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## Reciprocity and the Compulsory Jurisdiction of the International Court of Justice

**Abstract.** The paper analyses the role and importance of the principle of reciprocity in the optional clause system of the International Court of Justice. After a short description of the Statute provisions on reciprocity of the two International Courts the author deals with the stipulation of reciprocity in declarations accepting the compulsory jurisdiction of the Court. The main part of the paper is devoted to the legal practice of the two International Courts on the matters of reciprocity. As a conclusion the author says that, by virtue of the principle of reciprocity, reservations to the acceptances of compulsory jurisdiction tend, in practice, to make their effect felt more often than not, precisely against the State or States making a reservation.

**Keywords:** International Court of Justice, compulsory jurisdiction, optional clause, reciprocity

International law is permeated, perhaps more profoundly than any other branch of law, with reciprocity in the sense that rights must be coupled with certain obligations in relations between States and that there must be some sort of correspondence between rights enjoyed and obligations assumed,<sup>1</sup> first of all because law is made by equal States, which, in creating law, are well aware of the need to assume certain obligations in exchange for their rights, and conversely. This thesis in international law holds true not only for law-making, but also for the application and enforcement of law. There is no doubt that the principle of reciprocity is most clearly manifested in the law of contracts, however, as will be seen in the following discussion, it is also a basic element of the system of compulsory jurisdiction of the International Court of Justice.

The International Court of Justice, being the principal judicial organ of the United Nations under Article 92 of its Charter, has jurisdiction only with the consent of the parties. Dealing with the case of the *Minority Schools of Upper*

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<sup>1</sup> For more detail, see Virally, M.: *Le principe de réciprocité dans le droit international contemporain*. Recueil des Cours, 1967, Vol. III. 1969. A. W. Sijthoff—Leyden, 5–101.

*Silesia* in the interwar period, the Permanent Court of International Justice formulated this thesis in the following terms: “The jurisdiction of the Court depends on the will of the parties.”<sup>2</sup> This same thesis was expressed in the case of *Eastern Karelia* to the effect that no single State can be compelled to submit its disputes with other States to mediation or arbitration or any other procedure for peaceful settlement unless it has consented thereto.<sup>3</sup> Later this principle was also reaffirmed by the International Court of Justice in several cases.

Under Article 36 of the Statute, the parties may express their consent to the Court’s jurisdiction, in addition to other means,<sup>4</sup> by a declaration of submission to or acceptance of compulsory jurisdiction made by reliance on the so-called optional clause as referred to in paragraph 2 of Article 36. In relations between States that have made unilateral declarations of acceptance under the optional clause, a special system comes into effect whereby a State party to that system may refer to the International Court of Justice its dispute with another State party to that system by filing a unilateral application without the prior consent of the opponent State.

### 1. Statute provisions on reciprocity

Reciprocity is covered by Article 36, paragraphs 2 and 3, of the Statute of the Court reading: “The States to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court...” (para. 2) and “The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time” (para. 3). At first sight, however clear these provisions appear to be, one can detect some confusion<sup>5</sup> concerning the relationship between paragraphs 2 and 3 of Article 36. This is likely due to the

<sup>2</sup> PCIJ Series A. No. 15.22.

<sup>3</sup> PCIJ Series, B. No. 5. 27.

<sup>4</sup> Other means may include the agreement of the parties to submit an already existing dispute to the Court, or the so called compromissory clause of an international agreement providing that disputes arising between them of the kind envisaged in the compromissory clause, shall or may be submitted to the Court.

<sup>5</sup> In a similar sense, see Thirlway, H. W.: *The Reciprocity in the Jurisdiction of the International Court*. Netherlands Yearbook of International Law, 1984, 98; Shabtai, R.: *The Law and Practice of the International Court*. A. W. Sijthoff—Leyden, 1963, 384; Shihata, I. F. I.: *The Power of the International Court to Determine its Own Jurisdiction*. Martinus Nijhoff—The Hague, 1965. 147.

fact that while both paragraphs cover reciprocity, they refer to different aspects thereof.

Paragraph 2 of Article 36 is unambiguously clear about what is in reality a specificity of the entire regime of the optional clause, namely that it is a network of additional obligations and additional rights as between certain groups of States party to the Statute. In the *Anglo-Iranian Oil Company Case* Judge McNair described the optional clause as being *contracting in* rather than *contracting out* in nature.<sup>6</sup> This regime operates only in the inter se relations of States that have made declarations of acceptance of compulsory jurisdiction, and not in respect of all States party to the Statute. Professor Waldock, in his study on the optional clause, describes all this as the lack of “some basic mutuality” between States having made declarations of acceptance and those having made none. The declaring States are continuously liable to be brought before the Court at any time,<sup>7</sup> however, States not making such declarations cannot be sued before the Court unless and until they choose to initiate proceedings before the Court as plaintiff and make declaration under the optional clause.<sup>8</sup>

As noted earlier, paragraph 3 of Article 36 refers to reciprocity in connection with the content of declarations of acceptance, in which reciprocity may be stipulated by States. It is this paragraph of the Statute that forms the legal basis of the practice of States to make restrictions or reservations to their declarations of acceptance, placing limitations as to persons, subject-matters or periods of time on the obligations they have assumed concerning the Court’s compulsory jurisdiction.

The explanation for the Statute referring twice to the principle of reciprocity is offered by the documents preparatory to the drafting of the Statute, and the double reference can, in all likelihood, be attributed to the proposals of the Brazilian jurist Fernandez, a member of the 1920 Committee of Jurists. Fernandez thought that States were free to accept the Court’s jurisdiction on condition or unconditionally. He saw one such condition in reciprocity in respect of certain States or in respect of a certain number of States, including certain denominated States. The Brazilian expert argued that it is impossible for a State to accept the Court’s compulsory jurisdiction without knowing the States with which it is to undertake such an obligation. Regarding Fernandez, Thirlway comes to the conclusion that the Brazilian jurist’s draft sought to

<sup>6</sup> ICJ Reports, 1952. 116.

