

Treaty “Interpretation” in a Judicial Context

Sir Frank Berman, Q.C.[†]

I. INTRODUCTION

Oil Platforms was a treaty case. Although it grew out of a much deeper dispute, involving not just the United States but numerous other States, about the military tactics employed during the Iran-Iraq war, and although that dispute revolved around the entitlement of the belligerents under general international law to damage the interests of third States, the ICJ’s jurisdiction to hear the case brought before it depended on the 1955 bilateral Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States.¹ In the words of Judge Kooijmans, it was “a dispute which originated in the use of force but was brought to the Court as a violation of treaty-guaranteed freedom of commerce.”² It followed that, in accordance with the Court’s established jurisprudence, the only substantive disputes on which it was entitled to pronounce were those falling within the jurisdictional clause in that Treaty. In this case (as the Court had already decided in the jurisdictional phase in 1996), that meant a dispute over the interpretation or application of Article X, paragraph 1. As framed in their closing Submissions, Iran claimed that in attacking and destroying the oil platforms the United States breached its obligations to Iran under Article X, paragraph 1. The United States in turn, while rejecting that claim on the merits, counter-claimed under the same provision against Iran’s mine and missile attacks on vessels in the Gulf and other military actions said to be dangerous and detrimental to commerce and navigation.

It was not simply a matter therefore of abstracting one element from a more general dispute; that aspect is not all that unusual in the jurisprudence of the ICJ.³ The point was that the dispute had to be squeezed—for the purposes of the judicial proceedings—not merely into a bilateral mold, but into the

[†] Barrister and arbitrator, Essex Court Chambers, London; Judge ad hoc on the International Court of Justice; Visiting Professor of International Law at the University of Oxford.

1. Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 899, 284 U.N.T.S. 93.

2. *Oil Platforms* (Iran v. U.S.) (Merits), 2003 I.C.J. (Nov. 6.) (separate opinion of Judge Kooijmans), para. 4, <http://www.icj-cij.org/icjwww/idecisions.htm>. All references to *Oil Platforms* are to the merits phase of the case unless otherwise specified.

3. For a recent example, see the maritime delimitation case between Qatar and Bahrain. *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahr.) (Jurisdiction and Admissibility), 1994 I.C.J. 112 (July 1); 1995 I.C.J. 6 (Feb. 15); (Merits) 2001 I.C.J. 40 (Mar. 16).

contours of a particular bilateral treaty provision,⁴ and, what is more, into the contours of a provision which appeared on the face of it to have no direct connection with the actions impugned by each Party against the other before the Court.⁵

Treaty interpretation was thus at the heart of the case. How then should it be handled? One may infer that the proper approach to it was not a simple matter, indeed that it gave rise to some controversy within the Court. Judge Higgins says in her Separate Opinion, "The Court has, however, not interpreted Article XX, paragraph 1(d), by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law."⁶ The issue would seem to have been (as explained below) how far the interpretation of the terms of the treaty could properly be used as the engine for drawing in the rules of general international law, not simply in the legal relations between the Parties, but within the jurisdiction of the Court.

The purpose of this contribution will therefore be to examine the way the Court set about the questions of treaty interpretation and to discuss what the proper approach should be. The examination falls into three parts, corresponding to the three Articles which featured in the Parties' argument before the Court: i.e., apart from Article X, paragraph 1 itself, Article I, and Article XX, paragraph 1(d).

II. ANALYSIS

A. *Article I*

Article I is a treaty clause of a very general character. In it, the Parties declare in solemn form that there shall be "firm and enduring peace and sincere friendship" between them. From its form and its placing, the Article appears as a central part of the mutual undertakings exchanged between the Contracting States; it played some role in the original formulation of the Iranian claims, although it later disappeared from view. But if it was a central element of the Treaty's structure, what was its specific legal effect? The issue for the Court was whether such a general formulation was rhetorical only, or contained some specific substantive content of relevance to the dispute before it. The Court had already held, in the jurisdictional phase of the case, that Article I was drafted "in terms so general that *by itself* it is not capable of *generating* legal rights and obligations."⁷ At the merits phase, the Court

4. In his separate opinion, Judge Simma coins the colorful phrase: "the rather businesslike Article X, paragraph 1, on freedom of commerce now serves as the proverbial eye of the needle through which the Court's treatment of the question of the use of armed force by the United States has to be squeezed." *Oil Platforms* (separate opinion of Judge Simma), para. 2 (internal citation omitted).

