

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING OIL PLATFORMS

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

COUNTER-CLAIM

ORDER OF 10 MARCH 1998

1998

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES PLATES-FORMES PÉTROLIÈRES

(RÉPUBLIQUE ISLAMIQUE D'IRAN c. ÉTATS-UNIS
D'AMÉRIQUE)

DEMANDE RECONVENTIONNELLE

ORDONNANCE DU 10 MARS 1998

Official citation:

*Oil Platforms (Islamic Republic of Iran
v. United States of America), Counter-Claim,
Order of 10 March 1998, I.C.J. Reports 1998, p. 190*

Mode officiel de citation:

*Plates-formes pétrolières (République islamique d'Iran
c. Etats-Unis d'Amérique), demande reconventionnelle,
ordonnance du 10 mars 1998, C.I.J. Recueil 1998, p. 190*

ISSN 0074-4441
ISBN 92-1-070764-8

N° de vente: Sales number	700
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INTERNATIONAL COURT OF JUSTICE

YEAR 1998

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CASE CONCERNING OIL PLATFORMS

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES
OF AMERICA)

COUNTER-CLAIM

ORDER

Present: Vice-President WEERAMANTRY, Acting President; President SCHWEBEL; Judges ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK; Judge ad hoc RIGAUX; Registrar VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Articles 31, 44, 45 and 80 of the Rules of Court,

Makes the following Order:

1. Whereas, on 2 November 1992, the Government of the Islamic Republic of Iran (hereinafter "Iran") filed in the Registry of the Court an Application instituting proceedings against the Government of the United States of America (hereinafter "the United States") in respect of a dispute

“aris[ing] out of the attack and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively”;

whereas, in its Application, Iran, maintaining that those acts constituted “a fundamental breach” of various provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, which was signed in Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter “the 1955 Treaty”), and of international law, invoked Article XXI, paragraph 2, of the 1955 Treaty as the basis of the Court’s jurisdiction; and, whereas at the end of its Application, it set out its claims as follows:

“On the basis of the foregoing, and while reserving the right to supplement and amend these submissions as appropriate in the course of further proceedings in the case, the Islamic Republic respectfully requests the Court to adjudge and declare as follows:

- (a) that the Court has jurisdiction under the Treaty of Amity to entertain the dispute and to rule upon the claims submitted by the Islamic Republic;
- (b) that in attacking and destroying the oil platforms referred to in the Application on 19 October 1987 and 18 April 1988, the United States breached its obligations to the Islamic Republic, *inter alia*, under Articles I and X (1) of the Treaty of Amity and international law;
- (c) that in adopting a patently hostile and threatening attitude towards the Islamic Republic that culminated in the attack and destruction of the Iranian oil platforms, the United States breached the object and purpose of the Treaty of Amity, including Articles I and X (1), and international law;
- (d) that the United States is under an obligation to make reparations to the Islamic Republic for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. The Islamic Republic reserves the right to introduce and present to the Court in due course a precise evaluation of the reparations owed by the United States; and
- (e) any other remedy the Court may deem appropriate”;

2. Whereas, on 8 June 1993, within the fixed time-limit, as extended by the Order made by the President of the Court on 3 June 1993, Iran filed its Memorial, at the end of which it made the following 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 Court has jurisdiction under the Treaty of Amity to entertain the dispute and to rule upon the claims submitted by Iran;
2. That in attacking and destroying the oil platforms referred to in Iran’s Application on 19 October 1987 and 18 April 1988, the United States breached its obligations to Iran, *inter alia*, under Articles I, IV (1) and X (1) of the Treaty of Amity and international law, and that the United States bears responsibility for the attacks; and
3. That the United States is accordingly under an obligation to make full reparation to Iran for the violation of its international legal obligations and the injury thus caused in a form and amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves the right to introduce and present to the Court in due course a precise evaluation of the reparation owed by the United States; and
4. Any other remedy the Court may deem appropriate”;

3. Whereas, on 16 December 1993, within the time-limit fixed for the filing of the Counter-Memorial, as extended by the Order made by the President of the Court on 3 June 1993, the United States, referring to Article 79 of the Rules of Court, raised a preliminary objection to the jurisdiction of the Court, at the end of which it requested that the Court “decline to entertain the case”; and whereas, by a Judgment dated 12 December 1996, the Court rejected the “objection . . . according to which the Treaty of 1955 does not provide any basis for the jurisdiction of the Court” and found

“that it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of 1955, to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty”;

4. Whereas, on 23 June 1997, within the new time-limit fixed by the Order made by the President of the Court on 16 December 1996, the United States filed its Counter-Memorial, entitled “Counter-Memorial and Counter-Claim”; whereas it stated, in the introduction to that Counter-Memorial that, on the one hand, “Part VI sets forth the US counter-claim in this case, which is based on facts directly at issue in assessing Iran’s claim” and, on the other hand, “As required by Article 80 of the Court’s Rules, this counter-claim is ‘directly connected with the subject-matter’ of Iran’s claim, and ‘comes within the jurisdiction of the Court’”; whereas, in Part VI of its Counter-Memorial, the United States sets out the factual background, the reasons for which it considers that the Court

has jurisdiction to hear the counter-claim and that the counter-claim is admissible, and its submission that "Iran's actions against US vessels violated Article X of the 1955 Treaty"; and, whereas at the end of the Counter-Memorial, it made the following submissions:

"On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare:

1. That the United States did not breach its obligations to the Islamic Republic of Iran under Article X (1) of the Treaty of Amity between the United States and Iran, and,
2. That the claims of the Islamic Republic of Iran are accordingly dismissed.

With respect to its counter-claim, and in accordance with Article 80 of the Rules of the Court, the United States requests that the Court adjudge and declare:

1. That in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-1988 that were dangerous and detrimental to maritime commerce, the Islamic Republic of Iran breached its obligations to the United States under Article X of the 1955 Treaty, and
2. That the Islamic Republic of Iran is accordingly under an obligation to make full reparation to the United States for violating the 1955 Treaty in a form and amount to be determined by the Court at a subsequent stage of the proceedings.

The United States reserves the right to introduce and present to the Court in due course a precise evaluation of the reparation owed by Iran."

* * *

5. Whereas, by a letter dated 23 June 1997, filed at the same time as its Government's Counter-Memorial, the Agent of the United States informed the Court of the following:

"In connection with the Counter-Claim, the United States had requested on March 26 that the Government of Iran enter into negotiations for the payment of compensation to the United States for damages incurred from Iran's actions, on the ground that they violated Article X of the 1955 Treaty. By letter dated June 12, Iran replied to that request, proposing instead that the Parties conduct negotiations on a broader range of subjects. Iran's proposal in this respect was not acceptable to the United States. Accordingly, the Parties have not agreed to enter into negotiations regarding the matters involved in the US Counter-Claim";

and whereas the Registrar communicated a copy of that letter, together with the Counter-Memorial, to the Agent of Iran;

6. Whereas, in a letter dated 2 October 1997, the Agent of Iran, referring to that communication, stated as follows:

“In the Counter-Memorial and Counter-Claim of the United States dated 23 June 1997, paragraph 6.10, it was asserted that the Government of the Islamic Republic of Iran has not agreed to enter into negotiations in relation to the counter-claim. That statement was not, however, accompanied by the correspondence which has been exchanged between the Parties.

In order fully to inform the Court on this question, I attach hereto copies of [that correspondence]. The Court will see that, through this exchange of letters, Iran did agree to discuss all legal issues arising between the United States and Iran in relation to the period covered by the case before the Court”;

whereas, in that letter, he also stated the following:

“I should further observe that Iran has serious objections to the admissibility of the United States counter-claim. It is Iran’s position that the counter-claim as formulated by the United States does not meet the requirements of Article 80 (1) of the Rules. Iran requests a hearing on this question, as provided for in Article 80 (3) of the Rules. Iran would wish, prior to that hearing, to submit a brief statement explaining its objections to the counter-claim. In light of the fact that the Vice-President has scheduled a meeting with the Agents of the Parties on 17 October 1997 to consider further proceedings in this case, I would hope that it will be possible at that meeting to discuss, amongst other issues, the procedure and modalities for the hearing under Article 80 (3) in relation to the counter-claim”;

and whereas the Registrar sent a copy of that letter and of its enclosures to the Agent for the United States;

7. Whereas, on 17 October 1997, the Vice-President of the Court, acting as President in the case by virtue of Article 13, paragraph 1, and Article 32, paragraph 1, of the Rules of Court, held a meeting with the Agents of the Parties in order to find out their views as to the further proceedings in the case; whereas the two Agents agreed that their respective Governments would submit written observations on the question of the admissibility of the United States counter-claim; and whereas the Agent of Iran envisaged that his Government would then present oral observations on the question;

8. Whereas, by a letter dated 20 October 1997, the Agent of the United States, referring to the views expressed during that meeting, let it be known that his Government

“under[stood] that any order by the Court [would] limit the filing of these submissions to the issue set forth in Rule 80 (3) of the Rules of Court, in other words, to the connection of the counter-claim to Iran’s claim”;

and whereas the Registrar communicated a copy of this letter to the Agent of Iran;

9. Whereas, by a letter dated 21 October 1997, the Registrar, on the instructions of the Court, invited the Iranian Government to specify in writing, by 18 November 1997 at the latest, the legal grounds on which it relied in maintaining that the Respondent’s counter-claim did not meet the requirements of Article 80, paragraph 1, of the Rules of Court; and whereas, in that letter, the Registrar stated that the Government of the United States would in turn be invited to present its views on the question during the month following the filing of Iran’s observations; and whereas the Registrar sent a copy of that letter to the United States the same day;

10. Whereas, by a letter dated 27 October 1997, the Agent of Iran stated as follows:

“Iran does not share the views of the United States as expressed in its letter of 20 October 1997 that Iran’s submissions are to be limited to the issues set forth in Article 80, paragraph 3, of the Rules. As provided for in Article 80, paragraph 1, of the Rules, a counter-claim may only be presented provided that it is directly connected with the subject-matter of the claim of the party and that it comes under the jurisdiction of the Court. Pursuant to the Registrar’s letter of 21 October 1997, Iran’s submissions will be directed to showing the legal grounds why the counter-claim presented by the United States does not meet these requirements, as indicated in Iran’s letter of 2 October 1997.

