Prior Consent by States to the Jurisdiction of International Courts and Tribunals in Inter-State Disputes

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INTRODUCTION

1. States have an obligation under international law to settle their disputes by peaceful means.[3] They have freedom to choose which method of peaceful dispute settlement they utilise.[4] Diplomatic means of settlement involve an attempt by the parties to arrive at a mutually acceptable agreement. In contrast, arbitration and judicial settlement delegate the authority to resolve the dispute to an impartial third party (an arbitral tribunal or a court). In general, the arbitral tribunal or court is required to decide the dispute on the basis of rules of law, unless the parties have agreed that the court or tribunal can decide the case *ex aequo et bono*.[5] The decision of the court or tribunal is legally binding on both parties, distinguishing these methods of settlement from conciliation which involves a third party recommendation which is not legally binding.[6]

2. The jurisdiction of international courts and tribunals is founded upon State consent.[7] This is a corollary of States' freedom to choose among the various peaceful means of dispute settlement. A State which prefers to utilise diplomatic means to resolve a particular dispute is not required to consent to adjudicatory settlement by an arbitral tribunal or court. In the absence of consent validly given by all the parties to an inter-State dispute, a court or tribunal cannot be seised of the case.[8] This constitutes a major difference between international law and domestic legal systems, where courts as organs of a particular State can exercise compulsory jurisdiction over individuals and entities within that State's jurisdiction.

3. State consent to the jurisdiction of an international court or arbitral tribunal can be given in different ways. A State may consent to a specific dispute being heard by a court or tribunal on an *ad hoc* basis. Commonly, this is done by two States which have a dispute concluding a special agreement or *compromis* which defines the scope of the dispute and refers it to a particular court or tribunal for decision.[9]

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[3] Art 2(3), UN Charter.

[4] Art 33, UN Charter; see also Manila Declaration on the Peaceful Settlement of International Disputes, UN Doc A/RES/37/10 (15 November 1982); *Aerial Incident of 10 August 1999 (Pakistan v India), Jurisdiction,* ICJ Reports 2000, 33, para 53.

[5] See ICJ Statute, art 38(1), (2).

[6] For more discussion of conciliation see paras 231-232, below.

[7] *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States),* Preliminary Question, ICJ Reports 1954, 19, 32; see also *Case Concerning East Timor (Portugal v. Australia), Judgment*, ICJ Reports 1995, 87, 101; Alexandrov 2006, 29.

[8] *Status of the Eastern Carelia* (Advisory Opinion), PCIJ Series B no 5 (PCIJ 1923), 7, 27.

[9] Shaw 2015, II.175.

4. However, it is also possible for States to give consent in advance to the jurisdiction of a court or tribunal over a broader category of disputes.[10] One way this is commonly done is through a treaty which contains a provision (a compromissory clause) allowing any party to the treaty to refer a dispute with another party or parties concerning the interpretation or application of the treaty to a particular court or tribunal.[11] When a State becomes a party to such a treaty by consent, by the same act it also consents to the jurisdiction of the court or tribunal as defined in the compromissory clause (unless it has made a valid reservation regarding this clause).[12] The legal effect of such a clause is to allow a unilateral reference of a relevant dispute to the court or tribunal for binding decision. The respondent State may dislike the prospect of third-party settlement in a particular case and would not be willing to conclude a special agreement referring it to a court or tribunal, but it is bound by the prior consent given as a party to the relevant treaty.

5. Typically, compromissory clauses are limited in their scope, in that they do not grant the relevant court or tribunal jurisdiction over all disputes concerning international law, but only those concerning the interpretation or application of the particular treaty of which they are part. Thus, they are confined *ratione materiae* by the subject matter of the particular treaty.[13] However, there is a distinct set of multilateral and bilateral treaties whose overall aim is to facilitate settlement of a broader range of international disputes between the parties. These dispute settlement treaties allow any dispute that arises between the parties to be referred to a court or tribunal (subject to any limits defined by the treaty or by permissible reservations).[14]

6. In the context of the International Court of Justice (the ICJ), a separate mechanism allows States to give general consent in advance to the jurisdiction of the Court. This is the system of 'Optional Clause' declarations established by article 36(2) of the Court's Statute, to which all members of the United Nations are party. The Optional Clause system is the result of a compromise between those States, mainly small and middle powers, who wished for the Court (and its predecessor, the Permanent Court of International Justice) to have compulsory jurisdiction over all legal disputes between parties to its Statute and those States, particularly the leading great powers, who preferred that States be left free to decide whether or not to agree to the Court's jurisdiction in particular cases or by treaty.[15] Article 36(2) allows States to opt in to compulsory jurisdiction by making a declaration accepting the Court's jurisdiction 'in relation to any other state accepting the same obligation'. Thus the Optional Clause system operates on the basis of reciprocity.[16] By making a declaration, a State gains the

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[10] *Status of the Eastern Carelia,* 27:'consent can be given once and for all in the form of an obligation freely undertaken…'.

[11] For a general discussion in the context of ICJ jurisdiction, see Charney 1987; Morrison 1987; Tams 2009.

[12] Assuming the compromissory clause does not require a further act by the State to opt in to compulsory jurisdiction. The distinction between obligatory, opt out and opt in compromissory clauses is discussed further in Section C.2 of this report.

[13] Papadaki 2014, 563.

[14] Such treaties include the 1949 (Revised) General Act for the Pacific Settlement of International Disputes, 71 UNTS 101; the 1948 American Treaty on Pacific Settlement, 30 UNTS 55 (the Pact of Bogotá) ; and the European Convention for the Peaceful Settlement of Disputes, 329 UNTS 243. Cf Shaw 2015, II.177; Kolb 2013, 395, 409.

[15] Shaw 2015, II.190; Lamm 2014, 19, 26–27.

[16] See for example *Anglo-Iranian Oil Co (Iran v UK),* ICJ Reports 1952, 103; *Certain Norwegian Loans (France v Norway)* ICJ Reports 1957, 23-24; *Interhandel (Switzerland v US)* ICJ Reports 1957, 23.

right to initiate litigation against any other State which has itself made a declaration, without needing to obtain the respondent State's consent in the particular case (assuming that there is no relevant reservation in either its or the respondent's declaration). Equally however, such a State can be made the respondent to litigation without its *ad hoc* consent by an applicant who has also made an Optional Clause declaration (again assuming the lack of a relevant reservation in either declaration).

7. This report, seeks to analyse States' willingness to give consent in advance to the compulsory jurisdiction of international courts and tribunals in relation to inter-State disputes. As the focus is on inter-State disputes, mechanisms designed to resolve disputes between States and private parties are excluded from consideration in this report. Compulsory jurisdiction is understood in this context to exist wherever one party to a dispute can unilaterally take another to a court or arbitral tribunal for third party settlement, without the respondent State needing to give *ad hoc* consent in the particular case.[17] The focus is primarily on States' consent to the compulsory jurisdiction of the International Court of Justice, while also considering inter-State arbitration and dispute settlement under Part XV of the United Nations Convention on the Law of the Sea (UNCLOS).

8. The report examines several questions, both of law and policy, which arise from the piecemeal nature of States' consent to compulsory jurisdiction. These questions include:
   - What trends and patterns can be discerned in States' acceptance, limitation, or non-acceptance of jurisdiction? What factors appear to underlie States' willingness to give, or not to give, prior consent?
   - What conclusions can be drawn from a comparison of States' consent to ICJ jurisdiction, as opposed to the jurisdiction of arbitral tribunals or ITLOS? Has there been a shift away from the ICJ to other fora? If so, is this problematic?
   - How does the piecemeal nature of compulsory jurisdiction affect the functioning of the international legal system?
   - Are there any practical steps which could be taken to encourage States to accept compulsory jurisdiction more widely?

9. **Part A** provides an analysis of the jurisdictional bases relied on to bring contentious cases before the Court. **Part B** analyses States' willingness to make Optional Clause declarations and the conditions and reservations which they commonly include. **Part C** considers States' consent to ICJ jurisdiction given via treaty provisions, including general dispute settlement treaties and compromissory clauses in subject-matter specific treaties. **Part D** discusses States' treaty consent to compulsory inter-State arbitration. **Part E** focuses on the dispute settlement mechanisms in Part XV of UNCLOS, which require parties to accept compulsory dispute settlement but allow them to choose between different fora (art 287) and to exclude certain topics from jurisdiction (art 298). The dispute settlement system of the World Trade Organization will not be considered in detail, although contrasts between States' attitudes to it and other inter-State dispute settlement mechanisms will be touched on briefly in the conclusion.[18]

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[17] This use of the term is broader than those authors who reserve it for jurisdiction under the Optional Clause, for example Lamm 2014; Shaw 2014, II.190.

[18] See para 298, below.

10. The report also includes several annexes which provide an accessible overview of State consent to compulsory jurisdiction via the Optional Clause and Part XV of UNCLOS. The table in **Annex 1** summarizes the conditions and reservations in Optional Clause declarations currently in force. **Annex 2** identifies those States which have made a declaration under art 287 UNCLOS and their choice of forum (or fora) pursuant to this provision. **Annex 3** provides a similar overview of which States have taken advantage of the optional exclusions to compulsory dispute settlement available under art 298 UNCLOS. **Annex 4** consists of an integrated presentation of States' prior consent to compulsory settlement of law of the sea disputes under the Optional Clause and Part XV UNCLOS. **Annex 5** provides a summary of a Roundtable of experts held in March 2019 at the Blavatnik School of Government, University of Oxford, at which an earlier draft of this report was discussed. This final version of the report incorporates insights from the Roundtable.

SECTION A. THE INTERNATIONAL COURT OF JUSTICE: OVERVIEW OF COMPULSORY JURISDICTION IN PRACTICE

A1. Jurisdictional bases of contentious cases brought before the Court

11. The International Court of Justice, the principal judicial organ of the United Nations, is the most well-known and prestigious of international courts. States' willingness to utilize the Court is often taken as indicative of their general attitude to compulsory inter-State dispute settlement.[19] One way to measure the importance of international adjudication in practice is to consider the number of cases being taken by States to the Court. These numbers suggest an increased appetite among States for judicial settlement of disputes. From the inception of the Court until 1 December 2019, 150 contentious cases were initiated.[20] Only 62 of these cases were initiated in the first 45 years of the Court, between 1946 and 1990.[21] In contrast, 35 cases were initiated between 1991 and 2000,[22] and 53 cases since 2001,[23] including 16 since 2016. This seems to indicate a growing willingness by States to turn to adjudication as a method of dispute settlement in the decades since the end of the Cold War.[24]

12. Of the 150 contentious cases brought before the Court, 10 have involved a request for interpretation or revision of a previous judgment under articles 60 and 61 of the Statute.[25] One additional application involved a 'request for an examination of the situation' in accordance with a paragraph of a previous judgment by the Court.[26] 10 cases on the General List were brought to the Court on the basis of *forum prorogatum,*[27] and 18 were jointly submitted by special application.[28] The remaining 111 cases were initiated unilaterally based on prior consent, rather than reliance on actual or prospective *ad hoc* consent. Thus, the great majority of the Court's case load relies on prior consent given by treaty or via the Optional Clause.

13. Figure 1 illustrates the number of cases in which jurisdiction was asserted based on each of the forms of prior consent identified in the introduction to this report: the Optional Clause, general dispute settlement treaties and compromissory clauses in

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[19] Wood 2006, 624–25.

[20] The *Yearbook of the International Court of Justice* [2016-17], 104, states that there have been 143 contentious cases as of 31 July 2017, but the list it provides appears to include only 142 cases. 8 new cases have been initiated between then and 1 December 2019, most recently *Application on the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*: see ICJ, 'Pending Cases' <www.icj-cij.org/en/pending-cases> (accessed 1 December 2019).

[21] Akande 2016, 322.

[22] Including the 10 *Legality of the Use of Force* claims brought by the Federal Republic of Yugoslavia in 1999.

[23] Numbers updated from Akande 2016, 322.

[24] Cf Jennings *et al* 2019, 42-43.

[25] ICJ Yearbook [2016-17], 68.

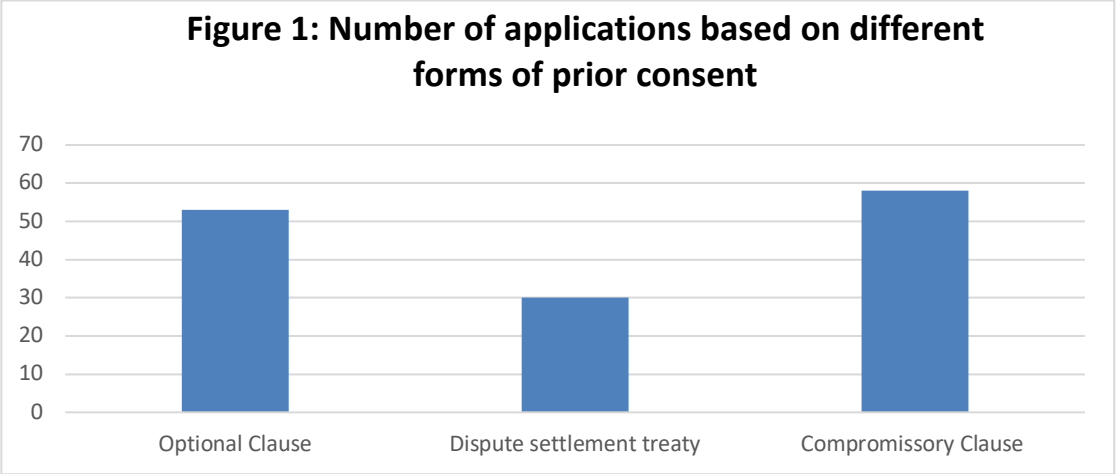
[26] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests *(New Zealand v France) Case*, ICJ Rep 1995, 288: see ICJ Yearbook [2016-17], 68.

[27] Eight of these cases were submitted prior to the introduction of Article 36, para 5 of the Court's Rules in 1978. Before this time, all application based on *forum proragatum* were entered on the Court's General List, and were subsequently removed if the respondent State refused to consent to the Court's jurisdiction. Since 1978, applications based on *forum proragatum* are not entered on the Court's list unless and until the respondent State consents: ICJ *Yearbook* [2017-18] 67, 138–40.

[28] ICJ Yearbook [2016–17], 65, with the addition of the *Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize)*, a case initiated by special agreement in 2019.

subject matter specific treaties. Out of the 111 cases taken to the Court unilaterally by the applicant relying on some form of compulsory jurisdiction,[29] the applicant relied on the Optional Clause in 53, a dispute settlement treaty in 30, and one or more compromissory clauses in 59. (As these numbers demonstrate, in many cases more than one type of jurisdiction was invoked, for example both a general dispute settlement treaty and the Optional Clause).[30] Looking only at the 40 cases initiated by unilateral application in or after 2000, the Optional Clause was invoked in 16, a dispute settlement treaty in 16, and one or more compromissory clauses in 19. The most notable revelation from these figures is the increased reliance on dispute settlement treaties in recent years. This is largely due to a flurry of cases between Latin American States in which jurisdiction has been based on the Pact of Bogotá, which will be discussed in Section C.1 of this report.

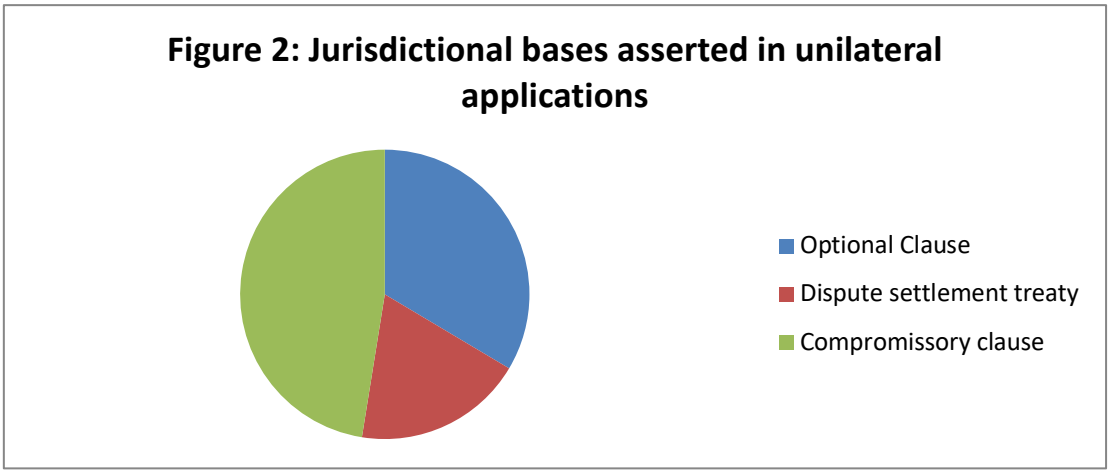
14. Since in many cases the applicant relied on two or more bases for jurisdiction, figures can also be provided categorising the total number of jurisdictional claims made by applicants in contentious cases. Figure 2 categorises the 158 discrete bases for jurisdiction involving reliance on the applicants' prior consent, of which 53 (33.5%) referred to the Optional Clause and 105 jurisdictional claims (66.5%) involved invocation of the provisions of a treaty. The latter 105 jurisdictional claims can be divided into 75 involving compromissory clauses in subject matter specific treaties and 30 invocations of general dispute settlement treaties.[31]



[29] That is, contentious cases excluding those initiated by special agreement, tacit consent or *forum prorogatum,* or involving an application for interpretation or revision of a previous judgment under articles 60 and 61 of the Statute. In a small number of cases an agreement was concluded concerning the resolution of a specific dispute, which was later used as a basis for one party to unilaterally institute proceedings. These cases include the *Asylum (Colombia v Peru)* ICJ Reports 1950, 266; *Monetary Gold*; *Fisheries Jurisdiction* (*UK v Iceland*) ICJ Rep 1973, 3; *Fisheries Jurisdiction* (*Federal Republic of Germany v Iceland*) ICJ Rep 1973, 49; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* ICJ Rep 1994, 112; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* ICJ Reports 2009, 61; *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (application made 29 March 2018). Following the Court's own classification, these are categorized here as unilateral applications on the basis of a compromissory clause, and not as cases involving a special agreement: ICJ Yearbook [2016-17] 68, 121–37.

[30] A number of applications made in disputes between Latin American States have invoked both the Pact of Bogotá and the Optional Clause, as for example in *Border and Transborder Armed Actions (Nicaragua v Honduras*) ICJ Rep 1988, 69; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, ICJ Rep 2007, 832.

[31] See para 5, above.



15. The high number of compromissory clauses invoked partly results from the fact that it is possible for an applicant to rely on more than one compromissory clause in a single case. For example, the DRC's application in *Armed Activities (Democratic Republic of Congo v Rwanda)*[32] relied on nine, although such a high number is rare. In contrast, there is only a single Optional Clause (art 36(2)) to be invoked in each case. However, it remains clear that treaty provisions remain the most frequent basis for cases to be brought before the Court, as indicated by the data in figure 1.

16. Two further questions involve whether there is a substantial difference between the success rate of applications based on the different types of jurisdiction. Firstly, how often in each category is the assertion of jurisdiction successful? Secondly, where the applicant succeeds on jurisdiction, how often in each category do they succeed, either wholly or partly, on the merits?

17. Figures 3, 4 and 5 show the jurisdictional outcome for the three different types of jurisdictional claim (Optional Clause declarations, dispute settlement treaty and compromissory clause). A jurisdictional claim is counted as 'upheld' either if jurisdiction was upheld either in whole or in part by a judgment of the Court following preliminary objections from the respondent, or if it was upheld implicitly given the respondent's failure to object to jurisdiction. A claim is counted as 'rejected' if the Court decided that the relevant jurisdictional basis did not provide it with jurisdiction over the dispute. If the case was withdrawn before a decision on jurisdiction, the relevant jurisdiction claim or claims are counted as 'discontinued'. (It should be noted that even if a case is discontinued, the act of taking the dispute to the Court may have assisted the parties to reach an agreement settling the dispute).[33] Where two or more jurisdictional bases are invoked in a single case, the Court may uphold jurisdiction on the basis of one of the

[32] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* ICJ Rep 2006, 6. In that case, the DRC relied on: the Convention on the Elimination of All Forms of Discrimination against Women (art 29, para 1); the International Convention on the Elimination of All Forms of Racial Discrimination (art 22); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (art 30); the Constitution of the WHO (art 75); the Constitution of UNESCO (art XIV); the Genocide Convention (art IX); the Montreal Convention for the Suppression of the Unlawful Acts against the Safety of Civil Aviation (art 14, para 1); the Vienna Convention on the Law of Treaties (art 66); and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (art 9).

[33] Akande 1996, 611–14; Jennings *et al* 2019, 65. See for example *Phosphate Lands in Nauru (Nauru v Australia)* ICJ Rep1992, 241; *Case Concerning Passage through the Great Belt* ICJ Rep 1991, 12; *Aerial Herbicide Spraying (Ecuador v Colombia)* ICJ Reports 2008, 174*; Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* ICJ Reports 2014, 147.

claims and refrain from deciding on the other(s). Jurisdictional claims in the latter category are classified as 'not treated'. Jurisdiction bases asserted by the applicant in a case which the Court found inadmissible are put in a separate category, as are those in cases where a decision on jurisdiction is still pending.

18. This analysis suggests that jurisdictional claims made under the Optional Clause and general dispute settlement treaties are slightly more likely to be upheld at the jurisdictional stage than those under compromissory clauses. The success rate for Optional Clause claims was 45.3%; for dispute settlement treaties the figure was 43.3%. The success rate for invocations of jurisdiction under compromissory clauses is marginally lower, at 39.2%.

Figure 3: Optional Clause - outcomes on jurisdiction

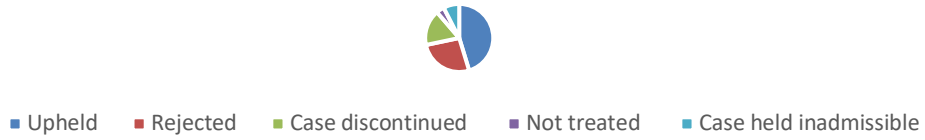
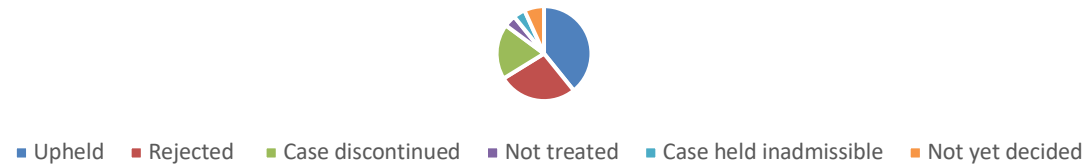


Figure 4: Dispute settlement treaties - outcomes on jurisdiction

Figure 5: Compromissory clauses - outcomes on jurisdiction



19. Several reasons can be suggested for the lower success rate for compromissory clauses. One potential explanation has already been touched on: compromissory clauses providing for ICJ jurisdiction are numerous, whereas the Optional Clause is singular and the number of general dispute settlement treaties is relatively limited.[34] Thus, parties may potentially rely on a number of compromissory clauses in a single case, as in *Armed Activities (DRC v Rwanda)*.[35] If all these jurisdictional claims are unsuccessful, as in that case, that will significantly lower the success rate for compromissory clause claims. On the other hand, since jurisdiction under several compromissory clauses can also be

[34] See generally Part C.1, below.

[35] See para 15, above.

upheld in the same case, as occurred in *US Diplomatic and Consular Staff in Teheran (US v Iran),*[36] this factor does not provide a full explanation.

20. Another reason for the slightly lower success rate of invocations of compromissory clauses may be linked to the limited scope of jurisdiction *ratione materiae* provided by these clauses. An applicant which wishes to initiate an ICJ case against a State which does not have an Optional Clause declaration in force and which is not a party to a general dispute settlement treaty may seek to rely on a compromissory clause, even where the connection of the dispute with the subject matter of the relevant treaty is tenuous and hence the chances of success are low. For example, the *Legality of the Use of Force* cases between the Federal Republic of Yugoslavia and a range of NATO States produced a high number of failed compromissory clause claims. In each of these ten cases[37] the FRY relied on the compromissory clause in the Genocide Convention despite the difficulty in applying the concept of genocide to the relevant NATO operations and the foreseeability of the Court's decision to reject jurisdiction on this basis.

21. A further issue involves how many claims in each jurisdictional category led to a wholly or partly successful outcome on the merits for the applicant. Figure 6 includes all jurisdictional grounds which formed the basis for a merits decision, as well as those which were upheld against preliminary objections but where the case was then settled before a decision on the merits.[38] For all jurisdictional bases, most claims which reach the merits lead to at least a partial success for the applicant.[39] This is perhaps unsurprising, since the party which initiates a case unilaterally is more likely to do so if it thinks it will win.[40] Interestingly, while claims made on the basis of a compromissory clauses had a slightly lower success rate at the jurisdictional stage, those claims which reached the merits had a slightly higher success rate than claims based on Optional Clause declarations or a general dispute settlement treaty.

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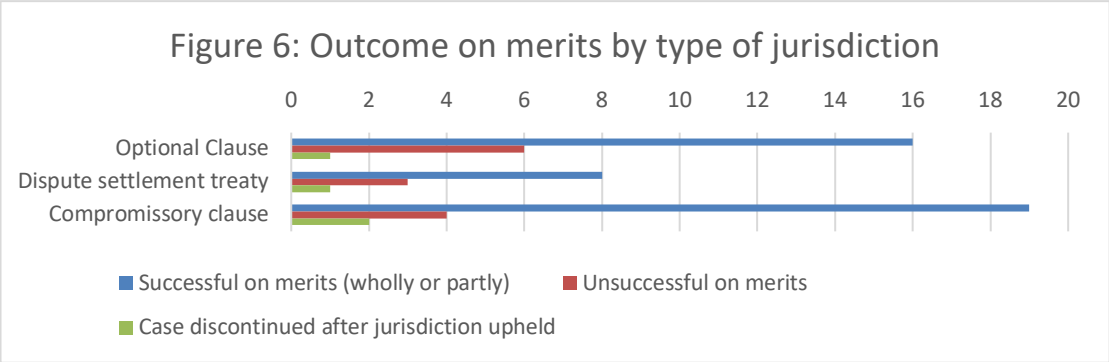
[36] ICJ Rep 1980, 1. In this case the United States relied on the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes (Art I); the Optional Protocol to the Vienna Convention on Consular relations, concerning the Compulsory Settlement of disputes (Art I); the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, of 15 August 1955 (art XXI, para 2); and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (art 13). The Court upheld the first three grounds of jurisdiction and did not find it necessary to deal with the fourth: see ICJ Rep 1980, para. 55.

[37] *Legality of the Use of Force (Serbia and Montenegro v Belgium)* ICJ Rep 2004, 279; *Legality of the Use of Force (Serbia and Montenegro v Canada)* ICJ Rep 2004, 429; *Legality of the Use of Force (Serbia and Montenegro v France)* ICJ Rep 2004, 575*; Legality of the Use of Force (Serbia and Montenegro v Germany)* ICJ Rep 2004, 720*; Legality of the Use of Force (Serbia and Montenegro v. Italy)* ICJ Rep 2004, 865*; Legality of the Use of Force (Serbia and Montenegro v Netherlands)* ICJ Rep 2004, 1011*; Legality of the Use of Force (Serbia and Montenegro v Portugal)* ICJ Rep 1160*; Legality of the Use of Force (Serbia and Montenegro v United Kingdom)* ICJ Rep 2004, 1307*; Legality of the Use of Force (Yugoslavia v Spain)* ICJ Rep 1999, 761*; Legality of the Use of Force (Yugoslavia v. United States of America)* ICJ Rep 1999, 916.

[38] The latter outcome may constitute a successful outcome for the applicant, as the agreement between Nauru and Australia discontinuing *Certain Phosphate Lands in Nauru* following the Court's rejection of Australia's preliminary objections, in which Australia agreed to pay Nauru compensation for the phosphate mining which had taken place in Nauru under Australian administration.

[39] Whether a partial success, for example establishment of title over some but not all of a disputed territorial claim, counts as a real victory depends on an analysis of the political context of each particular case, a task which is beyond the scope of this report.

[40] Cf Brilmayer and Faure 2014, 207-08.



A2. Reasons underlying the greater role of treaty-based jurisdiction

22. What overall conclusions can be drawn from this analysis of the jurisdictional bases of the Court's case load? The figures suggest that both treaty-based and Optional Clause jurisdiction remain important. While a greater number of cases involved some form of treaty-based jurisdiction, the Optional Clause was still invoked in a significant proportion of the Court's case load and has not declined into the irrelevance foreseen by some past authors.[41] On the other hand, the most recent applications have shown a greater skew towards treaty-based jurisdiction. Of the thirteen new contentious cases initiated by unilateral application since 2016,[42] all rely on treaty-based jurisdiction and only in one of the thirteen did the application also invoke the Optional Clause.[43]

23. One important reason for the greater role of treaty-based jurisdiction is that, while only a minority of UN member States (74 out of 193, or 38.3%) have made Optional Clause declarations,[44] the great majority of States are party to at least some treaties which contain compromissory clauses providing for the Court's jurisdiction, so that such clauses provide the only possible basis for jurisdiction in relation to many international disputes. Although States which are sceptical about judicial dispute settlement may enter reservations against such clauses, this practice is not uniform. In major multilateral treaties providing for ICJ jurisdiction but which give parties the right to opt out, on average only about 20% of parties opt out.[45] Thus a large number of States have not made declarations under the Optional Clause but have nonetheless routinely accepted compulsory ICJ jurisdiction through compromissory clauses.

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[41] See for example Scott and Carr 1987; cf Oda 2000.

[42] *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia); Immunities and Criminal Proceedings (Equatorial Guinea v. France); Certain Iranian Assets (Iran v United States); Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua); Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation); Jadhav (India v Pakistan); Arbitral Award of 3 October 1988 (Guyana v Venezuela); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates); Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section II of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and the United Arab Emirates v Qatar); Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar); Alleged violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Iran v United States); Relocation of the United States Embassy to Jerusalem (Palestine v United States); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar).*

[43] *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua)*; see Judgment of 2 February 2018, paras 45-46.

[44] See further the analysis in Part B.1.

[45] Galbraith 2013, 330-31; also Powell and Mitchell 2011, 130. See further Part C.2 of this report.

24. An example of a State in this category is the Russian Federation. The Soviet Union long resisted consenting in any form to the International Court's compulsory jurisdiction and almost without exception made a reservation to any compromissory clause providing for it. However, during the late 1980s as part of the general shift in Soviet foreign policy its attitude towards the Court changed. General Secretary Gorbachev expressed the Soviet Union's interest in making a declaration under the Optional Clause, in concert with the other permanent members.[46] This did not happen, but the Soviet Union did withdraw its reservations to compromissory clauses providing for the ICJ's compulsory jurisdiction in a number of major multilateral human rights conventions.[47] In more recent years the Russian Federation has not moved towards making an Optional Clause declaration, but nor has it resumed making reservations to compromissory clauses in multilateral treaties which provide for compulsory ICJ jurisdiction.[48] Russia's acceptance of jurisdiction under compromissory clauses has provided a basis for it to be brought before the ICJ for the first time by Georgia in 2008,[49] and subsequently by Ukraine in 2017.[50]

25. Two main explanations can be suggested for why many more States are subject to the Court's compulsory jurisdiction under treaty provisions than under the Optional Clause. Firstly, the generally more restricted scope of treaty-based jurisdiction, particularly of compromissory clauses, makes risk-averse States more willing to accept jurisdiction in this form. Secondly, it is generally more difficult for States to withdraw consent to jurisdiction given by treaty than under the Optional Clause.

26. It seems clear that many States are willing to accept a role for international adjudication in disputes which are seen as having a 'technical' character,[51] but are reluctant to litigate disputes which are highly politically sensitive. The range of disputes which fall within the latter category will vary depending on the outlook of political actors within each State, although many territorial disputes and disputes concerning armed conflict are likely to do so.[52]Although the Court has emphasised that even disputes of the greatest political salience are justiciable in their legal aspects,[53] States are often unwilling to allow

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[46] See UN Doc. A/42/574-S/19143 (1987); also Quigley 1988, 795; Higgins 1994, 193; Jennings *et al* 2019, 42.

[47] 'Soviet Union Accepts Compulsory Jurisdiction of ICJ for Six Human Rights Conventions' (1989) 83 AJIL 457. The Conventions in question were the 1948 Genocide Convention; the 1949 Convention for the Suppression of the Traffic In Persons and of the Exploitation of the Prostitution of Others; the 1952 Convention on the Political Rights of Women, the 1965 Convention on the Elimination of all Forms of Racial Discrimination, the 1979 Convention on the Elimination of all Forms of Discrimination against Women, and the 1984 Convention against Torture.

[48] Thus, the Russian Federation did not make a reservation to compromissory clauses providing for compulsory ICJ jurisdiction when becoming a party to the 1999 Convention for the Suppression of the Financing of Terrorism; the 2000 UN Convention against Transnational Organized Crime; the 2003 UN Convention against Corruption; and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. Russia is not a party to the 2006 International Convention for the Protection of all Persons from Enforced Disappearance, which also contains such a compromissory clause.

[49] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Georgia v Russian Federation) ICJ Rep 2011, 70.

[50] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination* (Ukraine v Russian Federation), Judgment of 8 November 2019.

[51] For an enunciation of this view see the representative of India speaking at the Third UN Conference on the Law of the Sea, A/CONF.62/SR.59, para 42.

[52] See further the discussion in section B.3(iii) of this report, paras 124-133 below.

[53] *Teheran Hostages*, 20, para 37; *Border and Transborder Armed Actions* 91, para 52. See Akande 1996, 597-98.

such disputes to be unilaterally referred to the Court since this involves a loss of control concerning the outcome.

27. Optional Clause declarations (and general dispute settlement treaties) in principle expose the declaring State to litigation on any matter governed by international law, however sensitive it may be (subject to any reservations contained in the relevant declarations, which may not anticipate sensitive disputes which will arise in the future).[54] Compromissory clauses in contrast generally confine the Court's jurisdiction to the interpretation or application of the relevant treaty. This helps address the concern of States about the possibility of politically sensitive litigation in the future, since jurisdiction is tied to a relatively determinate subject matter.[55]

28. However, although this distinction may help explain States' greater willingness to accept jurisdiction under compromissory clauses, there is often room for disagreement as to whether a particular dispute involves 'interpretation or application' of the relevant treaty. Where an objection to jurisdiction is made on this basis, the Court must determine whether the violations pleaded by the applicant 'fall within the provisions of the Treaty'.[56] The Court's recent case law suggests an increasing use of compromissory clauses by applicants to bring particular aspects of highly politically sensitive disputes before the Court.[57] The jurisprudence of the Court makes clear that the fact that 'a dispute before the Court forms part of a complex situation that includes various matters, however important, over which the States concerned hold opposite views, cannot lead the Court to decline to resolve the dispute…'.[58]

29. Related to, but distinct from, the extent of the Court's jurisdiction under a compromissory clause is the applicable law when such a dispute is brought to the Court. States may be more willing to accept jurisdiction under a compromissory clause because the applicable law in a case brought under the clause will primarily be the treaty itself, and hence will involve the (arguably) more determinate task of interpretation of an agreed text. In contrast, jurisdiction under the Optional Clause (or a general dispute settlement treaty) will allow applications to be brought against the State on the basis of rules of customary international law.[59] Certain statements made by State representatives suggest that they considered the process by which customary rules are formed as quite opaque or saw its contents as lagging behind the needs of the international

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[54] Bilder 1987, 176–77.

[55] Morrison 1987, 60; Galbraith 2013, 353. State representatives have expressed the view that it is easier to accept compulsory jurisdiction in the context of a compromissory clause than via the Optional Clause: see 'Review of the Role of the International Court of Justice: Report of the Secretary-General'(15 September 1971), UN Doc A/8382, 79 (Finland, Mexico); see also the statement of the representative of Ghana during the drafting of the Convention on the Elimination of all Forms of Racial Discrimination, UN Doc A/C.3/SR.1367, para 42.

[56] *Oil Platforms (Iran v United States),* Preliminary Objections, Judgment, ICJ Reports 1996 (II) 809-10, para 16; *Certain Iranian Assets (Iran v United States)* Preliminary Objections, Judgment of 13 February 2019*,* para 36; *Ukraine v Russia* , Judgment of 8 November 2019, para 57.

[57] Tams 2009, 486; see also Kingsbury 2012, 211. For further discussion see the Conclusion to this report, paras 300, 301.

[58] *Application of ICSFT and CERD (Ukraine v Russia),*Judgement of 8 November para 28, citing *Certain Iranian Assets (Iran v United States), Preliminary Objections,* Judgment of 13 February 2019*,* para 36; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile), Preliminary Objection, Judgment, ICJ Reports 2015 (II)*, 604, para 32.

[59] Tams 2009, 490–91.

community.[60] In the 1971 discussion of the ICJ's role in the Sixth Committee of the UN General Assembly, treaties were praised as a 'readily discernible and dynamic body of law'[61] and a number of States identified further codification and progressive development of international law as a prerequisite for enhancing the Court's role.[62] However, the Court's case law demonstrates that even where it is seized under the compromissory clause of a treaty, the Court will have recourse not only to the relevant treaty, 'but also to rules of general international law on treaty interpretation and on the responsibility of States for internationally wrongful acts.'[63] Thus other applicable rules of international law outside the four corners of the treaty itself, including customary rules, will play a role in the decision of cases brought under a compromissory clause.[64]

30. Turning to the second point, if a State changes its mind about the acceptance of jurisdiction under the Optional Clause it can terminate or amend its declaration. The majority of declarations currently in force contain a proviso allowing for their immediate termination on notice (as discussed further in section B.2). If the declaration does not state that it can be terminated, the Court's case law suggests that it can nonetheless be terminated on reasonable notice.[65] In contrast, a party may generally make a reservation to a compromissory clause in a multilateral treaty when it signs, ratifies or accedes to the treaty. But if it fails to do so, or later withdraws the reservation, it then has no easy way to get out of the Court's jurisdiction if it later changes its mind.[66] The only way to do so would be to denounce or withdraw from the treaty as a whole. Although many treaties do allow for withdrawal after a period of notice has elapsed,[67] this may come with a significant practical or reputational cost,[68] and denunciations of this kind seem rarer than withdrawal from or limitation of Optional Clause declarations.[69]

31. The difficulty in withdrawing from a treaty providing for compulsory jurisdiction also helps explain an apparent paradox. Despite the major importance of treaties as a basis for the jurisdiction of the ICJ, relatively few treaties in recent decades have included such a provision (as will be discussed in more detail in section C of this report).The

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[60] See for example the statement of the representative of Swaziland during the drafting of the Vienna Convention of State Succession in respect of Treaties, UN Doc A/CONF.80/16.Add1, 120, para 13: 'the brutal truth was that third world countries had played no part in the formulation of customary law and for that reason preferred to emphasize treaty law'.

[61] UN Doc A/8382, 11-12 (Canada).

[62] Un Doc A/8382, 22-26 (US, Madagascar, Iraq, Yugoslavia).

[63] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007, 105, para 149; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia),* ICJ Reports 2015, 45–46 , para 85; *Jadhav (India v Pakistan)*, Judgment of 17 July 2019, paras 36, 37.

[64] See generally Papadaki 2014.

[65] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US), Jurisdiction and Admissibility,* ICJ Reports 1984, 420, para 63.

[66] See ILC Guide to Practice on Reservations to Treaties (2011) 2.3, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf.

[67] But not all: for example, the Optional Protocols on Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations and on Consular Relations are silent on the possibility. It seems probable however, given the fundamentally consensual nature of international jurisdiction, that the US's denunciations of these treaties should be considered effective after twelve months' notice (in line with the rule in art 56 VCLT): cf Quigley 2009,

[68] Murphy 2009, 63.

[69] Tams 2009, 479–81.

treaties most commonly asserted as a basis for jurisdiction are often quite old.[70] This certainly applies to general dispute settlement treaties, the most important of which are the 1948 Pact of Bogota and the 1957 European Convention for the Peaceful Settlement of Disputes, but also to many major multilateral treaties containing compromissory clauses granting the ICJ jurisdiction, either as an integral part of the treaty or as an optional protocol.[71] Compromissory clauses which have been invoked as a basis of jurisdiction before the ICJ more than once are:

1948 Genocide Convention:[72] 14 applications
1971 Montreal Convention: 6
1963 Optional Protocol to the Vienna Convention on Consular Relations: 6
1955 US-Iran Treaty of Amity, Economic Relations and Consular Rights: 5
1965 Convention on the Elimination of Racial Discrimination: 4
1984 UN Convention against Torture: 4
1961 Optional Protocol to the Vienna Convention on Diplomatic Relations: 3
1944 Chicago Convention: 3
1944 Air Services Transit Agreement: 2

Thus, although the majority of cases in the Court's history have been initiated since 1990, the treaty basis for the Court's case load is largely found in treaties from earlier decades.

32. Various factors are at play in this reliance on older treaties. In part this reflects the central importance to the contemporary legal order of certain major treaties, such as the Genocide Convention and the Vienna Conventions on Diplomatic and Consular Relations, established in the early post-war period. There may also be a natural time lag between the point at which a treaty is concluded and when major disputes about its interpretation give rise to litigation. For example, the Genocide Convention came into force in 1951 but was not relied on as a jurisdictional basis before the ICJ until 1973.[73] More recently concluded treaties may thus play a greater role before the Court in the future. Two treaties concluded in the last twenty years have quite recently been invoked before the Court for the first time: the 1999 International Convention for the Suppression of Terrorism[74] and the 2000 UN Convention against Transnational Organized Crime[75]

33. It is also clear, as will be discussed further in Section C.2 of this report, that certain States have become less willing in recent decades to accept compulsory ICJ jurisdiction via compromissory clauses.[76] Such States may however continue to be bound by treaties accepting compulsory jurisdiction to which they consented during an earlier era. Even if they might wish to denounce or withdraw from such treaties, the legal obstacles or

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[70] ibid

[71] Cf Tams 2009, 481–84.

[72] Including the very recent application in *Application of the Convention on Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar).*

[73] In *Trial of Pakistani Prisoners of War (Pakistan v India)*; see Order of 13 July 1973, ICJ Reports 1973, 328.

[74] In *Ukraine v Russia,* introduced in 2017.

[75] *In Immunities and Criminal Proceedings (Equatorial Guinea v France),* introduced in 2016; see Judgment (Preliminary Objections) of 6 June 2018.

[76] Tams 2009, 479.

political cost may prevent them from doing so. Because of these factors, older treaties may often provide a more extensive basis for the Court's jurisdiction than newer ones.

34. The United States provides a prominent example of a State which in recent decades has become highly resistant to the Court's compulsory jurisdiction but which has still regularly been brought before the Court on the basis of older treaty provisions. Before the 1980s the US generally supported the inclusion of compromissory clauses in treaties providing for compulsory ICJ jurisdiction.[77] As is well known, the United States terminated its Optional Clause declaration in response to the Court's decision on jurisdiction in the *Nicaragua* case. Since that time it has also been highly resistant to accepting the Court's compulsory jurisdiction by treaty, and it almost invariably enters a reservation to clauses which provide for such jurisdiction.[78] Nonetheless, the US has been the respondent in several ICJ cases since *Nicaragua*, based on treaty provisions from earlier decades: the 1963 Optional Protocol to the Vienna Convention on Consular Relations,[79] the 1955 US-Iran Treaty of Amity,[80] and the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations.[81]

35. Further examples are provided by five Arab States: Qatar, the United Arab Emirates, Bahrain, Saudi Arabia, and Egypt. Of these States, only Egypt has made an Optional Clause declaration, and its declaration is extremely limited in scope.[82] Yet three cases currently before the Court involve some or all of these States: the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*[83]*;* the *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar)*; and the *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v Qatar).* In all three, a compromissory clause was relied on as the basis for jurisdiction.

36. It may be too sanguine to rely on these older treaties to continue to sustain the Court's compulsory jurisdiction. Despite the costs involved in denouncing treaties providing for the ICJ's compulsory jurisdiction, a number of States have done just that in recent years in response to decisions by the ICJ which they found objectionable. The United States has now denounced all three of the treaties mentioned in paragraph 34. The 1963 Optional Protocol was denounced following the *Avena* and *La Grand* judgments,[84] while the 1955 Treaty of Amity and the 1961 Optional Protocol were denounced in 2018 following the indication of provisional measures in the *Alleged Violations of the 1955 FCN Treaty* case and the initiation by Palestine of the *Relocation of the US Embassy to Jerusalem*

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[77] See for example the US proposal for dispute settlement during the drafting of the Vienna Convention on State Succession in Respect of Treaties:, UN Doc A/CONF.80/16/Add.1, 78; also Rehof 1993, 238–39 (showing US support for reference to the ICJ during the drafting of CEDAW); Paulus 2004, 787–92.

[78] Murphy 2009, 63; Paulus 2004, 790. See further para 205 below.

[79] *Avena and other Mexican Nationals (Mexico v US)* ICJ Reports 2004, 12; *La Grand (Germany v US)* ICJ Reports 2001, 466.

[80] *Oil Platforms (Iran v US)* ICJ Reports 2003, 161*; Certain Iranian Assets (Iran v US); Alleged Violations of the 1955 Treaty of Amity, Commerce and Navigation* (*Iran v US)*, Order of 3 October 2018.

[81] *Relocation of the United States Embassy to Jerusalem (Palestine v US),* initiated on 28 September 2018.

[82] Discussed at para 97, below.

[83] See Order of 23 July 2018.

[84] Quigley 2009; Veneziano 2019, 972–74.

case.[85] Similarly, Colombia denounced the Pact of Bogota in 2012 following an adverse ruling in *Territorial and Maritime Dispute (Nicaragua v Colombia)*.[86]

37. Notably though, these instances of denunciation involved either a bilateral treaty (in the case of the US-Iran Treaty of Amity), a general dispute settlement treaty (the Pact of Bogota), or Optional Protocols on dispute settlement separate from the substantive treaty (the Optional Protocols to the Vienna Conventions). The cost of withdrawal will likely be higher where a compromissory clause providing for compulsory dispute settlement is integrated within a major substantive multilateral treaty. Integrating compromissory clauses with the substantive treaty in this way is therefore likely to provide the most stable basis for jurisdiction.[87] Establishing this disincentive to withdraw, however, comes with a corresponding cost: if a State nevertheless does decide that to withdraw from compulsory jurisdiction, it must also withdraw from the substantive treaty, increasing the destabilising effect of the withdrawal on the international legal system.[88]

[85] See Bellinger 2018. The denunciation of the Treaty of Amity had been predicted some years earlier: Murphy 2009, 82-83.

[86] Crawford 2017, 99.

[87] Morrison 1987 76.

[88] Paulewyn and Hamilton 2018, 688–89.

SECTION B: STATES' DECLARATIONS UNDER THE OPTIONAL CLAUSE

B.1 Optional Clause declarations: patterns and underlying factors

38. Any party to the ICJ Statute[89] may make an Optional Clause declaration, by which it accepts jurisdiction in all legal disputes with any other State which has made such a declaration. Unlike treaty-based jurisdiction, which is generally tied to a particular subject matter and/or limited to a particular set of parties,[90] jurisdiction under the Optional Clause has the potential to form the basis for a truly general system of compulsory jurisdiction encompassing all disputes between States involving international law. However, in practice the Optional Clause has not fully lived up to this potential, for two reasons: firstly because most States have not made Optional Clause declarations, and secondly because those States which have made declarations have often included reservations which impose significant limits on the scope of their consent to ICJ jurisdiction.

39. The next three subsections of the report will provide an analysis of States' willingness to accept compulsory ICJ jurisdiction under the Optional Clause. This subsection will consider trends over time in the number of States making Optional Clause declarations, what variations can be observed between different groups of States, and whether this casts any light on the factors influencing a State's decision as to whether or not to make a declaration. The next subsection will analyse under what conditions States may withdraw or modify their declarations, and how this affects the Optional Clause system. The third subsection will discuss the reservations most commonly include in Optional Clause declarations, and the reasons why particular kinds of dispute are commonly excluded by States.

40. The number of States accepting the Court's compulsory jurisdiction has varied over time. In the 1920s and 1930s the Court's predecessor, the Permanent Court of International Justice, attracted an impressive number of Optional Clause declarations from among the much smaller cohort of sovereign States then in existence. The high water mark was 1934 when Optional Clause declarations were in force for 42 States out of the 49 parties to the Protocol of Signature of the Statute of the Court (85.7%).[91] Unsurprisingly, the subsequent years of the lead-up to and outbreak of the Second World War which were so disastrous for the international order also saw the number of Optional Clause declarations decline as various States allowed their declarations to lapse without renewal.[92]

41. The International Court of Justice in its early years saw a gradual increase in the number of States accepting jurisdiction under the Optional Clause, from 25 in 1947 to 37 in 1952-53.[93] However, this number declined in the course of the 1950s as a number of States (Bolivia, Brazil, Guatemala and Iran) either terminated their declarations or failed

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[89] A category which includes all UN member States: UN Charter, art 93(1).

[90] With the exception of the General Act and Revised General Act for the Pacific Settlement of International Disputes, discussed at paras 154-156 below.

[91] Waldock 1955, 245; *Eleventh Annual Report of the Permanent Court of International Justice* [1934-35] 39, 51 (although it must be noted that a number of States, including the United States, had not ratified the Protocol of Signature, making the comparison with the current Court inexact).

[92] Waldock 1955, 245–46.