<sup>7</sup> At least in principle, as will be discussed later.

<sup>8</sup> Waldock, C. H. M.: *Decline of the Optional Clause*. The British Yearbook of International Law. 1955–1956. 280.

allow States to choose those with which they are able to establish a compulsory jurisdiction relationship obligating them to submit their disputes to international adjudication.<sup>9</sup> At any rate, it was under the influence of Fernandez's proposals that the section saying that "the declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Member States, or for a certain time" was inserted in the Statute of the Permanent Court of International Justice. To our knowledge, the possibility for the "choice of partners" as originally suggested by Fernandez was used by only one State, namely Brazil, which in 1920 included in its declaration of acceptance a formula under which the declaration was to be effective "as soon as it has likewise been recognized as such by two at least of the Powers permanently represented on the Council of the League of Nations". Waldock's statement that paragraph 3 of Article 36 refers in fact not to reciprocity is essentially in harmony with Fernandez's concept. According to the prominent British jurist, what we have here is a provision authorizing States to accept compulsory jurisdiction for a definite period of time and on condition that the Court's compulsory jurisdiction is also accepted by a certain number of States or by specified States. Thus, Waldock argues this is not a real "condition of reciprocity", but one that a declaration will not become effective until the Court's compulsory jurisdiction has been accepted by a certain number of States or by certain specified States.<sup>10</sup>

As is provided by paragraph 2 of Article 36., a State recognizes the Court's compulsory jurisdiction in respect of States "assuming the same obligation". Here it is most likely that the framers of the optional clause had in mind cases in which a State accepts the Court's jurisdiction in respect of only some of the four categories of disputes enumerated in paragraph 2.<sup>11</sup> However, what happened in practice instead, was that States, by attaching reservations to their declarations of acceptance, did not exclude categories (a), (b), (c) or (d) of disputes, but, by naming precisely or less precisely formulated conditions as to

<sup>9</sup> Thirlway: *op. cit.* 103–104.

<sup>10</sup> Waldock: *op. cit.* 255.

<sup>11</sup> Under para. 2 of Art. 36, States may recognize as compulsory the jurisdiction of the Court in all or any of the classes of 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".

time, persons or subject-matters, they limited the scope of the obligations they undertook in respect of the Court's compulsory jurisdiction.

Emmanuel Decaux writes that the original idea was confined to the reciprocity of acceptance, namely States making declarations of acceptance, and did not imply any sort of full reciprocity comprising reservations and conditions.<sup>12</sup> According to the said author, paragraph 2 of Article 36 allows for two extreme concepts: minimum reciprocity is satisfied by both parties adhering to the system of the optional clause, whereas maximum reciprocity requires the parties to make identical declarations of acceptance. Where making reservations is not allowed, this distinction would be superfluous as States could make identical declarations only.<sup>13</sup>

Obviously, neither of these two concepts is acceptable. The minimum reciprocity disregards the wide diversity of declarations flowing from the many reservations attached to them, while the maximum reciprocity actually rules out the application of reciprocity as no two identical declarations of acceptance exist.<sup>14</sup> Herbert Briggs stresses that any concept to the effect of "accepting the same obligation" presupposes that identical declarations or corresponding reservations leads to the nullification of the system of compulsory jurisdiction under Article 36 paragraph 2 of the Statute, because States have wide discretionary powers to unilaterally determine the conditions for accepting the Court's compulsory jurisdiction.<sup>15</sup> Taking the passage "accepting the same obligation" literally would imply that the system of compulsory jurisdiction would only operate in relations between States having made completely identical declarations, but would not operate with respect to the other States.<sup>16</sup> Thus, the passage "accepting the same obligation" does not mean that "exactly or even broadly the same obligation of compulsory jurisdiction must have been accepted by each State," but requires complete reciprocity in the operation of compulsory jurisdiction between two States which have accepted the obligation in different terms.<sup>17</sup>

<sup>12</sup> Decaux, E.: *La réciprocité en droit international*. Librairie Générale de Droit et de Jurisprudence, Paris, 1980. 85.

<sup>13</sup> *Ibid.* 87.

<sup>14</sup> *Ibid.* 87–88.

<sup>15</sup> Briggs, H. V.: *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice. Recueil des Cours*, 1958. 242.

<sup>16</sup> In a similar sense, see Briggs: *op. cit.* 242–243.

<sup>17</sup> Waldock: *op. cit.* 257–258.

## 2. Stipulation of reciprocity in declarations of acceptance

A closer look at the declarations of acceptance made since the early 1920s reveals that stipulation of reciprocity, in most different formulations, can be found in most declarations of acceptance. There are declarations which refer to Article 36 of the Statute concerning reciprocity, using the phrases: “on condition of reciprocity”; “subject to reciprocity”; “subject exclusively to reciprocity”; or, “on the basis of absolute reciprocity”. Also known is the phrasing that the instrument creates an obligation in respect of “States making identical declarations” or of “States accepting the same obligation”, which is naturally equivalent to the aforesaid express stipulations of reciprocity. Declarations are frequent which contain the formula “in relation to any other State accepting the same obligation, that is to say on condition of reciprocity”; such a formula is termed by Briggs as the “double formula of reciprocity”.<sup>18</sup> On the other hand, some declarations of acceptance contain no reference to reciprocity, meaning that the declaring States recognized the Court’s compulsory jurisdiction without providing for reciprocity.

