

The Case Concerning Oil Platforms (Islamic Republic of Iran *v.* United States of America) - Preliminary Objection

Keywords: International Court of Justice; jurisdiction; sovereignty.

1. INTRODUCTION

The case-law of the International Court of Justice (Court) is replete with arguments about whether the Court has jurisdiction to entertain the particular dispute (or request for advisory opinion) with which the Court is faced. These arguments are framed at one level as matters of interpretation of the relevant instruments. But they typically play out as well a multiplicity of variations on the overlapping themes of sovereignty (the extent to which states have been prepared to concede decision-making to third-party settlement mechanisms)¹ and justiciability (the extent to which they will accept that an issue may be governed by 'law' and thus be susceptible to resolution by judicial actors).

The 12 December 1996 Judgment of the International Court of Justice on the Preliminary Objection raised by the United States in the *Oil Platforms* case (Judgment)² is a striking example of the residual force of these themes of sovereignty and justiciability, although the Court ultimately found that there was jurisdiction, albeit limited. The Judgment also reminds us of the complex relationship between jurisdiction and substance.

-
1. Judge Oda in his Dissenting Opinion in the Judgment endeavours to show how reluctant states have been to provide for the referral of disputes in advance to the Court, whether pursuant to the Optional Clause of Art. 36(2) of the Statute of the Court, or in multilateral and, particularly, bilateral treaties. He states the strong position in favour of unequivocal consent before the Court can proceed.
 2. *Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objection)*, Judgment of 12 December 1996 (not yet reported).

2. IRAN'S ARGUMENT FOR JURISDICTION

Instituting proceedings on 2 November 1992, Iran alleged a dispute

aris[ing] out of the attack [on] 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.³

These complexes were located on the Iranian continental shelf. The attacks occurred in two separate incidents in 1987 and 1988 during the Iraq/Iran War. Iran claimed a "fundamental breach"⁴ of various provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Treaty) between the parties.⁵

As the over-arching jurisdictional basis of its claim, Iran invoked the provisions of Article XXI(2) of the Treaty, which provides:

[a]ny dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.⁶

It also referred in a general way to breaches of "applicable principles and rules of international law."⁷

As it developed the argument in the course of the proceedings, Iran became somewhat more specific. The Treaty, apparently the only plausible basis for getting into the Court that Iran could find,⁸ did not say that all disputes arising under international law between the parties could be referred to the Court; it said only that disputes "as to the interpretation or

3. Application Instituting Proceedings, filed in the Registry of the Court on 2 November 1992, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1992 ICJ Rep. 763.

4. The Iranian case is so described in Judgment, *supra* note 2, para. 1. The Application in fact uses the words "breached its obligations" and "breached the object and purpose" of the Treaty. See Application, *supra* note 3, at 12.

5. United States and Iran, Treaty of Amity, Economic Relations and Consular Rights, signed at Tehran on 15 August 1955, 284 UNTS 93.

6. *Id.*

7. Application, *supra* note 3, at 8.

8. The United States withdrew its acceptance of the Optional Clause after the Court proceeded with the case brought by Nicaragua against the United States: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment, 1986 ICJ Rep. 14. Iran had not made an appropriate declaration.

application of the present Treaty" might be.⁹ Iran thus emphasized three particular substantive provisions of the Treaty in its written materials. At the oral argument on the Preliminary Objection, Iran conceded that

its claim is strictly based on three very specific provisions of the 1955 Treaty of Amity and that the Court can settle the dispute which is submitted to it on the basis of that Treaty alone.¹⁰

It added that its allegations were based on the particular provisions and "not on the violation of the object and purpose of the Treaty as a whole".¹¹ Moreover, it said that general international law was not invoked as such, but "in order to identify the content and scope of obligations arising from the Treaty".¹²

Iran relied specifically upon Article I, Article IV(1), and Article X of the Treaty.¹³

Article I provides:

[t]here shall be firm and enduring peace and sincere friendship between the United States and Iran.