[93] Ibid.

to renew them.[94] In 1955 there were 33 declarations in force, representing just over 40% of the 80 parties to the Statute of the Court.[95] Those States which accepted the Optional Clause were largely drawn from the Western bloc in Europe and the Americas, with the addition of few non-aligned States like India. In contrast, no States from the Socialist bloc accepted the ICJ's jurisdiction under the Optional Clause.[96]

42. The subsequent years saw a significant fall in the percentage of States accepting the Optional Clause. While the absolute number of declarations in force increased somewhat, this did not keep pace with the rapid increase in UN membership (and hence parties to the Statute) resulting from decolonization. By 1979 45 States had Optional Clause declarations in force out of a total of 155 parties to the Statute (29.0%).[97] In addition to the continued abstention of Socialist bloc, this reflected the fact that relatively few of the newly independent States accepted the Court's compulsory jurisdiction. In part this reflected the understandable wariness of these States concerning restrictions on their recently obtained sovereignty.[98] It has also been attributed to the alienation of the developing world from the Court following its 1966 decision in the *South West Africa* case,[99] which gave rise to a widespread view that the Court's approach to international law reflected the interests of Western powers.[100]

43. Since then however the percentage of States making Optional Clause declarations has seen a steady increase. This shift is sometimes said to date back to the Court's decision in the *Nicaragua* case, where it demonstrated its willingness to find in favour of Nicaragua and against the United States in a highly sensitive political context. Although this decision resulted in the United States' termination of its Optional Clause declaration, it may have increased the prestige of the Court in the eyes of smaller and/or developing States who make up the majority of the international community.[101] It was around this time that the number of cases brought to the Court, which had fallen to a very low number in the 1970s, began to increase again.[102] Significant growth in the percentage of States making Optional Clause declarations however did not occur until some years later. In 1993 the number of States with Optional Clause declarations in force was 56 out of 186 parties to the Statute, or 30.1%, little more than the 29.0% of States in 1980.[103] By 2009 however the number had increased to 67 out of 192 UN

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[94] Ibid; see also ICJ Yearbook [2016-17] 67.

[95] Merrills 1979, 90–91. All UN members are parties to the statute: for the growth of UN membership over time see <www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> (accessed 1 December 2019). In addition, a number of States became parties to the Statute prior to becoming members of the UN: Switzerland (in 1948), Liechtenstein (1950), San Marino (1954), Japan (1954), and Nauru (1988). See <https://www.icj-cij.org/en/states-not-members> (accessed 1 December 2019).

[96] Kolb 2013, 454.

[97] Merrills 1979, 90–91

[98] Jennings *et al* 2019, 21.

[99] *South West Africa, Second Phase, Judgment,* ICJ Reports 1966, 6.

[100] Crawford 2017, 97.

[101] Burmester 1996, 33; Higgins 1994, 190; Murphy 2009, 97; Crawford 2017, 97.

[102] 9 contentious cases were initiated between 1970 and 1979, compared with 13 between 1980 and 1989: see <www.icj-cij.org/en/contentious-cases/introduction/desc>.

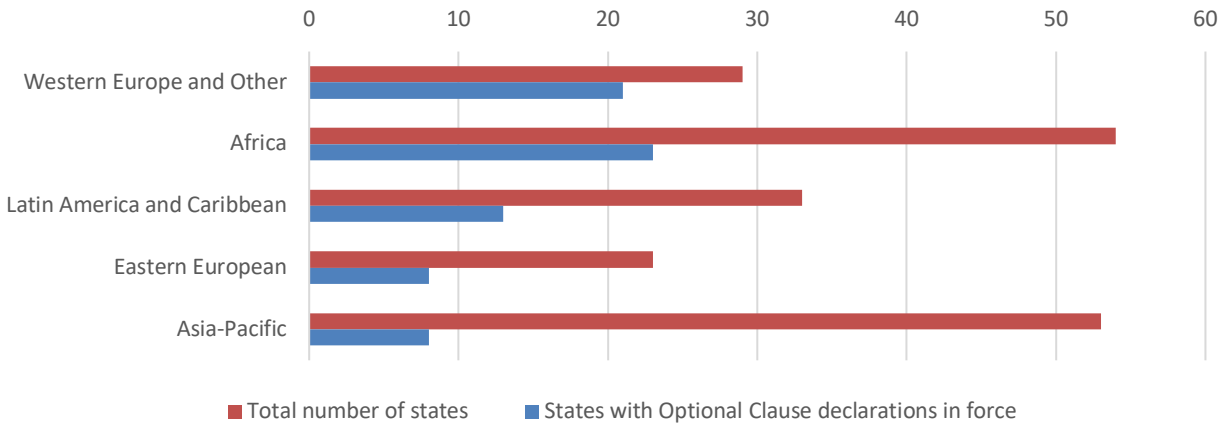
[103] Merrills 1993, 202–03.

members, or 34.9%.[104] This trend has continued in the past decade, so that there are currently 74 States with declarations in force out of 193 UN members, or 38.3%.

44. Since 1990, the following States have made new Optional Clause declarations accepting the jurisdiction of the current Court for the first time:[105] Poland (1990), Spain (1990) Estonia (1991), Hungary (1992), Bulgaria (1992), Madagascar (1992), Greece (1993), Cameroon (1994), Georgia (1995), Paraguay (1996), Guinea (1998), Lesotho (2000), Côte d'Ivoire (2001), Peru (2003), Slovakia (2004), Djibouti (2005), Dominica (2006) Germany (2008), Ireland (2011), Timor-Leste (2012), Marshall Islands (2013), Italy (2014), Lithuania (2014), Romania (2015), Equatorial Guinea (2017), and Latvia (2019). During the same period, only three States have left the Optional Clause system: Nauru, whose declaration expired in 1993; Colombia, which terminated its declaration in 2001; and Serbia, which indicated in 2008 that it did not recognize a declaration deposited in 1999 by the Federal Republic of Yugoslavia.[106] Including both declarations made for the first time and those replacing or modifying previous declarations, close to half have been made since 1990, indicating States' continued engagement with the Optional Clause.[107]

45. There remain significant regional differences in States' willingness to make Optional Clause. This can be measured by utilising the regional groups into which UN member States are divided for electoral purposes and comparing how many member States in each group have made an Optional Clause declaration.

Figure 7: Optional Clause Declarations in force by UN regional group



46. The group with the highest proportion of States making an Optional Clause declaration is the Western European and Other Group (WEOG). 21 out of the 29 States within this group, or 72.4%, have made an Optional Clause declaration. A number of Western European States have had accepted the Court's jurisdiction for many years with few

[104] Merrills 2009, 432. All the previous non-UN member States which were parties to the ICJ Statute had by this stage joined the UN.

[105] Some of these States had made Optional Clause declarations during the period of the Permanent Court of International Justice.

[106] Crawford 2017, 99.

[107] Cf Merrills 2017, 905.

reservations, notably the Scandinavian and Benelux countries. The proportion has grown in recent years as Western European States which previously held aloof from the Optional Clause have made Optional Clause Declarations, including Germany (2008), Ireland (2011) and Italy (2014). These developments may have been encouraged by a Council of Europe initiative to encourage participation in the Optional Clause system.[108] Apart from some States with small populations,[109] the only Western European country not to have an Optional Clause declaration in force is France, which terminated its previous declaration in 1974 following the Court's order for provisional measures in the *Nuclear Tests* case.[110] Of the countries outside Europe forming part of this group, Australia, Canada and New Zealand are longstanding participants in the Optional Clause system, while the US[111] and Israel[112] both terminated their declarations in 1985.

47. The African group has the second highest proportion of Optional Clause declarations in force, with 23 out of 54 States participating in the Optional Clause system, or 42.6%.[113] Some of these declarations date back to the 1950s and 1960s, often following shortly after independence. States in this category include Liberia, Sudan, Somalia, Uganda, Kenya, Gambia, Malawi, Mauritius, and Swaziland. Between 1970 and 1984 only two further African States accepted Optional Clause jurisdiction, Botswana and Togo, a decline which some have linked to African States' disillusionment with the Court following the 1966 decision in the *South West Africa* case.[114] The situation began to improve from the mid-1980s: 3 African States made declarations for the first time between 1985 and 1989,[115] 3 between 1990 and 1999,[116] and 4 have done so since 2000.[117] The only State in Africa to have withdrawn from the Optional Clause system is South Africa, which under the apartheid regime terminated its declaration in 1967.[118]

48. The Latin America and Caribbean regional group has 13 declarations in force out of 33 States (39.4%). A number of States in this region have declarations dating back to the interwar period which are still in force in accordance with art 36(5) of the ICJ Statute: 5 of the 13 declarations fall within this category (Dominican Republic, Haiti, Nicaragua, Panama and Uruguay).[119] Mexico and Honduras deposited declarations for the first time following the establishment of the current Court in the 1940s. Between 1973 and 1996 four State joined the system (Costa Rica, Barbados, Suriname and Paraguay), with two more since 2000 (Dominica and Peru). However, several States in the region have left

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[108] Tams and Zimmermann 2008, 393

[109] Andorra, Iceland, Monaco and San Marino.

[110] Turkey, which participates in both the WEOG and the Asian group but which is counted as part of the WEOG for UN electoral purposes, made a declaration in 1947 which after being renewed several times expired in 1972.

[111] 'Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction' (1985) 24 ILM 1742. (The US is not formally a member State of WEOG but counted as such for UN electoral purposes).

[112] Crawford 2017, 99.

[113] See also Higgins 1994, 190

[114] Anand 2001, 10

[115] Senegal, Guinea-Bissau, and the Democratic Republic of Congo.

[116] Madagascar, Cameroon and Guinea.

[117] Lesotho, Côte d'Ivoire, Djibouti, and Equatorial Guinea.

[118] Crawford 2017, 99.

[119] Outside Latin America, Luxembourg's declaration also falls into this category: see ICJ Yearbook [2016-17] 67.

the system, while others never joined it.[120] Brazil and Guatemala made declarations in the late 1940s which they allowed to lapse in the early 1950s. El Salvador allowed its declaration to expire in 1988[121] while Colombia terminated its declaration in 2001.[122] During the life of the current Court, Argentina, Chile and Venezuela, *inter alia*, have never deposited declarations. (However, even for States with no Optional Clause declaration in force, the Pact of Bogotá may provide a separate basis for compulsory jurisdiction as between the parties. The Pact will be discussed later in Part C.1 of this report).

49. Following Latvia's recent Optional Clause declaration made in September 2019,[123] nine out of 23 States in the Eastern Europe regional group have Optional Clause declarations in force, so very similar to the Latin American and Caribbean group (39.1%). This is the region which has contributed the most to the growth in the number of Optional Clause declarations in the last three decades.[124] No State in this region had a declaration in force during the Cold War period, reflecting the Soviet bloc's rejection of the Court's compulsory jurisdiction. Thus, all eight of these States joined the Optional Clause system since 1990, making up almost a third of the 25 States making completely new declarations during this period. Five of these States joined between 1990 and 1999,[125] one between 2000 and 2009,[126] and three since 2010.[127] One State in the region, Serbia, left the Optional Clause system in 2008, as mentioned previously.

50. Considering western and eastern European states together, there is a high degree of overlap between acceptance of the Optional Clause and EU membership: 24 out of 28 EU member States have declarations in force (85.7%). (The exceptions are Croatia, the Czech Republic, France, and Slovenia).[128]

51. The Asia-Pacific regional group has by far the lowest proportion of Optional Clause declarations, with only 8 out of the 55 States within this group part of the Optional Clause system (14.5%).[129] One of these, Cyprus, as an EU member is more naturally classified as a European State.[130] India has had a declaration in force before its independence, with a hiatus between 1957 and 1959,[131] and Pakistan since 1948, although both these States have greatly narrowed the scope of their acceptance of compulsory jurisdiction in later declarations.[132] The Philippines joined the Optional

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[120] Merrills 1993, 241.

[121] Lamm 2014, 277, 303.

[122] See *Territorial and Maritime Dispute (Colombia v Nicaragua), Preliminary Objections,* ICJ Reports 2007 870, para 122.

[123] 'Republic of Latvia', <www.icj-cij.org/en/declarations/lv> (accessed 24 September 2019).

[124] Lamm 2014, 128.

[125] Poland, Estonia, Bulgaria, Hungary, and Georgia.

[126] Slovakia.

[127] Lithuania, Romania and Latvia.

[128] Cf Murphy 2009, 52.

[129] See Chesterman 2016, 961; Koh 2011, 57.

[130] Higgins 1994, 190.

[131] Merrills 1979, 93.

[132] Both these States have recently made new declarations introducing further reservations: Pakistan on 29 March 2017 and India on 27 September 2019: see <www.icj-cij.org/en/declarations> (accessed 1 December 2019).

Clause system in 1947, Cambodia in 1957 and Japan in 1958. Two (small) States have made new declarations this decade, Timor-Leste in 2012 and Marshall Islands in 2013. On the other hand, several States in Asia have withdrawn from the Optional Clause system over the years. The Nationalist government of China made a declaration in 1946, but the People's Republic of China indicated it 1972 that it did not recognize it.[133] Iran denounced its declaration, made in 1930 during the life of the PCIJ, in 1951 (following the commencement of the *Anglo-Iranian Oil Company* case against it.[134] In 1950 Thailand renewed a declaration dating back to 1930 but let it expire (following its loss in the *Temple of Preah Vihear* case)[135] in 1960, and Nauru made a declaration for 5 years in 1988 which expired in 1993.[136] It may also be worth noting that no Arab State in Asia-Pacific group has ever made an Optional Clause declaration,[137] although some Arab League member States in the African group (Egypt,[138] Sudan, Somalia and Djibouti) have done so.

52. Can any conclusions be drawn about factors which lead States to join the Optional Clause system? The significant regional differences suggest that 'peer effects' may be important in a State's decision whether or not to accept the Optional Clause.[139] On this hypothesis, States are influenced by the action of their peers, particularly States in the same region or otherwise seen as sharing a similar political situation or culture. When several States in such a grouping already accept jurisdiction Optional Clause, it draws attention among others to the possibility of doing the same and decreases the real or perceived risks involved.[140] Thus a declaration by one State can potentially help influence further declarations by several others. This seems to have happened in eastern Europe after the end of the Cold War, when the declaration made by Poland in 1990 was followed by other post-Communist States.[141] In contrast, the fact that few other States in east Asia accept the Court's jurisdiction likely makes States in that region more reluctant to do so.

53. One common motivation for depositing an Optional Clause declaration may be a desire to litigate in relation to a particular dispute with a State which already has a declaration in force to the Court. States which initiated litigation soon after making an Optional Clause declaration include Portugal (against India in 1955 in the *Right of Passage* case),[142] Cambodia (against Thailand in 1959 in *Temple of Preah Vihear*), Nauru (against Australia in 1989 in *Certain Phosphate Lands in Nauru*), Guinea-Bissau (against Senegal in 1989 in *Arbitral Award of 31 July 1989*),[143] Cameroon (against Nigeria in 1994 in *Land and*

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[133] Lamm 2014, 274, 303.

[134] See *Anglo-Iranian Oil Company case (Jurisdiction) (United Kingdom v Iran),* ICJ Rep 93, 98.

[135] *Case concerning the Temple of Preah Vihear,* ICJ Reports 1962, 6.

[136] See Tomuschat 2019, 769.

[137] Cf Merrills 1993, 241.

[138] Although Egypt's declaration is extremely narrow, being confined to the interpretation or application of the Convention of Constantinople of 1888 governing free navigation through the Suez Canal: see para 97, below.

[139] Galbraith 2013, 351; Jennings *et al* 2019, 90.

[140] Such as the possibility of 'ambush' discussed in part B.2.

[141] See para 49, above.

[142] *Right of Passage over Indian Territory (Preliminary Objections),* ICJ Reports 1957, 125.

[143] ICJ Reports 1991, 53.

Maritime Boundary between Cameroon and Nigeria),[144] Guinea (against the Democratic Republic of Congo in 1998 in the *Diallo* case),[145] the Federal Republic of Yugoslavia (against a number of States in 1999 in the *Legality of Use of Force* cases),[146] and Dominica (against Switzerland in 2006 in the *Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations* case, which was discontinued shortly afterwards).[147] More recent cases which could be placed in this category are Timor-Leste's application against Australia in 2013 (in the *Questions Relating to the Seizure and Detention of Certain Documents and Data* case) and Marshall Islands' application against the UK, India and Pakistan in 2014 (in the *Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament* cases).[148]

54. It seems States may be inspired to make Optional Clause declarations when they are considering bringing or have brought particular cases to the Court, even against States which do not have Optional Clause declarations in force and where the case must therefore rely on a different basis for jurisdiction. Thus Hungary's 1992 declaration was made in light of its desire to take the dispute concerning the Gabčíkovo Nagymaros dam project to the Court; in 1993 the case was brought to the Court by special agreement with Slovakia.[149] Peru made an Optional Clause declaration in 2003, several years before instituting proceedings in 2008 against Chile on the basis of the Pact of Bogotá.[150] Djibouti made its declaration on September 2005 before instituting proceedings against France in January 2006 on the basis of *forum prorogatum.*[151] More recently, Equatorial Guinea instituted proceedings against France in 2016 on the basis of *forum prorogatum* (in *Immunities and Criminal Proceedings*), and then in 2017 deposited an Optional Clause declaration confined to 'disputes relating to the privileges and immunities of States, senior State officials and State property', which seems clearly inspired by the subject matter of the dispute with France being litigated before the Court.

55. A State making a declaration in order to litigate a particular case against an existing participant in the Optional Clause system raises concerns about fairness, since it allows a State with a longstanding declaration to be 'ambushed' at any time by a State with no pre-existing commitment to the system. States commonly include conditions and reservations in their declaration to address this vulnerability. This will be discussed in greater detail in section B.2 of this report. A broader concern is that the integrity of the Optional Clause system as a whole would be undermined if States made declarations in order to bring a particular dispute before the Court and afterwards revoked them (or narrowed them significantly).[152] However, so far this has not been a major problem in practice. Of the States mentioned in paragraph 53 which brought applications to the Court shortly after depositing a declaration, Nauru allowed its Optional Clause to expire

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[144] *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections),* ICJ Reports 1998, 275.

[145] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo*, ICJ Reports 2010, 639.

[146] See para 20, above.

[147] Order of 9 June 2006.

[148] *Marshall Islands v India,* Preliminary Objections, ICJ Reports 2015, 255; *Marshall Islands v Pakistan*, ICJ Reports 2016, 552; *Marshall Islands v United Kingdom,* Preliminary Objections, ICJ Reports 2016, 833.

[149] Jennings *et al* 2019, 73.

[150] *Maritime Dispute (Peru v Chile)*, ICJ Reports 2014, 3.

[151] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, ICJ Reports 2008, 177.

[152] Waldock 1955, 283.

after it reached a settlement with Australia in the *Certain Phosphate Lands* case, and Serbia withdrew from the system in 2008.[153] The other States have remained within the Optional Clause system, nor did any of them rapidly amend their declarations to introduce new reservations.[154] Thus even if a State makes a declaration with the short-term goal of bringing a particular dispute to the Court, it seems that it will most likely retain its declaration in force after the case has been concluded, whether because the State's experience of the Court is positive, or because of the reputational cost involved in entering and withdrawing from the system in a blatantly opportunistic way, or simply through inertia or status quo bias.[155]

56. It is often suggested that less powerful States have a greater incentive to seek recourse to adjudication (or arbitration) as a means of dispute settlement than stronger States.[156] Thus, Sweden stated in the discussion of the ICJ's role at the Sixth Committee of the UN General Assembly in 1971 that:

> The political, economic or military strength of the respective party becomes irrelevant in a judicial proceeding. This may not be as true of some other peaceful means of settling disputes such as negotiations.[157]

In other words, stronger States can utilize differences in bargaining power to their advantage in negotiations and other forms of diplomatic dispute settlement. In contrast, formal legal processes leading to a binding decision based on impartial application of international law place the parties on a (more) equal footing.[158]

57. Of the permanent members of the Security Council, only the United Kingdom has an Optional Clause declaration in force, which is subject to significant reservations. Major regional powers such as Brazil, South Africa, Turkey and Indonesia are also absent from the Optional Clause system. On the other hand powerful States like Japan, Germany, Nigeria and India have declarations in force, although the declarations of the latter two contain wide-ranging reservations. Of the 19 State members of the G20, representing the world's major industrialised and developing economies,[159] eight have declarations in force.[160] Unsurprisingly perhaps, military power appears to correlate somewhat more closely with non-acceptance of Optional Clause jurisdiction than economic power. Out of the International Institute for Strategic Studies' list of the 15 States with the highest military spending,[161] six have Optional Clause declarations in force;[162] none of the top

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[153] See para 44, above.

[154] Portugal amended its declaration of 1955 many decades later, in 2005.

[155] Cf Galbraith 2013, 358.

[156] For example Rovine 1976, 319; Burmeister 1996, 32.

[157] UN Doc A/8382, 11. See UN Doc A/CONF.62/SR58, para 20; UN Doc A/CONF.62/SR.60, para 44 (Cyprus); UN Doc A/CONF.80/16.Add1, 93 (Guyana).

[158] Crawford 2017, 98.

[159] Excluding the European Union, which cannot be a party to contentious cases before the Court as it is not a State: art 34(1) of the ICJ Statute.

[160] Australia, Canada, Germany, India, Italy, Japan, Mexico, United Kingdom.

[161] International Institute for Strategic Studies, *The Military Balance: Press Statement,* 2, available at < https://www.iiss.org/press/military-balance> (accessed 1 December 2019)

[162] India (the 5th highest spender), United Kingdom (6th), Japan (8th), Germany (9th), Australia (12th), Italy (13th).

four (the US, China, Saudi Arabia and Russia) do, and the fifth (India) has a broad reservation excluding military hostilities from the scope of its declaration.[163]

58. Considering the other side of the picture, the Optional Clause does seem to have an attraction to smaller States involved in a dispute with a stronger or larger party (or parties); some of the cases discussed in paragraph 53 seem to fit this paradigm. Making a declaration may also considered a means for a smaller State or middle power to 'enhance [its] standing as a respected and influential member of the international community.'[164] Independently of a desire to litigate a particular dispute, States may see acceptance of the Optional Clause as a means of promoting the ideal that international relations should be governed by impartially applied rules rather than simply by power politics.[165] This ideal may appeal particularly (although not exclusively)[166] to small and middle powers,[167] although where the contents of international law accord with great powers' preferences, it may also be motivated to favour compulsory adjudication to facilitate general compliance.[168]

59. A further potential factor which has been discussed in the literature is the character of that State's internal political system and legal order. It has been argued that liberal democratic States which observe the separation of powers and the rule of law in their own legal systems are more likely to accept scrutiny of their actions by an independent court at the international level, just as they do in the domestic sphere.[169] Important interest groups and broader public opinion in these societies may be invested in the ideal of the rule of law and seek to promote it internationally as well as domestically, which may influence governments to accept ICJ jurisdiction.[170]

60. Although there are difficulties in quantifying a State's compliance with liberal values and the rule of law, certain non-government organizations have prepared indices which attempt this task. Two are used here: those produced by Freedom House[171] (which classifies all States with a 'freedom rating' between 1.0, 'free', and 7.0, 'not free') and the World Justice Project Rule of Law index (which ranks a selection of 125 sovereign States according to their compliance with the rule of law).[172]

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[163] See further section B.3 paras 124-128, below.

[164] See the statement made by the Irish Minister of Foreign Affairs concerning Ireland's Optional Clause declaration, (2011) 6 Irish YBIL 87.

[165] Galbraith 2013, 348; Wood 2006, 636.

[166] For example, a great power might wish to bind its (present or future) adversaries or may consider that 'the benefits of at least some kinds of cooperation may exceed the cost…of reducing its discretion': Stephan 2009, 97–98; see also Krisch 2005.

[167] Cf Scott and Carr 1987, 59.

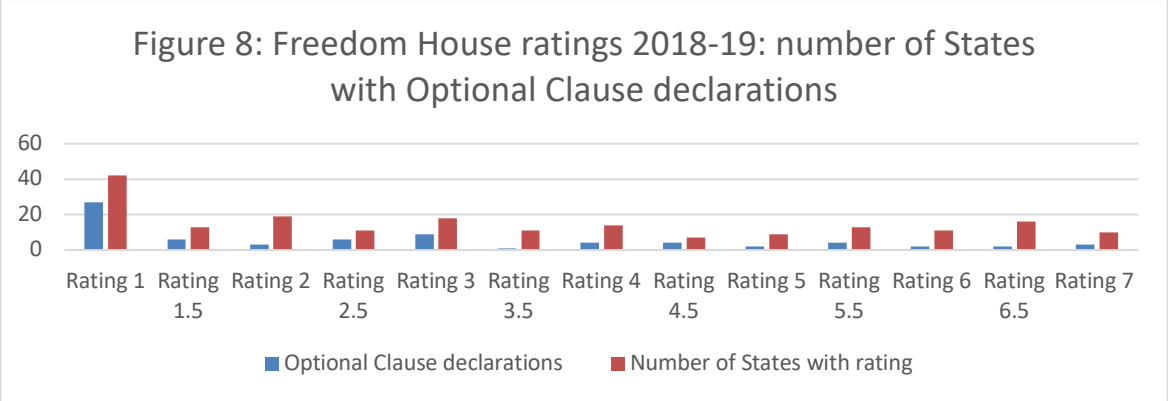
[168] Stephan 2009, 97.

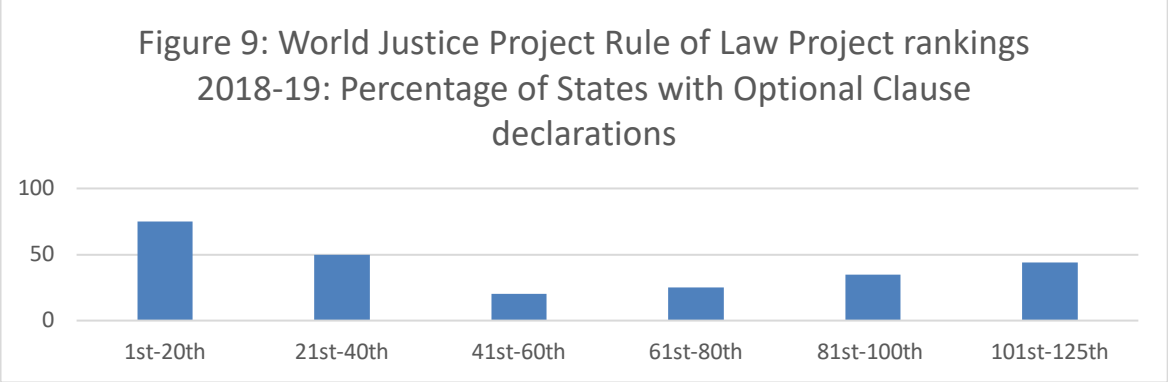
[169] Cf Chesterman 2016, 963. On this theory, the US would be an outlier, which may be attributed to its superpower status, its particular democratic tradition and the existence of constitutional constraints arising from its federal system: Paulus 2004, 810-11.

[170] Lloyd 1997 has undertaken a detailed historical work showing the influence of public opinion on the United Kingdom's decision to make its first Optional Clause declaration (during the PCIJ period) in 1930. See also Simmons 2002, 845.

[171] Freedom House, *Freedom in the World 2019: Countries,* available at https://freedomhouse.org/report/countries-world-freedom-2019 (accessed 1 December 2019)

[172] World Justice Project, *WJP Rule of Law Index,* available at < http://data.worldjusticeproject.org/#table> (accessed 1 December 2019).





61. Both these measures indicate a high degree of correlation between having a very high ranking and having an Optional Clause declaration in force. However, below the highest rankings the correlation is not clear.[173] Thus on the Freedom of House index, while 27 of the 42 States with a ranking of 1.0 have an Optional Clause declaration in force (64.3%) only 4 out of 19 with a ranking of 2.0 (21.1%) do, which is lower than the percentage of States ranked 3.0 (9/18, or 50%), 4.0 (4/14, or 28.6%), 5.0 (2/9, or 22.2%), 6.0 (2/11, or 18.2%) or 7.0 (3/10, or 30%). The lack of correlation beyond the highest ranking is more dramatic with the World Justice Project index. While 75% (15/20) of the top 20 States on this ranking (and all of the top 12) have an Optional Clause declaration in force, States with rankings in the middle have the lowest percentage of Optional Clause declarations. The percentages then rise again at the very bottom: 11 of the bottom 25 States (44%) have an Optional Clause declaration in force, including five of the lowest ranking 10 (50%).

62. A possible explanation is that States with low rule of law rankings may also often be particularly weak, unstable or politically isolated States. Their vulnerability to external pressure and interference may provide a countervailing incentive for them to have recourse to the Court as a means of redress. Acceptance of the Optional Clause and participation in international litigation may also help enhance their international legitimacy by demonstrating their status as States possessing sovereign equality under international law.[174] Contrastingly, one hypothesis presented in the literature for the low number of Asian States to have made Optional Clause declarations links this

[173] Cf Alvarez 2001, 209, who notes the willingness of non-liberal States to utilise the ICJ as applicants.

[174] Cf Murphy 2009, 52.

phenomenon to the long history of strong State structures in this region,[175] which (according to this argument) makes these governments less in need or desirous of legitimation and other assistance from multilateral institutions than other States in the Global South.[176]

63. A State's prior experience with judicial dispute settlement (or lack thereof) will also influence its willingness to accept the ICJ's compulsory jurisdiction. States which have no such experience may find exposure to compulsory jurisdiction especially intimidating. The financial costs of litigating may also be higher for a State which has limited experience in international litigation and which has to draw primarily on external counsel, compared with a State which has access to more 'in-house' expertise.[177] In contrast, a State which has (positive) prior experience of the Court and other forms of international adjudication may be more comfortable with the prospect of future litigation and hence more willing to make an Optional Clause declaration.[178]

64. Relatedly, involvement in cases brought before the Court by special agreement or treaty jurisdiction may help encourage the parties, or other States in the broader region, to accept its compulsory jurisdiction under the Optional Clause. A number of African territorial and maritime delimitation disputes have been brought to the Court by special agreement from the 1980s onwards.[179] Although the particular States involved in these cases did not go on to make an Optional Clause declaration, satisfactory resolution of these disputes may have encouraged other States in Africa to pay more attention to the Court and its potential role, ultimately leading to some States depositing new declarations. A similar phenomenon may be discerned recently in Eastern Europe, where Romania deposited a declaration following the positive outcome for Romania of *Maritime Delimitation in the Black Sea (Romania v Ukraine).*[180] On the other hand, two territorial disputes brought to the Court by states in southeast Asia (one brought by Indonesia and Malaysia in 1998[181] and the other by Malaysia and Singapore in 2003)[182] have not been followed by new Optional Clause declarations in this region (with the exception of Timor-Leste's 2012 declaration).

65. More intangible cultural differences, relating to different attitudes to judicial dispute settlement, have also been suggested as reasons for varying acceptance of compulsory jurisdiction. An official of the Chinese Foreign Ministry drew on arguments of this kind in a public speech, stating:

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[175] Abebe and Ginsburg 2019.

[176] Chesterman 2016, 965.

[177] Cf Miron 2014, 256-57; for a similar observation in the context of WTO dispute settlement, see Davis and Bermeo 2009, 1035.

[178] Relatedly, an initial positive experience of the Court may prompt a State to become a particularly avid customer of the Court. For a discussion of Nicaragua's regular appearances before the Court since the *Nicaragua* case, see in general Sobenes Obregon and Samson (eds) 2018.

[179] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, filed in 1978-79; *Frontier Dispute* (*Burkina Faso/Mali)* in 1983; *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* in 1990; *Kasikili/Sedudu Island (Botswana/Namibia)*, in 1996*; Frontier Dispute (Benin/Niger)*, in 2001; *Frontier Dispute (Burkina Faso/Niger)*, in 2009. See ICJ Yearbook [2016-17], 121-22; Jennings *et al* 2019, 34.

[180] ICJ Reports 2009, 61.

[181] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia),* ICJ Reports 2002, 625.

[182] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Reports 2008, 12.

> [China] firmly believes that consensus between the relevant parties is the fundamental way to address the disputes…China's mechanisms of treaty dispute settlement carries forward the fine tradition of the Chinese culture. For several thousands of years, the Chinese people have always cherished peace, believing that peace is more precious than anything else. We Chinese are reluctant to bring cases to courts and always prefer solving disputes through non-confrontational means.[183]

66. Finally, the role of individual political and legal actors in a State's decision to make, or not, an Optional Clause declaration cannot be discounted. For example, the fact that an eminent international lawyer, Kryzstof Skubiszewski, served as foreign minister in Poland's first post-Communist government likely helped influence Poland's decision to deposit a declaration in 1990.[184] The election of a national to the Court may also encourage a State to make a declaration: for example, Madagascar made a declaration in 1992, shortly after Raymond Ranjeva's election to the Court.

67. Turning from the regional variations to trends over time, the increased number of Optional Clause declarations can be linked to perceptions of the Court's greater effectiveness as a tool for applicants. During the Cold War period, a relatively low proportion of unilaterally initiated contentious cases led to a wholly or partly successful judgment for the applicants on the merits: in the almost four decades leading up to the *Nicaragua* case, only 8 out of 32 cases (25%) did so.[185] Several prominent cases took up a great deal of time and expense only for the Court to find that the applicant did not have standing.[186] Results like this may have led discouraged States not only from litigating but also from accepting the Court's jurisdiction in the first place.

68. In contrast, of the 28 cases initiated since 2000 by unilateral application on the basis of prior consent in which a merits judgment is not still pending, 17 have led to a wholly or partly successful merits judgment for the applicant (60.7%).[187] (Additionally, as already mentioned, cases may be settled before the merits judgment which may often also be considered a successful outcome for the applicant).[188] The academic literature generally suggests that the Court's judgments have mostly been met with substantial

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[183] Ma 2012, 392.

[184] Jennings *et al* 2019, 43.

[185] *Rights of Nationals of the United States in Morocco; Haye de la Torre (Colombia v Peru); Ambatielos (Greece v United Kingdom); Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua); Temple of Preah Vihear; Fisheries Jurisdiction (United Kingdom v Iceland); Fisheries Jurisdiction (Federal Republic of Germany v Iceland); Teheran Hostages.*

[186] This was the outcome in the *South-West Africa* case and *Barcelona Traction Light and Power Company, Ltd (Belgium v Spain)* (although both of these concerned cases involving compromissory clauses rather than the Optional Clause). See Jennings *et al* 2019, 30.

[187] *Arrest Warrant (Democratic Republic of Congo v Belgium)*; *Territorial and Maritime Dispute (Nicaragua v Colombia); Avena (Mexico v US); Maritime Delimitation in the Black Sea (Romania v Ukraine); Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua); Pulp Mills on the River Uruguay (Argentina v Uruguay); Maritime Dispute (Peru v Chile); Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece); Jurisdictional Immunities of the State (Germany v Italy; Greece intervening); Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal); Whaling in the Antarctic (Australia v Japan; New Zealand intervening); Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica); Maritime Delimitation (Costa Rica v Nicaragua); Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua); Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua); Jadhav (India v Pakistan).*

[188] For example, *Certain Documents*: see para 17, above.

compliance, even in cases commenced unilaterally.[189] Thus, the practical benefits of accepting the Court's jurisdiction in order to obtain the right to initiate litigation appear greater than previously. It seems likely that there is a positive feedback loop between the Court's effectiveness in resolving disputes and acceptance of its compulsory jurisdiction.[190]

69. It has also become increasingly clear since the *Nicaragua* case that a State can use litigation to put pressure on a stronger adversary in the context of highly politically sensitive disputes.[191] It may be doubtful whether such an application will succeed and, if it does, it may be unlikely that the respondent will comply due to the political sensitivities involved. But merely initiating the litigation may help bring the dispute to the attention of the international community and embarrass the respondent State. Additionally, the applicant may be able to obtain a provisional measures order against the respondent if (among other requirements) the Court finds that it has *prima facie* jurisdiction,[192] which may create a strong short-term incentive to litigate. The attractiveness of provisional measures for applicants has been heightened since the Court's decision in *LaGrand*[193] that they are legally binding.

70. A perception that litigation is more likely than previously to lead to a successful merits judgment provide reasons for States which consider themselves as potential applicants to accept the Court's jurisdiction. However, the same perception may have the opposite effect on States considering themselves primarily as potential respondents.[194] Similarly, just as litigation may have political benefits for the applicant even if it does not ultimately prevail on jurisdiction or on the merits, equally there may be political costs to the applicant from the mere fact that litigation has been initiated which shines a spotlight on a sensitive area of its conduct.

71. While well-crafted reservations will prevent the Court from proceeding to a merits judgment, they are unlikely to prevent a case from proceeding to the preliminary objections stage, and may not succeed in preventing an order for provisional measures (given that *prima facie* jurisdiction provides a sufficient jurisdictional basis for these). In contrast, if the respondent has no Optional Clause declaration in force, this will (in the absence of any plausible treaty basis for jurisdiction) prevent the case being entered on the Court's list in the first place. These considerations were referred to in 1974 by the then French Foreign Ministry legal adviser (later himself to sit on the Court) Guy Ladreit de Lacharrière, following the Court's provisional measures orders in the *Nuclear Tests* cases,[195] to justify France's decision to terminate its declaration without replacing it instead of making a new declaration with additional reservations.[196]

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[189] Llamzon 2007; Powell and Mitchell 2011, 76.

[190] Shany 2015, 46.

[191] Cf Shaw I.38; Tams 2009, 486–87.

[192] Charney 1987, 860-61.

[193] *LaGrand (Germany v US)* ICJ Reports 2001, 506, paras 109-110.

[194] See further the discussion in section B.2, below.

[195] *Nuclear Tests Case (Australia v France), Interim Protection,* Order of 22 June 1973, ICJ Reports 1973, 99; *Nuclear Tests Case (New Zealand v France), Interim Protection,* Order of 22 June 1973, ICJ Reports 1973, 135.

[196] de Lacharrière 1973, 251.

72. A delicate balance thus seems to be required for the Court to maintain its perceived legitimacy both with States that conceptualise themselves primarily as potential applicants and as potential respondents, and thus maximise acceptance of compulsory jurisdiction.[197] Too narrow and cautious an approach to its jurisdiction will raise doubts about the Court's effectiveness as a means for dispute settlement and may discourage potential applicants from resorting to the Court or from accepting its jurisdiction in the first place. Too expansive an approach, however, may undermine potential respondents' perceptions of the Court's legitimacy as an institution whose jurisdiction is based on consent, undermining the 'compliance pull' of the Court's decisions as well as providing a motive for risk-averse States to decline to accept the Court's compulsory jurisdiction and potentially also to withdraw consent previously given.

[197] Shany 2015, 46.

B.2. Duration, withdrawal and amendment of Optional Clause declarations

73. Counting the number of States which have Optional Clause declarations in force provides only a partial view of States' willingness to accept the jurisdiction of the Court. The contents of these declarations must also be considered; 'quality' is important as well as 'quantity'. States have the freedom to include conditions and reservations within their declarations which restrict or limit their consent to the Court's jurisdiction. While some declarations constitute a broad acceptance of the jurisdiction, others are highly restricted.

74. In the *Nicaragua* case the Court drew a distinction between two aspects of a State's Optional Clause declaration: 'the scope and substance of the commitments entered into, including reservations' and 'the formal conditions of their creation, duration or extinction'[198] This distinction reflects two different ways a State can restrict its consent to the Court's jurisdiction in the form of a declaration. The first is to include reservations within the declaration so that matters falling within the scope of the reservations will be excluded from jurisdiction under the Optional Clause. The second is make provision within the declaration for the expiry or termination of the declaration itself, or to allow its amendment to introduce new reservations. The first kind of restriction governs the scope of the existing declaration while it is in force; the second kind governs how long the declaration remains in force and how its current scope can be changed.

75. This subsection of the report considers the second kind of limitation, conditions within the declaration governing its duration, withdrawal and amendment. The next section will consider reservations limiting the scope and substance of the declaration itself. A complete table providing an overview of both kinds of limitations is attached as **Annex 1** to this report.

76. The Court has observed that States 'may specify how long the declaration…shall remain in force, or what notice (if any) will be required to terminate it'.[199] As regards their duration and termination, declarations can be divided into four categories: 1) those made for a fixed period only; 2) those made for an indefinite or unlimited period, with no provision for their termination or amendment; 3) those which provide for their termination on notice, but require advance notice (six months or one year) before the termination comes into effect; 4) those which are terminable immediately.[200] Some declarations are initially for a fixed period after which they become terminable either with advance notice or immediately.[201] Thus, after the initial period has expired, these declarations in effect fall either within category 3) or category 4).

77. As well as provision for its termination or withdrawal, a declaration can contain a provision allowing for its modification or amendment, allowing the State to add to (or to withdraw) its existing substantive reservations. Such explicit provisions, like those allowing for termination, may either require advance notice of six months or one year or may allow amendment with immediate effect. A clause allowing for amendment with immediate effect was introduced for the first time in Portugal's 1955 declaration, made

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[198] *Nicaragua (Jurisdiction)* 419, para 62.

[199] *Nicaragua (Jurisdiction)* 418, para 59.

[200] Cf Alexandrov 1995, 58-66; Kolb 2013 520–29.

[201] See for examples the declarations of Austria, Belgium, Bulgaria, Cambodia, Liberia, and New Zealand.

immediately before it commenced litigation in the *Right of Passage* case.[202] India in that case argued that this clause was incompatible with the object and purpose of the Optional Clause.[203] Sweden also objected to the Portuguese declaration on this basis.[204] However, the Court rejected this argument and held that the Portuguese declaration was valid. The Court relied on the fact that in substance the effect of the clause is the same as one allowing immediate termination, which was already commonly included in Optional Clause declarations at this time (including India's). The same object can be achieved either by modifying a declaration with immediate effect, or by terminating it with immediate effect and then issuing a new declaration on different terms.[205] The latter method is in fact common in practice.[206] Thus, the inclusion of a clause allowing immediate amendment does not in substance add anything to a declaration that already allows for immediate termination, although since 1955 many declarations have included both.

78. How many declarations currently in force fall into each of the categories defined above? The first category, declarations made only for a set period, were common in the time of the Permanent International Court of Justice, and during earlier decades in the life of the ICJ.[207] However, by their nature such declarations are transient and when they expire they generally either have not been renewed or they have been replaced with new declarations that are not tied to a specific time limit. Only one of the declarations currently listed on the ICJ website seems on its terms to be valid solely for a set period: that of Djibouti, which was made in 2005 'for a period of five years, without prejudice to the right of denunciation and modification which attaches to any commitment undertaken by the State in its international relations.'[208] Confusingly, on its own terms it would seem that this declaration lapsed in 2010, but it remains on the ICJ website, which does not clarify whether it has been renewed or not. The Bulgarian declaration made in 2015 does not fall within this category: although it initially applies for a set period of 5 years, it thereafter will automatically continue in force until six months after its denunciation, so that ultimately it should be classified as belonging to the third category, discussed below in paragraph 80.

79. The second category of declarations is those made for an unlimited period without any provision for their termination. 11 of the current 73 declarations fall in this category.[209] A number of declarations of this kind were made by Latin American States in the early years of the PCIJ, perhaps reflecting general optimism about the Optional Clause system and the prospects that it would develop into a general system of compulsory jurisdiction.[210] Several unlimited declarations from this era continue in force on the

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[202] *Right of Passage Preliminary Objections,* 125; Merrills 1993, 210-11.

[203] *Right of Passage*, 141.

[204] Törber 2015, 239–40

[205] *Right of Passage,* 143.

[206] See for example Australia's declaration of 2002, withdrawing its declaration of 1975 and replacing it with a new declaration on different terms; similarly India's declaration of September 2019.

[207] See for example Turkey's repeated declarations from 1947 to 1967, each made for a period of 5 years: Lamm 2014, 299.

[208] Wood 2006, 641.

[209] Those of the Dominican Republic, Dominica, Egypt, Estonia, Georgia, Haiti, Nicaragua, Panama, Paraguay, Uganda and Uruguay.

[210] Cf Separate Opinion of Judge Oda, in *Nicaragua (Jurisdiction)* 471, 500; Lamm 2014, 233.

basis of Art 36(5) of the Court's Statute. Since 1990, 4 declarations have been made for an unlimited period: Estonia (1991), Georgia (1995), Paraguay (1996) and Dominica (2005).

80. The third category of declarations are those which are make express provision for termination, but require advance notice before that termination takes effect. 16 of the current 73 declarations fall within this category.[211] A number of these declarations provide that the declaration will be automatically or tacitly renewed every five years, unless notice of termination is given at least six months before the expiration of the current period. This in effect requires advance notice of anything between six months and five and a half years, depending on the point at which it is given. Other declarations more simply provide for termination at any point, but require a waiting period before it becomes effective, generally six months. Since 1990, 5 declarations have been made falling within this third category: Spain (1990),[212] Hungary (1992), Norway (1996),[213] Poland (1996),[214] and Bulgaria (2015).

81. The majority of declarations in force – 41 out of 73 – indicate that they are terminable (either *ab initio* or after the end of a fixed period which has now elapsed) on notification of the Secretary-General, without providing for any waiting period before the termination becomes effective. Of the 25 declarations made since 2000, 21 are of this kind.[215] This class of declarations can be divided into two further categories, depending on the type of formulation used. . The first kind clarifies that the termination becomes effective 'from the moment of…notification',[216] making it explicit that they reserve a right to immediate termination. The second kind provides simply that the declaration applies 'until such time as notice may be given to terminate…'.[217] This formulation is arguably more ambiguous, since the word 'notice' may be interpreted as suggesting some delay before the termination takes effect.[218] However, the more literal and natural interpretation of the language used is that termination takes effect when (i.e., at the moment that) notification of the decision to terminate is provided, so that these declarations also allow for immediate termination.[219] In addition to these 40 States, 4 others, while they do not reserve a right to terminate on notification of the Secretary-General, do reserve a right to amend the declaration with immediate effect.[220]

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[211] Bulgaria, Costa Rica, Denmark, Finland, Guinea-Bissau, Hungary, Liechtenstein, Luxembourg, Mexico, New Zealand, Norway, Poland, Spain, Suriname, Sweden, Switzerland.

[212] Spain's 1990 declaration however, although it imposes a general requirement of 6 months' notice for denunciation, allows for modification at any time by notice with immediate effect.

[213] Norway's declaration however incorporates with immediate effect into its Optional Clause declarations any limitations or exceptions applicable at any given time under UNCLOS or the Straddling Fish Stocks agreement. New Zealand's 1977 declaration includes a similar clause.

[214] Following a similar provision in its first declaration of 1990: see Merrills 1993, 212.

[215] Australia, Cyprus, Equatorial Guinea, Germany, Greece, India, Ireland, Italy, Japan, Latvia, Lesotho, Lithuania, Marshall Islands, Netherlands, Pakistan, Peru, Portugal, Romania, Slovakia, Timor-Leste, United Kingdom.

[216] For example Nigeria (1998), Germany (2008), Italy (2014), Greece (2015).

[217] For example Australia (2002), Netherlands (2017).

[218] Cf Kolb 2013, 524-25.

[219] Cf Merills 2009, 434–35

[220] Botswana, Malawi and Senegal (which make no provision for termination) as well as Spain (which does so with a six month notice requirement, subject to reciprocity): Merrills 1993, 213.

82. 3 declarations contain clauses on termination and modification which pose difficulties of interpretation. The declarations of Togo (1989) and Côte d'Ivoire (2001) state that they are made 'subject to the power of denunciation and modification attached to any obligation assumed by a State in its international relations.' Djibouti's 2005 declaration, already referred to, uses similar language alongside the statement that it is made for a period of five years. It is unclear whether this should be read as reserving a right to denounce or modify immediately from the moment notice is given, or as requiring a reasonable period of advance notice before the denunciation or modification comes into effect, which the Court indicated in the *Nicaragua* case was required for withdrawal of a declaration made without any provision for termination.[221]

83. These figures indicate that the preponderant number of declarations, particularly those made more recently, provide for termination (and/or modification) of the declaration without a requirement of advance notice.[222] This provides a potential escape route from the Court's jurisdiction for States which anticipate undesired litigation against them.[223] Such States can forestall the threatened application by terminating their current declaration, potentially then replacing it with a new declaration which contains a reservation excluding the threatened case. (As discussed above, modification of the existing reservation may be used to the same effect). As long as the termination or modification occurs before the case is seised, this manoeuvre will succeed in preventing the Court from deciding the case on the merits.

84. Termination to avoid threatened litigation has happened a number of times in practice. For example, Australia in 1954 terminated its existing declaration and made a new declaration with an additional reservation in order to avoid a case being brought by Japan concerning restrictions on Japanese pearl fishing in Australia's continental shelf,[224] and again terminated and replaced its declaration in 2002, in part to avoid litigation by Timor-Leste concerning delimitation of the two States' maritime zones.[225] The UK replaced a declaration excluding disputes with members of the Commonwealth with a new declaration also excluding disputes with former members of the Commonwealth, in anticipation that Mauritius might leave the Commonwealth in order to bring a case concerning the Chagos Islands.[226] Further examples could be given.[227]

85. Parties that make an unlimited declaration or subject their right to terminate to an advance notice requirement do not have the same freedom of manoeuvre. The Court's decision in *Nicaragua* held the United States to its provision in its 1946 declaration requiring six months' advance notice before termination of its declaration could take effect. Thus the US's purported modification of its declaration with immediate effect three days before Nicaragua made its application was ineffective to strip the Court of

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[221] *Nicaragua (Jurisdiction),* 420, para 63.

[222] Merrills 2017, 906.

[223] *Nicaragua (Jurisdiction)*, 418, para 59

[224] Waldock 1955, 267–68

[225] This introduction of this reservation has recently met with renewed criticism in Australia, with a member of the Senate describing it as a 'historic wrong' and arguing for a new declaration without the reservation: 'Crossbench senator pushes to fix "shameful" historic wrong against Timor-Leste', *The Guardian,* 8 September 2019, available at <www.theguardian.com/world/2019/sep/09/crossbench-senator-pushes-to-fix-shameful-historic-wrong-against-timor-leste> (accessed 1 December 2019).

[226] Wood 2006, 638.