Regarding the inclusion of reciprocity in declarations of acceptance, the question automatically arises whether reciprocity applies to all declarations of acceptance and to the situation when a State makes no reference to, or expressly excludes, reciprocity in its declaration of acceptance.<sup>19</sup> This question seems proper if only for the reason that, according to some authors, there is nothing to prohibit States from accepting the Court’s compulsory jurisdiction without stipulating reciprocity. The view that distinction can be made between declarations of acceptance unconditionally and on condition of reciprocity is associated in the pertinent literature with Guiliano Enriques during the inter-war years and with Hambro among other authors in later times.<sup>20</sup> According to Enriques, declarations of acceptance made with the reference to reciprocity imply acceptance of obligations of only States having made identical declarations, whereas declarations made without referring to reciprocity apply, in the absence of a contrary provision, simply to obligations assumed in

<sup>18</sup> Briggs: *op. cit.* 238.

<sup>19</sup> *Ibid.* 238–239; Thirlway: *op. cit.* 107.

<sup>20</sup> On the basis of paragraph 3 of Article 36 of the Statute, Hambro deems it conceivable for a State to accept the Court’s jurisdiction unconditionally, which leads to the conclusion that such a State accepts the Court’s jurisdiction without the reciprocity clause. He adds, however, that this cannot be supposed to be the case. HAMBRO, E.: *The Jurisdiction of the International Court of Justice*. Recueil des Cours, 1950, I. 184–185.

respect of States having ratified the Statute.<sup>21</sup> It calls for no further explanation that, based on this view, the States having made declarations of the latter form would assume rather far-reaching obligations, for they would in fact accept the Court's compulsory jurisdiction in respect of all States party to the Statute. In connection with such declarations, Bertrand Maus writes that, in the absence of will expressed to that effect, such declarations cannot be construed to imply an obligation wider than that expressed in the clause itself.<sup>22</sup>

Concerning Enríques's view, Thirlway points out that the author practically overlooks the reference to "reciprocity", which is a kind of *communis error*, contained in a declaration referring to paragraph 2 of Article 36, and that the possibility of excluding reciprocity is only given in respect of paragraph 3, which, however, covers a different sort of reciprocity.<sup>23</sup>

The concept that reciprocity is neither a discretionary condition nor a reservation, but constitutes the basis of the system following from Article 36 of the Statute, can be considered to be the view of the majority in the pertinent literature.<sup>24</sup> Reciprocity is a fundamental provision of the Statute applicable to all declarations of acceptance, including that of a State having unconditionally accepted the Court's compulsory jurisdiction.<sup>25</sup> This is supported by the practice of the two Courts, which purports the statement that "reciprocity" has always been interpreted as applying to all declarations of acceptance of compulsory jurisdiction. For that matter, practice over more than eight decades has shown that, as is asserted by Shabtai Rosenne, "(T)he real problem which has faced the Court has never been whether or why reciprocity exists and within the framework of the compulsory jurisdiction, but how it affects the Court's jurisdiction in the concrete case."<sup>26</sup>

<sup>21</sup> Enríques, G.: *L'acceptation sans réciprocité de la juridiction obligatoire de la Cour Permanente de Justice*. RDILC, 1932. 845.

<sup>22</sup> Maus, B.: *Les réserves dans les déclarations d'acceptation de la juridiction obligatoire de la Cour Internationale de Justice*. Librairie E. Droz, Genève, Librairie Minard, Paris, 1959. 100.

<sup>23</sup> Thirlway: *op. cit.* 107–108.

<sup>24</sup> Decaux: *op. cit.* 80.

<sup>25</sup> In a similar sense, see Waldock: *op. cit.* 255; Briggs: *op. cit.* 242; and Anand, R. P. *Compulsory Jurisdiction of the International Court of Justice*. Asia Publishing House, New York, 1961. 160.

<sup>26</sup> Rosenne: *op. cit.* 385.

### 3. Limits of reciprocity under the practice of the two Courts

#### *Practice of the Permanent Court of international Justice*

In the legal practice of the two International Courts, the question of reciprocity has emerged in a number of cases, with both the parties, the Court and the pertinent literature not infrequently offering differing interpretations of this principle. The problem concerning the interpretation of reciprocity results from the fact that in 1920 the framers of the Statute did not consider how reciprocity would really operate with respect to reservations, so the will of the lawmakers provides no guidance in this matter.<sup>27</sup> It is not accidental that Rosenne points to contradictions in the views of both the Permanent Court of International Justice and the contemporary literature on the subject of reciprocity.<sup>28</sup>

In the jurisprudence of the Permanent Court of International Justice, the case of the *Phosphates in Morocco* was the first occasion to consider the question of reciprocity. In the proceedings initiated by Italy against France, which was as a result of measures by Moroccan authorities described by the applicant as “the monopolization of Moroccan phosphates”, attention should be directed to, for the purpose of the present discussion, the French preliminary objection invoking the reservation to the French declaration of acceptance, which excluded the retroactive effect of the declaration. According to the reservation, the Court’s compulsory jurisdiction existed in respect of any disputes arising after the ratification of the present declaration, (i. e. after 25 April 1931—V. L.) with regard to situations and facts subsequent to this ratification.<sup>29</sup> On the basis of reciprocity, France claimed that the exclusion of the retroactive effect in relations between the two States—albeit the Italian declaration contained no reservation concerning earlier facts and situations—was effective as from the date of ratification of the Italian Court’s jurisdiction to exist in relations between the two States in respect of only disputes arising on the basis of facts and situations subsequent to 7 September 1931.<sup>30</sup> Decaux considers that the said objection of France not only involved reciprocity, but actually transplanted the French reservation into

<sup>27</sup> Thirlway: *op. cit.* 112.

<sup>28</sup> Rosenne: *op. cit.* 384.

<sup>29</sup> In that case the applicant State based the Court’s jurisdiction on the declarations of acceptance by the two States.

