Naval Commander pointed out in a radio interview on 17 April 1987:

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63 Danziger, R.: "The Persian Gulf Tanker War", Proceedings/Naval Review, 1985, p. 164. Iran's Memorial, Exhibit 16.

64 Ibid.

65 Ibid., p. 165.

66 Ibid.

67 See, Wiswall, D.L.: "Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf", Virginia Journal of International Law, Vol. 31, 1991, p. 626. U.S. Preliminary Objection, Exhibit 12.

68 Middle East Economic Survey, 17 August 1987, p. A2. Exhibit 25.

> "For seven years, the Iranian Navy has maintained security in the Persian Gulf. For seven years, Iraq has laid mines and we have gathered them ... we have minehunting helicopters, minesweeping ships, as well as, minehunting diving teams[69]."

Apart from the risk to shipping, the presence of mines increased insurance premiums for shipping, which was itself an added burden on Iran's economy.

47. As Iran made clear in its Memorial, the only mines laid by Iran were laid in the Khor Abdullah north of Bubiyan Island. These mines were laid for purely defensive purposes to prevent Iraq from using this waterway to attack Iranian positions. Such mines had no effect on commercial shipping[70].

48. Iraq, on the other hand, did have an interest in minelaying, not only to disrupt shipping trading with Iran, but also to create exactly the kind of threat which would be bound to increase the western powers' presence in the Persian Gulf and thus increase the pressure on Iran. Iraq was successful on both counts.

49. Third, the mine threat in the Persian Gulf should not be exaggerated. According to the United States, only 176 mines were found during the eight years of the war. Of these, 95 were Myams[71]. Myams are small Soviet mines with only a 20 kg. charge and are designed for use in rivers and lakes against small craft. The rest were apparently Soviet M-08 mines. Even these mines were of little danger to tankers and larger merchant vessels. Moreover, they were normally visible on the surface of the water and could be avoided. No serious campaign of mining was carried out by either side.

50. The United States refers to nine vessels that were allegedly hit by mines in 1987-88. The first four incidents are supposed to have taken place in May-June 1987 in waters off Kuwait, close to the edge of the Iraqi exclusion zone. Reports in fact differ as to whether these vessels were hit by missiles or mines. Moreover, a number of reports suggest that if the vessels were hit by mines, the mines had probably floated down from the zone to the north - very possibly from the Shatt Al Arab or from the entrance to the port of Bandar

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69 See, SWB (BBC Monitoring), ME/8650/A/3, 19 August 1987. Exhibit 26.

70 See, Iran's Memorial, pp. 39-40, para. 1.97.

71 U.S. Preliminary Objection, Annex, p. 67, para. A1.17, footnote 57.

Khomeini, where Iraq was known to have laid mines. The United States produces no evidence to show the mines were Iranian. In any event, none of these four vessels were American and all the reports suggest that the vessels suffered very minor damage, with no casualties[72].

51. Two other vessels (neither U.S. flag vessels) are alleged to have hit mines in the territorial waters of the United Arab Emirates off Fujairah in the Gulf of Oman in August 1987. The first incident, discussed above, involved the Texaco Carribean, which was carrying Iranian crude oil from Larak Island, and was therefore hardly likely to be a target of Iranian attack. The second, the Anita, a small "survey vessel", apparently sank without trace. Again, there is no evidence that Iran had any part in placing these mines. Iran was as concerned as anyone about the appearance of mines in this area, outside the Persian Gulf. A large number of Iranian vessels used this area as a stopping off point before entering the Strait of Hormuz. Following the Texaco Carribean incident, Iran immediately protested about the laying of mines in this area and offered and obtained permission to assist in the minesweeping efforts in the area[73].

