The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?

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Abstract

The “compulsory jurisdiction” of the International Court of Justice is not truly compulsory. The Court’s jurisdiction is based on the consent of the parties. States have the option to accept or not to accept the Court’s jurisdiction and can do so under terms and conditions they determine themselves. However, once a State has granted its consent, and when a dispute that falls within the scope of that consent is submitted to the Court, the State must subject itself to the Court’s jurisdiction. It is that legal obligation that is at the root of the term “compulsory”.

The jurisdiction of the International Court of Justice (ICJ, “the Court”) is based on the consent of the parties. No State can be compelled without its consent to submit a dispute with another State to international adjudication. In the words of the Court, the principle that “the Court can only exercise jurisdiction over a State with its consent” is “a well established principle of international law embodied in the Court’s Statute”.1 If that is the case, why then speak of compulsory jurisdiction? After all, States cannot be compelled to grant their consent to the Court’s jurisdiction. This short essay will attempt to address that question and compare with similar concepts in other dispute settlement regimes.

Before addressing that question, we need to consider the various ways in which a State can express its consent. A State that wishes to express its consent to the jurisdiction of the Court is required to take two separate steps. First, it must become a party to the Statute of the Court.2

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1 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, para.26.

2 Under Art.35(1) of the Statute, the Court “shall be open to all states parties to the present Statute”. To become a party to the Statute, a State must either be a member of the United Nations or accept the conditions specified in
This first step establishes a State’s consent to assume the obligations incumbent upon it under the Statute but is not sufficient to establish the jurisdiction of the Court to adjudicate a specific legal dispute. A second, independent act of consent is required—an acceptance of the Court’s jurisdiction under the relevant provisions of the Statute. As the Court has stated, “[i]n the absence of a clear agreement between the Parties, . . . the Court has no jurisdiction to go into . . . the merits”.  

This second, independent act of consent can be expressed in various forms. One significant distinction among those forms is whether the State consents to submit to the Court’s jurisdiction a specific, already existing dispute, or all or certain categories of potential future disputes.

A State can consent to submit to the Court a specific, already existing dispute in several different ways. First, the States Parties to a dispute can refer a specific dispute to the Court by an ad hoc agreement concerning the specific dispute, known as a special agreement or compromis. Such jurisdiction has been generally known as voluntary jurisdiction, as provided for in Article 36(1) of the Statute. Second, a State may express its consent by accepting a recommendation to submit a dispute to the ICJ made by the Security Council under Articles 33 and 36 of the UN Charter.  

Third, a State may give its consent through conduct explicitly or implicitly manifesting its intention to accept the Court’s jurisdiction with respect to a dispute (forum prorogatum).  

The consent of a State, however, can cover more than a specific, already existing dispute. States can agree to refer to the Court all or certain categories of legal disputes. It is the Court’s jurisdiction exercised on this basis that is referred to as compulsory jurisdiction.

The consent of a State to accept the Court’s jurisdiction with respect to all or certain categories of legal disputes can also be expressed in different ways. First, it can be expressed in a treaty, as provided for in Article 36(1) of the Statute. States express their consent to adjudicate by becoming parties to such treaties, and in these cases no further consent is required. Any State Party to such a treaty or convention can submit to the Court a dispute with another State Party without any special agreement or ad hoc consent of the defendant. As the Court has stated, “[t]he characteristic of this compulsory jurisdiction is that it results from a previous agreement which makes it possible to seise the Court of a dispute without a Special

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3 Ambatielos Case (Greece v. United Kingdom), Preliminary Objection, Judgment, ICJ Reports 1952, 28, 39.
4 For example, in the Corfu Channel Case, Albania declared that it accepted the recommendation of the Security Council to submit the dispute to the Court; Corfu Channel Case (UK v. Albania), Order (31 July 1947), ICJ Reports 1947, 4, 5.
5 See, e.g. Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Poland), Judgment, 1928 PCIJ, Series A, No.15, 4, 24. See also Chorzow Factory (Germany v. Poland), Judgment (Merits), 1928 PCIJ, Series A, No.17, 4, 37; Société Commerciale de Belgique (Belgium v. Greece), Judgment, 1939 PCIJ, Series A/B, No.78, 160, 174. For a survey of these cases and a discussion of the whole subject, see C.H.M. Waldock, Forum Prorogatum or Acceptance of a Unilateral Summons to Appear before the International Court, 2 International Law Quarterly (1948), 377.
6 See Ruth C. Lawson, The Problem of the Compulsory Jurisdiction of the World Court, 46 AJIL (1952) 219, 223–30 on treaties and conventions as a basis for the Court’s compulsory jurisdiction.
Agreement, and that in respect of disputes subject to it, the Court may be seised by means of an Application by one of the parties.”7 This jurisdiction of the Court is not really compulsory. States enter into treaties and undertake obligations under international law as sovereign actors. They cannot be “compelled” to enter into a treaty in the ordinary meaning of that term, let alone to accept the jurisdiction of the Court to resolve disputes under the treaty in question.