[227] See Lamm 2014 225–31.

jurisdiction in the case. The Court went on to consider whether the US could rely on the fact that Nicaragua's own declaration was for an unlimited duration to claim a right of instant termination as a matter of reciprocity. The Court denied this for two reasons. First, utilising the distinction referred to previously, the Court indicated that the reciprocity principle only applied to 'the scope and substance of the commitments entered into' and not 'the formal conditions of their creation, duration or extinction'.[228] Secondly, the Court found that declarations like Nicaragua's which were made for unlimited duration without any reference to termination were, by analogy with the law of treaties,[229] terminable only on reasonable notice.[230]

86. The general tendency for States to condition their acceptance of the Court's jurisdiction on a right to immediately withdraw or amend their declarations constitutes a significant restriction on the Court's jurisdiction. It allows a State to escape the jurisdiction of the Court in any threatened case, provided that it anticipates the case and withdraws before the application is made. Reserving this right suggests States' lack of deep commitment to the judicial settlement of disputes by the Court.[231] It also potentially encourages a 'race to the Hague': a potential applicant may hasten unduly to initiate a case out of concern that otherwise the respondent State may get in first and withdraw its declaration.[232] This may discourage States from first pursuing negotiations and other diplomatic means of dispute settlement, even where this would be highly desirable.[233] Moreover, the practical pressure to initiate litigation quickly where the potential respondent's declaration can be terminated on notice sits uneasily with the ICJ's case law requiring that the dispute must exist prior to the filing of the application, in particularly the rigorous interpretation of this requirement in the recent *Marshall Islands* cases.[234]

87. Despite the problems which arise from the right of States to immediately withdraw or amend their declarations, it seems unrealistic to expect most States to give up this right, given how the Optional Clause system has developed. A State which refrains from reserving its right to terminate or amend its declaration immediately on notice puts itself in a highly disadvantageous position in relation to other States, in two respects.

88. Firstly, States which have made Optional Clause declarations are already in a vulnerable position compared with States which are parties to the ICJ Statute but have not made declarations.[235] The Court's decisions in *Right of Passage* and *Land and Maritime Boundary*[236]

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[228] *Nicaragua (Jurisdiction)* 419, [62].

[229] Compare art 56(2) VCLT, which requires at least twelve months' notice of intent to denounce or withdraw from a treaty.

[230] Ibid 419–20, [63]; see Merrills 1993, 209. The issue of whether declarations without any provision for withdrawal could nonetheless be withdrawn with immediate effect was argued again in the pleadings in *Territorial and Maritime Dispute (Nicaragua v Colombia)*, but the Court avoided deciding upon this point in its judgment on preliminary objections: see Merrills 2017, 912–14.

[231] Waldock 1955, 266 –67

[232] Törber 217–18.

[233] Ibid; Kolb 2013, 527.

[234] As observed by Judge Tomka in his Separate Opinion: ICJ Reports 2016, 896, para 31; also Tanaka 2018, 14.

[235] Waldock 1955, 280. For an expression of dissatisfaction at this position, see the representative of Canada during the drafting of UNCLOS: UN Doc A/CONF.62/SR.65, para 6.

[236] *Land and Maritime Boundary (Cameroon v Nigeria), Preliminary Objections,* ICJ Reports 1998, 295–96, paras 34–35.

establish that a State which has not previously deposited a declaration can do so at any time, and can then immediately make an application against a State with an existing declaration. In effect, this means that States which have not made declarations can force States with existing declarations before the Court at any time, but the same does not apply *vice versa*. By retaining the right to terminate or amend its declaration immediately, a State creates a potential defence against this vulnerability, so long as it is able to anticipate the surprise application before it is made.

89. An alternative way States can address this inequality is by including a reservation *ratione personae* where the other party to the dispute 'has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than 12 months prior to the filing of the application bringing the dispute before the Court.'[237] Such 'anti-ambush' reservations have become a common feature of Optional Clause declarations.[238]

90. However, such a reservation *ratione personae* would not address a second kind of inequality: that which exists between States which both have Optional Clause declarations in force, where State A's declaration requires advance notice before termination takes effect and State B's provides for immediate termination or amendment. Following the Court's decision in *Nicaragua* that reciprocity does not apply to conditions of this kind, State A will not be able to escape a threatened application by State B, whereas State B can escape a threatened application by State A. This aspect of the Court's judgment was criticised by a number of individual judges in their separate or dissenting opinions.[239] If reciprocity were recognized in this context, it could alleviate this unfairness and provide an incentive for States to accept jurisdiction without an immediate escape route.[240] One major objection would be that applying reciprocity in this context could be highly complex and might undermine the functionality of the Optional Clause system.[241] The date on which a State's termination or modification of its declaration became effective would not be uniform, but would vary *vis-à-vis* every other State with a declaration in force, requiring a consideration of the clauses on termination or modification in both declarations. However, complexities also arise from the application of reciprocity to substantive reservations, but reciprocity is nonetheless accepted in that context.[242]

91. Despite the Court's unwillingness to apply reciprocity as a general principle to termination and modification clauses, one subsequent declaration has attempted to do so by express provision. Spain's declaration of 1990 provides that withdrawal of the declaration shall become effective six months after notice is received by the Secretary-General; '[h]owever, in respect of States which have established a period of less than six months between notification of the withdrawal of the Declaration and its becoming

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[237] This kind of reservation was suggested by Waldock and soon after incorporated in the UK's declaration: Waldock 1955, 283, 286.

[238] See paras 106–07, below.

[239] See the Separate Opinions of Judges Mosler (ICJ Reports 1984, 466), Oda (ICJ Reports 1984, 511), and Jennings (ICJ Reports 548–550) and the Dissenting Opinion of Judge Schwebel (ICJ Reports 1984, 625–28).

[240] Separate Opinion of Judge Oda, 511; Törber 2015, 195.

[241] Kolb 2014, 484–86.

[242] See Separate Opinions of Judges Mosler, 466 (stating that 'the difficulties are not much greater than the relativity generally admitted with respect to substantive reservations'); Törber 2015, 195.

effective, the withdrawal of the Spanish Declaration shall become effective after such shorter period has elapsed.'[243] Including a provision of this kind may be more beneficial overall for the functioning of the Optional Clause system than reserving a generally applicable right to immediate withdrawal.

92. Alternatively, it has been suggested that conditions reserving a right to immediate termination should be considered invalid as contrary to the Statute's object and purpose, although severable from the declaration itself so that it does not put into question the latter's validity.[244] On this view, a reasonable period of advance notice is required before any attempt at withdrawal can take effect. This seems however contrary to the Court's dictum in *Nicaragua* that declarations can provide for what notice 'if any' is required,[245] to its more recent approach in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*,[246] and to large number of declarations which have explicitly reserved such a right without objection from other States.

93. Some recent Optional Clause declarations suggest a desire for further safeguards against surprise applications. Following the *Marshall Islands* cases, the United Kingdom in its recent 2017 declaration included a new reservation which requires any State wishing to submit a case against the UK to give the UK 6 months' advance notice in writing, which must specify the State's intention to submit the dispute to the Court failing an amicable settlement. The British Minister of State for Foreign and Commonwealth Affairs justified this new reservation as follows:[247]

> This [requirement of six months' notice] would provide an opportunity for diplomatic engagement with the State concerned. The prior notification of a claim is an established part of domestic dispute resolution in the United Kingdom, as well as being a feature of the dispute settlement provisions in many international treaties. The judgment of the ICJ in the nuclear disarmament case accepted that a State must be made aware that litigants have opposing views, otherwise a respondent State does not have the opportunity to react to those opposing views before the institution of proceedings against it. The revised Declaration incorporates the UK position that was advanced in the proceedings that prior notification of the kind described is an appropriate step before an application instituting proceedings…can be submitted.

The new reservation, combined with the UK's reservation of a right to terminate or amend its declaration with immediate effect, would seem to give the UK the option to avoid any case brought against it, even by a State with a long-standing declaration in force. The advanced notice requirement guarantees to the UK the opportunity, if it so chooses, to change its declaration to exclude the Court's jurisdiction over the dispute. An identical reservation has been included in the most recent declaration made by Latvia in September 2019. It remains to be seen whether it will be more widely imitated.

94. Even though the common practice of reserving a right to immediate withdrawal does not seem optimal, the extent to which it undermines the Optional Clause system can

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[243] Lamm 2014, 114–15. See also Peru's 2003 declaration, discussed by Törber 2015, 190.

[244] Kolb 2014 525–29; cf Törber 2015, 218–19, 232.

[245] *Nicaragua* 418, para 59.

[246] ICJ Reports 2016, 24, para 45: the Court stated that '[i]n its declaration under Article 36, paragraph 2, a State is free to provide that that declaration may be withdrawn with immediate effect.'

[247] Written Statement by Sir Alan Duncan (Minister of State), Amendments to the UK's Optional Clause Declaration to the International Court of Justice, (23 February 2017) HCWS489.

perhaps be exaggerated. As Michael Wood has emphasised, '[a] State remains bound until it amends or terminates the declaration, and amendment or termination requires a decision that is not necessarily cost free in political terms.'[248] It seems preferable, if the aim is to encourage the judicial settlement of disputes, for States to make declarations subject to this condition rather than not making them at all.[249]

[248] Wood 2006, 636. Burmester 1996, 24, states that the Australian government was aware of the imminence of the applications of Nauru and Portugal in *Certain Phosphate Lands* and *East Timor* but chose not to modify its Optional Clause declaration to prevent these disputes being brought before the Court.

[249] Cf Kolb 2014 527.

B.3. Reservations to Optional Clause declarations

95. This section considers what reservations States commonly include to limit the scope and substance of their Optional Clause declarations, and what these reservations suggest about States' willingness, or unwillingness, to accept compulsory jurisdiction in particular contexts.

96. The Statute of the Court does not explicitly state that parties have the right to limit their declarations by the inclusion of reservations.[250] However, the permissibility of reservations was established from the earliest days of the Permanent Court of International Justice. The Netherlands' 1921 declaration contained the first example of a substantive reservation, excluding disputes where the parties had agreed to have recourse to another means of dispute settlement.[251] To encourage greater participation in the Optional Clause system, the General Assembly of the League of Nations subsequently passed resolutions specifically drawing States' attention to the possibility of limiting their declarations by means of reservations,[252] a right which States have regularly exercised in both the PCIJ and ICJ eras and which has been continuously upheld in the Court's case law.[253] A broad right to make reservations can be argued to follow from the fully 'optional' nature of optional clause declarations. Since States can deny the Court any jurisdiction under the Optional Clause by not making a declaration, they also have the lesser right to impose restrictions on any declaration which they choose to make.[254]

97. Reservations specify particular categories of dispute carved out from the State's general recognition of the Court's jurisdiction in 'all legal disputes' concerning any question of international law (art 36(2), ICJ Statute). More radically, a State may attempt to curtail the Court's jurisdiction under the Optional Clause by issuing a declaration which instead specifies a narrow class of disputes over which the court will have jurisdiction, excluding all disputes which fall outside that class. Two current Optional Clause declarations fall within this category. Egypt's declaration of 1957, made following the Suez crisis, is limited to disputes arising under the 1888 Convention of Constantinople governing passage through the Suez Canal. Equatorial Guinea's recent declaration of 2017 applies only to 'all disputes relating to the privileges and immunities of States, senior State officials and State property.' It has been questioned whether declarations in this form comply with the requirements of art 36(2) of the Statute, given that they do not even *prima facie* recognize the Court's jurisdiction over 'all legal disputes' under international law.[255]

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[250] Art 36(3) allows declarations to be made 'on condition of reciprocity on the part of several or certain states, or for a certain time.' This however refers to formal conditions which States may impose before the declaration comes into effect, rather than reservations limiting the scope of the declaration itself. The provision for a declaration to be made 'on condition of reciprocity on the part of several or certain States' was inserted in the Statute of the Permanent International Court of Justice on the proposal of Brazil, to allow a State to make a declaration which would only come into force if other specified States (for example, one or more great powers) also made a declaration. See Alexandrov 2001, 99.

[251] See Lamm 2014, 290.

[252] See Waldock 1955, 285 (noting that during the San Francisco Conference Australia proposed that there should be an exhaustive list of permitted reservations, but that this was rejected); Törber 2017, 314.

[253] *Aerial Incident of 10 August 1999 (Pakistan v India), Jurisdiction,* ICJ Reports 2000, 12, 29-30, paras 36–38.

[254] *Nicaragua (Jurisdiction)* 418, para 59.

[255] See e.g. Waldock 1955, 281–82; Merrills 2017, 905; Törber 2015 236.

98. Putting aside these two atypical declarations, States' declarations vary greatly in the breadth or narrowness of the consent to jurisdiction that they provide. A basic fact about the Optional Clause system is that reciprocity applies to reservations governing the scope and substance of the declaration (as opposed to the formal conditions of the declaration's validity, discussed in the previous section), since declarations only apply 'in relation to any other State accepting the same obligation' (art 36(2)). Many declarations explicitly state that they are made 'on condition of reciprocity', but this proviso has no additional legal effect and must be considered to be made *ex abundantia cautela*.[256] The effect of the principle of reciprocity is that a respondent State can rely on the reservations contained in the declaration of the applicant to exclude jurisdiction.[257] This provides an incentive for States to limit the number of reservations in their declarations, counterbalancing to incentive to include them to avoid undesired litigation.[258]

99. Despite the price paid for reservations due to reciprocity, most declarations contain some, and some declarations include a long list of wide-ranging exclusions. Rosalyn Higgins, in a speech given to the Sixth Committee of the UN General Assembly during her term as President of the Court, expressed concern about the use of reservations 'carefully worded with so much legal skill, so as to render almost nil the scope of the apparent acceptance of the Court's jurisdiction'.[259] She also observed that the inclusion of complex reservations 'simply adds to the days and weeks that the Court will spend on objections to jurisdiction, and to diminish the time it has for resolving major substantive disputes'.[260] On the other hand, it can be argued that categories of disputes exist where adjudication by the ICJ is unlikely to be the best or most effective method of settlement. Reservations seem justified regarding these kinds of dispute. More pragmatically, in many cases States will have such strong objections to compulsory judicial settlement of particular disputes or kinds of disputes that including the reservation will be an essential condition for the declaration to be made at all.

100. The reservations contained in Optional Clause declarations can be classified as falling within one of three categories: i) reservations *ratione temporis*, ii) reservations *ratione personae* and iii) reservations *ratione materiae*. This section will now consider practice regarding these different categories of reservation in turn. The greatest focus will be on the final category, reservations *ratione materiae*.

i) Reservations ratione temporis

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[256] Tomuschat 2019, 734–35. In contrast, the special declaration made by Malta in 1981, which was limited to disputes concerning the delimitation of the continental shelf, was expressed to be made 'without the condition of reciprocity and without reservations' in an attempt to facilitate intervention by Malta in the case between Tunisia and Libya before the Court at that time: Thirlway 2016, 47–48.

[257] *Certain Norwegian Loans (France v Norway)* ICJ Reports 1957, 23–24.

[258] Lamm 2014, 116–17.

[259] Speech by HE Judge Rosalyn Higgins to the Sixth Committee of the General Assembly, 31 October 2008, 6, available at < https://www.icj-cij.org/files/press-releases/1/14841.pdf>.

[260] Ibid. See also the statement of the representative of Swaziland during the drafting of the Vienna Convention on Succession of States in respect of Treaties, UN Doc A/CONF.80/16.Add1, vol ii, 121, that 'many countries whose delegations advocated the compulsory jurisdiction of the Court had made declarations so hedged about with reservations as to be meaningless.'

101. The basic idea of a reservation *ratione temporis* is to exclude from jurisdiction disputes which arose before a particular date.[261] Such reservations are quite common, with 32 of the current 73 declarations including a limitation of this kind.[262] This reservation comes in various forms. Since it can easily be argued that a new dispute has emerged out of a long-standing factual situation, many reservations use a 'double exclusion' formula which confines jurisdiction to disputes which both arise after the 'cut off' date and relate to facts and situations subsequent to that date. This type of reservation is known as the 'Belgian formula' as it was first introduced by Belgium during the period of the PCIJ.[263]

102. There are various possible reasons why a State may decide to include a reservation *ratione temporis*. A dispute originating in the distant past may quite likely have lost its intensity and its ability to threaten peaceful relations. Unilateral resort to litigation before the Court in these circumstances could in fact revive hostility between the States concerned.[264] Moreover, the Court may perhaps be considered less well-placed to make factual findings concerning events in the distant past (although it does in fact often do so, for example in cases concerning sovereignty over land territory which depend on historic title). States may wish to exclude disputes originating in a previous period in their history when they lacked sovereignty, while others may be motivated by a desire to avoid a potentially wide array of claims arising out of past periods when they were involved in war or imperial expansion.[265]

103. One difficulty for States in drafting a reservation *ratione temporis* is how to define the 'cut off' date. A specific date may be referred to,[266] for example the date the State attained independence.[267] Otherwise, the cut off is commonly defined by reference to the date on which the declaration was made.[268] In both cases, the extent of the limitation will diminish as time elapses and the cut off date recedes further into the past. On the other hand, if a State defines its acceptance of jurisdiction *ratione temporis* by the date of its declaration, it will significantly diminish the extent of the Court's jurisdiction whenever it replaces one declaration with another.[269]

104. In light of these issues, the approach taken by the Netherlands in its 2017 declaration provides a useful model. Rather than referring to a specific date, this reservation limits the acceptance of jurisdiction to 'all disputes arising out of situations or facts that took place no earlier than one hundred years before the dispute is brought to the Court'.

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[261] See generally Merrills 2017, 909.

[262] Barbados, Belgium, Bulgaria, Canada, Finland, Gambia, Germany, Guinea, Hungary, India, Italy, Japan, Kenya, Latvia, Lithuania, Luxembourg, Malawi, Marshall Islands, Mexico, Netherlands, Nigeria, Pakistan, Paraguay, Poland, Portugal, Romania, Senegal, Slovakia, Spain, Sudan, Sweden, United Kingdom.

[263] Tomuschat 2019, 770–71.

[264] See *Phosphates in Morocco (Italy v France) Preliminary Objections* §938 PCIJ (ser A/B) No 74, 24; Lamm 2014, 118–19

[265] Merrills 1993, 213-14.; Merrills 2017, 909; see also Lamm 2013, 128.

[266] For example Portugal (2005), Japan (2015), United Kingdom (2017).

[267] For example Kenya (1965), Nigeria (1998).

[268] For example Canada (1994), India (2019), Latvia (2019).

[269] Thus the new declaration of India made in September 2019, although very similar to its 1974 declaration, substantially cuts down the temporal scope of the Court's jurisdiction.

105. The Court has found temporal reservations difficult to apply in practice.[270] It has been suggested that the Court's interpretative approach to *ratione temporis* restrictions has varied in different cases.[271] This reflects the inherent difficulty of the task which such reservations impose. As Judge Owada observed in a speech during his term as President of the Court, 'it can be nearly impossible to determine exactly how far back to consider the foundations, reasons and causes of the dispute to have begun, since ultimately everything in history is related to and results from that which happened before it.'[272] In the same speech, Judge Owada went on to speculate that 'certain States, in entering this type of reservation, have in mind a very specific dispute existing prior to the optional clause declaration, which they are interested in excluding. In such a case, a reservation drafted in more specific terms could facilitate judicial efficiency, as it would be easier to determine whether it was applicable.'[273] On the other hand, it may be diplomatically difficult for a State to do this, as a reservation which is clearly targeted at a specific dispute with a particular State may conceivably worsen relations with that State.[274]

ii) Reservations ratione personae

106. The most common reservation *ratione personae* is the 'anti-ambush' clause which was already briefly discussed in section B.2. This seeks to address the vulnerability of States with a declaration in force to unanticipated litigation by a State which has only recently deposited a declaration.[275] 25 out of the 74 declarations include a reservation of this kind.[276] This reservation seems justified in the light of the inequality which otherwise exists in practice between those parties to the ICJ Statute which have made an Optional Clause declaration and those which have not.[277]

107. In its most common formulation, this reservation contains two limbs, covering: i) disputes where the other Party has accepted the compulsory jurisdiction of the Court only in relation to or for the purposes of the dispute, and ii) disputes where the declaration of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court. It may be challenging to rely on the first limb in practice, since it requires the respondent

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[270] Wood 2006, 636; see also Shaw 2015, II.204.

[271] Shany 2016, 122, referring to the *Legality of the Use of Force* cases, the *Right of Passage* case and the *Certain Property* case (although the last mentioned concerned the interpretation of the temporal restriction in the European Convention for the Peaceful Settlement of Disputes, discussed in Section C.1, rather than a reservation in an Optional Clause declaration).

[272] Speech by HE Judge Hisashi Owada, 26 October 2010, 8, available at <www.icj-cij.org/files/press-releases/5/16225.pdf> (accessed 1 December 2019).

[273] Ibid.

[274] As discussed in para 110, below, only one declaration excludes disputes with a specific State, that of Ireland which excludes disputes with the United Kingdom concerning Northern Ireland.

[275] Merrills 1993, 219.

[276] Australia, Bulgaria, Cyprus, Germany, Greece, Hungary, India, Italy, Japan, Latvia, Lithuania, Malta, Marshall Islands, Mauritius, New Zealand, Nigeria, Pakistan, Philippines, Poland, Portugal, Romania, Slovakia, Somalia, Spain, United Kingdom; cf Tomuschat 2019, 772.

[277] As discussed at para 93 above, two States, the United Kingdom and Latvia, have introduced an additional reservation requiring six months' written notice from any State (irrespective of how long its Optional Clause declaration has been in force) which intends to bring an application against them, which would give them an opportunity to avoid any case by terminating or amending their declarations to remove the basis for the Court's jurisdiction before it is seised.

to establish that the applicant's declaration was *exclusively* motivated by a desire to bring the case in question.[278] The second limb in contrast is objective and was successfully relied on by Spain and the United Kingdom in the *Legality of the Use of Force* cases.[279] The application of reciprocity may give rise to some degree of difficulty where a State terminates an existing declaration and issues a new one containing this clause: would such a State be precluded from initiating litigation for the following 12 months? It has been argued that it would not, as long as it is not relying on an expansion of its acceptance of jurisdiction in its latest declaration.[280]

108. Apart from anti-ambush provisions, the most common reservation *ratione personae* is contained in the declarations of certain Commonwealth States, excluding disputes with other members of the Commonwealth (and, in the UK and India's declarations, also those with former members). This reservation has its origins in the earliest declaration made by the United Kingdom and the then British dominions in 1929. It reflected the idea that relations between Commonwealth States *inter se* were governed by a special legal system and that judicial settlement of such disputes should be reserved to an intra-Commonwealth tribunal, to be established at some point in the future.[281] This tribunal never came into existence and the transformation of the Commonwealth into a loose and diverse grouping of fully independent States means that the reservation has lost its original rationale, and it has been dropped from the declarations of Commonwealth States such as Australia and New Zealand.[282]

109. However, the intra-Commonwealth reservation is still contained in the declarations of 8 States.[283] In some cases, this can be attributed to inertia. In others, the reservation may be retained to exclude disputes with a particular Commonwealth State. Thus, as already mentioned, the extension of the UK's reservation to include former members of the Commonwealth was aimed at ensuring that Mauritius could not initiate litigation concerning the Chagos Islands, even if it left the Commonwealth.[284] India's retention of the Commonwealth reservation has been useful to block litigation initiated by Pakistan, as in the *Aerial Incident of 1999* case.[285]

110. Can a State exclude from jurisdiction disputes with a particular State identified by name? The only current reservation of this kind is contained in Ireland's 2011 declaration, which excepts 'any legal dispute with the United Kingdom…in respect of Northern Ireland.' The Court's case law indicates that a declaration can validly exclude

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[278] Wood 2006, 640. It has been argued that this limb would apply to declarations which restrict the recognition of compulsory jurisdiction disputes to on a specified subject, like Egypt's: Merrills 1993, 220; cf Kolb 2014, 471. The Marshall Islands' 2013 declaration only included the first limb of this reservation, and one of the respondents' preliminary objections in the *Marshall Islands* cases was that Marshall Islands had accepted jurisdiction only for the purposes of the dispute in question. The Court did not address this contention, instead finding that there was no dispute between the parties at the time the application was made: see ICJ Reports 2016, 276–77, 573, 833.

[279] *Legality of the Use of Force (Yugoslavia v Spain)* ICJ Rep 1999, 770, para 25; *Legality of the Use of Force (Yugoslavia v United Kingdom)* ICJ Rep 1999, 835, para 23.

[280] Wood 2006, 640; cf Merrills 1993, 221.

[281] Wood 2006, 638; Macdonald 1970, 31–33.

[282] Merrills 1993, 222.

[283] Barbados, Canada, the Gambia, India, Kenya, Malta, Mauritius, United Kingdom.

[284] Ibid; see Written Statement of the United Kingdom to the Court in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (15 February 2018), para 5.19.

[285] ICJ Rep 2000, 12, 25–31, paras 29–44.

disputes with a specific State. Pakistan argued in the *Aerial Incident of 1999* case that India's Commonwealth reservation was in fact directed solely against Pakistan and should be considered discriminatory and hence void, but the Court rejected this argument, holding that the Court was bound to apply India's *ratione personae* reservation whatever the reasons behind it.[286] Given that declarations can exclude specifically named States, the question raised by Judge Owada concerning *ratione temporis* reservations can also be asked here: where a State wishes to avoid litigation with a particular State, would it be better for it to make a narrow reservation specifically naming that State, rather than relying on a broader formulation that captures that State along with others?[287] This would have the advantage of ensuring that the reservation is confined to the State's actual concern and is not over-extensive. On the other hand, depending on the context it could worsen a relationship which may already be fraught.

111. Only a few declarations contain other reservations *ratione personae*. Three declarations contain reservations excluding disputes with States which are not recognized by the State making the declaration and/or with which it has no diplomatic relations.[288] These reservations seem problematic as they may be interpreted to allow the declaring State to stave off litigation at any point by withdrawing recognition from and/or breaking of diplomatic relations with the potential applicant.[289] Two declarations include reservations concerning disputes with non-sovereign States.[290] This reservation seems unnecessary since under its Statute only sovereign States can apply to and appear before the Court.[291]

iii) Reservations ratione materiae

112. A range of subject matters are commonly excluded from the scope of the Court's jurisdiction in States' Optional Clause declarations. These reservations are of interest in that they suggest diverse attitudes among States about what kinds of dispute are, and are not, appropriate for compulsory judicial settlement.

113. Reservations *ratione materiae* can themselves be divided into three categories. First, there are broad reservations seeking to impose extensive limits on the court's jurisdiction, specifically the 'domestic jurisdiction' reservation (at least in its automatic or 'self-judging' form) and the 'multilateral treaty' reservation. Second, there are reservations which seek to govern the Court's relationship with other peaceful means of dispute settlement, most notably the common reservation precluding recourse to the Court where the parties have agreed to some other method of peaceful settlement. Third, there are reservations which attempt to exclude disputes concerning specified subject matters such as territorial or maritime delimitation disputes, environmental disputes, or disputes concerning the use of force.[292]

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[286] Ibid

[287] See para 105, above.

[288] India, Djibouti and Nigeria; Nigeria's reservations refers only to lack of diplomatic relations, whereas the other two also refer to non-recognition.

[289] Merrills 1979, 105.

[290] Djibouti and India.

[291] ICJ Statute; art 34(1); see Lamm 2014, 138.

[292] Cf Lamm's distinction between 'generally accepted'and 'destructive'reservations: Lamm 2014, 118.

114. **Domestic jurisdiction:** Reservations concerning jurisdiction need be discussed only briefly because they are either not substantive or they are uncommon, particularly in declarations made in recent years.[293] 22 States include a general reservation regarding matters within their domestic jurisdiction.[294] However, what is considered to be a matter of domestic jurisdiction under international law is a question for international law itself: the term encompasses those matters which 'are not, in principle, regulated by international law.'[295] (Most of the 22 declarations referred to in fact specify that domestic jurisdiction is defined 'under' or 'by' international law).[296] Matters within the domestic jurisdiction by this definition do not fall within the scope of art 36(2) of the ICJ Statute and the Court would not have jurisdiction over them in any case. Thus, this reservation has little or no substantive effect on the Court's jurisdiction, although it may be politically important to include it.

115. A much more far-reaching and controversial type of domestic jurisdiction reservation is the notorious 'Connolly reservation', first introduced by the United States in its (since terminated) 1946 declaration. These reservations are 'automatic' or 'self-judging' in that they exclude matters which the State *considers* to be within its jurisdiction. These reservations thus assert that the State, not the Court, will determine in each case whether a matter falls within the domestic jurisdiction and is excluded. Whether a reservation of this kind is invalid because it is incompatible with the Statute of the Court is an issue which the Court has not decided, although several separate opinions discuss the issue.[297] If invalid, this would raise the further question about how this would affect the validity of the declaration as a whole.[298] However, the issue is of decreasing importance in practice.[299] Only 5 declarations in force contain such a declaration,[300] and the most recent of these (the Philippines') dates back to 1972. This indicates that States have largely abandoned this form of reservation, no doubt in part owing to the fact that a declaration containing it seems largely pointless: since it applies reciprocally, it greatly limits the ability of any State to rely on the Optional Clause as an applicant.[301]

116. **Multilateral treaties:** Another far-reaching reservation pioneered by the United States in its 1946 declaration concerns multilateral treaties, also known as the 'Vandenburg reservation'.[302] In its original form, the reservation excluded compulsory jurisdiction unless all parties to the treaty 'affected by the decision' were parties to the

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[293] Lauterpacht notes that the domestic jurisdiction reservation was first introduced in the 1929 declarations made in identical form by the United Kingdom and the then dominions to assuage the fears of certain dominions that the Court might be used to challenge their immigration policy: Lauterpacht 1930, 150–51.

[294] Barbados, Botswana, Cambodia, Canada, Côte d'Ivoire, Cyprus, Djibouti, Eswatini, Gambia, Guinea, Hungary, India, Kenya, Madagascar, Malta, Mauritius, Nigeria, Pakistan, Poland, Romania, Senegal, Slovakia.

[295] *Nationality Decrees in Tunis and Morocco (French Zone) on November 8th 1921* (Advisory Opinion) (1923) PCIJ Ser B No 4, 24.

[296] See the specification provided in the table in Annex 1 to this report.

[297] See the Separate of Judge Lauterpacht, *Certain Norwegian Loans* ICJ Rep 1957, 34; Dissenting Opinion of Judge Klaestad, *Interhandel (Switzerland v US)* ICJ Rep 1959, 75.

[298] Ibid; see also Separate Opinion of President Schwebel, *Fisheries Jurisdiction (Spain v Canada)* ICJ Rep 1998, 472; also Crawford 1979.

[299] Similarly, Merrills 1993, 240, 242.

[300] Those of Liberia, Malawi, Mexico, Philippines, and Sudan.

[301] As demonstrated in *Norwegian Loans*; also Alexandrov 2001, 117; Tomuschat 2019, 773.

[302] See generally Merills 1993, 230 ff; Lamm 2014, 200–13.

case.[303] Later versions of the reservations have extended it to require that all parties to the treaty (affected or not) also be parties to the case.[304] The reservation is potentially far-reaching and famously prevented the Court from applying the UN Charter in the *Nicaragua* case.[305] However, that case also shows the limits of the reservation, in that it did not prevent the Court from deciding the case on the basis of relevant customary international law.[306]

117. The reservation is now only contained in 5 declarations.[307] However, it is not entirely obsolete, as shown by the fact that it was recently introduced in Pakistan's 2017 declaration. India's recent 2019 declaration retains the reservation and adds an additional clause excluding 'disputes concerning the interpretation or application of a multilateral treaty to which India is not a party.' This reservation seems to have been included in response to *Marshall Islands v India*. The Marshall Islands characterised the dispute in this case as concerning India's non-compliance with customary international law, while India characterised it as concerning interpretation of an obligation arising under a treaty (Article VI of the Treaty on Non-Proliferation of Nuclear Weapons) to which India is not a party.[308]

118. **Other means of dispute settlement:** The most common type of reservation aims to govern the relationship between the Court's general jurisdiction under the Optional Clause and other methods of dispute settlement which the parties have agreed, giving precedence to the latter.[309] 44 out of 74 declarations (a clear majority) include such a reservation.[310] The majority of these reservations apply in general to 'other means of peaceful settlement', and are thus capable of including not only mechanisms which lead to a legally binding decision, but also those which do not.[311] Some, however, apply only where there has been agreement to have recourse to 'tribunals',[312] or to a means leading to 'a final and binding decision.[313]

119. The rationale behind reservations of this kind seems clear. The ICJ, as a generalist court of international law, will not always be the most appropriate forum for the resolution of disputes between States involving international law. A different mechanism may have been established which may be considered to better suited to the dispute, for example adjudication by a tribunal with specialised expertise or

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[303] Among declarations in force, Malta's and Pakistan's follow this model.

[304] Three declarations currently in force, those of Djibouti, India, and the Philippines, follow this model.

[305] Having determined that El Salvador would be 'affected' by the decision: *Nicaragua*, ICJ Reports 1986, 38, para 56.

[306] Ibid, 92–97, paras 172–82; Tanaka 2018, 156.

[307] Djibouti, India, Malta, Pakistan, Philippines.

[308] See Memorial of Marshall Islands (16 December 2014), para 17; Counter-Memorial of India (16 September 2015), paras 73-82.

[309] Alexandrov 2001, 117.

[310] Those of Australia, Austria, Barbados, Belgium, Botswana, Cambodia, Canada, Côte d'Ivoire, Djibouti, Estonia, Eswatini, Gambia, Germany, Guinea, Honduras, Hungary, India, Italy, Japan, Kenya, Latvia, Lesotho, Liberia, Lithuania, Luxembourg, Madagascar, Malawi, Malta, Marshall Islands, Mauritius, Nigeria, New Zealand, Pakistan, Peru, Philippines, Poland, Portugal, Romania, Senegal, Slovakia, Spain, Sudan, Suriname, United Kingdom.

[311] Lauterpacht raised the issue of whether the reservation ceased to apply if the other (non-binding) means of dispute settlement failed to resolve the dispute: Lauterpacht 1930, 147.

[312] For example , Estonia (1991), Liberia (1952) and Pakistan (2017).

[313] For example, Austria (1971), Japan (2015), Lesotho (2000), Peru (2003) and Romania (2015).

procedures.[314] Where States have agreed on a dispute settlement mechanism other than the Court for reasons of this kind, it seems inappropriate for one party to later be able to decide to take the matter to the Court anyway under the Optional Clause. This would raise concerns about 'forum shopping' and cases being heard in relation to the same dispute in different fora, leading to potentially contradictory outcomes.[315] The reservation seeks to avoid this problem by excluding the Court's jurisdiction in these circumstances. On the other hand, the effect of the reservation may be problematic where the other dispute settlement mechanism does not lead to the settlement of the dispute, in particularly in cases where it does not entail a binding decision.[316]

120. This kind of reservation may lead to uncertainty in practice, since it will require an interpretation of the parties' agreement to a different form of dispute settlement to determine whether it actually was intended to displace the jurisdiction of the Court.[317] In some declarations, such as Italy's from 2014, the reservation specifies that it applies only where the parties have agreed to have recourse to some other method 'exclusively'. But even if that is not specified, if the relevant agreement is interpreted not as excluding the Court's jurisdiction but as simply providing an alternative mechanism, it would seem not to be an agreement of the kind referred to in the reservation. The complexities involved in interpreting whether one dispute settlement provision precludes another can be seen (outside the ICJ context) in the *Southern Bluefin Tuna* case,[318] where ITLOS (in its provisional measures order) and the Annex VII tribunal came to opposite conclusions.[319]

121. The situation may be clearer where the agreement establishing the alternative method specifies that it excludes other methods of dispute settlement. Examples of treaty clauses in the former category include art 344 of the Treaty on the Functioning of the European Union, art 55 of the European Convention on Human Rights and art 23 of the Dispute Settlement Understanding of the World Trade Organization.[320] Because of the latter provision, the ICJ is unlikely to be hear disputes concerning international trade law. Even where parties have not made a reservation in their Optional Clause regarding other means of dispute settlement, the Court would still likely give effect to an agreement of this kind and decline jurisdiction in disputes arising under the agreement.[321] Complications may still arise however even where an agreement makes provision for an exclusive means of dispute settlement. In particular, similar or identical rights and obligations may be recognized in different legal instruments, so that the exclusion of alternative dispute settlement mechanisms in one treaty may not

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[314] See Wood 2006, 337, referring to the British Foreign Secretary's explanation for the inclusion of the reservation in the UK's original 1929 Optional Clause declaration.

[315] Shany 2003, 196–97.

[316] See Lauterpacht 1930, 147; Lamm 2014, 144.

[317] Tams and Zimmermann 2008, 409.

[318] *Southern Bluefin Tuna* (New Zealand v Japan; Australia v Japan), Order on Provisional Measures (ITLOS Cases Nos. 3 and 4) (August 27, 1999); *Southern Bluefin Tuna*, Award on Jurisdiction and Admissibility,(2000) 39 ILM 1359 (August 4, 2000).

[319] Shany 2003, 235–39; Tams and Zimmermann 2008, 410.

[320] Shany 2003, 180–191.

[321] Alexandrov 1995, 104–05. In *Rights of Minorities in Upper Silesia (Minority Schools)* [62], the Permanent Court of International Justice endorsed the principle that the Court would decline jurisdiction 'in those exceptional cases in which the dispute…fall within the exclusive jurisdiction referred to some other authority.'

prevent such mechanisms being utilised for a closely related dispute concerning rights or obligations arising from a different source.[322]

122. In contrast, a treaty may make clear that the dispute settlement mechanism which it establishes does not exclude or take precedence over other available dispute settlement mechanisms. Examples of such treaty clauses include article 44 of the International Covenant on Civil and Political Rights[323] and article 45 of the Vienna Convention on Succession of States in respect of Treaties. Disputes concerning such treaties can thus clearly be taken to the ICJ on the basis of the Optional Clause (despite the lack of a compromissory clause providing for compulsory jurisdiction in the treaty) where the parties to the dispute are both parties to the relevant treaty and have Optional Clause declarations in force, unless there is a specifically applicable reservation in one or both of the declarations. A general reservation concerning other agreed means of dispute settlement will probably not be specific enough to exclude jurisdiction in such a case, as was demonstrated in the ICJ's 2017 judgment on preliminary objections in *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*.[324] This case, as well as the case law of the Permanent Court of International Justice,[325] suggests that the Court will not decline jurisdiction because of the existence of an agreement providing for another means of dispute settlement, unless it is clear that the other agreement was intended to take precedence or there is a more specific reservation in the instrument(s) establishing the Court's jurisdiction. The *Somalia v Kenya* case will be discussed further in Section E of this report, which will analyse the relationship between the ICJ jurisdiction under the Optional Clause and the UNCLOS dispute settlement decision.[326]

123. **Treaties excluding adjudication:** A small number of declarations (5 out of 74)[327] include a separate reservation concerning matters excluded from adjudication by virtue of a treaty to which the State making the declaration is a party. This reservation has not been dealt with in the Court's case law. It appears to incorporate into the Optional Clause treaty provisions which exclude adjudication regarding disputes that arise under the treaty or certain categories of these disputes, even where the treaty does not specify an alternative means of dispute settlement.[328] It thus can be interpreted as a departure from the general rule that the exclusion of ICJ jurisdiction under a treaty does not close

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[322] See generally Oellers-Frahm 2001. An example of diverging decisions on this point (outside the ICJ context) can be found in the diverging approaches of ITLOS (in its provisional measures order) and the European Court of Justice in the *Mox Plant* case. ITLOS found that there was *prima facie* jurisdiction since the case brought by Ireland against the UK concerned the interpretation and application solely of UNCLOS and not the OSPAR Convention or the EU Treaties and since the relevant rights and obligations had a separate existence under the various treaties: *Mox Plant Case (Ireland v UK)* Provisional Measures, Order of 3 December 2011 (ITLOS) [50]. The case under Part XV UNCLOS was later discontinued by Ireland after the ECJ found that most of the matters in question were exclusively within the jurisdiction of the ECJ under the EU treaties: *Mox Plant Case, Commission of the European Communities v Ireland*, Case C-459/03 [2006] ECR 1-4635.

[323] See Shany 2003, 197; cf Nowak and Macarthur 2008, 854.

[324] ICJ Rep 2017, 3.

[325] In *Rights of Minorities in Upper Silesia (Minority Schools)(Germany v Poland), Judgment No 12* PCIJ Series A 1928, No 15, 23, the Permanent Court endorsed the principle that it would decline jurisdiction only 'in those exceptional cases in which the dispute…fall within the exclusive jurisdiction referred to some other authority.' See also *Factory at Chorzów, Jurisdiction, Judgment No 8* 1927, PCIJ Series A, No 9, 30.

[326] See paras 277–281, below.

[327] Cambodia, Lithuania, Malta, Mauritius, and Portugal.

[328] Cf Merrills 2009, 440.

off jurisdiction under the Optional Clause, which applies concurrently.[329] For example, where a State with an Optional Clause declaration containing this reservation has also made a reservation to a treaty opting out of the ICJ jurisdiction provided for in the treaty's compromissory clause,[330] it might potentially argue that its declaration does not provide a separate jurisdictional basis for disputes concerning the interpretation or application of the treaty.[331]

124. **Disputes relating to armed conflicts:** A common substantive reservation concerns armed conflicts and military matters. 16 out of 74 declarations contain reservations of this type.[332] These reservations vary significantly in scope. Broad formulations generally refer to disputes connected with facts or situations of hostilities, armed conflicts, or individual or collective self-defence.[333] A somewhat more precise limitation is found in the German declaration of 2008, which excludes any dispute which 'relates to, arises from or is connected with the deployment of armed forces abroad, involvement in such deployments or decisions thereon' or which 'relates to, arises from or is connected with the use for military purposes of the territory of the Federal Republic of Germany, including its airspace, as well as maritime areas subject to German sovereign rights and jurisdiction.'[334] This reservation was imitated in Latvia's recent declaration of September 2019. Some other reservations are confined to disputes relating to or arising out of military occupation,[335] or occupation and actions pursuant to a recommendation or decision of a UN organ.[336] Lithuania's 2012 declaration applies to disputes arising from or connected with 'a military operation carried out in accordance with a decision taken by consensus or unanimity by international security and defence organization or organization implementing common security and defence policy, to which the Republic of Lithuania is a member'.

125. The rationale behind reservations relating to armed conflict can be surmised. Some States may wish to preserve their freedom of action to take military measures which they consider to be necessary for their national security. Of the 15 powers with the highest military spending, only 6 have a declaration in force[337] and of these 2 (India and Germany) include a reservation limiting jurisdiction over disputes concerning armed conflict.[338]Any decision to use military force, because of its inherent seriousness, will probably be highly charged politically both on the domestic and international level. States may be reluctant to subject themselves to the judgement of a third party tribunal

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[329] A rule established in the PCIJ case of *Electricity Company of Sofia and Bulgaria (Preliminary Objections) (Belgium v Bulgaria)* 1939 PCIJ (ser A/B) No 77, 76.

[330] See para 169, below.

[331] Likewise, this reservation may be interpreted as incorporating the limitations on compulsory jurisdiction applicable under arts 297 and 298 of UNCLOS, discussed in section E.2 below, into the Optional Clause declaration: see para 284, below.

[332] Djibouti, Germany, Greece, Honduras, Hungary, India, Kenya, Latvia, Lithuania, Malawi, Malta, Mauritius, Nigeria, Pakistan, Romania, Sudan.

[333] See the declarations of India, Djibouti, Honduras, Hungary, Nigeria, Romania.

[334] Tams and Zimmermann 2008, 410–15.

[335] As in the declaration of Malawi.

[336] As in the declarations of Kenya, Malta, and Mauritius.

[337] See the discussion in para 57, above.

[338] In addition, the UK's 2017 declaration effectively excludes disputes connected with nuclear weapons: see para 128 below.

in such a context.[339] States may also take the view that adjudication is not an effective means of resolving active armed conflicts.[340]

126. Non-acceptance of the jurisdiction of the ICJ may also indicate dissatisfaction with, or a lack of full commitment to, the international legal rules governing the use of force as interpreted and applied by the Court. A number of aspects of the law on the use of force are controversial, with certain States asserting (for example) a legal doctrine of humanitarian intervention or a broad legal right of self-defence against non-State actors operating from another State's territory. States may prefer that operations which rely on such legal doctrines should not come before the Court if they think that the Court may not endorse them.[341] Other States may wish to preserve the possibility of taking military action which they consider to be morally or politically legitimate, even if they suspect that it is contrary to international law as it stands.[342] States may also feel that it is politically necessary to cooperate to some degree with military operations undertaken by allied States, or by alliance structures of which they are members and on which they rely for their security, even if they themselves may doubt the legality of the operations in question. Thus the German reservation concerning the use of its territory for military purposes seeks to preclude litigation arising from the use of German airspace by its NATO allies or the deployment of troops abroad from military installations on German territory, as occurred during the Iraq War.[343] Lithuania's reservation, quoted above, likely reflects the importance to it of NATO (and EU) membership and the collective security which this provides.

127. It is worth noting that Pakistan in its 2017 declaration, in addition to a reservation relating to hostilities and military conflicts, has introduced a very broad reservation excluding 'all matters related to the national security of the Islamic Republic of Pakistan'. This reservation is reminiscent of the broad reservation 'concerning activities connected with the national defence' in the French declaration of 1966 which was considered in the *Nuclear Tests* cases.[344] India has subsequently, in its recent 2019 declaration, extended its own reservation for armed hostilities to include 'the measures taken for the protection of national security and ensuring national defence'.

128. Of the nine States that have or are presumed to have nuclear weapons,[345] only three (India, Pakistan and the United Kingdom) have Optional Clause declarations in force. India and Pakistan, as already discussed, have broad reservations in their declarations related to armed conflict and self-defence, which they have recently reinforced

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[339] Cf the US State Department Legal Advisor's explanation of the decision to withdraw from the Optional Clause system following the *Nicaragua* case: Sofaer 1986, 209, referring *inter alia* to the US and its allies' need to guarantee their security and the ICJ's claimed lack of capacity for assessing facts in relation to ongoing hostilities.

[340] ibid.

[341] While the Court has exercised jurisdiction over a range of disputes involving the use of force, including *Nicaragua, Armed Activities* and *Oil Platforms,* it avoided pronouncing on the legality of the 1999 NATO intervention against the Federal Republic of Yugoslavia, finding in the multiple *Legality of the Use of Force* cases on various grounds that it had no jurisdiction. See Shany 2015, 109–10, 120.

[342] Cf Simma 1999.

[343] Tams and Zimmermann 2008, 413–14.

[344] Alexandrov 1995, 99.

[345] Including the five States designated as nuclear weapons States in the Treaty on Non-Proliferation of Nuclear Weapons, as well as India, Pakistan, North Korea and Israel. Israel maintains a policy of deliberate ambiguity about its possession of nuclear weapons.

subsequent to the *Marshall Islands* cases.[346] In its latest 2017 declaration (also following the *Marshall Islands* cases), the United Kingdom has introduced a more specific reservation concerning disputes connected with nuclear weapons and/or nuclear disarmament, unless the other four Nuclear Non-Proliferation Treaty nuclear weapons States also accept the Court's jurisdiction with respect to the case. The Minister of State justified this reservation by stating that 'the Government does not believe the United Kingdom's actions in respect of such weapons can meaningfully be judged in isolation'.[347] It could be added that the legal status of such weapons is highly divisive and that nonetheless their possession is considered of the highest strategic importance by nuclear weapons States, including the UK, explaining these States' reluctance to engage in litigation on the issue before the Court.

129. **Territorial and maritime delimitation disputes:** Another common set of reservations seek to exclude the Court's compulsory jurisdiction over territorial and maritime delimitation disputes. These reservations vary in their exact scope. 8 declarations generally exclude the Court's jurisdiction over both land and maritime territorial disputes,[348] while 4 other reservations refer to the delimitation of maritime zones.[349]

130. Such reservations do not seem surprising, since disputes involving territory (like those involving the use of force) are often highly politically charged.[350] Land territory may well be home to some of the State's citizens, with all the emotional significance that this connotes.[351] Territorial claims often are inextricably interwoven with the State's history and identity. Resource exploitation rights relating to a particular maritime zone may be of high economic value. Establishing a permanent boundary either at land or sea will have consequences extending into the indefinite future for the States concerned. These factors mean that the dispute may be considered so important that a State cannot run the risk of being compelled to appear before the Court and then losing. In the context of land territory, the cost-benefit analysis will be particularly negative for a State which already exercises control over all or most of the territory in dispute.[352]

131. Another factor which may influence a State to avoid litigation in the context of maritime delimitation is the degree of unpredictability about the outcome. While relatively clear principles for delimitation have been developed,[353] their application in practice by a court or tribunal may require a significant degree of equitable judgment.[354]

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[346] India's recent 2019 declaration, with its expanded multilateral treaty reservation, and the new national security reservations included in both Pakistan's 2017 declaration and India's 2019 declaration, can be seen as reactions to the *Marshall Islands* cases.

[347] Sir Alan Duncan, Amendments to the UK's Optional Clause Declaration to the International Court of Justice, (23 February 2017) HCWS489; see also Wood, 2006, 633.

[348] Djibouti, Greece, India, Malta, Nigeria, Philippines, Poland, Suriname.

[349] Australia, Bulgaria, Honduras, Pakistan.

[350] Merrills 2017, 907; cf *Aegean Sea Continental Shelf (Greece v Turkey)*, ICJ Reports 1978, 30, para 73 ('[a]ny modification of a territorial "status" or "situation" or "frontier" is likely to be unpalatable to a State…').

[351] Kingsbury 2012, 217.

[352] Brilmayer and Faure 2014, 202–06.

[353] See the three stage approach endorsed by the Court in *Maritime Delimitation in the Black Sea* ICJ Rep 2009,

[354] Oda 1995, 869; Zou and Qiang 2017, 335.