52. Apart from these incidents[74], the United States holds Iran responsible for laying the mines which damaged the U.S.S. Bridgeton (a reflagged Kuwaiti tanker) and the U.S.S. Samuel B. Roberts, a U.S. navy warship. The United States has never produced any independent evidence of Iran's responsibility for laying these mines. Once again, it is almost impossible for Iran to prove a negative and the burden must be on the United States on this issue. Nevertheless, Iran finds it extraordinary that a sophisticated U.S. warship (or indeed a tanker being escorted by U.S. naval forces) should have hit an old M-08 Soviet mine, as is alleged. Such mines are normally clearly visible on the surface and relatively easy to destroy or avoid. Moreover, the damage reports of both the

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72 See, also, Cordesman, A. H. and Wagner, A. R.: op. cit., pp. 288, 291, and p. 345, footnote 42. Exhibit 18. Cordesman and Wagner state that one of these four vessels was hit by an "unidentified warplane". They also suggest that the Primrose and the Marshal Chuykov were damaged by "free-floating or breakaway" mines.

73 See, Yearbook of the United Nations, Vol. 41, 1987, p. 235. Iran's Memorial, Exhibit 58. See, also, SWB (BBC Monitoring), ME/8650/A/4, 19 August 1987, and ME/8652/i, 21 August 1987. Exhibit 27.

74 The United States also mentions a Panamanian research/survey vessel, the Marissa, hitting a mine in 1987. See, U.S. Preliminary Objection, Annex, p. 64, para. A1.13. The U.S. reports, however, conflict as to whether this occurred, if it did occur, off Farsi Island or to the north of Bahrain. Moreover, reports differ as to whether the alleged attack occurred in July or in September 1987.

Bridgeton and the Roberts given in the press seem inconsistent with the kind of damage that would be caused by an M-08. If hit, an M-08 would blow up near the front of a vessel at surface level. Both the Bridgeton and the Roberts were apparently damaged close to the rear of the vessel and on its underside. This suggests that the mines were bottomlaid, and far more sophisticated than M-08s. The only sea mines in Iran's possession were M-08s. It had no such sophisticated bottomlaid mines, which were, however, possessed by Iraq[75]. Finally, there are a number of reports suggesting that the mines which damaged the Bridgeton and the Samuel B. Roberts were either Iraqi mines or floating mines of unknown provenance[76].

F. The Status of the Oil Platforms and the U.S. Attacks

(i) The Commercial Nature of the Platforms

53. In its Memorial, Iran described the platforms attacked and destroyed by the United States[77]. The United States alleges that the Reshadat platform, destroyed in the attack on 19 October 1987, was "inoperative as an oil production facility[78]". What this means is that the platforms had already been attacked twice by the Iraqi forces in October 1986 and July 1987 and that, at the time of the U.S. attacks, were under repair[79]. The United States also alleges that the Salman and Nasr platforms were being used for military purposes but admits that these platforms were producing oil at the time of the U.S. attacks[80]. In fact, despite general allegations about the military use of the platforms to coordinate attacks on shipping and in minelaying, the United States produces no evidence to support such allegations.

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75 See, Wiswall, D.L.: op. cit., p. 626. U.S. Preliminary Objection, Exhibit 12.

76 According to The Financial Times, 12 April 1987, Washington sources stated there would be no retaliation for the attack on the Bridgeton because the United States "was not sure who was responsible". Iran's Memorial, Exhibit 57. The United States also points to a report that the Samuel B. Roberts hit an Iraqi mine. U.S. Preliminary Objection, Annex, p. 67, para. A1.17, footnote 55.

77 See, Iran's Memorial, pp. 9-11, paras. 1.14-1.18.

78 U.S. Preliminary Objection, p. 21, para. 1.31.

79 Iran's Memorial, p. 41, para. 1.101.

80 U.S. Preliminary Objection, p. 17, para. 1.24.

54. The United States also alleges that the oil platforms were "armed and equipped with radar and communications devices beyond that reasonably required for the defensive purposes alleged by Iran[81]". Again, this is mere assertion and no attempt to support the assertion is made. First, it is entirely a matter for Iran to judge what defensive equipment was necessary to protect its oil workers and oil installations from the real threat of Iraqi attack. Second, the actual equipment on the platforms was extremely limited in nature - 23 mm. anti-aircraft machine guns, and miscellaneous small weapons. The idea that such weapons could have been used in any way against shipping is absurd. No mines are alleged to have been found. There is no report of small patrol boats or helicopters (allegedly used by Iran in actions against shipping) being found at the platforms.

