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DISPUTE SETTLEMENT

GENERAL TOPICS

1.2 International Court of Justice



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

The International Court of Justice (hereinafter, the ICJ or the Court) is the principal judicial organ of the United Nations. It offers an important forum for the settlement of international economic disputes among States.

This module is intended for those who wish to examine the option of approaching the Court for the settlement of economic disputes. It provides an overview of the functioning of the Court and of its jurisprudence bearing upon international economic issues. A detailed analysis is made of the organization, jurisdiction and procedures of the Court. This analysis enables an assessment of the advantages the Court presents for the settlement of international economic disputes.

OBJECTIVES

Upon completion of this Module the reader should be able to:

- Distinguish the special features of the ICJ;
- Identify its structure;
- Explain the law governing its jurisdiction;
- Analyse the procedure applicable to cases before the Court;
- Discuss some important cases involving the economic interests of States and individuals; and
- Assess the usefulness of the Court for the resolution of economic disputes.

1. INTRODUCTION

1.1 The Permanent Court of International Justice

The idea of peacefully settling disputes at the international level is a very old one. Systems of mediation and arbitration were known, but not the establishment of a permanent bench of judges to settle disputes, employing strict judicial techniques. However, at the end of the First World War, and with the creation of the League of Nations, under a mandate of the Article 14 of the Covenant of the League of Nations, a concrete shape was given to the idea of a Permanent Court of International Justice (hereinafter, the Permanent Court or the PCIJ). The Permanent Court was established with 15 judges elected by the Assembly and the Council of the League of Nations. They represented the main forms of civilization and the principal forms of legal systems of the world. The Statute, which governed the operation of the Permanent Court, was however an instrument independent from the Covenant of the League of Nations. Only States could be parties before the Permanent Court. But it was empowered to give advisory opinions to the Assembly and the Council of the League of Nations. The Permanent Court, which came into operation in 1922 and ceased functioning in 1940 with the outbreak of the Second World War, dealt with 29 contentious cases and gave 27 advisory opinions.

1.2 The International Court of Justice

The Permanent Court was dissolved in 1946, followed by a decision at the San Francisco Conference to create a new International Court of Justice (hereinafter, the ICJ or the Court) on the same lines as the Permanent Court, but as a principal judicial organ of the United Nations.¹ Contrary to the Statute of the PCIJ, the Statute of the ICJ is an integral part of the Charter of the United Nations (Article 92 of the UN Charter).² Both instruments were adopted on 26 June 1945, and came into force on 24 October 1945.

¹ It may be noted that 13 of the States represented at the San Francisco Conference were not signatories to the Statute of the PCIJ, including the then Soviet Union and the United States, and that 16 signatories of the Statute were not participants at the San Francisco Conference. See Hans-Jurgen Schlochauer (1995), pp. 1084-1104, p. 1085.

² See the *Barcelona Traction case*, ICJ Reports, 1964.

2. ORGANIZATION OF THE ICJ

2.1 Basic Texts

The basic texts on the Court and its work are:³

- The Charter of the United Nations, Articles 92 to 96, which establishes the general lines of the work of the Court;
- The Statue of the Court, which determines its organization, competence and procedures; and
- The Rules of the Court, which deal with matters concerning the judges and assessors, the presidency of the Court, the work of the chambers, the internal functioning of the Court and of its registry, as well as the proceedings in the contentious and advisory cases.

2.2 Composition of the Court

The International Court of Justice is composed of 15 judges elected for a period of nine years; no more than one national of any State may be a member of the Court. The judges represent the main legal systems of the world. The Court elects, for a term of three years, the President and Vice-President of the Court. The Court is assisted by a Registry, headed by a Registrar.

Elections are held every three years for five vacancies of the Court each time. Eligible as judges are persons of high moral character and possessing the qualifications required in their respective countries for appointment to the highest judicial offices, or jurisconsults of recognized competence in international law.⁴ The election is held simultaneously both in the General Assembly and in the Security Council, each voting independently of the other. In order to get elected, a candidate must obtain an absolute majority in both forums.

The Court may establish chambers composed of three or more judges. Such Chambers were constituted upon request of the parties, for example, in the *Gulf of Maine*,⁵ *Frontier Disputes*,⁶ *ELSI*⁷ and *Land, Island and Maritime Frontier* cases.⁸ The Court also established a special chamber for environmental matters. It should be pointed out that a judgement rendered by a chamber is considered a judgement of the Court.

³ The basic texts and general information on the ICJ work can be found on its website: www.icj-cij.org/.

⁴ Although no specific quota to different regions of the world is assigned, so far the practice has been to elect one judge from each of the States which are Permanent Members of the Security Council, three judges from Asia, three judges from Africa, two judges from Latin America and one judge each from Western Europe and other States and from the Eastern European States.

⁵ See the *Delimitation of Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, ICJ Reports 1984.

⁶ *The Frontier Dispute (Burkina Faso v. Republic of Mali)*, ICJ Reports 1986.

⁷ *Elettronica Sicula S.p.A (ELSI) (United States and Italy)*, ICJ Reports 1989.

⁸ *The Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Nicaragua intervening*, ICJ Reports 1993.

2.3 The Bench

All the judges of the Court, including ad-hoc judges, constitute the Bench of the Court in a case. No member can be dismissed unless, in the opinion of other members, he/she has ceased to fulfil the required conditions (Article 18 of the Statute).

During his/her term of office, no judge should engage in any political or administrative functions or in any other occupation of a professional nature (Article 16 of the Statute). Further, no judge may participate in a case brought before the Court in which he/she has previously been involved as agent or counsel for one of the parties, as a member of a commission of inquiry, or as a member of a national or international tribunal or arbitration.

In this sense, a member of the Court may declare that he/she should not take part in the decision in a particular case. It is also open to the President of the Court to suggest that for some special reasons one of the members of the Court should not sit in a particular case and should give his/her notice accordingly. In case of disagreement between the judge concerned and the President, the matter shall be settled by a decision of the Court.

2.4 Judges *Ad hoc*

In order to maintain equality in the status of the parties, the Statute provides that where a judge of the nationality of one of the parties is sitting on the bench, the opposing party may choose an additional judge. Such a judge need not be a national judge, but should be a national of the party which is not represented on the bench. Further, each of the parties may choose such a judge if neither of them has its national sitting on the bench. Judges so chosen by the parties have the same rights and duties as the members of the Court for the duration of the proceedings (Article 31 of the Statute).

2.5 Official Languages

The official languages of the Court are English and French. If the parties agree, the case can be conducted and the judgement delivered exclusively in either English or French. The Court may also authorize, at the request of a party, a language other than French or English to be used by that party. In such a case, an English or French translation has to be attached to the judgement (Article 39 of the Statute).

2.6 Costs

In general, each party to a dispute bears its own costs for the procedure. Nevertheless, the Court may decide that all or part of a party's costs be paid by the other party (Article 64 of the Statute and Article 97 of the Rules of the Court).

3. JURISDICTION AND APPLICABLE LAW

3.1 Types of Jurisdiction

The International Court of Justice possesses two types of jurisdiction:

(i) Contentious jurisdiction

Contentious jurisdiction involves States that submit the dispute by consent to the Court for a binding decision.

(ii) Advisory jurisdiction

Advisory jurisdiction, on the other hand, concerns questions referred to the Court by the General Assembly, the Security Council or other organs and specialized agencies of the United Nations. Those questions can only refer to legal questions arising within the scope of their activities. Advisory opinions given by the International Court of Justice are not binding.⁹

3.2 Mainline and Incidental jurisdiction

A distinction can be made between incidental jurisdiction and mainline jurisdiction. *Incidental jurisdiction* relates to a series of miscellaneous and interlocutory matters; for example the power of the Court to decide a dispute as to its own jurisdiction in a given case; its general authority to control the proceedings; its ability to deal with interim measures of protection; and the discontinuance of a case. *Mainline jurisdiction*, on the other hand, concerns the power of the Court to render a binding decision on the substance and merits of a case placed before it.

3.3 Jurisdiction *Rationae Personae*

The Statute of the ICJ establishes that for contentious jurisdiction, only States can be parties before the Court (Article 34(1) of the Statute of the ICJ). However, States are entitled to sponsor the claims of their nationals against other States. This is generally done by way of diplomatic protection. Such protection under international law can be exercised by the State of nationality only after the person concerned has exhausted local/judicial remedies available in the jurisdiction of the State in which the person has suffered the legal injury.

