

IN THE NAME OF GOD

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING OIL PLATFORMS

ISLAMIC REPUBLIC OF IRAN

v.

UNITED STATES OF AMERICA

**REQUEST FOR HEARING IN RELATION TO THE
UNITED STATES' COUNTER-CLAIM
PURSUANT TO ARTICLE 80(3) OF THE RULES OF COURT**

18 November 1997

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A. INTRODUCTION

1. By letter of the Registrar dated 21 October 1997 the Court invited the Applicant, the Islamic Republic of Iran ("Iran"), to specify in writing the legal grounds on which it believes that the United States' Counter-Claim, as formulated in its pleading of 23 June 1997, is inadmissible. This statement responds to that invitation and, as a consequence, confirms the Applicant's request for an oral hearing, as contemplated in Article 80, paragraph 3, of the Rules, to enable the Parties to address the issues raised by the written exchange.

2. It should be recalled that the present proceedings were instituted by Iran on 2 November 1992. Iran's Application concerned specific United States' attacks on oil platforms belonging to the National Iranian Oil Company. The attacks occurred on 19 October 1987 and on 18 April 1988. The basis of Iran's claim in this Case was that these attacks breached three provisions of the Treaty of Amity between the Parties signed on 15 August 1955. These were Articles I, IV(1) and X(1).

3. Following a Preliminary Objection lodged by the United States, the Court ruled in its Judgment of 12 December 1996 that only Article X(1) of the Treaty of Amity was applicable to the Iranian claim. Specifically, the Court held that the lawfulness of the attacks on the platforms "can be evaluated in relation to that paragraph" (Judgment of 12 December 1996, paragraph 51). The Court's Judgment is of course binding on the Parties pursuant to Article 59 of the Court's Statute. The Court has thereby limited Iran to contesting the legality of the

attacks on the platforms under Article X(1) of the Treaty, and under no other provision¹. The Court also decided 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. It has never been suggested that the platforms which were attacked were engaged in "navigation" within the meaning of Article X(1) or were "vessels" within the meaning of Article X(2). Thus, the Court's Judgment on the preliminary objection confirmed that the Case was further limited to the issue of freedom of commerce².

4. Despite 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 its pleading of 23 June 1997, the Respondent's Counter-Claim is described as follows:

"The counter-claim is based on actions by Iran in the Persian Gulf during 1987-88 that created extremely dangerous conditions for shipping, and thereby violated Article X of the 1955 Treaty. Iran's actions resulted in significant damage to U.S. commercial and military vessels ...³"

5. In its formulation of the Counter-Claim, the Respondent refers throughout to "U.S. vessels", by which it evidently means both vessels which arguably qualified as such under Article X(2) of the Treaty, and foreign vessels in which United States nationals had ownership interests or which were carrying United States goods but which were plainly not United States vessels for the purposes of the Treaty⁴. The Respondent further "reserves the right...to supplement information contained in this pleading regarding attacks on U.S. vessels, as well as to add further instances of Iranian attacks on U.S. vessels in the [Persian] Gulf in 1987-88"

¹ In particular, the Court held that Article I of the Treaty did not create separate substantive rights between the Parties, although it is relevant to the interpretation of other Articles. See, Judgment of 12 December 1996, para. 31.

² See, ibid., para. 38.

³ U.S. Counter-Memorial and Counter-Claim, para. 6.01.

⁴ See, ibid., para. 6.08. The fact that the United States found it necessary to rely on the consent, or "lack of objection", of other States whose flag certain of the ships were flying further demonstrates that point. See, ibid., para. 6.24, footnote 397. With respect to vessels to which Article X of the Treaty applies, such consent or "lack of objection" would be wholly unnecessary. The Islamic Republic of Iran reserves its position as to the legal effect, if any, to be attached to consent or lack of objection on the part of third flag States.

(U.S. Counter-Memorial and Counter-Claim, para. 6.26). Thus, although the United States lists seven alleged attacks on "U.S. vessels", it does so by way of illustration only⁵.

6. The United States confirms that its Counter-Claim is, at least in part, general and unspecified, in paragraph 6.25 of its pleading. There, it also notes that its Counter-Claim is not limited to the seven specific incidents:

"Rather, the United States claim is based on Iran's obligation to the United States itself to abide by the provisions of Article X. Iran's overall conduct in creating extremely dangerous conditions for the conduct of U.S. maritime trade in the Gulf, including the attacks on U.S. vessels, violated Iran's obligations under Article X."

