Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms *Case*

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Abstract

This article addresses the role of compromissory clauses in limiting the law applicable by the ICJ to disputes concerning the interpretation and application of treaty provisions. In the Oil Platforms *case, the Court essentially tried to avoid such a problematic side-effect of compromissory clauses by relying on principles of treaty interpretation. Accordingly, customary law can be taken into account in order to interpret treaty provisions falling under the Court's jurisdiction. However, this is only a limited mechanism aiming at balancing the principle of consent (underlying the limited jurisdiction under compromissory clauses) and the need to take other international law rules into account when applying treaty rules to the dispute before it. In particular, there are disputes governed at the same time by treaty rules and customary law, which can hardly be settled on the ground of the former only. An inquiry into the jurisprudence of the ICJ shows that the Court is also prepared to consider that disputes concerning the applicability of a treaty fall within its jurisdiction under compromissory clauses. This may be deemed an important tool at the disposal of the Court in order to avoid the fragmentation of international law under compromissory clauses.*

One of the most controversial issues in the judicial settlement of disputes before the International Court of Justice (ICJ) is the relationship between the scope of the jurisdiction conferred on the Court and the law applicable to the dispute. When, in particular, the Court possesses jurisdiction under a compromissory clause of a treaty, the issue arises, in dispute settlement on the interpretation and application of that treaty, as to whether the treaty is the only law applicable. This question is easily solved when

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the parties have different views on the way in which the treaty provisions are to be interpreted or applied. In such case it can be naturally assumed that the dispute must be settled on the basis of the treaty itself. Not infrequently, however, the Court, having jurisdiction under a compromissory clause, must settle disputes over conduct which is governed at the same time by the treaty and by other international rules applicable to the relationship between the parties. In such case, the Court must preliminarily ascertain if the dispute falls within the scope of the jurisdictional clause, and then ultimately identify the rules under which the differing views of the parties must be settled.

1 The Court's Decision in the *Oil Platforms* case

This latter question has been considered by the Court in its interesting decision in the *Oil Platforms* case.[1] The case concerned the legality of certain forcible measures adopted by the United States towards Iran in the context of the Gulf War between Iran and Iraq at the end the 1980s. The jurisdiction of the Court was limited to disputes on the interpretation and application of the 1955 FCN Treaty in force between the parties; therefore, the question arose as to whether the Court could determine the legality of the forcible measures on the basis of the Treaty provisions alone, or whether it could do so on the basis of international customary law on the use of force. That is, the Court had the choice between a narrow approach, focusing on the Treaty provisions as the only law applicable to the dispute, and a broader approach, which would admit that the dispute could be settled according to a wider range of international law rules applying to both of the parties.

The Court adopted an intermediate approach. It relied on international customary law as a means of interpreting the Treaty, in particular Article XX, paragraph 1(d), which contained a saving clause allowing either party to adopt measures that are apparently inconsistent with the Treaty but are necessary for the protection of its essential security interests. Paragraph 41 of the decision reads:

> under the general rules of treaty interpretation, as reflected in the 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' (Article 31, paragraph 3(c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty.

The reference to Article 31, paragraph 1(c) of the Vienna Convention and to the customary law on treaty interpretation codified by this provision, is certainly a novelty in the jurisprudence of the ICJ. However, this approach is not entirely free from ambiguity.

[1] ICJ, judgment of 6 Nov. 2003 in *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, available at www.icj-cij.org.

On the one hand, the decision may appear to be a far-reaching acknowledgement of the interplay between international customary law and treaties. In fact, by making the shift from a dispute concerning the application of the Treaty provisions to one concerning the interpretation of those provisions, the Court seems to have considered interpretation as a means by which to escape the narrow limits of its jurisdictional bounds. In this context, Article 31 of the Vienna Convention seems to play an important role as a means to interconnect different international legal regimes, and could prove able to provide a remedy to the emerging risk of fragmentation of international law. Thus, the relevance of the reference to Article 31 goes well beyond the single case before it. Moreover, the solution adopted by the Court echoes similar solutions by other international tribunals and, in particular, by the WTO judicial bodies,[2] and seems to adhere to widespread interpretative practices adopted by dispute settlement bodies.

On the other hand, by adopting such an approach, the Court may give the impression that the role of international customary rules in disputes brought before it under compromissory clauses is limited to that of an auxiliary aid to the interpretation of treaty provisions. A negative aspect of the Court's finding is that it seems to have implicitly assumed that it was bound in principle to consider the Treaty alone as the law applicable to disputes concerning the Treaty's interpretation and application.

This strict approach, however, would not be warranted, on the basis of sound legal reasoning nor by reference to previous jurisprudence. Its technical coherence would appear questionable and, furthermore, it could dramatically fragment the unity of the international legal order, at least in those cases in which the treaty in question contains no provision which could be reasonably interpreted as a reference to international customary law.[3]

There is thus a strong case for reconsidering the issues raised in this decision in more general terms. In the following sections an attempt will be made to demonstrate that a broad recourse to international customary law, as well as to other legal rules