As the Court is aware, Iran has requested a hearing pursuant to Article 80, paragraph 3, of the Rules. Iran understands that the Court will address this request after receiving the written submissions of the Parties”;

and whereas the Registrar sent a copy of that letter to the Agent of the United States;

11. Whereas, by a communication from its Agent dated 18 November 1997 and filed in the Registry on that day, Iran forwarded to the Court a document entitled “Request for Hearing in Relation to the United States Counter-Claim Pursuant to Article 80 (3) of the Rules of Court”, which contained its observations on the admissibility of the counter-claim; and whereas, by a letter dated 18 November 1997, the Registrar sent a copy

of that document to the United States Government, and informed the Iranian Government that he had done so that same day;

12. Whereas, in the introduction to its written observations, Iran states that in its Judgment of 12 December 1996, the Court ruled, on the one hand, that only Article X, paragraph 1, of the Treaty of Amity was applicable to the Iranian claim, thereby limiting Iran “to contesting the legality of the attack on the platforms under Article X (1) . . . and under no other provision”, and, on the other hand, that “the aspect of Article X (1) of the Treaty which relates to the present affair is that relating to freedom of commerce between the territories of the Parties”, the case being thus limited to that question; whereas it submits that, “[d]espite the specific and precise nature of the issues which remained for decision as a result of the Court’s Judgment of 12 December 1996, the Respondent has now chosen to react by lodging a counter-claim of a sweeping and general character”, in a way which is inconsistent “with its previously declared position on claims under the Treaty”; whereas Iran makes the following criticisms of this “change of position”:

“First, the United States seeks to widen the dispute to provisions of the Treaty of Amity, Articles X (2)-(5), which were never in question in the proceedings to date, and have never been mentioned before by the United States. Second, the United States also seeks to widen the dispute to include US claims concerning Iran’s overall conduct throughout the period 1987-1988, when it has always been its position in the preliminary objection phrase that such overall conduct, at least in so far as it concerned the United States, was irrelevant in this case, and specifically brought its preliminary objection to limit Iran’s claim as far as possible. Third, and most importantly, the United States has effectively refused to seek to resolve these wider disputes by diplomatic negotiations, despite Iran’s agreement to such negotiations”;

and whereas Iran adds that the seven specific attacks described in the counter-claim, which are alleged to have been carried out against “US vessels”, fall “wholly outside the scope of the Treaty of Amity, and in particular the provisions of Article X (1) dealing with freedom of commerce between the territories of the High Contracting Parties”, and hence it is claimed that, “following the Court’s Judgment of 12 December 1996, there is . . . no basis in the Treaty on which the Court can evaluate the legality of these alleged attacks in this case”;

13. Whereas Iran states that it is “convinced that the United States counter-claim, as formulated, is inadmissible under Article 80, paragraph 1, of the Rules”; whereas it “therefore asks the Court to hear the Parties pursuant to Article 80, paragraph 3, of the Rules, in order to

decide whether or not the question presented in the United States counter-claim 'shall be joined to the original proceedings'; and whereas Iran states that "in summarizing its objections in its written statement, [it] reserves the right to further particularize and develop them in the hearing for which Article 80, paragraph 3, specifically provides";

14. Whereas, in the body of its written observations, Iran maintains that neither of the two conditions required by Article 80 of the Rules of Court for a counter-claim to be presented — namely, on the one hand, that the counter-claim and the original claim must be "directly connected" and, on the other hand, that the counter-claim must "come within the jurisdiction of the Court" — are met in the present case;

15. Whereas Iran first of all claims that the United States counter-claim is not sufficiently specific for the Court to be able to determine whether it is directly connected with the principal claim; whereas it points out that "the counter-claim is not limited to the seven incidents referred to in paragraph 6.08" and argues that "it does nothing more than allege unspecified Iranian interference with unspecified maritime trade between the United States and Iran"; and whereas Iran argues that "no counter-claim may be filed after submission of the Counter-Memorial", it challenges the right which the United States reserves "to add further instances of Iranian attacks on US vessels in the [Persian] Gulf in 1987-1988", whilst noting that "in any event, in the case of each such instance which the United States may subsequently seek to introduce, it would be necessary to apply the test of admissibility under Article 80 of the Rules";

16. Whereas Iran then states that there is no direct connection between the counter-claim and the principal claim, either general, or with regard to the specific cases of attacks which, according to the counter-claim, were allegedly carried out on "United States shipping";

17. Whereas, as regards the first point, Iran explains its position as follows:

"To the extent that the United States Counter-Claim consists of a general assertion of the violation of freedom of commerce and navigation between the United States and Iran, either under Article X (1) or under Article X (3)-(5), there is not even the appearance of any legal or factual connection between such a violation and the attacks on the platforms. The United States did not attack the platforms because of any alleged Iranian attacks on vessels engaged in trade between Iran and the United States, whether or not such vessels were US vessels within the meaning of Article X (2)";

18. Whereas Iran, having furthermore analysed each of the specific attacks on vessels alleged by the Respondent in detail, from the standpoint of the admissibility of the counter-claim, states that that analysis “is based on the presentation of these incidents made by the United States” and “is entirely without prejudice to Iran’s position at any subsequent phase of the present proceedings”; and whereas at the end of that analysis Iran concludes first of all that “no fewer than six incidents involved vessels which were not . . . engaged in commerce or even navigation between the territories of the High Contracting Parties” and that those incidents are accordingly “irrelevant to a counter-claim which is founded on an assertion of a violation of freedom of commerce and navigation between the two countries”; whereas Iran concludes secondly that, although the seventh vessel (the *Texaco Caribbean*) was, it could be argued, “covered by Article X (1) of the Treaty which is the provision by reference to which the legality of the attack on the platforms is to be appreciated”, that vessel was not a United States flagged vessel and “in any event, there is no factual or legal link whatever between the alleged attack on the *Texaco Caribbean* and the attacks on the platforms”; and whereas, thirdly, Iran concludes, on the one hand, that

“even assuming that there may be a sufficient legal link (*connexité juridique*) between claims of a breach of freedom of commerce under Article X (1) of the Treaty (which pursuant to the Court’s Judgment of 12 December 1996 now forms the sole basis of Iran’s Application) and claims of breaches of freedom of navigation under Articles X (3)-(5), only two of the incidents involved US vessels within the meaning of Article X (2) which were even arguably covered by those paragraphs (*Bridgeton* and *Sea Isle City*)”

and, on the other hand, that “[i]n any event, none of these incidents, even on the facts alleged by the United States, raises, even arguably, a case of violation of Article X (3)-(5)”;

19. Whereas, whilst restating its position that the United States counter-claim does not come within the jurisdiction of the Court and is therefore inadmissible, on this ground also, Iran observes moreover that “it is . . . not entirely clear from the language of Article 80, paragraph 3, of the Rules whether the hearing for which that paragraph provides extends to cover an objection . . . based on lack of jurisdiction”; whereas Iran recognizes that, although “a State is normally entitled to question the Court’s jurisdiction over a claim prior to being called on to respond to the merits of that claim”, “proceedings under Article 80 are [not] a substitute for a preliminary objection”, since the hearing for which Article 80, paragraph 3, provides “is evidently intended to be a brief one,

to which the protective provisions of Article 79 of the Rules do not as such apply"; whereas Iran considers that "the decision the Court is called upon to make under Article 80, paragraph 3, concerns exclusively the question of whether or not the counter-claim should be joined to the original proceedings" and does not prejudice in any way the right of the party objecting to the counter-claim "to make any defence relating either to the admissibility or to the merits of the counter-claim in a subsequent phase of the proceedings"; whereas, therefore, Iran "reserves the right, if necessary, to lodge preliminary objections in respect of the United States counter-claim"; and whereas it notes however that "the fact that a counter-claim is plainly outside the Court's jurisdiction is *relevant* for the purposes of Article 80, paragraph 3" in so far as, on the one hand "a counter-claim which fails to satisfy the express requirement imposed by Article 80, paragraph 1, should not be joined to the original proceedings, whether the failure relates to lack of connection or lack of jurisdiction", and, on the other hand, "there may well be a link between an evident lack of jurisdiction and the lack of direct connection" as, Iran alleges, is the case here;

20. Whereas, in the concluding remarks to its written observations, Iran alleges that, in general, the State responding to the counter-claim is "at a significant disadvantage" since it "is apparently confined to a single written pleading, whereas the counter-claimant will have both the first and the last written word on the matter"; whereas Iran maintains that in this instance "the generalized claim of the United States with respect to the period of 1987-1988 covers a series of incidents with respect to which Iran has important additional claims of its own", and whereas, "[i]f the United States counter-claim was admitted, Iran would necessarily be forced to seek leave to introduce such claims", otherwise it would be "severely prejudiced"; and whereas Iran also argues that "[i]f the case were to be widened in the way proposed by the United States, this might also prejudice third States' interests", since "Article 40, paragraph 3, of the Statute of the Court only provides that a new case is notified to third States" and that "[no] such provision is made with respect to counter-claims";

21. Whereas, by a communication from its Agent dated 18 December 1997 and received in the Registry on that day, the United States submitted to the Court its observations on the admissibility of the counter-claim set out in its Counter-Memorial, taking the observations submitted by Iran into consideration; and whereas, by a letter dated 18 December 1997, the Registrar communicated a copy of the observations of the United States Government to the Iranian Government, informing the latter, on the one hand, that the Court would decide on future proceedings on the basis of the documents now before it and, on the other hand, that

the Agents of the Parties would be informed of the decision in due course; and whereas, the same day, the Registrar transmitted that information to the Government of the United States;

22. Whereas, in the introduction to its written observations, the United States submits that Iran's request for a hearing on the matter was made pursuant to Article 80, paragraph 3, of the Rules of Court and that:

“Under the Rules of Court, the only legally relevant issue now is whether there is ‘doubt’ as to whether the US counter-claim is ‘directly connected to the subject-matter’ of Iran’s claim. Here, there can be no such doubt. There is therefore no basis for Iran’s demand for a hearing or for its insistence that the counter-claim not be joined to the original proceedings”;

whereas the United States maintains that Iran “asks the Court . . . to address issues going far beyond the limits of Article 80 (3), including sweeping objections to jurisdiction and admissibility of the counter-claim”; whereas, in the first part of its observations, the United States submits that Iran “essentially seeks a separate procedure similar to preliminary objections under Article 79” and draws, between the proceedings provided for, respectively, in Article 79 and in Article 80 of the Rules of Court, analogies which are “false” in so far as “the Party facing the counter-claim initiated the case and chose the forum”; and whereas it draws the attention of the Court to the following:

“Moreover, the Court could face great practical difficulties in seeking to resolve Iran’s objections to admissibility at this stage in the context of Article 80 (3). Many of Iran’s objections to jurisdiction and admissibility involve contested matters of fact which the Court cannot effectively address and decide at this stage, particularly not in the context of the abbreviated procedures of Article 80 (3)³.