Thus, the claim also relates to all possible actions by Iran in 1987-88 which might allegedly have created dangerous conditions for U.S. maritime trade in the Persian Gulf. As a consequence, the U.S. claim for damages is equally wide:

"In ascertaining what reparation should be made for such a violation, it is appropriate to consider all damage to the interests of the U.S. Government and its nationals, regardless of the legal form under which those interests arise. Such damage would include the significant costs incurred by the United States in deploying additional forces to the [Persian] Gulf to protect maritime commerce by escorting vessels, clearing minefields, and other activities".

The formal submissions made by the United States in respect to its Counter-Claim confirm that its scope is, as these quotations demonstrate, unlimited and unspecified.

7. In filing such a general and vague Counter-Claim, the Respondent is acting in a way which is inconsistent with its previously declared position on claims under the Treaty of Amity, and which also ignores the Court's own approach. Having first sought to exclude or significantly limit Iran's claim by relying on a narrow interpretation of the 1955 Treaty (an interpretation in some respects adopted by the Court), the United States now seeks to bring far wider claims, indiscriminately formulated and having no regard either to the terms of the Treaty or to the Court's Judgment of 12 December 1996. This change of position is vulnerable to a number of further criticisms. First, the United States seeks to widen the dispute to

⁵ It should be noted in this context that in his correspondence with the Agent of the Islamic Republic of Iran, the Agent of the United States of America has referred to other vessels, which are not however included in the U.S. Counter-Claim. See, the Agent of the United States of America's letter dated March 26, 1997, to the Agent of the Islamic Republic of Iran enclosed with the Agent of the Islamic Republic of Iran's letter to the Registrar dated 2 October 1997.

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 U.S. claims concerning Iran's overall conduct throughout the period 1987-88, when it has always been its position in the preliminary objection phase that such overall conduct, at least insofar 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 negotiations⁶. Iran would ask the Court to take into account these factors when it considers whether the United States' Counter-Claim should be joined in this Case.

8. Counter-Claims are dealt with in the Rules of Court and not in the Court's Statute, to which States are party. It is Iran's position that this is an argument in favour of a cautious approach to the issue of whether or not a counter-claim is admissible. Article 80 of the Rules of the Court deals with the admissibility of counter-claims. It provides as follows:

"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."

The French text of paragraph 3 states:

"3. Si le rapport de connexité entre la demande présentée comme demande reconventionnelle et l'objet de la demande de la partie adverse n'est pas apparent, la Cour, après avoir entendu les parties, décide s'il y a lieu ou non de joindre cette demande à l'instance initiale."

⁶ See, the Agent of the Islamic Republic of Iran's letter to the Registrar dated 2 October 1997, and the correspondence attached.

9. For the reasons stated in Part B of this Statement, it is Iran's position that there is no "direct connection" between the United States' Counter-Claim and the principal claim formulated by Iran under Article X(1) of the Treaty relating to the specific attacks on the oil platforms. Moreover, the seven incidents invoked by the United States 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. Following the Court's Judgment of 12 December 1996, (there is thus) no basis in the Treaty, on which the Court can evaluate the legality of these alleged attacks in this Case. Since those seven incidents, which are the only specific incidents on which the United States currently relies, have no direct factual connection with the platforms and fall outside the jurisdiction of the Court under the Treaty of Amity, the United States' Counter-Claim fails to fulfil the requirements of Article 80, paragraph 1, of the Rules. To the extent the U.S. Counter-Claim is more generally framed, without reference to any specific incident, it is impossible for the Court to determine whether there is any "direct connection". Indeed, it must be doubtful whether any such generalised claim is even justiciable.

10. Iran is convinced that the United States' Counter-Claim, as formulated, is inadmissible under Article 80, paragraph 1, of the Rules. 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". Iran sets out below in outline the reasons why the claim presented in the Counter-Claim should not be so joined. In summarising its objections in this statement, Iran reserves the right to further particularise and develop them in the hearing for which Article 80, paragraph 3, specifically provides⁷.