In the case of *Maritime Dispute (Peru v Chile)*,[355] for example (a case brought to the Court under the Pact of Bogotá rather than the Optional Clause) the Court drew the boundary between the two States' maritime zones in a way quite different from what either State had claimed.[356] (On the other hand, the States seemed ultimately satisfied with the result and reached an agreement on the coordinates of the boundary).[357] In explaining Australia's decision to exclude maritime delimitation from compulsory dispute settlement (under both the Optional Clause and art 298 UNCLOS), the government legal adviser stated the view that some tribunals had arrived at 'unusual if not unsatisfactory decisions', referring particularly to the 1992 *Canada-France Maritime Boundary* arbitration.[358] A State which does not want to risk an unpredictable or undesired outcome being imposed upon it by compulsory dispute settlement may seek to avoid this making a reservation, particularly when it feels that it is in a stronger bargaining position than the other party and can thus rely on negotiation.[359]

132. On the other hand, factors that lead some States to exclude territorial and maritime delimitation disputes from compulsory jurisdiction (that such disputes are generally quite politically important and that their resolution has long-term significance) also make this an area where adjudication can play a highly beneficial role. Territorial and maritime delimitation disputes have in fact formed a major part of the Court's docket since its creation: they constitute the single largest category of contentious cases decided by the Court (although quite often by special agreement rather than by unilateral application).[360] The high importance and political sensitivity of such disputes may make it difficult for both sides to agree on a resolution by diplomatic methods. But resolving the dispute may well be beneficial to both States, removing a long-standing irritant from their relationship and (particular important in certain maritime delimitation disputes) establishing legal certainty so as to allow the full exploitation of the resources in the previously disputed area.[361]

133. Adjudication (or arbitration) may be the best way to reach this mutually beneficial end point at the lowest political cost to both sides, since the 'losing' government can blame the Court for the negative outcome rather than taking full responsibility itself for negotiated concessions.[362] Third party settlement may be even more attractive where it is likely that the application of international law will lead to each State getting some of the territory without a clear 'winner' or 'loser', so that each government will be able to claim the outcome as an overall win, while still transferring responsibility for the unsatisfactory aspects of the decision to the court.[363] In the context of maritime delimitation, the somewhat vague nature of the applicable legal principles makes it

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[355] ICJ Rep 2014, 3.

[356] Brown 2016, 194.

[357] Jennings *et al* 2019, 72.

[358] Joint Standing Committee on Treaties (Australian Parliament) Report 47 (August 2002), 21.

[359] Thus Australia's decision clearly reflected in part its preference to resolve its maritime delimitation dispute with Timor-Leste by negotiations rather than by adjudication. However, compulsory conciliation under art 298(1)(a) UNCLOS recently led to an agreed settlement of the maritime boundary: see further para 232, below.

[360] Ginsburg and McAdams 2004, 1317; Lamm 2014, 157; Simmons 2002, 829.

[361] Akande 1996, 610–11; Simmons 2002, 838–39.

[362] Ibid.

[363] Gray and Kingsbury 1992, 108.

difficult for parties to bargain 'in the shadow of the law',[364] which can provide an incentive to parties to refer the matter to a court or tribunal for resolution despite the risks involved.[365] These factors help explain the frequent recourse to the Court in territorial and maritime delimitation cases, as well as the high degree of compliance with the Court's judgments in such cases compared with those concerning 'more urgent disputes about the present.'[366]

134. **Other law of the sea and environmental disputes:** In addition to the reservation relating to maritime delimitation, another set of reservations relate to aspects of law of the sea, notably i) the conservation, management or exploitation of the living resources of the sea, either generally or in relation to a particular maritime zone, or ii) the prevention or control of marine pollution, or the control of marine scientific research, as a coastal State. 10 declarations in force have reservations of varying scope that can be placed in this category.[367] These reservations reflect disagreement among States about certain aspects of marine environmental law, including the management of highly mobile fish stocks and the balance between the rights of coastal and fishing States. The sensitivities of coastal States in regard to fishing and marine scientific research in their exclusive economic zone are also reflected in art 297 UNCLOS, which automatically excludes certain disputes of this kind from the treaty's general system of binding and compulsory dispute settlement.[368]

135. A later section of this report will consider how States' Optional Clause declarations, including reservations regarding aspects of the law of the sea, interact with the dispute settlement provisions contained in Part XV of UNCLOS.[369]

136. Three other declarations, all from States within the UN Eastern European regional group,[370] contain a more general reservation applying to all disputes with regard to environmental protection.[371] This is in line with the trend in relation to compromissory clauses in environmental treaties, which generally favour conciliation combined with monitoring and non-compliance mechanisms rather than adjudication or arbitration.[372]

iv) Analysis

137. Reservations remain a major feature of States' Optional Clause declarations. Only 16 of the 74 declarations currently in force do not include at least one substantive reservation. Of these, 4 are declarations made by States in Latin America dating back to the era of the PCIJ.[373] Another 3 were made by Western European States in the early

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[364] Kingsbury 2012, 217.

[365] A number of States during the UNCLOS drafting process expressed the view that the vagueness of the Convention's rules for maritime delimitation required compulsory adjudication or arbitration as a corollary: see UN Doc A/CONF.62/SR.60, para 2 (Netherlands), 49 (Cyprus) (compulsory dispute settlement particularly necessary if delimitation based on vague principles which lent themselves to subjective interpretation).

[366] Crawford 2017, 100; Powell and Mitchell 2011, 76.

[367] Barbados, Bulgaria, Canada, Djibouti, India, Japan, Malta, New Zealand, Norway, Philippines.

[368] Churchill 2017, 218.

[369] See Section E.3, below.

[370] Poland, Romania, Slovakia; see Lamm 2014, 160–62.

[371] Lamm 2014, 160–61

[372] See paras 197, 231, below.

[373] Dominican Republic, Haiti, Panama, Uruguay.

post war era.[374] The remaining 9 unlimited declarations range in date from 1963 (Uganda) to 2012 (Timor-Leste). By region, these 9 States include 5 African States,[375] 2 States from Latin American and the Caribbean,[376] one from Eastern Europe[377] and one from Asia.[378] Thus it can be seen that, while States in Western Europe are most likely to make Optional Clause declarations,[379] those States which accept ICJ jurisdiction under the Optional Clause with no substantive reservations tend to be smaller States in the Global South.[380] This may reflect the advantages for smaller or weaker States of compulsory jurisdiction, or perhaps a lack of legal resources making it more difficult for such a State to determine what reservations it would be desirable for it to include.

138. Declarations also seem to be less likely to include reservations when they are deposited in order to bring a particular dispute to the Court in the near future: the declarations of Guinea-Bissau, Cameroon and Dominica can be placed in this category.[381] This makes sense, given the urgency with which such declarations are made and the possibility that any reservation may backfire in the imminent case, as occurred with the Federal Republic of Yugoslavia's *ratione temporis* reservation in the *Legality of the Use of Force* cases.[382]

139. More generally, a clear tendency can be observed for States making new declarations to imitate reservations introduced by other States.[383] For example, Latvia's newly made 2019 declaration imitates the phrasing of the reservation in the German declaration concerning deployment of armed forces abroad and use of the national territory for military purposes, and incorporates the notice requirement first introduced by the UK in its 2017 declaration.

140. Focussing on the most recent three decades, of the 37 declarations made since 1990 listed on the ICJ website, four were made without any reservation: those of Cameroon (1994), Georgia (1995), Dominica (2006) and Timor-Leste (2012). At the opposite extreme, Equatorial Guinea's 2017 declaration is limited to a specified subject matter. The remaining 32 declarations made since 1990 include at least one, and usually several, reservations. Those which appear in more than one reservation can be categorised as follows:

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[374] Denmark, Liechtenstein and Switzerland.

[375] Cameroon, the Democratic Republic of Congo, Guinea-Bissau, Togo and Uganda.

[376] Costa Rica and Dominica.

[377] Georgia.

[378] Timor-Leste.

[379] See para 46, above.

[380] Cf Powell and Mitchell 2011, 188

[381] See para 53, above.

[382] Which led the Court to conclude in its provisional measures order that it lacked *prima facie* jurisdiction: see ICJ Reports 1999 (I), 134–35, paras 26 to 30.

[383] Merrills 1993, 237, refers generally to the phenomenon of 'erosion by imitation'.

- Other agreed means of dispute settlement: 25. (7 of these declarations[384] are limited to decision by other tribunals and/or which result 'final and binding' settlement).
- *Ratione temporis* limitations: 21
- 'Anti-ambush' reservations: 19
- Domestic jurisdiction: 13
- Armed conflicts/military hostilities (in various forms): 10
- Territorial or maritime delimitation disputes: 8
- Other categories of disputes involving the law of the sea: 5
- Environmental protection: 3
- Multilateral treaties: 3
- Commonwealth members: 3
- No diplomatic relations: 3
- Matters excluded from compulsory judicial settlement by treaty: 2

141. From the Court's point of view, this picture is a mixed one, but on the whole seems relatively positive. The most frequently occurring reservations do not radically undermine the general acceptance of the Court's jurisdiction.[385] The most prevalent reservation (regarding other agreed means of dispute settlement), although it can be difficult to apply, does not indicate a broader lack of faith in the role of compulsory third party dispute settlement in international law. This is particularly clear where it is limited to methods of dispute settlement leading to 'final and binding' settlement, as has become increasingly common. The second and third most popular types of reservation, *ratione temporis* limitations and 'anti-ambush' clauses, also arguably serve legitimate purposes, although again the former can be difficult to apply in practice.

142. In contrast, the reservations which most radically curtail the Court's jurisdiction are generally absent from declarations made in recent decades. The reservation regarding domestic jurisdiction remains common, but in no declaration since 1972 has it taken the 'self-judging' form. Another form of reservation which a State could potentially trigger by its own unilateral action, those *ratione personae* for disputes with States which the declaring State does not recognize and/or with which it does not have diplomatic relations, is found only in two recent declarations, Nigeria's (in 1998) and Djibouti's (1998). The multilateral treaty reservation has similarly only been included in three new declarations, Djibouti's (in 2005), Pakistan's (in 2017), and India's (in 2019, incorporating an expanded version of the reservation from its previous 1974 declaration).[386] The great majority of recent declarations thus do not fall into the category which Judge Higgins criticised, those which by multiple capacious reservations cut down the recognition of jurisdiction to 'almost nil',[387] although it remains to be seen whether Pakistan's introduction of a capacious national security reservation will inspire imitators.

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[384] Those of Estonia, Japan, Lesotho, Lithuania, Pakistan, Peru, and Romania; cf Latvia's declaration, which excludes both disputes where the parties have agreed on a method of settlement which entails a binding decision, and disputes under treaties which provide for 'a mechanism for monitoring implementation, whether or not they provide for access of Parties or any other persons or entities.'

[385] Cf Lamm 2014, 118.

[386] Cf Merrills 2009, 444.

[387] Speech by HE Judge Rosalyn Higgins, 31 October 2008, 6, available at < https://www.icj-cij.org/files/press-releases/1/14841.pdf>.

143. Reservations excluding certain substantive categories of dispute *ratione materiae* continue to appear moderately frequently in recent declarations. The subject matters most often excluded are disputes relating to armed conflicts or military hostilities and territorial or maritime delimitation disputes.

144. Various reasons have been suggested above as to why States may wish to avoid judicial settlement of disputes in these areas. Disputes in these areas may be highly politically sensitive and States may consider that they affect their most important interests.[388] States may wish to stop such disputes from being adjudicated by the Court without their consent. Even where States have some degree of confidence in their own legal position, a decision by a third party can never be entirely predictable and involves some loss of control.[389] A State may not want to run the risk of a loss which will force it to choose between complying with the Court's judgment, with the substantive and/or political cost that entails, and defying it, which will bring a reputational cost of its own.

145. A State's motivation for avoiding litigation is even greater where it lacks confidence that the course it wishes to pursue complies with international law. This situation may arise because the law on a certain point is uncertain or in flux,[390] or because a State considers that it is legitimate for it to disregard the existing law in a particular case or cases, or because a State considers that the existing legal position is unjust or otherwise unacceptable and seeks to change the law by breaking it.

146. For example, in 1970 Canada issued a new declaration containing a reservation applying to 'disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.'[391] The reservation was included to prevent Canada being taken to the ICJ in respect of measures under its Arctic Waters Pollution Prevention Act. The Canadian Prime Minister stated that: 'Canada is not prepared…to engage in litigation with other States concerning vital issues where the law is either inadequate or non-existent and therefore does not provide a firm basis for judicial decision'.[392]

147. In its current declaration, made in 1994, Canada excludes from jurisdiction 'conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area…and the enforcement of such measures.'[393] Canada's enforcement of its fisheries conservation legislation on the high seas against a Spanish-flagged vessel led to an application by Spain against Canada in the ICJ, relying on the Optional Clause. The Court held that it lacked jurisdiction, given that the dispute fell clearly within Canada's reservation, and that this reservation had to be applied even if its intent was to prevent the Court from reviewing an action of dubious legality:

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[388] Compare the exclusion of disputes concerning vital interests in early twentieth century arbitration treaties: Gray and Kingsbury 1992, 102.

[389] See Bilder 1987.

[390] Rovine 1976, 317, 330.

[391] Macdonald 1970, 34.

[392] Macdonald 1970, 3–4.

[393] See de La Fayette 1999.

> Reservations from the Court's jurisdiction may be made by States for a variety of reasons, sometimes precisely because they feel vulnerable about the legality of their position or policy…The fact that a State may lack confidence as to the compatibility of certain of its actions with international law does not operate as an exception to the principle of consent to the jurisdiction of the Court and the freedom to enter reservations.[394]

148. States have not infrequently introduced a new reservation or reservations into their declarations after being brought before the Court as a respondent against their will, in order to avoid a similar case being brought against them in future.[395] This is unsurprising: being forced before the Court on a sensitive issue brings home to the State the practical downside of acceptance of the Court's compulsory jurisdiction, particularly if the State loses (or goes on to lose) the case.[396] More rarely, as mentioned previously, this experience has inspired States to terminate their Optional Clause declarations (or allow them to lapse without renewing them).

149. However, there are also reasons for States to avoid reservations excluding politically sensitive issues from the Court's jurisdiction, despite the potential costs. First, reservations which seek to preserve a State's ability to act contrary to law in certain contexts undermine the rule of law in international affairs. States' long-term interest that international disputes should be resolved on the basis of law, and not simply of power, suggest they should accept the Court's jurisdiction broadly, even though that may sometimes lead to unwelcome results.[397] Second, such reservations will prevent a State's recourse to the Court as an applicant when its legal position is strong, because of the principle of reciprocity.[398] Third, a point touched on already, the political sensitivity of a dispute may hinder a diplomatic resolution despite the practical benefits to both sides of reaching a resolution. In such circumstances, a decision by the Court can provide political cover for one or both sides to back down, to both parties' ultimate benefit. Fourth, acceptance of compulsory jurisdiction provides a greater opportunity for a State to have its voice heard as the Court interprets and develops international law, a function that impacts all States, not just participants in the Optional Clause system.[399]

SECTION C. TREATIES PROVIDING FOR ICJ JURISDICTION

150. Broader acceptance of the Optional Clause remains of great practical importance in enhancing the Court's role. But as was established in the first part of this report, the largest share of the Court's case load has been brought to the court on the basis of treaty provisions which establish the Court's jurisdiction, in accord with art 36(1) of the Statute. Such clauses form a basis for the compulsory jurisdiction of the Court insofar as they allow for unilateral applications by one party to a dispute, in contrast to treaties

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[394] *Fisheries Jurisdiction (Spain v Canada)* ICJ Rep 1998, 455, para 54.

[395] For example, the new Japanese declaration of 2015 (following the *Whaling* case) and the new Pakistani, UK and Indian declarations (following the *Marshall Islands* cases).

[396] As France did in 1974 in reaction to the *Nuclear Tests* cases and the US in 1985 in reaction to *Nicaragua.*

[397] Burmester 1996, 33; cf Rovine 1976.

[398] Tomuschat 2019, 775–76.

[399] Romano 2009, 437.

which provide for disputes to be referred to the Court with the mutual consent of the parties.[400]

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151. In the introduction, a distinction was drawn between dispute settlement treaties, which provide general consent to the submission of legal disputes between the parties to the Court (subject to any reservations), and compromissory clauses contained in a treaty on a particular subject and confined in scope to disputes concerning the interpretation or application of that treaty. These different categories will be considered in turn.

C.1 Dispute settlement treaties

152. Dispute settlement treaties can be divided into three categories: general treaties aiming at universality, regional treaties, and bilateral treaties.

153. There has only been one attempt at establishing a universal dispute settlement treaty since the foundation of the present Court. The 1949 Revised General Act[401] grants general jurisdiction to the Court over legal disputes between the parties.[402] Article 39 limits permissible reservations to three classes, concerning disputes arising out of facts prior to accession, disputes concerning questions which by international law are solely within the domestic jurisdiction, and disputes concerning particular cases or clearly defined subjects.[403]

154. The Revised General Act has only eight parties. Six of these are Western European states which also are among the most long-standing participants in the Optional Clause system.[404] A seventh, Estonia, has also been a party to the Optional Clause since shortly after it regained its independence. The eighth State, Burkina Faso, is the only surprise, since this State has never made an Optional Clause declaration. None of the eight parties has made a reservation. No State has acceded to the Revised General Act since Estonia did so in 1991; the second-most recent accession, by the Netherlands, occurred in 1971.[405]

155. The Revised General Act, as the name suggests, is an attempt to revise a previous instrument of the same kind, the 1928 General Act open to accession by members of the League of Nations.[406] The original act achieved somewhat wider coverage than its successor, with 22 parties during the period of the League's existence (one of these States, Spain, denounced it in 1939 after the victory of the Nationalist forces in the Spanish Civil War).[407] Whether this Act has remained in force following the dissolution

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[400] For example, art XI of the 1959 Antarctic Treaty; see Kolb 2014, 418–20.

[401] 71 UNTS 101.

[402] See generally Tomuschat 2002.

[403] Crawford 2013, 6 (noting that middle powers including Australia and Canada sought to have this model adopted for the Optional Clause in 1945).

[404] Belgium, Denmark, Luxembourg, the Netherlands, Norway and Sweden.

[405] Information taken from United Nations Treaties Collection, <https://treaties.un.org/ > (accessed 1 December 2019).

[406] 93 LNTS 343; information taken from United Nations Treaties Collection, <https://treaties.un.org/ > (accessed 1 December 2019).

[407] Ibid.

of the League is a highly controversial question:[408] applicant States have sought to rely on it before the Court on several occasions, but the Court has never found it necessary determine whether it continues in force.[409] Three of the parties to the Act (France, Turkey and the United Kingdom) have denounced it (without conceding that it continues in force),[410] and India has effectively also done so (while also denying that it had at any point since independence been bound by it).[411]

156. Attempts to establish a universal dispute settlement treaty have clearly been unsuccessful.[412] Such treaties functionally overlap with the Optional Clause in that both attempt to provide a mechanism for a truly general acceptance of jurisdiction which is not limited by subject matter (except to the extent that reservations are made) nor confined to a defined pair or group of States (as is the case with bilateral or regional dispute settlement treaties). It seems that States which are willing to make such a general acceptance of jurisdiction prefer to do so under the Optional Clause. Two major reasons can be suggested for this. One is that the both General Acts impose certain limitations on reservations which can be made, notably by requiring that they be 'clearly defined.'[413] Even more importantly, these treaties impose significant restrictions upon a party's right to withdraw from them. The Revised General Act, like its predecessor, is automatically renewed every five years unless it is denounced at least six months before the expiry of the current period. In contrast, the Optional Clause system, as has been discussed,[414] provides the flexibility for States to withdraw or amend their declarations at any time if they specify this in their declaration, and the majority of current Optional Clause declarations reserve such a right. Preserving an 'escape route' of this kind seems to be a necessary condition before most States are willing to consent to general and potentially universal jurisdiction.

157. Regional dispute settlement treaties have proved more significant as a source of the Court's jurisdiction.[415] There are two such treaties: the 1948 American Treaty on Pacific Settlement (commonly known as the Pact of Bogotá)[416] and the 1957 European Convention for the Peaceful Settlement of Disputes.[417]

158. The Pact of Bogotá has proved the most important dispute settlement treaty as a basis for the Court's jurisdiction in practice. The Pact currently has 14 parties, all Latin American States.[418] This number includes four States in the region which do not have

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[408] Shaw 2015, II.177.

[409] The *Nuclear Tests* cases, *Trial of Pakistani Prisoners of War, Aegean Sea Continental Shelf,* and *Aerial Incident of 10 August 1999.*

[410] Information taken from United Nations Treaties Collection, <https://treaties.un.org/ > (accessed 1 December 2019).

[411] See *Aerial Incident of 10 August 1999*, ICJ Reports 2000, 19–20, para 17.

[412] Tams 2009, 473.

[413] See art 39 of both the General Act and the Revised General Act.

[414] See general Part B.2 of this report, above.

[415] Tams 2009, 473–74.

[416] 30 UNTS 55.

[417] 320 UNTS 243.

[418] Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay.

Optional Clause declarations in force (Bolivia, Brazil, Chile and Ecuador).[419] Mexico's Optional Clause declaration contains a self-judging domestic jurisdiction reservation, so its status as a party to the Pact is also significant. Although the Pact of Bogotá entered into force in 1949, almost four decades passed before it was first relied on to bring a dispute before the Court, in 1986 in the *Border and Transborder Armed Actions* case. Since then however the Pact has played a major role as a jurisdictional basis for the Court. In the last twenty years, it has been relied on in 14 applications.[420]

159. Article XXXI of the Pact constitutes a broad and general recognition of the Court's jurisdiction as between the parties, allowing either party to any legal dispute to have recourse the Court. A procedural precondition to the application of art XXXI is that it applies only to those disputes 'which, in the opinion of the parties, cannot be settled by direct negotiations…'. According to the Court's case law, this requires an objective determination by the Court that the parties considered in good faith that they could, or could not, settle the dispute by agreement.[421]

160. A more substantive restriction on the Pact's broad grant of jurisdiction to the Court is that its procedures cannot be applied 'to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty' (article VI).[422] This provision, which seeks in line with the principles of *pacta sunt servanda* and *res judicata* to prevent the Pact being used to undermine existing agreements and court decisions, has proved difficult to apply as a preliminary jurisdictional limitation, since it in fact requires a determination of the merits of the applicant's claim.[423]

161. Unlike the Revised General Act and the European Dispute Settlement Convention, the Pact contains no specific provisions allowing States to make reservations to their acceptance of the Court's jurisdiction, although there is a general clause (article LV) stating that any reservation to the Treaty applies reciprocally. Thus, the general law of treaties applies and reservations can only be made at the time of signature, ratification or accession.[424] None of the Parties for whom the Pact is in force have a current reservation limiting the Court's jurisdiction under Article XXXI.

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[419] See Organization of American States, Pact of Bogota, <http://www.oas.org/juridico/english/Sigs/a-42.html> (accessed 1 December 2019); Tomuschat 2019, 749.

[420] *Territorial and Maritime Dispute (Nicaragua v Colombia); Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua); Maritime Dispute (Peru v Chile); Aerial Herbicide (Ecuador v Colombia); Certain Questions Concerning Diplomatic Relations (Honduras v Brazil); Certain Activites (Costa Rca v Nicaragua); Construction of a Road (Nicaragua v Costa Rica);Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile); Delimitation of the Continental Shelf (Nicaragua v Colombia); Alleged Violations of Sovereign Rights (Nicaragua v Colombia); Maritime Delimination (Costa Rica v Nicaragua);Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia); Land Boundary in the Northern Part of the Isla Portillos (Costa Rica v Nicaragua).* See also para 13, above.

[421] *Armed Actions* ICJ Reports 1988 94–95, para 65; *Alleged Violations of Sovereign Rights* ICJ Reports 2016, 37–39, paras 92–101.

[422] There is also a limitation concerning matters within domestic jurisdiction: art V.

[423] As pointed out in the Separate Opinion of Judge Abraham in *Territorial and Maritime Dispute (Nicaragua v Colombia) (Preliminary Objections)* ICJ Reports 2007, 903*;* see Fuentes 2014, 91–94.

[424] *Armed Actions* 84–85, paras 35-36.

162. Article LVI of the Pact allows for its denunciation, which is only effective after one year's notice.[425] Thus the Pact is more restrictive in this regard than the Optional Clause but on the whole less restrictive than the Revised General Act. Two parties have denounced the Pact, El Salvador in 1973 and Colombia in 2012. El Salvador's action in 1973 was prompted by a desire to prevent its territorial and maritime dispute with Honduras coming before the Court; around the same time it also introduced reservations into its Optional Clause declaration which excluded this dispute.[426] Colombia denounced the Pact in 2012, thus expressing its dissatisfaction with the Court's decision on the merits in *Territorial and Maritime Dispute (Nicaragua v Colombia)*. It had previously terminated its Optional Clause declaration in 2001 in order to try to prevent this case from coming before the Court.[427]

163. The 1957 European Convention is the other regional dispute settlement treaty currently in force which provides a basis for the Court's compulsory jurisdiction. Like the Pact of Bogotá, the Convention currently has 14 parties,[428] all of which are in the Western European UN regional group except Slovakia (which is also the most recent State to have ratified the Convention, in 2001). Of these 14 parties, all 14 also have an Optional Clause declaration in force, reflecting the high level of acceptance of the Optional Clause in Europe.

164. The provisions of the 1957 European Convention concerning ICJ jurisdiction are broadly similar to those in the Revised General Act.[429] Like the Revised General Act, the European Convention does not impose any procedural preconditions before an application can be made. Unlike the Revised General Act, it excludes all disputes relating to past facts or situations and disputes concerning domestic jurisdiction, rather than simply allowing parties to make reservations excluding such disputes.[430] Parties are also permitted to make reservations concerning particular cases or clearly defined subject matters at the time of ratification.[431] They may also apply at any time reservations made in their Optional Clause declarations to jurisdiction under the Convention by simple declaration, although such a declaration only applies to disputes relating to prior facts or situations after a year has elapsed.[432] Malta and the United Kingdom have made a declaration applying the reservations in their Optional Clause to jurisdiction under the Convention; the other parties have not made any reservations relevant to the jurisdiction of the ICJ.[433] Another difference between the Convention

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[425] A point decided by the Court in its judgment on preliminary objections in the *Alleged Violations of Sovereign Rights* case, which Nicaragua brought against Colombia within one year of the latter's denunciation of the Pact: 19-20, paras 36–39. See Jennings *et al* 2019, 70.

[426] The case was subsequently brought by special agreement: see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* ICJ Rep 1992, paras 36–39.

[427] Crawford 2017, 99.

[428] Austria, Belgium, Denmark, Germany, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Slovakia, Sweden, Switzerland, United Kingdom. See <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/023> (accessed 1 December 2019).

[429] Kolb 2014, 399–400.

[430] Art 27.

[431] Art 35.

[432] Ibid.

[433] See Council of Europe, <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/023e> (accessed 1 December 2019).

and the Revised General Act is that the Convention, after an initial five year period, may be denounced at any time by a party on six months' notice.[434]

165. After decades of neglect, since 2001 the Convention has been relied on twice as the major basis for jurisdiction in a case before the Court: in *Certain Property (Liechtenstein v Germany)*[435] (where the Court denied jurisdiction on the basis of the *ratione temporis* limitation in the treaty) and in *Jurisdictional Immunities of State (Germany v Italy).*[436] It was also relied on as a concurrent basis of jurisdiction, along with the Optional Clause, in Belgium's application against Switzerland in *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, which was discontinued in 2011. Since both Germany (in 2008) and Italy (in 2014) made Optional Clause declarations,[437] the significance of the Convention in practice has greatly diminished, since now all the parties to the Convention also have Optional Clause declarations in force which can be utilised as a basis for jurisdiction instead.

166. In the past it was also common for two States to enter a bilateral treaty establishing, among other dispute settlement mechanisms, a right to recourse to the ICJ applying generally to any legal dispute between them.[438] Such bilateral dispute settlement treaties were common in the pre-Charter era. However, they became rare in the post-1945 period, and the phenomenon seems to have completely disappeared since the 1960s. The latest such treaty listed on the ICJ website as a source of the Court's jurisdiction is the 1965 Treaty for Conciliation, Judicial Settlement and Arbitration between the United Kingdom and Switzerland.[439]

167. This overview suggests that there has been little or no interest among States in according jurisdiction to the Court through general dispute settlement treaties since the early post-war era. To the extent that States have been willing to accord the ICJ jurisdiction by treaty, they have done so in compromissory clauses, limiting their consent to the interpretation or application of the particular treaty in question.

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[434] Art 40.

[435] ICJ Reports 2005, 6.

[436] ICJ Reports 2012, 99.

[437] See para 46, above.

[438] Anand 1961, 136; Tams 2009, 474.

[439] ICJ, 'Treaties', <https://www.icj-cij.org/en/treaties> (accessed 1 December 2019); Tams 2009, 474.

C.2 Compromissory clauses

168. Compromissory clauses in subject matter specific treaties form the most important basis for the Court's compulsory jurisdiction in practice, as was established by the statistics provided in Section A of this report. This section will consider the scope of the compulsory jurisdiction accorded to the Court by compromissory clauses, and discuss what trends can be discerned as to States' willingness to consent to the Court's jurisdiction by this means.[440]

169. Analysing this requires not only consideration of the overall number of compromissory clauses providing in some form for unilateral recourse to the Court (provided in part i) of this section), but also the exact ambit of the consent to jurisdiction provided by the clause. Two main factors affect the extent of such consent. Firstly, there may be preconditions requiring other means of dispute settlement be attempted before the Court can be seised of the dispute.[441] Secondly, it must be considered whether it is possible for a State to become a party to the treaty while exempting itself from recognizing compulsory jurisdiction.[442] In this regard, treaties providing for compulsory jurisdiction can be classified into four categories: those that specifically prohibit reservations to the compromissory clause; those that are silent on the possibility of such reservations; those which explicitly allow for reservations excluding the default provision for compulsory jurisdiction ('opt out' compulsory jurisdiction); and those where compulsory jurisdiction only applies if parties to the treaty accept it by a separate act ('opt in' compulsory jurisdiction). Both these limitations will be considered in part ii) of this section. Part iii) will discuss how States' willingness to accept the compulsory jurisdiction of the Court varies depending of the subject matter of the treaty. Part iv) provides an overall analysis.

i) Overall number of compromissory clauses providing for ICJ jurisdiction: trends over time

170. The website of the ICJ provides a chronological list of 'treaties and other instruments notified to the Registry, after being registered, classified or recorded by the Secretariat of the United Nations, which contain clauses relating to the jurisdiction of the Court in contentious proceedings'.[443] The list of treaties on the Court's website suggests that States since 1946 have agreed on almost 300 such treaties (294 to be exact).[444] The list includes both dispute settlement treaties and compromissory clauses in subject matter specific treaties, but the vast majority of treaties listed fall within the latter category.[445] Only a small number of these treaties have actually been utilised to bring a case before the Court.[446] As discussed previously, the jurisdiction provided by these compromissory clauses is usually defined as covering disputes concerning the interpretation or application of the treaty.[447] A few instead provide the ICJ appellate

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[440] See also generally Tams 2009; Kolb 2013, 409-447.

[441] See paras 187–92, below.

[442] See para 192–94, below.

[443] ICJ, 'Treaties', <https://www.icj-cij.org/en/treaties> (accessed 1 December 2019).

[444] Cf Tams 2009, 470.

[445] Ibid.

[446] See para 31, above.

[447] See para 4, above.

jurisdiction over such disputes, allowing a party to appeal a decision made by a treaty body.[448]

171. The website list is presented as being comprehensive, although a disclaimer also provides that '[t]he fact that a treaty is or is not included in this section is without prejudice to its possible application by the Court in a particular case.'[449] In fact, there are a number of relevant treaties which have been not on the list. A very recent treaty which the website may not yet have been updated to include is the Prespa Agreement settling the naming dispute between Greece and North Macedonia, which entered into force in February 2019,[450] art 19 of which provides for reference of disputes concerning the interpretation or implementation of the agreement to the Court.

172. While it is understandable that this very recent treaty has not yet been included, it is perhaps more puzzling that other treaties that have been in force for some time are not listed. A relatively recent multilateral treaty providing for compulsory reference of disputes to the Court (in art 11) is the 2008 Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR), which has 19 parties (mainly in Europe) and which entered into force in 2011. Although the depository of the protocol is the Secretary-General of the UN and it appears in the UN Treaty series,[451] it is not on the ICJ's list.

173. More significantly, some multilateral treaties of broader importance which contain compromissory clauses providing for default ICJ jurisdiction are also not on the list. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,[452] which entered into force in 2003, includes such a provision (art 92) but is not included. Other examples are two 1986 International Atomic Energy Agency conventions related to nuclear accidents, the Convention on Early Notification of a Nuclear Accident[453] and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,[454] which provide (in arts 11 and 13 respectively) that any party to the dispute may either submit the case to arbitration or to the ICJ, at its choice. There are also a number of treaties which allow for the acceptance of the compulsory jurisdiction of the Court on an opt-in basis (if parties which make an additional declaration to that effect) which are not listed, despite the fact that a number of the treaties which are on the list are of this type.[455] Such omissions include the 2013 Minamata Convention on Mercury (art 25(2)),[456] the 1991 Protocol on Environmental Protection to the Antarctic Treaty (art 19 of which contains a dispute

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[448] Most prominently the 1944 Chicago Convention on International Civil Aviation and the 1944 International Air Services Transit Agreement, which provide a right of appeal to the Court from decisions of the ICAO Council. These treaties form the basis for two cases currently before the Court: see para 35, above. One other treaty providing a right of appeal to the Court from the decision of a treaty body is the 2015 International Agreement on Olive Oil and Table Olives, art 26(4).

[449] 'Treaties', <www.icj-cij.org/en/treaties>, accessed 1 December 2019; Tams 2009, 470.

[450] See Ventouratou 2018.

[451] 2762 UNTS 23.

[452] 2220 UNTS 3.

[453] 1439 UNTS 275.

[454] 1457 UNTS 133.

[455] For example, the 1994 Protocol to the 1979 Convention on long-range transboundary air pollution on further reduction of sulphur emissions, 2030 UNTS 122, art 9(2).

[456] Akande 2016, 324.

settlement mechanism modelled on that contained in Part XV of UNCLOS), and UNCLOS itself.[457]

174. The ICJ website's list is thus under-inclusive. It is also arguably over-inclusive as well, since it includes treaty provisions that refer to the ICJ but which do not provide for its compulsory jurisdiction in contentious cases, even on an opt-in basis. Art 32 of the 2002 Agreement on the Privileges and Immunities of the International Criminal Court,[458] for example, provides for arbitration to settle disputes arising out of the interpretation or application of the agreement. The only reference to the ICJ is that the President of the ICJ may appoint a member of the arbitral tribunal when a party fails to make an appointment, or may appoint the chairman if the two members fail to agree. Other potentially misleading entries on the ICJ list include the 1959 Antarctic Treaty[459] and the 1993 Convention for the Conservation of Southern Bluefin Tuna (the dispute settlement provision of which was modelled on the Antarctic Treaty).[460] Both of these treaties provide for the reference of disputes to the ICJ, but only with the consent, in each case, of all parties to the dispute. Since the parties could refer a dispute under the treaty to the Court by mutual consent in any case, the utility of this kind of compromissory clause has been questioned.[461] Where the clause provides that the parties 'shall' refer the case to the Court it may nonetheless impose a legally binding obligation for the parties to negotiate a special agreement referring the dispute to the Court,[462] but does not allow the dispute to be brought to the Court in the absence of such an agreement.

175. Despite its flaws, the ICJ's list provides a reasonable starting point for assessing trends regarding the inclusion of compromissory clauses. The list indicates that there has been a significant decline in the number of compromissory clauses since the early post-war decades. 101 treaties are listed for the 1950s, 61 for the 1960s, but only 32 in the 1970s and 11 in the 1980s.[463] There was a slight improvement in the 1990s, with 23 treaties from this decade listed on the website, but then the numbers drop again to 11 between 2000 and 2006, and none are listed after that day.

176. It seems safe to conclude that there been a significant decrease over the decades in the number of new compromissory clauses referring to the Court. Much of the numerical decline can be attributed to the decreasing number of bilateral treaties on specific subject matters containing such a clause. This can be seen by comparing the number of bilateral and multilateral treaties on the Court's list in each decade since the 1950s:

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[457] See generally Part E, below.

[458] 2271 UNTS 3.

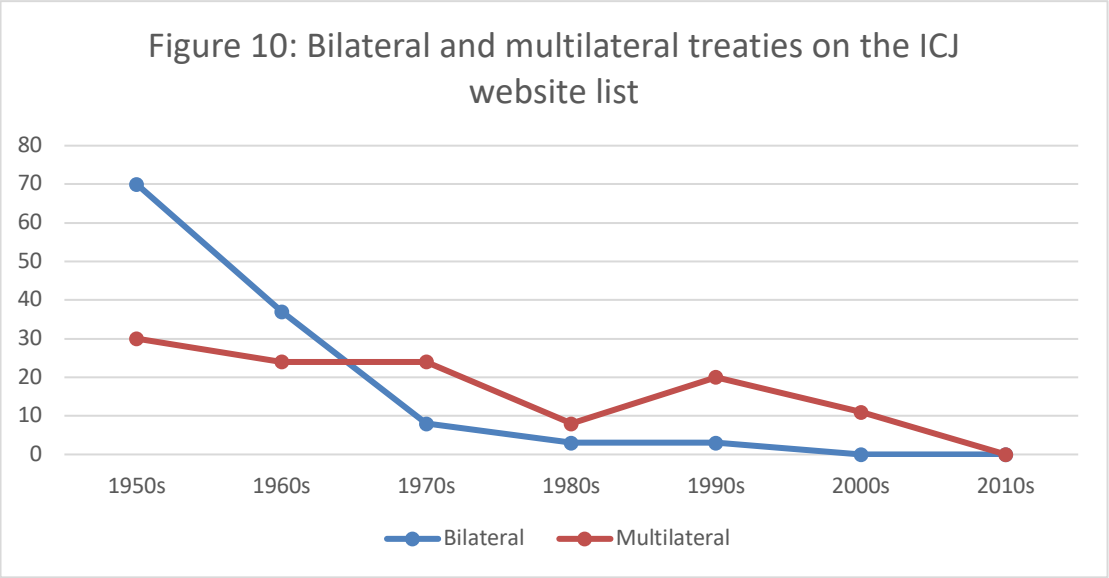
[459] 402 UNTS 71

[460] 1819 UNTS 359. See the discussion of this compromissory clause by the Annex VII Tribunal in *Southern Bluefin Tuna*, Award on Jurisdiction and Admissibility, (2000) 39 ILM 1359 (August 4, 2000), para 58.

[461] See Thornberry 2016, 473 (referring to criticisms by Canada and the US of proposed amendments to the compromissory clause in CERD to require mutual consent before a dispute can be referred to the Court).

[462] Kolb 2013, 418.

[463] Cf Tams 2009, 476.



There thus appear to have been very few bilateral treaties referring to the court since the 1970s, and that the decline has accelerated further since then.

177. More general shifts in treaty making can be discerned in the decline of the number of bilateral treaties assigning a dispute settlement role to the Court. Two kinds of bilateral treaty which were common in the 1950s and 1960s, 1) treaties of friendship, commerce and navigation (FCN Treaties)[464] and 2) consular treaties, commonly included a clause providing for the Court's jurisdiction over disputes arising in relation to the treaty.[465] Two US treaties in the first category, with Nicaragua and with Iran, have played a well-known role in the Court's docket, the first in the *Nicaragua* case[466] and the second in several cases brought by Iran against the US.[467] (The 1955 Treaty of Amity with Iran, like the Treaty with Nicaragua before it, has recently been denounced by the US).[468] These two kinds of bilateral treaty have now largely been replaced by new forms of treaty practice. Instead of concluding FCN treaties to facilitate investment, States in recent decades have concluded bilateral investment treaties which rely primarily on mixed arbitration rather than inter-State adjudication for dispute settlement.[469] Bilateral consular treaties have largely become outmoded following the 1963 Vienna Convention on Consular Relations, the Optional Protocol to which provides for ICJ jurisdiction.[470]

178. While the virtual disappearance of compromissory clauses providing for ICJ jurisdiction in bilateral treaties is the most dramatic change, the Court's list also suggests significant fluctuations in the number of such clauses in multilateral treaties. Figure 10 shows that raw number of multilateral treaties referring to the Court declining greatly only in the 1980s, before reviving in the 1990s and then declining again in the 2000s

[464] Paulus 2011.

[465] Morrison 1987, 64–65.

[466] The 1956 US-Nicaragua Treaty of Friendship, Commerce and Navigation: Tams 2009, 483.

[467] *Teheran Hostages, Aerial Incident of 3 July 1988* (alongside the 1971 Montreal Convention); *Oil Platforms, Certain Iranian Assets, Alleged Violations of the 1955 Treaty*. See para 31, above.

[468] Bellinger 2018; see para 36, above.

[469] Paulus 2011.

[470] Tams 2009, 478–79.

and (more dramatically) in the 2010s. The 2006 Enforced Disappearance Convention[471] is the last treaty listed on the ICJ website as containing a relevant compromissory clause.

179. The list on the Court's website provides an indication of significant decline. However, the list is not entirely complete and more information is needed to clarify the extent of the shift and to put it in context. A number of questions seem relevant. Does the decline merely reflect a broader drop in the number of major multilateral treaties concluded in recent decades? If the proportion of multilateral treaties providing for ICJ jurisdiction has indeed dropped, what alternative methods of dispute settlement are States choosing in its place? What patterns in choice of dispute settlement mechanism can be observed for treaties with particular subject matters? And of those treaties which do provide for ICJ jurisdiction, what is the actual extent of that jurisdiction: in particular, how many allow States to make a reservation 'opting out' of ICJ jurisdiction, and how many require a separate declaration from States 'opting in'?

180. Answering these questions requires the selection of a representative sample of major multilateral treaties concluded since 1945, in order to compare their dispute settlement provisions. In line with a number of previous studies,[472] this report takes as its sample multilateral treaties of which the UN Secretary-General serves as depository. This sample does omit some important treaties providing for ICJ jurisdiction. For example, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,[473] the depository of which is ICAO, allows disputes to be unilaterally submitted to the Court if negotiations and an attempt at arbitration fail, and has formed the jurisdictional basis of multiple applications to the Court.[474] However, the body of treaties deposited with the Secretary-General provides the most accessible sample of treaties of a degree of importance, since it consists of 'open multilateral treaties of worldwide interest or regional agreements negotiated under UN auspices'.[475] The report uses the collection of dispute settlement provisions in these treaties published in 2017 by the Centre of International Law at the National University of Singapore, adding to the sample four more recent treaties deposited with the Secretary-General.[476]

181. By decade, the number of multilateral treaties deposited with the UN Secretary-General fulfilling the above criteria is as follows:

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[471] 2716 UNTS 3.

[472] Galbraith 2013; Laidlaw and Kang 2018.

[473] 974 UNTS 177.

[474] See para 31, above. Another significant treaty providing for ICJ jurisdiction is the ICSID Convention, the depository of which is the World Bank. Art 64 of the Convention allows inter-State disputes concerning the interpretation or application of the treaty to be unilaterally referred to the ICJ. However, this provision has not yet been utilised to bring a case before the Court.

[475] Galbraith 2013, 325; also Hinojal-Oyarbide and Rosenboom 2012, 252.

[476] The 2015 Paris Agreement, the 2017 Treaty on the Prohibition of Nuclear Weapons, the 2018 UN Convention on International Settlement Agreements Resulting from Mediation, and the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean. The sample excludes treaty amendments, previous versions of commodity treaties which have since been updated or modified (so that only the most recent version is included), treaties which have been terminated, and treaties more than 30 years old which have not yet entered into force. Optional Protocols which simply supplement the parent Convention (for example, the Optional Protocols to the VCDR and VCCR) are counted as a single entity with the parent convention: see NUS, 2017 Compilation of Dispute Settlement Mechanisms, 13-14, <https://cil.nus.edu.sg/wp-content/uploads/2017/07/Final-Compilation.pdf> (accessed 1 December 2019). This report also excludes a treaty from before 1945 which has not been subsequently amended (the 1928 Slavery Convention). The total number of treaties in the sample is 239.

1945-49: 15	1980-89: 31
1950-59: 31	1990-99: 50
1960-69: 26	2000-09: 35
1970-79: 35	2010-19: 16

This indicates that the number of multilateral treaties remained roughly steady over the decades of the Cold War period. Multilateral treaty making then peaked during the 1990s, before returning to the historical average in the first decade of the twenty-first century. The first marked decline in the UN Charter era has occurred since 2010. Part of the explanation for the dearth of recent treaties providing for ICJ jurisdiction may indeed be the simple fact that fewer major multilateral treaties have been concluded this decade, a worrying trend for multilateralism as a broader phenomenon. It has been suggested that recent shifts in the global balance of power and a more ideologically divided international community have made it more difficult to achieve the consensus required to conclude new multilateral treaties of worldwide scope.[477]

182. To measure changes in States' willingness to accept compulsory jurisdiction over time, an initial (rather crude) device is to examine the percentage of treaties in each decade that provide for the Court's compulsory jurisdiction. All treaties that contain a mechanism for unilateral recourse to the Court by one party to a dispute (including on an opt-in basis) have been counted within this category. In contrast, treaties that refer to the Court but require the mutual consent of both parties for it to have jurisdiction over a given dispute have not been included.

183. The number of treaties deposited with the Secretary-General providing for some form of compulsory ICJ jurisdiction each decade, and the percentage of the total, is as follows:

	ICJ compromissory clause	**Total number of treaties**	**Percentage**
1940s	7	15	46.7
1950s	14	31	45.2
1960s	14	26	53.9
1970s	7	35	20.0
1980s	7	31	22.6
1990s	21	50	42.0
2000s	14	35	40.0
2010s	5	16	31.3

184. These figures indicate a steep decline in the number and percentage of treaties with compromissory clauses providing for compulsory ICJ jurisdiction in the 1970s and 1980s, followed by a recovery in the 1990s and 2000s. The trend in the 1970s and 1980s seems likely to be related to the Court's damaged reputation following the *South West Africa* case.[478] While during this period Western States (including the US) generally supported including compromissory clauses providing for compulsory ICJ jurisdiction during the treaty drafting process, this was usually opposed by many developing States, as well as States from the socialist world.[479] Such States criticised what they perceived

[477] Scott 2018, 640.

[478] See para 42, above.

[479] The Soviet Union did accept ICJ compulsory jurisdiction in a small number of treaties, mainly constitutive instruments of international organization: Morrison 1987, 69.

as the Court's outdated conception of international law. For example, during the negotiation of the 1978 Vienna Convention on Succession of States in respect of Treaties, the Somali delegate (Mr Osman) stated that '[t]he International Court of Justice was an anachronism set up to apply the nineteenth century law of nations which has been evolved by the European and colonialist powers'.[480] The increased proportion of treaties including compromissory clauses referring to the Court in the 1990s and 2000s can be linked to the general improvement in the Court's reputation since its post-*South West Africa* low point. Also relevant is the fact that during this period major powers such as the Russian Federation and France were won over (or in the latter's case, won back) to accepting the Court's jurisdiction via compromissory clauses.[481] The 2010s have seen a decline in the raw number of treaties providing for ICJ jurisdiction, but as a percentage of multilateral treaties deposited with the UN they have not decreased much.

ii) Limitations on the ambit of compromissory clauses: preconditions and opt-out/opt-in clauses

185. This apparent recovery however is tempered when considering the extent to which recent compromissory clauses in multilateral treaties actually provide the Court with compulsory jurisdiction.

186. An example of a strong compromissory clause which gives a broad grant of compulsory jurisdiction to the Court is found in the 1948 Genocide Convention, which has been relied upon as a jurisdictional basis in a large number of cases before the Court. Article IX of which states that '[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention…shall be submitted to the International Court of Justice at the request of any of the parties to the dispute'. The provision provides does not impose procedural preconditions which must be met before a party can have recourse to the Court. It is silent on whether parties can make reservations to the compromissory clause (although nonetheless certain States have made such reservations, and such reservations have been held by the Court to be valid).[482] An even stronger kind of compromissory clause could explicitly exclude any reservations to the Court's compulsory jurisdiction.[483]

187. Compromissory clauses in later decades have often stated that recourse to the Court is available for a dispute which 'is not settled by' or 'cannot be settled by' negotiation.[484]

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[480] 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole', Doc. A/CONF.80/16/Add.1/1978, 121; cited by Kolb 2013, 1152.

[481] For Russia's shift of attitude see para 24, above. France seems to have ceased making reservations to compromissory clauses providing for compulsory ICJ jurisdiction, which it regularly did in the years following the *Nuclear Tests* cases, at some point in the 1980s. The 1984 Torture Convention, which it ratified in 1986, seems to have been one of the last treaties to which it made such a reservation.

[482] Akande 2016, 326. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep 1951, Advisory Opinion, 22ff; *Legality of Use of Force (Yugoslavia v Spain)* Provisional Measures, Order of 2 June 1999, ICJ Rep 1999 (II) 772, paras 32–33; *Legality of Use of Force (Yugoslavia v US)* Provisional Measures, Order of 2 June 1999, ICJ Rep 1999 (II) 924; *Armed Activities (DRC v Rwanda)*, Jurisdiction and Admissibility, ICH Rep 2006, 6, 64–70.

[483] See for example the 1951 Refugee Convention, arts 38, 42.

[484] See *Application of CERD (Georgia v Russia)*, ICJ Reports 2011, 126, para 136.