³ Should the Court decide to consider these issues in the present context, the United States would have to request a further opportunity to address them in greater detail in writing before the Court rendered any decision”;

23. Whereas the United States considers that “Iran . . . regularly mis-characterizes the key legal requirements of Article 80”; whereas the United States points out that under that provision the counter-claim must be directly connected “to the *subject-matter* of the claim, not to the claim itself”; whereas from this it infers that “[a] proper counter-claim need not be a mirror image of the claim or rest upon precisely the same

theory or facts” but that it “must be sufficiently linked to the facts or circumstances giving rise to the claim — the ‘subject-matter’ — to enable the Court to address both efficiently in the context of a single proceeding”; whereas it argues that for the Court to rule, within a single proceeding, on claims where there are substantial common elements “helps to reduce the burden on the Court . . . guards against inconsistent results, and helps the Court to reach a just and rational result”; and whereas, having analysed the case-law of the Court and of its predecessor, it reaches the conclusion that the decisions of those two Courts reflect “this practical understanding of the necessary connection between claim and counter-claim”;

24. Whereas, in the second part of its written observations, the United States seeks to show that its counter-claim is “directly connected to the subject-matter” of Iran’s claim; whereas it accuses Iran of putting forward an “artificial and illogical definition of the subject-matter of the [main] claim” by asking the Court “to consider only the US defensive actions against [Iran’s] platforms” and “to exclude Iran’s prior conduct leading to those actions”; and whereas it maintains that the factual connection between the subject-matter of Iran’s case and the United States counter-claim is direct and compelling since

“the facts and circumstances that caused the United States to engage Iran’s oil platforms — Iranian attacks on, and threats to, merchant shipping, including US shipping and US nationals — are at the heart of the US defence to Iran’s claims”

and “[t]hese same facts and circumstances are likewise the basis of the US counter-claim”;

25. Whereas the United States goes into greater detail of Iran’s alleged actions which, according to the United States, justified “under . . . the law of self-defence and the 1955 Treaty’s provision”, the “defensive actions” which it took, in October 1987, against the Rostam Platform, then, in April 1988, against the Sirri and Sassan Platforms; and whereas it explains that in committing those acts Iran violated the 1955 Treaty, not only because the “seven specific Iranian attacks” which it describes damaged its vessels, but also because the consequences of Iran’s conduct for the overall exercise of navigational rights protected by the 1955 Treaty were the following:

“Iran’s pattern of armed attacks against neutral shipping created threatening conditions which interfered with the ability of all US-flag and US-owned ships and US nationals to exercise their rights under the Treaty. Substantial damages resulted, including increases in the costs of operating both US-flag and US-owned commercial vessels and the warships protecting them. Insurance and labour

costs increased; steaming times increased; vessels were forced to carry smaller cargoes in order to pass through the relative safety of shallower waters”;

26. Whereas the United States, whilst it maintains that the Iranian objections to the jurisdiction of the Court to entertain its counter-claim “are not appropriate for consideration at this stage [of the case]”, intends nonetheless “[to] comment briefly on some of Iran’s argument concerning the 1955 Treaty”; whereas it alleges that “Iran’s jurisdictional arguments seek to force all of the US counter-claim into the confines of Article X (1) of the 1955 Treaty”, of which it provides a debatable interpretation, and whereas “[i]ssues involving the relationship between that Article and the US counter-claim await the Court’s eventual decision regarding the interpretation and application of that Article”; whereas it argues that “Iran’s specific objections to the application of paragraphs X (2) through X (5) of the Treaty are without merit”, in so far as, *inter alia*, “these provisions are not limited to ships involved in trade between the United States and Iran”; and whereas it adds that “the exclusion of warships in Article X (6) is not applicable to Article X (5)”, since attacks on United States warships protecting United States commercial vessels must “be viewed as endangering and denying access to those commercial vessels as well”;

27. Whereas the United States rejects the Iranian contention that the United States counter-claim “is not admissible because it is not framed clearly or with sufficient precision”; whereas it asserts that the counter-claim “has been stated with sufficient precision to be understood by Iran”; and whereas it observes that, although it has reserved the right to prove other Iranian ship attacks, “Iran itself has frequently sought to reserve the right to prove additional matters supporting its claims”;

28. Whereas the United States also denies that there is any basis to the Iranian argument that it too could have made a counter-claim, pointing out that “Iran initiated [these proceedings], asserting claims that it alone selected”; and whereas it denies that its counter-claim affects the rights of third parties since “[t]he other States potentially interested in the . . . counter-claim have indicated their consent or lack of objection to the counter-claim”;

29. Whereas, in the third part of its written observations, the United States reiterates its conviction that, contrary to what is maintained by

Iran, no hearing is required in the present circumstances; it points out that the expression “after hearing the Parties”, which appears in paragraph 3 of Article 80 of the Rules “come[s] into operation only if the Court determines that there is ‘doubt’ as to the requisite ‘connection between the question presented by way of counter-claim and the subject-matter’”, which is not the case here; and whereas it adds that “[t]he principles of justice and of sound judicial administration require no different result” since “[t]he question of connection . . . here is simple and straightforward” and that “[t]he relevant considerations are fully explained in the papers submitted by the Parties”;

30. Whereas, in its concluding observations, the United States submits that “the Court should now decide to join the questions presented by the US counter-claim to the original proceeding” since “[b]oth claim and counter-claim arise out of the same circumstances and require the Court to examine and decide many of the same factual and legal issues”;

31. Whereas, having regard to Article 80, paragraph 3, of its Rules, and having received detailed written observations from each of the Parties, the Court is sufficiently well informed of the positions they hold with regard to the admissibility of the claims presented as counter-claims by the United States; and whereas, accordingly, it does not appear necessary to hear the Parties further on the subject;

* * *

32. Whereas in this case Iran does not dispute that the United States claim is presented not as a defence on the merits, but as a “counter-claim” within the meaning of Article 80 of the Rules of Court; whereas it is not disputed that the claim has been “made in the Counter-Memorial of the party presenting it, and [appears] as part of the submissions of that party”, in accordance with Article 80, paragraph 2; whereas, however, Iran denies that the counter-claim meets the requirements of “jurisdiction” and of “direct connection” set out in Article 80, paragraph 1, and whereas it falls to the Court to determine whether these requirements are met in this particular case;

33. Whereas the Court has already had occasion to state the reasons why the admissibility of a counter-claim as such is contingent on those conditions in the following terms:

“Whereas the Respondent cannot use a counter-claim as a means of referring to an international court claims which exceed the limits of its jurisdiction as recognized by the parties; and whereas the Respondent cannot use that means either to impose on the Applicant any claim it chooses, at the risk of infringing the Applicant’s rights and of compromising the proper administration of justice; and whereas it is for that reason that paragraph 1 of Article 80 of the Rules of Court requires

that the counter-claim ‘comes within the jurisdiction of the Court’ and ‘that it is directly connected with the subject-matter of the claim of the other party’” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Order of 17 December 1997, I.C.J. Reports 1997, pp. 257-258, para. 31*);

* *

34. Whereas the Court has found, in its Judgment of 12 December 1996, that its jurisdiction in the present case covers claims made under Article X, paragraph 1, of the 1955 Treaty, which is worded as follows: “Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation”;

35. Whereas, in its Judgment of 12 December 1996, the Court indicated, *inter alia*,

“it would be a natural interpretation of the word ‘commerce’, in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general — not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce” (*Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 819, para. 49*).

and whereas it added that:

“Article X, paragraph 1, of the Treaty of 1955 does not strictly speaking protect ‘commerce’ but ‘freedom of commerce’. Any act which would impede that ‘freedom’, is thereby prohibited. Unless such freedom is to be rendered illusory, the possibility must be entertained that it could actually be impeded as a result of acts entailing the destruction of goods destined to be exported, or capable of affecting their transport and their storage with a view to export” (*ibid.*, para. 50);

36. Whereas the counter-claim presented by the United States alleges attacks on shipping, the laying of mines, and other military actions said to be “dangerous and detrimental to maritime commerce”; whereas such facts are capable of falling within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court; and whereas the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1;

* *

37. Whereas the Rules of Court do not define what is meant by “directly connected”; whereas it is for the Court, in its sole discretion, to

assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and whereas, as a general rule, the degree of connection between the claims must be assessed both in fact and in law;

38. Whereas, in the present case, it emerges from the Parties' submissions that their claims rest on facts of the same nature; whereas they form part of the same factual complex since the facts relied on — whether involving the destruction of oil platforms or of ships — are alleged to have occurred in the Gulf during the same period; whereas the United States indicates, moreover, that it intends to rely on the same facts and circumstances in order both to refute the allegations of Iran and to obtain judgment against that State; and whereas, with their respective claims, the two Parties pursue the same legal aim, namely the establishment of legal responsibility for violations of the 1955 Treaty;

39. Whereas the Court considers that the counter-claim presented by the United States is directly connected with the subject-matter of the claims of Iran;

* *

40. Whereas in the light of the foregoing, the Court considers that the counter-claim presented by the United States satisfies the conditions set forth in Article 80, paragraph 1, of the Rules of Court;

* * *

41. Whereas a decision given on the admissibility of a counter-claim taking account of the requirements set out in Article 80 of the Rules in no way prejudices any question which the Court will be called upon to hear during the remainder of the proceedings;

42. Whereas in order to protect the rights which third States entitled to appear before the Court derive from the Statute, the Court instructs the Registrar to transmit a copy of this Order to them;

43. Whereas when, in accordance with the provisions of its Rules, the Court decides, in the interests of the proper administration of justice, to rule on the respective claims of the parties in a single set of proceedings, it must not, for all that, lose sight of the interest of the Applicant to have its claims decided within a reasonable period of time;

44. Whereas, during the meeting which the Vice-President of the Court held on 17 October 1997 with the Agents of the Parties (see paragraph 7 above), the Agents envisaged a new exchange of written pleadings on the merits; and whereas the Agent of Iran, when asked about the time his Government would need in order to present a Reply, if such proved necessary, indicated that, without prejudice to the question of whether that pleading should also cover the counter-claim, a time-limit of one year

as from the date of filing of the Counter-Memorial would seem necessary to reply to it; and whereas at the end of its written observations (see paragraphs 21 *et seq.* above), the United States expressed itself as follows in that connection:

“As to the schedule of future proceeding on the merits of this case, the United States would not object should Iran ask under Article 45 (2) of the Rules of Court for permission to submit a Reply to the US Counter-Memorial to accompany its defence to the US counter-claim, if the United States is also authorized to file a Rejoinder. The United States notes, however, that Iran received the US Counter-Memorial and Counter-Claim late in June 1997, nearly six months ago. Iran thus already has had as long to study the US document as the United States had to write it. Therefore Iran should be required to submit any Reply within six months. The United States should then be given as much time to prepare its Rejoinder as Iran will have had from June 1997 to the filing of its Reply”;

45. Whereas, taking into account the conclusions it has reached above, the Court considers that it is necessary for Iran to file a Reply and for the United States to file a Rejoinder relating to the claims of both Parties; and whereas it is necessary moreover, in order to ensure strict equality between the Parties, to reserve the right of Iran to present its views in writing a second time on the United States counter-claim, in an additional pleading the filing of which may be the subject of a subsequent Order;

* * *

46. For these reasons,

THE COURT,

(A) By fifteen votes to one,

Finds that the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings;

IN FAVOUR: *Vice-President Weeramantry, Acting President; President Schwebel; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;*

AGAINST: *Judge ad hoc Rigaux;*

(B) Unanimously,

Directs Iran to submit a Reply and the United States to submit a Rejoinder relating to the claims of both Parties and *fixes* the following dates as time-limits for the filing of these pleadings:

For the Reply of Iran, 10 September 1998;

For the Rejoinder of the United States, 23 November 1999; and

Reserves the subsequent procedure for further decision.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this tenth day of March, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Islamic Republic of Iran and the Government of the United States of America, respectively.

(Signed) Christopher G. WEERAMANTRY,
Vice-President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judges ODA and HIGGINS append separate opinions to the Order of the Court.