[2] However, the approach of WTO dispute settlement bodies is different to some extent. According to Art. 3(2) of the Dispute Settlement Understanding, panels and the Appellate Body can take into account only 'customary rules of interpretation of public international law'. The dispute settlement organs have had wide recourse to Art. 3 in their case law: see *US – Gasoline*, WT/DS2/ABR, 29 Apr. 1996; *Japan – Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 Oct. 1996; *US – Section 301 Trade Act*, WT/DS152/R, 22 Dec. 1999; *US – Shrimp*, WT/DS58/AB/R, 12 Oct. 1998; *India – Patents (US)*, WT/DS50/AB/R, 19 Dec. 1997; *EC – Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, 16 Jan. 1998; *Canada – Pharmaceutical Patents*, WT/DS114/R, 17 Mar. 2000. Arguably, this reference to interpretation rules was the only way to take into account a broader range of international rules than those embodied in the covered agreements and, in particular, rules of customary international law. See, e.g., the *US – Section 301 Trade Act* case (*supra*), applying general rules on state responsibility (para.7.80), and the *EC – Hormones* case (*supra*), taking into account the precautionary principle (paras. 120-125).

[3] See Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' [1999] *NYU J Int'l L and Pol* 791; Dupuy, 'L'unité de l'ordre juridique international', 297 *RCADI* (2002) 9; Koskenniemi and Leno, 'Fragmentation of International Law? Postmodern Anxieties' [2002] *Leiden J Int'l L* 553.

applicable between the parties, in the context of disputes on the interpretation and application of a treaty, is perfectly consistent with the principles of the judicial settlement of disputes and is part of the well-established jurisprudential trends of the ICJ.

2 The Compartmentalization of Disputes under a Treaty: A List of Problems

The difficulty of dealing with this issue essentially derives from the fact that compromissory clauses in a treaty have a compartmentalizing effect. They tend to draw a dividing line between the category of disputes which fall within their scope – which must be settled solely on the basis of the treaty provisions – from those which fall outside their scope.

Thus, compromissory clauses presuppose the existence of a perfect symmetry between the scope of the jurisdictional clause and the law applicable to it.[4] However, the need to obtain that symmetry might lead to a narrow construction of the notion of 'dispute on the interpretation and application of the treaty'. If we accept that this notion relates only to the different views of the parties in relation to how a certain treaty provision must be interpreted or applied, then there is no difficulty in accepting that the treaty is the only law applicable to the dispute. The scope of the jurisdictional clause and the identification of the law applicable to the dispute become two overlapping notions, defined on the basis of and complementing each other.

However, uncertainty is created when the parties have different views about the identification of the law which governs certain conduct. For example, one of the parties may invoke a treaty provision in order to assess the unlawfulness of a certain conduct, whilst the other may invoke other international rules which justify the conduct that is allegedly inconsistent with the treaty or which may materially interfere with the treaty and narrow its scope. Disputes of this kind entail an assessment of the interplay between the various sources of international law in force as between the parties and which interfere with each other. The assessment of that interplay thus constitutes the true object of the dispute.

How to deal with disputes of this type is highly controversial. They do not fall plainly within the scope of the jurisdictional clause, nor clearly outside it; they straddle the dividing line. The existence of disputes of this kind thus calls into question the assumption that a neat borderline separates two categories of disputes: those falling within and those falling outside the scope of a jurisdictional clause.

Abstractly speaking, there are two different ways in which the question can be framed, both of which, however, although for different reasons, appear untenable. Either the dispute must be split into parts, each corresponding to the scope of the different legal rules applicable to them (with the consequence that only the part which

[4] Certainly, such symmetry may exist. It actually happens that disputes brought under a compromissory clause can be exclusively settled on the basis of treaty provisions. The case law of the Court affords us several cases of this type. See, e.g., the ICJ judgment of 18 July 1966, *South West Africa cases (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase [1966] ICJ Rep 6.

falls under the scope of the treaty can be settled) or, alternatively, the dispute must be considered in its entirety outside the scope of the jurisdictional clause, with the consequence that the Court must decline its jurisdiction.

The first perspective presupposes the possibility of separating the structural elements of a dispute according to the scope of the compromissory clause. The part concerning the application of the treaty, falling within that scope, could be settled on the basis of treaty provisions. The remaining part, governed by other legal rules, would remain unsettled.

This construction relies on the need to maintain a certain connection between the scope of the jurisdiction of the Court on the one hand and, on the other, the law applicable to that dispute. This aim could seemingly be reached by removing the part of the dispute that falls under the jurisdictional clause and by settling it according to the treaty provisions. From the normative perspective, however, this would produce an artificial isolation of the treaty in the complex normative dynamics of international law. A compromissory clause, included in a treaty in order, presumably, to facilitate the parties deferring disputes to the Court, would have the unintended effect of cutting its ties with the rest of international law; of producing an autonomous conventional sub-regime.

A brief look at the pitfalls produced by the construction above is sufficient to evidence its inappropriateness. First, to split the dispute into parts is not always possible; certainly it is not possible when the dispute revolves around the way in which the respective scope of diverse legal rules invoked by the parties must be coordinated. In such situation, the idea of settling a part of the dispute under one isolated legal instrument appears nonsensical. However, even when it is logically possible to split the dispute into parts to be distinctly adjudged under different legal rules, this produces further incoherence. In fact, it may happen that the application of the two different legal rules leads to two contradictory solutions. For example, the conduct may be unlawful under treaty provisions and lawful under customary law.[5] Thus, the Court decision

