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**ONCE BURNED, TWICE SHY. THE
USE OF COMPROMISSORY
CLAUSES BEFORE THE
INTERNATIONAL COURT OF
JUSTICE AND THEIR DECLINING
POPULARITY IN NEW TREATIES**

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Abstract. — *This article attempts to probe and assess the contemporary relevance of compromissory clauses conferring compulsory jurisdiction to the International Court of Justice. An analysis of State practice, including both law-making and litigation before the Court, reveals two patterns, that perhaps reinforce each other. First, States have all but ceased to include compromissory clauses in new treaties. Second, applicants increasingly seize the Court through this title of jurisdiction, placing before the Court an out-of-context fragment of a larger dispute. In the past two decades, while applicants have approached compromissory clauses with cunning, drafters have used caution. This ambivalent tendency might explain the inverse correlation between the use and conclusion of compromissory clauses: the clauses' fall out of fashion in treaty negotiations is aggravated by, and might even promote, their popularity in contentious proceedings at the Peace Palace.*

SUMMARY: 1. Introduction. — 2. Compromissory clauses, their function and the risks that parties accept. — 3. The decline of compromissory clauses in treaty-making: (a) A snapshot. — 4. (b) The decline of compromissory clauses' popularity in new treaties: some data. — 5. (c) How to read this trend of decline. — 6. The application of compromissory clauses by the Court. — 7. (a) *Ratione materiae* tactics to drag the respondent to Court. — 8. (b) The treatment of incidental issues in UNCLOS-based cases. — 9 (c) The Court's reluctance to declare itself *forum inconveniens*. — 10. The Court's reluctance to look into ulterior motives, and its potential effects on the States' willingness to subject themselves to its jurisdiction. — 11. Concluding remarks.

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1. *Introduction.* — In 1982, Schachter noted that Governments typically hesitated to submit themselves to the compulsory jurisdiction of international tribunals. He wished for this tendency to subside: “it may be hoped that the younger generation of international lawyers will overcome those limitations and make a sustained effort to attain a greater use of the International Court and other adjudicatory bodies”¹. In December 2020, Pellet cautioned against this “greater use”, arguing that States are not always wise when they seise the Court: “[s]alvation does not lie in the compulsory jurisdiction of the Court but in the patient learning by States of the virtues of settling disputes by judicial means. It is not major and politically sensitive disputes that should be submitted to the Court, but the “lambda” disputes that poison bilateral relations [without threatening international peace and security]”².

Should Shachter have been careful what he wished for? Pellet’s allusion implies that indiscriminate reliance on the compulsory jurisdiction of the International Court of Justice (the “Court” or ICJ) frustrates the virtues of dispute settlement by adjudication. These quotes suggest an inverse correlation between the frequency and the legitimacy of the Court’s activity. States determine the former, sometimes oblivious to its repercussions on the latter.

Surely, the Court is in “greater use” now than it was in the sleepy decade between 1974 and 1984. Whether the current use is welcome, of course, depends on perspective. Sometimes, respondents might even complain to have been wrongfooted, claiming that their compromissory clauses did not mean to expose them to the kind of proceedings they endure. When in 1989 the Soviet Union withdrew its reservations from the compromissory clauses of six human rights treaties³, Conforti noted

¹ SCHACHTER, *International Law in Theory and Practice, Recueil des cours*, vol. 178, 1982, p. 211. The pessimistic outlook is shared by CONFORTI, *Cours général de droit international public, Recueil des cours*, vol. 212, 1988, p. 23 f.

² British Institute of International and Comparative Law, *Reimagining the International Court of Justice* (8 December 2020), available at <https://www.biiicl.org/reimagining/41/reimagining-the-international-court-of-justice-8-december>. “Lambda” disputes are the unexceptional or anonymous ones, lambda being being roughly midway into the Greek alphabet. A similar notion was proposed by President Schwebel in his address to the UN General Assembly of 27 October 1998, in which he claimed that States are inclined to settle disputes judicially “in times of low international tension”.