⁹ Since 1946 the Court has given 24 Advisory Opinions, concerning, *inter alia*, the admission to United Nations membership, reparation for injuries suffered in the service of the United Nations, the territorial status of South-West Africa (Namibia) and Western Sahara, judgments rendered by international administrative tribunals, expenses of certain United Nations operations, the applicability of the United Nations Headquarters Agreement, the status of human rights rapporteurs, and the legality of the threat or use of nuclear weapons. See the general information concerning the International Court of Justice, of 25 October 2002 (www.icj-cij.org) Also see, D. Pratap (1972).

Exhaustion of local remedies is more than a procedural requirement. Without their exhaustion, no remedies for legal injury can be envisaged at the international level. On the other hand, for a foreign national to exhaust local remedies, such remedies should not only be available, but they should also be effective and not merely notional or illusory. However, these are matters for judgement in a given case.

The question has also been raised as to whether an individual could renounce through a contract with a foreign government his/her right to seek diplomatic protection from the State of his or her nationality. It is argued that the exercise of diplomatic protection is a right of the State, and its nationals cannot therefore seek its exemption through a contract; this can only be exercised at the discretion of the State. It is also common nowadays for States to agree, in bilateral treaties, to submit dispute concerning foreign investment directly to arbitration outside their jurisdiction without requiring the investing company or individuals to exhaust local remedies.

It is understood that a State cannot sponsor the claims of its national against another State of which he or she or the entity is also a national. Further, in the case of persons with dual or multiple nationality, only the State with which the person enjoys a “genuine link” can exercise diplomatic protection (see the *Nottebohm* case). It is also held that where the legal interests of company are injured in a foreign jurisdiction, only the State in whose jurisdiction the company is incorporated has the right to sponsor its claims and not the State of nationality of the shareholders, even if they constitute a majority share holding in the company, except where: (1) the rights of the shareholders are directly affected; (2) the company has ceased to exist in the country of incorporation; and (3) The State of incorporation is the country responsible for the injury of the company.¹⁰

3.4 Basis for Jurisdiction

The basis for jurisdiction is the consent of the States parties to a dispute. Consent can be expressed in one of the following ways:¹¹

3.4.1 Special Agreement

The conclusion of a special agreement (*compromis*) to submit the dispute after it has arisen. For example, a *compromis* was concluded between Hungary and Slovakia on 7 April 1993, by which they submitted to the Court the dispute concerning the Gabčíkovo Nagymaros Project.¹²

¹⁰ See *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, ICJ Reports.

¹¹ Even though the engagement of jurisdiction of the Court is essentially based on the concurring wills or consent expressed through declarations submitted by States, such an engagement is not treated in the practice of the Court as a treaty arrangement. In interpreting this engagement, “the Court will look at the underlying intention of the State making the declaration, the declaration itself being the expression of a unilateral act of policy to accept the jurisdiction of the Court for disputes coming within its scope” (*Rosenne S*, 1997 p. 812).

¹² The dispute concerned the construction and operation of the Gabčíkovo-Nagymaros Barrage system. See *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports, 1997, p. 7.

3.4.2 Jurisdictional Clause

Another way of conferring jurisdiction on the Court is through the inclusion of a jurisdictional clause in a treaty. Generally, through this *compromissory clause* the States parties agree, in advance, to submit to the Court any dispute concerning the implementation and interpretation of the treaty.

Article 36(1) of the Statute

“The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”

Several treaties contain such *compromissory clauses* conferring jurisdiction upon the Court in respect of the parties to those treaties.

3.4.3 Declarations made under Article 36(2) of the Statute

The jurisdiction of the International Court of Justice also exists by virtue of declarations made by States, that they recognize as compulsory its jurisdiction in relation to any other State accepting the same obligation in all legal disputes concerning the matters specified in Article 36(2) of the Statute. This method of conferring jurisdiction on the ICJ is also known as the *Optional Clause*.¹³

Article 36(2) of the Statute of the ICJ

The States Parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement in relation to any of the States accepting the same obligations, the jurisdiction of the court in all legal disputes concerning:

- a) *the interpretation of a treaty;*
- b) *any question of international law;*
- c) *the existence of any fact which, if established, would constitute a breach of an international obligation;*
- d) *the nature or extent of the reparation to be made for the breach of an international obligation.*

3.4.4 The Doctrine of Forum Prorogatum

In accordance with the *Forum Prorogatum* doctrine, the Court infers the consent of the State, expressed in an informal and implied manner, and after the case has been brought before it. The Court has upheld its jurisdiction even where consent has been given after the initiation of proceedings, in an implied or informal way or by a succession of acts.¹⁴

¹³ *States enjoy wide liberty in formulating, limiting, modifying and terminating their declarations under Article 36(2), Fisheries Jurisdiction Case (Spain v. Canada), ICJ Reports 1998, paras. 44, 52 and 54. See also Phosphates in Morocco judgment, 1938, PCIJ Series A/B No. 74, p. 23 (the jurisdiction exists only in the limits within which it has been given and accepted). The Anglo-Italian Oil Co. case (United Kingdom v. Iran), ICJ Reports 1952, p. 104. (In interpreting the intention of the parties the Court would look to all the elements in a declaration as a unity and not seek a mere grammatical interpretation.)*

For example, in the *Corfu Channel* case, the Court pointed out that Albania, not a party to the Statute, would have been entitled to object to the jurisdiction of the Court, by virtue of the unilateral initiation of the proceedings by the United Kingdom. Nevertheless, as indicated in its letter of 2 July 1947 to the Court, Albania accepted the recommendation of the Security Council and the jurisdiction of the Court for this case. Therefore Albania was precluded thereafter from objecting to the jurisdiction.¹⁵

3.4.5 *Conditional and Unconditional Jurisdiction*

Under Article 36(3) of the Statute, declarations may be made “unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.” This provision seems to contemplate “not a limitation of the jurisdiction accepted but a condition as to the operation of the declaration itself”.¹⁶ In other words, it is possible for a State making a declaration under Article 36(2) to specify the time limits and the States in respect of which it would operate. In that sense, the provision contemplates a principle of reciprocity in the form of a choice of partners.¹⁷

3.4.6 *Reservations to Jurisdiction*

Declarations under Article 36(2) can be made with such reservations as the author State may deem fit to specify.¹⁸ It is understood that the jurisdiction of the Court exists only to the extent there is common ground between the declarations of each of the parties on the given subject matter. Reciprocity is therefore an important feature of the Optional Clause system.

3.4.7 *Some Types of Reservations*

Reservations can exclude disputes for which a solution is not reached through diplomatic means, or for which the parties had agreed on some other methods of settlement, or disputes relating to events occurring in time of war or conflict.

¹⁴ In the *Mavrommatis* case, the Court regarded it as immaterial that the ratification of the Treaty of Lausanne (on the basis of which Greece, in part, invoked the Court's jurisdiction) took place after the initiation of the proceedings. *Mavrommatis* case (1924), PCIJ Series A, No. 2, p. 34. Similarly, in the *Rights of Minorities of Upper Silesia* the Court inferred consent from the failure of the Polish Government to raise the question of jurisdiction in its counter-memorial, its pleading on merits, and its statements subsequent to the filing of the counter-memorial before the League Council. PCIJ (1928) series A/B no. 15, pp. 24-26.

¹⁵ ICJ Reports 1947-48, pp. 4 and 27.

¹⁶ See *Hudson MO* (1943), pp. 66-467.

¹⁷ *Thirlway H* (1984), pp. 103-107.

¹⁸ *Fisheries Jurisdiction Case (Spain v. Canada)*, ICJ Reports 1998, para. 44. (Reservations and conditions attached to a Declaration need not be interpreted in a restrictive way, as they define the parameters of the consent of the State.)