⁷ Iran understands that the word "hearing" in this paragraph refers to oral hearing, consistent with the use of this word in other Rules, and its distinction from references in the Rules to written proceedings or observations. In this regard, Article 43 of the Statute makes clear that proceedings can be written and oral, written proceedings consisting in the communication of documents (Article 43, paragraph 2), oral proceedings consisting in a hearing (Article 43, paragraph 5) (see, also Article 54 of the Rules). References to oral hearings are clearly intended where language similar to or the same as that in Article 80, paragraph 3, is used. See, Articles 59; Article 74, paragraph 3 (interim measures); Article 79, paragraph 7 (preliminary objection); and Article 84, paragraph 2 (intervention). On the other hand, the Rules only refer to "observations", implying written comments, in for example Article 76, paragraph 3, relating to the revocation or modification of interim measures.

B. SUMMARY OF IRAN'S OBJECTIONS TO THE UNITED STATES' COUNTER-CLAIM

11. Article 80 envisages that counter-claims may only be presented if two conditions are met. First, there must be a direct connection between the counter-claim and the original claim. In the terms of the French text, the two must be "en connexité directe". Secondly, the counter-claim must be within the jurisdiction of the Court. If there is any doubt about the direct connection, there is to be a separate hearing and the Court is to decide. See, respectively, Articles 80, paragraphs 1 and 3.

12. It should be stressed that the normal procedure for the introduction of affirmative claims before the Court, in cases not depending on a special agreement, is by way of application. If a claim falls within the jurisdiction of the Court, it can always be brought by separate application, in which case no issue of direct connection with any other claim will arise. If it does not fall within the jurisdiction of the Court, it cannot be brought at all, whether by way of application or counter-claim. The Rules provide for the special procedure of counter-claim only in limited cases, where the connection between the counter-claim and the principal claim is specific and direct. The point was made by Anzilotti, commenting on Article 40 of the Rules of the Permanent Court, which was much less specific in its terms than the present Article 80⁸. According to Anzilotti:

"... une correcte interprétation du Statut porte à considérer que la demande reconventionnelle ne peut être admise qu'exceptionnellement dans le cas où cette demande se trouve en rapport spécial avec la demande principale."⁹

This requirement of a "special link" ("rapport spécial") was subsequently expressly recognised in the 1936 revision of the Rules, and this language is now reflected in Article 80, paragraph 1, of the present Rules of Court.

⁸ In its earlier form, the second paragraph of Article 40 provided that the Counter-Case shall contain "conclusions based on the facts stated: these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court".

⁹ D. Anzilotti, "La demande reconventionnelle en procédure internationale", 57 *Journal de droit international* (1930), 857 at p. 870. See, also at p. 866.

par. 14
Ostonski

13. Moreover, the direct connection required by Article 80 is not just a connection of fact but a legal connection, which the Court in its Judgment in the *Chorzow Factory* case referred to as a "connexité juridique". In that case the Court stated:

"... que la demande reconventionnelle est basée sur l'article 356 du traité de Versailles, qui constitue le fondement de l'exception soulevée par la partie défenderesse, et que, pourtant, elle se trouve en rapport de connexité juridique avec la demande principale."¹⁰

It was on the basis of this jurisprudence that the current requirement of "direct connection" was formulated¹¹.

14. Thus Article 80, in imposing the requirement that a counter-claim be "directly connected" ("en connexité directe") with the primary claim, added a requirement over and above that of "connection". The connection must be direct. As the Court put it in its Order of 15 December 1979 in the *Diplomatic and Consular Staff Case*, there must be "une étroite connexité juridique" ("legally ... a close connection with the subject-matter of the United States Application")¹². Unless this direct connection can be established *ex facie*, the counter-claim is inadmissible.

15. In the present case, the United States' Counter-Claim lacks the required direct connection with Iran's claim, and is inadmissible for failure to comply with Article 80, paragraph 1, of the Rules. This is so, *inter alia*, for the following reasons.

(1) Lack of Specificity of the U.S. Counter-Claim

16. It follows from the procedure envisaged by Article 80, paragraph 3, of the Rules that a counter-claim must be pleaded with sufficient specificity, so that the Court can determine whether Article 80, paragraph 1, has been complied with. The United States' Counter-Claim fails to meet this requirement of sufficient specificity in several respects:

¹⁰ *Factory at Chorzow, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 36.*

¹¹ G. Guyomar, *Commentaire du Règlement de la Cour Internationale de Justice*, A. Pedone, Paris, 1983, pp. 521-2, with references.