[5] When asked to settle a dispute on the grounds of a compromissory clause, we assume that the Court can only rely on the provisions of the treaty embodying such a clause. From the viewpoint of the interplay between different treaties, this assumption has another problematic consequence. When two states by a subsequent treaty merely supplement a conventional regime previously agreed upon, the Court then faces a difficult situation if its jurisdiction is limited to the former treaty. Can the Court take into account the later discipline? This hypothesis is not so far-fetched. For example, with respect to its subject-matter jurisdiction, the Rome Statute can be considered as an implementation of the Genocide Convention providing under Art. IV that 'persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. Moreover, with respect to disputes concerning genocide the ICJ has jurisdiction only under the compromissory clause embodied in Art. IX of the Genocide Convention. Clearly, the dispute which may arise on the applicability of treaty provisions can hardly be split into two separate parts, each governed by a different treaty. Thus, the principle according to which the jurisdiction of the Court should be strictly connected to the applicable law (the Genocide Convention) clashes with the principle of consent (the subsequent ratification of the Rome Statute). Undoubtedly, the parties originally expressed their willingness to bring their claims before the Court, but then decided to modify the relevant legal regime applicable to the dispute. Strictly speaking, it is not even possible to say that the Court has no jurisdiction, unless the subsequent treaty can be considered as

would not be able to pronounce the 'final word' on the dispute and could allow one of the parties to refuse to abide by it. This might render the judgment practically useless and put at stake the authoritativeness of the judicial settlement of disputes.

True, the Court has admitted more than once that the parties may bestow jurisdiction upon it to adjudge only one part of a more complex dispute. In such case, the binding character of the decision is not imperilled, as the parties are bound by the part decided by the Court and may pursue a settlement of the other parts by diplomatic means. However, this has been done only following an explicit request by the parties, who delimit the part of the dispute to be decided by the Court. It is debatable whether this may constitute a side-effect of the inclusion of a compromissory clause in a treaty. Whereas the parties are certainly able to split a dispute and defer only a part of it to judicial settlement, it is much more difficult to presume that they intended the compromissory clause to have such a far-reaching effect. Rather, the opposite presumption appears much more persuasive, namely, that the attribution of jurisdiction to the Court is made conditional on the fact that the entire dispute falls under the scope of the jurisdictional clause.[6]

This paves the way for considering a second perspective, which, rather than assuming the possibility of splitting the dispute in two parts, each governed by different provisions, tends to emphasize its unitary character.

Under this approach, one may be tempted to conclude that a dispute falls within the scope of the jurisdictional clause only if the parties agree in principle that their different views concern only the way in which the treaty must be interpreted or applied. In other words, the pre-condition for the Court to have jurisdiction would be the existence of an agreement between the parties as to the identification of the treaty as the only law applicable to the dispute. If, on the contrary, there is no such agreement and the parties invoke different legal rules as the basis for the conduct in question, the dispute does not fall within the scope of the compromissory clause and the Court must decline its jurisdiction. This may be the case if, for example, one of the parties, instead of disputing the legality of certain conduct under the treaty, acknowledges in principle that it is inconsistent with the treaty provisions and invokes a different legal rule as the basis for its action.

This conclusion could appear to be appropriate. If the parties agree in principle on the applicability of the treaty, but disagree as to the effect on the treaty of a different legal rule, it can hardly be said that the dispute concerns the application of the treaty and therefore

derogating from the compromissory clause. Arguably, the Court should still apply the first agreement while taking into account later provisions which modify its obligations. Moreover, to rule out the possibility of the Court taking into account the subsequent treaty provisions would lead to the paradoxical result that the dispute would be settled according to a legal regime that applied to it only in part.

[6] The compartmentalizing effect of compromissory clauses included in a treaty might finally encourage the emergence of forum shopping by parties. It is likely that the party which bases its claim on the treaty will tend to refer the dispute to the Court, whereas the other party will rather tend to contest the jurisdiction of the Court, or to settle the dispute according to other dispute settlement mechanisms. This is, for instance, what happened with respect to the *Swordfish* case. The dispute between Chile and the EC was actually brought by the EC before the WTO DSB – invoking the breach of Articles 5 and 11 of the GATT – and by Chile before the ITLOS – invoking the violation of several articles of the UNCLOS – respectively. See the EC request for consultations and establishment of a panel, WT/DS 193/1 and WT/DS 193/2 as well as the claim by Chile before the ITLO's case no. 7 (www.itlos.org).

falls within the scope of its compromissory clause. However, this conclusion clashes with a practical consideration. The effectiveness of the obligation to submit a dispute to judicial settlement would be seriously endangered if the jurisdiction of the Court regarding a treaty could be set aside if one of the parties were to invoke a different legal rule as the basis for its conduct. To admit that the jurisdiction of the Court depends on the contention of the parties as to the law which governs the dispute would be tantamount to depriving the jurisdiction clause of its effectiveness by affording the parties a simple way to circumvent it.