Judge *ad hoc* RIGAUX appends a dissenting opinion to the Order of the Court.

(Initialled) C.G.W.

(Initialled) E.V.O.

SEPARATE OPINION OF JUDGE ODA

I

1. I voted in favour — albeit reluctantly — of the Order which was very nearly unanimously adopted.

However, I find it incorrect that the Court has decided, at this stage and in the form of a Court Order, that “the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings” (Order, p. 206, para. 46 (A)).

I feel that the Court’s decision in this Order sets a rather unfortunate precedent in its jurisprudence relating to counter-claims.

II

2. In the current case concerning *Oil Platforms*, which was presented unilaterally by Iran against the United States on 2 November 1992, Iran submitted its Memorial on 8 June 1993. While the United States, on 16 December 1993, presented its preliminary objection to the jurisdiction of the Court (within the time-limit fixed by the Court for the submission of the Counter-Memorial), the Court in its Judgment of 12 December 1996 rejected that objection and found that “it has jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of 1955, to entertain the claims made by [Iran] under Article X, paragraph 1, of that Treaty” (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection*, *I.C.J. Reports 1996*, p. 821, para. 55 (2)).

Within the time-limit fixed by the President of the Court for the submission of the Counter-Memorial, the United States, on 23 June 1997, filed its Counter-Memorial entitled “Counter-Memorial and Counter-Claim”. In its submission, the United States requests, on the one hand, that the Court adjudge and declare “[t]hat the United States did not breach its obligations to [Iran] under Article X (1) of the Treaty” and that “the claims of [Iran] are accordingly dismissed”. On the other hand, Part VI of the United States Counter-Memorial sets forth its counter-claim and in its submissions the United States requests, with respect to its counter-claim, that the Court adjudge and declare:

- “1. That in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-1988 that were dangerous and

detrimental to maritime commerce, [Iran] breached its obligations to the United States under Article X of the 1955 Treaty, and

2. That [Iran] is accordingly under an obligation to make full reparation to the United States for violating the 1955 Treaty in a form and amount to be determined by the Court . . .”

3. Several months passed and the Court has not taken any action so far. The Court did not order a second round of written pleadings (in other words, the submission of a Reply by Iran and a Rejoinder by the United States) since the counter-claim was presented in the Counter-Memorial of the Respondent party on 23 June 1997.

In fact, in a letter dated 2 October 1997 addressed to the Registrar of the Court, which was, in part, a response to the contention contained in the letter dated 23 June 1997 from the Agent of the United States filed at the same time as its Counter-Memorial, the Agent of Iran stated:

“I should . . . observe that Iran has serious objections to the admissibility of the United States’ counter-claim. It is Iran’s position that the counter-claim as formulated by the United States does not meet the requirements of Article 80 (1) of the Rules. Iran requests a hearing on this question, as provided for in Article 80 (3) of the Rules.”

On 17 October 1997, after the exchange of the above-mentioned letters of the Agents of both Parties through the Registrar of the Court, the Acting President in the present case held a meeting with the Agents of the Parties in order to ascertain their views as to the further proceedings in the case. According to the United States letter of 20 October 1997 “it was discussed [at that meeting] that the two Parties may be ordered by the Court to file *submissions* regarding the United States Counter-Claim” (emphasis added). It is also known from the text of the present Order, however, that at that meeting “the two Agents agreed that their respective Governments would submit *written observations* on the question of the admissibility of the United States counter-claim” (emphasis added) and that “the Agent of Iran envisaged that his Government would then present oral observations on the question”.

In that letter dated 20 October 1997 addressed to the Registrar, the Agent of the United States stated that

“the United States understands that any order by the Court will limit the filing of these submissions to the issue set forth in Rule 80 (3) of the Rules of the Court, in other words, to the connection of the counter-claim to Iran’s claim”.

In his letter of 27 October 1997 to the Registrar, prepared in response to the Registrar’s request of 21 October 1997, the Agent of Iran made it

clear that he did not share the views of the United States that Iran's submissions should have been limited to the issue set forth in Article 80, paragraph 3, of the Rules. Iran was of the view that "a counter-claim may only be presented provided that it is directly connected with the subject-matter of the claim of the [other] party and that it comes under the jurisdiction of the Court".

4. By invitation of the Registrar in the above-mentioned letter dated 21 October 1997, Iran, on 18 November 1997, forwarded a document entitled "Request for Hearing in Relation to the United States Counter-Claim Pursuant to Article 80 (3) of the Rules of Court" in which Iran stated:

"[Iran] hereby requests a hearing pursuant to Article 80, paragraph 3, of the Rules of Court in order to allow the Court to determine whether or not the United States Counter-Claim should be joined to this Case".

On 18 December 1997, the United States, in response to the Registrar's invitation in the above-mentioned letter to set forth its views within a month of receiving Iran's statement, submitted "Views on Iran's 'Request for Hearing in Relation to the United States Counter-Claim Pursuant to Article 80 (3) of the Rules of Court'", in which the United States stressed that

"[t]he thrust of Iran's position is not whether the US counter-claim is connected to the subject matter of Iran's claim, but whether there is a valid US counter-claim at all. The Court cannot make such a determination at this stage of the proceedings. It certainly should not allow Iran to avoid responding to the merits of the US counter-claim"

and that "the Court should now decide to join the questions presented by the US counter-claim to the original proceeding" (*ibid.*). The United States was of the view that "no oral proceeding is required in connection with such a decision" (*ibid.*) and "[t]here is . . . no need for an oral proceeding under Article 80 (3)" (*ibid.*).

Since 18 December 1997, there was no further development at the Court until 10 March 1998, the date on which Iran was informed by this Order, without being given the requested opportunity to be heard, "that the counter-claim presented by the United States in its Counter-Memorial is admissible as such and forms part of the current proceedings" (Order, p. 206, para. 46 (A)).

III

5. This procedure strikes me as irregular, if I may say so, in the light of the jurisprudence of this Court, as well as of its predecessor, the Permanent Court of International Justice.

A “counter-claim”, as one of the incidental proceedings of the Court, has featured not in the Statute itself but in the Rules of Court since the time of the Permanent Court of International Justice. At its inception in 1946, the International Court of Justice included a “counter-claim” in its 1946 Rules of Court, Article 63 of which read:

“When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject-matter of the application and that it comes within the jurisdiction of the Court. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings.”

This same text remained in the Rules, as amended in 1972, as Article 68. That text was redrafted, without great modification to the substance, in the new 1978 Rules, as Article 80:

“1. A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court.

2. A counter-claim shall be made in the Counter-Memorial of the party presenting it, and shall appear as part of the submissions of that party.

3. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Court shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.”

6. Throughout the entire history of the present Court, there have been only two other cases (except for the quite recent case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, in which case an Order on a relevant matter has been issued during the past few months) when counter-claims were presented during the proceedings.

In the *Asylum* case (presented unilaterally by Colombia against Peru on 15 October 1949), which was the first case at the International Court of Justice to deal with the issue of counter-claims, the Respondent, Peru, in replying to Colombia’s Memorial of 10 January 1950, filed its Counter-Memorial on 21 March 1950 in which it presented its counter-

claim. In its submissions, Peru requested the Court to set aside the submissions of the Applicant, in which Colombia asks the Court to adjudge and declare:

"I. That the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of the said asylum, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of 18 July 1911, and the Convention on Asylum of 20 February 1928, and of American international law in general.

II. That the Republic of Peru as the territorial State, is bound, in the case now before the Court, to give the guarantees necessary for the departure of . . . Haya de la Torre from the country, with due regard to the inviolability of his person." (*I.C.J. Pleadings, Asylum*, Vol. I, p. 43.) [*Translation by the Registry.*]

With respect to its counter-claim, Peru requested the Court to adjudge and declare

"[as a counter-claim under Article 63 of the Rules of Court, and in the same decision,] that the asylum granted by the Colombian Ambassador at Lima to . . . Haya de la Torre was contrary to Article 1, paragraph 1, and Article 2, paragraph 2, item 1 (*inciso primero*), of the Convention on Asylum signed at Havana in 1928" (*ibid.*, p. 164 [*translation by the Registry*]).

In its Reply of 20 April 1950, Colombia expressed its views on the counter-claim, although Colombia did not address explicitly the question whether there existed a direct connection with the subject-matter of the claim of the other party, and stated

"To sum up, the Government of Peru has not succeeded in establishing its counter-claim concerning the alleged violation of Articles 1, paragraph 1, and 2, paragraph 2, item 1 (*inciso primero*) of the 1928 Havana Convention on Asylum, by the Colombian Ambassador at Lima as resulting from the 'grant' of asylum to . . . Haya de la Torre." (*Ibid.*, p. 386.) [*Translation by the Registry*].

In its Rejoinder of 15 June 1950 (*ibid.*, p. 425), as in its Counter-Memorial, Peru submitted its request to the Court to reject the Colombian submission and to adjudge in relation to its counter-claim in the same manner as in its Counter-Memorial (*ibid.*, p. 442).

The issues relating to the counter-claim of Peru were extensively discussed in parallel with the original submission of Colombia in the two rounds of oral proceedings held from 26 September 1950 to 9 October 1950. At those oral proceedings Peru submitted its final submissions, presented by Georges Scelle, which were essentially the same as the previous

submissions in its Counter-Memorial and Rejoinder, but with one addition in the last line, which reads that “in any case the maintenance of the asylum constitutes at the present time a violation of that treaty” (*I.C.J. Pleadings, Asylum*, Vol. II, p. 192 [translation by the Registry]).

In the Judgment of 20 November 1950, the Court, regarding Peru’s counter-claim, (i) “[r]ejects it in so far as it is founded on a violation of Article 1, paragraph 1, of the [1928 Havana] Convention on Asylum” and (ii) “[f]inds that the grant of asylum by the Colombian Government to . . . Haya de la Torre was not made in conformity with Article 2, paragraph 2 (‘First’), of that Convention” (*I.C.J. Reports 1950*, p. 288).

7. In the case concerning *Rights of Nationals of the United States of America in Morocco* presented unilaterally by France against the United States on 27 October 1950, France submitted its Memorial on 1 March 1951 in which it made submissions relating, *inter alia*, to the privileges that were to be enjoyed by United States nationals in Morocco, which privileges arose from the 1836 Treaty, to the existence of the consular jurisdiction over United States nationals and to the extent of that consular jurisdiction, and to the effect of the 1948 Decree relating to consumption taxes upon United States nationals.

The United States raised a preliminary objection on 15 June 1951, in which that country already indicated that it “would wish to consider the inclusion of a counter-claim or counter-claims in its Counter-Memorial, pursuant to Article 63 of the Rules of Court” and continued:

“Should it be determined, pursuant to that article, that under such circumstances a counter-claim of this character could not be joined to the original proceedings, the Government of the United States would have to consider what other steps it must take to safeguard its rights and interests.” (*I.C.J. Pleadings, Rights of Nationals of the United States of America in Morocco*, Vol. I, p. 238.)

The preliminary objection was eventually withdrawn by the United States.