Second, the compulsory jurisdiction of the Court can be accepted by a unilateral declaration pursuant to Article 36, paragraph 2 of the Statute of the Court. By making a declaration, a State recognizes “as compulsory ipso facto and without special agreement the jurisdiction of the Court”. The consent of a State to adjudicate a specific dispute is thus established on the basis of its unilateral declaration. Such consent has to be established both with respect to the claimant and with respect to the defendant State. Therefore, the compulsory jurisdiction of the Court derived from Article 36(2) is still based on the consent of the parties, which is expressed in their respective unilateral declarations.

The compulsory jurisdiction of the Court under Article 36(2) is not really compulsory either. It is, in fact, optional. States have the option to accept it and can do so under terms and conditions that they determine themselves. The Court has stated:

Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations.8

Not all States have made such unilateral declarations. The declarations of acceptance of the compulsory jurisdiction of 67 States are currently in effect.9 While this is not an insignificant number, it is less than half of the States Parties to the Statute of the Court. Moreover, only one of the permanent members of the Security Council—the United Kingdom—currently consents to the Court’s jurisdiction under Article 36(2); several other leading States, such as Germany and Brazil, do not.

The drafting history of Article 36(2) of the Court’s Statute makes it clear that the jurisdiction based on that provision is hardly compulsory. When Article 36(2) of the Statute of the Permanent Court of International Justice was drafted, the Committee of Jurists, which was asked by the Council of the League of Nations to draft the Statute, adopted a text providing for the compulsory jurisdiction of the Court with respect to all legal disputes. The Council, however, proceeded to approve a series of amendments virtually eliminating compulsory jurisdiction.10 Further, the proposal of the Committee of Jurists was not accepted by the

7 Nottebohm Case (Liechtenstein v. Guatemala), Preliminary Objections, Judgment, ICJ Reports 1953, 111, 122.
10 For a review of the discussion in the Committee and the Council, see M.O. Hudson, The Permanent Court of International Justice 1920–1942: A Treatise (1943), 189–91.
First Assembly. The delegate of Brazil suggested that alternative texts be adopted, so that Member States have the choice to adhere to one of them. This proposal was adopted with some modifications in the form of an optional provision for obligatory jurisdiction and the Third Committee of the First Assembly adopted a provision for an optional declaration accepting compulsory jurisdiction. Thus, instead of including in the Statute a provision on the compulsory jurisdiction of the Court, as the prevailing views in the Committee of Jurists suggested, the League of Nations Assembly adopted an optional clause to which States could adhere by a separate act of consent. The provision was optional as far as the mechanism of States’ adherence to it was concerned. Once, however, a State made the independent act of consent required for accepting the optional clause, the provision became binding.

The issue was extensively discussed during the drafting of the Statute of the ICJ. The Committee of Jurists, unable to reach a conclusion, submitted for consideration to the San Francisco Conference two alternative proposals. One of them corresponded to the provision of Article 36(2) as it is today, following the text of Article 36(2) of the Statute of the Permanent Court of International Justice. The other provided for the compulsory jurisdiction of the ICJ in all legal disputes. The Committee of Jurists referred the matter to the Conference. The debate in the First Committee of the Conference revealed a “sharp division of opinion” on the two proposed texts. After long discussions and several votes, the First Committee decided “to retain the optional provision for compulsory jurisdiction.”

Why, then, is this type of the Court’s jurisdiction referred to as compulsory? A declaration under Article 36(2) is a unilateral act by which a State accepts the Court’s jurisdiction and which, therefore, creates an international obligation for the State. By virtue of its declaration, the declarant State undertakes a binding legal obligation to submit to the jurisdiction of the Court. This act establishes both the relationship between the State and the
Court and the relationship between the declarant State and other States. The declaration is an invitation—an offer extended by the declarant State to other States to adjudicate before the Court all or certain categories of legal disputes. Judge McNair’s observation that Article 36(2) of the Court’s Statute is “in the nature of a standing invitation” to Member States to accept compulsory jurisdiction also applies with respect to declarations under Article 36(2) themselves, which may also be considered “in the nature of a standing invitation” to other States that have or will accept compulsory jurisdiction to submit disputes before the Court. In the words of Briggs, the Court’s jurisdiction pursuant to Article 36(2) “is in the nature of a general offer, made by declarant to all other States accepting the same obligation, to recognize as Respondent the jurisdiction of the Court . . .”. As a result, other States acquire the right to bring before the Court cases against the declarant State (while the declarant State acquires the right to bring cases against those other States).