³ Russia’s declaration of 10 February 1989, in *Revue générale de droit int. public*, 1989, p. 689 f.; see SCHWEISFURTH, *The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions, European Journal of Int. Law*, vol. 2, 1991, p. 110.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

that on these matters “there could hardly be disputes with the Soviet Union”⁴. Assuming that this calculation reflects the views of the Soviet Government and observers⁵ at the time, one can imagine the contemporary irritation of the Russian Federation, currently defending itself against the second CERD-based application in a row⁶.

A “greater use” of the Court could also result from the stipulation of new compromissory clauses. However, compromissory clauses are hardly ever stipulated anymore. States mostly avoid them in new treaties, and those that can be found are in treaties with few parties and narrow scope *ratione materiae*. Treaties with large membership and substantive scope have been allergic to pure compromissory clauses for a while, and are now completely immune therefrom.

This article probes the contemporary relevance of compromissory clauses conferring compulsory jurisdiction to Court. The findings update the results of comparable assessments carried out over time⁷, and support a specific argument about the inverse correlation between these clauses’ exploitation and their (non) proliferation.

After a section that sets the scene, the article divides in two parts, each investigating a benchmark of relevance. It is examined first whether and how often States include compromissory clauses in new treaties, and what these clauses look like. It is then explored to what extent compromissory clauses are actually resorted to, looking at the applications lodged to the Court since 2000. The findings highlight two trends, which play out consistently and determine the current and future influence of this title of jurisdiction.

First: States no longer include compromissory clauses in their agreements. Existing clauses are maintained — i.e., there is no regression

⁴ CONFORTI, *op. cit.*, p. 24, footnote 7: “l’acceptation concerne des matières [...] dont il semble difficile qu’elles puissent faire l’objet de différends avec l’Union soviétique”.

⁵ SCHWEISFURTH, *op. cit.*, p. 116: “Soviet Union’s acceptance of the compulsory jurisdiction of the ICJ for the six human rights conventions should not be overestimated because disputes concerning these conventions will rarely arise”.

⁶ International Convention on the Elimination of All Forms of Racial Discrimination (CERD), New York, 15 January 1992, in *UNTS*, vol. 660, p. 195.

⁷ TAMS, *The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction*, in *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference* (Giegerich ed.), Berlin, 2009, p. 461 ff.; see also AKANDE, *Selection of the International Court of Justice as a Forum for Contentious and Advisory Proceedings (Including Jurisdiction)*, *Journal of Int. Dispute Settlement*, vol. 7, 2016, p. 320 ff.

overall, unsurprisingly given the difficulty of amending treaties. However, there is little or no progress either: the patchy grasp of the Court's jurisdiction over international obligations increases in patchiness as new obligations emerge that bear no link with the Court. On the one hand, States do not take new risks. On the other, they are not actively trying to extricate themselves from existing commitments.

Second: States have been bolder in their shoe-horning efforts. Given the existing clauses, States have been resourceful in slotting disputes into any available jurisdictional title, often pushed to exasperation by the defendant's unwillingness to resolve a conflict through diplomatic means. As a result, respondents often would not have predicted for which actual dispute they would end up summoned to the Peace Palace. These tactics can erode States' comfort with existing clauses, and might deter them from concluding new ones.

There is a factual correlation between these trends. It is hard to say whether there is causation between them and, if so, in which direction⁸. Unpredictably aggressive litigation might discourage new clauses, if treaty-makers dislike risks. Conversely, the awareness that new clauses are not forthcoming might stimulate new litigation stratagems: if States must make do with the existing clauses, they better leave none of them unturned.

2. *Compromissory clauses, their function and the risks that parties accept.* — The Court's jurisdiction flows from State consent⁹. States can conclude "special agreements" to refer their disputes to the Court. This possibility is implicitly accepted in Article 36, paragraph 1, whereby the parties can refer a "matter" "specially provided for" in any treaty.

⁸ SHANY, *Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions*, in *Legitimacy and International Courts* (Grossman et al., eds.), Cambridge, 2018, p. 354 ff. at p. 360 described the vicious circle triggered by the reactions to one court's performance, which might aggravate its perceived legitimacy, and in turn complicate its activity (and so on).