It may be useful to note what the ICJ said in the *ICAO's Council* case,[7] in which the Court was faced with a somewhat analogous situation to the one above. The dispute originated from the refusal by India to allow Pakistani aircraft to overfly its territory, in contravention of the Chicago Convention and the related transit agreement. It did so on the grounds that its obligations towards Pakistan had been suspended due to the alleged involvement of Pakistan in the hijacking of an Indian aircraft. Following the referral of the dispute to ICAO's Council by Pakistan, India contended that the jurisdiction of this organization to hear complaints about conduct inconsistent with the Chicago Convention did not extend to its conduct, because 'the Indian action had been taken wholly outside the [treaties], on the basis of general international law'. The reply of the Court was direct:

> The acceptance of such a proposition would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses by allowing a party first to purport to terminate, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension – whereas of course it may be precisely one of the objects of such a clause to enable that matter to be adjudicated upon.[8]

This case decided on the competence of a judicial body to hear, under a treaty's compromissory clause, disputes concerning the legality of the termination or suspension of a treaty.[9] However, its implication goes well beyond this particular scenario. It seems to imply that the jurisdiction of a judicial body under a treaty does not depend on the different views of the parties as to how the treaty must be applied,[10] but rather extends to ascertain whether the treaty is applicable to conduct taken on the basis of international

[7] ICJ judgment of 18 Aug. 1972 in *Appeal relating to the Jurisdiction of the ICAO Council (India v Pakistan)* [1972] ICJ Rep 46.

[8] *Ibid.*, at para. 32.

[9] See the ICJ judgment of 25 Sept. 1997 in *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, which, however, was brought before the Court on the basis of a special agreement referring the dispute to the Court.

[10] In its judgment no. 6 of 25 Aug. 1925, *Case Concerning certain German Interests in Polish Upper Silesia*, PCIJ Rep, Ser. A Vol.1, the PCIJ was faced with the divergent views of the parties on the law applicable to the dispute. In particular, Poland refuted the argument that the provisions of the Geneva Convention embodying the jurisdictional clause were relevant to the dispute. Yet the Court clearly held 'that the Court's jurisdiction cannot depend solely on the wording of the Application; on the other hand, it cannot be ousted merely because the respondent Party maintains that the rules of law applicable in the case are not amongst those in regard to which the Court's jurisdiction is recognised. The Court must, in the first place, consider whether it derives from Article 23 of the Geneva Convention jurisdiction to deal with the suit before it and, in particular, whether the clauses upon which the decision on the Application must be based, are amongst those in regard to which the Court's jurisdiction is established' (at 15).

customary law.[11] This rationale may include situations in which a treaty in force between the parties is not applicable to certain conduct by virtue of a rule which has the effect of narrowing its scope or affording the parties a justification for disregarding its provisions.

In situations of this type, the Court has not considered the possibility of splitting the dispute into two parts, or of declining its jurisdiction. A contrary principle has been affirmed; disputes concerning the applicability of a treaty fall within the jurisdiction conferred on the Court by compromissory clauses contained therein. This observation provides a firm basis for proceeding further in our inquiry. Once it is ascertained that the Court's jurisdiction arising under a compromissory clause encompasses the jurisdiction to decide disputes on the applicability of a treaty to a given situation, the only step that remains to be accomplished is the identification of the law to be applied in order to settle the dispute.

3 The ICJ's Jurisprudence: An Analytical Review

In consideration of the remaining step to be taken, as mentioned above, it is worth examining how this issue has been dealt with in the jurisprudence of the Court.

The results, whilst still tentative, of this line of research are certainly promising. Despite the relatively small number of cases in which this issue has arisen, the jurisprudential trends are well settled and offer some guidance on how to solve the question in more general terms. Without any pretence at exhausting the variety of relationships between international customary law and treaties, four different classes of situations can be distinguished.

A *International Customary Law Invoked as the Only Legal Basis for Assessing the Legality of the Conduct*

The first class includes cases in which the Court found itself unable to adjudge on the basis of a compromissory clause included in a treaty and grounded claims on international customary law instead.

Probably the most famous example of this class is the *Nicaragua* case.[12] Nicaragua asked the Court to ascertain, *inter alia*, if the conduct of the United States was in breach of the obligation not to prejudice the object and the purpose of the 1956 FCN Treaty in force between them. The Court, however, considered this claim to be grounded not so much on the treaty but rather on a rule of customary law.[13] Accordingly, it held itself to be empowered to deal with the claim only because it possessed

[11] See ICJ judgment of 11 July 1996 in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia)*, Preliminary Objection [1996] ICJ Rep 595. Even if no alternative ground of jurisdiction had been invoked in this decision, the Court established that the dispute between the parties actually fell under the relevant compromissory clause. In particular, it held that Art. IX of the Genocide Convention 'does not exclude any form of State responsibility' (at para. 32).

[12] ICJ judgment of 27 June 1986 in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United* States) [1986] ICJ Rep 14.

[13] *Ibid.*, at para. 270 ('Nicaragua has relied on the existence of a legal obligation of States to refrain from acts which would impede the due performance of any treaties entered into by them. However, if there is a duty of a State not to impede the due performance of a treaty to which it is a party, this is not a duty

jurisdiction on the basis of the unilateral declarations made by the parties in accordance with Article 36, paragraph 2, of its Statute.[14] The compromissory clause embodied in the 1956 Treaty was not considered to be an appropriate ground of jurisdiction 'to entertain a claim alleging conduct depriving the treaty of its object and purpose'.

One may cast doubts on the correctness of the Court's construction as to the obligation not to prejudice the object and the purpose of a treaty.[15] However, if this obligation is, as here, traced back to a rule of international customary law, the finding of the Court seems to constitute a consistent and sustainable approach towards the limits of the jurisdiction conferred by the treaty. Arguably, the alleged breach of the obligation not to prejudice the object and purpose of the treaty could have been considered (and was actually considered) by the Court as a completely separate claim from that pertaining to specific treaty provisions.