Some clauses contain a time element for negotiations, referring to disputes which 'cannot be settled by negotiations within a reasonable time'[485] or 'within six months'.[486]

188. Some clauses also refer to other modes of dispute settlement alongside negotiation, such as complaints mechanisms established under the treaty. For example, art 22 of the 1966 Convention on the Elimination of all Forms of Racial Discrimination refers to '[a]ny dispute…which is not settled by negotiation or by the procedures expressly provided for in this Convention'. The latter procedures allow for inter-State complaints to the expert Committee on the Elimination of Racial Discrimination established under the treaty, which may undertake fact-finding and appoint an ad hoc conciliation commission.[487] In its recent decision on preliminary objections in *Application of ICSFT and CERD (Ukraine v Russian Federation),* the Court found that negotiations and treaty procedures were alternative, not cumulative, requirements.[488]

189. The Court has had occasion in recent years to interpret what is required by compromissory clauses referring to prior negotiations. In *Application of CERD (Georgia v Russian Federation)*, interpreting art 22 of CERD's reference to 'any dispute…which is not settled by negotiation', the Court applied a seemingly rather stringent test, stating that 'negotiations are distinct from mere protests or disputations' and that the concept 'requires – at the very least – a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.' Although the treaty need not be expressly referred to by name, 'the subject matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question'.[489] A similar approach was taken in *Obligation to Prosecute or Extradite (Belgium v Senegal)* when interpreting art 30(1) of the Convention against Torture, which refers to 'any dispute…which cannot be settled through negotiation'.[490] Thus, the Court appears to treat as identical in meaning the condition that a dispute 'is not settled' and 'cannot be settled' by negotiation. In contrast, in its provisional measures order in the *Alleged Violations* case, the Court found that the phrase 'any dispute…not satisfactorily adjusted by diplomacy' in the Article XXI, paragraph 2 of 1955 Treaty of Amity was descriptive in character and hence that there was 'no need for the Court to examine whether formal negotiations have been engaged in or whether the lack of diplomatic adjustment is due to the conduct of one party or the other.'[491]

190. The requirement of attempted negotiation as a precondition for the Court's jurisdiction under many compromissory clauses departs from general international law, which does not require the exhaustion of diplomatic negotiations before a dispute can be unilaterally referred to adjudication or arbitration. Hence, disputes can be referred

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[485] For example, the 1997 International Convention for the Suppression of Terrorist Bombings, art 20(1); the 1999 International Convention for the Suppression of Financing of Terrorism, art 24(1).

[486] 2004 UN Convention on Jurisdictional Immunities of States and their Property, art 27(2).

[487] For a more recent provision of the same kind see art 42 of the 2006 International Convention for the Protection of all Persons against Enforced Disappearance.

[488] Judgment of 8 November 2019, paras 99–113.

[489] ICJ Reports 2011, 132-33, paras 157–161.

[490] ICJ Reports 2012, 445–46, para 57.

[491] Order of 3 October 2018, para 50.

to the Court under the Optional Clause without a previous attempt at negotiation,[492] in the absence of a specific reservation in the parties' declarations.[493] States' common inclusion of this requirement in compromissory clauses is in line with a general preference among States for diplomatic means of dispute settlement. Thus the *travaux* to the 2000 UN Convention against Transnational Organized Crime states that the requirement for negotiations in its compromissory clause 'to be understand in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies.'[494] Providing for negotiations as a precondition somewhat lessens the risk involved in accepting compulsory jurisdiction, since it ensures that the potential respondent will have a chance to attempt to settle the dispute diplomatically before it can be compelled to appear before the Court.[495] Even if the dispute does end up before the Court, prior negotiations may assist in delimiting the scope of the dispute and its subject matter.[496] On the other hand, if the requirement is interpreted strictly it may lead to significant delay, or otherwise may bar the Court from proceeding to the merits and contributing the resolution of the dispute.[497]

191. Starting in the 1970s,[498] it has become usual for compromissory clauses providing for compulsory ICJ jurisdiction to not only require negotiations, but also an attempt at arbitration before a dispute can be taken to the Court. A standard clause of this type provides that:

> Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.[499]

Thus the general approach in recent decades has been to provide for a three step approach to dispute settlement: first negotiation, then an attempt at arbitration, with recourse to the Court only if the other two methods of dispute settlement fail.[500] The most recent clause in a multilateral treaty to allow for unilateral recourse to the ICJ without an attempt at arbitration is the 2008 CMR Additional Protocol, a road transport treaty largely limited to European States and which replicates the compromissory clause

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[492] *Land and Maritime Boundary (Preliminary Objections),* 302–03, para 56.

[493] Cf the notice requirement recently introduced into the UK and Latvian declarations: para 93, above.

[494] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Official Records* (travaux préparatoires) *of the negotiation of the UN Convention against Transnational Organized Crime, Tenth session* (UN Doc A/AC.254/33), para 34; Sean D Murphy, 'Third Report on Crimes against Humanity', UN Doc A/CN.4/704, para 248.

[495] See Separate Opinion of Judge Greenwood in *Application of CERD (Georgia v Russia)*, ICJ Reports 2011, 328, para 13.

[496] *Mavrommatis Palestine Concessions,* Judgment No. 2, 1924, PCIJ, Series A, No. 2, p. 15; *Application of CERD (Georgia v Russia)* ICJ Reports 2011, 124, para 131.

[497] Cf Guzman 2008, 219.

[498] This form of compromissory clause seems to have first been introduced in the context of ICAO penal conventions dealing with aviation-related offences, such as the 1963 Tokyo Convention and the 1973 Montreal Convention: Nowak and Macarthur 2008, 859. The first treaty deposited with the UN Secretary General with a clause in this form appears to be the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons.

[499] Art 29(1) of the Convention on the Elimination of Discrimination Against Women.

[500] Akande 2016, 325.

in the 1956 CMR Convention;[501] before that one needs to go back to the 1989 UN Convention against Illicit Traffic in Narcotic Drugs. States' apparent preference shift towards inter-State arbitration in place of the ICJ will be discussed further in the next section of this report (section D).

192. As well as establishing preconditions to the Court's jurisdiction, compromissory clauses in recent decades almost invariably allow States to exempt themselves from compulsory jurisdiction while still becoming parties to the treaty. Two main models can be discerned. The first, while providing (subject to preconditions) for compulsory ICJ jurisdiction explicitly permit States to make a reservation to this clause at the time of signature or ratification, or of accession.[502] Reciprocity applies so that a party that has opted out under such a clause cannot rely on it to initiate a unilateral application against a State which has not opted out.[503] It is generally also made clear that the reservation can be withdrawn at any time.[504] Explicit opt out clauses of this kind appear to have become prevalent by the 1960s (see Figure 11, below).

193. An alternative model provides for compulsory ICJ jurisdiction only in relation to parties which have opted into such jurisdiction by an additional act. Two different methods of establishing an opt in mechanism can be found in treaty practice.[505] The earlier method involves establishing a separate Optional Protocol additional to the main substantive treaty providing for recourse to the ICJ. Parties to the main substantive treaty could thus choose whether or not to also become parties to the optional protocol. This model was used for the four law of the sea conventions of 1958,[506] for the 1961 Vienna Convention on Diplomatic Relations[507] and the 1963 Vienna Convention on Consular Relations,[508] but as a method of conferring jurisdiction on the ICJ has more recently has fallen out of favour. The newer method avoids the need for a separate protocol by incorporating an 'opt in' compromissory clause within the main treaty, providing for compulsory ICJ jurisdiction if States make an additional declaration at any time to that effect. Parties may withdraw their declarations, but (in contrast to the prevailing situation with declarations made under the Optional Clause) there may be a notice period imposed before such withdrawal becomes effective.[509] Generally, States also have the choice to opt in to compulsory arbitration, either in combination with or separately from ICJ jurisdiction. Such a clause was included in a number of treaties in

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[501] Laidlaw and Kang 2018, 33, para 62.

[502] See for example art 30(2) of the 1984 Convention against Torture: 'Each State may, at the time of signature or ratification of this convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article [providing for unilateral recourse to the ICJ following attempts at negotiation and arbitration]. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State party having made such a reservation.'

[503] Ibid.

[504] See for example art 30(3) of the 1984 Convention against Torture: 'Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations'.

[505] Galbraith 2013, 324.

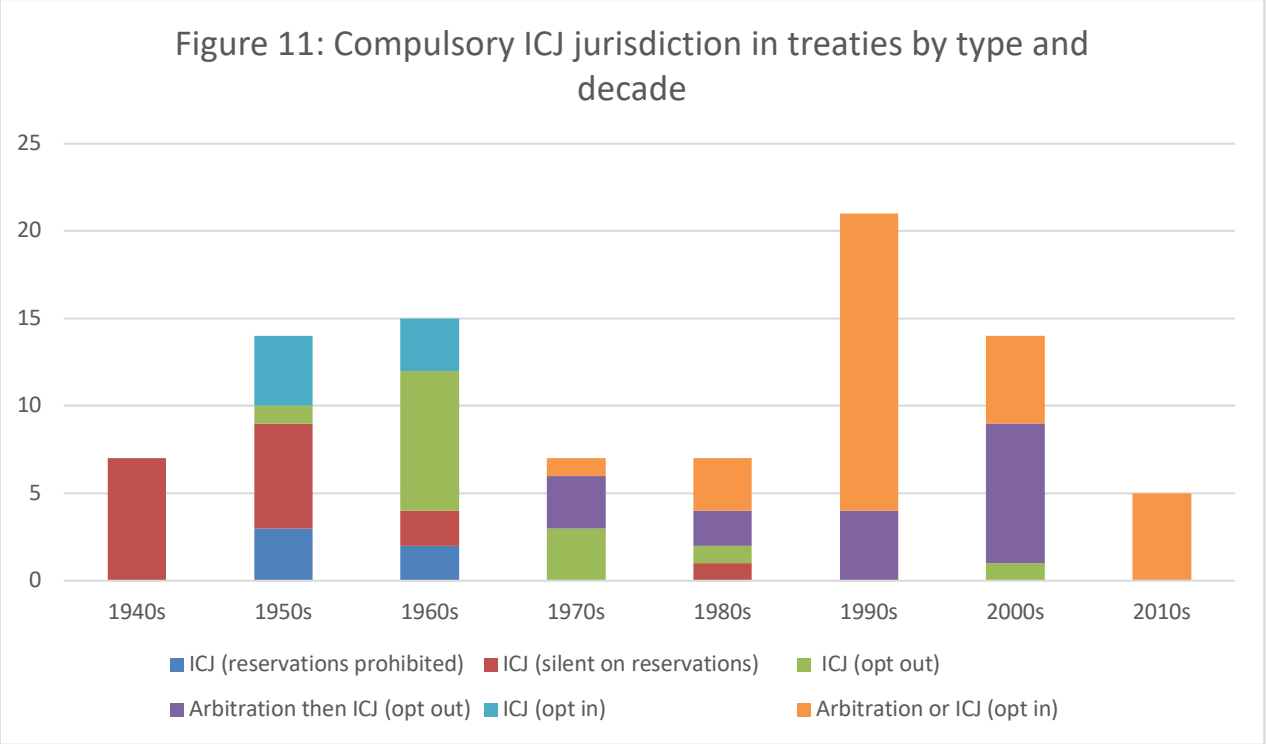
[506] Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, 450 UNTS 169.

[507] Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 500 UNTS 241.

[508] Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 596 UNTS 487.

[509] For example, art 9(3) of the 1994 Oslo Protocol on Further Reduction of Sulphur Emissions provides that opt-in declarations 'shall remain in force until it expires in accordance with its terms or until three months after written notice of its revocation has been deposited with the Depository.'

the 1970s; since the 1980s it has become extremely common in environmental treaties.[510]



194. An examination of compromissory clauses in treaties deposited with the UN Secretary-General which provide for unilateral recourse to the ICJ indicates a clear trend towards more limited clauses over time. As Figure 11 indicates, since the 1970s, almost all treaty acceptance of ICJ jurisdiction has explicitly allowed parties to opt out or required a further declaration to opt in. It is also clear that the increased number of compromissory clauses providing for ICJ jurisdiction in the 1990s was comprised largely of 'opt in' clauses (mostly in environmental treaties),[511] which are of very limited significance in practice since very few parties in fact opt in.[512]

iii) Variations in compromissory clauses by treaty subject matter

195. The decline in the number of new compromissory clauses including anything more than 'opt in' jurisdiction for the ICJ seems linked to changes over the decades in the subject matter of treaties deposited with the Secretary-General. New areas for multilateral treaty-making have emerged which States seem reluctant to submit to compulsory jurisdiction by a traditional judicial or arbitral forum.

[510] Laidlaw and Kang 2018, 37–38, para 72; see paras 196–197, below.

[511] The five post-2010 treaties all fall into this category: the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, the 2010 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, the 2013 Minamata Convention on Mercury, the 2015 Paris Agreement and the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.

[512] See para 197, below.

196. Two subjects to which this dynamic clearly applies are environmental protection and disarmament. Since the conclusion of the 1979 Convention on Long-Range Transboundary Air Pollution,[513] a large percentage of treaties deposited with the Secretary-General have concerned the environment, with the high point reached during the 1990s.[514] While since the 1985 Vienna Convention on the Ozone Layer[515] most environmental treaties have included a clause allowing parties to opt in to ICJ jurisdiction or arbitration (as discussed above), none of those in the sample have gone beyond this.[516] Very few States have opted in to the compulsory dispute settlement mechanisms under these treaties. For example, in relation to the 1998 Aarhus Protocol to the 1979 Convention on Long-Range Transboundary Pollution on Heavy Metals,[517] out of 34 parties only Austria, Liechtenstein and the Netherlands opt in in to both forms of compulsory dispute settlement, while Norway has opted in only to the compulsory jurisdiction of the ICJ, and this low rate is very typical.[518]

197. Environmental treaties almost invariably include compliance provisions separate to their clauses on traditional dispute settlement. These provisions require the parties to report at regular interviews on compliance with the treaty to the Conference of State Parties or to an expert committee, so that their actions are monitored and problems identified and addressed. States seem generally to prefer relying on such managerial approaches in the environmental context rather than traditional dispute settlement[519] (although nonetheless a number of environmental disputes have come before the Court in recent years).[520] This preference may reflect various factors, including that environmental damage is often diffuse rather than impacting one particular State and is not easily reversible or compensated. Thus collective, non-adversarial, and proactive methods seem generally preferred to adjudication, a bilateral and generally reactive mode of dispute settlement.[521] Environmental disputes also often involve consideration of complex scientific and technical evidence which States may feel the Court is not best-equipped to consider.[522] Alternatively, States may simply prefer to avoid legally binding determinations given the economic implications of compliance with environmental rules.

198. Similarly, since the 1970s a significant body of disarmament treaties have been concluded and deposited with the Secretary-General each decade.[523] These treaties never provide for the compulsory jurisdiction of the ICJ (or arbitration), not even in opt-in form, although some refer to judicial settlement only as one of a range of options

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[513] 1302 UNTS 217.

[514] 19 of the 48 treaties in the sample deposited with the UN Secretary-General in the 1990s are environmental treaties.

[515] 1513 UNTS 293

[516] See Laidlaw and Kang, 37–38, para 72.

[517] 2237 UNTS 4.

[518] Tams 2009, 476–78.

[519] Tams 2009, 479; generally Ulfstein 2007.

[520] For example *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICJ Reports 2010, 14 and the *Whaling* case.

[521] See Paulus 2007, 362–65; cf Galbraith 2013, 334.

[522] Paulus 2007, 365; see further para 227, below.

[523] See generally Marauhn 2007.

that the parties may choose to utilise by mutual consent.[524] Two arms control treaties, the Chemical Weapons Convention and the Comprehensive Nuclear Test Ban Treaty, which is not yet in force, additionally allow treaty bodies, subject to authorization by the General Assembly, to request an advisory opinion from the ICJ on any legal question arising within the scope of their activities.[525] The lack of compulsory dispute settlement provisions in such treaties reflects the special sensitivity of their subject matter, so closely connected with national security. In place of classic dispute settlement, these treaties often include reporting and inspection requirements to ensure compliance.[526]

199. ICJ compulsory jurisdiction plays a more significant role in human rights treaties, although the picture is mixed and shows variation over time. The earliest treaty deposited with the Secretary-General in this category is the 1948 Genocide Convention, which as already discussed contains a strong compromissory clause granting jurisdiction to the ICJ.[527] The next major human rights treaty to be concluded, the 1965 Convention on the Elimination of all Forms of Racial Discrimination, provided (as discussed above) for ICJ jurisdiction regarding disputes not settled by negotiation or a treaty complaints mechanism.[528] In contrast, the two UN human rights covenants concluded in 1966 do not provide for judicial or arbitral dispute settlement, instead setting up a compliance system based on reporting and monitoring.[529] Individual complaints mechanisms have also been established for most of the core UN human rights treaties to consider communications or petitions by individuals alleging violations of human rights.[530] The preference for such mechanisms reflects in part the perceived ineffectiveness of traditional bilateral inter-State dispute settlement in the human rights context.[531] More recent treaties reveal a similarly mixed picture regarding ICJ jurisdiction. 4 of the major substantive human rights conventions concluded since 1979 have included an opt-out compromissory clause providing for compulsory ICJ jurisdiction if negotiation and an attempt at arbitration fail.[532] The other two – the 1989 Convention on the Rights of the

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[524] For example the 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art XIV(2): see NUS Final Compilation, 275, <www.cil.nus.edu.sg/wp-content/uploads/2017/07/Final-Compilation.pdf> (accessed 1 December 2019).

[525] 1992 Chemical Weapons Convention, art XIV(5); 1996 Comprehensive Nuclear-Test-Ban Treaty, Art VI(5).

[526] Marauhn 2007, 257–66.

[527] See para 186, above.

[528] Thornberry 2016, 472.

[529] 1966 International Covenant on Economic, Social and Cultural Rights, arts 16–23; 1966 International Covenant on Civil and Political Rights, arts 40 to 42.

[530] See First Optional Protocol to the International Covenant on Civil and Political Rights; Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women; art 22 of the Convention against Torture; art 14 on the Convention on the Elimination of all Forms of Racial Discrimination; Optional Protocol to the Convention on the Rights of Persons with Disabilities; art 31 of the Enforced Disappearance Convention; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; Optional Protocol (on a communications procedure) to the Convention on the Rights of the Child. The Convention against Torture also provides for an inter-State complaints mechanism (in an Optional Protocol) which States have been highly reluctant to use: Nowak and McArthur 2008, 855.

[531] Nowak and McArthur 2008, 855-856.

[532] 1979 Convention on the Elimination of All Forms of Discrimination against Women (art 29), 1984 Convention against Torture (art 30), 1990 International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (art 92), 2006 International Convention for the Protection of all Persons from Enforced Disappearance (art 42).

Child and the 2006 Convention on the Rights of Persons with Disabilities – contain no dispute settlement clause.[533]

200. Treaties in three particular subject matter areas show a much higher tendency to include recognition of ICJ jurisdiction on at least an opt-out basis: refugees and stateless persons, narcotics and psychotropic substances, and penal matters.[534] The four treaties on refugees and stateless persons deposited with the Secretary-General, including the 1951 Refugee Convention[535] and the 1967 Protocol relating to the Status of Refugees,[536] provide for compulsory ICJ jurisdiction. The earlier treaty excludes reservations to this provision, while the latter allows explicitly allows States to opt out.[537] No cases have been brought to the ICJ on the basis of these treaties, and no new treaties in this area have been deposited with the Secretary-General since 1967. Four treaties on narcotic drugs and psychotropic substances were concluded between 1961 and 1988. These all allow for reference to the ICJ if parties have failed to resolve the dispute by negotiation or other consensual means, on an opt-out basis.[538] The 1988 Narcotics Convention is the second most recent treaty in the sample to provide for opt-out ICJ jurisdiction without requiring a prior attempt at arbitration.[539] .

201. In recent decades, the majority of new treaties providing for compulsory ICJ jurisdiction (although on an opt-out basis and only subsequent to an attempt at arbitration) have those categorized as concerning penal matters.[540] This classification covers a range of conventions coordinating international cooperation against *inter alia* corruption, transnational crime, human trafficking and terrorism. States' apparent greater willingness to accept ICJ jurisdiction in this context may reflect the fact that (as with narcotics treaties) most of these treaties combat actions which in general emanate from non-State actors and which undermine States' own authority.[541] From 1989 to 2005 12 treaties were concluded in this field, 10 of which provided for opt-out ICJ jurisdiction (following attempts at negotiation and arbitration).[542] One exception is the Rome Statute establishing the International Criminal Court: this vests responsibility for dispute settlement in the Assembly of States Parties, which can then 'make

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[533] Unsurprisingly the major IHL treaties (the four 1949 Geneva Conventions and their two additional Protocols), which are not deposited with the Secretary-General and thus fall outside the scope of this survey, also do not provide for ICJ jurisdiction: see Tams 2009, 472.

[534] Cf Laidlaw and Kang 2018, 29, para 57.

[535] 189 UNTS 137.

[536] 606 UNTS 267.

[537] Cf 1951 Refugee Convention, arts 38, 42; 1967 Protocol, arts IV, VII.

[538] 1961 Single Convention on Narcotic Drugs, arts 48, 50(2); 1971 Convention on Psychotropic Substances, arts 31, 32; 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 32.

[539] See para 191, above.

[540] See Murphy, 'Third Report on Crimes against Humanity', UN Doc A/CN.4/704, para 247.

[541] Although they may also catch within their provisions acts of State officials: see the recent interpretation of art 24 of the 1999 International Convention for the Suppression of the Financing of Terrorism in *Application of ICSFT and CERD (Ukraine v Russia),* Judgment of 8 November 2019, para 61.

[542] 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art 17; 1994 Convention on the Safety of United Nations and Associated Personnel, art 22; 1997 International Convention on the Suppression of Terrorist Bombings, art 20; 1999 International Convention on the Suppression of the Financing of Terrorism, art 24; 2000 UN Convention Against Transnational Organized Crime, art 35; 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, art 15; 2000 Protocol against the Smuggling of Migrants, art 20; 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, art 16; 2003 UN Convention Against Corruption, art 66; 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, art 23.

recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of the Court'.[543] The paucity of new treaties providing for compulsory ICJ jurisdiction (except on an opt-in basis) can be linked to the fact that no new multilateral treaties on penal matters have been deposited with the Secretary-General since 2005. However, the provisionally adopted draft articles on crimes against humanity provides for unilateral recourse to the Court without the standard requirement for a prior attempt at arbitration.[544] A multilateral treaty incorporating this provision would potentially constitute a significant expansion of the Court's compulsory jurisdiction.

iv) Analysis

202. As has already been indicated, the raw number of treaties referring to the ICJ is not sufficient to assess the actual extent of the ICJ's jurisdiction, since all recent compromissory clauses providing for ICJ jurisdiction either expressly grant States the right to make a reservation opting of the Court's jurisdiction or only apply if States make a declaration opting in. As Figure 11 shows, only a handful of multilateral treaties deposited with the Secretary-General contain a clause providing for compulsory ICJ jurisdiction and specifically prohibit reservations to that clause, and the most recent of these treaties was concluded in the early 1960s.[545]

203. A somewhat greater number of treaties among those surveyed (15) contain a compromissory clause providing for compulsory ICJ jurisdiction and are silent on the permissibility of reservations, but the vast majority of these are from the 1940s and 1950s.[546] The most prominent example of a treaty in this category is the Genocide Convention. A number of parties have made reservations to the compromissory clause of this Convention providing for compulsory ICJ jurisdiction, while other parties have made objections to these reservations.[547] One issue which arises is whether, where a treaty does not expressly allow reservations to a compromissory clause providing for compulsory jurisdiction, such a reservation might be found by the Court to be invalid as contrary to the object and the purpose of the treaty. This issue was decided in the negative by the Court in the *DRC v Rwanda* case in relation to the Genocide Convention.[548] Rwanda's reservation to Art IX was held to be valid, since it did not affect substantive obligations under the treaty and hence could not be regarded as contrary to its object and purpose. Some have expressed a desire for future reconsideration of this approach on the basis that compromissory clauses may be an essential part of the *raison d'être* of a treaty.[549] However, if the reservation were invalid it would raise the difficult question of whether it could be severed from the State's consent to be bound by the treaty, or whether the entire consent would be invalidated:

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[543] 1988 Rome Statute of the International Criminal Court, art 119. The other exception is the 2002 Agreement on the Privileges and Immunities of the International Criminal Court, which provides for arbitration: art 32.

[544] UN Doc A/CN.4/L.935, art 15.

[545] The 1961 Convention on the Reduction of Statelessness and the 1961 International Convention for the Protection of Performers, Producers of Phonographs and Broadcasting Organisations.

[546] The two more recent conventions in this category are the 1969 and 1986 Vienna Conventions on the Law of Treaties (arts 66), which provide for ICJ jurisdiction over disputes concerning the provisions relating to peremptory norms without providing expressly for a right to opt out of such jurisdiction by reservation. See Ruiz Fabri 2011, 1533-36.

[547] See Kolb and Krähenmann 2009, 434–35, 440.

[548] *Armed Activities (DRC v Rwanda)*, Jurisdiction and Admissibility, ICH Rep 2006, 6, 64–70.

[549] Joint Separate Opinion of Justice Higgins, Koojimans, Elaraby, Owada and Simma in *Armed Activities (DRC v Rwanda)* Jurisdiction and Admissibility, Judgment, ICJ Rep 2006. See also Kolb and Krähenmann 2009, 438; Kolb 2013, 502.

'only the former approach would actually confer jurisdiction on the Court, but…[t]he Court's traditional adherence to the importance of consent may make such a decision unlikely.'[550] In any case, the issue is of limited relevance in relation to more recent treaties providing for the compulsory jurisdiction of the ICJ, which at their strongest explicitly recognize a right to make a reservation to the compromissory clause. Without a major shift in attitude on the part of many States, this seems unlikely to change.

204. The reason why multilateral treaties, even where they provide for compulsory ICJ jurisdiction, include an explicit clause allowing States to opt out seems relatively simple: since a significant percentage of States are not willing to accept the Court's compulsory jurisdiction, providing a right of opt out is necessary to ensure wider participation in the treaty.

205. Despite the increase in the Court's case load since the 1980s, many States, including some of the most powerful, remain unwilling to accept ICJ jurisdiction via compromissory clauses. A study of treaties containing such opt-out clauses has found that on average about 20% of parties to multilateral treaties providing for compulsory ICJ jurisdiction make a reservation opting out.[551] States which almost invariably opt out include the United States and China. The US since the *Nicaragua* case has been unwilling to accept new treaty provisions granting the Court compulsory jurisdiction, with very rare exceptions (and none in the last two decades). The constitutional requirement that treaties be ratified by a two-third majority in the Senate creates a major obstacle in this regard. The most recent treaties in relation to which the US has accepted compulsory ICJ jurisdiction are the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 1991 Montreal Convention for the Marking of Plastic Explosives).[552] In China's case, a representative of the Chinese Foreign Ministry has stated that 'China does not accept compulsory jurisdiction of the International Court of Justice (ICJ)…In participating in multilateral conventions, we have made reservations without exception on the provisions concerning compulsory dispute settlement'.[553] Other States that almost always make a reservation to compromissory clauses providing for ICJ jurisdiction include Algeria, Bahrain, El Salvador, Cuba, India, Indonesia, Israel, Laos, Myanmar, Saudi Arabia, Singapore, South Africa, Thailand, Tunisia, Turkey, Venezuela, and Vietnam.[554]

206. On the other hand, opt-out compromissory clauses do significantly extend the Court's jurisdiction as most States (on average 80%) do not opt out. Further, such provisions generally impose a temporal restriction on the right to opt out by specifying that the reservation may be made only at the time of signature, ratification or accession to the treaty. While a party which has made such a reservation can withdraw it at any time, a party which failed to make a reservation at the specified time cannot introduce it at later date and thus cannot escape the Court's jurisdiction (unless by denouncing

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[550] Akande 2017, 327. For different approaches in other contexts, see Human Rights Committee, General Comment 24, CCPR/C/21/Rev/Add.6, para 14; European Court of Human Rights, *Bellilos v Switzerland* (1988) EHRR 466; also Swaine 2012, 291.

[551] Galbraith 2013, 309.

[552] See Murphy 2009, 99–111. The US ratifies these treaties in 1994 and 1997 respectively.

[553] Ma 2012, 391. China appears to have accepted only two treaty provisions providing for compulsory ICJ jurisdiction: art 84 of the ICAO Convention (which provides for a right of appeal of Council decisions to the ICJ) and art 64 ICSID (which allows inter-State disputes to be referred to the ICJ). See Ku 2012, 162.

[554] Cf Galbraith 2013, 331.

the treaty as a whole). New opt out compromissory clauses thus create a substantial and relatively stable increase in the Court's jurisdiction.[555]

207. In contrast, dispute settlement provisions which require States to opt in to the Court's jurisdiction by a separate declaration have a very low take up rate and thus have not meaningfully extended the Court's jurisdiction, at least where the opt in dispute settlement provision forms part of the same treaty which imposes the substantive obligations (as is the case in most environmental treaties). On average, only 5% of parties 'opt in'.[556] No case has ever come to the ICJ on the basis of such an 'integrated' opt in compromissory clause. In contrast the older practice of providing for the Court's jurisdiction in an Optional Protocol separate from the substantive treaty (most notably the Optional Protocols to the Vienna Conventions on Diplomatic Relations and on Consular Relations) seemed to attract a significantly higher participation rate,[557] and a number of cases have come to the Court on the basis of this instruments.[558]

208. Judge Owada, in a speech made while President of the Court, emphasised the desirability of treaties containing compromissory clauses providing for the compulsory jurisdiction of the Court, and that such clauses not be subject to reservations. He contended that:

> The Court plays a crucial role in ensuring the application of the conventions in question, without which the substantive obligations contained in the convention would be reduced to mere words. The Court provides a forum where State parties can raise situations of non-compliance in a concrete case, and it thus serves to contribute to the consolidation, clarification and development of the law contained in the conventions in question.[559]

209. Since a significant number of States are unwilling to accept the compulsory jurisdiction of the Court by treaty, it seems highly unlikely that many new treaties will be concluded providing for ICJ jurisdiction without a specific right to opt out. On the other hand, it is conceivable that States favourable to the ICJ's jurisdiction could succeed in including more compromissory clauses in future multilateral treaties providing for default compulsory ICJ jurisdiction with an explicit right to opt out. Practice shows that (since most States accept the default rule) opt out clauses significantly extend the Court's jurisdiction, while respecting the interests of those States that have an established policy of refusing to accept compulsory jurisdiction. Where an opt in approach is preferred, States should perhaps consider reviving the mechanism of establishing ICJ jurisdiction via a separate Optional Protocol, rather than by a compromissory clause within the same treaty, given the minimal take-up rate of the latter approach.[560]

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[555] See paras 30, 33 above.

[556] Galbraith 2013, 314.

[557] Galbraith 2013, 343. For example, the Optional Protocol to Vienna Convention on Diplomatic Relations has 70 parties; the Optional Protocol to the Vienna Convention on Consular Relations has 52.

[558] See para 31, above.

[559] Speech by HE Judge Hisashi Owada to the Legal Advisers of the UN Member States, 26 October 2010, available at <https://www.icj-cij.org/files/press-releases/5/16225.pdf > (accessed 1 December 2019).

[560] Galbraith 2013, 357.

210. More generally, there is seemingly a tendency for States to replicate a standard compromissory clause repeatedly in treaties falling within the same broad area. Although this may seem like a labour-saving, low-risk approach, it may be desirable for treaty drafters to devote more attention to the design of dispute settlement provisions in new treaties rather than adopt the 'off-the-shelf' model.[561]

[561] Galbraith 2013, 359–60.

SECTION D. INTER-STATE ARBITRATION AS AN ALTERNATIVE TO THE ICJ

211. The survey of treaty provisions in the previous section demonstrated that most recent treaties which provide for ICJ jurisdiction also refer to inter-State arbitration. This supports the view expressed in the literature that there has been a revival in States' interest in inter-State arbitration in recent decades, after a period of relative decline in the years following the Second World War.[562] Further evidence of this can be found in the increased number of parties to the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, which provide the legal basis for the Permanent Court of Arbitration. In 1970 only 70 States had acceded to one or both Conventions;[563] by 1 December 2019 the number of State Parties had greatly increased to 122.[564]

212. Inter-State arbitration provides an alternative mechanism for compulsory and binding resolution of disputes by a third party. In certain treaties from the immediate post-war era, including the General Act, the Revised General Act and the European Dispute Settlement Convention,[565] a distinction is drawn between the functions of adjudication and arbitration. Adjudication by the ICJ was seen as a mechanism for settling legal disputes on the basis of international law. Arbitration, in contrast, was allocated the function of settling non-legal disputes *ex aequo et bono*. However, this distinction is not reflected in more recent dispute settlement provisions or in the actual practice of inter-State arbitration.[566] Arbitration generally involves a binding decision being made strictly on the basis of international law, just like adjudication.

213. In line with the trend outlined in section C of this report, acceptance of compulsory arbitration generally takes place in the context of a compromissory clause in a subject matter specific treaty. While many bilateral dispute settlement treaties concluded during the inter-war and early post-war period provided generally for arbitration of disputes between the parties, arbitration under treaties of this kind has been rare in practice, and has only taken place following a subsequent special agreement to establish the arbitral tribunal.[567]

214. A more recent treaty which establishes a general framework for arbitration of any dispute between the parties is the 1992 Convention on Conciliation and Arbitration within the OSCE[568] (Organization for Security and Co-Operation in Europe).[569] In general this treaty requires mutual consent of the parties before a dispute can be referred to arbitration. However, article 26(2) of the Convention provides for a system modelled on the ICJ's Optional Clause, whereby States can declare (either for an unlimited period or a specified time) that they recognize the compulsory jurisdiction of

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[562] Indlekofer 2013, 100.

[563] Indlekofer 2013, 148.

[564] See 'Contracting Parties', Permanent Court of Arbitration/Cour Permanent d'Arbitrage, <https://pca-cpa.org/en/about/introduction/contracting-parties/> (accessed 1 December 2019).

[565] See discussion in Section C.1, above.

[566] Gray and Kingsbury 1992, 98.

[567] Gray and Kingsbury 1992 107: Indlekofer 2013, 154–55.

[568] 1842 UNTS 150.

[569] Although its role is only residual, so if other bodies (such as the ICJ) have jurisdiction, it will not: see Lamm 2014, 142.

an arbitral tribunal, subject to reciprocity. Unlike the Optional Clause system, reservations are specifically limited to 'disputes concerning a State's territorial integrity, national defence, title to sovereignty over land territory, or competing claims with regard to jurisdiction over other areas.' Only 6 States out of the 34 parties to the convention have accepted compulsory jurisdiction under this clause: Denmark, Finland and Sweden (without reservation); Greece (excluding disputes concerning national defence); and Malta and North Macedonia (excluding matters of territorial integrity and national defence).[570] All of these declarations were made for set times which have since elapsed, and it is not clear from the OSCE website whether they were renewed.[571] No case has ever been initiated under the Convention.

215. The previous section of this report demonstrated that compromissory clauses in recent decades often provide for arbitration in combination with, or as a separate option to, jurisdiction of the ICJ. There are in addition many treaties which provide for arbitration as the exclusive means for dispute settlement by a third party. Treaties with compromissory clauses of this type are common in the fields of transport, investment, trade and economic cooperation, as well as other more technical fields of international law.[572]

216. One important question is whether there has been a trend over time for inter-State arbitration to replace ICJ jurisdiction in compromissory clauses. Laidlaw and Kang's 2018 study of treaties to which the UN Secretary-General is the depository found that 75% of these treaties, or 178, included a dispute settlement provision of some kind. Of the 178 treaties including a dispute settlement provision, 140 (79%) contained some kind of compulsory mechanism (with or without an opt-out provision) allowing a unilateral application to a third party forum.[573] Arbitration was found to be far the most common compulsory mechanism, with 43% of these clauses providing for it as the primary or sole third party forum.[574] Only 24% of clauses referred the ICJ as the primary or sole third party forum, while 16% referred to conciliation and 17% to treaty bodies and other miscellaneous fora.[575] The study indicates that since the late 1960s arbitration has consistently outranked the ICJ as the most popular third party dispute settlement mechanism.

217. However, these statistics do not capture certain important distinctions between different types of compromissory clause providing for arbitration. Treaties which combine provision for arbitration with ICJ jurisdiction using the model described in paragraph 191 of this report are classified by Laidlaw and Kang as compulsory arbitration clauses, since they provide for arbitration as the initial third party settlement mechanism and compulsory adjudication by the ICJ only if the parties cannot agree on the organization of the arbitration.[576] As discussed in the previous section, many recent multilateral treaties concerning human rights and penal matters contain compromissory

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[570] Schenider and Müller-Wolf 2007, 23.

[571] See list showing signatures and ratifications or accessions, <www.osce.org/cca/40119> (accessed 1 December 2019).

[572] Cf Indlekofer 2013, 210.

[573] Laidlaw and Kang 2018, 26, para 52.

[574] Ibid, 28, para 55.

[575] Ibid.

[576] Ibid, 64–67.

clauses of this kind.[577] But these clauses do not provide a means for allowing the arbitration to be organized without the cooperation of both parties: the provision for arbitration is not self-executing.[578] In fact, it appears that inter-State arbitration rarely if ever takes place on the basis of this kind of compromissory clause, while in contrast several such disputes have ended up before the ICJ.[579] Thus, arbitration under these treaties is not truly compulsory; the ICJ remains the actually compulsory mechanism that is ultimately available even if one State is resisting third party dispute settlement.

218. In contrast, treaties that provide for arbitration as the ultimate dispute settlement mechanism generally include provisions which allow an arbitration to commence even if one party to the dispute does not cooperate in organizing it, notably by identifying a neutral authority which can appoint members of the arbitral tribunal in place of a non-cooperating party. Treaties of this kind provide for genuinely compulsory arbitration. An example of a treaty vesting this authority in the President of the ICJ was discussed in the previous section.[580] A more important example for this report is UNCLOS, which allows the President of ITLOS to appoint arbitrators where a party is not cooperating in the organization of an annex VII arbitration. UNCLOS thus provides for a genuinely compulsory form of arbitration, as is demonstrated by the recent *Arctic Sunrise*[581] and *South China Sea,*[582] where arbitration proceeded despite the lack of cooperation of the respondent State. UNCLOS will be discussed further in the next section of this report.

219. For this report further decade by decade analysis of the body of multilateral treaties for which the UN Secretary-General is depository has been undertaken, focussing specifically on treaties that provide for compulsory arbitration without providing a complementary role for the ICJ. As in Figure 11 (which dealt with compromissory clauses providing for compulsory ICJ jurisdiction in some form), these arbitration clauses have been divided into 4 classes: those which expressly prohibit reservations, those which are silent on the permissibility of reservations, those that provide for an express right to opt out from the compromissory clause, and those where compulsory arbitration is only available where both parties have opted in.

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[577] See the discussion in section C.3(iii), above.

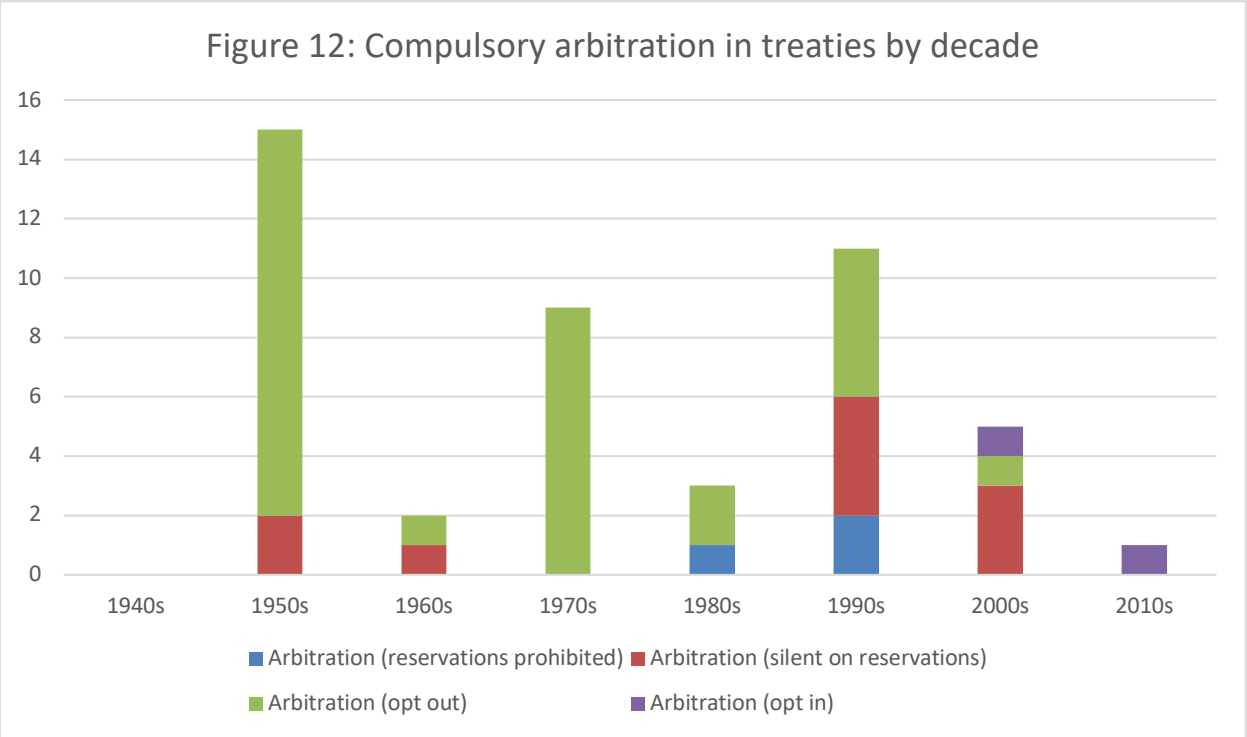
[578] Cf Gray and Kingsbury 1992, 107.

[579] See for example the 6 cases brought on the basis of the 1971 Montreal Convention and the 4 cases relying on the 1984 Convention against Torture: para 31, above.

[580] Art 32 of the 2002 Agreement on the Privileges and Immunities of the International Criminal Court, discussed in para 174, above.

[581] *Arctic Sunrise Arbitration (Netherlands v Russia)* PCA Case No 2014-02.

[582] *South China Sea Arbitration (Philippines v China)* PCA Case No 2013-19.



220. As will be seen, the number of treaties providing for compulsory arbitration to the exclusion of ICJ jurisdiction has fluctuated over the decades. The majority of UN-deposited treaties providing for compulsory arbitration (generally on an opt-out basis, with an express right to make a reservation) fall within the field of transport and communications, which includes treaties concerning customs matters as well as those facilitating cooperation in road and rail transport.[583] Particularly high numbers of treaties on these topics were concluded in the 1950s and the 1970s, often with a regional European focus and generally expressly allowing for reservations to the compromissory clause.[584] The number of treaties in this field (at least with the UN Secretary-General as depository) has declined in recent decades, contributing to the drop in the number of compulsory arbitration clauses in the sample from the 2000s and 2010s. In addition, recent UN-deposited transport treaties have been more varied in their choice of dispute settlement mechanism. For example, while two treaties made in the early 2000s concerning road and rail in the Arab Mashreq provide for compulsory arbitration (remaining silent on the permissibility of reservations)[585], three regional transport treaties concluded in Asia since 2000 utilise compulsory conciliation (with an express right of opt out) instead.[586]

221. While transport and communications treaties make up the highest number of UN-deposited treaties with compulsory arbitration clauses, it is in the law of the sea that arbitration plays the most practically important role. Although Part XV of the 1982

[583] Laidlaw and Kang 2018, 29-30.

[584] For example the 1957 European Agreement on Road Markings, art 14; 1974 European Agreement on Main International Traffic Arteries, art 13.

[585] 2001 Agreement on International Roads in the Arab Mashreq; 2003 Agreement on International Railways in the Arab Mashreq.

[586] 2006 Intergovernmental Agreement on the Asian Highway Network; 2006 Intergovernmental Agreement on the Trans-Asian Railway Network; 2013 Intergovernmental Agreement on Dry Ports. See Laidlaw and Kang 2018, 69.

United Convention on the Law of the Sea allows parties to choose between various fora for third party dispute settlement, as will be discussed further in the next section of this report, it provides for arbitration as the default mechanism. This same dispute settlement system applies to the 1995 Straddling Fish Stocks Agreement.[587] While parties are permitted to opt out of compulsory dispute settlement over certain specified categories of dispute by declaration, general reservations to compulsory dispute settlement are prohibited.[588]

222. The other main type of UN-deposited treaties providing for compulsory arbitration either establishes a new international institution or specifies the privileges and immunities of such an institution.[589] Generally these treaties are silent on their permissibility of reservations.[590] There are a few treaties on other subjects which provide for compulsory arbitration. In the environmental field, the 1994 Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Flora and Fauna[591] provides for compulsory arbitration (and is silent on the permissibility of reservations). In the field of health, the 2003 WHO Framework Convention on Tobacco Control[592] and the 2012 Protocol to Eliminate Illicit Trade in Tobacco Products[593] provide for compulsory arbitration but only on an 'opt-in' basis. As with treaties providing for opt in ICJ jurisdiction, very few parties have in fact opted in.[594]

223. This survey of UN-deposited treaties suggests that the number of compromissory clauses providing for compulsory arbitration without any complementary role for the ICJ has not dramatically increased. However, the body of treaties deposited with the UN Secretary-General give an incomplete view of the role of compulsory arbitration in modern treaty-making, since such treaties are not necessarily representative of the wider body of multilateral treaties. Treaties on specialised or technical matters may be more likely to provide for arbitration than ICJ jurisdiction, but are less likely to be deposited with the UN Secretary-General than with a UN specialised agency or some other depository. Furthermore, dispute settlement provisions in other multilateral treaties may not be in line with those in UN-deposited treaties on a similar subject matter. For example, while treaties concerning the environment deposited with the UN Secretary-General do not provide for compulsory ICJ jurisdiction or arbitration except on an opt-in basis, two regional environmental treaties in Europe – the 1999 Convention on the

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[587] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 2167 UNTS 3, art 30.

[588] See further section E of this report.

[589] For example the 1996 Agreement on the Establishment of the International Vaccine Institute, art VII and the 1997 Agreement on the Privileges and Immunities of the International Tribunal of the Law of the Sea, art 26.

[590] See the two treaties referred to in the previous footnote.

[591] 1950 UNTS 35, art 10.

[592] 2302 UNTS 166, art 27.

[593] Art 37.

[594] Out of the 181 parties, only Azerbaijan, Belgium, and Vietnam have opted into compulsory arbitration under art 27 of the WHO Convention on Tobacco Control. It is interesting to note that Vietnam, a country which generally makes a reservation to clauses providing for compulsory ICJ jurisdiction, has in this case chosen to opt into compulsory arbitration.

Protection of the Rhine and the OSPAR Convention[595] – establish compulsory arbitration mechanisms.

224. It remains true though that few of the wide range of treaty mechanisms providing for compulsory inter-State arbitration seem to have been used in practice. The majority of inter-State arbitrations in recent years appear to have been Annex VII arbitrations under Part XV of UNCLOS.[596] Since UNCLOS came into force in 1994, 15 cases have led to the commencement an Annex VII arbitration tribunal.[597] In the same time period, only 11 other inter-State arbitrations are recorded on the website of the Permanent Court of Arbitration.[598] Only 6 of these were initiated under compromissory clauses in existing treaties.[599] The other 6 were based on a special agreement.[600] The list on the PCA website is not comprehensive, as there seem to be at least some post-1994 inter-State arbitrations not listed there, including for example the *Italy v Cuba* arbitration initiated in 2004 by Italy on the basis of art 10 of the Italy-Cuba BIT.[601] Nonetheless, it does suggest that inter-State arbitration outside of the context of UNCLOS remains quite rare.

225. Despite the relatively limited recourse to inter-State arbitration in practice, it does seem clear that a number of States prefer it as a dispute settlement mechanism to adjudication by the ICJ. China, for example, which as discussed has adopted a policy of refusing without exception to accept the compulsory jurisdiction of the ICJ, has accepted compromissory clauses providing for compulsory arbitration in certain contexts, most notably UNCLOS. China's announced policy is that arbitration is acceptable as a supplementary means of dispute settlement in 'non-political bilateral treaties, including investment protection', and 'in some international technical conventions…including economic cooperation and trade, science and technology, transport, aviation, environment, health and culture,' but not in relation to human rights, counterterrorism, and transnational organized crime.[602]

226. A similar preference can be discerned among the 10 States in southeast Asia which are members of ASEAN. The 2010 ASEAN Protocol on Dispute Settlement Mechanisms,[603] which governs disputes concerning the interpretation or application of the ASEAN Charter and other ASEAN instruments (except those which expressly

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[595] 1992 Convention for Protection of the Marine Environment of the North-East Atlantic, art 32; see *Ireland v UK (OSPAR Arbitration),*<https://pca-cpa.org/en/cases/34/> (accessed 1 December 2019).

[596] Akande 2016, 323.

[597] Churchill 2017, 224, listing 14 cases, with the addition of *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v Russian Federation),* initiated in April 2019: see <https://pca-cpa.org/en/cases/229/>.

[598] See 'Cases', <https://pca-cpa.org/en/cases/> (accessed 1 December 2019).

[599] The 5 treaties in question were the 1991 Additional Protocol to the 1976 Convention on the Protection of the Rhine against Pollution by Chlorides *(Rhine Chlorides Arbitration,* initiated by the Netherlands pursuant to art 7 of the Protocol), the 1992 OSPAR Convention (*Ireland v UK)*, the 1960 Indus Waters Treaty (*Indus Waters Kishenganga Arbitration (Pakistan v India))*, the 1993 US-Ecuador BIT (since terminated by Ecuador) *(Ecuador v US)*, and the 2002 Timor Sea Treaty (*Timor-Leste v Australia*).

[600] *Eritrea/Yemen – Sovereignty and Maritime Delimitation in the Red Sea, Eritrea/Ethiopia Boundary Commission*, *Eritrea/Ethiopia Claims Commission*, *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, *Railway Land (Malaysia/Singapore)*, *Iron Rhine Arbitration (Belgium/Netherlands)*.

[601] See Potestà 2012.

[602] Ma 2012, 389–90.