<sup>30</sup> *Phosphates of Morocco*, in: Hudson, M.: *World Court Report*. Washington, Carnegie Endowment for International Peace. Vol. IV. 315.



the Italian declaration,<sup>31</sup> and that France invoked against Italy a pseudo-reservation embodied in the Italian declaration.<sup>32</sup> For its part, the Court stated that “(T)his (the Italian—V. L.) declaration does not contain the limitation that appears in the French declaration concerning the situations or facts with regard to which the dispute arose; nevertheless, as a consequence of the condition of reciprocity stipulated in paragraph 2 of Article 36 of the Statute of this Court, it is recognized that this limitation holds good as between the Parties”.<sup>33</sup> However, the Court did not consider the question whether the restriction excluding the retroactive effect should operate in that particular case from the date of ratification of the Italian or the French declaration, as the Court held that “(T)he date preferred by one or other of the Governments would not in any way modify the conclusions which the Court has reached. It does not therefore feel called upon to express an opinion on that point.”<sup>34</sup> In reality, therefore, the Court recognized the application of reciprocity to the reservations to the declarations of acceptance by the two States, but did not clarify the consequences ensuing there from. In that case, no special problem was caused by this course of the Court, since there was an interval of a few months between the dates of the deposit of the two declarations of acceptance. However, one can easily imagine a case in which the date accepted by the Court could have been of supreme importance.

Similarly, in the *Electricity Company of Sofia Case* between Belgium and Bulgaria, the Court was confronted with a reservation excluding the retroactive effect of the declarations. In that case, it was on the basis of reciprocity that Bulgaria—which recognized the Court’s jurisdiction in respect of States accepting the same obligation but “unconditionally”—invoked the reservation to the declaration of acceptance by the applicant State, Belgium; the declaration was ratified on the 10th of March, 1926, and the reservation was to the effect that the declaration applied to any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification. The Court stressed that “(A)lthough this limitation does not appear in the Bulgarian Government’s own declaration, it is common ground that, in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36 of the Court’s Statute and repeated in the Belgian declaration, it is applicable as between the Parties”.<sup>35</sup>

<sup>31</sup> Decaux: *op. cit.* 90.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* 322.

<sup>35</sup> *Electricity Company of Sofia and Bulgaria*. In: Hudson: *op. cit.* Vol. IV. 408.

Dealing with this decision, Alexandrov writes that the Court expressly and irrevocably recognized that reciprocity applies to reservations *ratione temporis*. Hence, it was necessary to determine two dates: the date of exclusion of the retroactive effect, on the one hand, and the critical date of emergence of the dispute, on the other.<sup>36</sup>

Despite their apparent similarity, the two cases considered by the Permanent Court of International Justice are different. In the *Phosphates of Morocco* case the respondent State actually contested the Court's jurisdiction on the basis of the reservation to its own declaration and not on the basis of reciprocity. It was a case of genuine reciprocity when that State wanted to have the date of exclusion of the retroactive effect counted from the deposit, not of its own declaration of acceptance, but that of the applicant State, yet that matter was not decided by the Court. On the other hand, in the case of the *Electricity Company of Sofia*, the reservation excluding the retroactive effect was contained in the declaration of acceptance of the applicant State, however, it was invoked by the respondent State on the basis of reciprocity, but such reciprocity was not recognized by the Court.

#### *Practice of the International Court of Justice*

The question of reciprocity has also been considered by the International Court of Justice in several cases.

Chronologically, mention should be made first of the *Anglo-Iranian Oil Company Case*, which was submitted by the United Kingdom against Iran. In that case, the respondent State invoked the reservation contained in its own declaration of acceptance and excluded the retroactive effect of the declaration.<sup>37</sup> In its judgement on the preliminary objections the Court emphasized that "(B)y these Declarations jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it. As the Iranian Declaration is more limited in scope than the United Kingdom Declaration,

<sup>36</sup> Alexandrov, S. A.: *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*. Martinus Nijhoff Publishers, Dordrecht (Boston) London, 1995. 43.

<sup>37</sup> By the terms of this reservation, the declaration did not apply to disputes arising after its ratification in respect of situations and facts relating directly or indirectly to the application of treaties or conventions accepted and ratified by Persia after the ratification of that declaration. The dispute between the parties concerned the question of whether the reservation was operative in respect of the application only of treaties and conventions accepted by Iran after the ratification of the declaration or of treaties and conventions accepted by Iran at any time.

it is the Iranian Declaration on which the Court must base itself. This is the common ground between the Parties”.<sup>38</sup> This statement regarding such “coincidence” has been repeatedly invoked by the Court, most recently in the case of *Land and Maritime Boundary between Cameroon and Nigeria* at the end of the 1990s.<sup>39</sup> In connection with the *Anglo-Iranian Oil Company Case*, Briggs notes that, since the respondent State was invoking the reservation to its own declaration as a bar to jurisdiction, there was no need for the reference to reciprocity, and it is likely that the Court and its President addressed that point “as an elucidation provided by the Court on a question argued at some length by the Parties in the pleadings.”<sup>40</sup>

Perhaps of greatest interest to reciprocity is the *Norwegian Loans Case* between France and Norway, which involved application, on the basis of reciprocity, of a subjective reservation of domestic jurisdiction. The declaration of acceptance made by France as the applicant State incorporated a reservation under which the declaration did not apply to disputes “relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic”. The Norwegian declaration of acceptance contained no such limitation, but, in its first preliminary objection, Norway contended that the International Court did not have jurisdiction in that case because by virtue of the declarations accepting the compulsory jurisdiction the Court’s jurisdiction extended to legal disputes falling within one of the four categories enumerated in paragraph 2 of Article 36 of the Statute, while the subject-matter of the dispute as stated in the French application related to the national law of Norway. In the second part of the objection, Norway relied on the principle of reciprocity in referring to the reservation to the French declaration of acceptance, under which “(T)his declaration does not apply to differences relating to matters, which are essentially within the national jurisdiction as understood by the Governments of the French Republic”.<sup>41</sup>

For its part, the International Court of Justice stated that “in the present case the jurisdiction of the Court depends upon the Declarations made by the Parties in accordance with article 36, paragraph 2, of the Statute on condition

<sup>38</sup> ICJ Reports, 1952. 103.