B *International Customary Rules relating to the Application of the Treaty*

On some occasions, the Court, asked to settle disputes on the interpretation and application of treaties on the ground of compromissory clauses, has applied international customary law when customary rules and treaty obligations complemented one another.

As pointed out above, in the *ICAO Council* case[16] the Court held that compliance with the customary rules on suspension or termination of a treaty was an essential element to be taken into account in establishing whether the relevant treaties had been breached by India. A second aspect of this decision is worth mentioning. India's claim, arguing that the dispute fell outside the scope of the treaty, was partially grounded on the presence of a saving clause in the Chicago Convention.[17] Thus, the question arose as to the role of this provision in limiting the Court's power to take customary law into account when called to settle a dispute on the applicability of the treaty provisions.

The Court acknowledged that the saving clause was the object of particular disagreement between the parties and that the ICAO Council was competent to settle, amongst others, such a dispute. Therefore, the Court indirectly refuted India's argument that the mere presence of a saving clause in a treaty containing a compromissory clause is sufficient to deprive the competent judicial body of the power to take

imposed by the treaty itself. Nicaragua itself apparently contends that this is a duty arising under customary international law independently of the treaty, that it is implicit in the rule *pacta sunt servanda*').

[14] *Ibid.*, at para. 271 ('It is only because in the present case the Court has found that it has jurisdiction, apart from Article XXIV, over any legal dispute between the Parties concerning any of the matters enumerated in Article 36, paragraph 2, of the Statute, that it can proceed to examine Nicaragua's claim under this head').

[15] Should the compromissory clause limit the Court's decision to breaches of specific treaty provisions, this would result in the complete isolation of general rules on the law of treaties, such as that under examination, from the obligations arising under the treaty. Thus, the risk is not only that of fragmenting international law, but also that of depriving general rules of their object.

[16] *Supra* note 7.

[17] Art. 89 reaffirms the freedom of action of the contracting parties in times of war or national emergencies.

general international law into account when asked to interpret or apply the treaty.[18] This position is particularly significant since it rejects the existence of a general presumption according to which saving clauses are intended to isolate the legal regime established by a treaty from general international law.

In the *ELSI* case[19] the Court was confronted with a similar question. In this case, the US claimed that Italy had violated the 1948 FCN Treaty in force between the parties, by preventing US companies from liquidating the assets of the wholly-owned Italian corporation ELSI and by causing the latter's bankruptcy. Italy replied that the US application was not admissible because local remedies had not been exhausted. The Court's jurisdiction was grounded on Article XXVI of the FCN Treaty,[20] which, however, made no mention of the exhaustion of the local remedies rule. Indeed, the US maintained that this rule developed independently of the treaty as a customary international law rule and, therefore, should not apply to the dispute, which essentially focused on the breach of treaty obligations. Yet the Court found 'itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so'.[21] Interestingly, the Court explained that it was impossible to dissociate the claim on the exhaustion of local remedies from the dispute over the alleged violations regarding the US companies.[22] The Court admitted that the parties could have made, should they have so desired, the rule on diplomatic protection independent from the rule on previous exhaustion of local remedies. However, this should have been done by explicit terms and could not be presumed in a bilateral treaty having a different aim.

When read in conjunction with previous cases, the reasoning of the Court seems unequivocal. Assuming that its jurisdiction is limited by a compromissory clause to disputes relating to the interpretation and application of treaty provisions, the Court is prepared to take into account other international rules and, in particular, customary international law, when this has a direct impact on the applicability of the treaty in question.

C *International Customary Law Invoked as a Justification for Conduct Allegedly Inconsistent with a Treaty*

The Court has frequently been confronted with disputes over conduct which could be considered unlawful under specific treaty provisions, but which could be justified in

[18] An argument similar to India's claim was put forward by Vice-president Schwebel in his Dissenting Opinion attached to the ICJ judgment on the *Oil Platforms* case – Preliminary Objections, *supra* note 1. Accordingly, the inclusion of a saving clause in a treaty should be interpreted as an expression of the parties' intention to keep the object of such clause outside the scope of the treaty.

[19] ICJ judgment of 22 July 1989 in *Case Concerning Elettronica Sicula SpA (ELSI) (USA v Italy)* [1989] ICJ Rep 15.

[20] According to Art. XXVI, the Court can settle disputes arising between the parties concerning the interpretation and application of the FCN Treaty.

[21] *Ibid.*, at para. 50.

[22] *Ibid.*, at para. 51.

the light of customary international law. Examples of this may be found throughout the whole spectrum of the ICJ's jurisprudence.

A particularly clear example is that of the decision of the Court in the *Lockerbie* case (*preliminary exceptions*),[23] in which the parties clearly expressed different views about the law governing the conduct in question. Indeed, Libya asked the Court to hold that it had been fully justified, under the terms of the Montreal Convention, to reject the request of the United States and the United Kingdom to extradite two Libyan nationals who had allegedly brought about the destruction of an aircraft over Lockerbie, and to institute criminal proceedings itself against the two individuals. Moreover, Libya asked the Court to hold that the two respondent states were in breach of the Convention, on the grounds that they refused to cooperate with Libya in the criminal proceedings and tried to enforce their requests with means not contemplated by the Convention. On the other hand, the respondent states, without denying that abstractly the facts of the case could fall within the terms of the Montreal Convention, contested the jurisdiction of the Court over conduct described by them as a reaction towards a state involved in acts of terrorism, thus governed by international customary law.