5. While it is true that the Court had had a previous excursion into whether a similar clause could be so interpreted (in the *Nicaragua* case in 1986), that was of course a case in which the Respondent failed to appear at the merits stage, so that the Court was deprived of the inestimable benefit of contradictory argument from both treaty parties. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) (Merits), 1986 I.C.J. 14 (June 27).

6. *Oil Platforms* (separate opinion of Judge Higgins), para. 49.

7. *Oil Platforms* (Iran v. U.S.) (Preliminary Objections), 1996 I.C.J. 803, 820, para. 52 (Dec. 12) (emphasis added).

held—if only implicitly—to the interpretation it had earlier given to the article. In other words, it held to the conclusion that, in view of its generality, Article I could not be interpreted in isolation from the object and purpose of the Treaty in which it appeared.⁸ The Article fixed an objective in the light of which the other Treaty provisions should be interpreted and applied, but had no relevant substantive value of its own.⁹

The Court had arrived at this view by looking at various elements: the type of treaty in which the provision had been inserted; the treaty's object as recited in the Preamble; the negotiating history and subsequent practice (such as they were); and how the United States had handled similar provisions in other treaties of the same kind.¹⁰

The materials used by the Court were the obvious ones. That does not, however, mean to say that it is all that easy to assign them to their proper categories as tools for interpretation. For example, how does the treatment by the United States of similar treaties rank in Vienna Convention terms? It can hardly form part of the "context" as defined in Article 31 of the Convention,¹¹ nor of the materials "to be taken into account, together with the context" under the same Article,¹² nor is it *travaux préparatoires* under Article 32.¹³ The Court is not more precise about the basis on which this material was admitted—but then nor were the Parties themselves in arguing it. Part of the answer (at least implicitly) might be that Article 32 does not confine itself to the negotiating history and the circumstances of the treaty's conclusion, but gives them as examples only of a *general* category of "supplementary means of interpretation." That is, however, only a partial answer since neither of the two conditions set out in Article 32 was present.¹⁴

Of more interest than the basis on which this material was examined was the *result* to which it led, i.e. the curious one that a treaty article was treated as part of the "object and purpose" but no more. A particular awkwardness was the circularity in the reasoning that led to this result. At the Preliminary Objections phase, the Court was at pains to tell us that the reason why it had concluded that Article I was not purely aspirational, but had specific legal content, was because of the nature of the provisions that followed.¹⁵ But that specific legal content (as it now emerges) is to lend color to the interpretation of those very provisions. The circularity is plain to see. This illustrates perhaps that the freedom of the Parties to construct their treaty as they choose includes the freedom to give ostensibly operative form to what is essentially

8. *Id.* at 813, para. 27.

9. *Id.* at 814, para. 28.

10. *Id.* at 813-15, paras. 27-30.

11. See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 31, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 321, 340 (1980) [hereinafter Vienna Convention] (since "context" refers only to the text itself and to external instruments *related* to the treaty in question).

12. *Id.* (since those materials relate to the parties to the treaty as a group, not to the actions of one of them vis-à-vis other States).

13. *Id.* art. 32, 1155 U.N.T.S. at 340 (since the *travaux préparatoires* are apparently concerned with the negotiations between the particular contracting States).

14. Article 32 covers cases "when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." *Id.*

15. *Oil Platforms* (Preliminary Objections), 1996 I.C.J. at 813-14, paras. 27-28.

preambular material. It illustrates also the problems the interpreter is faced with when the Parties choose a form that inevitably implies significant legal content, but then fill it with words that hardly fulfil the promise. However, the question whether Article I embodied any core of real legal obligation became transmuted, as will be seen, into the subtler and more controversial one of whether Article I could be used to determine the meaning of Article XX, paragraph 1(d), and if so how.

B. *Article X, Paragraph 1*

Article X, paragraph 1, by contrast, is the provision around which much of the substantive dispute revolved. It, too, was quite laconic: "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation." The question, as it became refined in the course of argument, was not so much what "freedom of commerce" or "freedom of navigation" meant in themselves, as how far they stretched. Specifically, did freedom of commerce cover trade only or also activities incidental to it, and did it cover indirect trade as well? The first of these questions was treated by the Court very much as a matter of dictionary definition, in the context of the treaty as a whole, illuminated as well by the way the terms in question had been used in other treaties of a similar kind. The second question was largely resolved through *de facto* agreement between the Parties, as their Pleadings developed. Namely, the phrase "between their territories" had to be taken as meaning what it said—in other words as limiting the coverage of the provision to commerce and navigation moving from the territory of one Party to that of the other.¹⁶

In the end, the Court decided both Iran's claim and the U.S. counterclaim on factual grounds; it found as fact that the trade-related activities that were affected by the Iranian and U.S. military measures were not, in any real sense, direct trade between the Parties. Interference with them could not therefore fall within the intendment of the Article.