Article IV(1) provides:

[e]ach High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

Article X(1) provides:

[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.

9. Art. XXI(2) Treaty, *supra* note 5.

10. Judgment, *supra* note 2, para. 13.

11. *Id.*

12. *Id.*

13. Treaty, *supra* note 5.

3. THE UNITED STATES ARGUMENT AGAINST JURISDICTION

The United States argument against jurisdiction had two branches. One was that the Treaty simply did not apply to cases involving the use of force. (I see this as essentially an argument about justiciability, but it can also be read as an attempt to create an implied sovereignty exception to the plain words of the Treaty.) The other was that the particular articles relied upon by Iran could not be interpreted affirmatively in such a way as to support jurisdiction over the claim. The obligations contained therein had nothing to do with what the United States was alleged to have done; if there was no connection between the substance of the claim and the provisions of the Treaty, then there was obviously nothing for the Court to consider about its 'interpretation or application'. So ran the argument. (In this branch, the sovereignty aspects are dominant. The United States was denying that it had agreed to subject claims like the present to the Court's processes.)¹⁴

The Court first addressed the question of force. The nub of the United States argument appeared to be that Treaties of Friendship, Commerce and Navigation (of which category the Treaty of Amity, Economic Relations and Consular Rights was regarded as an example), entered into by the United States with some 14 countries following World War II, did not apply to (and were not understood by the parties to apply to) situations involving combat operations:

[t]he purpose of the treaties is to provide protection for the property and interests of American citizens and companies in the territory of the other party and to assure fair and nondiscriminatory treatment with respect to engaging in commercial, industrial and financial activities in those countries, in return for like assurances for the nationals of those other parties in the territory of the United States.¹⁵

14. Indeed, the tone of the United States argument on this point seemed to be one of total incredulity that anyone would think that it might give up to a third party the right to second-guess its sovereign right to use force when it saw fit.

15. Preliminary Objection submitted by the United States of America, 16 December 1993, at 39-40.

Moreover, according to the United States,¹⁶ any doubts as to the applicability of the Treaty to Iran's claims was dispelled by Article XX(1) of the Treaty, which provides that:

1. The present Treaty shall not preclude the application of measures: [...] (d) necessary [...] to protect its [a party's] essential security interests.¹⁷

4. THE COURT'S HOLDING

For the Court, however, not only was there no provision in the Treaty expressly excluding "certain matters from the jurisdiction of the Court" but also Article XX(1) was open to different interpretations. It could be interpreted as excluding some things from the scope of the Treaty "and, consequently, as excluding the jurisdiction of the Court to test the lawfulness of such matters." On the other hand, it could be read as "affording only a defence on the merits."¹⁸ The Court recalled that in the *Nicaragua* case,¹⁹ it had adopted the second interpretation for an identical clause included in the United States/Nicaragua treaty at issue there. The Court saw no reason to depart from its earlier interpretation.

It accordingly takes the view that Article XX, paragraph 1(d), does not restrict its jurisdiction in the present case, but is confined to affording the Parties a possible defence on the merits should the occasion arise.

In short,

[a] violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Measures relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955.²⁰

The Court then turned to Article I of the Treaty.²¹ Was the assertion that "[t]here shall be firm and enduring peace and sincere friendship"²² between the parties merely aspirational, as the United States asserted? Was

16. *Id.*, at 50.

17. Art. XX(1) Treaty, *supra* note 5.

18. Judgment, *supra* note 2, para. 20.

19. *Nicaragua case*, *supra* note 8, at 116 and 136.

20. Judgment, *supra* note 2, para. 21.

21. *Id.*, paras. 24-31.