In two separate decisions the Court held that its jurisdiction under a compromissory clause of the Montreal Convention[24] extended so far as to enable it to decide on the legal regime applicable to the conduct:

> the parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal regime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.[25]

More explicitly, the Court rejected the UK and US argument, according to which 'it is not for the Court, on the basis of Article 14, paragraph 1, of the Montreal Convention, to decide on the lawfulness of actions which are in any event in conformity with international law, and which were instituted by the Respondent to secure the surrender of the two alleged offenders'. The answer of the Court leaves no space for doubt: 'it is for the Court to decide, on the basis of Article 14, paragraph 1, of the Montreal Convention, on the lawfulness of the actions criticised by Libya, in so far as those actions would be contrary to the provisions of the Montreal Convention'.[26]

Although the Court did not make any reference to the law applicable to the dispute, this finding seems unequivocal. The application of international customary law affording, under certain conditions, a justification for conduct apparently inconsistent

[23] ICJ judgment of 27 Feb. 1998, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v UK)*, Preliminary Observations [1998] ICJ Rep 9, and ICJ judgment of 27 Feb. 1998, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v USA)*, Preliminary Objections [1998] ICJ Rep 115.

[24] Art. 14(1).

[25] *Lockerbie cases, supra* note 24, respectively, at paras. 25 and 24.

[26] *Ibid.*, respectively, at paras. 35-36 and 34-35.

with a treaty, is necessary in order to integrate the yardstick against which the legality of that conduct must be measured.

The Court was confronted with a similar situation in the *Hostages* case.[27] The case originated from the seizure and holding as hostages of US diplomatic and consular staff in Tehran by Iranian nationals. Thus, the United States asked the Court to assess whether the Vienna Conventions of 1961 and 1963 and the 1955 FCN Treaty had been breached. On the other hand, Iran stated in two communications to the Court that the allegedly unlawful conduct could not be separated from the broader context of US interference in the domestic affairs of Iran, and thus it was justified in the light of previous unlawful activities by the US.

In this case the Court exhibited a certain readiness to consider justification for conduct which was alleged to be inconsistent with the treaty that conferred jurisdiction on the Court. Indeed, once it was established that the Iranian conduct was unlawful, the Court considered itself under a duty to examine one further element, namely, whether the unlawful conduct of Iran 'might be justified by the existence of special circumstances'.[28] Although the Court did not unveil the legal qualification of the special circumstances which could have justified the Iranian conduct, there is little doubt that it referred to the regime of countermeasures under the customary law of state responsibility.

In the end, the Court rejected the Iranian contention. It found that the ordinary regime of countermeasures, which was seemingly relied upon by the respondent, was derogated from by the Treaty which provided for a proper response to the US breach alleged by Iran. The Court went on to qualify this as a self-contained regime. Independently of the appropriateness of this formula in that particular case,[29] it is clear that the Iranian contention was rejected not because the Court felt unable to apply international customary law by virtue of its jurisdictional bounds, but rather because the Treaty itself provided the proper redress for the alleged breach.[30] Thus, more generally, when a treaty aims to constitute a self-contained regime, the Court will normally apply only the treaty.[31] Indeed, under such circumstances the treaty provides a regime which is aimed at substituting, at least partially, general international law.

[27] ICJ judgment of 24 May 1980 in *Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v Iran)* [1980] ICJ Rep 3.

[28] *Ibid.*, at para. 80.

[29] For a comprehensive study of this difficult notion see Simma, 'Self-contained Regimes', 16 *Netherlands Yearbook of Int'l L* (1985) 111.

[30] *Ibid.*, at para. 86.

[31] As the Court held in the *Nicaragua* case: '[i]n general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim': *supra* note 13, at para. 274. See PCIJ judgment 5 of 26 Mar. 1926 in *The Mavrommatis Jerusalem Concessions*, PCIJ Rep, Ser. A Vol.1. The Court rejected the Greek argument that treaty provisions had to be supplemented by certain rules taken from general international law considering 'that Protocol XII is complete in itself, for a principle taken from general international law cannot be regarded as constituting an obligation contracted by the Mandatory except in so far as it has been expressly or implicitly included in the protocol' (at 27).

D *International Customary Law Invoked in Order to Determine the Scope of a Treaty*

It now remains to consider the last class of situations – those in which the Court has taken into account international customary law in order to determine the precise scope of a treaty that it was asked to interpret and apply on the basis of a compromissory clause.

Arguably, this is what the Permanent Court of International Justice (PCIJ) did in the *Wimbledon* case.[32] Some state parties to the Treaty of Peace of Versailles instituted proceedings against Germany on the basis of a compromissory clause included in that treaty. They alleged that Germany, by refusing passage through the Kiel Canal to a British vessel, was in breach of Article 38, which imposed on Germany the obligation to maintain the Canal open to all vessels of nations at peace with Germany.[33] Germany contended that its conduct was governed by international customary law rules imposing on neutral powers the obligation not to allow their territory to be used for belligerents' aims. According to Germany, the treaty did not intend to derogate from international customary law; rather its provisions should be framed in the wider context of the rights and duties descending from territorial sovereignty and should be coordinated with them. According to Germany, therefore, there was a case for the Court to exercise its jurisdiction under the Treaty in order to assess the scope of the Treaty in its interplay with other international law rules materially interfering with the Treaty provisions.[34] The relevant passage of the decision reads:

> The argument has been advanced that the general grant of a right of passage to vessels of all nationalities through the Kiel Canal cannot deprive Germany of the exercise of her rights as a neutral power in time of war, and place her under an obligation to allow the passage through the canal of contraband destined for one of the belligerents; for, in this wide sense, this grant would imply the abandonment by Germany of a personal and imprescriptible right, which forms an essential part of her sovereignty and which she neither could nor intended to renounce by anticipation.[35]

The Court did not reject, in principle, the German contention. On the contrary, it seemed to sympathize with the argument that its jurisdiction under the treaty covered the different views of the parties as to the mutual scope of the treaty and of international customary law. It is only because it adopted a different construction of the treaty and, in particular, it construed the treaty provisions on the Kiel Canal as having a self-contained character, *se suffissant à lui-même*, that the Court rejected on its

[32] PCIJ judgment 1 of 28 June 1923, *Case of the S.S. 'Wimbledon'*, PCIJ Rep, Ser. A Vol. 1.

[33] The Permanent Court was involved on the basis of Art. 386 of the Treaty of Versailles, which conferred jurisdiction on the Court 'in the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these Articles'.

[34] This task is usually discharged by international tribunals when they decide a dispute over which they have full jurisdiction. See, e.g., the ICJ judgment of 12 Apr. 1960 in *Case Concerning Right of Passage over Indian Territory – Merits (Portugal v India)* [1960] ICJ Rep 6, or the decision of the arbitral tribunal which adjudicated on the dispute between France and Spain in the *Lac Lanoux* case, 24 ILR (1957) 101.

[35] *Wimbledon* case, *supra* note 33, at 25.

merits the German contention as to the applicability of international customary law and ascertained that the German conduct constituted a breach under the treaty.[36]

Undeniably, there is some analogy between the findings of the PCIJ in the *Wimbledon* case and those contained in the decision of the ICJ in the *Hostages* case. In both, the Court asserted the self-contained character of the treaty in question in order to avoid considering the effect of international customary law on the applicability of the treaty. True, in both cases the self-contained character of the treaty is not uncontroversial; rather one can reasonably maintain that international customary law, although in principle interfering with the treaty provisions, could not be construed as asserted by the respondent parties. What is worth pointing out, however, is that in both cases the Court refused to assess the legality of the conduct of the respondent state according to international customary law not for want of jurisdiction, but only because international customary law was not relevant for the case before it.[37]

A restatement of this principle is contained in the decision of the PCIJ in the *Chorzów Factory* case.[38] In this case the Court recognized that disputes arising under a compromissory clause relating to the application of treaty provisions 'include not only those relating to the question of whether the application of a particular clause has or has not been correct, but also those bearing upon the *applicability* of these articles, that is to say, upon any act or omission creating a situation contrary to the said articles.'[39] From a general perspective, the Court considered that its jurisdiction under a compromissory clause is not limited to an assessment of the facts in the light of relevant treaty provisions, but also includes the taking into account of other international law rules which can interact with the treaty.

4 Concluding Remarks

From the previous analysis, one conclusion seems to emerge unequivocally: the Court has adopted quite a broad interpretation of the notion of 'disputes on the interpretation and application of the treaty'. In connection with this stance, the scope of

[36] In particular, the Court held: '[t]he provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII, they would lose their "raison d'être" ': *ibid.*, at 23-24.

[37] This was explicitly affirmed in the *Polish Upper Silesia case*, *supra* note 10. The Court held that the differences of opinion contemplated by the compromissory clause of the Geneva Convention, 'which refers to Articles 6 to 22, may also include differences of opinion as to the extent of the sphere of application of Articles 6 to 22 and, consequently, the difference of opinion existing between the Parties in the present case' (at 16). Accordingly, the Court found that its jurisdiction under the compromissory clause 'in regard to differences of opinion between the German and Polish Governments respecting the construction and application of the provisions of Articles 6 to 22 concerning rights, property and interests of German nationals is not affected by the fact that the validity of these rights is disputed on the basis of texts other than the Geneva Convention' (at 18).

[38] PCIJ judgment 8 of 26 July 1927 in *Case Concerning the Factory at Chorzów – Jurisdiction*, PCIJ Rep, Ser. A Vol. 1.

[39] *Ibid.*, at 20-21 (emphasis added).

jurisdictional clauses has been expanded correspondingly, so as to encompass disputes over the legal regimes and pertinent rules applicable to a certain conduct.

Theoretically this conclusion has two main consequences. First, it dispels the fear that the mere inclusion of compromissory clauses within a treaty may prevent the application of other legal rules and may thus contribute to segmenting international law. In many instances in which the Court felt that the application of international customary law might contribute to the settlement of a dispute concerning the applicability of a treaty, it has not hesitated to apply it. Thus, whereas the parties to a dispute are always at liberty to determine the law applicable to them, the mere inclusion in a treaty of a compromissory clause cannot, by itself, have the effect of fragmenting the unity and the coherence of international law.