[603] Text available at <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2010-Protocol-to-the-ASEAN-Charter-on-Dispute-Settlement-Mechanisms.pdf> (accessed 1 December 2019).

provide for an alternative mechanism for dispute settlement) makes no mention of the ICJ. It does however provide for arbitration, which can take place either by mutual consent or where consultation has failed and the ASEAN Co-Ordinating Council (made up of the Foreign Ministers of ASEAN member States) directs arbitration.[604] The Protocol thus makes a limited provision for compulsory arbitration (i.e. arbitration against the will of one of the parties to the dispute), where this is decided by the ASEAN Co-Ordinating Council.

227. Various factors may influence States to prefer arbitration to adjudication by the ICJ.[605] Arbitration allows the parties to the dispute to retain a greater degree of control over the dispute settlement process than adjudication by the ICJ, including over the selection of the arbitrators. A panel of specialists or technical experts may be selected, and in certain contexts this may be preferred to the Court, which is a generalist institution, particularly as international law has diversified to govern a range of more technical matters. For example, Annexure G of the 1960 Indus Waters Treaty[606] makes provision for one of the arbitrators to be a qualified engineer.[607] Relatedly, some have argued that arbitral tribunals perform better at fact-finding, particularly where this requires consideration of complex expert evidence.[608] Parties to arbitration have the flexibility to adopt rules of evidence that facilitate this task. In contrast, the Court's approach to witness testimony and expert evidence has sometimes been considered inadequate.[609] The parties may also potentially agree on procedures which may lead to a speedier result than the Court's, although the Court has been deciding cases more quickly on average in recent years[610] and in many cases delay may be attributable not to the Court but to the actions of one or both parties.[611]

228. Importantly for many States, arbitral pleadings and hearings can be kept confidential, which allows States to put forward arguments which might be politically embarrassing if made publicly or which could contribute as *opinio juris* to the formation of customary international law in a way which the State does not desire.[612] Parties to arbitration can exclude the possibility of third party intervention in the proceedings, which is allowed under certain circumstances by the ICJ's rules[613] (although these provisions have been interpreted quite narrowly by the Court, perhaps in part to avoid losing cases to arbitration).[614] Arbitration can also hear cases involving non-State actors like the EU as parties, which could only be brought to the ICJ through the awkward mechanism of allowing the international organization to request via an authorised UN

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[604] Arts 9, 10; see Naldi 2014.

[605] See Akande 2016, 329–32.

[606] 419 UNTS 125.

[607] Indlekofer 2013, 220; see the *Indus Waters Kishenganga Arbitration (Pakistan v India),* available at <https://pca-cpa.org/en/cases/229/> (accessed 1 December 2019).

[608] Sands 2015, 795–96.

[609] Sands 2015 795; Brown 2016, 194. See *Pulp Mills,* Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, ICJ Reports 2010, 108.

[610] Sands 2015, 793–94.

[611] Akande 2016, 331–32.

[612] Gray and Kingsbury 1992, 110–11.

[613] Arts 62, 63 ICJ Statute; see Indlekofer 2013, 227.

[614] Gray and Kingsbury 1992, 112–13.

organ or agency a 'binding' advisory opinion.[615] Dissatisfaction with the outcome of a particular case at the ICJ may also influence a particular State to prefer arbitration thereafter: examples include Thailand following the *Temple* case and France for several decades following the *Nuclear Tests* case.[616]

229. On the other hand, there are practical disadvantages to arbitration for the States involved. Most obviously, they will bear the costs of the arbitrators' fees and the premises, rather than taking advantage of a pre-existing institution that is already paid for[617] (though these savings may be outweighed if ICJ proceedings take longer than arbitration would).[618] Although both are legally binding, in practice a decision by an arbitral tribunal may not necessarily have the same legitimacy and 'compliance pull' as a decision by the ICJ, making it somewhat easier for a losing State to ignore. Of course, States may consider this an advantage rather than a disadvantage, depending on their cost-benefit analysis of the rewards and risks involved in third party dispute settlement.[619] Thus, Chinese commentary justified its rejection of the decision of the arbitral tribunal in the *South China Sea* case on the basis, *inter alia,* that it was not made by a court.[620] On the other hand, it is not clear that the compliance rate for arbitral decisions is less than for decisions of the ICJ or other standing international courts.[621]

230. A concern arising from the *ad hoc* nature of the membership of arbitral tribunals is that increased reliance on arbitration could potentially detract from the development of consistent case law.[622] Relatedly, where arbitral proceedings are kept partly confidential, they may resolve the particular dispute between the parties, but they do not necessarily fulfil the broader function which a court may perform, of clarifying the law in the interests of the broader legal community. In light of the complex relationship between the two forms of dispute settlement, the announcement by the Court's President last year that ICJ judges will only participate in inter-State arbitration in exceptional circumstances is an interesting development.[623]

231. It is worth briefly noting that treaties which do not provide for compulsory ICJ jurisdiction or arbitration, or which provide for these only on opt-out or an opt-in basis, may instead establish a process for unilateral referral of disputes concerning the treaty to a conciliation committee. This approach was pioneered by the 1969 Vienna Convention on the Law of Treaties,[624] which established conciliation as the only compulsory procedure for disputes arising from the treaty (except for those involving peremptory norms) and provided a detailed institutional framework allowing the conciliation process to operate even without the cooperation of one of the parties to

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[615] See art 66(2), 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[616] Gray and Kingsbury 1992, 109–110.

[617] Miron 2014, 245–46.

[618] Sands 2015, 795.

[619] Brown 2016 194.

[620] Roberts 2017, 247.

[621] Sands 2015, 792–93.

[622] Kolb 2013, 49–50.

[623] And that they will not participate at all in investor-State or commercial arbitration: Speech by HE Judge Yusuf, 25 October 2018: https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf.

[624] Art 66(b) and Annex.

the dispute.[625] Compulsory conciliation is particularly prominent in treaties in the environmental field, where it generally is established as a default compulsory mechanism if States do not opt in to compulsory ICJ jurisdiction or arbitration.[626] UNCLOS also provides a role for conciliation as a compulsory mechanism available for certain classes of disputes regarding which compulsory adjudication or arbitration is excluded.[627] As mentioned above, conciliation seems preferred to arbitration or ICJ jurisdiction in recent treaty practice among certain Asian States.[628]

232. Compulsory conciliation seems to reflect a compromise between States which would prefer provision for compulsory adjudication or arbitration and those sceptical of the value of any compulsory procedure. Unlike adjudication or arbitration, conciliation does not lead to a legally binding decision and ultimately relies on the parties to come to a consensual settlement of their dispute. The utility of compulsory conciliation can therefore be questioned, and its use in practice has been infrequent. However, the first compulsory conciliation to take place pursuant to UNCLOS article 298, initiated in 2016 by Timor-Leste against Australia, led to the parties in 2018 signing a treaty to resolve the longstanding maritime boundary dispute between the two countries.[629] This suggests that in the right circumstances compulsory conciliation can play a beneficial role in bringing parties in dispute to an agreed resolution.

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[625] See Adede 1987, 173; Laidlaw and Kang 2018, 34.

[626] For example, the 1985 Vienna Convention on the Protection of the Ozone Layer, art 11(4),(5); 1992 Framework Convention on Climate Change, art 14(5)-(7); see Laidlaw and Kang 2018, 50, para 98.

[627] UNCLOS arts 297, 298; see paras 261-62, below.

[628] See para 220, above.

[629] *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, available at <;https://pca-cpa.org/en/cases/132/>; for commentary see Klein 2019.

SECTION E. DISPUTE SETTLEMENT UNDER PART XV UNCLOS

233. The 1982 UN Convention on the Law of the Sea constituted a major step forward for the principle that inter-State disputes should be subject to compulsory third party dispute settlement.[630] Part XV of the Convention provides that, if a dispute concerning the interpretation or application of the Convention has not been settled by other peaceful means and the parties have not agreed on another dispute settlement procedure, it can be referred by any party to a court or tribunal for binding dispute settlement by any one of the parties to the dispute.

234. Unlike most compromissory clauses in multilateral treaties,[631] UNCLOS does not expressly indicate that the parties must negotiate on the substance of the dispute before it can be referred to adjudication or arbitration.[632] Instead, art 283 provides that the parties to a dispute 'shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means'. This obligation concerns the procedures to be used to resolve the dispute, rather than requiring negotiation on the underlying substantive dispute itself.[633] . While this requirement has been interpreted as a precondition to the exercise of jurisdiction by a Part XV court or tribunal, the threshold imposed has been low[634] and jurisdiction has never been declined on this basis.[635] This contrasts with the more formalistic interpretation of preconditions to jurisdiction in some of the recent ICJ cases under compromissory clauses[636] and the Optional Clause.[637]

235. Innovatively, rather than imposing a single forum for this process, art 287 UNCLOS provides a range of options among which parties can choose by making a declaration: the International Tribunal for the Law of the Sea (a specialist court created under UNCLOS), the ICJ , arbitration under Annex VII, and special arbitration under Annex VIII. Annex VII arbitration is conducted in line with the typical rules and procedures for inter-State arbitration, while Annex VIII special arbitration provides for the selection of scientific and technical experts as arbitrators and empowers the tribunal to carry out inquiries and undertake fact-finding functions in relation to disputes concerning fisheries, environmental protection, marine scientific research and navigation. If the parties to a dispute have not made declarations under art 287, or if they have not chosen the same forum, Annex VII arbitration applies as the default forum.

236. There are exceptions to the application of these compulsory mechanisms of dispute mechanisms, some of which apply automatically (art 297) and some of which are optional (art 298). In some contexts where an automatic or optional limitation prevents recourse to the usual mechanisms for (legally binding) compulsory dispute settlement,

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[630] See generally Adede 1987; Klein 2005.

[631] Paras 187 to 190, above.

[632] *Chagos Marine Protetcted Area Arbitration (Mauritius v UK)*, Award of 18 May 2015, para 379 (although the Tribunal raised the possibility that such a requirement may be implied from the structure of sections 1 and 2 of Part XV).

[633] Bankes 2017, 255–56.

[634] *Arctic Sunrise (Netherlands v Russian Federation)*, Award on the Merits, 14 August 2015, para 151.

[635] Bankes 2017, 256.

[636] See para 189, above.

[637] See para 86, above.

conciliation can be initiated by unilateral application instead (arts 297(2),(3); 298(1)(a)).[638] States parties are not permitted to introduce any additional limitations to the compulsory dispute settlement system by reservations (art 309).

237. UNCLOS, and the related 1995 Implementation Agreement relating to Straddling Fish Stocks and Highly Migratory Fish Stocks, are almost the only treaties deposited with the UN Secretary-General since the 1960s to both 1) provide for compulsory adjudication or arbitration and 2) to explicitly prohibit reservations allowing parties to generally avoid the compulsory dispute settlement system.[639] UNCLOS thus provides for a much stronger system of compulsory dispute settlement than most other major multilateral treaties, which as discussed in the previous section usually (at best) explicitly allow States to make a reservation at the time of signature, ratification or accession to avoid any exposure to compulsory dispute settlement.[640]

238. Part XV, like UNCLOS as a whole, is the product of a series of complex negotiations requiring compromise between widely divergent viewpoints. The *travaux préparatoires* show that States were divided on whether provisions for compulsory dispute settlement should be included in the Convention. Some States from the developing world considered that accepting compulsory adjudication or arbitration would compromise their sovereignty, and argued that the relevant provisions should be contained in an Optional Protocol rather than forming an inherent part of the Convention which all States must accept. States taking this view included China[641] and India.[642] However, the great majority of States considered compulsory dispute settlement as an essential prerequisite for the effective functioning of UNCLOS. States taking this view included most smaller developing States, Western-aligned States (including the United States, which prior to the *Nicaragua* case was generally a champion of compulsory dispute settlement)[643] and the Soviet Union (a major maritime and fishing State) and its eastern European allies,[644] despite the general scepticism of the Soviet bloc towards compulsory dispute settlement in other contexts.[645]

239. Various reasons were given by States for their insistence on compulsory dispute settlement. The text of UNCLOS reflects a series of 'delicate compromises' between the views of different groups of States.[646] Given this, compulsory dispute settlement was widely seen as necessary to 'prevent [UNCLOS] from unravelling in the face of unilateral State action, and…ensure its uniform interpretation.'[647] Some States pointed to the innovative nature of many of the provisions in UNCLOS as a reason why

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[638] Adede 1987, 173, 253-57.

[639] One other such treaty among those whose depository is the UN Secretary-General is the 1994 Agreement to establish the South Centre, an intergovernmental organization for developing nations, which provides for arbitration of disputes by a panel established by the South Centre's Board (art XVI) and prohibits all reservations (art XVI).

[640] Cf Adede 1987, 68.

[641] UN Doc A/CONF.62/SR.60, para 27.

[642] UN Doc A/CONF.62/SR.59, para 42.

[643] UN Doc A/CONF.62/SR.61, paras 17 to 19.

[644] Adede 1987, 86–87.

[645] See Shaw 2015, I.37; also paras 41, 184 above.

[646] Churchill 2017, 218.

[647] Ibid.

compulsory adjudication or arbitration was needed.[648] Some of these provisions, such as those concerning coastal States' right to a 200 nautical mile exclusive economic zone (EEZ), which would foreseeably give rise to interpretative disputes between coastal and shipping States and requiring compulsory dispute settlement to prevent abuse. On the other hand, smaller and developing States generally supported compulsory dispute settlement as a means of responding to violations of the Convention by more powerful States, while some at the same time sought to exclude the actions of coastal States within the territorial sea and the EEZ from the scope of Part XV.[649] As finally agreed, Part XV balances a general principle of compulsory dispute settlement with several important exceptions, notably that an agreement between the parties may exclude the UNCLOS mechanisms or elect an alternative binding method of settlement (arts 281 and 282) and also the automatic and optional exceptions in arts 297 and 298.

240. UNCLOS currently has 168 State parties: 164 out of 193 UN member States, as well as Palestine, Cook Islands, Niue and the European Union. Given the large number of parties to UNCLOS, it is clear that a number of States that almost always opt out of compulsory dispute settlement in other treaties have been willing to accept it in this context. Notable examples are China, which ratified UNCLOS in 1996 and India, which did so in 1995 (despite the opposition of both States to compulsory adjudication or arbitration during the drafting process).[650] Other UNCLOS parties in this category include Algeria, Azerbaijan, Bahrain, Cuba, Indonesia, Myanmar, Qatar, Saudi Arabia, Singapore, Vietnam and Zimbabwe. Most of these States ratified UNCLOS in the 1990s,[651] a decade which in retrospect appears to have been a recent high point for multilateralism.[652] The willingness of these States seems to confirm that the most effective way to get States to consent to compulsory dispute settlement mechanisms is to incorporate them as an inherent part of a substantive treaty which is seen as bringing real benefits to the parties.

241. Of the 29 UN member States which are not UNCLOS parties, 15 are landlocked States.[653] The remaining 14 States are Cambodia, Colombia, El Salvador, Eritrea, Israel, Iran, Libya, North Korea, Peru, Syria, Turkey, the United Arab Emirates, the United States and Venezuela. Most (although not all) of these States are among those that generally refuse to accept compulsory jurisdiction. Certain of these States also have substantive interests which lead them to be reluctant to ratify the Convention. For example, Iran opposes the UNCLOS regime allowing all ships a right of transit passage through straits use for international navigation, seeing the transit of foreign warships through the Strait of Hormuz as a threat to its security.[654] Turkey opposes the provisions in art 121(1) UNCLOS which accord the same maritime entitlements to

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[648] See for example UN Doc A/CONF.62/60, para 1 (Netherlands), para 49 (Cyprus); UN Doc A/CONF.62/62 paras 85, 86 (Philippines).

[649] Churchill 2017, 218.

[650] See para 238, above.

[651] For example, Vietnam ratified in 1994, India in 1995, China and Saudi Arabia in 1996. See https://treaties.un.org (accessed 1 December 2019).

[652] As also reflected in the high number of compromissory clauses referring to the ICJ in treaties concluded that decade: see para 181, above.

[653] 2 of these States, Kazakhstan and Turkmenistan, border the Caspian Sea, the legal status of which (whether it is a sea or lake) has been disputed. The 2018 Convention on the Legal Status of the Caspian Sea, to which the five littoral States are parties, suggests that the Caspian Sea has a *sui generis* special legal status.

[654] Bagheri 2015, 86–87.

islands as to mainland territory, given the large number of Greek islands very close to its coast in the Aegean Sea.[655]

242. As mentioned, the United States was a supporter of compulsory dispute settlement during the negotiation of UNCLOS.[656] Despite the United States' shift to a generally sceptical attitude to international adjudication and arbitration since the *Nicaragua* case, three successive US Administrations (under Presidents Clinton, George W Bush and Obama) have attempted to convince the US Senate to ratify UNCLOS. Administration officials argued that upholding the law of the sea, in particular the right to freedom of navigation, was in the US interest as the predominant maritime power and that the US's non-party status undermined its ability to respond to violations by other States,[657] as well as its ability to influence the future interpretation and application of the Convention.[658] However, each administration has been frustrated by a failure to gain a two-thirds majority for ratification in the Senate. Senate opponents have referred to the compulsory dispute settlement system as one of their main objections to UNCLOS.[659]

E.1 Choice of forum under art 287 UNCLOS

243. While the preponderance of States involved in negotiating the text of UNCLOS supported the principle of compulsory dispute settlement, States could not agree on the choice of a single forum. Developing States tended to oppose according the ICJ a role. This reflected the fact that UNCLOS was negotiated during the Court's post-*South West Africa* nadir when the ICJ was perceived by many as unrepresentative and Western-dominated.[660] Many of these States supported the creation of a new specialist court which would include more judges from the developing world. They also argued that a new tribunal could develop greater specialist expertise, deliver speedier judgments and better handle law of the sea disputes with both legal and technical aspect.[661] It was also pointed out that non-State parties, including international organizations and private companies involved in seabed exploitation, could also be allowed access to the new tribunal, unlike the ICJ.[662]

244. Western European and Latin American States generally supported reference to the ICJ,[663] referring to the costs of establishing a new court and the risk that multiple tribunals could produce conflicting jurisprudence.[664] In response to the latter concern, it was argued that institutional competition between different tribunals would in fact

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[655] Oral 2009.

[656] Adede 1987, 15-16

[657] See e.g. Prepared Statement of John F Turner, Assistant Secretary of State, US Senate Exec Rep 108-10, (March 11, 2004) 85–87.

[658] Testimony of William H Taft IV, Legal Adviser, Department of State, US Senate Exec Rep 108-10 (March 11, 2004), 90–91.

[659] See Statement of Secretary of State Hilary Clinton, Senate Hearings 112-654 (May 23 2012), 10; 50-51 (Senator DeMint).

[660] Churchill 2017, 220

[661] For example, UN Doc A/CONF.62/SR.61, para 55 (Cuba).

[662] UN Doc A/CONF.62/SR.62, para 65 (Bangladesh).

[663] See for example UN Doc A/CONF.62/SR.59, paras 13-15 (United Kingdom),

[664] UN Doc A/CONF.62/SR.38 (Federal Republic of Germany).

increase the quality of the case law produced.[665] France, reflecting no doubt its alienation from the ICJ following the *Nuclear Tests* case, argued for arbitration as the main dispute settlement mechanism, emphasising the greater responsiveness of this mechanism to the desires of the parties in a particular dispute.[666] The Soviet bloc championed a separate model which would reserve most categories of disputes to specialist arbitral tribunals comprised of technical and scientific experts, potentially with a residual role for the ICJ concerning more general interpretative disputes.[667]

245. In the end, as States were unable to agree on a particular forum, they accepted the right of States to choose among the ICJ, ITLOS (the specialist court created by UNCLOS), standard inter-State arbitration under Annex VII, and special arbitration under Annex VIII. Although there was an attempt to assign ITLOS jurisdiction as the default forum where parties had not chosen a forum or where they had not chosen the same one, ultimately Annex VII arbitration was substituted as the default forum as the most generally acceptable 'second choice'.[668] The deficiencies of arbitration in urgent cases was addressed by providing ITLOS with jurisdiction to order provisional measures pending the constitution of an arbitral tribunal under art 290(5),[669] as well as over all applications for prompt release of vessels and crews under art 292.[670]

246. Article 287 allows parties to make a written declaration selecting one or more of these four means of compulsory dispute settlement. Such declarations may be made when signing, ratifying or acceding to the Convention or at any time thereafter (art 287(1)). Parties may revoke an art 287 declaration at any time, but the declaration shall remain in force until 3 months after notice of revocation has been received by the UN Secretary-General (art 287(5)).[671] Thus the parties are expressly prevented from making their art 287 declarations terminable with immediate effect, which provides a contrast with the common inclusion of such provisos in ICJ Optional Clause declarations (discussed in Part B.2 of this report).

247. As of December 2019, 53 of the 168 parties to UNCLOS have made declarations selecting a particular forum or fora under art 287.[672] Of these, three States (Bangladesh[673], Panama[674] and Nigeria[675]) have made declarations applying only to

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[665] UN Doc A/CONF.62/SR.60, para 52 (Thailand).

[666] UN Doc A/CONF.62/SR.59, paras 2-12; Adede 1987, 83.

[667] Adede 1987, 82-83.

[668] Adede 1987, 103, 134-36; for criticism of this outcome see Oda 1995.

[669] The availability of provisional measures under UNCLOS raises similar issues to those discussed in the context of the ICJ at paras 69, 71, above.

[670] ITLOS's Seabed Disputes Chamber was also vested with compulsory jurisdiction over disputes between a range of parties, both State and non-State, concerning activities in the international seabed area: see art 287(2).

[671] It would seem that in contrast, as with Optional Clause declaration, an art 287 declaration which does not replace an existing declaration takes effect immediately on deposit with the Secretary-General. Thus, by making an art 287 declaration a party can 'ambush' of a party with an existing art 287 declaration: cf UN Doc A/CONF.62/SR65, para 6 (Canada).The unfairness to the respondent State is obviously less severe in this context than in that of the Optional Clause, since the 'ambush' only involves the choice of forum rather than the very existence of compulsory jurisdiction.

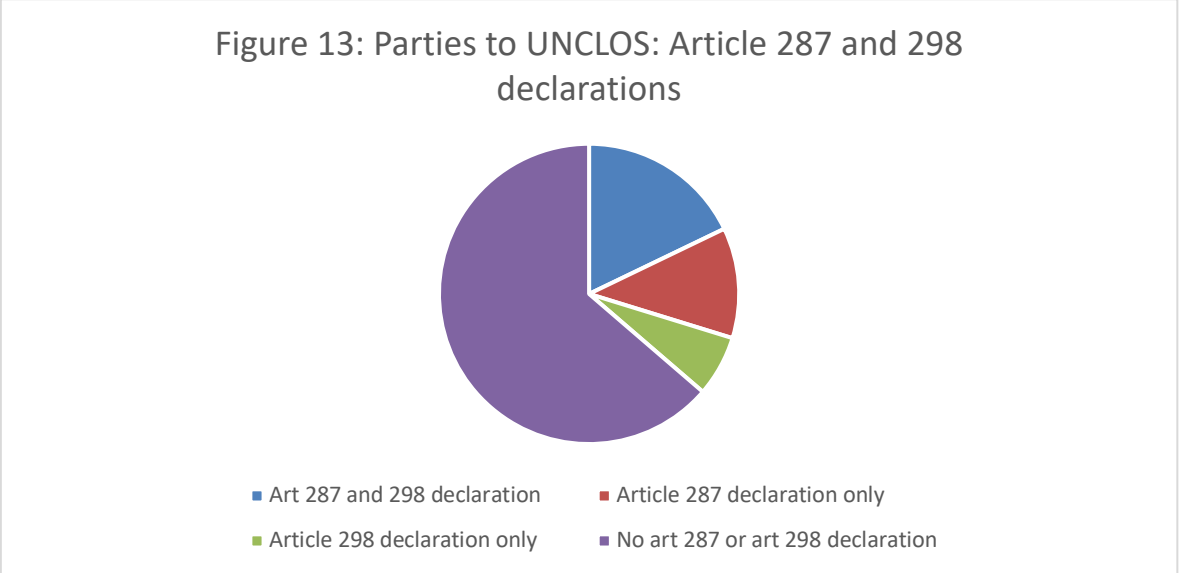
[672] See ITLOS, 'Declarations Made by State Parties under art 287', <www.itlos.org/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/> (accessed 1 December 2019).

[673] In regard to maritime delimitation disputes with India and Myanmar in the Bay of Bengal.

[674] In regard to the detention of the NORSTAR, a tanker flying the Panamanian flag.

[675] In regard to the dispute with Switzerland concerning the M/T 'San Padre Pio'.

specific disputes, leaving 50 parties which have made a choice of forum under art 287 which applies generally to all UNCLOS disputes. Of these 50 States, 30 have also made a declaration under art 298 regarding the optional exceptions to compulsory jurisdiction under UNCLOS, while 20 States have made a 287 declaration without an art 298 declaration.



248. The relatively low proportion of parties which have made an art 287 declaration may be considered surprising, given the importance which States appeared to accord to the issue of forum choice during the drafting process. One commentator has suggested that in many cases the failure to make an art 287 declaration may simply be due to 'bureaucratic inertia in national governments.'[676] This seems in line with the findings referenced in section C.2 of this report, that treaty parties generally tend to accept the default position regarding dispute settlement rather than to utilize opt out or opt in clauses.[677] However, in the UNCLOS context, the quite low number of art 287 declarations may in many cases reflect a conscious preference for annex VII arbitration which applies as the default mechanism.[678] As discussed in section D of this report, arbitration seems to be preferred to judicial settlement by many States since it allows them to retain a greater degree of control over the dispute settlement process.

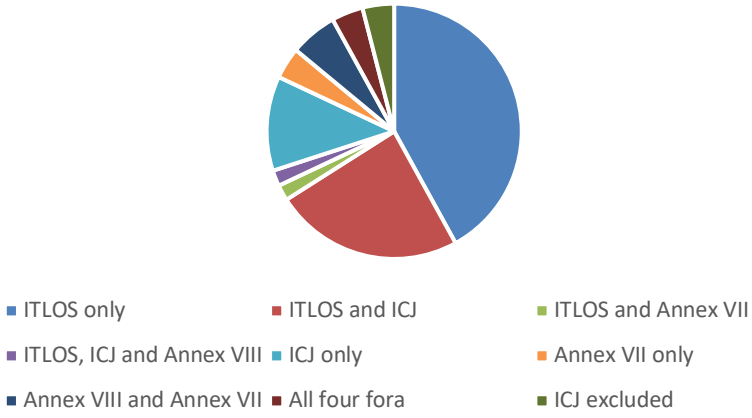
249. A table setting out the choice of forum of those parties which have made declarations under art 298 is found in **Annex 2** to this report. Of the 50 generally applicable declarations under art 287, some select only one mechanism, whereas others select more than one. Of those that select more than one, some rank the mechanisms in order of preference whereas others select them without specifying that one has precedence over the other. For the purpose of analysing States' preferences between different fora, the statistics in this section consider only States' first preference, counting a State as choosing more than one mechanism only if they are unranked.

[676] Churchill 2017, 220

[677] See para 206, above.

[678] Successive US administrations have indicated that if the US ratified UNCLOS, it would choose Annex VIII where it applies and Annex VII arbitration for all other disputes: Murphy 2009, 64.

Figure 14: First preference choices in Art 287 UNCLOS declarations



250. Applying this metric, 22 States have chosen ITLOS as their sole first preference choice under Art 287. Many of these States are in the global South, including Algeria, Angola, Argentina, the DRC, Madagascar, Tunisia, and Tanzania. But a number of European States also fall within this category, including Austria, Bulgaria, Croatia, Germany, Greece, Hungary and Switzerland.

251. Only 6 States have chosen the ICJ as their sole first preference. These States include four States in northern Europe (Denmark, Norway, Sweden and the UK) and two States in Central America (Honduras and Nicaragua, which since its success in the *Nicaragua* case has been among the Court's most loyal 'customers').[679] 12 States choose both ITLOS and the ICJ, without ranking them. These States are mostly European States, as well as Australia, Oman, and most recently Togo (which made its art 287 declaration in April 2019).

252. 2 States (Egypt and Slovenia) have chosen annex VII arbitration as their sole first preference. 3 States (Belarus, Russia and Ukraine) have identical declarations which choose Annex VIII special arbitration for those disputes to which it applies, i.e. those relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, including pollution from vessels and by dumping. This choice is in line with support for these special procedures from the Soviet Union during the drafting of the Convention.[680] Annex VII arbitration is selected for all other disputes. These 3 States also state they recognize ITLOS's jurisdiction in respect of the prompt release of detained vessels or their crews, although this seems unnecessary since according to art 292 of the Convention ITLOS has jurisdiction over prompt release claims independent of States' choice of forum under art 287.

253. One State, Canada, has chosen ITLOS and annex VII arbitration as equal first preferences. 2 States (Ecuador and Mexico) have chosen with equal preference ITLOS, the ICJ and annex VIII special arbitration (but not annex VII arbitration). 2 States (Timor-Leste and Portugal) have selected all four dispute settlement mechanisms. 2 States (Cuba and Guinea-Bissau) do not make a positive selection but specifically

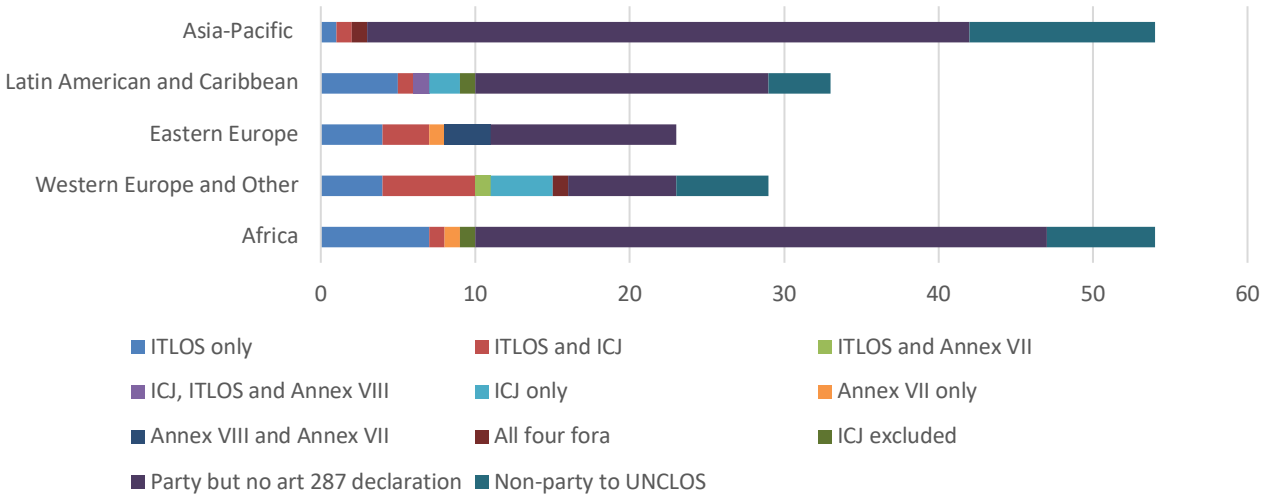
[679] See para 63, above.

[680] See para 244, above.

exclude ICJ jurisdiction, although this would seem to be strictly speaking unnecessary. Guinea-Bissau's declaration sits oddly with the fact that it has an Optional Clause declaration in force (dating back to 1989) which does not include any reservations.[681]

254. All in all, 37 declarations thus choose ITLOS, either solely or as their equal first preference; 20 choose the ICJ; 8 choose annex VII arbitration; and 6 choose special arbitration under annex VIII. ITLOS is thus a more popular option than the ICJ, although not by an overwhelming margin. This in part reflects continued support from developing States which championed its formation during the negotiation of UNCLOS. But it has also now been chosen by a significant number of developed States, suggesting that the fears among such States at the time of drafting that that this new tribunal could radically unsettle the law of the sea have largely vanished.

Figure 15: Art 287 declarations by UN regional group



255. There do however remain significant differences in States' choices under art 287 between States in different regional groups. Those States choosing the ICJ, either alone or in combination with other fora, are largely confined to the Western European and Other, Eastern European and Latin American groups. Thus, there is some divergence from the pattern of acceptance of ICJ jurisdiction under the Optional Clause;[682] while the rate of Optional Clause declarations in Africa is the second highest among the regional groups, only one African State (Togo) has chosen the ICJ as a forum under art 287 UNCLOS.[683]

256. The proportion of UNCLOS parties which have not made a declaration under art 287 also varies dramatically. While only about a quarter of UNCLOS parties in the Western European and Other Group have not made a declaration, this increases to 68.5% of UNCLOS parties in the African group and over 70% of UNCLOS parties in the Asia-Pacific group. This may be because more States in these regions are content with annex VII arbitration as the default mechanism. States in the Global South may in

[681] Collier and Lowe 1999, 94.

[682] See paras 45-51, above.

[683] In its recent declaration of 12 April 2019.

general also have fewer resources to devote to building up governmental expertise in international law, which may lead to tendency to accept the default option.[684]

257. Few States have provided public explanations for why they have chosen particular mechanisms under art 287. One exception can be found in statements made by Australian government legal advisers before a parliamentary committee. The Australian Attorney-General's Department advised the committee that Australia had waited some time to see how ITLOS would function in practice before making an art 287 declaration; once it gained experience of ITLOS by appearing before it, Australia had selected ITLOS, along with the ICJ with which Australia had extensive experience.[685] The cost advantages to parties of standing courts over arbitral tribunals were also emphasised.[686] Australia's positive experience with ITLOS at the provisional measures stage of the *Southern Bluefin Tuna* case, and its negative experience with the subsequent annex VII arbitration, also seems to have been a factor.[687] In other cases some indication can be found in the text of the art 287 declaration itself: Belgium's declaration selecting both ITLOS and the ICJ refers to its 'preference for pre-established jurisdictions', and Italy's (making the same two choices) states that it is 'reaffirming its confidence in the existing international judicial organs.'[688]

258. Annex VII arbitration has been chosen by few States, but since relatively few States have made a declaration and it remains the default option, the great majority of UNCLOS cases have been initiated under this procedure: of the 24 cases (excluding prompt release applications) which thus far have been initiated under Part XV UNCLOS,[689] 21 have commenced as annex VII arbitrations and only 3 as ITLOS cases. However, 5 annex VII cases were subsequently transferred by agreement to ITLOS, probably for reasons of cost.[690]

259. No law of the sea case has been decided by the ICJ based on parties' selection of it under art 287 of UNCLOS. However, as will be discussed shortly,[691] recent ICJ case law establishes that jurisdiction under the Optional Clause will pre-empt jurisdiction under arts 286 and 287 of UNCLOS, so the ICJ has an important role in interpreting and applying UNCLOS on this basis.[692] Finally, no case has yet been considered by a

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[684] Cf para 137, above.

[685] Joint Standing Committee on Treaties (Australian Parliament) Report 47 (August 2002), 21, available at <www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/18_25_june_2002/report.htm> (accessed 1 December 2019).

[686] Ibid, 21.

[687] Ibid, 22.

[688] See 'Declarations made by State parties under art 287, <www.itlos.org/en/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/> (accessed 1 December 2019).

[689] These figures are updated from Churchill 2017, 223, taking into account three cases initiated since 2017: *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation);* the *M/T 'San Padro Pio' Case (Switzerland v Nigeria);* and *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives).* The latter case was submitted by special agreement to a special chamber of ITLOS.

[690] Churchill 2017, 224 (quoting Panama's proposal to Guinea-Bissau in the *Virginia G* case to refer the dispute to ITLOS so as to resolve it 'in a less costly manner'). Nigeria's very recent art 287 declaration recognizing ITLOS's jurisdiction in respect of the *M/T San Padre Pio* case suggests that this case will also be transferred to ITLOS: see para 247, above.

[691] See Section E.3, below.

[692] See paras 275-81, below.

special annex VIII tribunal, unsurprisingly given the small number of States which have selected this option.

260. Parties' ability to choose more than one option under art 287 means that more than one tribunal may have jurisdiction under Part XV of UNCLOS. Where both parties to a dispute have chosen the same two or more fora with equal preference under UNCLOS, a case could be initiated in any of the fora.[693] Similarly, where both parties have chosen the same two fora but ranked them in opposite order, both would seem to have jurisdiction. If each party then tried to initiate dispute settlement using a different mechanism, priority would presumably go to the first tribunal to be seized of the case (applying a rule of *lis pendens).*

E.2 Exceptions to jurisdiction: articles 297 and 298 UNCLOS

261. Arts 297 and 298 UNCLOS provide for certain exceptions to the applicability of the usual compulsory dispute settlement mechanisms under Part XV. The exceptions under art 297 are applicable to all parties automatically. They reflect the sensitivities of coastal States about the exercise of their sovereign rights or jurisdiction and exclude the application of legally binding dispute settlement mechanisms to coastal States' regulation of marine scientific research and fisheries within their exclusive economic zone.[694] It allows instead for some disputes in this category to be submitted to compulsory conciliation.

262. Art 298(1) in contrast provides for optional exceptions to the usual compulsory dispute settlement mechanisms. A party can declare that it does not accept the generally applicable compulsory procedures in relation to one or more of three specified categories of dispute: a) disputes relating to maritime boundary delimitation, or those involving historic bays or titles; b) disputes concerning military activities, and disputes concerning law enforcement activities related to the coastal States' regulation of marine scientific research and fisheries as defined in art 297; c) disputes in respect of which the UN Security Council is exercising the functions assigned to it by the Charter. Disputes within category a) are subject to compulsory conciliation if they have been excluded from legally binding settlement. So far one such conciliation has occurred, between Timor-Leste and Australia relating to maritime delimitation in the Timor Sea, leading to the conclusion of a maritime boundary agreement between them.[695]

263. A party can make a declaration at any time, although such a declaration applies only prospectively and does not affect pending proceedings, in the same way that termination or amendment of an Optional Clause declaration does not (art 298(5)). Thus the 'opt out' right provided by art 298, while more limited in scope than the express right to make a reservation present in most treaties making provision for compulsory and binding dispute settlement,[696] is also more flexible in that can be invoked after the point of signature, ratification or accession.

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[693] See Tanaka 2018, 237.

[694] See Allen 2017; Tanaka 2018, 238–39.

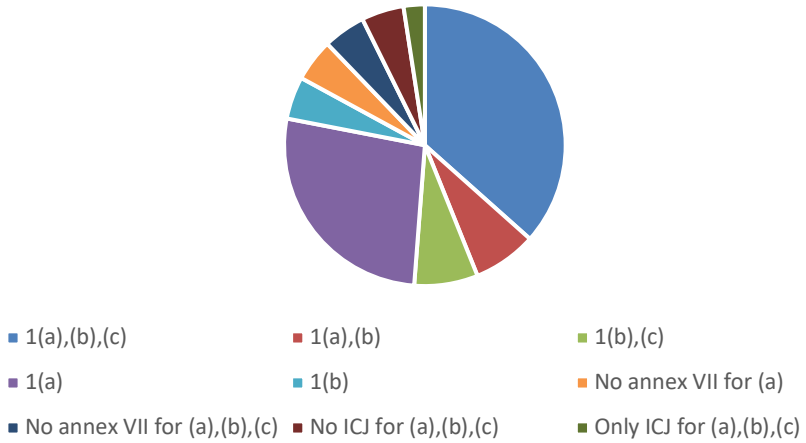
[695] See para 232, above; Laidlaw and Phan 2019; Klein 2019

[696] See para 192, above.

264. The Convention does not expressly state when an art 298 declaration takes effect. Arguably the Convention implies that the declaration is effective immediately on receipt of the declaration by the Secretary-General, given that the Convention earlier provides explicitly for three months delay before withdrawal of an art 287 declaration becomes effective.[697] This raises similar issues to those discussed in Part B.2 of this report concerning withdrawal or amendment of Optional Clause declarations; a potential respondent may make an art 298 declaration to avoid an imminent application against it, thus encouraging in turn a 'race to litigation' by potential applicants.[698]

265. The inclusion of optional exceptions to compulsory jurisdiction in art 298 reflects the special sensitivity of these subjects to States. Some of these sensitivities have already been observed in the context of the Optional Clause. Maritime delimitations may be matters of high political and economic importance, and have a very long-term impact.[699] Some States may be unwilling to cede control of this delimitation to a tribunal, preferring instead to rely on negotiation. Military activities are also often of the highest sensitivity to States, and are also commonly the subject of Optional Clause reservations. The exception for particular law enforcement activities by coastal states reflects the close link between the activities in question and the automatic exclusions contained in art 297. The third exception allows States to avoid litigation which might challenge actions which they are taking in compliance with Security Council decisions.[700] Certain Optional Clause declarations also attempt to exclude from ICJ jurisdiction measures taken in accord with the decisions of UN organs.[701]

Figure 16: Art 298 declarations by category



[697] See para 246, above. The Convention does specify that a new declaration does not affect pending proceedings: art 298(5).

[698] See para 86, above.

[699] Joint Standing Committee on Treaties (Australian Parliament) Report 47 (August 2002), 23–24.

[700] UN Doc A/CONF.62/SR 58, para 10 (El Salvador); UN Doc A/CONF.62/SR.60, para 12 (Netherlands).

[701] Cf the Optional Clause declarations of Hungary, Kenya, Malta, Mauritius and Pakistan; see para 129, above.

266. 42 out of 168 parties (one-quarter) have made current declarations under art 298.[702] (A table of these declarations is provided in **Annex 3** of this report). Like the quite low number of art 287 declarations, this has been considered somewhat surprising considering the importance attached to these exceptions during negotiations. Of the 35 art 298 declarations currently in force which totally exclude certain categories of dispute:

- 12 apply only art 298(1)(a) (maritime delimitation)
- 2 apply only art 298(1)(b) (military activities and law enforcement)
- None apply only art 298(1)(c) (Security Council)
- 3 apply both art 298(1)(a) and (1)(b)
- 3 apply both art 298(1)(b) and (1)(c).
- 15 exclude all three categories.[703]

Thus altogether 30 States exclude maritime delimitation, 23 exclude military activities and law enforcement, and 18 exclude disputes in respect of which the Security Council is exercising its functions.[704]

267. Seven declarations under art 298 exclude the jurisdiction only of a particular forum or fora. Denmark and Norway exclude the jurisdiction of an annex VII tribunal for all three categories, which in combination with their art 287 declarations means they in effect only accept the jurisdiction of the ICJ. Nicaragua similarly excludes any forum other than the ICJ for all three categories. Angola and the Democratic Republic of Congo[705] accept only the jurisdiction of ITLOS for disputes falling under art 298(1)(a). The effect of these declarations is to prevent these States being compelled to appear before an Annex VII arbitral tribunal (as the default mechanism) in relation to disputes falling within the scope of their declarations. Cuba and Guinea-Bissau exclude any jurisdiction of the ICJ regarding these matters (seemingly unnecessarily, since it would not have jurisdiction in any case).

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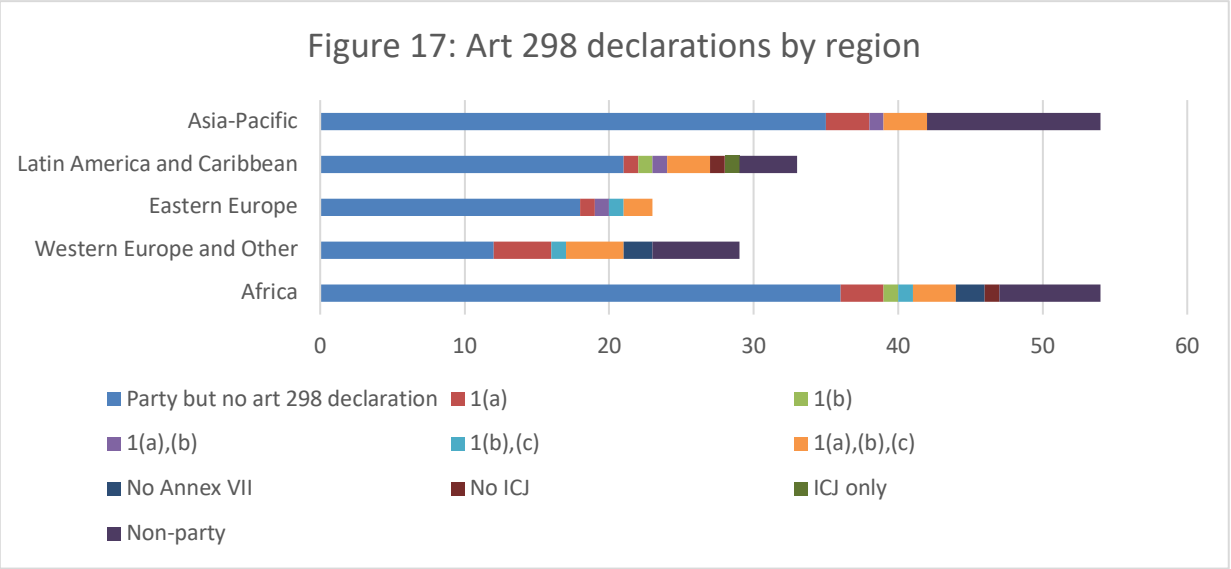
[702] 'Declarations of State Parties under article 298',<www.itlos.org/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298> (accessed 1 December 2019).

[703] This includes Slovenia, which in its terms only excludes the jurisdiction of an Annex VII tribunal. But since this is the only forum it accepts under art 287, this is equivalent to a complete exclusion of compulsory dispute settlement in relation to the three categories.

[704] A few declarations exclude only a subset of disputes in the relevant category: thus Iceland's art 298(1)(a) declaration is confined to disputes concerning the delimitation of the continental shelf under art 83.

[705] There is a certain ambiguity in the DRC declaration, which states that 'it does not accept any of the procedures provided for in art 287, paragraph 1(c)' with respect to maritime disputes. While the phrasing ('any of the procedures', in French '*aucune des procédures*') might suggest an intent to exclude multiple fora, it expressly refers to art 287(1)(c), i.e. only to an annex VII arbitral tribunal.



268. The percentage of UNCLOS parties which have made art 298 declarations varies significantly by region. For a more accurate comparison, the following statistics consider only those States which have made a declaration excluding all compulsory jurisdiction over one or more categories of dispute (rather than excluding only a particular forum). 9 out of 23 UNCLOS parties in the Western European and Other group, or 39.1%, have made an art 298 declaration of this type. In contrast, the percentage of UNCLOS parties in other regions that have made substantive art 298 declarations in other regions is lower: 21.7% in Eastern Europe, 20.7% in Latin America and the Caribbean, 17.0% in Africa, and 16.6% in the Asia-Pacific. From one point of view it may seem quite surprising that Western European States are more likely to have limited their acceptance of compulsory jurisdiction under Part XV of UNCLOS by making an art 298 declaration. This region of the world is the most generally accepting of compulsory jurisdiction, as shown in the high number of States in this group accepting ICJ jurisdiction under the Optional Clause.[706] One potential reason may be that some States in this region have made art 298 declarations precisely to avoid displacing ICJ jurisdiction under the Optional Clause. If so, the ICJ's decision in *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*[707] shows this motivation to have been misplaced, since (as will be discussed further in the next subsection) it determined that the Optional Clause jurisdiction takes precedence over dispute settlement under Part XV of UNCLOS. A stronger explanation may be that States in this region are both more likely to accept compulsory jurisdiction but also more likely to 'tailor' it by introducing limitations in light of their own particular circumstances and interests. States in the Global South, in contrast, are in general less likely to accept compulsory jurisdiction, but in those circumstances (as with UNCLOS) where they do they seem more likely to accept the default extent of jurisdiction rather than to take advantage of optional limitations. A similar general pattern regarding Optional Clause reservations was mentioned earlier in this report: States in Western Europe are most likely to make Optional Clause declarations, but the States which accept ICJ jurisdiction under the Optional Clause with no substantive reservations are concentrated in the Global South.[708]

[706] See para 46, above.

[707] ICJ Rep 2017, 3; see further paras 277-82, below.

[708] See para 137, above.

269. States that exclude jurisdiction in relation to all three categories are three Security Council permanent members (China, Russia, and France). A fourth member, the United Kingdom has made an article 298 declaration excluding disputes under art 298(1)(b) (military and law enforcement disputes) and art 298(1)(c) (disputes being considered by the Security Council). Of course, the fifth member, the US, is not an UNCLOS party. Thus the tendency discussed in relation to the Optional Clause, of a greater reluctance by more powerful States to avoid compulsory jurisdiction, is also evident in this context.[709] That States with a predominant position on the Security Council would take advantage of the optional limitation in art 298(1)(c) is not surprising. As these States are all also among the strongest military powers, their decision to take advantage of the optional limitation in art 298(1)(b) also seems predictable.[710] On the other hand, other significant powers such as Japan, India, Pakistan, Germany, Indonesia, Brazil, South Africa and Nigeria have not made art 298 declarations. This might be considered somewhat surprising, since all of these States (apart from Japan) have either refrained from making an ICJ Optional Clause declaration or have included a reservation in their declaration related to military hostilities.

270. Other States (apart from China, Russia and France) which have made art 298 declarations excluding all three categories of dispute are found various regions: in Latin America (Argentina,[711] Chile, Ecuador), North Africa (Algeria, Egypt, Tunisia), Asia (Republic of Korea, Thailand), and Europe and North America (Greece, Portugal, Slovenia, Canada). Of these States, three (Greece, Portugal and Canada) have an Optional Clause declaration in force.

271. An obvious motivating factor for a State to make an art 298 declaration, as with reservations limiting acceptance of jurisdiction under the Optional Clause, is to avoid undesired litigation. Thus at the same time as it amended its Optional Clause declaration, Australia also made a declaration under art 298(1)(a) to avoid an application by Timor-Leste concerning maritime delimitation. Similarly, Singapore's art 298(1)(a) declaration, made in December 2018, seems clearly motivated by a desire to stave off a unilateral application by Malaysia as the maritime dispute between the two States intensifies.[712] (Subsequently, Malaysia made its own art 298(1)(a) declaration in August 2019). Saudi Arabia's 2018 decision to expand its declaration to include art 298(1)(b) as well as art 298(1)(a) may perhaps be influenced by the ongoing war in Yemen.