<sup>39</sup> ICJ Reports, 1998. 298.

<sup>40</sup> Briggs: *op. cit.* 253.

<sup>41</sup> The second preliminary objection of Norway also referred to reciprocity *ratione temporis*, claiming that the Court was without jurisdiction because, under the French declaration of acceptance of compulsory jurisdiction, the Court had jurisdiction in respect only of disputes relating to facts and situations subsequent to the ratification of the declaration. This question was not, however, considered by the Court.

of reciprocity; and that, since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the Declarations coincide in conferring it. A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation".<sup>42</sup> Referring to the statements of its predecessor in the *Phosphates of Morocco Case* and the *Electricity Company of Sofia Case*, as well as to its own findings in the *Anglo-Iranian Oil Company Case*, the International Court of Justice stressed that "(I)n accordance with the condition of reciprocity to which acceptance of the compulsory jurisdiction is made subject in both Declarations and which is provided for in Article 36, paragraph 3, of the Statute, Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction".<sup>43</sup>

In the literature on international law, the Court's judgement rendered in the *Norwegian Loans Case* prompted a large share of criticism, first of all because the Court had in fact sidestepped the question of how far subjective reservations of domestic jurisdiction were admissible and valid in respect of national jurisdiction and, instead of deciding that question, it just stated the lack of its jurisdiction on the basis of reciprocity. In its judgement, the Court did not deal with the validity of the reservations, and the majority of the judges took the position that—since the validity of the reservation was not contested by the parties—the Court was faced with a restriction that was deemed by both disputants to express their common will regarding the competence of the Court, and the Court "... gives effect to the reservation as it stands and as the parties recognize it".<sup>44</sup>

In connection with reciprocity, Decaux writes that it would have been possible to consider two concepts of reciprocity in this case. The first is an objective one, under which France has no discretionary power by virtue of its reservation invoking national jurisdiction, but is bound by good faith. As the matters relating to loans do not pertain to the French internal law, they cannot be incorporated in the Norwegian internal law on the basis of reciprocity.<sup>45</sup> By contrast, under the subjective concept, the position of France is less important:

<sup>42</sup> ICJ Reports, 1957. 23.

<sup>43</sup> ICJ Reports, 1957. 24.

<sup>44</sup> ICJ Reports, 1957. 27.

<sup>45</sup> Decaux: *op. cit.* 97.

the law operating between the two parties is constituted not by the content of the French reservation, but by the Oslo Government's interpretation thereof in terms as if the reservation had been made by Norway. However, the author claims that this was not expressed by Norway, but by the Court's judgement in its stead.<sup>46</sup> Rather than consider the positions of France and Norway on international bonds, the Court based itself on the assumption that the determination of matters falling within national jurisdiction was subjective and that the parties' declarations were sufficient and fell outside the scope of consideration by the Court.<sup>47</sup>

Thirlway likewise holds that, with respect to the scope of reciprocity, the Court went rather far in the *Norwegian Loans Case* when it had not simply "written" into the Norwegian declaration the reservation expressed in the French declaration of acceptance, but had also adapted it to its new environment in the sense that it had turned the matters understood by the French Government to be within national jurisdiction into ones understood by the Norwegian Government to fall within national jurisdiction.<sup>48</sup>

In connection with the cited passage of the Court's decision in the *Norwegian Loans Case*, Briggs raises the question why, in relation to the condition of reciprocity contained in the declarations, the Court referred to paragraph 3, and not to paragraph 2, of Article 36, although the issue sometimes emerged that reciprocity was not an absolute condition of Article 36 of the Statute, because paragraph 3 thereof permits declarations of acceptance to be made unconditionally or on condition of reciprocity.<sup>49</sup> For that matter, in its earlier judgements, the Court argued that Statutory condition of reciprocity contained in paragraph 2 of Article 36, as it also appeared from the Court's opinion on the Norwegian loans. Therefore, Briggs is of the view that the reference to paragraph 3 instead of paragraph 2 is thus probably an error.<sup>50</sup> On the other hand, Renata Szafarz's conclusion is that the reference in this case to paragraph 3 instead of paragraph 2 is to a certain degree inconsistent with the Court's earlier decisions, but may also justify the inclusion in declarations of the condition of reciprocity regardless of the fact that reciprocity is covered by Article 36, paragraph 2, of the Statute.<sup>51</sup> The

<sup>46</sup> *Ibid.* 98.

<sup>47</sup> *Ibid.* 97.

<sup>48</sup> Thirlway: *op. cit.* 115.

<sup>49</sup> Briggs: *op. cit.* 255.

<sup>50</sup> *Ibid.* 256.

<sup>51</sup> Szafarz, R.: *The compulsory jurisdiction of the International Court of Justice*. Martinus Nijhoff Publishers. Dordrecht—Boston—London. 1993. 45.

Polish international jurist stresses further that reservation in this case has undergone a significant transformation, as the principle of reciprocity enabled Norway to invoke the reservation, and invoke it not in its original form, notably in its applicability to France, but in a modified form to allow its content to be applied to Norway. She adds that the effects of reservations in the declarations of acceptance differ essentially in this respect from the reservations attached to international treaties and that the effects of the principle of reciprocity has much more far-reaching implications for reservations contained in declarations of acceptance.<sup>52</sup>

Alexandrov takes a more understanding attitude towards the Court and writes that—since in the French view it is not sure that whether the class of disputes which could be determined by France belonging to its domestic jurisdiction would not necessarily coincide with those understood by another State to fall within domestic jurisdiction “(T)he only way to apply reciprocity was to allow Norway to exclude the same category of disputes as regards Norway.”<sup>53</sup>

Despite the criticisms the International Court has faced for its decision in the *Norwegian Loans Case*, one should acknowledge that the Court did not have much choice in terms of ways to pronounce itself, for if it had decided that subjective reservations of domestic jurisdiction were either admissible or inconsistent with the Statute, its decision would have been bound to produce harmful effects on the system of the Court’s compulsory jurisdiction.<sup>54</sup> To avoid such pernicious consequences, the Court came to a decision by widening the scope of the reciprocity principle to an undoubtedly significant measure, thus also creating a good opportunity to demonstrate the backlash effect of subjective reservations of domestic jurisdiction.