A common form of reservation excludes disputes that come within the domestic jurisdiction of a State. This type of reservation is also known as the “automatic” reservation.¹⁹

3.5 Jurisdiction *Rationae Temporis*

There is no time limit for submission of a dispute to the Court. However, as mentioned previously, several States, while submitting their declarations under Article 36 (2), prescribe time qualifications for a dispute to come within the scope of the declaration.²⁰

The time factor is also important in determining whether, in a given case, the ICJ has inherited the jurisdiction of the PCIJ.²¹

3.6 Applicable Law

Matters before the International Court of Justice are decided in accordance with international law. According to the Statute, the Court is required to apply:

Article 38(1)
Statute of ICJ

- a) *International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
- b) *International custom, as evidence of a general practice accepted as Law;*
- c) *The general principles of law recognized by civilized nations;*
- d) *Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

Further, while the primary function of the Court is to settle the dispute in accordance with international law, Article 38(2) gives power to the Court to decide a dispute *ex aequo et bono*, that is on the basis of equity, if the parties agree.

Article 38(2)
Statute of ICJ

This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

¹⁹ The United States submitted such an amendment to its declaration in 1946 (referred to as the Connelly Amendment). The validity of this reservation was questioned by Judge Lauterpacht, as, in his view, the automatic reservation was repugnant to Article 36(6) of the Statute, which gave the Court the power to determine its own jurisdiction (*Compétence de la Compétence*). See the Norwegian Loans case; the Preliminary Objection, Judgment, ICJ Reports 1957; and the Interhandel case. In the two latter cases, the Court avoided pronouncing upon the validity of a reservation.

²⁰ Such as arising before or after a specified date. Some declarations exclude situations or disputes arising prior to the date from which they came into force. However, the expiry or revocation of a declaration after initiation of proceedings will not affect the jurisdiction. *Nottebohm case*, ICJ Reports 1953, pp. 111, 122 and 123. *Right of Passage over Indian Territory case*, ICJ Reports 1957, pp. 125, 142.

²¹ See *Rosenne S (1960)*; *Murty BS (1968)* pp. 706-70; and *Barcelona Traction, Preliminary Objections, Judgment*, ICJ Reports 1964.

4. PROCEDURES

The Statute of the Court, in Chapter 3, establishes procedures for the conduct of a case before the Court. The provisions of the Statute are supplemented by the Rules of the Court. The current Rules were promulgated in 1978. The Court, while being faithful to the provisions of the Statute, treats matters concerning procedure with the necessary flexibility.

4.1 Initiating a Case

States parties to a dispute may commence a case after notifying it to the Registrar of the Court. Upon receipt of either the notification of the special agreement or a written application, the Registrar of the Court will communicate the application to all concerned. The Members of the United Nations will be informed through the Secretary-General. The Registrar communicates the application to any other States entitled to appear before the Court (Article 40 of the Statute).

4.2 Representation of the Parties

Agents appointed by the parties represent them before the Court. They may have the assistance of counsels or advocates. The agents, counsel, and advocates of the parties before the Court enjoy privileges and immunities necessary for the independent exercise of their duties (Article 42 of the Statute).

4.3 Interim Measures of Protection

**Article 41 of
the Statute**

The ICJ may, without prejudice to the decision as to its jurisdiction in the case, where necessary, indicate interim measures for the protection of the rights of one of the parties.

Such measures are also aimed at preserving the situation under dispute with a view to giving full effect to the final decision of the Court. In some cases, the Court has first ordered interim measures of protection and later found itself without jurisdiction.²² In other cases, it has rejected the request for interim measures of protection on the ground that the nexus between the rights to be protected and the measures sought was not established.²³

Once the matter has been brought before it, the Court may indicate measures not only at the request of one of the parties, but also on its own initiative. The Court can order interim measures of protection even if there is a special agreement between the parties not to preserve the *status quo*. Generally, such

²² See the *Anglo-Iranian Oil Co. case* cited below.

²³ See the *Legal Status of the South-Eastern Territory of Greenland*, PCIJ Series A/B No. 58.

a conflict does not arise, as, in most cases, interim measures of protection are ordered only upon the request of one of the parties. Furthermore, the Court may indicate measures other than those requested by a party, or it may reject the application *in toto*.

The Court indicates such measures by way of an order. Even if such an order does not have the character of a recommendation, it has a binding effect.²⁴

The Court must give notice of the measures indicated to the parties concerned and to the United Nations Security Council (Article 41 of the Statute).

It must however be noted that, as interim measures of protection are not a judgement of the Court within the meaning of Article 94 of the United Nations Charter, the Security Council cannot be called upon to enforce them. However, a party that has failed to comply with an order is under obligation to compensate the other party.

4.4 Preliminary Objections

Article 79 of the Rules of the Court governs decisions on preliminary objections. Preliminary objections are those that require a decision before the Court can proceed to consider the dispute on its merits. As the Court itself pointed out, the purpose of a preliminary objection is to avoid not merely a decision on, but even any discussion of, the merits.²⁵ In some cases, if issues concerning jurisdiction and merits, on facts, cannot strictly be separated, the Court, with the agreement of the parties, may join the preliminary objections to the merits phase of the case. Preliminary objections are an issue only in the cases where one State party, accepting the optional jurisdiction of the Court, brings a case against another State party on the basis of the declaration that State submitted under Article 36(2) of the Statute.

Bases for an objection

The bases include an objection to the capacity of a State to present a claim before the Court; an objection to the jurisdiction of the Court to pronounce upon the merits of a case because of an applicable reservation; an objection on the ground that the matter has already been decided; or that the matter is pending in another forum between the same parties.

Objections can also be raised on the ground that the instrument conferring jurisdiction is no longer in force, or that the instrument was not relevant at the critical point in time when the dispute arose, or that the dispute is essentially within the domestic jurisdiction; or that the matters at issue are not governed by international law.

²⁴ See *LaGrand case*, ICJ Reports 2000.

²⁵ *Barcelona Traction case*, ICJ Reports 1964, p. 44.

Objections have also been raised on the ground that diplomatic means of settlement have not been exhausted, or that the issues involved are essentially political in nature, or that the matter is under consideration before the Security Council of the United Nations. Objections that local remedies have not been exhausted have been raised in cases brought before the Court by States pursuant to an infringement of the rights of their nationals.

The Court has not accepted objections to its jurisdiction on the ground that the issues involved are essentially political.²⁶ It has also rejected the argument that it should not entertain jurisdiction in a matter, which is also being considered by the Security Council of the United Nations.²⁷

4.5 Right of Intervention of a Third Party

Article 62 of the Statute

A State which is not a party to a dispute can intervene in the case if it has an interest of a legal nature that is likely to be affected by a decision in the case. However, it is for the Court to decide upon its request.

In practice, the Court rarely allows intervention of a third party. Nicaragua was allowed to intervene in the *Land, Island and Maritime Frontier Dispute* case, although only in respect of the Legal Regime of the Gulf of Fonseca. A resolution adopted in 1999 by the Institute of International Law,²⁸ made some useful suggestions in understanding Article 62 of the Statute of the ICJ.

The phrase, “matters of legal nature”, means that the rights/obligations of the intervening State under public international law can be affected by the final decision of the Court.

Intervention does not require the existence of a jurisdictional link between the parties to the dispute and the third State.

Intervention by a third State does not mean that, once admitted, the intervening State becomes a party to the dispute. The intervening State is not entitled to nominate a judge ad hoc. However, with the consent of all the parties, an intervener may become a full party to the proceedings. The decision of the Court in relevant part(s) is also binding upon the State that is allowed to intervene.

Further, according to Article 63 of the Statute, a State, which is a party to an international convention, can intervene in a case in which the construction of the provision of the Convention is at issue.²⁹ In such a case, the decision given

²⁶ *Nicaragua, ICJ Reports 1984.*

²⁷ *Lockerbie (United States and the United Kingdom v. Libya), ICJ Reports 1998.*

²⁸ *See the Resolution on “Judicial and Arbitral settlement of Disputes involving more than two States”, adopted by the Institute of International Law at its Berlin Session (1999).*

²⁹ *See Wimbeldon (France, Italy, Japan and the United Kingdom v. Germany), PCIJ, Series A, No. 1 1923. In this case, Poland was allowed to intervene In Haya de la Torre (Colombia v. Peru), ICJ Reports 1951, Cuba was allowed to intervene in the proceedings.*

by the Court is equally binding on the intervening State. An international organization, however, does not have a right to intervene in any case before the Court; it only has the right to be informed of any proceedings in which the interpretation of its constituent instrument, or any Convention adopted thereunder, is in issue (Article 34 of the Statute). Further, the Court may ask such an organization to furnish information or it may supply information on its own initiative.