272. As with the Optional Clause declarations, the principle of reciprocity applies to art 298 declarations.[713] This provides a motivating factor for States to accept jurisdiction, in order to be able to initiate litigation against other parties. There are examples of a State partially or fully withdrawing its art 298 declarations to allow it to bring a case of its own, which it would otherwise be unable to do under art 298(3) UNCLOS.

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[709] See para 57, above.

[710] Compare the situation with the Optional Clause, discussed in para 125, above.

[711] Although Argentina in 2012 partially withdrew its declaration under art 298(1)(b), so that it now maintains this limitation only in regards coastal State law enforcement, not military vessels: see para 272, below.

[712] See Zakir Hussain, 'Singapore Moves to Avert Unilateral Action Over Maritime Claims' https://www.straitstimes.com/singapore/singapore-files-declaration-under-unclos-to-ensure-no-party-unilaterally-starts-third (December 13 2018).

[713] See art 298(3) UNCLOS.

Argentina in 2012 made a partial withdrawal of its declaration under art 298(1)(b) to allow it initiate proceedings against Ghana when the latter detained an Argentinian warship.[714] Ghana withdrew its article 298(1)(a) declaration in 2014 in order to initiate a maritime delimitation case against Côte d'Ivoire.[715] As with sudden deposit of Optional Clause declaration, this practice raises potential concerns about fairness where a party makes an application shortly after withdrawing the limitation that up until that moment prevented an application being brought against it.[716]

273. The reality that jurisdiction under Part XV of UNCLOS is ultimately based on State consent poses an interpretative challenge to tribunals. A narrow approach to jurisdiction by tribunals will discourage potential applicants from using the system. On the other hand, an expansive approach may be seen as illegitimate by respondents, leading to non-compliance and perhaps even withdrawal of consent to jurisdiction.[717] The narrow interpretation of the maritime delimitation exception under art 298(1)(a) by the annex VII arbitral in the *South China Sea* case prompted a highly negative response from China, including speculation that China might denounce UNCLOS.[718] However, the fact that China has not done so shows the difficulty in escaping compulsory jurisdiction when it forms an inherent part of a major law-making convention.

274. More recently, ITLOS's recent decision at the provisional measures stage in the *Case concerning the detention of three Ukrainian naval vessels (Ukraine v Russian Federation)*[719] that *prima facie* the dispute did not fall under the military activities exception, despite the naval status of the vessels in question and the wider military context, has attracted criticism from some quarters.[720] The Tribunal's approach would seem to make it even less likely that the United States will ratify UNCLOS. In making the case for US ratification of UNCLOS, succeeding US administrations have stressed the availability of the optional exception for military activities under art 298(1)(b), and have taken a very broad view of the scope of that exception.[721]

E.3 Part XV UNCLOS and the Optional Clause

275. Under the Optional Clause, the ICJ potentially has jurisdiction over all disputes concerning international law, including those involving the interpretation and application of UNCLOS. The relationship between these two bases for jurisdiction is therefore of great importance for disputes between parties to UNCLOS which have

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[714] The *ARA Libertad Arbitration (Argentina v Ghana)* PCA Case 2013-11.

[715] Ultimately a special agreement was concluded: see *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire),* ITLOS Reports 2017, 4.

[716] Compare the discussion in section B.2, above.

[717] Cf para 72, above.

[718] See e.g. Mark E Valencia, 'Might China Withdraw from the UN Law of the Sea Treaty?' (3 May, 2019) <https://thediplomat.com/2019/05/might-china-withdraw-from-the-un-law-of-the-sea-treaty/> (accessed 1 December 2019).

[719] *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation),* Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-19, <https://www.itlos.org/cases/list-of-cases/case-no-26/> (accessed 1 December 2019).

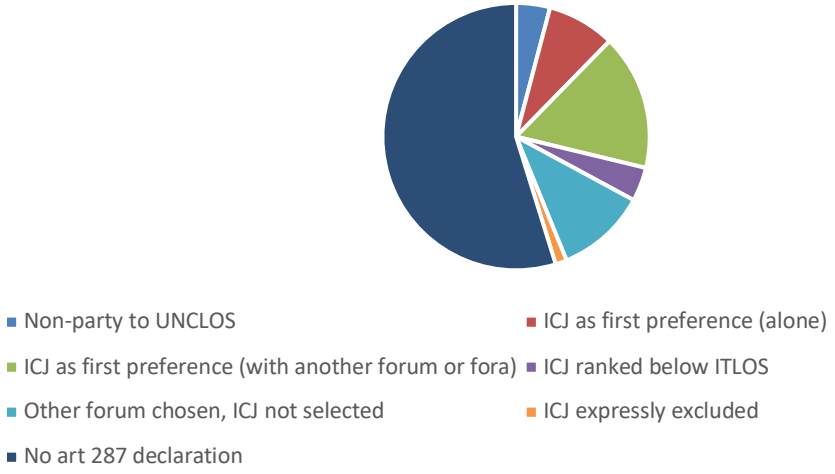
[720] See Kraska 2019.

[721] Statement of Secretary of Defence Leon Panetta, Senate Hearings 112-654 (May 23 2012), 18: 'it would be up to the United States to decide precisely what constitutes a military activity, not others.'

also made Optional Clause declarations. A table comparing States' acceptance of compulsory jurisdiction in law of the sea disputes under the Optional Clause (and under regional dispute settlement treaties) with their acceptance of it under Part XV of UNCLOS is provided in **Annex 4** to this report.

276. Of the 74 States which have made Optional Clause declarations, 3 (Cambodia, Peru, and Liechtenstein) are not parties to UNCLOS. Of the other 71, 19 have made an art 287 UNCLOS declaration choosing the ICJ as a first preference option for dispute settlement under Part XV UNCLOS: 6 selecting the ICJ as their sole choice,[722] 11 alongside ITLOS, and 2 by selecting all four fora. 14 States which have made Optional Clause declarations have chosen another forum as their first preference under art 287. Of these, 3 have chosen the ICJ but as second or third preference, 10 have chosen other fora without choosing the ICJ, and 1 (Guinea-Bissau) has simply excluded the ICJ.[723] This leaves 40 participants in the Optional Clause system which have not made an art 287 declaration (8 of these 40 are landlocked). On the other side of the ledger, one State which has not made Optional Clause declarations (Oman) has nonetheless chosen the ICJ as their joint first preference with ITLOS under art 287 UNCLOS, and four such States (Cabo Verde, Croatia, Montenegro, and Trinidad and Tobago) have chosen the ICJ as their second preference under ITLOS.

Figure 18: Choice of forum under art 287 UNCLOS of States with Optional Clause declarations in force



277. In its recent judgment on preliminary objections in *Maritime Delimitation in the Indian Ocean (Somalia v Kenya),*[724] the ICJ clarified the relationship between its jurisdiction under the Optional Clause and the compulsory dispute settlement provisions contained in UNCLOS.[725] Somalia brought a maritime delimitation case against Kenya in the ICJ, relying on both States' Optional Clause declarations. Kenya sought to rely on the reservation in its declaration excluding disputes where the parties had agreed on another

[722] See para 251, above.

[723] See generally Annex 2 (in which States with Optional Clause declarations are highlighted).

[724] ICJ Reports 2017, 3.

[725] See generally Chan 2018.

method of dispute settlement (the most common form of reservation contained in Optional Clause declarations, as discussed above).[726] Kenya argued, *inter alia*, that Part XV of UNCLOS constituted such an agreement.

278. The Court rejected Kenya's argument and found that it had jurisdiction under the Optional Clause. It referred to art 282 of UNCLOS, which provides that parties to the Convention may agree 'through a general, regional or bilateral agreement, or otherwise' to submit a dispute to a procedure entailing a binding result, in which case that procedure applies 'in lieu' of the procedures in Part XV. The Court, referring to the *travaux préparatoires*, decided that the phrase 'or otherwise' encompassed agreement to the jurisdiction of the ICJ resulting from Optional Clause declarations.[727]

279. The court then interpreted Kenya's reservation concerning other agreed means of peaceful dispute settlement, and found that this did not apply. Since art 282 UNCLOS determines that optional clause declarations apply 'in lieu' of the Part XV mechanisms, Part XV of UNCLOS does not constitute an agreement to another means of dispute settlement falling within the scope of the reservation.[728] In reaching this conclusion, the Court also referred to the risk that if it refused jurisdiction, an arbitral tribunal under UNCLOS might also refuse by reference to art 282, and cited the observation of the PCIJ in the *Chorzów Factory* case that

> the Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice.[729]

280. The Court's decision that an Optional Clause reservation referring to other agreed methods of dispute settlement does not apply to Part XV UNCLOS has resolved what was previously considered a difficult question.[730] Both Kenya's Optional Clause declaration and art 282 UNCLOS on their terms give precedence to other agreed methods of dispute settlement, and the texts do not provide an answer about how to break the circular *renvoi* between them. It had been argued that applying a combination of *lex specialis* and *les posterior* it may have made more sense to give precedence to the UNCLOS dispute settlement mechanisms,[731] particularly given that parties to UNCLOS are given the option under art 287 to make a declaration selecting the ICJ as forum if they wish it to have compulsory jurisdiction over disputes concerning the interpretation or application of the convention (and that relatively few parties have done so).

281. As discussed in paragraph 276, there are a number of States which have Optional Clause declarations in force and which also have made art 287 declarations under UNCLOS, but which have not chosen the ICJ. These States include Canada, the Democratic Republic of Congo, Greece, Guinea-Bissau, Madagascar, Switzerland and

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[726] Paras 118 to 122.

[727] ICJ Reports 2017, 48–49, paras 126–28.

[728] ICJ Reports 2017, 49-50, paras 129–30.

[729] ICJ Reports 2017, 50, para 132, citing *Factory at Chorzów, Jurisdiction, Judgment No 8* 1927, PCIJ Series A, No 9, 30.

[730] Shany 2003, 202–07.

[731] Cf Bankes 2017, 247–48.

Uruguay. Austria, Germany and Hungary have made art 287 declarations choosing the ICJ, but not as their first choice. The Court's decision in *Somalia v Kenya* indicates that any declaration under art 287 is irrelevant to the existence of jurisdiction under the Optional Clause. Unless there is a specific reservation in one of the declarations barring jurisdiction (not just a reservation relating to other means of dispute settlement) the Court's compulsory jurisdiction as between Optional Clause parties will preclude dispute settlement under the UNCLOS mechanisms. This might be considered somewhat surprising, at least for States such as Canada and Madagascar which have expressly chosen another mechanism under art 287 and also have included a reservation referring to other agreed methods of dispute settlement in their Optional Clause declarations. However, the fact that no State has changed its Optional Clause declarations in response to Court's decision suggests that they are content for the Court to exercise jurisdiction relating to the interpretation and application of UNCLOS under the Optional Clause.

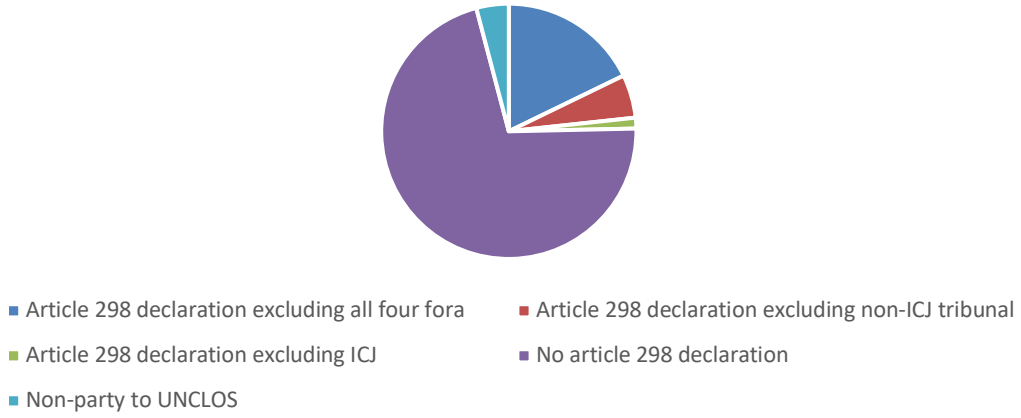
282. The Court's reasoning logically applies not only to its jurisdiction under the Optional Clause, but also to jurisdiction granted to it by the general dispute settlement treaties, in particular the Pact of Bogotá and the European Convention for the Peaceful Settlement of Disputes. Whether a State is a party to one of these treaties is thus included in the table in **Annex 4**. Law of the sea disputes between the parties to these treaties can thus only be taken to the ICJ and not to the dispute settlement mechanism which would apply under Part XV of UNCLOS, unless the parties to the dispute otherwise agree. This may be relevant for disputes involving parties to the Pact of Bogotá which are not Optional Clause parties (Bolivia, Brazil, Chile and Ecuador)[732] or where the dispute would otherwise fall within a reservation to one of the parties' Optional Clause declarations.

283. A related issue concerns whether there is overlap, or divergence, in States' exclusion of certain categories of law of the sea disputes from compulsory jurisdiction under the Optional Clause and UNCLOS. Of the 71 States which are both UNCLOS parties and participants in the Optional Clause system, 18 have made declarations under Art 298 of UNCLOS, of which 4 (the declarations of Denmark, the Democratic Republic of Congo, Norway and Nicaragua) only exclude the jurisdiction of alternative fora.[733] 13 Optional Clause parties have made art 298 declarations excluding compulsory jurisdiction of all four fora over one or more of the categories of dispute listed in art 298, and one (Guinea-Bissau) seeks to exclude the ICJ itself as a forum. 52 Optional Clause parties have not made art 298 declarations.

[732] See para 158, above.

[733] See para 267, above.

Figure19: Art 298 UNCLOS declarations of States with Optional Clause declarations in force



284. Of the Optional Clause parties that have made art 298 declarations, some have clearly taken action to harmonise the scope of their acceptance of compulsory jurisdiction under the Optional Clause and under Part XV of UNCLOS. For example, Australia excluded maritime delimitation from compulsory dispute settlement under the Optional Clause and art 298 at the same time.[734] Norway incorporates the limits and exceptions applying from time to time under UNCLOS by a reservation in its Optional Clause declaration, although as it has selected the ICJ as its sole choice for dispute settlement under art 287 UNCLOS, and as its art 298 declaration only excludes the jurisdiction of non-ICJ fora, the current effect of this reservation is only to exclude from Optional Clause jurisdiction disputes automatically excluded from compulsory jurisdiction under art 297 UNCLOS. Greece in 2015 also took action suggesting a degree of planned harmonisation, making a new Optional Clause declaration with reservations regarding territorial and military disputes and also declaration excluding all three categories of dispute under art 298. More comprehensively, Portugal's Optional Clause reservation excluding jurisdiction 'with a party or parties to a treaty regarding which the jurisdiction of the International Court…has, under the applicable rules, been expressly excluded' seems to carry over its art 298 declaration excluding Part XV jurisdiction over all three categories of dispute to also exclude Optional Clause jurisdiction over these disputes.[735]

285. On the other hand, a number of States have made declarations under art 298 UNCLOS without making similar exclusions in their Optional Clause declarations. Canada, Italy, and Spain exclude maritime delimitation from binding UNCLOS dispute settlement under art 298(1)(a), but there is no similar reservation in their Optional Clause declarations (although they may be excluded by their *ratione temporis* reservations). Kenya also made an art 298(1)(a) declaration in 2017, but has not introduced a mirroring reservation in its Optional Clause declaration. (At least regarding its dispute with Somalia, introducing such a reservation would have been ineffective as the case was already pending). In April 2019 Togo made a declaration applying art 298(1)(b) and (c) UNCLOS, but did not modify its 1979 Optional Clause declaration, which is made without substantive reservations. The UK similarly has made a

[734] See para 257, above.

[735] See para 123, above.

declaration applying art 298(1)(b) and (c), but it does not have a general reservation regarding military activities in its Optional Clause declaration.[736]

286. The reverse situation applies where States have made reservations concerning certain categories of law of the sea dispute in their Optional Clause declarations, but have not made declarations excluding jurisdiction under Part XV UNCLOS to the extent possible under art 298. In some cases, this reflects a clear decision to prefer UNCLOS mechanisms over the ICJ. Thus Bulgaria made its 2015 Optional Clause (excluding all law of the sea disputes) only a few days before its declaration under art 287 UNCLOS selecting ITLOS as its sole choice of forum under Part XV, but without making an art 298 declaration. In other cases,[737] it is a matter for speculation whether the divergence reflects the influence when ratifying UNCLOS of States' tendency to accept the default position, or a considered choice in favour of UNCLOS mechanisms over ICJ jurisdiction.

[736] See paras 124–28, above.

[737] See for example the reservations concerning the law of the sea contained in the Optional Clause declarations of Malta and India, States which have not made declarations under UNCLOS art 298.

CONCLUSION

i) A mixed picture

287. The overview in this report of States' consent to the compulsory jurisdiction of international courts and tribunals in relation to inter-State disputes reveals a mixed picture. A range of indicators show a greater willingness among States to utilise international courts and tribunals for the resolution of inter-State disputes. The number of contentious cases submitted to the ICJ has greatly increased, so that the Court has been busier than ever before in its history. The great majority of these cases are brought as unilateral applications relying on the respondent's prior consent to jurisdiction.[738]

288. The gradual upward trend in the number of Optional Clause declarations has continued, with Latvia's September 2019 declaration bringing the total to 74.[739] Recent declarations, although they mostly include some reservations, do not generally include so many as to 'render almost nil'[740] the Court's jurisdiction, nor do they include 'self-judging' reservations.

289. These positive developments for the Court have occurred alongside provision for other fora with compulsory jurisdiction over inter-State disputes. Notably, UNCLOS has subjected most law of the sea disputes to compulsory dispute settlement, created ITLOS as a new standing court, and made a major contribution to the revival of inter-State arbitration.[741] All 168 parties to UNCLOS are subjected to its compulsory dispute settlement provisions, reservations to which are prohibited, and only a quarter of them have taken advantage of the optional exceptions in art 298.[742]

290. On the other hand, there remain clear limits on States' willingness to give prior consent to international adjudication and arbitration. Despite the increased number of States making Optional Clause declarations, the substantial majority of States still have not done so. More recent declarations generally reserve the State's right to withdraw and/or amend the declaration with immediate effect, providing a potential escape clause to avoid threatened or additional litigation on a particularly sensitive issue.[743] Reservations excluding some of the most significant types of dispute, such as those involving military hostilities, remain quite common.

291. Treaty provisions, not Optional Clause declarations, are the most common jurisdictional basis for applications to the ICJ. However, usually the treaties relied on are quite old. Fewer recent treaties provide for the Court's compulsory jurisdiction.[744]

292. Moreover, practice shows that a compromissory clause providing for truly compulsory adjudication or arbitration is only very rarely included in a major multilateral treaty. Even where a relatively strong compromissory clause is included,

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[738] See paras 11–12, above.

[739] See paras 43–44, above.

[740] Speech by HE Judge Rosalyn Higgins, 31 October 2008, 6, available at < https://www.icj-cij.org/files/press-releases/1/14841.pdf>.

[741] See generally Section E, above.

[742] See para 266, above.

[743] See generally section B.2, above.

[744] See para 31, 175–184, above.

States are usually given the explicit right to opt out of compulsory dispute settlement by making a reservation at the time of signature, ratification or accession.[745]

293. It is evident that most States remain unwilling to accept compulsory jurisdiction on a truly general basis. While the Optional Clause system allows States to accept the ICJ's compulsory jurisdiction over all disputes governed by international law, only a small minority of States have made an Optional Clause declaration without reservations. The States in this category are often small States and/or weaker States in the global South.[746]

294. At the other extreme, a significant minority of States are highly resistant to accepting the ICJ's compulsory jurisdiction in almost all circumstances. As well as holding aloof from the Optional Clause system, these States almost invariably make a reservation when becoming parties to treaties containing compromissory clauses in order to exclude compulsory ICJ jurisdiction. In recent decades, the United States, China, and India, as well as a number of other States in various regions, have taken this approach.[747]

295. The majority of States fall in between these two extremes, in that they are willing to accept ICJ compulsory jurisdiction over some categories of dispute, but not others. Many States in this category have made Optional Clause declarations, but include reservations carving out specific categories of disputes. Another large group of States refrain from making Optional Clause declarations but also do not usually make reservations to compromissory clauses providing for compulsory ICJ jurisdiction, thus accepting compulsory jurisdiction but confining it *ratione materiae* to disputes involving the interpretation or application of the treaty in question.[748]

296. The unwillingness of most States to accept compulsory jurisdiction on a general basis can be attributed to various factors. On a basic level, inter-State adjudication and arbitration are unfamiliar to many State officials and involve the risk of the unknown.[749] Relatedly, the acceptance of compulsory jurisdiction deprives States of control over the resolution of disputes. States are often unwilling to accept the risk of an unwelcome outcome being imposed upon it by the decision of a tribunal. This is likely to be one reason that many States seem to prefer inter-State arbitration to recourse to the ICJ, as arbitration leaves States a greater degree of control over the constitution of the tribunal and its proceedings.[750]

297. Even States which almost uniformly refuse the jurisdiction of the ICJ have been been more willing to accept the compulsory jurisdiction of other more specialised tribunals. Notably, most States in this category are parties to UNCLOS and have hence accepted the compulsory dispute settlement mechanism established in Part XV. Most parties to UNCLOS have not made art 287 declarations, suggesting an apparent

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[745] Paras 192–94, 220.

[746] Para 137, above; also para 268.

[747] Para 205, above.

[748] Paras 23–29, above.

[749] Dillard 1978, 228.

[750] See Section D, above.

satisfaction with Annex VII arbitration as the default mode of dispute settlement under the Convention.[751]

298. Although not discussed in this report, the great majority of States are also members of the WTO and hence accept its compulsory dispute settlement system.[752] A far greater number of cases have been brought under this system than any other: in the WTO's first 20 years (from 1995 to 2015), '500 disputes were submitted…with just over 280 of them proceeding to the adjudication phase before a WTO panel.'[753] A number of States which have stood aloof from compulsory jurisdiction in most other contexts have in contrast been avid users of the WTO, including China and (until recently) the US.[754] A number of suggestions have been made about why the WTO has attracted so much more activity than other inter-State mechanisms, including: that the overall benefit to each State of liberalised economic trade is more concrete and tangible than the benefits of a rules-based order in other areas; that economic power is somewhat more dispersed than political and military power, so that even great powers have an incentive to accept and utilise international adjudication;[755] that a loss at the WTO does not involve the same degree of 'loss of face' as defeats in other kinds of international disputes, for example those concerning territorial sovereignty, the use of force, or human rights;[756] and the perception that adverse decisions in the WTO are not as truly binding as those made by international tribunals in other contexts, but allow space for further bargaining.

iii) Some trends in international litigation and their relationship to States' acceptance of compulsory jurisdiction

299. States' concerns about the loss of control involved in compulsory jurisdiction have particular relevance for disputes of high political importance. In this context, a loss before an international tribunal could have a significant negative effect on a government's domestic standing or on what it perceives as its vital security or economic interests. States are thus more willing in general to accept compulsory jurisdiction via compromissory clauses in treaties whose subject matter does not seem to involve issues of the highest political salience.

300. Despite the reluctance of many States to accept compulsory adjudication and arbitration over highly politically fraught disputes, there seems to be an increasing tendency for such disputes to be brought by unilateral application to international adjudication or arbitration[757] Recourse to international courts and tribunals in such circumstances is not new: the *Nicaragua* case provides an obvious example. But arguably such cases of high political intensity are becoming more frequent: recent examples in the ICJ include *Application of ICSFT and CERD (Ukraine v Russian Federation),* the three *Marshall Islands* cases, *Alleged violations of the 1955 Treaty of Amity, Economic Relations and*

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[751] Section E.1, above.

[752] The WTO currently has 164 member States: see <https://www.wto.org/> (accessed 1 December 2019).

[753] Akande 2016, 322.

[754] Akande 2015; see also Dunoff 2009. However, since 2017 the United States has refused to consent to the appointment or re-appointment of Appellate Body members, raising the prospect of the breakdown of the WTO dispute settlement system.

[755] Paulus 2004, 792–93.

[756] Moynihan 2017, 6.

[757] See paras 28, 69 above.

Consular Rights (Iran v US), and *Relocation of the United States Embassy to Jerusalem (Palestine v US)*. The *South China Sea* arbitration provides an obvious example of such a case arising under UNCLOS.

301. The very fact that a dispute is highly politically fraught may make the parties less likely to be able to resolve it by diplomatic means. Litigation offers a potentially attractive for a party to such a dispute which feels that it has a strong case in international law. The mere act of initiating the litigation will draw attention to its grievance, and a favourable judgment may provide one of the few ways it can pressure the other State to change its approach, particularly if the other State is stronger. Increased awareness of this option provides an incentive for States which are potential applicants to accept compulsory jurisdiction. The same trend however provides potential respondent States with an incentive to avoid accepting compulsory jurisdiction which could allow a highly sensitive case to be brought unilaterally against them. One option for such a State is a selective approach, accepting compulsory jurisdiction with reservations or exceptions, or only through compromissory clauses in treaties on subjects which are not highly politically sensitive. However, a State cannot predict with certainty what politically sensitive disputes will arise in the future, or whether they may be characterised as falling within or outside the scope of any consent it has given to jurisdiction. Aspects of a particular dispute may well fall within jurisdiction, even if the broader dispute as a whole does not.[758]

302. A related trend is the increasing recourse to inter-State litigation by States which have not been directly injured by the respondent's (alleged) breach of law, but which seek to uphold protect obligations owed *erga omnes* (or *erga omnes partes)* in the common interest of the international community or of the all the parties to the relevant multilateral treaty.[759] Over the last decade, several cases have been brought to the ICJ which can be placed in this category, including *Belgium v Senegal* and the *Whaling* case.[760] In both of these cases, the Court accepted the standing of the applicant State to bring the case. The phenomenon of inter-State community interest litigation is encapsulated even more clearly in the recently instituted case of *Application of the Genocide Convention (The Gambia v Myanmar)*. States' increasing awareness of the possibility of using inter-State litigation to uphold common interests may help continue to increase the number of applications and encourage States which are potentially interested in making such an application to accept compulsory jurisdiction. Conversely however, it may lead respondent or potential respondent States to withdraw or limit their exposure to compulsory jurisdiction. Thus Japan (following the *Whaling* case) and the UK (following the *Marshall Islands*) case introduced new reservations to their Optional Clause declarations which would prevent similar applications being made against them again.[761]

iv) Effects of piecemeal acceptance of compulsory jurisdiction

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[758] See paras 303 to 308, below.

[759] See *Barcelona Traction,* ICJ Reports 1970, 32, para 33; art 48 and commentary, 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10.

[760] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ Reports 2012, 449-50, paras. 66–69; *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)*, ICJ Reports 2014, 226. The three *Marshall Islands* cases also involved an interest of this kind.

[761] Tanaka 2018b, 454-45.

303. States' piecemeal acceptance of compulsory jurisdiction brings with it challenges affecting the ability of international courts and tribunals to effectively resolve international disputes. The ICJ constitutes the only international court with potentially general jurisdiction over all inter-State disputes governed by international law. Since the majority of States have neither made Optional Clause declarations nor are parties to general dispute settlement treaties, the Court's compulsory jurisdiction regarding many disputes can only be found in compromissory clauses. But in relation to many important categories of inter-State dispute there is no multilateral treaty containing a compromissory clause providing a straightforward basis for compulsory jurisdiction.[762] Examples include most disputes concerning the prohibition of the use of inter-State force; international humanitarian law; crimes against humanity; civil and political rights; economic, social and cultural rights; and environmental disputes.[763]

304. The result of the patchwork nature of the Court's jurisdiction may be that the only jurisdictional basis on which an applicant can rely maps only partially onto the broader dispute between the parties.[764] For example, a number of disputes arising from armed conflict situations have come before the Court on the basis of the compromissory clauses in the Genocide Convention[765] and the Convention on the Elimination of Racial Discrimination,[766] although these disputes arise from situations which also involve the use of force, international humanitarian law and other aspects of human rights law.

305. The ICJ's case law makes clear that one aspect of a broader dispute may fall within jurisdiction even though other aspects do not.[767] Evidently, any other approach would radically confine the role of inter-State adjudication. However, it is also true that the piecemeal nature of the Court's jurisdiction may potentially hinder its judgment from playing an effective role in the broader resolution of the dispute between the two parties. Adjudication or arbitration may even be counterproductive: where a Court must find on the merits that there has been no violation of the treaty which provides it with jurisdiction, this may provide a degree of vindication to the respondent State, even its conduct violates other important principles of international law.

306. Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which also is generally considered to reflect customary law, provides that when interpreting a treaty '[t]here shall be taken into account, together with the context…any relevant rules of international law applicable in the relations between the parties'. This principle may provide a means for the Court to mitigate the difficulty discussed in the previous paragraph.[768] Interpreting the treaty which provides jurisdiction in the light of other applicable rules of law allows the Court to consider the dispute in a more holistic legal context. This was the Court's rationale in *Oil Platforms*, where it pronounced on the

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[762] Tams 2009, 472–73; Tomuschat 2019, 752–53.

[763] Kingsbury 2012, 212; see also section C.2(iii) of this report, above.

[764] Tams 2009, 489–90.

[765] For example the *Bosnia Genocide* and the *Croatia Genocide* cases..

[766] *Application of CERD (Georgia v Russian Federation)* and *Application of ICSFT and CERD (Ukraine v Russian Federation*

[767] See para 28 above, citing *Application of ICSFT and CERD (Ukraine v Russia),*Judgement of 8 November para 28; *Certain Iranian Assets (Iran v United States), Preliminary Objections,* Judgment of 13 February 2019*,* para 36; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile),* ICJ Reports 2015 (II), 604, para 32

[768] *Bosnia Genocide,* ICJ Reports 2007, 105, para 149; *Croatia Genocide,* ICJ Reports 2015, 45–46, para 85; *Jadhav (India v Pakistan)*, Judgment of 17 July 2019, paras 36, 37; also para 29 of this report, above.

compatibility of the United States' actions with UN Charter rules and customary international law on the use of force, although its jurisdiction was limited to the interpretation and application of the US-Iran Treaty of Amity.[769] The Court's approach was criticised by several judges in their separate opinions,[770] who argued that the Court had gone beyond using the Charter and customary rules on the use of force to help interpret the jurisdictional treaty, and had instead directly applied those rules. In their view, this went beyond the consent to jurisdiction provided by the compromissory clause.[771]

307. Similar issues may arise in the context of more specialised tribunals. Thus the Annex VII arbitral tribunal in *Guyana v Suriname,* basing its jurisdiction on art 293 UNCLOS (which provides that a court or tribunal having jurisdiction under Part XV UNCLOS 'shall apply this Convention and other rules of international law not compatible with the Convention'), determined that an incident in disputed maritime territory constituted a threat of the use of force by Suriname in contravention of UNCLOS, the UN Charter, and international law.[772] This decision has been criticised, arguing that the Tribunal illegitimately used art 293 to expand the tribunal's jurisdiction, which was confined under art 286 to disputes concerning the interpretation or application of UNCLOS and did not extend to disputes concerning the legality of threatened force under the UN Charter or customary international law.[773] In contrast, in the *Chagos MPA* arbitration the majority of the Annex VII arbitral tribunal held that it lacked jurisdiction to determine whether the UK was or was not the 'coastal State' under UNCLOS, holding that the dispute was, at its core, a dispute over land sovereignty falling outside the Convention's scope.[774]

308. When interpreting their jurisdiction and identifying the law applicable to the dispute, a delicate balance seems required of international courts and tribunals in order to maintain their effectiveness and their legitimacy as a mechanism for dispute settlement. A narrow approach will undermine the court or tribunal's ability to contribute to resolving disputes which come before it, discouraging potential applicants from initiating cases and even perhaps from accepting its jurisdiction. On the other hand, an expansive approach may be seen by the respondent as going beyond the limited scope of their consent to jurisdiction. This could potentially 'jeopardize the willingness of States to accept the Court's jurisdiction for the adjudication of disputes relating to the interpretation or application of specific rules of international law.'[775]

iv) Possibility of a backlash against compulsory jurisdiction?

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[769] *Oil Platforms (Iran v US),* Judgment, ICJ Reports 2003, 182–83, paras 41–42.

[770] Separate Opinion of Judge Buergenthal, ICJ Reports 2003, 281–82, para 29; Separate Opinion of Judge Higgins, ICJ Reports 2003, 238, para 47.

[771] Papadaki 2014, 575.

[772] *Guyana v Suriname,* PCA Case 2004-04, Award of the Arbitral Tribunal, 17 September 2007, paras 402-06.

[773] Forteau 2013, 437.

[774] *Chagos Marine Protected Area Arbitration (Mauritius v UK)*, PCA Case 2011-03, Award of 18 March 2015, paras 203–221.

[775] *Oil Platforms,* Judgment, Separate Opinion of Judge Buergenthal, ICJ Reports 2003, 279, para 22.

309. Some scholars have identified a developing backlash against international courts and tribunals.[776] In the context of inter-State litigation, one example is the apparent revival of the practice of non-appearance by respondent States. On several occasions in the 1970s and 1980s, respondent States refused to appear before the ICJ: Iceland in the *Fisheries Jurisdiction* cases, France in the *Nuclear Tests* case, Turkey in the *Aegean Sea Continental Shelf* case, Iran in the *Teheran Hostages* case and the US in the merits phase of the *Nicaragua* case.[777] This practice did not recur in the subsequent decades. However, recently both Russia and China have refused to appear in arbitral proceedings commenced under UNCLOS: Russia in *Arctic Sunrise* case and China in the *South China Sea*. Non-appearance may also be about to do so: Venezuela has indicated that it will not appear in the *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* case, initiated in 2018.[778]

310. More directly pertinent to the subject of this report is the possibility that dissatisfied respondents in cases initiated via compulsory jurisdiction may not only refuse to give any new consent to compulsory jurisdiction but also withdraw acceptance given previously. Various examples in recent years of withdrawal of consent have been discussed in this report.

311. So far however the phenomenon of States withdrawing from compulsory inter-State jurisdiction has remained relatively contained. Although a number of States have introduced new reservations into their Optional Clause declarations since 2000,[779] only two States have completely departed from the Optional Clause system (Colombia in 2001 and Serbia in 2008).[780] Despite the examples previously discussed,[781] the denunciation of treaties providing for compulsory adjudication or arbitration also thus far remains quite rare. As already noted, where consent to compulsory jurisdiction has been given via a compromissory clause which is an integral part of a subject matter specific treaty, denouncing the treaty will have broader consequences which will likely make a State reluctant to do so.[782] A more wide-ranging retreat from compulsory jurisdiction seems however to remain a real risk for the future.

v) The impact of the broader legal and political context

312. States' willingness to accept compulsory jurisdiction is closely linked to more fundamental questions about their attitude towards international law. Widespread acceptance of compulsory jurisdiction is more likely where there is a broad consensus among States concerning the contents and legitimacy of the rules of international law which the court or tribunal will apply.[783] In contrast, in areas of international law which are more unsettled or controversial, or where some States seek to change previously established international law, States may refrain from accepting compulsory

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[776] See generally the discussion in Pauwelyn and Hamilton 2018.

[777] Jennings *et al* 2019, 31–42.

[778] Wentker 2018.

[779] For example, the UK, Japan, Pakistan and India.

[780] See para 44, above.

[781] See para 30, above.

[782] See paras 37, 273 above.

[783] Kelly 1987, 344.

jurisdiction. At the 1971 discussion of the ICJ's role in the General Assembly, several State representatives emphasised that greater consensus and clarity as to the contents of international law, potentially achieved through codification, was a prerequisite for the expansion of the Court's compulsory jurisdiction.[784]

313. A related but somewhat broader point links States' willingness to accept compulsory jurisdiction to developments in world politics.[785] Consensus on the contents of international law is difficult to achieve when States are highly ideologically polarised, and decisions by international courts may impose limits on States' freedom of action which States may consider unacceptable when they are engaged in intensive competition for relative power. In contrast, compulsory jurisdiction will likely be more attractive in circumstances where power competition has receded and States are converging towards a greater degree of consensus on the fundamental values and goals which underlie international order. This seems to describe the trends of world politics in the immediate post-Cold War decade of the 1990s. As this report has discussed, the 1990s saw a large number of States making new Optional Clause declarations, including many former socialist States in eastern Europe.[786] The 1990s also seems to have seen an increase in the number of multilateral compromissory clauses providing for some form of compulsory ICJ jurisdiction.[787] It was also during this decade that a number of States usually reluctant to accept compulsory jurisdiction, including China and India, ratified UNCLOS and hence accepted compulsory dispute settlement in the form of the Part XV mechanisms.[788]

314. More recent years have seen new developments in international politics, including what may be seen as a return of great power competition and increasingly clear ideological divisions between liberal and non-liberal powers. This may be linked to the decline in the number of multilateral treaties providing for compulsory ICJ jurisdiction in recent years, discussed in section C.3 of this report.[789] If these trends continue, it seems less likely that there will be major extensions to States' acceptance of compulsory jurisdiction in the future, at least on a truly global level.[790] It is notable that China and the Russian Federation have expressed a renewed dissatisfaction with their experience of compulsory jurisdiction in their 2016 Joint Declaration on the Promotion of International Law, where they stated that '[i]t is crucial for the maintenance of international legal order that all dispute settlement means and mechanisms are based on consent and used in good faith and in the spirit of cooperation, and their purposes shall not be undermined by abusive practices.'[791]

vi) Encouraging broader acceptance of compulsory jurisdiction by States

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[784] See para 29, above.

[785] Cf Jennings *et al* 2019, 21.

[786] Para 49, above.

[787] Para 184, above.

[788] See para 240, above.

[789] Para 181, above.

[790] Kingsbury 2012, 212–15.

[791] 'Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law' (25 June 2016), available at <http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698 > (accessed 1 December 2019).

315. The limits in States' willingness to consent to compulsory adjudication or arbitration of international disputes reflect seemingly deep-seated structural features of the relatively decentralized and horizontal international legal system. States' consent to compulsory jurisdiction will thus likely remain piecemeal for the foreseeable future. This creates difficulties for international courts and tribunals and may hinder their ability to contribute to the settlement of disputes, as discussed above. However, attempts by international courts to respond to these limitations by interpreting their jurisdiction expansively could well backfire, perhaps ultimately leading them to terminate their consent to compulsory jurisdiction.[792]

316. States' determination to exclude some subjects from the jurisdiction of international courts and tribunals can be defended on the basis that adjudication and arbitration are simply two forms of dispute settlement among others, and may not be well-suited to resolving certain kinds of disputes. Thus, it may not necessarily be desirable for States to consent to the compulsory jurisdiction of courts and tribunals with respect to all inter-State disputes: limitations and reservations may be entirely legitimate in circumstances where diplomatic methods of dispute settlement are more appropriate.[793] Diplomatic methods are cheaper and may be more suited to produce compromise or 'win-win' outcomes, which may in many circumstances be more durable than the outcome determined by a court or tribunal on strictly legal grounds.[794]

317. On the other hand, the unavailability of compulsory adjudication or arbitration for important categories of international disputes may create circumstances in which disputes fester for long periods without resolution, causing increasing international tension.[795] Even though settlement by diplomatic methods may be preferable in most cases to adjudication, the availability of compulsory adjudication still can play an important role. It provides an incentive for parties to seek a settlement in good faith, knowing that if they do not the other party can refer the matter to a court or tribunal, and to abstain from relying on entirely self-serving interpretations of the law.[796] Where international law is not subject to compulsory jurisdiction, the compliance pull of the law becomes significantly less, both because it is more difficult to hold a State to account for a violation of the law and because many aspects of the law will likely remain vague without the possibility of authoritative interpretation. Professor Bin Cheng expressed such concerns in comments quoted favourably by Judge Koojimans in his Separate Opinion in the *Fisheries Jurisdiction (Spain v Canada)* case,[797] stating that:

> The acceptance of the compulsory jurisdiction of international tribunals is not only a question of procedure, but is also one of substance. It changes in fact the nature of the law which governs international relations. We may divide international law into…different grades. First of all there is international law on the auto-interpretation level. That is when States have not accepted the duty to go before an international tribunal. In such a situation when a dispute arises each party is entitled to maintain its own interpretation of the law. […] But when a State accepts in advance the duty to submit to international adjudication, it is no longer able to act in that way. It must always behave in such manner that, if brought before the court, its conduct stands at least a fair

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[792] Pauwelyn and Hamilton 2018, 690.

[793] See e.g. Bellinger 2009, 2.

[794] Kelly 1987, 344; Churchill 2017, 227.

[795] Akande 1996, 606.

[796] Sinclair 1984, 235.

[797] ICJ Reports 1998, 494.

> chance of being upheld…[C]ompulsory adjudication is not just another method of settling international disputes. It raises the international law applicable between the States concerned from the auto-interpretation to the justiciable grade.[798]

318. Although there are no magic solutions which will suddenly produce a radical increase in the extent of compulsory jurisdiction, there are a number of modest steps which may assist the continuation of the gradual expansion of recent decades. The expense involved in inter-State litigation may be another factor which discourages States, particularly developing States, from accepting compulsory jurisdiction. One response to this is the ICJ Trust Fund, established in 1989 to assist States with the costs involved in settling disputes through the ICJ. Similar funds have been established for ITLOS and the Permanent Court of Arbitration.[799] However, the ICJ Fund has made relatively little impact in practice; States' willingness to donate to it has been limited and only approximately eight states have been awarded financial support.[800] Promoting awareness of these funds and encouraging more donations to them could be practical steps to support international adjudication and arbitration.

319. Long delays in resolving the cases brought before a court or tribunal may increase costs and discourage potential parties from having recourse to adjudication or arbitration. The ICJ has been criticised for its slowness, and it has been suggested that one reason that States prefer arbitration is that it is relatively speedier. However, the ICJ seems in recent years to have decreased the average time taken in resolving disputes brought before it.[801] Delays are often not attributable to the Court but result from requests by one or both parties to a case, which in turn require alterations to the Court's schedule which can lead to delay in other cases. The Court's increasing case load, combined with its limited institutional resources, also make it difficult for it to resolve cases more rapidly. This is one reason to consider that other standing international courts like ITLOS, as well as inter-State arbitration, do not undermine its role but rather serve as useful complementary fora for the resolution of inter-State disputes.[802]

320. Finally, one major factor which may hold States back from accepting compulsory jurisdiction is sheer lack of familiarity with international adjudication or arbitration. Thus, efforts to promote understanding of the role and workings of the ICJ and other inter-State courts and tribunals are valuable.[803] States should be encouraged to take particular disputes to inter-State courts and tribunals by special agreement or to participate in advisory proceedings, which will provide them with experience of international litigation. Model Optional Clause declarations and compromissory clauses, of the kind provided by a recent handbook on accepting ICJ jurisdiction sponsored by Switzerland and a number of other States,[804] also seem highly useful.

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[798] International Law Association, Report of the Fifty-First Conference, Tokyo, 1964, 43–44.

[799] Tzanakopoulos 2019, para 3.

[800] Tzanakopoulos 2019, para 30.

[801] See para 227, above.

[802] Cf Sands 2015, 798.

[803] For example, through General Assembly resolutions drawing attention to the possibility of recognizing the Court's jurisdiction: Akande 2016, 325. See for example UNGA Res No 3232 (XXIX), *Review of the Role of the International Court of Justice*, 12 Nov 1974, para 2.

[804] Handbook on Accepting the Jurisdiction of the International Court of Justice: Model Clauses and Templates, 2014, <https://legal.un.org/avl/pdf/rs/other_resources/Manual%20sobre%20la%20aceptacion%20jurisdiccion%20CIJ-ingles.pdf> (accessed 1 December 2019).

Building up States' understanding of and confidence in international courts and tribunals, and the law which they apply, seems the most likely path to encourage the further increase of consent to compulsory jurisdiction in the future.

BIBLIOGRAPHY

Abebe D and Ginsburg T (2019), 'The Dejudicialization of International Politics' 63 International Studies Quarterly 521.

Adede AO (1987), *The System for Settlement of Disputes under the UN Convention on the Law of the Sea* (Martinus Nijhoff).

Akande D (1996), 'The Role of the International Court of Justice in the Maintenance of International Peace' 8 *African Journal of International and Comparative Law* 592-616.

Akande D (2015), 'China's View of International Litigation: Is the WTO Special?', EJIL*: Talk!* (13 November, 2015).

Akande D (2016), 'Selection of the International Court of Justice as a Forum for Contentious and Advisory Proceedings (Including Jurisdiction)' 7 JIDS 320.

Allan S (2017), 'Article 297 of the UN Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction' 48 Ocean Development and IL 313.

Alexandrov SA (2001), 'Accepting the Compulsory Jurisdiction of the International Court with Reservations: An Overview of Practice with a Focus on Recent Trends and Cases' 14 Leiden JIL 89.

Alexandrov SA (2006), 'The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?' 5 Chinese JIL 29.

Alvarez JE (2001), 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' 12 EJIL 183.

Anand RP (1961), *Compulsory Jurisdiction of the International Court of Justice* (Asia Publishing House).

Anand RP (2001), 'Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement' 5 Max Planck UNYB 1.

Bagheri S (2015), 'Iran's Attitude to Security in the Strait of Hormuz: An International Law Perspective' 13 NZYIL 83.

Bankes N (2017), 'Precluding the Applicability of Section 2 of Part XV of the Law of the Sea Convention' 48 Ocean Development and IL 239.

Bellinger JB (2009), 'International Courts and Tribunals and the Rule of Law', in Romano C P R (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (CUP).

Bellinger JB (2018), 'Thoughts on the ICJ's Decision in Iran v US and the Trump Administrations' Treaty Withdrawals' *Lawfare* (October 5 2018).

Bilder R, 'International Dispute Settlement and the Role of Adjudication' in Damrosch L (ed), *The International Court of Justice at a Crossroads* (Dobbs Ferry: Transnational Publishers)

Brilmayer L and Faure A (2014), 'Initiating Territorial Adjudication: The Who, How, When, and Why of Litigating Contested Sovereignty' in Klein N (ed) *Litigating International Disputes: Weighing the Options* (CUP).

Brown C (2016), 'Mock Debate: Is the Primacy of the International Court of Justice in International Dispute Settlement Under Threat?' 110 ASIL Proceedings 191.

Burmester H (1996), 'Australia and the International Court of Justice' 17 Australian YIL 19

Chan K (2018), 'The ICJ's Judgment in *Somalia v Kenya* and its Implications for the Law of the Sea' 34 Utrecht J of Intl and Eur Law 195.

Charney J (1987), Compromissory Clauses and the Jurisdiction of the International Court of Justice 81 AJIL 855.

Chesterman S (2016), Asia's Ambivalence about International Law and Institutions: Past, Present and Futures 27 EJIL 945.

Churchill R (2017), 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context and Use' 48 Ocean Development and IL 216.

Collier J and Lowe V (1999), *The Settlement of Disputes in International Law: Institutions and Procedures* (OUP).

Crawford J (1979), 'The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court' 50 BYIL 63.

Crawford J (2013), '"Dreamers of the Day": Australia and the International Court of Justice' 14 Melbourne JIL 520.

Crawford J (2017), 'The Place of the International Court in International Dispute Settlement', in Crawford, Koroma, Mahmoudi and Pellet (eds) *The International Legal Order: Current Needs and Possible Responses* (Brill).

Davis CL and Bermeo SB (2009), 'Who Files? Developing Country Participation in WTO Adjudication' 71 Journal of Politics 1033

de Lacharrière GL (1973), 'Commentaires sur la position juridique de la France à l'égard de la licéité de ses experiences nucléaires' 19 AFDI 235.

de La Fayette L, (1999) 'The Fisheries Jurisdiction Case *(Spain v Canada)*' 48 ICLQ 664.

Dillard HC (1978) 'The World Court: Reflections of a Professor Turned Judge' 27 Am U L Rev 205.

Dunoff JL (2009) 'Does the United States Support International Tribunals? The Case of the Multilateral Trade System' in Romano C P R (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (CUP).

Forteau M (2013), 'The Diversity of Applicable Law Before International Tribunals as a Source of Forum Shopping and Fragmentation in International Law: An Assessment', in Wolfrum R and Gätzschmann I (eds) *International Dispute Settlement: Room for Innovations?* (Springer).

Fuentes X (2014), 'Latin American States and the International Court of Justice', in Klein N (ed) *Litigating International Disputes: Weighing the Options* (CUP).

Galbraith J (2013), 'Treaty Options: Towards a Behavioural Understanding of Treaty Design' (2013) 53 Virginia JIL 309.

Ginsburg T and McAdams RH (2004), 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution' 45 Wm and Mary L Rev 1229.

Gray C and Kingsbury B (1992), 'Developments in Dispute Settlement: Inter-State Arbitration Since 1945' (1992).

Guzman A (2008), *How International Law Works: A Rational Choice Theory* (OUP).

Higgins R (1994), *Problems and Process: International Law and How We Use It* (Clarendon).

Hinojal-Oyarbide A and Rosenboom A (2012), 'Managing the Process of Treaty Formation: Depositories and Registration', in Hollis DB (ed), *The Oxford Guide to Treaties* (OUP).

Indlekofer M (2013), *International Arbitration and the Permanent Court of Arbitration* (Wolters Kluwer).

Jennings R, Higgins R and Tomka P (2019), 'General Introduction', in Zimmermann A, Tams CJ, Oellers-Frahm K and Tomuschat C (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, OUP).

Kelly JP (1987), 'The International Court of Justice: Crisis and Reformation' 12 Yale JIL 342.

Kinsgbury B (2012), 'International Courts: Uneven Judicialisation in Global Order' in Crawford J and Koskenniemi M (eds), *The Cambridge Companion to International Law* (CUP).

Klein N (2005), *Dispute Settlement in the UN Convention of the Law of the Sea* (CUP).

Klein (2019), 'The *Timor Sea Conciliation* and Lessons for Northeast Asia in Resolving Maritime Boundary Disputes' 6 Journal of Territorial and Maritime St 30.