However, in its Counter-Memorial of 20 December 1951, the United States presented, in addition to its objection to the original submission of France, its counter-claim. In support of that counter-claim, the United States Government requested the Court to

“judge and declare that:

1. Under Article 95 of the Act of Algeciras, the value of imports from the United States must be determined for the purpose of customs assessments by adding to the purchase value of the imported merchandise in the United States the expenses incidental to its transportation to the custom-house in Morocco . . .

2. The treaties exempt American nationals from taxes . . . [T]o

collect taxes from American nationals in violation of the terms of the treaties is a breach of international law.

Such taxes can legally be collected from American nationals only with the previous consent of the United States . . . and from the date upon which such consent is given . . .

3. Since Moroccan laws do not become applicable to American citizens until they have received the prior assent of the United States Government, the lack of assent of the United States Government to the Dahir of February 28, 1948, rendered illegal the collection of the consumption taxes provided by that Dahir." (*I.C.J. Pleadings, Rights of Nationals of the United States of America in Morocco*, Vol. I, p. 407.)

In its Reply of 13 February 1952, France stated in its submission in connection with the counter-claim contained in the United States Counter-Memorial, its request that the Court adjudge:

"That Article 95 of the Act of Algeciras defines valuation for customs purposes as the value of the merchandise at the time and at the place where it is presented for customs clearance;

That no treaty has conferred on the United States fiscal immunity for its nationals in Morocco, either directly or through the effect of the most-favoured-nation clause;

That the laws and regulations on fiscal matters which have been put into force in the Shereefian Empire are applicable to the nationals of the United States without the prior consent of the Government of the United States;

That, consequently, consumption taxes provided by the Dahir of 28 February 1948 have been legally collected from the nationals of the United States, and should not be refunded to them." (*Ibid.*, Vol. II, p. 72.) [*Translation by the Registry.*]

In its Rejoinder of 18 April 1952, the United States maintained, in their entirety, the submissions presented in its Counter-Memorial (*ibid.*, p. 131). The oral proceedings were held from 15 to 26 July 1952. The United States repeated its original submission in respect of its counter-claim (*ibid.*, p. 291).

With respect to the United States counter-claim, the Court's Judgment of 27 August 1952 partly rejected the submission of the United States relating to exemption from taxes and to the consumption taxes imposed by the Shereefian Dahir in 1948, but found that

"in applying Article 95 of the General Act of Algeciras, the value of merchandise in the country of origin and its value in the local Moroccan market are both elements in the appraisal of its cash wholesale value delivered at the custom-house" (*I.C.J. Reports 1952*, p. 213).

IV

8. The institution of counter-claims, in parallel with that of third-party intervention which appears immediately after counter-claims in the section on incidental proceedings in the Rules of Court, had been introduced at the time of the Permanent Court of International Justice. Its purpose was the proper administration of justice with a view to judicial economy to enable it to rule on any or all connected claims in a single proceeding, in other words, to avoid any inconvenience which might be caused by the other party or by a third party filing a fresh application on issues that are directly connected. Any new application would, of course, necessitate another confirmation of the Court's jurisdiction and an examination of the complete documentation, and it would be a situation best avoided.

However, an applicant State will be severely prejudiced if the scope of the issues, in the respondent State's counter-claim, is broadened beyond the original contention in the claim of the applicant State. While an applicant State is not itself allowed to bring additional claims, why then may a respondent State be permitted to bring a new claim if this (counter-)claim is not directly connected with the subject-matter of the Applicant's claim? We should not simply put what may have originally been somewhat distinct matters into one melting-pot without making a careful examination of the essential character of that claim.

9. In the present case, I wonder if it is quite proper to confirm the admissibility of the United States counter-claim and make it part of the whole proceedings without (i) affording the Parties, and in particular the Applicant, the opportunity to express their views on this matter in the written pleadings and (ii) without having oral hearings on the basis of the complete exhaustion of the exchange of views indicated in the written proceedings. In the light of past jurisprudence, except as already mentioned for the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* in which an Order was made just a few months ago, I wonder if the quick rendering of an Order by the Court is quite reasonable.

Past precedent (as mentioned above) seems to indicate, in general, that the question presented by way of a counter-claim by the Respondent and the subject-matter of the Applicant were so interlinked that their direct connection could not be determined without careful study of the substance of the issues contained in their respective counter-claims. In those two past cases, *Asylum* and *Rights of Nationals of the United States of America in Morocco*, some of the respective counter-claims submitted by the Respondents were rejected by the Court but only after it was proved by a thorough examination through the written and oral pleadings that

the counter-claims were directly connected with the subject-matter of the claim of the other party.

10. I certainly agree that, at this stage, the Court should fix the time-limit for the submission of a Reply and of a Rejoinder, as has been done in paragraph 46 (B) of the present Order. The matter, including whether or not there is a "connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party", should have been open to analysis by Iran in the Reply which it is to prepare and, further, by the United States in its Rejoinder.

There remains, as a matter of principle, the question of whether it is fair for the Respondent to be given the opportunity to present the subject-matter twice, once in its Counter-Memorial and once in its Rejoinder, while the Applicant is confined to a single written pleading in its Reply, although the Applicant will be afforded a further opportunity to argue this point during the oral pleadings.

11. I find it difficult to understand why the admissibility of the counter-claim should be determined *at this stage* before the Court has, at least, received Iran's Reply. I also fail to understand why this needs to be done so hastily in this case especially when one considers the careful manner in which the Court has proceeded in earlier years.

In addition, I believe that this matter, namely whether the (counter-) claim is admissible or not, should not be determined by the Court in the form of an Order but should rather be decided by the Judgment in the merits phase.

(Signed) Shigeru ODA.

SEPARATE OPINION OF JUDGE HIGGINS

I agree with the Court's finding that the counter-claim presented by the United States in its Counter-Memorial is admissible and now forms part of the current proceedings.

There is, however, one point which the Court has not at all addressed, while nevertheless apparently making a negative finding on it; and there are two further points which it seems to hold over for the merits, when arguably they should have been disposed of at this juncture.

As the present Order recalls, Iran instituted proceedings against the United States claiming breaches by the latter of Article I, Article IV, paragraph 1, and Article X, paragraph 1, of the Treaty of Amity of 1955. The Court, having heard the preliminary objections to its jurisdiction of the United States, in its Judgment of 12 December 1996 determined that it had jurisdiction "to entertain the claims made by the Islamic Republic of Iran under Article X, paragraph 1, of that Treaty". It found it did not have jurisdiction to entertain the claims under Article I and Article IV, paragraph 1.

On 23 June 1997 the United States presented both a defence to Iran's Memorial and the counter-claim which is the subject of the present Order. The United States contended that Iran, for its part, had engaged in actions which violated Article X of the Treaty. In Section 1 of its counter-claim it based its application on Article X, paragraph 1, of the Treaty. In Section 2 it based its application on "the remainder of Article X" and went on to refer particularly to acts it alleged constituted violations of Article X, paragraph 3. In its submissions the Court was asked to adjudge and declare that Iran had breached its obligations under Article X, generally.

In its reply to the Court's invitation to present its views on Iran's observations on the counter-claims (see paragraph 9 of this Order), the United States further referred at paragraph 39 to "paragraphs X (2) through X (5)". It both claimed violations of these provisions by reference to particular events and it objected that "Iran's jurisdictional arguments seek to force all of the US counter-claim into the confines of Article X (1) of the 1955 Treaty".

The Court's Order makes no reference whatsoever to these exchanges of the Parties save that it recalls in paragraph 26 that the United States did indeed make claims under Article X, paragraphs 2 to 5. However,

although the *dispositif* in paragraph A, as is customary, merely finds that the counter-claim is admissible, it seems from the text of the Order that this is only in relation to Article X, paragraph 1. In paragraph 34 the Court states that “its jurisdiction in the present case covers claims under Article X, paragraph 1, of the 1955 Treaty”, the text of which it then cites. In paragraph 36 it finds that the counter-claim falls

“within the scope of Article X, paragraph 1, of the 1955 Treaty as interpreted by the Court; and whereas the Court has jurisdiction to entertain the United States counter-claim in so far as the facts alleged may have prejudiced the freedoms guaranteed by Article X, paragraph 1”.

It may thus be that while Article X, paragraph 1, is the sole basis of jurisdiction identified by the Court, paragraphs 2 to 6 still have relevance to the task of ascertaining the freedoms guaranteed under paragraph 1.

In the first place, findings that reject the contentions of a party should be based on reasons. The disturbing tendency to offer conclusions but not reasons is not to be welcomed. In the second place, the inarticulate assumption that the jurisdictional basis established for a claim necessarily is the only jurisdictional basis for, and sets the limits to, a counter-claim, is open to challenge.

In both civil and common law domestic systems, as in the Rules of the Court, a defendant seeking to bring a counter-claim must show that the Court has jurisdiction to pronounce upon them. But it is not essential that the basis of jurisdiction in the claim and in the counter-claim be identical. It is sufficient that there is jurisdiction. (Indeed, were it otherwise, counter-claims in, for example, tort could never be brought, as they routinely are, to actions initiated in contract.)

There is nothing in the Rules or practice of the Court to suggest that the *very identical* jurisdictional nexus must be established by a counter-claimant. The *travaux préparatoires* to the various formulations of what is now Article 80 of the Rules of Court contain no suggestion whatever that this was thought of as a requirement. The rule on counter-claims has gone through successive changes. But neither in the discussions of 1922, nor of 1934, 1935, 1936, nor again of 1946, 1968, 1970, 1972, does this thought anywhere appear.

Attention was focused on the one hand on the required “connection” and on the other on certain matters relating to jurisdiction, notably (in 1922) whether counter-claims were limited to compulsory jurisdiction cases and whether objections to counter-claim jurisdiction would be allowed. At no stage was it even proposed, much less accepted, that the jurisdictional basis for the claim and counter-claim must be identical.

Nor does the wording of Article 80, paragraph 1, suggest this. It requires that a counter-claim “comes within the jurisdiction of the Court”, not that it “was within the jurisdiction established by the Court in respect of the claims of the applicant”.

Of course, the very requirement of a direct connection with the subject-matter of the claim is likely to bring a counter-claimant into the same general jurisdictional area, i.e., the same treaty may well form the basis of the claimed jurisdiction for the bringing of a counter-claim. But that is all.

The view of the Committee for the Revision of the Rules, when deciding to retain the phrase “and that it comes within the jurisdiction of the Court” from the old Rule, was that the phrase meant that a counter-claimant could not introduce a matter which the Court *would not have had jurisdiction to deal with had it been the subject of an ordinary application to the Court*.

And that remains the position under Article 80 of the present Rules of Court, which continues simply to require that a counter-claim “comes within the jurisdiction of the Court”. The correct and necessary procedure in the present case would have been for the Court to enquire whether it would have had jurisdiction to deal with the claims of the United States, as they related to Article X, paragraphs 2 to 5, had they “been the subject of an ordinary application to the Court”.