22. Art. 1 Treaty, *supra* note 5.

it, on the contrary, the language of obligation, requiring the parties, at minimum, as Iran contended, “to conduct themselves with regard to the other in accordance with the principles and rules of general international law in the domain of peaceful and friendly relations”²³ Did it, in effect, incorporate the relevant provisions of the Charter of the United Nations and of customary law governing the use of force, as well as General Assembly Resolution 2625 (XXV)²⁴ concerning friendly relations among states? What was to be made of the fact that the language was a kind of boilerplate, often found in preambular paragraphs and sometimes in operative articles of Treaties of Friendship that contain additional clauses aimed at clarifying the conditions of their application, such as a reference to particular provisions of the Charter? What was to be made of the whole context?²⁵

The Court came down on the side of a fairly narrow contextual interpretation. This was a treaty whose main objects, expressed in its preamble, were “encouraging mutually beneficial trade and investments and closer economic intercourse generally” and “regulating consular relations” between the two states.²⁶ Hence, the Court concluded that the parties had merely

intended to stress that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations and that such a development would in turn reinforce that peace and friendship.²⁷

It thus followed “that Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and

23. Judgment, *supra* note 2, para. 25. Iran emphasized the political and strategic context of the Treaty, which was entered into following the Iranian oil nationalizations, and the close connection between the Treaty of Amity and American oil interests both in the 1950s and later. See, generally, Observations and Submissions on the US Preliminary Objection, submitted by Iran, 1 July 1994.

24. UN Doc. A/8028 (1970).

25. As a matter of interpretive methodology, the Court, in para. 23 of its Judgment, *supra* note 2, recalls that, according to customary international law as expressed in Art. 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, reproduced in 1155 UNTS 331 (1980), a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Under Art. 32, recourse may be had to supplementary means of interpretation such as the preparatory work and the circumstances in which the treaty was concluded.

26. Judgment, *supra* note 2, para. 27.

27. *Id.*, para. 28.

applied".²⁸ While it might throw light on the interpretation of other Treaty obligations, notably Articles IV and X, it "cannot, taken in isolation, be a basis for the jurisdiction of the Court".²⁹

The Court then considered the jurisdictional possibilities of Article IV(1). For Iran, the obligation of the United States to accord "fair and equitable treatment"³⁰ to Iran's nationals and property, and to refrain from applying "unreasonable or discriminatory measures"³¹ was a standard to evaluate the lawfulness of the use of force against the platforms. For the United States, whatever the detailed obligations might be, they applied only in respect of actions against nationals and companies of Iran that came within its territory and had no application in the present circumstances.

In rejecting the United States argument, the Court observed that while other paragraphs of Article IV had a territorial limitation, paragraph 1 did not.³² However, it did not accept the Iranian position either.

The whole of these provisions is aimed at the way in which the natural persons and legal entities in question are, in the exercise of their professional activities, to be treated by the State concerned. In other words, these detailed provisions concern the treatment by each party of the nationals and companies of the other party, as well as their property and enterprises. Such provisions do not cover the actions carried out in this case by the United States against Iran. Article IV, paragraph 1, thus does not lay down any norms applicable to this particular case. This Article cannot therefore form the basis of the Court's jurisdiction.³³

Finally, the Court turned to the treaty provision which it believed *did* provide a basis for jurisdiction, Article X(1). It guaranteed "freedom of commerce and navigation"³⁴ between the territories of the parties. I take it that the thrust of the Iranian position was that destroying the oil-producing platforms prevented the ultimate sale of some or all of the oil produced by the platforms.³⁵ Since Iran had not claimed that there was any breach of freedom of navigation, the question turned on the meaning of freedom of

28. *Id.*

29. *Id.*, para. 31.

30. Art. IV(1) Treaty, *supra* note 5.

31. *Id.*

32. Judgment, *supra* note 2, para. 35.

33. *Id.*, para. 36.

34. Art. X(1) Treaty, *supra* note 5.

35. As to the puzzling question whether this sale had to be to the United States, *see infra*, at notes 50-51 and accompanying text.

'commerce' in the Treaty. Iran argued that the word 'commerce' as used there

does not contemplate only maritime commerce, but commerce in general; that it protects this without territorial restriction; and that apart from the activities of purchase and sale of goods, it covers those which, at a prior stage enable the goods to be made ready for exchange.³⁶

The United States put forward a restrictive interpretation.