¹² *Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 7 at 15 (para. 24).*

- (a) The Counter-Claim is not limited to the seven incidents referred to in paragraph 6.08. It does nothing more than allege unspecified Iranian interference with unspecified maritime trade between the United States and Iran. The Court is not in a position to determine what direct connection may exist between any such interference in that maritime trade and the United States conduct which is the subject of Iran's claims. In fact, it is *a priori* extremely unlikely that there is any such connection. None has hitherto been relied on or referred to by the United States.
- (b) The United States reserves the right to "add further instances of Iranian attacks on U.S. vessels in the [Persian] Gulf in 1987-88". However, under Article 80, paragraph 2, of the Rules, no counter-claim may be filed after submission of the counter-memorial, and thus Iran does not accept this reservation. 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. Without information as to the instances in question, the Court is obviously not in a position to do this.

(2) Lack of Direct Connection with Iran's Claims: In General

17. 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 U.S. vessels within the meaning of Article X(2).

18. It must be stressed that the requirements of Article 80 of the Rules do not apply to any plea a respondent State may make by way of defence, justification or excuse for its conduct, but only to affirmative counter-claims. The Court, having jurisdiction over a claim in any case, necessarily has jurisdiction to decide on any defence or excuse which may be relied on in

relation to that claim. The issue here is that of the admissibility of counter-claims, which are only allowed on the conditions laid down in Article 80.

(3) Lack of Direct Connection with Iran's Claims: Specific Cases

19. Turning to the seven specific attacks on "United States shipping" which have been alleged, non-exhaustively, by the Respondent, the Islamic Republic of Iran has the following observations:

(a) The *Bridgeton* (U.S. Counter-Memorial and Counter-Claim, para. 6.08, point 1)

The United States does not claim that the *Bridgeton* was engaged in commerce or even navigation between the territories of the two contracting parties, within the meaning of Article X(1) of the Treaty of 1955¹³. Moreover, there is no evidence that any alleged attack on the *Bridgeton* had any connection in fact to the platforms which are the subject of Iran's claims, or to the actual attacks on the first platform, which occurred three months later. There is thus no legal or factual connection between the Bridgeton and the claim presently before the Court. The Bridgeton was a reflagged Kuwaiti tanker. Iran has never accepted the validity of this reflagging and thus does not accept that the Bridgeton qualifies as a U.S. flag vessel under the 1955 Treaty. Although this point goes to the admissibility of the U.S. Counter-Claim, Iran does not propose to raise the argument here, because, even on the factual assumptions as presented by the United States, the Bridgeton cannot be included in the U.S. Counter-Claim. Nevertheless, Iran reserves the right to present this argument in full, should this be necessary, in subsequent pleadings in this Case.

(b) The *Texaco Caribbean* (U.S. Counter-Memorial and Counter-Claim, para. 6.08, point 2)

The United States acknowledges that the *Texaco Caribbean* was Panamanian-registered. Thus, it was not a "vessel of [a] High Contracting Party" within the meaning of Article X(2) of

¹³ To the contrary, the U.S. Preliminary Objection acknowledges (Annex, para. A1.13) that the vessel was "in ballast ... en route to Kuwait", in other words not engaged in commerce between the two Parties.

the Treaty. Article X(2)-(5) are accordingly irrelevant in the present case. The *Texaco Caribbean* may have been carrying Iranian oil and may have been engaged in commerce between the territories of the High Contracting Parties. In this respect, however, it is unique amongst the cases referred to by the United States. Nevertheless, there was no connection, legal or factual, between the alleged attack on this vessel and the platforms which are the subject of Iran's claims, and none is alleged by the United States. The incident is alleged to have occurred outside the Persian Gulf and over two months prior to the first U.S. attack on the platforms. For these reasons, the incident has no connection with the subsequent attacks on either of the platforms, and still less a "direct" connection.

- (c) The *Sea Isle City* (U.S. Counter-Memorial and Counter-Claim, para. 6.08, point 3).