Thus, the Court's approach towards interpretation was a perfectly standard one, revolving around the ordinary meaning to be given to the text. If there is a problem at all, it goes back to the Court's preliminary essay into construing Article X, paragraph 1, and involves, once again, the difficulty in placing in its proper category some of the material which the Court had examined along the way. This is notably true for the weight given to the way the terms to be interpreted had been used in other treaties.¹⁷ Perhaps the justification (though once more it was unspoken) is that to rely on this material does form a legitimate part of giving meaning to the words chosen "in their context," and notably also in the light of the treaty's object and purpose¹⁸, in the sense that a common and widespread usage, once established, could reasonably be said to have represented the assumptions and intentions of the Parties when they made their choice of terms.

16. *Oil Platforms*, para. 82.

17. *Oil Platforms* (Preliminary Objections), 1996 I.C.J. at 818-19, paras. 46-48.

18. Vienna Convention, *supra* note 11, art. 31(1), 1155 U.N.T.S. at 340.

C. *Article XX, Paragraph 1(d)*

The most controversial issues of interpretation, by far, related to Article XX(1)(d). This provision (as will be recalled) declared inter alia that the Treaty “shall not preclude the application of measures . . . necessary to protect . . . the essential security interests [of a High Contracting Party]” and the Court had already decided at the Preliminary Objections stage that the provision offered a defense on the merits, but not a limitation on the scope of the obligations undertaken under the Treaty. This had been done, though, in a glancing way, largely by reference to how the Court had interpreted a similar provision ten years earlier in the *Nicaragua* case, but without giving any overt consideration to whether the provision *did* have the same meaning in the two separate treaties between different pairings of Parties.¹⁹ That said, the bare wording of the provision did offer, on its own, strong grounds for the interpretation which the Court gave to it on each occasion. Before reaching that point, however, the Court had to deal with the U.S. argument that its attacks against the oil platforms were covered by Article XX, paragraph 1(d). An important issue arose in argument as to whether this provision, as a substantive defense against an allegation of breach of other Treaty provisions, covered only “measures” that were in themselves lawful under general international law. The Court’s approach to this issue has been a matter of sharp controversy, and doubtless will remain so. For present purposes, the interest is however that, in reaching its finding in favor of the more restricted coverage of Article XX, paragraph 1(d), the Court relied upon the coloration which it had derived from—or read into—Article I. As the Court put it, “It is hardly consistent with Article I to interpret Article XX, paragraph 1(d), to the effect that the ‘measures’ there contemplated could include even an unlawful use of force by one party against the other.”²⁰ It then went on to add, though, somewhat puzzlingly, “[m]oreover, under the general rules of treaty interpretation, as reflected in the a 1969 Vienna Convention on the Law of Treaties, interpretation must take into account ‘any relevant rules of international law applicable in the relations between the parties.’”²¹

Both of these pronouncements call for closer examination.²²

To begin with the relationship between Articles I and XX, it is difficult to see from where the Court derived its “hardly consistent.” As a matter of abstract logic, it is perfectly conceivable that a pair of Contracting States might wish to displace the general law in their mutual relations; very often that is the whole purpose of a bilateral treaty. It is every bit as conceivable that they might wish to provide (as seems on the face of it to have been the case

19. The actual words used by the Court at the Preliminary Objections phase, which may be thought more than somewhat laconic, were: “The Court sees no reason to vary the conclusions it arrived at in 1986.” *Oil Platforms* (Preliminary Objections), 1996 I.C.J. at 811, para. 20. But what “conclusions” can the Court have reached then in respect of a treaty between the United States and an entirely different bilateral partner, the more so (or less so) as the Treaty with Iran actually preceded that with Nicaragua?

20. *Oil Platforms*, para. 41.

21. *Id.* (internal citation omitted).

22. It is not entirely clear whether the Court meant them as two facets of a single principle, or as separate arguments each in its own right; the analysis here assumes the latter.

here) that certain eventualities would not represent breaches of their *special treaty relationship*, without any impact on the question whether such an eventuality might give rise to a separate claim under *general international law*—which would by definition not have been displaced in relation to happenings not covered by the treaty.²³ To justify “hardly consistent” one would have expected at the least some evidence derived directly from the accepted list of the basic and supplementary materials for treaty interpretation²⁴ rather than a mere postulate emanating *ex cathedra* from the Court itself.