Shortly after the judgement rendered in the case of *Certain Norwegian Loans* the International Court had to decide again on the question of reciprocity in two cases.

The first, examined by the Court, was the *Interhandel Case* between Switzerland and the United States regarding the restitution by the United States of the assets of the Société internationale pour participants industrielles et commerciales S.A. (Interhandel). Within the time-limit fixed for the filing of

<sup>52</sup> *Ibid.* 45.

<sup>53</sup> Alexandrov: *op. cit.* 82.

<sup>54</sup> On this point see the present author’s work: *A Connally-fenntartás és a Nemzetközi Bíróság kötelező joghatósági rendszere* (The Connally Reservation and the System of the Compulsory Jurisdiction of the International Court of Justice). *Állam- és Jogtudomány*, 1987–88. 449–553.

the Counter-Memorial, the United States filed four preliminary objections. Of interest to our subject is the second objection, in which the United States contested the Court's jurisdiction by contending that the dispute had arisen before Switzerland's declaration of acceptance of compulsory jurisdiction became binding, i.e. the 28th of July, 1948. Referring to what had been stated by the Court in the *Anglo-Iranian Oil Company Case*, namely that declarations should coincide in conferring jurisdiction; the Washington Administration argued that since the United States' declaration of acceptance contained a clause limiting the Court's jurisdiction to disputes "hereafter arising", while the Swiss declaration contained no such clause, but the principle of reciprocity required that, between the United States Switzerland, the Court's jurisdiction be limited to disputes arising after the 28th of July, 1948, the date the Swiss declaration came into force. The Court rejected that objection and pointed out the following: "Reciprocity in the case of declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own declaration but which the other Party has expressed in its declaration... Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends (my emphasis—V. L.). It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own declaration".<sup>55</sup>

In the *Interhandel Case*, the United States sought a double application of reciprocity, as is pointed out by Briggs.<sup>56</sup> Decaux wrote: double application of reciprocity, which, as against its single application securing the equality of the parties, is virtually conducive to inequality, and here with this case is a Swiss (non-existent) reservation excluding the retroactive effect and conferring advantage to the United States only.<sup>57</sup> However, by rejecting the American stand, the Court created a clear situation, defining the limits of reciprocity and blocking the way to potential abuse of double reciprocity.<sup>58</sup>

From the point of view of restrictions laid down in declarations of acceptance, the Court, in dealing with the *Interhandel Case*, faced a similar situation to that in the *Phosphates of Morocco Case*. Unlike its predecessor, however, the Court examined the question thoroughly clearly determining the aforementioned limitations on the application of reciprocity.

<sup>55</sup> ICJ Reports, 1959. 23.

<sup>56</sup> Briggs: *op. cit.* 248.

<sup>57</sup> Decaux: *op. cit.* 104.

<sup>58</sup> *Ibid.* 106.

The question of reciprocity was considered by the International Court of Justice in the greatest detail in the *Case concerning the Right of Passage over Indian Territory*. These proceedings were initiated by Portugal against India on the ground that the Delhi Government denied passage through Indian territory between the Portuguese enclaves. A specific feature of this case is that Portugal filed an application against India a few days after the deposit of its declaration accepting the compulsory jurisdiction of the Court; the Portuguese declaration was dated the 19th of December, 1955, and the Lisbon Government submitted its application on the 22nd of December, 1955. In response, India filed six preliminary objections, several of which related to the question of reciprocity.

In the first preliminary objection, India took exception to the third condition contained in the Portuguese declaration, under which Portugal has the right, by making at any time a notification to the Secretary-General of the United Nations to the effect of withdrawing from the compulsory jurisdiction any matter. The Indian Government contended that the said clause of the Portuguese declaration enabled Lisbon to withdraw, by a simple notification made at any time, from the Court's jurisdiction on any matter which has been submitted to it prior to such notification. India claimed that the said condition was incompatible with the principle and notion of the compulsory jurisdiction of the Court as established in Article 36 of the Statute, it introduced an element of uncertainty regarding the obligations of the declaring State; and it was contrary to the principle of reciprocity. The Court held that the said condition caused no uncertainty and did not contradict the basic principle of reciprocity underlying the optional clause, since any such reservation, by virtue precisely of the principle of reciprocity, was to become automatically operative against it in relation to other signatories of the optional clause.<sup>59</sup> The Court likened reservations concerning the right to modify declarations with immediate effect to clauses concerning the right of denunciation by simple notification with immediate effect, stating that there is no essential difference between the situations created by these clauses, with regard to the degree of certainty, and the third condition of the Portuguese declaration which leaves open the possibility of a partial denunciation.<sup>60</sup> In connection with modification of declarations, the Court pointed out that "when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective declarations".<sup>61</sup>

<sup>59</sup> ICJ Reports, 1957. 144.

<sup>60</sup> *Ibid.* 143–144.

<sup>61</sup> *Ibid.* 143.