The United States does not claim that the *Sea Isle City* was engaged in commerce or even navigation between the territories of the two contracting parties, within the meaning of Article X(1) of the Treaty of 1955. To the contrary, it asserts that the vessel was approaching the oil loading terminal at Kuwait's Mina al Ahmadi port when it was hit. Thus, the United States claim does not even arguably fall within the scope of Article X(1) of the Treaty, and thus lacks any direct legal connection for the purposes of Article 80 of the Rules. Moreover, there is no evidence whatever that any alleged attack on the *Sea Isle City* had any connection to the platforms which are the subject of Iran's claims, or that the platforms could have had any role in relation to that incident. There is accordingly no element of direct factual connection either. The United States cannot create such a connection merely by virtue of the fact that it cited the attack on the *Sea Isle City* as a justification for its first attack on the platforms. The existence or otherwise of a legal justification, excuse or exemption for the United States' attack is not sufficient to create a direct connection for the purposes of bringing a counter-claim within Article 80 of the Rules¹⁴.

¹⁴ The *Sea Isle City* was a reflagged Kuwaiti tanker and thus the same comments apply as were made above with respect to the *Bridgeton*.

(d) The *Lucy* (U.S. Counter-Memorial and Counter-Claim, para. 6.08, point 4).

The United States does not claim that the *Lucy* was engaged in commerce or even navigation between the territories of the two contracting parties, within the meaning of Article X(1) of the Treaty of 1955. Nor was the *Lucy* a "vessel of [a] High Contracting Party" for the purposes of Article X(2)-(5) of the Treaty. The United States acknowledges that it was a vessel en route to the U.A.E., and was Liberian flagged. The Court thus has no basis to appreciate the legality of any alleged attack on the *Lucy* under Article X of the Treaty. Moreover, there is no evidence that any alleged attack on the *Lucy* had any connection to the platforms which are the subject of Iran's claims. Finally, the incident involving the *Lucy* is alleged to have occurred on 15 November 1987 as the vessel was entering the Persian Gulf, one month after the first U.S. attack and five months prior to its second attacks. In these circumstances, there is no direct connection, legal or factual, between the alleged attack on this vessel and the attack on either of the platforms.

(e) The *Esso Freeport* (U.S. Counter-Memorial and Counter-Claim, para. 6.08, point 5).

The United States does not claim that the *Esso Freeport* was engaged in commerce or even navigation between the territories of the two contracting parties, within the meaning of Article X(1) of the Treaty of 1955. Nor was the *Esso Freeport* a "vessel of [a] High contracting Party" for the purposes of Article X(2)-(5) of the Treaty. The vessel is stated to be Panamanian-flagged and engaged in trade with Saudi Arabia. The Court thus has no basis to appreciate the legality of any alleged attack on the *Esso Freeport* under Article X of the Treaty. Moreover, there is no evidence that any alleged attack on the *Esso Freeport* had any connection to the platforms which are the subject of Iran's claim¹⁵. In these circumstances, there is no direct connection, legal or factual, between the alleged attack on this vessel and the attack on either of the platforms.

¹⁵ The incident involving the *Esso Freeport* allegedly occurred one day after the incident involving the *Lucy* and in the same area.

(f) The *Diane* (U.S. Counter-Memorial and Counter-Claim, para. 6.08, point 6).

The United States does not claim that the *Diane* was engaged in commerce or even navigation between the territories of the two contracting parties, within the meaning of Article X(1) of the Treaty of 1955. Nor was the *Diane* a "vessel of [a] High Contracting Party" for the purposes of Article X(2)-(5) of the Treaty. The Court thus has no basis to appreciate the legality of any alleged attack on the *Diane* under Article X of the Treaty¹⁶. Moreover, there is no evidence that any alleged attack on the *Diane* had any connection to the platforms which are the subject of Iran's claims, or to the second attack on the platforms which occurred 10 weeks after the incident allegedly involving the *Diane*. In these circumstances, there is no direct connection, legal or factual, between the alleged attack on this vessel and the attacks on the platforms.

(g) The U.S.S. *Samuel B. Roberts* (U.S. Counter-Memorial and Counter-Claim, para. 6.08, point 7)

The United States does not claim that the *Samuel B. Roberts* was engaged in commerce or even navigation between the territories of the two contracting parties, within the meaning of Article X(1) of the Treaty of 1955, and even if it had been, as a vessel of war, the *Samuel B. Roberts* was expressly excluded from the scope of Article X(1) of the Treaty by Article X(6). Moreover, there is no evidence that any alleged attack on the *Samuel B. Roberts* had any connection to the platforms which are the subject of Iran's claim¹⁷. There is accordingly no element of direct factual connection between the attacks on the platforms and the alleged Iranian mining of the *Samuel B. Roberts*. The United States cannot create such a connection merely by virtue of the fact that it cited the mining of the *Samuel B. Roberts* as a justification for its second platforms attack. The existence or otherwise of a legal justification, excuse or exemption for the United States' attack on the platforms is not sufficient to create a direct connection for the purposes of Article 80 of the Rules.