Under Article 36(2), however, the general offer is not extended to all States but only to “any other state accepting the same obligation”. This is logical, since the jurisdiction of the Court cannot exist without the consent of the parties to a dispute which, in the case of the compulsory jurisdiction under Article 36(2), is based on their unilateral declarations.

The compulsory jurisdiction of the Court is thus based on the prior consent by both of the parties concerned within the limits of that consent. In this regard, a declaration under Article 36(2) is similar to a treaty obligation where one party consents to join a system of rights and obligations based on a treaty. This was recognized by the Court on several occasions in some of its early cases. Later, in the Nicaragua case, the Court pointed out that unilateral declarations “establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction” and referred to the system under the Optional Clause as a “network of engagements”. More recently, the Court confirmed that “[a] declaration of acceptance of the compulsory jurisdiction . . . is a unilateral act of State sovereignty” which, at the same time, “establishes a consensual bond and the potential for a jurisdictional

20 Individual opinion of Judge McNair, Anglo–Iranian Oil Co. Case (United Kingdom v. Iran), Preliminary Objection, Judgment, ICJ Reports 1952, 93, 116.
22 See C.H.M. Waldock, Decline of the Optional Clause, 32 BYBIL (1955–56), 244, 247, who noted that the “reciprocal obligation [of two States] to accept the Court’s compulsory jurisdiction is constituted by the joining together of their two declarations through [Art.36(2)]”.
23 See H. Lauterpacht, The Development of International Law by the International Court (1958), 345–6; M.O. Hudson, The Permanent Court of International Justice 1920–1942: A Treatise (1943), 473, n.1, who pointed out that the 42 declarations effective as of the end of 1934 “were equivalent to 861 bipartite agreements”; C.H.M. Waldock, Decline of the Optional Clause, 32 BYBIL (1955–56), 244, 254.
24 See Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Preliminary Objection, Judgment, 1939 PCIJ, Series A/B, No.77, 87; Case Concerning Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections, Judgment, ICJ Reports 1957, 125, 146; Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 392, 418, paras 59–60.
25 Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 392, 418.
Because unilateral declarations under Article 36(2) express an advance consent to submit to the Court all or certain categories of disputes, it is very important for the Court to establish the scope of the consent of the declarant State, i.e. the scope of the jurisdiction that it intended to confer upon the Court. The obligations assumed by a unilateral declaration under Article 36(2) arise when a specific dispute is submitted to the Court. The Court then must establish whether both the applicant and the respondent have consented to adjudicate the dispute within the bounds of their unilateral declarations. The Court has ruled that a declaration “must be interpreted as it stands, having regard to the words actually used”.

In the *Fisheries Jurisdiction Case*, for example, the Court emphasized that it must “interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court”. The Court thus must interpret the declaration to determine the scope of the legal obligation undertaken by the declarant State.

In sum, a State expresses in advance its consent to be bound by the Court’s jurisdiction with respect to all or certain categories of disputes. When a dispute that falls within the scope of that consent is submitted to the Court, the State must subject itself to the Court’s jurisdiction. Because the consent is granted in advance, with respect to all or certain categories of disputes, including future disputes, States that grant such consent expose themselves to a certain degree of unpredictability and vulnerability. This was illustrated in the *Nicaragua* case. In 1946, when the United States made its declaration accepting compulsory jurisdiction, it was impossible to predict the deterioration of its relations with Nicaragua and the situation that emerged in the early 1980s leading to Nicaragua’s decision to file a suit against the United States before the ICJ. The belated attempt of the United States to exclude the dispute from its acceptance of compulsory jurisdiction was rejected by the Court.

This element of unpredictability and vulnerability is inherent in the legal nature of the compulsory jurisdiction. It arises out of the fact that consent is granted in advance, before a specific dispute comes to life. Unilateral declarations are made *erga omnes* once the consent is given, every declarant State “must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligation of