4.6 Written and Oral Proceedings

Proceedings before the Court take place in two phases: the written and the oral proceedings.

Written Proceedings

The written memorials and counter-memorials, and, if necessary, replies, are presented to the Court through the Registrar in the order prescribed and within the time fixed by the Court for this purpose. The President of the Court, in consultation with the Registrar convenes a meeting of the parties before deciding upon the deadlines and the order in which the written memorials and counter-memorials should be submitted (Article 49 of the Rules of the Court).

Oral Proceedings

The Court determines the number of sittings and the time allocated to each party. For this purpose, the Court passes the necessary orders and makes all necessary arrangements for the taking of evidence (Article 48 of the Statute). The oral proceedings before the Court involve the presentation of arguments by the agents, counsel and advocates and also the hearing of witnesses and experts. The hearings of the Court are under the control of the President or, in his absence, of the Vice President, and, in the absence of both, under the control of the most senior judge of the Court. The oral hearings are open to the public unless the Court decides otherwise or unless the parties demand that the public not be admitted. Minutes are prepared at each hearing and signed by the Registrar and the President, and they alone are authentic.

4.7 Evidence and Visit to Site

Where service of a notice upon a person other than the agents, counsel and advocates is necessary, the Court sends such a notice to the government of the State in whose territory the notice has to be served. A similar procedure is also applied to obtain evidence on the spot (Article 44 of the Statute). Similarly, the Court may at any time entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion (Article 50 of the Statute). The Court may make an on-site visit for a better appreciation of the case (e.g. *Gabcikovo-Nagymaros*).³⁰

³⁰ *ICJ Reports 1997*.

4.8 Deliberations of the Court

Once the Court declares the hearing closed, it deliberates on the matter in private and the proceedings of the Court are kept confidential. The deliberation of the Court are based on issues or questions for decision identified by the President of the Court and finalized in consultation with other judges.

Each judge, in the reverse order of seniority (i.e. commencing from the most junior judge), presents his/her views by way of answers to the questions drawn up by the Court. These comments are in the form of notes, which are circulated to all the judges. These notes are strictly for the Court, and enable it to form an initial idea of where the majority opinion may lie. At the end of the case, the registry destroys the notes. Further deliberations follow, with judges expressing their comments orally.

4.9 Drafting and Adoption of the Judgement

Once the Court forms a broad idea of the decision involved and the majority ascertained, a drafting committee of three members of the Court is constituted. The preliminary draft judgement is secret and is open to further discussions and suggestions. The drafting committee revises the draft in the light of the discussion, and presents a revised draft for two readings by all the judges. At the end of the second reading, the final vote is taken. Each decision is taken by an absolute majority of the judges present. Abstentions are not allowed. A judge who has failed to attend a part of the oral proceedings or deliberations, but who has nevertheless not missed anything essential, can participate in the vote. If a judge is incapable of attending the meeting, he/she can send his/her vote by correspondence. In case of a tie in the votes, the vote of the President determines the outcome of the decision.

4.10 Non-Appearance of a Party

On a few occasions, the respondent State has failed to appear before the Court to defend itself, having questioned the jurisdiction of the Court to adjudicate upon the matter brought before it by the applicant State.

For instance, Iran did not appear in *United States of America Diplomatic and Consular Staff in Tehran*, a case the United States of America brought before the Court on the basis of the optional protocols to the Vienna Convention on Diplomatic Relations, 1961, the Vienna Convention on Consular Relations, 1963, and the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, 1955.

On a few other occasions, the respondent State withdrew from the proceedings, having lost its argument against the jurisdiction of the Court.

For instance, the United States of America did not participate in the merits phase of the proceedings of *Military and Para-Military Activities In and Against Nicaragua* (1986).

On such occasions, it is not uncommon for the non-appearing State to make available to the Court its point of view, either through formal communications or through informal means. In such cases, the Court makes every effort to gather information concerning the position of the non-appearing State from various sources, including official statements. The Court also communicates these facts to the non-appearing State for its confirmation. Lack of denial is sufficient for the Court to be satisfied that the allegations of facts on which the applicant State bases its claim are well founded.

In the case of non-appearance of a party, the other party can request the Court to decide in favour of its claim. However, the Court must be fully satisfied, not only that it has jurisdiction in accordance with Articles 36 and 37 of the Statute of the Court, but also that the claim is well founded in fact and law (Article 53 of the Statute of the Court). It must be noted, though, that while the Court is expected to do everything possible in its power to appreciate the case of the defaulting party on the basis of the available facts and communications, its efforts, as the Court itself has pointed out, cannot be expected to fully substitute or represent the interest of the defaulting State, which it alone can defend vigorously by participating in the proceedings.

The judgement of a Court may not go beyond the scope of the claims made by the parties or the submissions made in the unilateral application to the Court.

4.11 Judgement

The Court may give a declaratory judgement or judgement requiring performance. A declaratory judgement covers questions of jurisdiction, interpretation of international treaties concerning the existence or non-existence of a legal principle or relationship, and questions of whether there has been an infringement of a right (without pronouncing upon a wrong resulting from such infringement).

The Court may also declare lack of jurisdiction, or it may decline to give a decision because the dispute has already been resolved as a result of the conduct of the defendant. It is not necessary, in any case, for the Court to pronounce upon the merits of the dispute, but it could impose an obligation upon the parties to seek a settlement corresponding to their special circumstances by means of negotiations in good faith.

The judgement states the reason for the decision and contains the names of the judges who took part in its decision. Judges who do not fully share the reasoning of the Court, and those who disagree with its contents, are entitled to deliver their separate or dissenting opinions. The judgement, once delivered, is final and without appeal, and is binding upon the parties. Article 59 of the Statute makes it clear that such decisions of the Court have binding force between the parties and in respect of that particular case. This means that decisions of the International Court of Justice do not have the status of a precedent (*stare decisis*). However, the decisions of the ICJ, the reasons generally given in a case and the interpretation of applicable law have high persuasive value, and are treated with some caution by the ICJ itself as subordinate sources of international law.

4.12 Revision

A judgement once rendered, can be revised on application made by a party if some fact, of such a nature as to be a decisive factor, was, when the judgement was given, unknown to the Court and also to the party claiming revision (Article 61 of the Statute). However, the earlier lack of knowledge of the fact on the part of the State seeking revision of the decision of the Court should not be due to any negligence on its part.

The application for revision can be made only within six months of the discovery of the fact. However, no application for revision may be made after the lapse of 10 years from the date of the judgement. The Court may require previous compliance with the terms of the judgement before it admits proceedings in revision. In addition, the proceedings for revision can be commenced by a judgement of the Court expressly recording the evidence of the new fact, and recognizing that it has such a character as to lay the case open to revision, and declaring the application for revision as admissible. It is understood that the proceedings of a case involving an application for revision will be subject to the same procedure as the original case.

4.13 Enforcement of a Judgement

A judgement is binding upon the parties in accordance with Article 2 and Article 94(1) of the United Nations Charter. In case of failure by one party to comply with the obligations arising from the decision of the Court, the other parties can have recourse to the Security Council for the enforcement of the decision.

The Security Council may, at its own discretion, make recommendations or decide on other measures, which can be taken to give effect to the judgement. The measures can be indicated by the Security Council in this regard only under Chapter VI of the United Nations Charter, meaning that they amount to a recommendation.

United Nations Charter
Article 94

1. *Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.*
2. *If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.*

5. RELEVANT CASES

We have discussed above the principles of jurisdiction and rules of procedure, including the manner in which the International Court of Justice arrives at a decision. We now turn to some cases in which the International Court of Justice actually considered and rendered a decision on economic disputes. These cases, incidentally, also illustrate the principles of substance and procedure concerning the jurisdiction of the Court and conduct of the case before the Court.

5.1 *Rights of Nationals of the United States of America in Morocco, (France v. United States of America)*

ICJ Report 1952, pp. 176-233

Facts

This case involved the validity of the decree of the French Resident General in Morocco, dated 30 December 1945, issued in pursuance of an exchange control system established in 1939. The United States of America contended that the decree violated its rights as established, *inter alia*, under the Treaty of Peace and Friendship with the Shereefian Empire of 16 September 1836, and demanded equal treatment for the goods imported from the United States with the goods imported from France and other parts of the French Union.