Koh T (2011) 'International Law and the Peaceful Resolution of Disputes: Asian Perspectives, Contributions and Challenges' (2011) 1 Asian JIL 57.

Kolb R and Krähenmann S (2009), 'The Scope *Ratione Materiae* of the Compulsory Jurisdiction of the ICJ' in Gaeta P (ed) *The UN Genocide Convention: A Commentary*.

Kolb R (2013), *The International Court of Justice* (Hart Publishing).

Kraska J (2019), 'Did ITLOS Just Kill the Military Activities Exemption in Article 298?' EJIL*:Talk!* (27 May 2019).

Krisch N (2005), 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' 16 EJIL 369.

Ku J (2012), 'China and the Future of International Adjudication' 27 Maryland JIL 154.

Laidlaw AK and Kang S (2018), 'The Dispute Settlement Mechanisms in Major Multilateral Treaties', NUS – Centre for International Law Working Paper 18/02.

Laidlaw AK and Phan HD (2019), Inter-State Compulsory Conciliation Procedures and the Maritime Boundary Between Timor-Leste and Australia 10 JIDS 126.

Lamm V (2014), *Compulsory Jurisdiction in International Law* (Edward Elgar).

Lauterpacht H (1930), 'The British Reservations to the Optional Clause' 29 Economica 137.

Llamzon AP (2007), 'Jurisdiction and Compliance in Some Recent Decisions of the ICJ' 18 EJIL 815.

Lloyd L (1997), 'Peace through Law: Britain and the International Court in the 1920s' (Boydell Press).

Macdonald RSJ (1970), 'The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice' Canadian YIL 3.

Marauhn T (2007), 'Dispute Resolution, Compliance Control and Enforcement of International Arms Control Law' in Ulfstein G (ed), *Making Treaties Work: Human Rights, Environment and Arms Control* (CUP).

Ma Xinmin (2012), 'China's Mechanism and Practice of Treaty Dispute Settlement' 11 Chinese JIL 387

Merrills J (1979), 'The Optional Clause Today' 50 BYIL 87

Merrills J (1993), 'The Optional Clause Revisited' 64 BYIL 197

Merrills J (2009), 'Does the Optional Clause Still Matter?' in Kaikobad KH and Bohlander M (eds), *International Law and Power: Perspectives on Legal Order and Justice* (Brill).

Merrills J (2017), 'Recent Practice with Regard to the Optional Clause: An Assessment', in Capaldi GZ (ed), *The Global Community Yearbook of International Law and Jurisprudence 2015* (OUP).

Miron A (2014), 'Le coût de justice internationale: enqûete sur les aspects financiers du contentieux interétatique' 60 AFDI 241.

Mitchell SM and Powell EJ (2011), *Domestic Law Goes Global: Legal Traditions and International Courts* (CUP).

Morrison FL (1987), 'Treaties as a Source of Jurisdiction, Especially in US Practice' in Damrosch L (ed), *The International Court of Justice at a Crossroads* (Dobbs Ferry: Transnational Publishers)

Moynihan H (2017), 'China's Evolving Approach to International Dispute Settlement' (Chatham House).

Murphy S D (2009), 'The United States and the International Court of Justice: Coping with Antinomies' in Romano C P R (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (CUP)

Naldi GJ (2014), 'The ASEAN Protocol on Dispute Settlement: An Appraisal' 5 JIDS 105.

Nowak M and McArthur E 2008, *The UN Convention against Torture: A Commentary* (OUP).

Oda S (1995), 'Dispute Settlement Prospects in the Law of the Sea' 44 ICLQ 863.

Oda S (2000), 'Compulsory Jurisdiction of the International Court: A Myth?' (2000) 49 ICLQ 251.

Oellers-Frahm K (2001), 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' 5 Max Planck UNYB 67.

Oral N (2009), 'Non-Ratification of the 1982 LOS Convention: An Aegean Dilemma of Environmental and Global Consequence' *Publicist: an online Publication of Berkeley Journal of International Law* (31 March 2009).

Papadaki M (2014), 'Compromissory Clauses as the Gatekeepers of the Law to be "Used" in the ICJ and the PCIJ' 5 JIDS 560.

Paulus A (2004), 'From Neglect to Defiance? The United States and International Adjudication', 15 EJIL 783.

Paulus A. (2011) 'Treaties of Friendship, Commerce and Navigation' MPEPIL.

Pauwelyn J and Hamilton R (2018), 'Exit from International Tribunals' 9 JIDS 679.

Potestà M (2012), 'Case Note: *Italy v Cuba*' 106 AJIL 341.

Quigley J (1988), 'Perestroika and International Law' 82 AJIL 788.

Quigley (2009), 'The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences' 19 Duke JICL 263.

Roberts A (2017), *Is International Law International?* (OUP).

Rehof LA (1993), *Guide to the* Travaux Préparatoires *of the UN Convention on the Elimination of all Forms of Discrimination against Women* (M Nijhoff).

Romano CPR (2009), 'The United States and International Courts: Getting the Cost-Benefit Analysis Right' in Romano C P R (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (CUP).

Rovine A W (1976), 'The National Interest and the World Court' in Gross L (ed) *The Future of the International Court of Justice* (vol ii, Oceana).

Ruiz Fabri H (2011), 'Article 66', in Corten O and Klein P (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP).

Sands P (2015), 'Of Courts and Competition: Dispute Settlement under Part XV of UNCLOS', in Wolfrum *et al* (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill).

Schneider P and Müller Wolf TJA (2007), 'The Court of Conciliation and Arbitration within the OSCE' CORE Working Paper 16, Centre for OSCE Research (University of Hamburg).

Scott GL and Carr CL, 'The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause' (1987) 81 AJIL 57.

Scott KN (2010), 'Non-compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements', in French D, Saul M and White ND (eds), International Law and Dispute Settlement: New Problems and Techniques (Hart).

Scott SV (2018), 'The Decline of International Law as a Normative Ideal' 49 Victoria Univ of Wellington LR 627.

Shany Y (2003), *The Competing Jurisdiction of International Courts and Tribunals* (OUP).

Shany Y (2015), *Questions of Jurisdiction and Admissibility Before International Courts* (CUP).

Shaw MN (2015), *Rosenne's Law and Practice of the International Court*, 1920-2015 (5th ed, Brill).

Simma B (1999), 'NATO, the UN and the Use of Force: Legal Aspects' 10 EJIL 1.

Simmons B (2002), 'Capacity, Commitment and Compliance: International Institutions and Territorial Disputes' (2002) 46 Journal of Conflict Resolution 829.

Sinclair I (1984), *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester UP).

Sobenes Obregon E and Samson B (2018), *Nicaragua Before the International Court* (Springer).

Sofaer A (1986), 'The United States and the World Court' 80 ASIL Proceedings 204.

Stephan PB (2009), 'Symmetry and Selectivity: What Happens in International Law When the World Changes' 10 Chicago JIL 91.

Swaine E (2012), 'Treaty Reservations' in Hollis DB (ed), *The Oxford Guide to Treaties* (OUP).

Tams CJ (2009) 'The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction' in Giegerich T (ed), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years After the Second Hague Conference* (Duncker and Humblot).

Tams CJ and Zimmermann A (2008), "'[T]he Federation Shall Accede to Agreements Providing for General, Comprehensive and Compulsory International Arbitration". The German Optional Clause Declaration of 1 May 2008' 51 German YIL 391.

Tanaka Y (2018), *The Peaceful Settlement of International Disputes* (CUP).

Tanaka Y (2018b) 'Reflections on *Locus Standi* in Response to a Breach of Obligations *Erga Omnes Partes*: A Comparative Analysis of the Whaling in the Antarctic and South China Sea cases' 17 Law and Practice of Intl Courts and Tribunals 527.

Thirlway H (2016), *The International Court of Justice* (OUP).

Thornberry P (2016), *The International Convention on the Elimination of All Forms of Racial Discrimination* (OUP).

Tomuschat C (2002), 'The 1928 General Act for the Pacific Settlement of International Disputes Revisited', in Ando N, McWhinney E and Wolfrum R, *Liber Amicorum Judge Shigeru Oda* (Kluwer).

Tomuschat C (2019), 'Article 36' in Zimmermann A, Tams CJ, Oellers-Frahm K and Tomuschat C (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, OUP).

Törber G (2015), *The Contractual Nature of the Optional Clause* (Hart).

Tzanakopoulos A (2019), 'The Secretary-General's Trust Fund to Assist States in the Settlement of their Disputes Through the International Court of Justice' Oxford Legal Studies Research Paper 45/2019.

Ulfstein G (2007), 'Dispute Resolution, Compliance Control and Enforcement in International Environmental Law' in Ulfstein G (ed), *Making Treaties Work: Human Rights, Environment and Arms Control* (CUP).

Veneziano S (2019), 'A Brief Criticism of the United States' Strategic Actions in Three Pending ICJ Cases' 51 International Law and Politics 965.

Ventouratou A (2018), 'The Settlement Agreement between Greece and the Former Yugoslav Republic of Macedonia', EJIL:*Talk!* (18 June 2018).

Waldock C (1955-56), 'The Decline of the Optional Clause' 32 BYIL 244–87.

Wentker A (2018), 'Venezuela's Non-Participation Before the ICJ in the Dispute over the Essequibo Region', EJIL:*Talk!* (29 June 2018).

Wood M (2006), 'The United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court' in Fauchald K, Jakhelln H and Syse A (eds) *Festskrift til CA Fleischer* (Universitetsforlaget Oslo).

Zou K and Qiang Y (2017), 'Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal' 48 Ocean Development and IL 331.

ANNEX 1: TABLE OF CONDITIONS AND RESERVATIONS TO OPTIONAL CLAUSE DECLARATIONS

	Provision for Expiry/ Withdrawal	***Ratione temporis***	**Anti-ambush**	**Domestic jurisdiction**	**Other means of dispute settlement**	**Territorial disputes/maritime delimitation**	**Military activities/armed conflict**	**Other**
Australia	On notification	-	For purpose of dispute/12 months	-	Yes	Yes (maritime)	-	Exploitation of maritime zone pending delimitation
Austria	5 years then on notification	-	-	-	Yes	-	-	-
Barbados	Immediate on notification	Yes	-	Yes ('by international law')	Yes	-	-	1)Commonwealth members 2) Living resources of sea/marine pollution
Belgium	5 years then on notification	Yes	-	-	Yes	-	-	-
Botswana	Silent on termination; amendment with immediate effect	-	-	Yes ('by international law'	Yes	-	-	-
Bulgaria	5 years then withdrawal w/ 6 months notice	Yes	For purpose of dispute/12 months	-	-	Yes (maritime)	-	All other law of the sea disputes
Cambodia	10 years then on notification	-	-	Yes ('by international law'	Yes	-	-	Disputes excluded from judicial settlement by treaty

Cameroon	5 years then on notification	-	-	-	-	-	-	-
Canada	On notification	Yes	-	Yes ('by international law')	Yes	-	-	1)Commonwealth members 2) Fisheries conservation/ management in NAFO area
Costa Rica	Tacitly renewed each 5 years	-	-	-	-	-	-	-
Cote d'Ivoire	'Subject to the power of denunciation and modification'	-	-	Yes ('by international law')	Yes	-	-	-
Cyprus	On notification, with immediate effect	-	For purpose of dispute/12 months	Yes	-	-	-	-
Dem. Rep. of the Congo	On notification	-	-	-	-	-	-	-
Denmark	Tacitly renewed each 5 years, unless denounced 6 months before expiration	-	-	-	-	-	-	-
Djibouti	For 5 years (from 2005)	-	-	Yes ('under international law'	Yes	Yes (land, maritime and airspace)	Yes	1) Multilateral treaties

								2) No diplomatic relations/non-recognition 3) Non-sovereign States 4) Maritime jurisdiction
Dominican Republic	-	-	-	-	-	-	-	-
Dominica	-	-	-	-	-	-	-	-
Egypt	-	*Only regarding Agreement on the Suez Canal and arrangements for its operation*						
Equatorial Guinea	On notification with immediate effect	*Only regarding disputes concerning privileges and immunities of States, senior State officials and State property*						
Estonia	-	-	-	-	Yes ('other tribunals')	-	-	-
Finland	Tacitly renewed each 5 years, unless denounced 6 months before expiration	Yes	-	-	-	-	-	-
Gambia	On notification	Yes	-	Yes ('by international law'	Yes	-	-	Commonwealth members
Georgia	-	-	-	-	-	-	-	-
Germany	On notification with	Yes	For purpose of dispute/12 months	-	Yes	-	Yes (deployment of armed forces abroad + use of	-

	immediate effect						German territory for military purposes)	
Greece	5 years and then until notification	-	For purpose of dispute/12 months	-	-	Yes (land, territorial sea and airspace)	Yes	-
Guinea-Bissau	W/ 6 months notice	-	-	-	-	-	-	-
Guinea	On notification	Yes	-	Yes ('under international law')	Yes	-	-	-
Haiti	-	-	-	-	-	-	-	-
Honduras	On notification	-	-	Yes ('under international law')	Yes	Yes (islands, shoals, keys, internal waters, bays, maritime zones)	Yes	Sovereignty and jurisdiction in maritime zones
Hungary	W/ 6 months notice	Yes	For purpose of dispute/12 months	Yes ('by international law')	Yes	-	Yes	-
India	On notification	Yes	For purpose of dispute/12 months	Yes	Yes	Yes (land and maritime)	Yes (including measures take for national security and preserving national defence)	1)Commonwealth members 2)League of Nations treaties 3)Multilateral treaties 4)No diplomatic relations/non-recognition 5)Non-sovereign States 6)Maritime jurisdiction

Ireland	On notification, with immediate effect	-	-	-	-	-	-	Dispute with the UK regarding Northern Ireland
Italy	On notification, with immediate effect	Yes	For purpose of dispute/12 months	-	Yes	-	-	-
Japan	On notification, with immediate effect	Yes	For purpose of dispute/12 months	-	Yes (where 'final and binding decision')	-	-	Living resources of the sea
Kenya	On notification, with immediate effect	Yes	-	Yes ('by general rules of international law')	Yes	-	Yes (belligerent occupation or UN-related)	-
Latvia	On notification	Yes	For purpose of dispute/12 months	-	Yes (where 'binding decision' or mechanism for monitoring treaty implementation)	-	Yes	6 months' notice in writing required.
Lesotho	On notification	-	-	-	Yes	-	-	-
Liberia	5 years, then on notification	-	-	Yes (self-judging)	Yes ('other tribunals')	-	-	-
Liechtenstein	W/ 1 year's notice	-	-	-	-	-	-	-

Lithuania	On notification, with immediate effect	Yes	For purpose of dispute/12 months	-	Yes	-	Yes (arising from decision of international security/ defence org.)	Any matter excluded from adjudication by treaty
Luxembourg	Tacitly renewed each 5 years, unless denounced 6 months before expiration	Yes	-	-	Yes	-	-	-
Madagascar	On notification, with immediate effect	-	-	Yes ('under international law')	Yes	-	-	-
Malawi	On notification, with immediate effect	Yes	-	Yes (self-judging)	Yes	-	Yes (belligerent occupation)	-
Malta	On notification	-	For purpose of dispute/12 months	Yes ('by international law')	Yes	Yes (land and maritime)	Yes (belligerent occupation or UN-related)	1)Commonwealth member 2)Multilateral treaty 3)Excluded from adjudication by treaty 4)Arbitral/judicial proceedings underway + other State had not at commencement

								accepted ICJ jurisdiction 5) Marine pollution
Marshall Islands	On notification; amendment with immediate effect	Yes	For purpose of dispute	-	Yes	-	-	-
Mauritius	On notification; amendment with immediate effect	-	For purpose of dispute/12 months	Yes (by international law)	Yes	-	Yes (belligerent occupation or UN-related)	1)Commonwealth member 2) Excluded from adjudication by treaty 3)Arbitral/judicial proceedings underway + other State had not at commencement accepted ICJ jurisdiction
Mexico	5 years, then withdrawal w/ 6 months notice	Yes	-	Yes (self-judging)	-	-	-	-
Netherlands	On notification	Yes	-	-	-	-	-	-
New Zealand	5 years, then withdrawal w/ 6 months notice	-	For purpose of dispute/12 months	-	Yes	-	-	Living resources in EEZ
Nicaragua	-	- (See 'other')	-	-	-	-	-	Treaties/arbitral awards made before 31 Dec 1901

Nigeria	On notification, with immediate effect	Yes	For purpose of dispute/12 months	Yes	Yes	Yes (land, maritime, lacustrine and airspace)	Yes	No diplomatic relations
Norway	Tacitly renewed each 5 years, unless denounced 6 months before expiration	-	-	-	-	-	-	Limitations on dispute settlement under UNCLOS and Straddling Fish Stocks Agreement apply
Pakistan	On notification, with immediate effect	Yes	For purpose of dispute/12 months	Yes	Yes	Yes (maritime zones, including exploitation of any disputed area)	Yes	1)National security 2)Multilateral treaty
Panama	-	-	-	-	-	-	-	-
Paraguay	-	Yes	-	-	-	-	-	-
Peru	On notification; amendment with immediate effect	-	-	-	Yes ('final and binding decision')	-	-	Disputes already settled by some other method
Philippines	On notification	Yes	For purpose of dispute/12 months	Yes (self-judging)	Yes	Yes (land, territorial seas and inland waters)	-	1)multilateral treaty 2)living resources of seabed
Poland	W/ 6 months' notice	Yes	12 months	Yes ('by international law')	Yes	Yes (territory and State boundaries)	-	1)environmental protection 2)foreign liabilities or debts
Portugal	On notification;	Yes	12 months	-	Yes	-	-	Dispute with a party/parties to a

	amendment with immediate effect							treaty regarding which ICJ jurisdiction excluded
Romania	On notification, with immediate effect	Yes	For purpose of dispute/12 months	Yes ('by international law')	Yes	-	Yes (hostilities + use of territory for military purposes)	Environmental protection
Senegal	Silent on termination; amendment with immediate effect	Yes	-	Yes ('under international law')	Yes	-	-	-
Slovakia	On notification with immediate effect	Yes	For purpose of dispute/12 months	Yes ('by international law')	Yes	-	-	Environmental protection
Somalia	On notification; amendment with immediate effect	-	For purpose of dispute/12 months	-	-	-	-	-
Spain	W/ 6 months' notice (but reciprocity applies); amendment with immediate effect	Yes	For purpose of dispute/12 months	-	Yes	-	-	-

Sudan	On notification	Yes	-	Yes (self-judging)	Yes	-	- (hostilities in which Sudan engaged)	-
Suriname	5 years, then withdrawal w/ 12 months' notice	-	-	-	Yes	Yes (borders of Suriname)	-	-
Swaziland	On notification, with immediate effect	-	-	Yes ('by international law')	Yes	-	-	-
Sweden	Tacitly renewed each 5 years, unless denounced 6 months before expiration	Yes	-	-	-	-	-	-
Switzerland	W/ 1 year's notice	-	-	-	-	-	-	-
Timor-Leste	On notification	-	-	-	-	-	-	-
Togo	'Subject to power of denunciation and modification'	-	-	-	-	-	-	-
Uganda	-	-	-	-	-	-	-	-
UK	On notification; amendment with	Yes	For purpose of dispute/12 months	-	Yes	-	Nuclear disarmament and/or nuclear weapons (unless	1)Commonwealth members (or former members)

	immediate effect						other nuclear weapons States are parties)	2)substantially the same as previously submitted claim 3) 6 months' notice in writing required.
Uruguay	-	-	-	-	-	-	-	-

ANNEX 2: ART 287 UNCLOS DECLARATIONS

States with Optional Clause declarations in force highlighted)

	ITLOS	ICJ	Annex VII	Annex VIII
Algeria	1			
Angola	1			
Argentina	1			
Australia	1	1		
Austria	1	3		2
Bangladesh[805]	1			
Belarus[806]			1	1
Belgium	1	1		
Bulgaria	1			
Cabo Verde	1	2		
Canada	1		1	
Chile	1			2
Croatia	1	2		
Cuba		X		
Democratic Republic of Congo	1			
Denmark		1		
Ecuador	1	1		1
Egypt			1	
Estonia	1	1		
Fiji	1			
Finland	1	1		
Germany	1	3	2	
Greece	1			
Guinea-Bissau		X		
Honduras		1		
Hungary	1	2		3
Italy	1	1		
Latvia	1	1		
Lithuania	1	1		
Madagascar	1			
Mexico	1	1		
Montenegro	1	2		
Netherlands	1	1		
Nicaragua		1		
Nigeria[807]	1			
Norway		1		
Oman	1	1		
Panama[808]	1			
Portugal	1	1	1	1

[805] For a specific dispute.

[806] An arbitral tribunal under Annex VII is chosen as the basic means of dispute settlement; a special arbitral tribunal under Annex VIII is chosen for questions related to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including the pollution from vessels of dumping; ITLOS's jurisdiction over prompt release of detained vessels and crews, provided for in art 292, is recognized.

[807] For a specific dispute.

[808] For a specific dispute.

Russian Federation[809]		**1**		**1**
St Vincent and the Grenadines	**1**			
Slovenia			**1**	
Spain	**1**	**1**		
Sweden		**1**		
Switzerland	**1**			
Tanzania	**1**			
Timor-Leste	**1**	**1**	**1**	**1**
Togo	**1**	**1**		
Trinidad and Tobago	**1**	**2**		
Tunisia	**1**		**2**	
Ukraine[810]			**1**	**1**
United Kingdom		**1**		
Uruguay	**1**			

[809] An arbitral tribunal under Annex VII is chosen as the basic means of dispute settlement; a special arbitral tribunal under Annex VIII is chosen for questions related to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including the pollution from vessels of dumping; ITLOS's jurisdiction over prompt release of detained vessels and crews, provided for in art 292, is recognized.

[810] Ibid.

ANNEX 3: ART 298 UNCLOS DECLARATIONS
(States with Optional Clause declarations in force highlighted)

	1(a) (maritime delimitation/historic bays or titles)	1(b) (military activities/ law enforcement under art 297(2),(3))	1(c) (disputes in respect of which UNSC is exercising its functions)	Specific forum excluded
Algeria	X	X	X	
Angola				No annex VII for 1(a)
Argentina[811]	X	X	X	
Australia	X			
Belarus		X	X	
Cabo Verde		X		
Canada	X	X	X	
Chile	X	X	X	
China	X	X	X	
Cuba				No ICJ for 1(a),(b),(c)
Democratic Republic of Congo[812]				No annex VII for 1(a)
Denmark				No annex VII for 1(a),(b),(c)
Ecuador	X	X	X	
Egypt	X	X	X	
Equatorial Guinea	X			
France	X	X	X	
Gabon	X			
Greece	X	X	X	
Guinea-Bissau				No ICJ for 1(a),(b),(c)
Iceland[813]	X			
Italy	X			
Kenya	X			
Malaysia	X			
Mexico	X	X		
Montenegro	X			
Nicaragua				Only ICJ for 1(a),(b),(c)

[811] Article (1)(b) declaration applies only to 'disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under art 297, paragraph 2 or 3'; the optional exception relating to 'military activities by government vessels and aircraft engaged in non-commercial service' was withdrawn in 2012.

[812] Unclear from text of the declaration whether it is intended to exclude all of the UNCLOS procedures or only an annex VII arbitral tribunal.

[813] Specifically limited to 'any interpretation of art 83' (delimitation of the continental shelf between States with opposite or adjacent coasts).

Norway				**No annex VII for 1(a),(b),(c)**
Palau	**X**			
Portugal	**X**	**X**	**X**	
Republic of Korea	**X**	**X**	**X**	
Russian Federation	**X**	**X**	**X**	
Saudi Arabia	**X**	**X**		
Singapore	**X**			
Slovenia	**X**	**X**	**X**	
Spain	**X**			
Thailand	**X**	**X**	**X**	
Togo		**X**	**X**	
Trinidad and Tobago	**X**			
Tunisia	**X**	**X**	**X**	
Ukraine	**X**	**X**		
United Kingdom		**X**	**X**	
Uruguay		**X**		

ANNEX 4: STATES' PRIOR CONSENT TO COMPULSORY JURISDICTION IN LAW OF THE SEA DISPUTES

	UNCLOS Party?	**ICJ Optional Clause? (if so, reservations relating to law of the sea disputes?)**	**ICJ – Pact of Bogota, European Convention?**	**UNCLOS art 287 declaration?**	**UNCLOS art 298 declaration?**
Afghanistan	No	No	No	-	-
Albania	Yes	No	No	No	No
Algeria	Yes	No	No	Yes - ITLOS	Yes – (a), (b), (c)
Andorra	No	No	No	-	-
Angola	Yes	No	No	Yes - ITLOS	Yes – no annex VII for 1(a)
Antigua and Barbuda	Yes	No	No	No	No
Argentina	Yes	No	No	Yes - ITLOS	Yes – (a), (b), (c)
Armenia	Yes	No	No	No	No
Australia	Yes	Yes with reservation (maritime delimitation and exploitation pending delimitation)	No	Yes – ITLOS and ICJ	Yes – (a)
Austria	Yes	Yes	Yes – European Convention	Yes – 1) ITLOS, 2) annex VIII, 3) ICJ	No
Azerbaijan	Yes	No	No	No	No
Bahamas	Yes	No	No	No	No
Bahrain	Yes	No	No	No	No
Bangladesh	Yes	No	No	No (in general)	No
Barbados	Yes	Yes with reservation (living resources of the sea/marine pollution)	No	No	No
Belarus	Yes	No	No	Yes – Annex VIII (where applicable), Annex VII (otherwise)	Yes – (b), (c)
Belgium	Yes	Yes	Yes – European Convention	Yes – ITLOS and ICJ	No
Belize	Yes	No	No	No	No
Benin	Yes	No	No	No	No
Bhutan	No	No	No	-	-

Bolivia	Yes	No	Yes – Pact of Bogotá	No	No
Bosnia and Herzegovina	Yes	No	No	No	No
Botswana	Yes	No	No	No	No
Brazil	Yes	No	Yes – Pact of Bogotá	No	No
Brunei	Yes	No	No	No	No
Bulgaria	Yes	Yes with reservation (all law of the sea disputes)	No	Yes - ITLOS	No
Burkina Faso	Yes	No	No	No	No
Burundi	No	No	No	-	-
Cabo Verde	Yes	No	No	Yes – 1)ITLOS, 2) ICJ	Yes – (b)
Cambodia	No	Yes (but reservation applying treaty limitations to jurisdiction under Optional Clause)	No	-	-
Cameroon	Yes	Yes	No	No	No
Canada	Yes	Yes with reservation (fisheries conservation/ management in NAFO area)	No	Yes – ITLOS, annex VII	Yes – (a), (b), (c)
Central African Republic	No	No	No	-	-
Chad	Yes	No	No	No	No
Chile	Yes	No	Yes – Pact of Bogotá	Yes – 1)ITLOS, 2)Annex VIII	Yes – (a), (b), (c)
China	Yes	No	No	No	Yes – (a), (b), (c)
Colombia	No	No	No	-	-
Comoros	Yes	No	No	No	No
Congo (Rep of)	Yes	No	No	No	No
Costa Rica	Yes	Yes	Yes – Pact of Bogotá	No	No
Côte d'Ivoire	Yes	Yes	No	No	No
Croatia	Yes	No	No	Yes – 1)ITLOS, 2)ICJ	No
Cuba	Yes	No	No	Yes - ICJ excluded	Yes – ICJ excluded for (a),(b),(c)
Cyprus	Yes	Yes	No	No	No
Czechia	Yes	No	No	No	No
Democratic People's	No	No	No	-	-

Republic of Korea					
Democratic Republic of the Congo	Yes	Yes	No	Yes - ITLOS	Yes – (a)[814]
Denmark	Yes	Yes	Yes – European Convention	Yes - ICJ	Yes – no annex VII for (a), (b), (c)
Djibouti	Yes	Yes with reservation (disputes concerning zones of maritime jurisdiction and maritime delimitation)	No	No	No
Dominica	Yes	Yes	No	No	No
Dominican Republic	Yes	Yes	Yes – Pact of Bogotá	No	No
Ecuador	Yes	No	Yes – Pact of Bogotá	Yes – ITLOS, ICJ, annex VIII	Yes – (a), (b), (c)
Egypt	Yes	Yes but only regarding Suez Canal	No	Yes – annex VII	Yes – (a), (b), (c)
El Salvador	No	No	No	-	-
Equatorial Guinea	Yes	Yes but only regarding State immunities	No	No	Yes – (a)
Eritrea	No	No	No	-	-
Estonia	Yes	Yes	No	Yes – ITLOS, ICJ	No
Eswatini	Yes	Yes	No	No	No
Ethiopia	No	No	No	-	-
Fiji	Yes	No	No	Yes - ITLOS	No
Finland	Yes	Yes	No	Yes – ICJ, ITLOS	No
France	Yes	No	No	No	Yes – (a), (b), (c)
Gabon	Yes	No	No	No	Yes – (a)
Gambia	Yes	Yes	No	No	No
Georgia	Yes	Yes	No	No	No
Germany	Yes	Yes	Yes – European Convention	Yes – 1)ITLOS, 2)annex VIII, 3) ICJ	No
Ghana	Yes	No	No	No	No
Greece	Yes	Yes with reservation (territorial sea)	No	Yes – ITLOS	Yes – (a), (b), (c)
Grenada	Yes	No	No	No	No

[814] Unclear from text of the declaration whether it is intended to exclude all of the UNCLOS procedures or only an annex VII arbitral tribunal.

Guatemala	Yes	No	No	No	No
Guinea	Yes	Yes	No	No	No
Guinea-Bissau	Yes	Yes	No	Yes – no ICJ	Yes – no ICJ for (a),(b),(c)
Guyana	Yes	No	No	No	No
Haiti	Yes	Yes	Yes – Pact of Bogotá	No	No
Honduras	Yes	Yes with reservation (territorial sovereignty and jurisdiction)	Yes – Pact of Bogotá	Yes - ICJ	No
Hungary	Yes	Yes	No	Yes – 1)ITLOS, 2)ICJ, 3)Annex VIII	No
Iceland	Yes	No	No	No	Yes – (a)[815]
India	Yes	Yes with reservation (disputes concerning zones of maritime jurisdiction and delimitation)	No	No	No
Indonesia	Yes	No	No	No	No
Iran	No	No	No	-	-
Iraq	Yes	No	No	No	No
Ireland	Yes	Yes	No	No	No
Israel	No	No	No	-	-
Italy	Yes	Yes	Yes – European Convention	Yes – ITLOS, ICJ	Yes – (a)
Jamaica	Yes	No	No	No	No
Japan	Yes	Yes with reservation (living resources of the sea)	No	No	No
Jordan	Yes	No	No	No	No
Kazakhstan	No	No	No	-	-
Kenya	Yes	Yes	No	No	Yes – (a)
Kiribati	Yes	No	No	No	No
Kuwait	Yes	No	No	No	No
Kyrgyzstan	No	No	No	-	-
Laos	Yes	No	No	No	No
Latvia	Yes	Yes	No	Yes – ITLOS, ICJ	No
Lebanon	Yes	No	No	No	No
Lesotho	Yes	Yes	No	No	No
Liberia	Yes	Yes	No	No	No
Libya	No	No	No	-	-

[815] Specifically limited to 'any interpretation of art 83' (delimitation of the continental shelf between States with opposite or adjacent coasts).

Liechtenstein	No	Yes	Yes – European Convention	-	-
Lithuania	Yes	Yes (but reservation applying treaty limitations to jurisdiction under Optional Clause)	No	Yes – ITLOS, ICJ	No
Luxembourg	Yes	Yes	Yes – European Convention	No	No
Madagascar	Yes	Yes	No	Yes - ITLOS	No
Malawi	Yes	Yes	No	No	No
Malaysia	Yes	No	No	No	Yes – (a)
Maldives	Yes	No	No	No	No
Mali	Yes	No	No	No	No
Malta	Yes	Yes with reservations (delimitation, maritime resources and pollution; also reservation applying treaty limitations to jurisdiction under Optional Clause)	Yes – European Convention (but Optional Clause reservations apply)	No	No
Marshall Islands	Yes	Yes	No	No	No
Mauritania	Yes	No	No	No	No
Mauritius	Yes	Yes (but reservation applying treaty limitations to jurisdiction under Optional Clause)	No	No	No
Mexico	Yes	Yes	Yes – Pact of Bogotá	Yes – ITLOS, ICJ	Yes – (a),(b)
Micronesia	Yes	No	No	No	No
Moldova	Yes	No	No	No	No
Monaco	Yes	No	No	No	No
Montenegro	Yes	No	No	Yes - 1) ITLOS, 2) ICJ	Yes – (a)
Morocco	Yes	No	No	No	No
Mozambique	Yes	No	No	No	No
Myanmar	Yes	No	No	No	No
Namibia	Yes	No	No	No	No
Nauru	Yes	No	No	No	No
Nepal	Yes	No	No	No	No

Netherlands	Yes	Yes	Yes – European Convention	Yes – ITLOS, ICJ	No
New Zealand	Yes	Yes with reservation (living resources in EEZ)	No	No	No
Nicaragua	Yes	Yes	Yes – Pact of Bogotá	Yes - ICJ	Yes – only ICJ for (a), (b), (c)
Niger	Yes	No	No	No	No
Nigeria	Yes	Yes with reservation (maritime delimitation)	No	No (in general)	No
North Macedonia	Yes	No	No	No	No
Norway	Yes	Yes with reservation (limitations and exceptions under UNCLOS apply)	Yes – European Convention	Yes - ICJ	Yes – no annex VII for (a), (b), (c)
Oman	Yes	No	No	Yes – ITLOS, ICJ	No
Pakistan	Yes	Yes with reservation (maritime delimitation and exploitation of disputed areas)	No	No	No
Palau	Yes	No	No	No	Yes – (a)
Panama	Yes	Yes	Yes – Pact of Bogotá	No (in general)	No
Papua New Guinea	Yes	No	No	No	No
Paraguay	Yes	Yes	Yes – Pact of Bogotá	No	No
Peru	No	Yes	Yes – Pact of Bogotá	-	-
Philippines	Yes	Yes with reservations (territorial seas and natural resources of seabed)	No	No	No
Poland	Yes	Yes with reservations (territory and environmental disputes)	No	No	No
Portugal	Yes	Yes (but reservation applying treaty limitations to jurisdiction	No	Yes - all four fora equally	Yes – (a),(b),(c)

		under Optional Clause)			
Qatar	Yes	No	No	No	No
Republic of Korea	Yes	No	No	No	Yes – (a), (b), (c)
Russian Federation	Yes	No	No	Yes – Annex VIII (where applicable), Annex VII (otherwise)	Yes – (a), (b), (c)
Romania	Yes	Yes with reservations (environmental disputes and military use of maritime zones)	No	No	No
Rwanda	No	No	No	-	-
Saint Kitts and Nevis	Yes	No	No	No	No
Saint Lucia	Yes	No	No	No	No
Saint Vincent and the Grenadines	Yes	No	No	Yes - ITLOS	No
Samoa	Yes	No	No	No	No
San Marino	No	No	No	-	-
São Tomé and Príncipe	Yes	No	No	No	No
Saudi Arabia	Yes	No	No	No	Yes – (a) and (b)
Senegal	Yes	Yes	No	No	No
Serbia	Yes	No	No	No	No
Seychelles	Yes	No	No	No	No
Sierra Leone	Yes	No	No	No	No
Singapore	Yes	No	No	No	Yes – (a)
Slovakia	Yes	Yes with reservation (environmental disputes)	Yes – European Convention	No	No
Slovenia	Yes	No	No	Yes – annex VII	Yes – (a), (b), (c)
Solomon Islands	Yes	No	No	No	No
Somalia	Yes	Yes	No	No	No
South Africa	Yes	No	No	No	No
South Sudan	No	No	No	-	-
Spain	Yes	No	No	Yes – ITLOS and ICJ	Yes – (a)
Sri Lanka	Yes	No	No	No	No
Sudan	Yes	Yes	No	No	No
Suriname	Yes	Yes with reservation (borders)	No	No	No
Sweden	Yes	Yes	Yes – European Convention	Yes - ICJ	No

Switzerland	Yes	Yes	Yes – European Convention	Yes - ITLOS	No
Syria	No	No	No	-	-
Tajikistan	No	No	No	-	-
Tanzania	Yes	No	No	Yes - ITLOS	No
Thailand	Yes	No	No	No	Yes – (a), (b), (c)
Timor-Leste	Yes	Yes	No	Yes - all four fora equally	No
Togo	Yes	Yes	No	Yes – ITLOS and ICJ	Yes – (b), (c)
Tonga	Yes	No	No	No	No
Trinidad and Tobago	Yes	No	No	Yes – 1)ITLOS, 2)ICJ	Yes – (a)
Tunisia	Yes	No	No	Yes – 1)ITLOS, 2)Annex VII	Yes –(a),(b),(c)
Turkey	No	No	No	-	-
Turkmenistan	No	No	No	-	-
Tuvalu	Yes	No	No	No	No
Uganda	Yes	Yes	No	No	No
Ukraine	Yes	No	No	Yes – Annex VIII (where applicable), Annex VII (otherwise)	Yes – (a) and (b)
United Arab Emirates	No	No	No	-	-
United Kingdom	Yes	Yes	Yes – European Convention (reservations to Optional Clause declaration apply)	Yes - ICJ	Yes – (b) and (c)
United States	No	No	No	-	-
Uruguay	Yes	Yes	Yes – Pact of Bogotá	Yes - ITLOS	Yes – (b)
Uzbekistan	No	No	No	-	-
Vanuatu	Yes	No	No	No	No
Venezuela	No	No	No	-	-
Vietnam	Yes	No	No	No	No
Yemen	Yes	No	No	No	No
Zambia	Yes	No	No	No	No
Zimbabwe	Yes	No	No	No	No

ANNEX 5: SUMMARY OF THE ROUNDTABLE ON PRIOR CONSENT BY STATES TO THE JURISDICTION OF INTERNATIONAL COURTS AND TRIBUNALS IN INTER-STATE DISPUTES

A roundtable on 'The Prior Consent by States to the Jurisdiction of International Tribunals in Inter-State Disputes' was held at the Blavatnik School of Government (University of Oxford) on 25 March 2019 to discuss the draft research document. The roundtable was divided in four sessions. The roundtable was chaired by Dapo Akande (Professor of Public International Law, Blavatnik School of Government, University of Oxford) and was attended by: Yutaka Arai (Professor of Law, University of Kent); Sir Frank Berman KCMG (Visiting Professor of Law, University of Oxford and Essex Court Chambers); Mathias Forteau (Professor of Public International Law, University of Paris Ouest); Hiroyuki Hamai (First Secretary, Embassy of Japan in the United Kingdom); Miles Jackson (Associate Professor of Law, University of Oxford); Vanda Lamm (Professor, Member of the Hungarian Academy of Sciences, Member of the *Institut de Droit International*); Sotirios Lekkas (DPhil candidate and Tutor in Public International Law, University of Oxford and former Judicial Fellow, International Court of Justice); Alison Macdonald QC (Matrix Chambers); Ruth Mackenzie (Reader in International Law, University of Westminster); Eleni Methymaki (DPhil candidate, University of Oxford); Alina Miron (Professor of International Law, University of Angers); Akio Morita (Professor of International Law, Hosei University); Masataka Okano (Deputy Director-General for Legal Affairs, Ministry of Foreign Affairs, Japan); Nikiforos Panagis (DPhil candidate and Tutor in Public International Law, University of Oxford); Yushifumi Tanaka (Professor of International Law, University of Copenhagen); Philippa Webb (Reader in International Law, King's College London and 20 Essex Street); Anna Ventouratou (DPhil candidate and Tutor in Public International Law, University of Oxford); and Zachary Vermeer (Postdoctoral Research Fellow, Blavatnik School of Government, University of Oxford).

The first session was devoted to an overview of the project, as outlined in Section A of the draft research document. After a brief introduction by the research team, the discussion was opened up regarding the broader themes of the study. Several participants inquired into the

standard by which the success (or progress) of dispute settlement mechanisms, and particularly of the ICJ, should be measured. It was pointed out that an increase in the docket of the ICJ does not necessarily mean adherence by States to dispute resolution, because often litigation is merely pursued as a tactical means (eg to obtain an order on interim protection, rather than a resolution of the dispute). Similarly, preference of other dispute resolution mechanisms (eg interstate arbitration) over the ICJ might be considered detrimental, or neutral, or beneficial to the international legal order, depending on the standard used. In this connection, a note of caution was given as to the distinction between the legal and the policy reasons for States' attitude towards third-party dispute settlement; it was suggested that the project could include a degree of political analysis, eg through interviews with State officials in relation to the acceptance of compulsory jurisdiction and to litigation.

In relation to the practice of prior consent to jurisdiction, several participants mentioned the potential relevance of multiple institutions and considerations in the drafting of dispute settlement provisions in treaties and of Optional Clause declarations under Article 36(2) ICJ Statute (OCDs). For instance, it might be worth inspecting whether bodies entrusted with the drafting of treaties, like the ILC or the Secretariat of an international organization, include compromissory clauses in the draft instruments they produce: often the default option offered for the purposes of treaty negotiation might inform the final choice made. Accordingly, the need (or willingness) for compulsory adjudication may vary depending on subject-matter: for instance, the importance of third-party fact-finding in the context of IHL may explain its prevalence (in theory, if not in practice) over dispute settlement, while a compromissory clause might be more expected in an area where there is little controversy or ambiguity as to the applicable substantive law. It was also pointed out that a decrease in recent treaties containing compromissory clauses might not be attributed to a reluctance to submit to jurisdiction but rather it might be correlated to an overall decrease in the conclusion of (multilateral) treaties. Alternatively, the cumulative effect of existing compomissory clauses might render new similar clauses redundant. In a similar vein, one participant pointed out that the study should take account not only of the States that have restricted or withdrawn their OCD to the ICJ, but also of those that have retained their OCDs and/or renewed their acceptance of compulsory jurisdiction.

With respect to the practice of litigation, it was considered interesting to explore the relationship between the acceptance of the jurisdiction of a court (notably the ICJ) and the use of bases of jurisdiction by litigant States in practice: for instance, despite the increasing acceptance of the jurisdiction of the ICJ through optional clause declarations (OCDs), States prefer

compromissory clauses as a basis of jurisdiction, and in fact only a handful of such clauses are repeatedly invoked, at the neglect of others. Moreover, note could be taken of the attitude of States towards alternative avenues available to them in relation to dispute resolution: why is the use of intervention (under Article 63 ICJ Statute) so rare and, further, may it be expected that States will attempt to use the advisory jurisdiction of the ICJ to obtain answers to their disputes (in the light of the recent Advisory Opinion in the *Chagos Islands*)? A few participants favoured the idea of mapping the case record of the ICJ in an attempt to identify patterns among States having used the court and among the subject-matters submitted. Closer to the topic of the research, it was deemed worth examining the relative success between the different legal bases invoked, by surveying both whether challenges to jurisdiction were raised by the respondent State and whether they were accepted by the Court. Relatedly, a potential correlation between the nature of consent (prior vs *ad hoc*, and/or through compromissory clause vs through OCD) and the level of compliance with the judgment might be sought.

The second session focused on prior consent to the jurisdiction of the ICJ, as provided for in OCDs and treaties. The two avenues of prior consent, which are covered in Sections B and C of the study respectively, were discussed in turn. Seeking to identify the reasons why States elect to submit an OCD or to refrain therefrom, several participants agreed that States, especially those not familiar with the Court's practice, gain confidence in the ICJ through participation in advisory proceedings, and might subsequently subject themselves to the Court's compulsory jurisdiction under the Optional Clause. Relatedly, a participant commended the importance of model OCDs, like one found in the handbook on accepting the ICJ's jurisdiction drafted by Switzerland (available online), in assisting States that are not very well-versed in the Court's operation. Further, an OCD might be submitted with a view to bringing a specific dispute to the Court in the future; in this connection, one participant suggested identifying patterns between the date of submission of OCDs by States and of institution of proceedings under the Optional Clause by the same States.

A few participants cautioned against the normative standpoint of the study and, in particular, the desirability of OCDs with few limitations over OCDs with broad limitations and, further, of the latter over no acceptance of the court's jurisdiction under the Optional Clause. More broadly, a participant advised for a balanced analysis of the considerations pertaining both to the applicant and to the respondent State and, more importantly, to the Court itself. In this connection, it was asserted that the cautious approach adopted by the ICJ as to its jurisdiction might be explained by its desire to convince and maintain its audience, namely the litigants and

potential litigants before it. This caution might be distorted by the Court's more liberal approach in respect of its advisory jurisdiction, as evidenced in the recent *Chagos Islands* Advisory Opinion.

On a more doctrinal level, a participant questioned the existence of any standards whatsoever against which the validity of an OCD (including the limitations thereof) could be assessed. Pointing out to the case concerning *Mutual Assistance in Criminal Matters*, another participant argued that the submission of an OCD, regardless of its potentially excessive limitations (including a self-judging clause), would at least entail an obligation to act in good faith. It was agreed among participants that the existence of consent on behalf of the respondent State hinges on the interpretation, rather than on the validity, of its OCD.

Turning to the acceptance of the jurisdiction of the ICJ through treaties, it was agreed among participants that there was merit in the distinction adopted by the study between general dispute settlement treaties and subject-matter-specific treaties with compromissory clauses. It was further enquired whether this distinction was also relevant at the level of compliance with the court's judgment, possibly suggesting that one of the two types of treaty is more effective in resolving disputes than the other. More broadly, extensive discussion was undertaken as to the relevance of treaty design in the acceptance of compulsory jurisdiction: arguably, different levels of acceptance would result from an opt-in, rather than an opt-out, dispute settlement mechanism embedded in a compromissory clause, or a mechanism provided for in a separate instrument (such as an Optional Protocol). Inertia, ease of acceptance or withdrawal, as well as possible constraints under domestic law (eg requirement of approval by the legislature) might inform the choice of accepting jurisdiction under the aforementioned or other different models.

In relation to the measurement of acceptance of the Court's jurisdiction through treaties, one participant pointed out that the quantity of treaties might be a misleading criterion; rather, it was important to assess the extent of jurisdiction accepted through each treaty. In this connection, several participants thought that the use of compromissory clauses as jurisdictional bases might have important implications for the resolution of the dispute: it might induce the Applicant to frame the dispute in a particular way and it might prevent the Respondent State from invoking defences under general international law. Further, one participant identified as a problem with compromissory clauses (as well as of limitations in OCDs) consists in the fact that they prevent the Court from addressing the dispute holistically and thus from fulfilling its function as an agent of development of international law.

The third session revolved around Sections D and E of the draft research document, namely interstate arbitration and dispute settlement under Part XV UNCLOS, respectively. With

respect to interstate arbitration, several participants were sceptical as to the existence of competition between the ICJ and arbitral tribunals. One participant pointed out that, despite the literature and warnings about fragmentation, cross-fertilisation among courts and tribunals was high. By contrast, another participant thought that the recent judgment by the ICJ on its jurisdiction in the *Somalia v Kenya* case indicated a degree of competition among different courts over the same class of disputes. In this connection, the participant highlighted the increasing possibility for the same dispute to be submitted, in whole or in part, before multiple forums. Relatedly, several participants highlighted that States commonly select arbitrators among the ICJ bench, which might reduce the institutional and doctrinal gap between the two institutions. However, one participant mentioned that this practice was already discouraged in the 2011 Report and Resolution of the *Institut de Droit International* on the 'Position of the International Judge'. Overall, it was agreed that the recently announced policy against participation by ICJ judges in arbitration would have implications in the development of dispute settlement, yet a degree of flexibility in the application of the policy was expected (if not necessarily desired).

The discussion then turned onto the merits and demerits of the two methods of dispute settlement. As one participant pointed out, interstate arbitration seems to be the preferred choice in compromissory clauses, yet in practice litigation in the ICJ is more frequent. Relatedly, it was suggested that States often prefer arbitration to judicial settlement by standing courts not for institutional but rather for practical or jurisdictional reasons, as several recent disputes confirmed (such as the *Indus Waters Treaty* and the *Croatia v Slovenia* cases). This was corroborated by the practice of litigant parties agreeing to transfer pending cases from Annex VII tribunals to ITLOS under UNCLOS.

Turning into judicial settlement under Part XV UNCLOS, several participants confirmed the assumption of the study that the relatively low number of declarations under Article 287 UNCLOS is owed to inertia or to a desire by the State to avoid committing itself to more than one standing courts (eg ICJ and ITLOS). In terms of treaty design, a few participants considered it telling that the complex model adopted in UNCLOS has not been replicated in subsequent dispute settlement mechanisms. The loopholes of the UNCLOS system, which prevented it from being considered truly compulsory, were also highlighted. The discussion then revolved around the relationship between jurisdiction under UNCLOS and other jurisdictional bases (eg OCDs). One participant suggested that States presumably approved the recent ICJ judgment in the *Somalia v Kenya* case, otherwise they would have indicated their dissatisfaction by amending their OCDs, especially the frequently encountered limitation in respect of the recourse to other

means of dispute settlement. Overall, it was agreed that this judgment was carefully confined to the specific circumstances.

The fourth and final session served as a general conclusion to the roundtable. The discussion focused on the ways in which acceptance of the compulsory jurisdiction of the ICJ could be improved. One participant suggested drawing analogies from the structure of the WTO dispute settlement mechanism, although it was admitted that the structure of the ICJ could not realistically be modified. Several participants concurred that more effort should be made in disseminating the Court's operation to a wider audience, especially to smaller or recently formed States; the PCA and its outreach strategy might provide useful insights in this regard. Further, the implications of compulsory jurisdiction in the settlement of disputes were discussed: several participants confirmed that the prospect of adjudication affects the attitude of States in relation to their everyday conduct and, in the context of a dispute, in relation to the course of negotiations or other non-judicial means of dispute settlement. In the same vein, it was argued that the ICJ should not undermine the role of other mechanisms of dispute settlement, especially specialized mechanisms such as the UN treaty bodies, and that it should facilitate discontinuance of litigation where a negotiated solution could be reached.