In its Judgment of 12 December 1996 (case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection*, *I.C.J. Reports 1996*, p. 803) the Court established the methodology for doing this where there is contested jurisdiction under a treaty. The test is whether the facts as claimed by the applicant might give to a violation of a specified provision (whether the facts are in fact correct, whether they do constitute a violation, and if there is a defence, are then all matters for the merits). There is no reason why the Court should not have engaged in this exercise in relation to the counter-claim of the United States based on Article X, paragraphs 2 to 5, of the 1955 Treaty and thus to provide it with a reasoned response, one way or the other.

Iran, too, seems not really to expect any eligible counter-claim to be limited to matters falling under Article X, paragraph 1, of the Treaty of Amity. Its document of 18 November 1997, entitled “Request for Hearing in Relation to the United States Counter-Claim Pursuant to Article 80 (3) of the Rules of Court” is replete with arguments directed towards showing that the specific counter-claims of the United States are excluded by their facts from falling under Article X, paragraphs 3 to 5 (paras. 17, 19 (b), 19 (d), 19 (e), 19 (f), 21 and footnotes 21 and 24.)

Implicit in the Court's unexplained reliance on Article X, paragraph 1, as the apparent sole basis of jurisdiction is the thought that a counter-claim can only arise out of an initial claim, and therefore cannot be on a wider jurisdiction basis than the initial claim. But it is not a question of a counter-claimant being able to "expand" the jurisdiction initially established by the Court. The Court first establishes its jurisdiction by reference to the facts as alleged by the claimant. But that does not mean to say that it might not have jurisdiction in relation to allegations brought by the defendant under other clauses of the same treaty.

The Order which the Court issued on 17 December 1997 in respect of the *Genocide Convention* case (also concerning treaty-based jurisdiction) referred to the matter in the following terms:

"Whereas the Respondent cannot use a counter-claim as a means of referring to an international court claims which exceed the limits of its jurisdiction *as recognized by the parties . . .*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 257, para. 31; emphasis added).

What matters in a counter-claim is the jurisdiction mutually recognized by the parties under the Treaty — *not* the jurisdiction established by the Court in respect of particular facts initially alleged by the claimant. (It so happens in the *Genocide Convention* that the identical basis of jurisdiction was in issue for both parties, in relation to *erga omnes* obligations.)

The test in the *Genocide Convention* case of "jurisdiction as recognized by the parties" will only be met when the Court decides whether Article X, paragraphs 2 to 5, on the facts alleged by the Defendant, might sustain claims of violations by the Applicant. The Order, which is the vehicle for dealing with preliminary matters in the counter-claim, should have contained a reasoned decision on this point.

The matter may usefully be looked at in the following way. There either is, or is not, jurisdiction to sustain claims, on the basis of the facts alleged by the United States, in relation to Article X, paragraphs 2 to 5. If an initial claim could have been brought claiming breaches of these provisions, that cannot be taken away by virtue of the fact that the Court has already established its jurisdiction, in respect of another provision (Art. X, para. 1) in respect of claims articulated by Iran.

This would in effect revise treaty jurisdiction "as recognized by the parties" through a judicial finding on jurisdiction relating to an initial claimant under a particular provision.

If, *arguendo*, the treaty provisions of Article X, paragraphs 2 to 5, would have founded jurisdiction in an initial claim then presumably the United States could still bring a claim *de novo* even if it is not allowed to do so as a counter-claim under the Court's Order. Such a result is hardly consistent with the stated purpose of counter-claims, namely, convenience of court management. It underlines that what is required under Article 80, paragraph 1, of the Rules is that a counter-claim "comes within the jurisdiction of the Court" by reference to the normal jurisdictional principles rather than by reference to the particular basis of jurisdiction that the initial claimant happens to have relied on in relation to its own particular facts.

* *

If the United States might reasonably have expected a reasoned response to its claim that the Court has jurisdiction under Article X, paragraphs 2 to 5, as well as under Article X, paragraph 1, Iran might reasonably have expected that, on the basis of equality of treatment, this Order would have resolved two items on which it is in fact silent.

In the counter-claim the facts alleged concern destruction of vessels rather than oil platforms. The issue of whether Article X, paragraph 1, is restricted to commerce between the two Parties was fully canvassed as an issue relevant to jurisdiction in the jurisdictional phase of this case. In the event, the Court stated that it did "not have to enter into the question whether [Article X, paragraph 1] is restricted to commerce 'between' the Parties" as it was "not contested between them that oil exports from Iran to the United States were — to some degree — ongoing" (*Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp. 817-818, para. 44). And in the context of the counter-claim there is not agreement as to the existence that all the vessels were engaged in commerce between the Parties. Iran argues that in many of the incidents cited by the United States in its counter-claim, the vessels "were not (even arguably) engaged in commerce or even navigation between the territories of the High Contracting Parties" (Iranian Request, para. 21). It would seem that, in order to determine whether it has jurisdiction in respect of claims relating to damage to warships under Article X, paragraph 1, of the Treaty, the matter which it was not necessary to decide in 1996 must now be decided in 1998. Iran has treated this question as going to jurisdiction and as relevant to the conditions laid down in Article 80, paragraph 1, of the Rules of Court.

Parties to litigation should be treated in a comparable manner. But, from the silence of the Court in the present Order, it seems that what it saw as a jurisdictional question when determining United States preliminary objections to the main claim it treats as a matter for the merits when considering Iran's response to the counter-claim.

Second, Iran claims that those itemized vessels identified as warships are excluded from the reach of Article X, paragraph 1, by the terms of Article X, paragraph 2. This may or may not be correct in the particular context. But the silence of the Order on this question — which Iran clearly saw as relevant to the “direct connection” requirement in Article 80, paragraph 1, of the Rules, and thus as preliminary — means that Iran will perforce have to answer on the merits all contentions of fact and law relating to the claims concerning warships. The Court has not applied the same procedures, in determining the scope of its jurisdiction under the Treaty, to both of the Parties.

Undoubtedly, some of the difficulties stem from the terms of Article 80 itself. Paragraph 1 of Article 80 contains two requirements for counter-claims to be admissible — that they have a direct connection with the subject-matter of the claim and that they come within the jurisdiction of the Court. Paragraph 3 of Article 80 provides that the Court shall hear the parties “In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party.” No provision is made to hear the parties in the event of doubt as to whether the counter-claim comes within the jurisdiction of the Court. It might be thought that this was perhaps deliberate, and that the intention was that the Court would resolve any doubts as to its jurisdiction only when it got to the merits. This would be a sort of standing exception to Article 79, paragraph 6, of the Rules (or, put differently, a counter-claim where jurisdiction is contested would always and necessarily be treated as not having an exclusively preliminary character under Article 79, paragraph 7). In any event, the idea that “direct connection” within the meaning of Article 80, paragraph 1, should be disposed of as a preliminary matter, while the jurisdiction requirement in Article 80, paragraph 1, should be dealt with on the merits finds no support at all in the *travaux préparatoires* of the various versions of the Rules, including the present Rules. The failure of Article 80, paragraph 3, to “match” Article 80, paragraph 1, seems to have been inadvertent and there was no intention to distinguish between objections relating to “connection” and those to “jurisdiction”.

What can be said is that the *travaux* do show that the Court has, since 1922, resolved to keep ample room for discretion in the handling of these

matters, on a case-by-case basis. In the exercise of this discretion the Court has determined that the reference in Article 80, paragraph 3, in case of doubt as to “connection”, to the phrase “after hearing the parties” may be taken in a particular case as the receipt of written submissions¹. Oral submissions are neither required by the terms of Article 80, paragraph 3, nor excluded. Further, the Court has also found sufficient freedom to decide, notwithstanding the apparently limiting terminology of Article 80, paragraph 3, that the Parties may be heard (whether in writing or orally) on the question of jurisdiction as well as on the question of connection.

The exception allowed in Article 79, paragraph 7, whereby preliminary matters are not disposed of at the preliminary phase, is to be used sparingly, lest the purpose underlying the 1978 alteration to that Article be negated. Further, the tests applied to Iran to see if its claims came under the 1955 Treaty should equally have been applied to the United States (i.e., to see, if on the facts alleged, a counter-claim could possibly lie under particular articles and clauses). The process by which certain claims of Iran were found not to be within the jurisdiction of the Court under the Treaty of Amity, and would thus not proceed to the merits, should be equally applied to the counter-claims of the United States to see whether or not they should advance in their entirety to the merits.

There is much to be said for three judicial principles. First, judicial conclusions should be justified by legal reasons. Second, matters going to jurisdiction should, whenever possible, be disposed of before proceeding to the merits. Third, parties to litigation are entitled to an equality of treatment (see, for example, *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964*, p. 25; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 296).

(Signed) Rosalyn HIGGINS.

¹ This matter is raised in footnote 2 of Iran's Request and in the declaration of Judge *ad hoc* Kreća and the separate opinion of Judge *ad hoc* Lauterpacht in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, pp. 262-271 and 278-286, respectively.

DISSENTING OPINION OF JUDGE RIGAUX

[Translation]

A. DELIMITATION OF THE QUESTION SUBMITTED TO THE COURT

On 23 June 1997, the United States of America filed its Counter-Memorial in the main action and appended to it a counter-claim. On 18 November 1997, the Islamic Republic of Iran filed a “Request for Hearing in Relation to the United States Counter-Claim Pursuant to Article 80 (3) of the Rules of Court”. On 18 December 1997, the United States submitted a statement on that request to the Court.

While maintaining that the Court has jurisdiction to entertain the counter-claim put forward in the Counter-Memorial of 23 June 1997, all that the statement seeks is that the Court should rule on the request for an adversarial hearing. In the words of the statement:

“Under the Rules of Court, the only legally relevant issue now is whether there is ‘doubt’ as to whether the US counter-claim is ‘directly connected to the subject matter’ of Iran’s claim. Here, there can be no such doubt. There is therefore no basis for Iran’s demand for a hearing or for its insistence that the counter-claim not be joined to the original proceedings.” (Para. 3.)

Although this passage in the statement by the United States is included in the Order (para. 22), the Court does not infer from it the consequences which the passage should have implied, namely that the Court is not asked to consider whether a direct connection exists between the original claim and the counter-claim, nor even whether such a connection is not in doubt. The Court’s sole choice is between the two limbs of the following alternative: either, if it considers that the connection is in doubt, to proceed to an adversarial oral hearing on that point, or else to dismiss the request of the Islamic Republic of Iran.

The second limb of the alternative does not imply that the Court should reply in the affirmative (the connection is not in doubt), but that the issue should be joined to the merits. That is also the position of the United States in the concluding observations of the statement of 18 December 1997:

“The thrust of Iran’s position is not whether the US counter-claim is connected to the subject matter of Iran’s claim, but whether there

is a valid US counter-claim at all. The Court cannot make such a determination at this stage of the proceedings. It certainly should not allow Iran to avoid responding to the merits of the US counter-claim.” (Para. 43.)

B. THE INTERPRETATION OF ARTICLE 80 OF THE RULES OF COURT

Paragraph 1 of Article 80 makes the admissibility of a counter-claim subject to two substantive conditions:

- the counter-claim must have a direct connection with the subject-matter of the original claim,
- it must come within the jurisdiction of the Court.

Paragraph 2 of Article 80 contains a condition of form.

Paragraph 3 of Article 80 raises two issues:

- doubt as to the connection,
- the decision by the Court “after hearing the parties”.