France, which rejected the United States' contention, filed an application instituting proceedings before the Court. For this purpose, France relied upon the declarations it had made dated 18 February 1947 and those of the United States dated 26 August 1946 under Article 36(2) of the Statute of the ICJ as the basis for the jurisdiction.

Preliminary objections

The United States first raised preliminary objections on the ground that it was not clear whether France was acting on its own behalf or on behalf of Morocco, in its capacity as the protecting power. France submitted that it was acting in both capacities, and it was accepted that the judgement would be binding on both France and Morocco. Thereafter, the United States withdrew its preliminary objection.

Decision

The Court found that the decree of French Resident General of 1948, prescribing import regulations for goods coming from the United States, was discriminatory in favour of France. Accordingly, France could not enjoy commercial or economic privileges, which the United States did not equally enjoy.

Note

This is an example where a State took up a case in its own right to protect the interest of its nationals in the then French Protectorate of Morocco, and in defence of the economic interests of its nationals.

5.2 Nottebohm (Liechtenstein v. Guatemala)

Preliminary objections, ICJ Reports 1953, pp. 111-125. First Phase, ICJ Reports 1955, pp. 4-65. Second Phase, ICJ Reports 1955.

Facts

Nottebohm, a German national by birth, took up residence in Guatemala in 1905, and also made it the centre of his business activities. He visited Germany just before the outbreak of the Second World War, and then again in around March 1939. In October of the same year, about a month after the war began, he went to Liechtenstein and applied there for naturalization. This was granted to him on 13 October 1939. After receiving the Liechtenstein passport he applied for a Guatemalan visa. When he returned to Guatemala in 1940 the change of his nationality was registered in the Register of Aliens. A similar amendment was also made to his identity document, and the Civil Registry of Guatemala issued another certificate to the same effect. In 1943 he was arrested as a result of war measures and taken to the United States, where he was interned for more than two years. After his release in 1946 he was not allowed to return to Guatemala. He then left for Liechtenstein. In 1949, his properties in Guatemala were confiscated. In 1951, Liechtenstein took up the matter of Nottebohm and filed an application before the International Court of Justice against Guatemala alleging wrongful acts and claiming restitution and compensation.

For the purpose of invoking the jurisdiction of the Court, Liechtenstein relied upon its own Declaration under Article 36(2) of the Statute dated 29 March 1950 and the Declaration made by Guatemala on 27 January 1947 under the same Article of the Statute.

Preliminary objections

Guatemala objected to the jurisdiction of the Court on the ground that the declaration it made had expired on 26 January 1952, a few weeks after the filing of the application and long before the Court could adjudicate on the case. Guatemala questioned the power of the Court under Article 36(6) of the Statute, arguing that it was confined to the question of whether the dispute was within the categories mentioned in Article 36(2) of the Statute. It urged the Court not to pronounce upon the Declaration, which was valid only for a specified term.

The Court held that it was an international tribunal, which was pre-established by an international instrument defining its jurisdiction and regulating its operations. It was also pointed out that it was the principal judicial organ of the United Nations. Accordingly, in the absence of any agreement to the contrary the Court like any other international tribunal, not being an arbitral tribunal constituted by a special agreement by the Parties, had the power under Article 36(6) to interpret the instruments, which govern its jurisdiction. It also held that once the Court seized of the matter, it had to exercise its power, and the lapse of the Declaration thereafter did not affect the jurisdiction of the Court. The Court unanimously, therefore, rejected the preliminary objection by an order issued on 18 November 1953.

Main issues

On the merits of the case, Liechtenstein claimed in its application restitution and compensation on the ground that Guatemala had acted towards Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law. Guatemala, on the other hand, argued that Liechtenstein's claim was inadmissible. While it relied on several grounds for this purpose, a primary ground on which it sought to oppose the claim of Liechtenstein concerned the nationality of Nottebohm, on whose behalf Liechtenstein had approached the Court. The main issue in this case therefore revolved around the alleged irregularity of Nottebohm's naturalization in Liechtenstein or Nottebohm's Liechtenstein nationality.

Decision

The Court accordingly confined its examination to whether the naturalization conferred on Nottebohm could be legally upheld as a basis for the proceedings before the Court. The Court did not question the right of Liechtenstein to grant its nationality to any person according to its laws. It was mainly concerned with the legal right of that State at the international level to provide diplomatic protection in respect of every person claimed as its nationals against another State.

The central point that the Court stressed in this case was that, "nationality is a legal bond having as its basis a social factor of attachment, a genuine connection of existence, interests and sentiments". The Court then found, on the basis of the facts of the case, that Nottebohm did not have a bond of attachment or a genuine link with Liechtenstein.

It was also of the opinion that Nottebohm continued to have a close connection with Guatemala and that this was not affected by his naturalization in Liechtenstein. For this reason, the Court came to the conclusion by 11 votes to 3 that Guatemala was under no obligation to recognize the nationality accorded by Liechtenstein, and hence that Liechtenstein did not have the right to extend its diplomatic protection to Nottebohm against Guatemala.

Note

The Nottebohm case is a standard citation on the question of "genuine link", which is central to the extension of diplomatic protection by a State to its nationals. The fact that Nottebohm maintained close connections with Guatemala, even after his naturalization in Liechtenstein, seemed to have weighed heavily against the right of the latter State to extend its diplomatic protection to him.

5.3 *Barcelona Traction, Light and Power Co. Ltd., (Belgium v. Spain).*

Preliminary objections, ICJ Reports 1961. New application, ICJ Reports 1964, pp. 6-166. Second Phase, ICJ Reports 1970, pp. 3-357.

Facts

The Barcelona Traction, Light and Power Co. Ltd., (hereinafter called Barcelona Traction) was a Canadian joint stock company formed in Toronto (Canada) in 1911. The greater part of its share capital belonged to Belgian nationals. Barcelona Traction also owned the shares of several other companies, some of which were operating in Spain under Spanish law. The company was chiefly concerned with the construction and operation of electric power plants. As a result of a series of measures taken by the Spanish Government, Barcelona Traction was adjudicated bankrupt in Spain on 12 February 1948, and later subjected to liquidation measures. Canada made several representations to Spain on behalf of Barcelona Traction, but did not succeed in getting its grievances redressed. Later, Belgium took up the case of its nationals who were significant majority shareholders of the company.

Belgium filed a case before the Court, invoking Article 36(1) of the Statute of the Court. In particular, it relied on Articles 2 and 17 of the Treaty of Conciliation, Judicial Settlement and Arbitration between Belgium and Spain of 19 July 1927.

Main issues

Belgium claimed that the Spanish authorities acted contrary to international law against Barcelona Traction, which resulted in damage to the company and its shareholders. Accordingly, Spain was under an obligation to restore in full to Barcelona Traction its property, rights and interests, and ensure compensation for all other losses. Alternatively, Spain should pay Belgium compensation equivalent to the value of the property, rights and interests of Barcelona Traction. As another alternative, Spain should at least pay to Belgium compensation equivalent to the amount of shares of the capital of Barcelona Traction owned by Belgian nationals, together with the amount of the sums standing due on 12 February 1948 in favour of Belgian nationals.

Before the Court could proceed with the matter on the basis of the memorial filed by Belgium and the preliminary objection raised by Spain, Belgium informed the Court, in accordance with Article 89 of the Rules of the Court, that it wished to withdraw from the case. Later Belgium and Spain engaged in negotiations, but as these did not result in any agreement, Belgium presented a new application in 1992 for the Court to hear the case.

Preliminary objections

In its first preliminary objection, Spain contended that the discontinuance of the proceedings earlier precluded the applicant from recommencing the proceedings.

The Court agreed with Spain that discontinuance was a procedural matter and should be examined in the context of the circumstances of the case.

However, the Court rejected Spain's argument that discontinuance signified renunciation of any further right of action unless the right to start new proceedings had been expressly reserved. In the absence of any clear intention on the part of Belgium to renounce its right to recommence the proceedings at the time of seeking discontinuance, the burden of proof was placed on Spain to show that such discontinuance meant actual renunciation of that right. According to the Court, Spain could not offer any such evidence, and in particular it found that Spain, when agreeing to the request of Belgium for discontinuance under Rule 89, had not attached any conditions.