¹⁶ The *Diane* is stated to be Liberian flagged and to have been trading between Bahrain, the U.A.E. and Japan.

¹⁷ In its *Counter-Memorial and Counter-Claim*, the United States cites no fact connecting the mining of the *Samuel B. Roberts* with any of the platforms.

20. The above analysis is based on the presentation of these incidents made by the United States and without entering into disputed questions of law and fact in relation to them. In short the above analysis is entirely without prejudice to the Iran's position at any subsequent phase of the present proceedings¹⁸.

21. However, even accepting the position as alleged by the Respondent, solely for the purposes of determining the admissibility of the Counter-Claim and entirely without prejudice to the subsequent determination of disputed legal and factual issues, the following picture emerges. Of the seven specified incidents of alleged Iranian interference with "United States shipping" in the Persian Gulf during the years 1987-88:

- No fewer than six incidents involved vessels which were not (even arguably) engaged in commerce or even navigation between the territories of the High Contracting Parties (*Bridgeton; Sea Isle City; Lucy; Esso Freeport; Diane; USS Samuel B. Roberts*), and the United States has not even argued that they were so engaged. They 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.
- Only with regard to one of the vessels - the *Texaco Caribbean* - could it be argued that it was 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 appreciated¹⁹. However, the *Texaco Caribbean* was not a U.S. 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 platforms²⁰.

¹⁸ Iran has also reserved its right to deal further with its objections inter alia to the inclusion of third State flag vessels and reflagged vessels.

¹⁹ In other words, only the *Texaco Caribbean* was arguably engaged in commerce or navigation between the territories of the High Contracting Parties.

²⁰ The United States did not refer to or rely on the alleged attack on the *Texaco Caribbean* as a justification for either attack on the platforms. There is no evidence whatever that any of the platforms was in any way involved in the alleged attack on the *Texaco Caribbean*.

- 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 U.S. vessels within the meaning of Article X(2) which were even arguably covered by those paragraphs (*Bridgeton* and *Sea Isle City*)²¹. In 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)²².

(4) Lack of Jurisdiction over the United States' Counter-Claim under the Treaty of Amity

22. Article 80, paragraph 1, of the Rules clearly stipulates that a counter-claim may not be presented unless it comes within the jurisdiction of the Court. In the light of the above, it is Iran's position that the United States' Counter-Claim does not satisfy this requirement.

23. "It is, however, ~~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 (to a counter-claim) based on lack of jurisdiction,~~" or on some other ground of inadmissibility distinct from lack of connection. In this regard, the Applicant would make the following observations.

Ord. para 19

24. Despite the unclear language of Article 80, paragraph 3, of the Rules, Iran is convinced that it must be interpreted in the context of Article 80 as a whole, and Article 80, paragraph 1, in particular. Article 80, paragraph 1, makes it clear that the two conditions of direct connection and jurisdiction must be met for a counter-claim to be admissible. It is accordingly

²¹ The *Texaco Caribbean*, *Lucy*, *Esso Freeport* and *Diane* were foreign flagged and were thus excluded from the scope of Article X(3)-(5) by the express language of Article X(2). The *Samuel B. Roberts*, as a vessel of war, was expressly excluded by Article X(6). It was, in any event, not engaged in navigation between the territories of the High Contracting Parties. This is of course quite apart from the fact that Iran does not accept the opposability of the reflagging of the *Sea Isle City* and *Bridgeton*.