In its second preliminary objection, the Government of India invoked reciprocity, contending that the filing of the Portuguese application violated the principle of “equality, mutuality and reciprocity” generally recognized in connection with declarations of accepting the compulsory jurisdiction. Portugal filed its application as little as three days after its declaration of acceptance, leaving insufficient time for the Secretary-General of the United Nations, in compliance with Article 36 paragraph 4 of the Statute, to transmit copies of the Portuguese declaration, before the filing of the application, to the other parties to the Statute, including India among other States. The first argument of the Court was that “(T)he principle of reciprocity forms part of the system of the optional clause by virtue of the express terms both of Article 36 of the Statute and of most declarations of acceptance, including that of India. The Court has repeatedly affirmed and applied that principle in relation to its own jurisdiction. It did so, in particular, in the case of *Certain Norwegian Loans* (ICJ Reports, 1957, pp. 22—24) where it recalled its previous practice on the subject. However, it is clear that the notions of reciprocity and equality are not abstract conceptions. They must be related to some provision of the Statute or of the declarations”.<sup>62</sup> The second part of the Court’s answer was that, in addition to the deposit of declarations of acceptance with the Secretary-General, the Statute contained no further requirement, such as a certain interval between the deposit of the declaration and the filing of the application. At every moment the declaring State is to “expect that an Application may be filed against it before the Court by a new declaring State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance”.<sup>63</sup> The Court concluded that the filing of the Portuguese application was in no way against Article 36 and did not violate any right of India under the Statute or the declaration of acceptance.<sup>64</sup>

The fourth Indian preliminary objection was closely related to the second. In it, the Government of India contended that, since it had had no knowledge of the Portuguese declaration before Portugal filed its application, it had been unable to avail itself, on the basis of reciprocity, of the third Portuguese condition and to exclude from the jurisdiction of the Court the dispute which was the subject-matter of the Portuguese application. In connection with the objection the Court practically repeated its above finding and stressed that the manner of filing the Portuguese application did not, in respect of the third Portuguese

<sup>62</sup> *Ibid.* 143.

<sup>63</sup> *Ibid.* 146.

<sup>64</sup> *Ibid.* 147.

condition, violate the rights under Article 36 of the Statute concerning reciprocity in such a way as to constitute an abuse of the optional clause.<sup>65</sup>

On the basis of the documents presented to the Court and of what the representatives of India stated before the Court, the position of India on reciprocity can be summarized as this: the Statute covers general and continuous reciprocity between two Statutes, and applies to the relations between them from the beginning of the relations established under the optional clause up to the date of termination of the respective declarations.<sup>66</sup> Contrary to this, the Court held that “it is not the date of deposit of a new Declaration which constitutes the crucial date for purposes of the jurisdictional requirement of reciprocity, but the date on which an Application is filed”.<sup>67</sup>

Dealing with the position of the Court, Decaux states that, in effect, it would have been possible to interpret reciprocity in a wider and a narrower sense. According to the wider interpretation, maintained by India, reciprocity generally applies to all obligations and rights deriving from declarations made under the optional clause. On the other hand, according to the narrower interpretation appearing in the Court’s decision, the determinant factor concerning the reciprocal rights and obligations of the parties is the time the proceedings are instigated.<sup>68</sup>

During the 1980s, new problems emerged concerning the application of reciprocity in the *Case concerning Military and Paramilitary Actions in and against Nicaragua*.

In the case submitted by Nicaragua against the United States, one of the most important points of controversy between the parties arose out of the fact that three days before Nicaragua filed its application the United States, by a Note to the International Court, had modified its declaration of 1946 to exclude from the Court’s jurisdiction certain disputes relating to Central America.<sup>69</sup> The United States declaration of acceptance originally fixed six months’ notice for the termination of the declaration. Nicaragua’s declaration contained no such restriction. The United States claimed it had modified its declaration of

<sup>65</sup> *Ibid.* 147–148.

<sup>66</sup> Briggs: *op.cit.* 258–259.

<sup>67</sup> *Ibid.* 262–263.

<sup>68</sup> Decaux: 102.

<sup>69</sup> Under the terms of the United States notification of the 6th of April, 1984, the 1948 American declaration of acceptance “shall not apply to disputes with any Central American State or arising out of or related events in Central America... Notwithstanding the terms of the aforesaid declaration (i. e. the declaration of acceptance of 1946), this proviso shall take effect immediately and shall remain in force for two years...”.

1946 by its 1984 notification, so the Court was without jurisdiction on the 9th of April, 1984, the date at which Nicaragua filed its application. The Washington Administration invoked reciprocity in an effort to render its 1984 notification immediately effective. That argument sought to ensure that since Nicaraguan declaration, being indefinite in duration, is subject to a right of immediate termination, without previous notice by Nicaragua, the United States declaration could also be terminated with immediate effect by virtue of the principle of reciprocity regardless of the six months' notice proviso in the United States declaration. The Court refused to accept the American argument and emphasized that "(T)he maintenance in force of the United States Declaration for six months after notice of termination is a positive undertaking, flowing from the time-limit clause, but the Nicaraguan Declaration contains no express restriction at all. It is therefore clear that the United States is not in a position to invoke reciprocity as basis for its action in making the 1984 notification which purported to modify the content of the 1946 Declaration. On the contrary it is Nicaragua that can invoke the six month's notice against the United States—not of course on the basis of reciprocity, but because it is an undertaking which is an integral part of the instrument that contains it."<sup>70</sup> The Court explained that "(T)he notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitations or conditions."<sup>71</sup> In other words, the Court held that the six months' notice formed an integral part of the American declaration of acceptance and constituted a condition which must be taken into account regardless of whether it related to the termination or the modification of the declaration.

The Nicaraguan case provoked, if for no other reason than its political relevance, a great deal of discussion in the pertinent literature. The Court's findings about reciprocity and the limits thereof were consistent with the view, as expounded in the majority of writings published before the Nicaraguan case, that reciprocity cannot be applied to the formal conditions, duration, extinction declarations, etc.<sup>72</sup> For the matter, a few members of the Court, including, e.g., Sir Robert Jennings, in his separate opinion given in the Nicaraguan case, relied precisely on reciprocity, among other things, for criticizing the

<sup>70</sup> ICJ Reports, 1984. 419.

<sup>71</sup> *Ibid.* 419.