⁹ TOMUSCHAT, *Article 36*, in *The Statute of the International Court of Justice: A Commentary* (Zimmermann and others eds.), Oxford, 2019, p. 728; THIRLWAY, *The Law and Procedure of the International Court of Justice*, Oxford, 2013, p. 690; XUE, *Jurisdiction of the International Court of Justice*, Leiden, 2017, p. 55; KOLB, *The Elgar Companion to the International Court of Justice*, Cheltenham/Northampton, 2016, p. 185. For instance, International Court of Justice, Judgment of 4 June 2008 in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *I.C.J. Reports*, 2008, p. 177 ff. at p. 200 ff., para. 48; Judgment of 30 June 1995 in the case concerning *East Timor (Portugal v. Australia)*, *I.C.J. Reports*, 1995, p. 101, para. 26.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

Typically, States provide for a matter in a treaty to fall under the Court's jurisdiction by including therein a compromissory clause, which is inherently reciprocal in its application. The focus of this inquiry is limited to compromissory clauses, and leaves out the analysis of unilateral declarations, *compromis* and agreements concluded by acquiescence (*forum prorogatum*)¹⁰.

Most compromissory clauses relate only to the treaties in which they appear. Nonetheless, there are treaties that only provide for judicial settlement of any international law controversies ("treaties on the settlement of disputes")¹¹. Dispute settlement treaties can be bilateral¹², regional¹³, or open to all States. Compromissory clauses relating to the interpretation and application of a treaty confer to the Court the jurisdiction to resolve only disputes arising under its rules. They have, in other words, a "compartmentalizing effect"¹⁴. Compromissory clauses in dispute settlement treaties, instead, confer to the Court the jurisdiction to resolve disputes under any rule of international law, including general international law. They create a title of jurisdiction comparable, save for the different subjective reach, to the unilateral declarations under the optional clause¹⁵.

Compromissory clauses, unlike *compromis*, expose the stipulating

¹⁰ COUVREUR, *The International Court of Justice and the Effectiveness of International Law*, Leiden, 2016, p. 55; KOLB, *op. cit.*, p. 198. See the two recent cases *Certain Questions*, *cit.*, and Order of 17 June 2003 in the case concerning *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *I.C.J. Reports*, 2003, p. 102.

¹¹ TAMS, *op. cit.*, p. 467; COUVREUR, *op. cit.*, p. 53; KOLB, *op. cit.*, p. 188. One such treaty, which did not meet widespread support, was the Revised General Act for the Pacific Settlement of International Disputes, New York, 28 April 1949, in *UNTS*, vol. 71, p. 101 ff.

¹² Treaty for the Pacific Settlement of Disputes between Brazil and Venezuela, Caracas, 30 March 1940, in *UNTS*, vol. 51, p. 291 ff.

¹³ Inter-American Treaty on the Peaceful Settlement of Disputes, Bogotá, 30 April 1948, in *UNTC*, vol. 30, No. 449; the European Convention on the Peaceful Settlement of Disputes, Strasbourg, 29 April 1957, in *UNTC*, vol. 320, No. 4646, available at <http://un.treaties.org>.

¹⁴ CANNIZZARO, BONAFÈ, *Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case*, *European Journal of Int. Law*, vol. 16, 2005, p. 481 ff. at p. 484.

¹⁵ Article XXXI of the Pact of Bogotá indeed refers to Article 36, paragraph 2, of the Statute. See TOMUSCHAT, *op. cit.*, p. 749. This distinction does not have to do with the different reach of the applicable law in the disputes brought, respectively, under treaty-specific clauses and dispute settlement conventions. The distinction is with respect to the jurisdiction *ratione materiae*, i.e., the range of norms under which the Court must determine the responsibility of the respondent. On the different function of applicable law and jurisdiction, and the clauses that determine the width of either, see BARTELS, *Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case before It, in Multi-Sourced Equivalent Norms in International Law* (Shany and Broude eds.), Oxford, 2011,

States to litigation of unspecified amount and type¹⁶. States are aware of this risk, and tread carefully: “[n]either the States with which it will be involved in the disputes, nor the number of cases and subject-matters involved, nor the contexts (political or other) in which the cases will arise, can be a matter of any certainty. Thus, a State which accepts the jurisdiction of the Court in advance assumes a significant and bold obligation — to defend a number of unpredictable and uncertain cases in the future”¹⁷. Compared to unilateral declarations under the optional clause, however, compromissory clauses contain a reassurance. Future litigation can only ever crop up with reference to the category of disputes indicated in the clause.