²² As to Article X(3), none of the vessels was at any relevant time carrying cargoes to "ports, places and waters" of Iran, and no issues of national treatment or most-favoured-nation treatment arose. As to Article X(4), similarly, no issues of national treatment or most-favoured-nation treatment in the carriage of products from the territory of Iran arose. Nor did any issue arise under Article X(5); none of the vessels sought or was refused refuge in a port or haven of Iran.

logical to assume that if one or other of these conditions were clearly not met, then the counterclaim would be inadmissible and would not be joined to the main claim, despite knowing in advance that it had no jurisdiction to decide the Counter-Claim on the merits. Moreover, faced with an hypothetical counter-claim which had some links with the main claim but which was plainly not within the Court's jurisdiction, it would be absurd if the Court nevertheless had to join the counter-claim to the main claim despite knowing in advance that it had no jurisdiction to decide the counter-claim on the merits. To the contrary, one must assume that the Court's evaluation of direct connection presupposes the Court's jurisdiction, in the sense that, if there was a clear lack of jurisdiction, the determination by the Court that there was connection would, or at least could, ultimately be inutiliter data.

25. In making this point, Iran does not suggest that the proceedings under Article 80 are a substitute for a preliminary objection, which would address all issues of jurisdiction and admissibility in detail. Iran is simply stating that when it is clear ex facie, and even on the basis of the facts put forward by the counter-claimant, that the Court has no jurisdiction in the context of the Case in question, the Court has the authority under Article 80, paragraph 3, not to join the counter-claim. In this Case, it is Iran's position that it is sufficiently clear ex facie that the United States' Counter-Claim is not within the jurisdiction of the Court, and that this can be determined by the Court independently of a full preliminary objection proceeding dealing, in the manner prescribed for preliminary objections, with all issues of jurisdiction and admissibility.

26. In this regard, a State should not be deprived of its right to test the jurisdiction of the Court, and the admissibility of a substantive claim brought against it, by reason of the fact that the claim is presented as a counter-claim. The policy underlying the Statute and Rules is that as 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 claim²³. On the other hand, 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. In any event, 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. It follows that, if the Court decides in favour of joinder, such a decision could not prejudice in any way the

²³ Cf. Statute, Article 36(6); Rules, Article 79(7).

right of the party objecting to the counter-claim^u to make any defence relating either to the admissibility or to the merits of the counter-claim in a subsequent phase of the proceedings.^v
 For these reasons, the Applicant reserves the right, if necessary, to lodge preliminary objections in respect of the United States' Counter-Claim.^w

27. However, the fact that a counter-claim is plainly outside the Court's jurisdiction is relevant for the purposes of Article 80, paragraph 3, (in at least two ways)

- *First*, if no facts are pleaded by the counter-claimant which would show that the counter-claim comes within the jurisdiction of the Court, this must be relevant in deciding "whether or not the question thus presented shall be joined to the original proceedings". In the Applicant's view, the Court has a discretion to decide whether joinder is to be allowed. A counter-claim which fails to satisfy the express requirements 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.
- *Secondly*, in particular cases there may be a link between the lack of jurisdiction and the lack of direct connection. Cases of course may arise where the requirements of jurisdiction and direct connection can be applied separately. A claim which is directly connected may not be within jurisdiction and *vice versa*. But in a given case there may well be a link between an evident lack of jurisdiction and the lack of direct connection. This arises from the proposition, affirmed by the Permanent Court in the *Chorzow Factory* case, that a counter-claim must be "en rapport de connexité juridique avec la demande principale" (emphasis added). To fall within Article X(1) of the Treaty of Amity, and in particular its guarantee of freedom of commerce, a claim must be capable of being characterised, and its legal basis evaluated, by reference to that provision. This the Court made clear in its Judgment of 12 December 1996. The fact that a counter-claim evidently cannot be evaluated by reference to that (or indeed any) provision of the Treaty, itself tends to establish the lack of a direct juridical connection between the counter-claim and the original claim. And that is certainly true in the present case.

C. CONCLUDING REMARKS

28. There is no injustice in holding a counter-claimant to the strict requirements of admissibility laid down by Article 80 of the Rules. It is always open to the party concerned to commence separate proceedings by Application in the normal way, subject to the Court's finding it has jurisdiction. Moreover, as noted already, the requirement of direct connection does not apply to any plea by way of justification or excuse which the United States wishes to make in respect of the attacks on the platforms, or to any exception from the requirements of the Treaty which it may gain by application of Article XX(1)(d).

29. By contrast, to proceed by way of counter-claim places the State responding to the counter-claim at a significant disadvantage. If joinder of the counter-claim is permitted, the respondent to the counter-claim 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.