(ii) The U.S. Attacks on the Platforms

55. There is no dispute that the United States totally destroyed the Reshadat platform by bombardment in its attack of 19 October 1987. In its Preliminary Objection, the United States asserts that it boarded and searched, and then destroyed, another platform - the Resalat platform - "when Iranian military personnel on the platform engaged in action that threatened U.S. forces, manning one of its two twin ZU-23 mm. guns to use against the approaching U.S. forces[82]".

56. Again, this is a new version of events that conflicts with the U.S. story at the time. At the time, a Pentagon spokeman stated that U.S. forces had seen another platform being evacuated and that, when the platform was abandoned, it was boarded by U.S. forces and destroyed. This was described by the spokesman as a "target of opportunity[83]". President Reagan's letter to Congress about the incident also stated that this platform "had been abandoned by the Iranians when the operation began[84]". These versions are totally

81 Ibid., p. 21, para. 1.31.

82 Ibid., pp. 21-22, para. 1.32.

83 This version was given by Fred Hoffman, a Pentagon spokesman, in a press briefing after the attack. See, The Washington Post, 20 October 1987. Iran's Memorial, Exhibit 69.

84 Letter dated 20 October 1987 from President Reagan to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 23 Weekly Comp. Pres. Doc. 1159-1160, 26 October 1987. Iran's Memorial, Exhibit 70.

inconsistent with the allegation of hostile activity by alleged Iranian forces on the platform.

57. The attack on the Salman and Nasr platforms was also described in detail in Iran's Memorial[85]. The United States alleges that in "retaliation" for the U.S. attacks on the platforms, Iran deployed Iranian frigates and small boats against "U.S.-owned or associated oil rigs, platforms and jack-up rigs" and that in the resulting engagement two Iranian frigates and one missile patrol boat were sunk or damaged and an Iranian F-4 damaged[86]. Once again, this is a travesty of the truth and bears no similarity with any other U.S. record of the events of 18 April 1988.

58. First, the United States fails to mention that part of the plan of the attack on 18 April 1988 was to destroy an Iranian frigate. Second, U.S. allegations about an attack on U.S. owned oil platforms is totally unsubstantiated. The oil field where these attacks are supposed to have occurred - the Mubarak field - is in fact Iranian owned and jointly operated with the U.A.E.. Third, neither the frigates nor the patrol boat nor the Iranian F-4 were anywhere near the Mubarak field at the time they were attacked by U.S. forces.

59. Even the record of events given by U.S. officers involved in the attacks contradicts the present U.S. version. Thus, one officer reports that the Joshan, the Iranian patrol boat, was simply informed by radio that it was to be sunk and the captain was told to abandon ship. The Iranian frigate, the Sahand, - allegedly proceeding to the Mubarak oilfield, but in fact in the Strait of Hormuz - was dived on by U.S. aircraft, and attacked with missiles. The Sabalan was also bombed from the air even further from the Mubarak oil field - close to Larak Island in the Strait of Hormuz[87].

60. These events only confirm the illegal nature of the U.S. attacks. Even on the U.S. version of events, the U.S. attacks were totally

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85 Iran's Memorial, pp. 47, et seq., paras. 1.114, et seq..

86 U.S. Preliminary Objection, pp. 24-25, para. 1.38.

87 See, Perkins, Capt. J.B.: "Operation Praying Mantis: The Surface View", Proceedings/Naval Review, 1989, p. 69. Iran's Memorial, Exhibit 80. See, also, Langston, Capt. B. and Bringle, Lieut. Commander D.: "Operation Praying Mantis: The Air View", Proceedings/Naval Review, May 1989, pp. 54-65. Iran's Memorial, Exhibit 89.

unnecessary and disproportionate. The United States itself described its first attack as a reprisal action. The United States made no attempt to approach Iran to settle any disputes it may have had with Iran about Iranian conduct, as it had done after Iraq's attack on the Stark. Nor did the United States attempt to obtain Security Council approval for the use of force against Iran. In fact, the U.S. actions were clearly illegal and can only be explained as part of the wider U.S. policy of assisting Iraq in the war. In this context, the United States was ready to use any pretext for taking hostile action against Iran.