26 Fisheries Jurisdiction Case (Spain v. Canada), Jurisdiction, Judgment, ICJ Reports 1998, para.46.
27 Anglo–Iranian Oil Co. Case (United Kingdom v. Iran), Preliminary Objection, Judgment, ICJ Reports 1952, 93, 105.
28 Fisheries Jurisdiction Case (Spain v. Canada), Jurisdiction, Judgment, ICJ Reports 1998, para.49.
29 It was in relation to this case that Michael Reisman noted: “[W]e extend a general invitation to any of the other members of the United Nations to adjudicate—at their invitation and at a time of their choosing—... any international matter not regulated by a multilateral convention. ... [W]e extend a general invitation to any of the 158 other states in the United Nations to frame the issue themselves when they initiate adjudication against us.” W. Michael Reisman, Termination of the United States Declaration under Article 36(2) of the Statute of the International Court, in: Anthony Clark Arend (ed.), The United States and the Compulsory Jurisdiction of the International Court of Justice (1986), 71, 71.
...in relation to ... [another State], as a result of the deposit by that” State of a declaration under Article 36(2). This has been referred to as the “sitting duck” or “hit-and-run” problem. This problem was the central issue in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria. Cameroon had deposited its declaration on 3 March 1994, and filed the application on 29 March 1994. Nigeria, which had submitted its declaration accepting the compulsory jurisdiction of the Court much earlier, contended that it did not know on the date of the filing of the application that Cameroon had deposited a declaration; that Cameroon had acted prematurely, accepting “surreptitiously” the jurisdiction of the Court and instituting the proceedings against Nigeria with “inappropriate haste”, without threat, suggestion or warning; and that Nigeria was accordingly subject to a “trial by ambush”.32

The Court disagreed with Nigeria’s arguments. It stated:

Any State party to the Statute, in adhering to the jurisdiction of the Court in accordance with Article 36, paragraph 2, accepts jurisdiction in its relations with States previously having adhered to that clause. At the same time, it makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance. The day one of those States accepts that offer by depositing in its turn its declaration of acceptance, the consensual bond is established and no further condition needs to be fulfilled.33

The Court thus essentially ruled that once a State makes a declaration under Article 36(2), it becomes a “sitting duck”, since it extends a standing offer to all other States accepting the same obligation to adjudicate disputes before the Court.

The Court’s compulsory jurisdiction is therefore compulsory in the sense that consent to jurisdiction is granted by the States in advance, with respect to all or certain categories of disputes, and once a dispute arises, the State then does have a binding obligation and must submit to the Court’s jurisdiction.

This concept has been applied to other types of dispute settlement mechanisms. Consider, for example, investor-State arbitrations under investment treaties, particularly those subject to the jurisdiction of the International Centre for Settlement of Investment Disputes.

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30 Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections, Judgment, ICJ Reports 1957, 125, 146.
(ICSID) under the ICSID Convention. Article 25 of the ICSID Convention requires that the parties, i.e. the host State and the foreign investor, have consented to ICSID’s jurisdiction. The Report of the Executive Directors of the World Bank on the ICSID Convention explains that consent is “the cornerstone of the jurisdiction of the Centre”. As a result, the scope of an ICSID tribunal’s jurisdiction depends on both the ICSID Convention—as an outside limit—and the specific provisions of the written instruments in which consent to arbitration is expressed, e.g. an investment treaty.

As in the case of the compulsory jurisdiction of the ICJ, an important feature of ICSID arbitration is the bifurcated manner in which consent may be given. As the Executive Directors of the World Bank explained, the ICSID Convention does not require that both parties express their consent in the same document, or that consent be simultaneously given. As a result, a host State can express in writing in one document its consent to arbitrate certain disputes under the Convention, and the investor can give its consent to arbitrate just such a dispute in another document—such as a request for arbitration—at a later time.

This is the approach found in investment treaties that include States’ consent to ICSID jurisdiction. In most cases, the investment treaty itself contains a standing, unilateral offer by the Contracting States to submit investment disputes with investors from the other Contracting Party (or Parties) to arbitration. More precisely, the treaty comprises the States’ advance consent to arbitrate disputes covered by the treaty. An aggrieved investor then consents to the arbitration—and thereby completes the agreement to arbitrate—by submitting such a dispute to an arbitral forum, such as ICSID, that is specified in the treaty.

The jurisdiction of ICSID tribunals in disputes under investment treaties is a function of the parties’ consent to arbitrate the dispute: a tribunal’s jurisdiction is as broad or as narrow as the parties have agreed that it will be. Therefore, the particular jurisdictional requirements for a given investor-State treaty-based dispute will turn on the terms of the treaty itself, i.e. on the textual boundaries of the category of disputes that the respondent