30. More importantly, had the United States brought its present Counter-Claim by way of an Application, it would have been open to Iran to bring its own counter-claim. In this context, it should be noted that the generalised claim of the United States with respect to the period of 1987-88 covers a series of incidents with respect to which Iran has important additional claims of its own²⁴. However, having first used its preliminary objection to seek to limit the claims brought by Iran, the United States now seeks to use Article 80 of the Rules to achieve a selective and partial widening of the dispute, beyond the focused claim allowed to stand by the Court's Judgment of 12 December 1996, and without taking into account Iran's own additional claims.

31. The inappropriateness of this manner of proceeding is further compounded by the fact that Iran agreed to comprehensive negotiations in an attempt to resolve all such legal issues arising between the Parties in relation to this period. However, the United States has apparently taken the position that it will only negotiate on the basis of a prior admission of

²⁴ Some of these are alluded to in the Agent of the Islamic Republic of Iran's letter dated 12 June 1997 to the Agent of the United States of America attached to the Agent of the Islamic Republic of Iran's letter to the Registrar dated 2 October 1997.

responsibility by Iran, as well as the prior exclusion of any matters for which the United States is, in Iran's view, responsible²⁵.

32. In the light of the above, it is clear that Iran would be severely prejudiced if it was not allowed to bring its own additional claims. If the United States' Counter-Claim was admitted, Iran would necessarily be forced to seek leave to introduce such claims.

33. If the Case were to be widened in the way proposed by the United States, this might also prejudice third States' interests. Article 40, paragraph 3, of the Statute of the Court only provides that a new case is notified to third States, giving them a right to request intervention in certain circumstances pursuant to Article 62 of the Statute. No such provision is made with respect to counter-claims. In this case, where it is at least possible that several other States' interests might be affected by the kind of widening of the dispute proposed by the United States, this must be a serious consideration, and must be a consideration which militates in favour of not joining the Counter-Claim, but leaving the United States to file a separate Application should it deem it appropriate.

34. In the light of the above, it is Iran's principal position that the United States' Counter-Claim should not be joined in this Case. To the extent the Counter-Claim presented by the United States takes the form of an unspecified allegation that Iran violated the freedom of navigation and commerce *between the two States*, there is neither factual connection nor legal link between any such alleged general violation and the specific attacks on Iranian oil platforms which are the sole subject-matter of the present case. Nor, for the reasons stated above, is there any legal or factual connection of a direct character between the seven incidents on which the United States specifically relies and the attacks on the platforms. Even on the facts as presented by the United States, in only one case, that of the *Texaco Caribbean*, does any paragraph of Article X provide a basis on which the legality of the Applicant's alleged conduct might be evaluated. However, even in that case, the vessel was not U.S.-flagged and there is no element of a legal or factual connection with the later attacks on the platforms.

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See, in general, the correspondence between the Parties attached to the letter of the Agent of the Islamic Republic of Iran to the Registrar dated 2 October 1997.

35. In conclusion, it should be stressed that in the present case Iran has proceeded to formulate its claim in a deliberately limited way. The Applicant State has not sought to bring before the Court all of its legal complaints as to the conduct of the United States in the Persian Gulf during the period of the Iran-Iraq War, but only the specific attacks on commercial oil platforms. In response - and despite the fact that the Court in its Judgment of 12 December 1996 still further limited the legal grounds for evaluating the conduct of the Parties in relation to the attacks on the platforms - the United States has now sought to broaden the case before the Court out of recognition. It has done so by a wide and unspecified counter-claim which calls into issue in a generalised way the conduct of Iran during a defensive war. (This was, moreover, a war during which, in Iran's view, the United States gave support and comfort, directly and indirectly, to the aggressor.) Such a selective broadening of the issues is unwarranted and goes well beyond the scope of counter-claims as carefully delimited in Article 80 of the Rules. If the United States wishes to have the Court adjudicate in the broadest terms on the legality of the Parties' conduct during this war, then it is for it to commence proceedings on that basis, or at least to enter into negotiations over such issues, something it has to date refused to do. The carefully limited dispute which Iran has brought before the Court, the legal grounds of the appreciation of which the Court has still further limited in its Judgment of 12 December 1996, would be denatured if the United States' Counter-Claim was joined. The Case would, in effect, be converted into a new and different dispute, one essentially unrelated to the attacks on the oil platforms.

36. In the light of the above, the Islamic Republic of 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.

Respectfully submitted by

Agent of the Islamic Republic of Iran