The Court also rejected the contention of Spain that Belgium, by its conduct, had misled Spain about the significance of the discontinuance of the proceedings before the Court. Such a conduct, Spain argued, amounted to an estoppel, precluding Belgium from exercising the right to recommence the proceedings before the Court. In the view of the Court, Spain had been unable to establish any misleading intention on the part of Belgium, and by recommencing the proceedings Belgium had not put Spain at any disadvantage. According to the Court, Spain would be able to raise all the objections to the jurisdiction of the Court, which it had contemplated pleading prior to the discontinuance of the proceedings.

Spain also argued that recommencement of the proceedings was contrary to the spirit of the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927, which, according to Belgium, conferred jurisdiction upon the Court. The preliminary procedure before discontinuance was said to have already exhausted the basis of the jurisdiction provided by the Treaty and it could not therefore be relied upon once again. The Court rejected this argument and held that the procedures established by the Treaty could not be regarded as exhausted so long as the right to bring new proceedings existed and until the case had been prosecuted to a judgement.

The second preliminary objection related to the combined effect of Article 17(4) of the 1927 Treaty, which provided for disputes between parties thereunder to be submitted to the Permanent Court of Justice, and Article 37 of the Statute of the ICJ, which transferred the subsisting competence of the PCIJ to consider a case to the ICJ.

Spain argued that the termination of the PCIJ had also resulted in the termination of obligations under Article 17(4) of the Treaty in respect of Spain because Spain originally had not been a member of the United Nations when it was formed, and of which the Statute of the Court was an integral part. Spain argued that it had become a member of the United Nations, and hence to the Statute of the Court, only in December 1955, and because of the gap between 1945 and 1955, Article 37 of the Statute could not be treated as a basis to revive the obligations Spain had had under Article 17 of the Treaty. The Court rejected this argument. It considered that Article 37 imposed three conditions which the Belgian application fully met: the Treaty of 1927 was in force and

Article 17(4) was an integral part of that Treaty; both the parties to the dispute were parties to the Statute; and the matter was referred to the ICJ as the competent forum. The Court further held that once the obligation was revived, it could operate only in accordance with the Treaty that provided for it and continued to relate to any dispute arising after the Treaty came into force. For this reason, the Court rejected the second preliminary objection.

The third preliminary objection related to the capacity of Belgium to espouse the claims of Belgian nationals, which, according to Spain, were different from the interests of Barcelona Traction. The fourth preliminary objection related to the exhaustion of local remedies.

In view of the mixed questions of law and facts, and particularly, in view of the close relationship between the questions raised in the third and fourth preliminary objections and the issue of denial of justice, which is a question relating to merits, the Court attached them to the merits of the case.

Decision

The Court first addressed itself to the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company incorporated in Canada. The complaint concerned measures taken not in relation to Belgian nationals, but to the company itself. The Court noted that in municipal law the concept of company was founded on a firm distinction between the rights of the company and those of the shareholders. Accordingly, only the company was endowed with a legal personality, and only it could pursue a legal action on its own behalf in respect of injuries suffered, even if such an injury in fact was also an injury to several of its shareholders. In the present case, the measures complained about were not aimed at shareholders directly, and the injury suffered was a consequence of such measures against the company itself.

The Court also considered whether there might not be, in the present case, special circumstances serving as exceptions to the general rule. Two situations were studied: (a) the fact that the company had ceased to exist; and (b) whether the protecting State of the company lacked the capacity to take action. The Court found that while Barcelona Traction had lost all its assets in Spain and had been placed in receivership in Canada, the corporate entity of the company had not ceased to exist, nor had the company lost its capacity to take corporate action. Similarly, there was no dispute about the incorporation of the company in Canada where it had its registered office, and about the company's Canadian nationality, which was generally acknowledged. Canada, therefore, being the national State of the company, in fact had exercised protection for Barcelona Traction for a number of years. According to the Court, whatever the reasons for the Canadian Government's change of attitude, which resulted in that Government not acting on behalf of Barcelona Traction after a certain point in time, that fact could not constitute a justification for the exercise of diplomatic protection by another State. In the view of the Court, Canada continued to retain its capacity to protect Barcelona Traction.

Belgium argued that it could make a claim when investments by its nationals abroad were prejudicially affected and thereby affected the State's national economic resources. However, the Court noted such a right could only exist in the form of a treaty or a special agreement, which Belgium could not establish. Belgium further based its rights to espouse the claims of its nationals, shareholders in Barcelona Traction, on grounds of equity. The Court rejected this also on the ground that acceptance of any such right on the part of Belgium would open the door to competing claims on the part of different States, which would create a climate of insecurity in international economic relations.

In view of the above, the Court held that the third preliminary objection was valid.

The Court did not consider it necessary to deal with the fourth preliminary objection on the exhaustion of local remedies, as it upheld the third preliminary objection.

By 15 votes to 1 the Court further held that it had no jurisdiction. Despite this vote, three judges supported only the operative portion of the judgement for different reasons. Judge Tanaka felt that the third and fourth preliminary objections should have been dismissed, and that the Belgian Government's allegation concerning the denial of justice was unfounded. Judge Jessup came to the conclusion that a State, under certain circumstances, had a right to present a diplomatic claim on behalf of shareholders who were its nationals, but Belgium had not succeeded in proving the Belgian nationality, between the critical dates, of those natural and juristic persons on whose behalf it had sought to claim. Judge Gross held that it was the State whose national economy was adversely affected that possessed the right to take action but that proof of Barcelona Traction's direct connection to the Belgian economy had not been produced.

Of the other 12 members of the majority who supported the operative paragraphs of the judgement, several appended separate opinions. Judges Fitzmaurice, Tanaka and Gross felt that the measures taken by the Spanish authorities were in the nature of expropriation, amounting to confiscation, which was contrary to international law, as claimed by Belgium. Some judges felt that, by denying the *jus standi* of Belgium and refraining from pronouncing upon the fourth preliminary objection on exhaustion of local remedies, the Court had missed an opportunity to contribute to the clarification and development of international business litigation and international economic relations in international law, and even simply the general international law obligations in the sphere of the treatment of foreigners. (See the separate opinions of Judges Fitzmaurice, Jessup and Tanaka.)

Note

During the extended proceedings of this case, a variety of controversial legal issues were considered. Diplomatic protection of corporations and shareholders as juridical and natural persons, and the right of a third



State, not being a State of legal incorporation, were primary issues. Other issues included: the distinction between injury to the rights of a company and injury to the interests of shareholders, and lifting of the corporate veil to determine effective nationality; the application of the test of a genuine link to corporate entities; and in general the status and personality of a company in international law. The issue of whether disguised appropriation amounts to confiscation was yet another issue. The Court did not offer any conclusive pronouncements on any of these issues. This case is presently being cited for yet another *obiter dictum*, on the existence and nature of the *erga omnes* obligations which States owe to the entire international community, as opposed to obligations States owe to each other in a bilateral or limited multilateral relationship.

5.4 Elettronica S.p.A. (ELSI) case (United States v. Italy)

ICJ Reports 1989.

Facts

ELSI S.p.A. (ELSI), an Italian corporation, wholly owned by the United States Corporation, Raytheon Company (Raytheon), which held 99.16 per cent of the shares, and its subsidiary Machlett Laboratories (Machlett), which held the remaining 0.83 per cent, was established in Palermo, Italy, where it produced electronics components. It had a workforce of 900 employees and produced five major product lines: microwave tubes, cathode-ray tubes, semiconductor rectifiers, X-ray tubes and surge arrestors.

ELSI ran into economic trouble from 1967, and the American corporation attempted to make it self-sufficient in Italy through Italian partners. These attempts, however, failed and the American corporation seriously considered closing and liquidating ELSI to minimize its losses. ELSI also issued dismissal notices to its workforce. The Mayor of Palermo reacted to the threatened closure of the plant and dismissal of the workforce on 1 April 1968 by issuing an order for immediate requisitioning of the plant and related assets for a period of six months. ELSI filed an administrative appeal against the requisition order to the Prefect of Palermo.