[Commerce] must be understood as being confined to maritime commerce; as being confined to commerce between the United States and Iran; and as referring solely to the actual sale or exchange of goods.³⁷

By looking at the Treaty as a whole, the Court was able to conclude readily that Article X, like the instrument as a whole, was not confined to maritime commerce.³⁸ Moreover, both in its "ordinary sense" and in its legal meaning at the international and domestic level, the word commerce "has a broader meaning than the mere reference to purchase and sale".³⁹ Such an interpretation is bolstered, for the Court, by the Treaty's promise not just of commerce, but of "freedom of commerce".⁴⁰

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.⁴¹

This view was said to gain further strength from Article I of the Treaty:⁴²

[t]he spirit and intent set out in this Article animate and give meaning to the entire treaty and must, in case of doubt, incline the Court to the construction which seems more in consonance with its overall objective of achieving friendly relations over the entire range of activities covered by the Treaty.⁴³

36. Judgment, *supra* note 2, para. 39. "[E]nabl[ing] the goods to be made ready for exchange" would surely include extracting oil from the continental shelf.

37. As summarized in *id.*, para. 40.

38. *Id.*, para. 41.

39. *Id.*, para. 45. (The Court had referred to various legal and non-legal dictionaries.) In paras. 46, 48, and 51 the Court makes various references to 'trade', apparently treating trade and commerce as synonymous.

40. Art. X(1) Treaty, *supra* note 5 (emphasis added).

41. Judgment, *supra* note 2, para. 50.

42. See the discussion on the role of Art. I, *supra*, at notes 21-28 and accompanying text.

43. Judgment, *supra* note 2, para. 16.

In the result, the Court found, by 14 votes to two, as it put it in the *Dispositif*:

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.⁴⁴

5. IMPLICATIONS OF THE COURT'S HOLDING

The Court's stark acceptance of jurisdiction via Article X may represent a new approach in the methodology of the Court in such cases. The Court's earlier cases, as Judge Higgins noted cogently in her *Separate Opinion*,

reveal a struggle between the idea that it is enough for the Court to find provisionally that the case for jurisdiction has been made, and the alternative view that the Court must have grounds sufficient to determine definitively at the jurisdictional phase that it has jurisdiction.⁴⁵

While not specifically saying what it was doing, or dealing with the divergent lines of authority, the Court evidently proceeded in the present instance on the basis that it had to determine the issue definitively at the jurisdictional phase.⁴⁶

Nevertheless, one can safely predict that the meaning of the Treaty's 'jurisdictional' provisions, and the facts that bring them into play, will still need further examination at the 'merits' stage. Jurisdictional considerations often shape the substantive form in which a lawsuit must ultimately be cast.⁴⁷ This case is a good example of the problem. The finding that there

44. *Id.*, para. 55(2). There were sixteen judges because Iran had exercised its right to appoint a judge *ad hoc*. Judges Schwebel and Oda dissented. Judge Schwebel thought it "obvious" that the dispute did not come within the Treaty: "[i]t is obvious from the title, preamble and terms of the Treaty. It is obvious from the circumstances of the conclusion as well as the text of the Treaty when those circumstances are set out. And what the text and circumstances of the Treaty demonstrate is sustained by such subsequent interpretation as the parties have placed upon it". Judge Oda (at para. 23 of his Opinion) saw any dispute that existed as one "going beyond the interpretation or application of the provisions of the bilateral 1955 Treaty of Amity and turning on the scope of the Treaty".

45. Judge Higgins, *Separate Opinion*, para. 9.

46. The point is discussed most carefully by Judge Higgins, (who agrees with the Court's approach) and by Judge Shahabuddeen in his *Separate Opinion* (who disagrees).