Ultimately, the utopia of generalised compulsory jurisdiction has never taken off, but the *à la carte* nature of the Court’s jurisdiction at least promotes compliance, since it builds on a clear consensual foundation. Arguably, “[i]f States were forced to submit their disputes to the jurisdiction of the Court, the record of actual compliance with judgments rendered would be abysmal”¹⁸. It is the Court’s task to ascertain, for each application, whether the dispute falls among those which the parties have deferred to its judicial function. There is no restrictive rule of interpretation of instruments establishing jurisdiction, including compromissory clauses¹⁹. Conversely, the Court’s jurisdiction under a compromissory clause “exists only [...] within the limits set out therein”²⁰.

States conclude compromissory clauses with the greatest care, knowing that they can expose them to disputes “the precise contours of which

p. 115. On the regime of declarations of acceptance of the jurisdiction of the International Court of Justice, see, *infra*, p. 41 ff., the article of ASTA.

¹⁶ MORELLI, *Cours général de droit international public, Recueil des cours*, vol. 89, 1956, p. 315: “c’est une norme qui envisage un nombre indéfini de décisions par rapport à un nombre indéfini de différends.”

¹⁷ KOLB, *op. cit.*, p. 187.

¹⁸ TOMUSCHAT, *op. cit.*, p. 728 f.

¹⁹ Permanent Court of International Justice, Order of 19 August 1929 on *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, P.C.I.J., *Publications*, Series A, No. 22, p. 5 ff. at p. 13; CHARNEY, *Compromissory Clauses and the Jurisdiction of the International Court of Justice, American Journal of Int. Law*, vol. 81, 1987, p. 855 ff. at p. 883.

²⁰ Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, I.C.J. Reports, 2006, p. 32, para. 65; Judgment of 1 April 2011 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, I.C.J. Reports, 2011, p. 124 f., para. 131; Judgment of 6 June 2018 in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, I.C.J. Reports, 2018, p. 307, para. 42.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

can never be predicted with absolute certainty”²¹. Tomuschat highlighted two occasions in which the applicants invoked a compromissory clause which, *ratione materiae*, had only a partial connection with the actual dispute, and in which the respondents were placed before “rather unexpected circumstances”²². In the *Genocide* cases against NATO countries and the *CERD* case against Russia, the respondent States could have hardly anticipated the submission of the dispute to the Court when they agreed to be bound by the clause. Both cases were dismissed on circumstantial procedural grounds, not because the application was defective *ratione materiae*: in principle, States can identify a plausible fragment of an existing dispute and submit it to the Court. The appeal of such practice depends on the specific case, but there are reasons for applicants to activate the Court’s jurisdiction over a minor or tangential aspect of their actual grievance. A limited vindication is better than no vindication at all, and the possibility of rehearsing before the Court the entire dispute and its various aspects, even to irk the respondent and gain political leverage, can be attractive irrespective of the actual possibility to obtain a remedy for each wrongful act alleged or discussed. Conversely, respondents must defend themselves for years in the public eye.

The flourishing of unexpected angles under which to bring a case to the Court is, of course, a legitimate trend, but it might wear down States’ confidence in the Court. The following sections address several recent examples of respondents facing “rather unexpected circumstances”. However, in a scenario of ultimately consensual jurisdiction, this trend can chill the States’ readiness to enter new compromissory clauses. The correlation between creative claims and States’ reluctance to conclude new compromissory clauses, of course, is speculative but plausible. Tomuschat considered it self-evident²³, and this article probes the solidity of its constitutive elements. Is there a dearth of new compromissory clauses? Is there a tendency to use existing ones in increasingly insidious

²¹ TOMUSCHAT, *op. cit.*, p. 742; HIGGINS, *International Trade Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law, Recueil des cours*, vol. 230, 1991, p. 243, remarking that States can express “consent of principle rather than consent in relation to a particular dispute with a particular opponent”.