A bankruptcy petition was also filed by ELSI on 26 April 1968 on the ground that the requisition of the company had resulted in the company losing control of the plant, which in turn did not allow it to avail of its immediate source of liquid funds for paying debts and bills. The Palermo Tribunal issued a decree of bankruptcy on 16 May 1968. Meanwhile the Prefect of Palermo annulled on 22 August 1969 the requisition order issued by the Mayor of Palermo. The Court of Appeal of Palermo also awarded damages caused by loss of use of the plant during the period of requisition in response to a petition filed by the trustee in bankruptcy. The Court of Cassation upheld this decision in 1975, and the bankruptcy proceedings were closed in November 1975. However, the amounts realized were not sufficient, and no surplus remained for

distribution to the shareholders (i.e. to the American Corporation and its subsidiary).

In 1974, the United States transmitted a note to Italy enclosing a claim on behalf of Raytheon, based on several alleged violations of the Treaty of Friendship, Commerce and Navigation (FCN) concluded between Italy and the United States.

The United States also submitted an application to the ICJ, in accordance with the terms of Article 36(1) of the Statute of the Court, seeking a declaratory judgement on the direct injury to the United States through infringement of its rights under the FCN Treaty, independent of the dispute over the alleged violation in respect of Raytheon and Machlett. Further, according to the wishes of the parties, this case was submitted to the Chamber of the Court under Article 26 of the Statute of the Court.

Preliminary objections

Italy raised objections to the United States application on the ground that the American companies had not exhausted the local remedies available to them in Italy. The parties, however, agreed to deal with this objection within the framework of merits.

Main issue

The United States claimed that Italy, by its actions with respect to an Italian company, ELSI, which was wholly owned by United States companies, had violated certain provisions of the FCN Treaty of 1948 between the two parties and the Supplementary Agreement, 1951 thereto. The United States claimed reparations from Italy for the losses suffered by ELSI.

Decision

At the outset, the Court rejected the Italian objection that the United States companies had not exhausted the local remedies available in Italy. Before doing so it rejected two United States arguments: first that the requirement of exhaustion of local remedies was not applicable to the present case as its claim was based on the FCN Treaty; and second, that Italy could not raise that objection, as it had not indicated until the time of filing of the counter-memorial that the parties could plead their case before United States courts in accordance with their rights under the FCN Treaty. While rejecting the Italian objection, the Court held that Italy had not shown the existence of a local remedy. Further, since Italy could not satisfy the Chamber that there clearly remained some remedy which Raytheon, independently of ELSI, ought to have pursued and exhausted, it could not accept Italy's objection on the ground of non-exhaustion of local remedies.

As to the merits, the majority of judges found that it had not been sufficiently established that an orderly liquidation of ELSI's assets would still have been feasible at the time of its requisitioning. Accordingly, in its view, the requisition order had not interfered with the control and management of the company in any real sense. Thus the Chamber felt that the requisition, while unlawful, was not the cause of ELSI's bankruptcy.

The Chamber also dismissed the United States claims alleging violation of Article V(1) and (3) of the FCN Treaty, which were concerned with the protection and security of nationals and their property. It noted in this regard that although the requisition could be an expropriation, it was not so in the present case, since ELSI was already under an obligation to file for bankruptcy.

The Chamber also held that the requisition order did not violate Article 1 of the Supplementary Agreement to the FCN Treaty, which prohibited arbitrary or discriminatory measures. According to the Chamber, arbitrariness would require more than mere unlawfulness. As the requisition order was made consciously, in the context of an operating system of law and of appropriate remedies of appeal, it could not be considered arbitrary.

Finally, the Chamber stated that it was ELSI's precarious financial situation that deprived its shareholders from disposing of the company's properties in an orderly manner, and that their loss therefore was not due to any action taken by the Italian authorities. Accordingly, there had been no violation of Article VII of the FCN Treaty, which provided for the rights of the parties to dispose of their property and interests.

In view of the above, the Chamber first unanimously rejected the Italian objection to consider the United States' application, and second, by 4 votes to 1, found that Italy did not commit any breach of the FCN Treaty of 1948 between the parties, or of the Supplementary Agreement of 1951.

Note

This case illustrates the possibility of utilizing the Chamber procedure of the Court. The issues involved were of essentially commercial and economic interest and based on a bilateral treaty. It clarifies the principles concerning "estoppel". On the matter of exhaustion of local remedies, while the Court held that it was a principle applicable in this case, it found that there existed no remedies for the United States companies to exhaust independently of remedies available to ELSI, which had been exhausted.

6. ICJ: A FORUM FOR SUBMISSION AND CONSIDERATION OF ECONOMIC DISPUTES

The suitability of referring economic disputes to the ICJ is generally recognized. In fact it is said that there is nothing in the Statute of the Permanent Court, and now the International Court of Justice, that prevents States from referring extra legal or non-legal matters, such as political, economic and financial matters, for a decision.³¹ Similarly, it has also been observed that

*“the competence of the Court is already wide, and there is nothing in the nature of the Court or its experience, which suggests that the Court would be unable to deal with any particular category of disputes”.*³²

Further, from the cases discussed in this module, it can be seen that the Court has been quite willing to deal with disputes involving trade, investment and the economic rights of States and individuals.

Economic disputes were submitted during the inter-war period either to arbitration or to the Permanent Court of International Justice (PCIJ), which was established in 1921 as part of the system of the League of Nations. Even though the Statute of the Permanent Court of International Justice allowed States to confer compulsory jurisdiction upon the Court through declarations made under an optional clause, the basic feature of the jurisdiction of the PCIJ, like that of the ICJ, was consent of States parties to a dispute. In this sense, the jurisdiction of the Court was similar to that of international arbitral tribunals, which are established by a special agreement between the parties to a dispute. Even after the creation of more specialized regimes to deal with economic disputes, such as the dispute settlement procedure of the World Trade Organization, and the possibility of referring certain class of economic disputes to the International Court of Justice cannot be ruled out.

The advantage of referring a case to the ICJ is that the parties do not have to bear the expenses of the Court, which is not the case in respect of the arbitral tribunal. The decision of the ICJ is immediately binding on the parties to a dispute without the need for additional ratification or confirmation by another body. Further, the Court's response to particular questions on rules and procedures and questions of admissibility is predictable given the well-developed jurisprudence of the Court on these matters. In addition, being a principal organ of the United Nations, a decision rendered by the Court, for all the judicial caution it exhibits, gives it the opportunity not only to advance the cause of development of international law, but also to put on the decision the imprimatur of the international community.

³¹Lord McNair(1957), p. 11.

³² Allot P (1972), pp. 128-158, at p. 157

This may be illustrated by reference to the *Barcelona Traction* case (1970),³³ a typical dispute involving economic interests. In that case, the observations of the Court on the nature of *erga omnes* obligations, which are owed to the entire international community, has given rise to a whole new doctrine of international law based on the interests of the international community distinct from the traditional bilateralism among States.

Accordingly, where issues of greater interest to the international community arise in a given case, even if the subject matter of the dispute is essentially economic in nature, it would appear desirable to submit such a case to the ICJ.

A few more points with reference to the Statute of the Court are useful to note which show the flexibility that exists in the jurisdiction of the Court to deal with economic disputes.

According to Article 36(2)(c), States parties to the Statute of the ICJ may refer to it all legal disputes concerning “the existence of any fact which, if established, would constitute a breach of an international obligation.” Further, under sub-paragraph (d) of the same Article, legal disputes concerning the “nature and extent of the reparation to be made for the breach of an international obligation” may also be referred to the Court.

In this connection, it may be noted that the facts, the existence of which the Court is called upon to determine, could be of any kind, and they could clearly be economic facts, considerations and circumstances.

Even though the Court is called upon to decide upon the dispute submitted to it in accordance with international law, it need not pronounce a judgement in every matter that is referred to it. It could suspend or discontinue its proceedings, either upon a request made by one of the parties or on its own initiative, with a view to helping States arrive at an agreement by negotiation in good faith or by any other means. It could render declaratory judgements, upon a request from the Applicant State to the dispute, to clarify the rights and obligations of the parties involved without having to deal with allegations of violation of obligations.

