Interpreting International Treaties
NAFTA, A Case Study[1]

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Even if they are only the tip of the iceberg in relationships among states, international treaties can be considered the highest form of concretizing international communications and their interpretation is the natural continuation of that communication.

By interpretation of a treaty, we understand the analysis of its text, taking into consideration its authors' intentions, and its application, which is directly associated with the future development of relations among states. Therefore, a treaty is at the same time the goal of past diplomatic activity and the beginning of future relations.

To analyze the importance of interpreting treaties and their effects on international communications, we must use interdisciplinary tools from international relations and law.

The North American Free Trade Agreement (NAFTA) suffices as an example; it has always been controversial in the three countries involved, from its creation up to its application, both politically and legally. In NAFTA, these issues are inseparable, particularly if we focus on how the interpretation can influence relations between states and if we ask ourselves if international law plays its role as a regulator of the international system.

From the legal point of view in general and that of the treaties in particular, interpretation is not a mechanical, objective action, but rather a complex, equivocal process that allows for placing theoretical approximations along the continuum between a strictly literal and a teleological interpretation, that is, one which also takes into account the treaty's objective. In addition, external factors such as the inter-temporality and the subjectivity of the actor-interpreters also intervene.

International guidelines about the interpretation of international treaties basically converge in the 1969 Vienna Convention on Treaty Law and the findings of the International Court. Nevertheless, although interpretation is quite regulated, some vacuums exist in which the authority of international law is limited in the international system. In addition, interpretation is subject to abuse by states which hide their own interests behind different possible interpretations of norms.

As a result, the interdisciplinary focus using politics and international law makes it possible to understand that international law is not a closed juridical system, above the international system, but that it is linked to politics and the will of states, which are sovereign actors for all effects.

There are several positions situated between positivist and realist theories about the role of law in the international system. The former aspire to a rule of law, that is a system in which law is the absolute entity; the latter maintain that states do not behave based on the law, but based on their own interests and their power. Between these two extremes and other theories like liberalism and those that have emerged from new studies about globalization, we find the opinion of Andreas L. Paulus, according to which law and international politics influence each other reciprocally and neither dominates the other.[2]

The behavior of states based on and *vis-à-vis* different aspects of interpretation depends

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a great deal on the dual nature of treaties: they are simultaneously a consequence of the dialogue among states and the cause of their interaction. They are the result of interest-based political thinking and at the same time a legitimate source of law. As Robert O. Keohane and the theoreticians of the constructivist school, like Harold H. Koe and Friedrich Kratchovil,[3] propose, in dealing with treaties, we must always keep in mind the three elements that make them up and mutually influence each other: interests, institutions and belief systems.[4] Or, as Anne-Marie Slaughter maintains, broadening out this vision, treaties play a role of persuasion and justification in forming the identities of international actors and, as a result, of interests, which in turn give rise to norms.[5]

In addition, the dual nature of the treaties lead to the recognition of the relativity of the interpretations of the rules. Attila Tanzi explains this by treaties' general nature and imprecision which, in turn, are the result of the compromise among the divergent interests involved in the process of producing norms.[6] From this is derived the possibility the states have, spurred by profound interests to rationally defend contrasting interpretations and the opportunity of hiding their own interests behind a defensible argument, making difficult the conciliatory work of bodies like *ad hoc* arbitration panels or the International Court of Justice that generally adopt an orthodox interpretation.

NAFTA is a good example of this dual nature of treaties: it was born of the interests of the parties involved in establishing a free trade area and many institutions, procedures and domestic needs of the states have changed to make fulfilling these objectives possible.

NAFTA contains articles pursuant to its own interpretation and refers to the 1969 Vienna Convention on Treaty Law. Its Chapter 20 also includes a controversy resolution mechanism, purposely established to solve or clarify differences regarding interpretation by the parties. This mechanism is divided in a political-diplomatic phase in which ministers and experts meet to talk about the issue, and a legal phase in which an arbitration panel is established, a neutral body made up of members of the two conflicting parties which makes decisions about the interpretation of the text of the treaty and makes recommendations about the states' behavior.

Although it has resolved some disputes successfully, this mechanism has its limits. Whether during the entire political-diplomatic phase before the establishment of the arbitration panel, or after the panel has made its recommendations, the states will have to decide if they take the controversy to the following levels of the resolution mechanism or if they accept what the treaty says. In many cases, in order to maintain their good relations and save their own reputations, the parties have decided not to resort to the formal mechanism, even though the controversy and differences in the treaty's application continue to exist.

Therefore, it turns out that law and politics interact, simultaneously protecting the state's internal and external needs. In other words, it could be said that politics seems to be at the bottom of all NAFTA's trade and legal matters, leaving certain spaces in which as a legal instrument, it manages to regulate relations among states and have an impact on political interests, and other spaces in which it will always be the state which will decide about interpretations of the treaty, and therefore about their behavior *vis-à-vis* the others.

Taking into consideration the areas analyzed —the law, the interdisciplinary intersection of politics and international law and the study of NAFTA— and applying to international communication the circularities found by Paulus in his reflection about the link between law and international politics, by Keohane in the nature of treaties, and those observed in the study of NAFTA, we can conclude that the interpretation of treaties influences and is in turn influenced by the behavior of states according to a circular dynamic which oscillates between the rule of law and a realist logic in the international sphere. VM

Notes

[1] This article is based on Stefanie Haeger's bachelor's thesis in international communications at the Università per Stranieri di Perugia (Italy), presented in April 2004. The research on NAFTA was carried out at the UNAM's CISAN in autumn 2003.

[2] Andreas L. Paulus, "Law and Politics in the Age of Globalization," *European Journal of International Law* vol. 11, 2000, p. 472.

[3] About that you can see Harold H. Koh, "Why Do Nations Obey International Law?," *The Yale Journal*, vol. 106, 1997, and Friedrich Kratchovil, *Rules, Norms and Decision: On the Conditions of Political and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).

[4] Robert O. Keohane, "International Relations and International Law: Two Optics," *Harvard International Law Journal* vol. 38, 1997, p. 500.

[5] Anne-Marie Slaughter, Andrew S. Tulumello and Stephan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *American Journal of International Law* vol. 92, 1998, p. 381.

[6] Attila Tanzi, *Introduzione al Diritto Internazionale Contemporaneo* (Padova: Cedam, 2003), p. 38.