Accordingly, in the present case, the Court will have to answer four questions:

1. Is there a direct connection between the two actions?
2. Does the counter-claim come within the jurisdiction of the Court?
3. In regard to the first question, is there doubt about the connection alleged?
4. If there is doubt, the Court must hear the Parties.

The answers turn upon three notions which are neither defined by the Rules of Court nor treated to any great extent in the jurisprudence:

1. What is a *direct connection*?
2. Is there or is there not doubt about the connection?
3. If there is, does the phrase “after hearing the parties” require oral proceedings?

As stated in point A above, the only question at present before the Court is whether there is doubt about the connection. If the answer to this question, itself formulated negatively, is in the negative, that does not mean that the connection is established, nor even that it is held not to be in doubt, but that the various other questions should be joined to the merits. Subject to the premature nature of this discussion, these different questions will now receive a concise treatment.

I. THE EVOLUTION IN THE RULES OF COURT

Following the succinct reference in the 1922 Rules of Court, the changes made in 1936, 1976 and 1978 had the effect of stating explicitly the conditions for a counter-claim to be brought, and of doing so restrictively.

The dual requirement of "direct connection" and competence emerged in 1936. The Rules adopted by the present Court in 1946 added a procedural rule: "In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application the Court shall, after due examination, direct . . ."

In 1978, this wording was moved to paragraph 3 of Article 80, with the words "after hearing the parties" substituted for the words "after due examination".

One of the main changes, that of 1936, was clearly inspired by Judge Anzilotti, who had presided over the Permanent Court when it pronounced judgment on the merits in the *Factory at Chorzów* case in 1928. The article published by the eminent judge, in Italian in 1929, and translated into French the following year¹ bears the imprint of that determination and can, in a way, be seen as a statement of the reasons for Article 63 as adopted in 1936.

After pointing out that the *Factory at Chorzów* case was the first in which the Permanent Court had had to rule on the admissibility of a counter-claim, Judge Anzilotti examined first whether Article 40 of the 1922 Rules of Court was in conformity with the Court's Statute, which had made no provision for a counter-claim being brought; he decided that it was, and today this is no longer disputed. He emphasized the exceptional nature of counter-claims, which could only be "certain claims which have some connection with that of the applicant"².

As regards the condition of jurisdiction which Judge Anzilotti held to be necessary, it implies that, unlike the solution adopted in some municipal systems of law, a connection does not, by virtue of Article 40 of the 1922 Rules, justify an extension of the Court's jurisdiction (*Clunet*, 1930, p. 869).

The second condition which the 1936 Rules was to include, namely the existence of a qualified connection, appears in Judge Anzilotti's article as well. The three statements which he makes in this connection are worthy of notice:

"The counter-claim can only be allowed in exceptional cases, where it has a special connection with the principal claim." (P. 870.)

¹ D. Anzilotti, "La riconvenzione nella procedura internazionale", VIII *Rivista di diritto internazionale*, 1929, pp. 309-327; "La demande reconventionnelle en procédure internationale", *Journal du droit international (Clunet)*, 1930, Vol. 57, pp. 857-877.

² *Clunet*, 1930, p. 866. It may be thought that "a connection which is certain" would have been a more accurate translation of the original Italian "*certa connessione*".

“There are . . . cases in which the respondent’s claim has such a strong connection with that of the applicant in the main action . . .” (P. 870.)

“It is left to the Court to determine the cases in which the counter-claim has a juridical nexus with the principal claim.” (*Ibid.*)

In so doing, Judge Anzilotti seems certain to have spelt out, with all due amplification, the thinking behind the 1928 Judgment.

These observations by the Permanent Court reveal clearly the notion of a connection between the two claims, of such a kind that it would have been neither appropriate nor equitable to rule on the claim by Germany without at the same time ruling on the claim by Poland: the decision seems therefore to fulfil the general criteria set forth earlier (p. 872).

This was also the position maintained by Judge Anzilotti at the meetings of the Court in 1934 concerning what was to become Article 63 of the Rules of the Permanent Court (*P.C.I.J., Series D, 1936, Third Addendum to No. 2*, pp. 104-117). The views of Judge Negulesco are in agreement here and he gives a very restrictive example of the notion of “direct connection” (*ibid.*, p. 111). In the opinion of Judge Fromageot (*ibid.*, p. 112) and Judge Wang (*ibid.*, p. 114) the counter-claim should be based on the same facts as the main action; however, that very restrictive definition of a “direct connection” was not followed by all the members of the working group (see *inter alia* the opinion of Judge Schücking, *ibid.*, p. 112).

II. THE JURISPRUDENCE OF THE PERMANENT COURT AND OF THE PRESENT COURT

A number of judgments provide indications of the “direct” or close character of a connection.

Just one judgment predates the introduction of this notion into the Rules of Court, but it was given under the presidency of Judge Anzilotti and appears to be in keeping with the restrictive conception of connection that he developed in the doctrinal study published a year later. Seeking to secure a ruling that the value of rights and interests allegedly passing into the ownership of the respondent State (applicant in the counter-claim) under Article 256 of the Treaty of Versailles should be deducted from the indemnity claimed in the main action, the counter-claim was “juridically connected with the principal claim” (case concerning *Factory at Chorzów, Merits, Judgment No. 13, P.C.I.J., Series A, No. 17*, p. 38).

In the case concerning *Diversion of Water from the Meuse (Judgment, 1937, P.C.I.J., Series A/B, No. 70)*, the counter-claim of the respondent State in the main action was for a ruling by the Court that the violation of the Belgian-Dutch Treaty of 12 May 1863 alleged against it had been preceded by a similar violation of which it accused the applicant State. The Permanent Court found that the claim was “directly connected with the principal claim” (*ibid.*, p. 28). The dismissal of the counter-claim

on the merits was the subject of several dissenting opinions. The most notable was that of Judge Anzilotti, who saw in the counter-claim an application of *exceptio non adimpleti contractus* justifying dismissal of the principal claim on that point (*ibid.*, pp. 49-52). As Judge Hudson saw it, this exception was an equitable principle that the Court ought to have applied (*ibid.*, pp. 75-78).

The *Panevezys-Saldutiskis Railway* case (*Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 4*) tells us nothing about the position of the Permanent Court regarding counter-claims, since the Court upheld a plea of non-admissibility inferred from the non-exhaustion of local remedies.

The two most significant judgments come from the present Court.

In the *Asylum* case (*I.C.J. Reports 1950, p. 265*), often also called the *Haya de la Torre* case, the principal claim — seeking a ruling that the Government of Peru was at fault for having delivered the safe-conduct to which Raúl Haya de la Torre was allegedly entitled under the doctrine of diplomatic asylum — was echoed by the counter-claim of that Government asking the Court to find that the asylum had been granted in breach of the rules of international law obtaining between the two countries. According to the Court:

“It emerges clearly from the arguments of the Parties that the second submission of the Government of Colombia, which concerns the demand for a safe-conduct, rests largely on the alleged regularity of the asylum, which is precisely what is disputed by the counter-claim. The connexion is so direct that certain conditions which are required to exist before a safe-conduct can be demanded depend precisely on facts which are raised by the counter-claim. The direct connexion being thus clearly established . . .” (*I.C.J. Reports 1950, pp. 280-281*).

In the case concerning *Rights of Nationals of the United States of America in Morocco* (*I.C.J. Reports 1952, p. 176*), the applicant State in the main action does not seem to have raised any objection to the counter-claim brought against it (at least there is no trace of any in the statement of reasons to the Judgment), but the connection between the two claims appears to be indisputable, since they both concerned the rights of which United States nationals in Morocco could avail themselves.

A passage from the Order of 15 December 1979 (*United States Diplomatic and Consular Staff in Tehran, Provisional Measures, I.C.J. Reports 1979, p. 15, para. 24*) emphasizes the hypothetical nature of the notion of “close connection” (“if the Iranian Government considers . . .”) and so provides no indication as to a solution of the various questions which will subsequently have to be submitted to the Court in the present case: what is to be understood by “direct connection”? When is such a connection not in doubt? What do the words “hearing the parties” mean?

Paragraph 33 of the Order of 17 December 1997 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1997*, p. 258) refers to the sovereign power of the Court to appreciate whether the link between the two claims is sufficient, seeing that no definition exists of the concept of "direct connection".

Doctrinal comment on the Rules of Court is usually confined to paraphrasing excerpts from the jurisprudence just mentioned. An eminent jurist who was a Member of both Courts appears to come very close to the reserved attitude of Judge Anzilotti:

"It goes without saying, however, that the applicant State in the main action cannot have imposed upon it in this way, which is neither that of the Special Agreement nor that of the Application, no matter what claim. The counter-claim introduces fresh elements into the proceedings. To permit the respondent State to take advantage of its position to formulate, by mere submissions and without any other condition, a fresh claim with which the Court would be alone in dealing would contravene the fundamental statutory provisions set forth in Article 63, which seeks to preserve, under the supervision of the Court, a balance between the parties: . . . The question of direct connection not being perfectly clear in itself, the article adds: 'In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings.'" (Charles De Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice*, 1966, pp. 114-115.)

Charles De Visscher's conclusion, which was to be echoed by other commentators, was the following:

"It [the application of the counter-claim system] requires the attentive supervision of the Court and depends to a great extent on the special features of the case in question." (*Op. cit.*, p. 116.)

The detailed commentary on the jurisprudence of both Courts in the work of Mrs. Geneviève Guyomar (*Commentaire du Règlement de la Cour internationale de Justice adopté le 14 avril 1978, Interprétation et pratique*, 1983, pp. 518-525) contains an objective account of the jurisprudence of both Courts and of the "travaux préparatoires" for the changes made to the Rules of Court.

The commentary of Ambassador Shabtai Rosenne (*Procedure in the International Court. A Commentary on the 1978 Rules of the International Court of Justice*, 1983, p. 171) contains an interesting clarification of the scope of paragraph 3 of Article 80:

"Paragraph 3 corresponds to the last sentence of the previous Rules. Here the expression 'after hearing the parties' replaces the former 'after due examination'. This means that in future there will always be some oral proceedings in the event of doubt — by whom

is not stated — as to the connection between the question presented by way of counter-claim and the subject matter of the claim of the other party.”

Mr. Rosenne’s commentary offers a dual interpretation of the Rules: the expression “after hearing the parties” refers to oral proceedings and their precondition is that the direct connection should be in doubt. The same solution is reiterated in the third edition of *The Law and Practice of the International Court*, Vol. III, 1997, pp. 1272-1273).

None of the precedents provides any answer to the questions the Court will have to decide in the case now pending. None of the cases previously judged reveals any serious questioning of the admissibility of the counter-claim. In all instances both claims concerned the same facts, and to rule on the counter-claim the Court had no need to examine new facts. The issue raised by Article 80, paragraph 3, was also a novel one, as observed by Mr. Rosenne (*ibid.*, pp. 1273-1274), until the Order of 17 December 1997 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1997, p. 243).