The second observation is that this broad notion of 'disputes on the interpretation and application of a treaty' establishes a symmetrical relationship between the scope of a jurisdictional clause and the law applicable to the dispute. If, in other words, the parties have different views on the applicability of a treaty to certain conduct, the settlement of the dispute entails the taking into account of all the pertinent legal rules which may interfere with it. Yet, the Court does not settle the dispute directly on the basis of international customary law. Rather, it assesses the effect produced by international customary law on the applicability of the treaty provisions to the conduct. Indeed, international customary law contributes to setting up the legal framework in which the application of a treaty takes place, be it by dictating rules relating to its application, by affording the parties a legal manner in which to exceptionally disregard its provisions, or by curtailing its scope.

It is not easy to determine how the finding of the Court in *the Oil Platforms* case fits into this jurisprudential trend. On the one hand, there are reasons for welcoming the finding of this case as a further step towards a wider consideration of international customary law in the judicial settlement of disputes concerning the interpretation and application of a treaty. After all, by taking into account international customary law on the use of force as a part of the treaty interpretation, the Court has refuted that the mere existence of a compromissory clause within the FCN 1955 Treaty could have the effect of cutting the ties with the rest of international law, isolating the treaty and creating a regime *se suffisant à lui-même*. Contextual interpretation may have been considered by the Court, in light of the particular circumstances of the case, as a way to attain this aim without needing to examine the complex relations between the treaty and international customary rules on the use of force. Sound judicial prudence could suggest that a court go no further than required to achieve such purpose.

On the other hand, those who advocated a more direct consideration of international customary law for settling that case may regret that the Court did not take this opportunity to make a more determined step in that direction, rather than grounding its decision on an argument that is not free from ambiguity.[40] Contextual interpretation

[40] See the separate opinion of Judge Simma appended to the ICJ judgment in the *Oil Platforms* case, *supra* note 1, available at, http://212.153.43.18/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106_simma.PDF.

was certainly not the only means at the disposal of the Court for remedying the looming risk of fragmentation inherent in a narrow interpretation of the compromissory clauses included in a treaty. An alternative path was to make clear that its jurisdiction under the treaty extended so far as to be able to decide if the conduct by the United States, allegedly inconsistent with the treaty, was nonetheless justified as an act of self-defence. Indeed, self-defence was invoked by the United States as a justification for its conduct; they maintained, however, that it was not for the Court, only having jurisdiction to decide disputes on the interpretation and application of the treaty, to decide on the legality of its action under the customary law of self-defence. Arguably, the Court would have lost an opportunity to restate its previous jurisprudence and make a pronouncement on the relationship between the scope of a jurisdictional clause of a treaty and the law applicable to the dispute.

There is some merit in both of these views. Questions of jurisdiction must certainly be considered with great caution by a judicial body whose jurisdiction depends on the consent of the parties. A cautious approach seems the most opportune at this time in which there is growing fear of an abusive use of compromissory clauses in treaties, which could be relied upon in order to bring before the Court disputes having a political character, and which are only remotely connected with it. Moreover, a too liberal attitude could produce an adverse impact on judicial settlement of disputes, as states would be much more reluctant to include jurisdictional clauses in a treaty.

There are many instances in which this fear has found voice. Among others, it is worth mentioning the dissenting opinion appended to the decision of the ICJ in the *Lockerbie* case by Sir Robert Jennings, sitting in the Court as *ad hoc* judge.[41] In severely criticizing the decision of the Court, Sir Robert Jennings cast a harsh warning against the effect of a wide interpretation of jurisdictional clauses included in FCN treaties, which, in his view, would exceedingly enlarge the scope of these clauses and allow them to be used for bringing before the ICJ disputes going well beyond the limited object and purpose of such treaties.

However, the analysis contained in the previous paragraphs seems to demonstrate that this fear is unfounded. The Court has in fact used the jurisdiction conferred on it by compromissory clauses with much prudence, and has accepted jurisdiction to settle disputes only if there is a clear connection between the conduct around which the dispute revolves and the treaty. It is only when a conduct governed by a plurality of rules falls clearly within the scope of one or more of the obligations incumbent on the parties to a treaty that the Court has felt enabled, in order to settle the dispute, to ascertain the relationship between these rules. In cases of this kind, the enlargement of the scope of its jurisdiction and the taking into consideration of this wider set of rules applicable to the dispute, constitute the only way to set aside the incumbent danger of fragmentation of the law.

It is against this wide background that the holding of the ICJ in the *Oil Platforms* case must be read. What the Court did on this occasion was to ascertain the legality of

[41] *Lockerbie* case, *supra* note 24, at 113.

conduct alleged to be inconsistent with the treaty, in the light of international customary law invoked by one of the parties as a possible justification. The Court did so cautiously and almost inadvertently. It may be argued that, in the light of the ongoing debate on fragmentation in international law[42] and on the remedies which can be expedited to prevent this, reference to international customary law could have been made more overtly and more directly.

[42] Because of the importance of the issue, the ILC is carrying out a study on fragmentation of international law. The work of the ILC on the topic is summarized in its last report to the General Assembly, doc. A/58/10, at 267. See, in particular, Hafner, 'Risks Ensuing from Fragmentation of International Law', *Official Records of the General Assembly, 55th Session, Supplement No. 10* (A/55/10), annex, the 'Report of the Study Group on Fragmentation of International Law', doc. A/CN.4/L.644, based on the outline prepared by the Chairman of the Study Group, M. Koskenniemi, on 'The Function and Scope of the *lex specialis* Rule and the Question of Self-contained Regimes', available at www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf. and the 'Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; ON Doc. A/CN.4/L.663/Rev. 1.