35 See Christoph Schreuer, Commentary on the ICSID Convention, Art.25, para.5.
37 See Christoph Schreuer, Commentary on the ICSID Convention, paras 24–35, 256–319.
38 Ibid. Tribunals have affirmed that claimants may accept this standing offer by complying with the terms of the BIT. See Lanco International, Inc. v. Argentina, ICSID Case No.ARB/97/6, Decision on Jurisdiction, 8 December 1998, 40 ILM (2001), 457; Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux v. Argentine Republic, Award, 21 November 2000, ICSID Case No.ARB/97/3, 40 (2001) ILM 426.
39 Christoph Schreuer, Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 The Journal of World Investment and Trade (2004), 231, 250: “BITs [bilateral investment treaties] define the parameters for the activities of tribunals in investor-State arbitration. Jurisdiction may be subject to certain procedural requirements. For instance, a claimant may be required to attempt to reach an amicable settlement for a certain period of time. The competence of arbitral tribunals may depend on proceedings in the host State’s domestic courts. For instance, the BITs may require the exhaustion of local remedies; or it may require the investor to choose between domestic courts and international arbitration.” The subject-matter jurisdiction of tribunals also varies. It may be described narrowly or more widely. For instance, jurisdiction may be limited to claims alleging a violation of the BIT itself or it may extend to investment disputes in general.
It is typically the investment treaty that defines, for example, who qualifies as an “investor” and what constitutes an “investment” for purposes of jurisdiction.

Because of the somewhat unusual “advance consent” mechanism in most investment treaties, aggrieved investors can call upon States to arbitrate long after the States have spelled out in their investment treaties the conditions under which they consented to do so. The element of unpredictability and vulnerability typical of the compulsory jurisdiction of the ICJ is thus also present in ICSID jurisdiction under investment treaties. Respondent States in investor-State arbitrations often complain that they are “sitting ducks”, vulnerable to unforeseen and unforeseeable investors’ claims. As a result, not surprisingly, the scope of consent expressed by States in investment treaties has given rise to a large number of jurisdictional challenges in ICSID cases—much like disputes before the Court regarding the scope of consent to jurisdiction in a unilateral declaration.

As with the consent in unilateral declarations accepting the compulsory jurisdiction of the ICJ, the consent to ICSID arbitration under investment treaties has also been described as a “general offer” or a “standing invitation”. In the case of ICSID, such an offer or invitation is extended by a State Party to an investment treaty to investors from the treaty partner or partners; the State “offers” or “invites” such investors to arbitrate before ICSID disputes under the treaty. As Geneviève Burdeau explains, States that have included ICSID clauses in investment treaties are in a very particular situation: private foreign investors can bring them before ICSID by filing a unilateral complaint before an ICSID tribunal in relation to all sorts of disputes that those States have not anticipated in advance.

In sum, the State’s consent in a treaty is granted in advance with respect to certain categories of future disputes. Once a dispute arises, the investor’s consent to submit that dispute to ICSID arbitration is sufficient for the ICSID tribunal’s jurisdiction. While ICSID’s jurisdiction based on the advance consent of a State in an investment treaty is not typically referred to as “compulsory”, the ICSID Convention provides in Article 25 that consent to ICSID jurisdiction, once granted, may not be withdrawn unilaterally. Thus, once granted, the consent creates a binding obligation for the State to submit to

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40 The jurisdictional requirements of the ICSID Convention are commonly broader or more general than the jurisdictional requirements of an investment treaty, and so it is usually the narrower treaty terms that control. See, e.g., Aron Broches, The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 136 Recueil des Cours (1972–II), 331, 361.

41 See Christoph Schreuer, Commentary on the ICSID Convention, Art. 25, paras 5, 287.

42 See Geneviève Burdeau, Nouvelles perspectives pour l’arbitrage dans le contentieux économique intéressant les Etats, 1 Revue de l’arbitrage (1995), 3, 15 (referring to the consent granted by States in investment treaties as “une offre générale, permanente et non-individualisée” (“a general, permanent and non-individualized offer”)).

43 See ibid., 14 (“[L]a situation des Etats qui ont suscrit à des clauses CIRDI... dans les traités bilatéraux est sensiblement modifiée, puisque des investisseurs privés étrangers... pourront les attaquer par voie de requête unilatérale devant un Tribunal CIRDI pour toutes sortes de différends qu’ils n’avaient pu envisager à l’avance, même si ces différends sont cantonnés à l’application des dispositions du traité bilateral.”).
the jurisdiction of the tribunal—much like in the case of the compulsory jurisdiction of the ICJ.

The principle underlying the concept of the Court’s compulsory jurisdiction, therefore, is not limited to the system of the ICJ. While the term “compulsory” does not apply to the granting by the State of its consent to submit to the Court’s jurisdiction, what is compulsory is the submission to such jurisdiction once such advance consent has been granted. It is that legal obligation that is at the root of the term “compulsory”.