As to the importation of general international law as an aid to treaty interpretation in itself, it seems plain that what Article 31(3) had in mind, in providing that relevant rules of international law were to be taken into account “together with” the context, was that they might help elucidate what the Parties had wished to establish between them by the words they chose to use. This is the whole sense of the phrase “applicable in the relations between the parties” with which Article 31(3) qualifies the reference to “international law.” To take the proposition beyond that—and it is difficult to escape the feeling that that is exactly what the Court has done—would be to place an unwarranted limitation on the Parties’ freedom of contract. The result was to *substitute for* what the Parties had provided in their Treaty the rules of general international law that applied between them in any case. One sees precisely what Judge Higgins had in mind when she complained that a supposed exercise in treaty interpretation had in fact been used as a device for displacing the applicable law.²⁵

III. THE PROPER APPROACH

It has already been noted that, for the case to be justiciable before the ICJ at all, a specific dispute under the bilateral Treaty had to be distilled from the broader differences under general international law between Iran (and Iraq) and numerous third States. What the Court ended up doing, by a wave of the interpreter’s wand, was to reinstate before the Court (as between the two litigating parties) these broader differences in place of the specific dispute under the treaty. It did so through the way in which it approached first the application and then the interpretation of Article XX, paragraph 1(d), and moreover in such a way as to allow one side of that dispute (the Claimant’s) to be adjudged but not the other side (the Counter-Claimant’s). To have ended up in this anomalous position ought to have served as an unmistakable signal to the majority on the Court that they had gone astray.

What, then, ought the Court to have done?

23. If the Court had in mind a sort of *jus cogens* preclusion, in virtue of the status of the rules of international law on the use of force, there is no trace of it in the language of the judgment.

24. See *supra* notes 10-14 and accompanying text.

25. One may compare in this context the Court’s express finding, at the jurisdictional phase, in relation to Article I, that it “cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations.” *Oil Platforms* (Preliminary Objections), 1996 I.C.J. at 814, para. 28.

As pointed out at the beginning of this contribution, *Oil Platforms* was a treaty case. Faced with the question of how to interpret a treaty provision, and then apply it to a set of facts before it, the task of the Court was straightforward: to elicit the ordinary meaning to be given to the terms of Article X, paragraph 1 of the bilateral Treaty of Amity, in their context and in the light of the Treaty's object and purpose. That is the golden rule in Article 31(1) of the Vienna Convention on the Law of Treaties. For that purpose, it was proper to give decisive weight to the common view between the Parties, as it emerged in the course of the proceedings, that Article X, paragraph 1 covered direct trade only. This is the rule in Article 31(3)(a) of the Vienna Convention, but used on this occasion to *confirm* the natural meaning of the terms of the Article. Beyond that, it was simply a matter of factual determination what trade was affected by the impugned measures taken by each Party, and whether any of it was direct trade.

Where did this leave Article I? Was there any scope for considering it at all, given that there was no dispute *under* Article I before the Court? The answer is, in principle, yes—as part of the context for the interpretation of Article X, paragraph 1. In practice, however, the answer is no—since Article X, paragraph 1 had a readily discoverable plain meaning, which the Court upheld, and it needed no additional assistance from the context in order to do so. The inference, therefore, is that Article I became merely a vehicle for drawing in Article XX, paragraph 1(d) (or vice versa). And that was not, on its proper analysis, part of the interpretative task which the Court was either entitled or called upon to perform.

As for Article XX, paragraph 1(d), it will already be evident that the writer does not believe that there was a proper case for drawing the rules of general international law into the interpretation of this provision. The clause had a clearly discoverable meaning on its face, and that should have sufficed.

IV. CONCLUSION

One is left therefore with more of a question than a conclusion: if the Court took a manifestly wrong path on this occasion, what effect is that likely to have for the future?

The answer can be addressed on a general level: the ICJ's decisions are binding only as between the Parties and in respect of the particular case,²⁶ and the extent to which a particular Judgment becomes accepted as a "leading case" depends upon its reception in the opinion of the international legal community. That applies just as much to the Court's approach to the question of treaty interpretation as it does to the other aspects of this case. This contribution will have served its purpose if it encourages continuing debate on the treaty aspects, not simply on those aspects of the case which generate greater political excitement.

On the more mundane level, it seems hardly likely that this particular decision by the ICJ will have much effect on the way States set about drafting

26. Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, T.I.A.S. No. 993.

bilateral treaties. Jurisdictional clauses in such treaties will continue, as they always have been, to be matters to which States pay close attention, and it is a matter for speculation of a much broader kind whether they are heartened (or the opposite) when the Court gives such clauses an expansive reach or when it takes the view that the principle of consent demands a restrictive interpretation. As with all other questions of treaty interpretation, a judicious balance is required, in which the words of the treaty play the central part.