From the jurisprudence of the Court, it is also amply established that economic disputes are as much justiciable as any other disputes.³⁴ Further, States have treated economic disputes as fit cases for submission to the Court. This is evident from the many declarations they have filed under Article 36(2) of the Statute of the Court.

³³ See *Second Phase, ICJ Reports (1970), paragraphs 33-34 at p. 605.*

³⁴ See *Wellens K (1996), p. 252.*

According to one study of economic disputes dealt with by the Court, relevant cases were classified into three categories: (i) where economic facts, factors and circumstances are relevant to a case but fall outside the scope of judicial function; (ii) those which are relevant but do not constitute the core of the matter; and (iii) economic rights and obligations which have been the subject matter of the dispute.³⁵

Cases involving delimitation of land and maritime boundaries are essentially disputes about sovereignty over natural resources and the exercise of sovereign rights of States. Even though disputes concerning these matters would involve economic rights and obligations, they are of a different class and raise broader issues of international law. Hence the scope of our study is limited to those cases where economic rights, trade and investment issues are directly part of the subject matter of a dispute.

³⁵ *Ibid.*

7. TEST YOUR UNDERSTANDING

After having studied this module, the reader should be able to answer the following questions.

1. What is the relationship between the ICJ and PCIJ? Under what conditions is jurisdiction conferred upon the PCIJ or a tribunal that might have been instituted by the League of Nations, devolve upon the ICJ?
2. Can a State not giving its consent under Article 36(1) or (2) of the ICJ Statute initiate a case before the World Court?
3. Can the jurisdiction of the Court be found on the basis of recommendations made by the Security Council between the parties to a dispute in accordance with Article 36(3) of the Charter?
4. What is the role of a judge ad hoc in the ICJ, and how is one appointed?
5. What is the basis of jurisdiction of the ICJ?
6. For unilateral declarations filed under Article 36(2) of the Statute with different reservations, as between an applicant State and a respondent State, how is the jurisdiction of the Court constructed/defined on the basis of reciprocity?
7. What is an “automatic reservation” and is it a valid reservation?
8. What are the conditions governing devolution of jurisdiction of the PCIJ over the ICJ in respect of: a) Article 36(1), and b) Article 36(2)?
9. What is the role of the “time factor” in determining the jurisdiction of the Court under Article 36(2) of the Statute?
10. Do the conditions specified in Article 36(3) limit the discretion of a State in specifying reservations to a declaration filed under Article 36(2) of the Statute?
11. Can the Court order interim measures of protection *suo moto* when parties to the dispute have not specifically requested them?
12. Is it necessary for the Court to first find the jurisdiction in the case before it can indicate the interim measures of protection?
13. What kind of preliminary objections to the jurisdiction of the Court can be raised? How are they treated in the practice of the Court?
14. Can a third State intervene in the proceedings before the ICJ? If so, on what terms and conditions?
15. Can a judgement rendered by the Court be revised later? If so, on what grounds?
16. How is the judgement of the ICJ enforced?
17. Can the ICJ proceed with a case if one of the parties does not appear, or if a party withdraws from the proceedings of the Court?

8. HYPOTHETICAL CASES

Case No. 1

Transatlantic Company is incorporated in country A. It makes investments in mining operations in country X. Country B gains independence from country X, and the mining operations in which Transatlantic Company made investments come under the jurisdiction of the country B. Country B nationalizes the operations and takes over the properties of the Transatlantic Company. The investments had been made in accordance with an agreement between countries A and X and a contract entered into between Transatlantic Company and country X.

The mining operations were nationalized with a nominal payment of compensation. Transatlantic Company filed a case before the local courts of competent jurisdiction. The case could not be taken up for more than a year due to the heavy load of cases pending before the courts of B.

Country A then takes up the matter for speedy resolution of the economic dispute between Transatlantic Company, which is a national of A. B declines responsibility for the agreement concluded with country X. Country A contends that it should accept responsibility as a successor State and offers to submit the matter to arbitration, but B refuses that offer.

Country X files a declaration accepting compulsory jurisdiction of the ICJ under Article 36(2), which came into effect five years before the separation of country B from country X. B filed a declaration when it became independent, but with a reservation that it would not cover disputes arising from situations prior to its independence. Country A makes an application to the ICJ requesting that it,

1. Adjudge and declare that country B, as a successor State to country X, committed an internationally wrongful act violating the terms of agreement between countries A and X;
2. Adjudge and declare that country B is guilty of denial of justice to Transatlantic Company, a national of country A;
3. Adjudge and declare that country B should immediately rescind the order of nationalization, and immediately restore ownership and management to Transatlantic Company and pay compensation for the loss suffered by the company since the takeover.

Country A also asks for interim measures of protection obliging country B to refrain from taking any action with regard to the assets of the company that would prejudice an effective implementation of the decision of the ICJ.

1. What are the options available to country B in responding to the application of country A before the ICJ?

2. What kind of objections could B raise against the jurisdiction of ICJ?
 - (a) Against the interim measures of protection sought.
 - (b) Against the merits of the case.
3. Should B appear before the court, or send the objections and not appear before the court, or keep silent and let the court come to its own conclusion on the basis of documents and submissions made by country A, which it believes provides no basis for the jurisdiction of the ICJ?

Case No. II

Country A enacted national legislation to protect the environment. According to this law, fishermen, including foreign fishermen, cannot engage in fishing either in its exclusive economic zone or in areas of the high seas adjacent to the zone without conforming to the rules and regulations enacted by country A fixing quotas for the fishermen and the duration of time they can engage in such fishing from season to season. World Wide Fishing Ltd., (hereafter referred to as “fishing company”) is a company incorporated in country B but the nationals of country C hold substantial shareholdings in it. The fishing company, which traditionally engages in fishing in the high seas adjacent to the exclusive economic zone of country A, is therefore affected by the new law of that country.

Country B does not question the law of country A as it has a similar law of its own. Therefore, the shareholders of the fishing company persuade country C, of which they are nationals, to take up the case of the fishing company with country A with a view to allowing it to continue to fish in the high seas without the restrictions imposed by country A. Country C lodges a protest with country A challenging the validity of laws and regulations of country A as a violation of the rights of States and the freedom of the high seas.

Country A rejects the claim of country C on the ground that under international law, country C does not have the right to sponsor the claim of the fishing company which is incorporated in country B. In any case, it points out that the aggrieved company or its shareholders, being foreign nationals, should first seek local remedies available in its domestic jurisdiction. Under the law of country A, which is in question, there is a provision for aggrieved persons, including foreign nationals, to appeal to a board of trustees responsible for environmental protection. The decisions of the board can further be appealed against in the higher courts of country A.

Country C is a party to the optional jurisdiction of the ICJ, having filed a declaration under Article 36(2) of its Statute. The declaration of country C reserved against the jurisdiction of the ICJ any dispute in respect of matters that it considers as being within its domestic jurisdiction. Country A is also a party to the optional jurisdiction of the ICJ, and its declaration had no reservations.

Country C files an application before the ICJ challenging the validity of the law and regulations of country A as a violation of international law and, in particular, the rights and freedoms of the high seas enjoyed by Country C and all States.

Indicate the possible objections country A could raise to the jurisdiction of the Court.

1. Could country A take advantage of the reservations made by country C to its declaration?
2. Could country A argue that the claim of country C is essentially a case of diplomatic protection that it is not entitled to give the fishing company, which is a national of country B?
3. Could country A further argue that environmental protection is a higher priority, and that such protection cannot effectively be accorded if a strict demarcation between the exclusive economic zone and the high seas is maintained?
4. In any case, as long as effective local remedies are available within the domestic jurisdiction of country A would the ICJ have a *locus standi* to entertain the dispute between countries A and C?

Identify possible grounds on which country C could seek and sustain its case against country A.

1. Could country C argue that freedom of the high seas is a well established principle of customary and conventional law, and that all States are free and equal in the enjoyment of these rights, and that accordingly, no State can impose its national laws and regulations on activities within the high seas?
2. Could country C also argue that even though the dispute involved the interests of its nationals, it has also direct interest in preserving its own rights and freedoms as against the unlawful laws and regulations of country A.
3. Could country C further argue that where the interests of States are involved, there is no need for country C to let its nationals first seek local remedies otherwise available under the laws of country A.

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