47. Another recent case before the Court underscores the way in which jurisdiction may dominate substance. Indonesia invaded and exploited the Portuguese colony of East Timor. Portugal wished to vindicate in judicial proceedings the right of the Timorese people to self-determination. Indonesia had not accepted the jurisdiction of the Court in any helpful

is authority to entertain the claims made 'under' Article X must leave the Iranian litigators with some hard questions about what it is that they must establish substantively to bring their case within the parameters of the grant of jurisdiction. Their initial approach, put at its simplest, was that the basic rules of general international law on the use of force were incorporated or re-stated into the relationship between the parties by the terms of the Treaty. The United States had used force that was unlawful under international law; therefore there was a breach of the bilateral treaty. (The United States, for its part, does not deny the attack, but claims it was justified - it denies illegality.) The effect of the decision seems to be that the parties will still join issue on these matters, but in a much narrower fashion than Iran might have liked. Iran has an additional element (or elements) of proof⁴⁸ beyond general illegality to meet under Article X(1), but it is unclear what exactly these are. Iran will presumably need to show definitively that 'commerce', as defined by the Court to include the production of oil, was taking place. But must it also show that this commerce took place *with the United States* and was terminated unilaterally by the United States attack? What, in short, is the effect of the opening words of the Article: "[b]etween the territories of the two High Contracting Parties"?⁴⁹ At one point in the Judgment, the Court treats the matter as already resolved by the position of the parties;⁵⁰ at another it seems to leave ques-

way. Australia, a neighbour, might be regarded by its actions as complicit in aspects of Indonesia's denial of self-determination and use of Timorese natural resources. It had made quite a general acceptance of jurisdiction. Could a complaint be stated against Australia? Clearly, it had to be one which emphasized Australia's and not Indonesia's sins. Ultimately, while underscoring Timor's right to self-determination, the majority of the Court held that Portugal had failed. It had not managed to state a substantive claim that stood alone against Australia without inextricably involving the absent Indonesia which had not consented to the jurisdiction of the Court. *East Timor (Portugal v. Australia)*, Judgment, 1995 ICJ Rep. 90.

48. Mixed questions of law and fact seem to be involved. Limited grants of jurisdiction to international tribunals often cause confusing overlaps between matters of substantive law and 'jurisdictional' matters. Consider, for example, the requirement at Nuremberg that a crime against humanity, to be within the jurisdiction of the Tribunal, had to be "in execution of or in connection with any [other] crime within the jurisdiction of the Tribunal" (notably aggressive war). Some commentators saw this as a substantive limitation on the concept of crimes against humanity. The true view seems to be that it was merely jurisdictional. See R.S. Clark, *Crimes Against Humanity at Nuremberg*, in G. Ginsburgs & V.N. Kudriavtsev (Eds.), *The Nuremberg Trial and International Law* 177, at 195-196 (1990).
49. Art. X(1) Treaty, *supra* note 5.
50. Judgment, *supra* note 2, para. 44: "[t]he Court does not have to enter into the question whether this provision is restricted to commerce 'between' the Parties. It is not contested between them that oil exports from Iran to the United States were - to some degree -

tions like this open for evaluation at the next stage of the proceedings.⁵¹

The United States has promised to defend the case vigorously on the merits, so it will be interesting to see how such issues play out.

Roger S. Clark

ongoing at least until after the destruction of the first set of oil platforms”.

51. *Id.*, para. 51: “[o]n the material now before the Court, it is indeed not able to determine if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil; it notes nonetheless that their destruction was capable of having such an effect, and, consequently, of having an adverse effect upon the freedom of commerce as guaranteed by Article X, paragraph 1, of the Treaty of 1955. It follows that its lawfulness can be evaluated in relation to that paragraph”. This language even suggests that it may be sufficient to show that the United States actions have affected Iranian commerce with *anyone*. See also *id.*, para. 50, which is open to the interpretation that the Court was focusing on commerce in the sense of transport and storage, rather than in the sense of production (both of which go beyond sale and purchase). Judge Higgins in her Separate Opinion says she is concurring in the Judgment on “limited grounds” which included the “transportational function” of some, but not all, of the installations.

* Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey, United States of America.