<sup>72</sup> Cf. Szafarz: 45–46. Of course, there are also views different from this.

judgement, observing that the reservations by which one of the parties can withdraw or alter a declaration with immediate effect produces an inequality and lack of reciprocity between the parties.<sup>73</sup>

In relation to the Nicaraguan case, mention should be made of Spain's declaration of acceptance of 1990, which extended the principle of reciprocity to the conditions for termination of the declaration. The Madrid Government, most certainly guided by an endeavour to avoid a situation similar to that in which the United States found itself, fixed six months' notification of the withdrawal of its declaration, "however, in respect of those States which in their respective declarations have established a shorter period of time between the notification of the withdrawal of their declaration and its becoming effective, the withdrawal of the Spanish declaration shall become effective after such that shorter period."<sup>74</sup> Thus, Spain intended to apply reciprocity to the withdrawal of the declaration. Up to now, that condition as laid down in the Spanish declaration has not been applied in practice, but, at any rate, it would be of interest to know the position of the Court on that condition, as it is contrary to what the Court stated in the Nicaraguan case.<sup>75</sup>

#### 4. Consequences of reciprocity

Application of reciprocity to the system of the optional clause and to declarations of accepting the compulsory jurisdiction entails various consequences, of which one can highlight but a few now.

a) As noted earlier, the reference to reciprocity in paragraph 3 of Article 36 was incorporated in the Statute based on the proposal of Fernandez. At the time, by the inclusion of reciprocity, Fernandez sought to ensure that States knew exactly which were the States, in respect of which, they had assumed obligations concerning the compulsory judicial settlement of disputes. Thus, by doing so, the Brazilian jurist wanted to eliminate certain elements of uncertainty. At that time, however, no one thought that there was another implication of reciprocity which, as is pointed out by Rosenne, operates to have the extent of jurisdiction crystallized and determined in a concrete case.<sup>76</sup> All this means that so long as a concrete legal dispute is not submitted to

<sup>73</sup> ICJ Reports, 1984. 548.

<sup>74</sup> See the last paragraph of the Spanish declaration of acceptance dated the 15th of October, 1990.

<sup>75</sup> Szafarz: *op. cit.* 46.

<sup>76</sup> Rosenne: *op. cit.* 387.

the Court, there are specific elements of uncertainty actually accompanying the obligations of States under the optional clause and that it is only in principle that the Court's jurisdiction exists in respect of disputes covered by declarations of acceptance. No State is in a position to know in advance which dispute will in practice be actually subject to the Court's jurisdiction and no State can be absolutely certain that the Court's jurisdiction will really extend to a particular dispute covered by its declaration of acceptance, for, in the last analysis, the Court's jurisdiction always depends on the specific dispute or on whether a particular dispute is within the scope of the declaration of the given party and that of the opponent State. It could occur that a State has recognized the compulsory jurisdiction of the Court in respect of a rather wide range of international disputes, but this notwithstanding the Court may in practice deal with a much narrower range of international conflicts of the State concerned by reason of the fact that the other disputant State has, or States have, accepted the compulsory jurisdiction of the Court in respect of a much more limited scope of disputes.

This was expressed by the Court in the Nicaraguan case by saying: "(T)he coincidence or interrelation of those obligations thus remain in a state of flux until the moment of the filing of an application instituting proceedings, The Court has then to ascertain whether, at that moment, the two States accepted 'the same obligations' in relation to the subject-matter of the proceedings".<sup>77</sup> If the system of obligations established by the optional clause is broken down to the bilateral level, one can practically find no two identical scopes of reciprocal obligations, and the extent of obligations assumed by each declaring State in respect of the other States party to the optional clause system is essentially different.

b) Most authors in the pertinent literature agree that the inclusion of reciprocity in the Statute is intended to ensure equality of the parties—the elementary requirement of justice—before the Court.<sup>78</sup> In Waldock's view, the optional clause ensures exactly the same rights and obligations for all States (i. e. those which have made declarations accepting compulsory jurisdiction—V. L.). He further argues that equality, mutuality and reciprocity are principles underlying the system of the optional clause. In order to ensure the equality of the parties to the fullest extent, reciprocity has also been applied to the limitations and reservations attached to declarations of acceptance. This has gone the length of entitling the States, which have recognized the Court's jurisdiction unconditionally, to avail themselves of the benefits of reservations

<sup>77</sup> ICJ Reports, 1984. 420–421.

<sup>78</sup> Briggs: *op. cit.* 245.

to declarations of acceptance by the adverse party. "The result is that application of the condition of reciprocity tends to equalize Declarations made with or without reservations."<sup>79</sup> In other words, a State making its declaration of acceptance without reservations or with some specific reservations recognizes the Court's compulsory jurisdiction in all other matters not affected by the reservations. This means that it has made an offer to the other States party to the optional clause system to the effect that it can be sued before the Court in any other matter. If a dispute is brought before the Court, and the declaration of acceptance of the applicant State contains reservations, the possibility exists for the respondent State to avail itself of the benefits of reciprocity and to invoke, if it so wishes, the reservations contained in the applicant State's declaration of acceptance. It is precisely the principle of equality of the parties that sets a limit of reliance upon the reservation contained in the declaration of the adverse party on the basis of reciprocity, and, as is also exemplified by the *Interhandel Case*, the application of double reciprocity was rejected by the Court through reliance on the principle of equality.

c) Considering that a State may, by virtue of reciprocity, invoke the reservation to the declaration of the adverse party, reservations tend, in practice, to make their effect felt more often than not, precisely against the State or States making a reservation, which is to say that this is a two-edged weapon.<sup>80</sup> Such was the case whenever the Court established the lack of its jurisdiction by invoking precisely the reservation or limitations contained in the declaration of the applicant State, while the respondent State relied on the reciprocity principle for causing the application of the other State to be rejected by the Court.<sup>81</sup>

<sup>79</sup> *Ibid*

<sup>80</sup> Decaux: *op. cit.* 88.

<sup>81</sup> This is what happened in, e. g., the Norwegian Loans Case.