In that Order the Court exercised the discretion allowed it by Article 80, paragraph 3, of its Rules, and it considered itself sufficiently well informed about the respective positions put forward in writing to be able to rule on the admissibility of the counter-claims. This would nevertheless not prevent the Court, in any subsequent case, from exercising the same discretion differently.

III. THE GENERAL PRINCIPLES OF LAW

The notions of counter-claim and connection used in Article 80 of the Rules of Court are borrowed from the vocabulary of the municipal law of procedure. This raises the question whether the Court could rely on general principles of law developed from convergent practice in municipal systems. That would appear to have deserved more painstaking examination. Here are a few examples taken from French law, Belgian law and the law of the European Communities.

(a) *Counter-claims*

France’s New Code of Civil Procedure ranks the counter-claim among incidental claims. The admissibility of such a claim may depend on the jurisdiction assigned to the Court in which it is pending (Art. 38).

Article 64 of that Code gives the following definition:

“A counter-claim shall be a claim whereby the original defendant seeks an advantage other than the mere dismissal of his opponent’s claim.”

Apart from the condition of assigned jurisdiction just referred to, the admissibility of a counter-claim is restricted by Article 70 of the same Code:

“Counter-claims or additional claims shall not be admissible unless there is a sufficient link between them and the original claims.

A claim for compensation shall nevertheless be admissible even in the absence of such a link, subject to the proviso that the court may sever it should it be liable excessively to delay trial of the case as a whole.”

The “sufficient link” between the two claims (Art. 70, para. 1) is an indeterminate concept not spelled out by the lawmakers. The Court of Cassation has inferred from this that the court trying the main action had discretion to determine the alleged link between the two claims (see, in particular, Civ. 1^{re}, 6 June 1978, *Bull. civ.*, I, p. 171; Civ. 3^e, 21 May 1979, *D.* 1979, IR 509; Civ. 2^e, 14 January 1987, *Bull. civ.*, II, p. 7).

Article 14 of the Belgian Judicial Code contains a definition close to that of Article 64 of the New French Code of Civil Procedure:

“A counter-claim is an incidental claim brought by the defendant for the purpose of securing judgment against the plaintiff.”

In dealing with assigned jurisdiction, Article 563 of the Belgian Code distinguishes the court of first instance — a court of general jurisdiction — from the courts of special jurisdiction:

“The court of first instance shall hear counter-claims whatever their nature and amount.

The labour court, the commercial court and the justice of the peace shall hear counter-claims which, whatever their amount, come within the jurisdiction assigned to them or derive either from the contract or from the fact serving as a basis for the original claim.” (See G. Closset-Marchal, “Les demandes reconventionnelles depuis l’entrée en vigueur du code judiciaire”, *Annales de droit de Louvain*, 1992, pp. 3-32.)

Despite its highly liberal approach to counter-claims, and perhaps as a corrective to it, the Belgian Judicial Code contains a *caveat* in Article 810:

“If the counter-claim is likely to cause excessive delay in the trial of the principal claim, the two claims shall be tried separately.”

(b) *Connection*

In the municipal law of procedure, connection (often joined to *litis pendens*) justifies the joinder of cases brought separately and, as the case may be, is a ground for extending the jurisdiction of the court first seised. The simplest case is the submission of two connected claims to different chambers of the same court. In that event, an order of the presiding judge, a purely internal measure, will suffice to join the cases (see Article 107 of the New French Code of Civil Procedure).

Article 101 of that Code reads as follows:

“Should two cases brought before two separate courts be connected in such a way that it is in the best interests of justice to hear and determine them together, one of these courts may be asked to relinquish jurisdiction and transfer the case as it stands to the other court.”

The tautological wording of this text conceals the absence of any definition of connection: cases linked in such a way that they should be joined are deemed to be connected, according to so vague a criterion as “the best interests of justice”. Hence the Court of Cassation decided that, since the law leaves it to the court seised of the merits to assess the circumstances establishing a connection, a court of appeal is exercising its unfettered discretion in ordering a joinder to the merits (Civ. 1^{re}, 9 October 1974, *Bull. civ.*, I, p. 223).

Where the court seised of the merits finds that there is a connection, two legal consequences arise: relinquishment of the case by the second court seised and, in certain instances, extension of the jurisdiction of the first court seised. Such extension is not always possible where there is exclusive jurisdiction. (In doctrinal writing: Loïc Cadet, *Droit judiciaire privé*, 1992, Nos. 632-633; Jean Vincent and Serge Guinchard, *Procédure civile*, 23rd ed., 1994, pp. 334-338; Jacques Héron, *Droit judiciaire privé*, 1991, pp. 636-641).

Article 30 of the Belgian Judicial Code gives a similarly tautological definition of connection to that found in French law. Here too, appraisal of the existence of “such a close link that they can usefully be heard and determined at the same time” is also at the sole discretion of the court seised of the merits (Cass., 6 June 1961, *Pas.*, 1961, I, 1082; 4 September 1987, *Pas.*, 1988, I, 4, and note 3).

(c) *Counter-claims and connection in relations between courts of different States*

The Franco-Belgian Convention of 8 July 1899 on jurisdiction and the authority and enforcement of judicial decisions, arbitral awards and authentic instruments dealt, in two paragraphs of a single article, with transfer of proceedings on the ground of connection (Art. 4, para. 1) and the jurisdiction with respect to counter-claims of the court seised (Art. 4, para. 2).

The second sentence in Article 4, paragraph 1, contains a restrictive definition of connection: "Only disputes arising from the same cause or relating to the same subject-matter may be regarded as connected."

As regards counter-claims, Article 4, paragraph 2, did not make their admissibility subject to any other condition than the jurisdiction of the court seized "by virtue of the matter concerned".

The Brussels and Lugano Conventions on jurisdiction and the enforcement of judgments in civil and commercial matters, the former of which is in force between the States of the European Union, and the latter between the same States and certain States of the European Free Trade Association, also contain rules on counter-claims and connection.

Under Article 6, paragraph 3, of each of these two Conventions:

"A person domiciled in a Contracting State may also be sued:

.....
 3. On a counterclaim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending."

Where connection is concerned, Article 22, paragraph 3, of each of the two Conventions gives a tautological definition which seems to be inspired by Belgian or French law:

"For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

However, unlike the situation obtaining in municipal law, connection is not a source of jurisdiction (Hélène Gaudemet-Tallon, *Les conventions de Bruxelles et de Lugano*, 1993, No. 297).

The same authoritative commentator on the two Conventions notes how strict the condition is for the admissibility of a counter-claim, and she proposes an interpretation which would seem better to suit the intentions of the authors of the Convention, namely, "that the notion contemplated was rather the more flexible one of a connection" (*op. cit.*, No. 229).

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By comparison with the provisions of procedural law which govern private-law disputes, Article 80 of the Rules of Court is distinguished by the link it establishes between the admissibility of a counter-claim and the two claims being "directly connected". This comparison calls for three remarks:

1. Whereas in municipal procedural law the admissibility of counter-claims and the joinder of related claims are two separate institutions, the

Rules of Court make the former subject to the establishment of a direct connection.

2. The Rules do not contemplate any extension of jurisdiction in favour of the admissibility of the counter-claim: to be admissible, the counter-claim must fall within the jurisdiction of the court before which the original claim is pending. In municipal law, the assigned jurisdiction of that court is sometimes, but not always, extended to enable it to entertain a counter-claim which, otherwise, would lie outside its jurisdiction.

3. The independent nature of the two institutions in municipal procedural law is brushed aside by provisions which, like Article 70 of the New French Code of Civil Procedure and Article 6, paragraph 3, of the Brussels and Lugano Conventions, require the existence of a "sufficient link" (Art. 70), defined more precisely in Article 6, paragraph 3, quoted above. This link may be regarded as analogous to what is required for the joinder of connected claims. The originality of Article 80 of the Rules of Court is that it does not — even tautologically — define connection, but qualifies it with an epithet ("directly connected"), of which there is no equivalent in the models of municipal procedural law discussed earlier.

The Court could learn from three municipal law solutions (which are confined to two similar systems in the foregoing discussion), namely that the connection is particularly close when the two claims are based on the same fact (see Article 563, paragraph 2, of the Belgian Judicial Code and Gérard Couchez, *Procédure civile*, 8th ed., 1994, No. 376) or that the counter-claim is only admissible if "arising from the same contract or facts on which the original claim was based" (Brussels and Lugano Conventions, Art. 6, para. 3); that the assessment of the connection is a specific determination lying outside supervision by the Court of Cassation, an idea which, transposed to the particular function of the International Court of Justice, might also inspire decisions appropriate to the particular circumstances of the case; and that one element for consideration in such an assessment is the delay which the joinder of the two claims would mean for the determination of the principal claim (Belgian Judicial Code, Art. 810; New French Code of Civil Procedure, Art. 70, para. 2).

CONCLUSION

The reasoning at the basis of the Order, whose main operative provision I found myself unable to support, is directly inspired by the Order of 17 December 1997 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. Many of the recitals in the present Order reproduce verbatim the terms of the Order of 17 December 1997. The force of *res judicata*, which is beyond dispute, or even the relative force of a case already adjudicated between other parties, is not undermined by the observation that the doctrine of pre-

cedent includes the art of distinguishing between one case and another submitted to the same court in turn. What the present Order asserts in relation to "direct connection", namely "whereas it is for the Court, in its sole discretion, to assess . . . taking account of the particular aspects of each case" the existence of a sufficient link between the two claims, applies equally to the application of Article 80, paragraph 3, of the Rules: is there doubt about such a link? It would therefore have been appropriate for the Court to ascertain how far "the particular aspects" of the present case would have warranted a departure by it from the previous decision without in any way undermining the force of the decision as a precedent. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* the facts forming the subject-matter of the respective claims of the two Parties were of the same kind (accusation of the crime of genocide) and had occurred in the same territory during the same period. In the present case too, but to a lesser extent, there is unity of time and place but not unity of action: the deliberate destruction of oil platforms, immobilized in the middle of the Persian Gulf, is quite different from the laying of mines and attacks on ships sailing in other parts of the Gulf. Hence, there are serious reasons for doubting the apparent connection between these two series of facts. The Court could therefore have accommodated Iran's claim that the reply to this question should form the subject-matter of adversarial oral proceedings.

Although, as the Court decided, it was sufficiently well informed by the written observations exchanged between the Parties, it was not immediately seized either of the question whether the direct connection was established, or whether the very varied claims made in the Counter-Memorial of the United States *all* met this condition and the condition of its jurisdiction. Admittedly, the terms in which the Court affirmed its jurisdiction in paragraph 36 in reality leave this question open, since only a detailed examination of each of the claims formulated by the United States is able to provide a reply to this question, as well as to the question of the sufficiency of the connection between each of these claims and the principal one. The summary examination undertaken by the Court during a purely procedural phase, when it had dispensed with an adversarial oral hearing of the Parties, does not make it possible to rule with certainty on whether all the counter-claims meet the substantive conditions in Article 80, paragraph 1, even though there is no doubt that they meet the formal condition in paragraph 2.

These are the reasons why I could not associate myself with all the other Members of the Court in regard to the first subparagraph of the operative part of the Order.

(Signed) François RIGAUX.