

DECLARATION OF JUDGE *AD HOC* GAJA

In deciding on the admissibility of Italy's counter-claim the Court is applying for the first time Article 80 of the Rules of Court as amended with effect from 1 February 2001. Unlike the previous provision, the new text requires the Court to take a decision "after hearing the parties" also on an objection raised by the claimant State with regard to the Court's jurisdiction on the counter-claim. In the context of the Rules of Court (see, e.g., Article 58, paragraph 2; Article 67; paragraph 1; Article 79, paragraph 9 and Article 84, paragraph 2) "hearing the parties" appears to imply that an oral hearing should be held. This seems particularly justified when an objection relates to jurisdiction, given the impact of a decision on jurisdiction. In case of a denial of jurisdiction, the defendant State would be effectively prevented from bringing to the Court the inadmissible counter-claim as a separate claim.

In the case in hand, an oral hearing would probably have helped the Court to identify more precisely the date when the dispute arose and the facts and situations to which the dispute related. It may have allowed the Court to establish which claims had been the object of "repeated attempts to reach an agreement" (thus a memorandum of the German Government quoted in the Memorial of the Federal Republic of Germany (p. 10, para. 10)) before the conclusion of the 1961 bilateral agreements.

*(Signed)* Giorgio GAJA.

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