²² TOMUSCHAT, *op. cit.*, p. 742.

²³ *Ibid.*: “Because of the risks inherent in compromissory clauses a tendency has emerged in recent years to omit from new multilateral treaties such clauses providing for the jurisdiction of the ICJ”.

and fastidious ways? The next two sections address these questions in turn, and find that there are, indeed, such dearth and such tendency.

3. *The decline of compromissory clauses in treaty-making: (a) A snapshot.* — On 29 August 2012, Albania and Austria concluded an agreement on the loan of movable cultural heritage items for exhibitions²⁴. The agreement designates, respectively, the Kunsthistorisches Museum in Vienna and the National Historical Museum in Tirana as responsible entities for its implementation²⁵. Failing negotiations, disputes on the interpretation or application of the agreement can be referred unilaterally to the Court²⁶.

On 24 October 2020, the U.N. Secretary-General received the 50th instrument of ratification or accession of the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW), entered into force on 22 January 2021²⁷. This treaty, saluted as “one of the most important instruments to shape the legal architecture of nuclear disarmament efforts”²⁸, does not establish a compulsory dispute settlement system, and simply exhorts the parties to resolve disputes peacefully, pursuant to Article 33 of the Charter²⁹.

Putting these instruments side by side captures the current fortune of compromissory clauses. They have all but disappeared from new treaties. The sparse few that still get through (the Austria-Albania treaty is the most recent on record, with one exception discussed below) are likely to be in treaties with small membership and narrow object. The next two paragraphs provide a complete survey of the law-making trends and a possible reading of them. If, truly, acceptance of compulsory jurisdiction is “a sign of confidence in international law”³⁰, a nearly complete standstill in new commitments must signal a lack of confidence.

²⁴ Agreement between the Republic of Austria and the Republic of Albania on Cooperation regarding the loan of objects belonging to their State Movable Cultural Heritage for exhibitions on each other’s territory, Vienna, 29 August 2012, and Tirana, 29 August 2012, in *UNTS*, vol. 2884, p. 131 ff.

²⁵ Article 4.

²⁶ Article 6, paragraph 2.

²⁷ Treaty on the Prohibition of Nuclear Weapons, New York, 7 July 2017, Article 15, paragraph 1, available at <https://undocs.org/A/CONF.229/2017/8>.

²⁸ LITO, *Treaty on the Prohibition of Nuclear Weapons*, *Int. Legal Materials*, vol. 57, 2018, p. 347 ff. at p. 348.

²⁹ TPNW, cit., Article 11, “Settlement of Disputes”.

³⁰ TREVES, *Judicial Settlement of Disputes and International Peace and Security*, in *International Challenges to Peace and Security in the New Millennium* (Koufa ed.), Athens, 2010, p. 217.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

4. (b) *The decline of compromissory clauses' popularity in new treaties: some data.* — In her 1991 General Course, Higgins commented the States' inclination to conclude compromissory clauses, noting for instance that African countries were not keen to include any in treaties between them, nor were Asian countries in any treaty³¹. She also pointed out a trend: “the tendency to include jurisdiction clauses in either multilateral or bilateral treaties is markedly declining. In the early years the Soviet Union and Eastern European States used to refuse any such reference to the Court, insisting on entering reservations to multilateral treaties that contained such clauses. Now all such objections have been withdrawn but, ironically, the general interest in including such clauses has greatly diminished. In 1951 there were 13 such treaties; since 1980 there have been two, more usually one, a year. This trend may partly reflect a growing variety of alternative dispute settlement procedures which today are on offer. Parties to multilateral treaties often now envisage entirely different ways of working out their disputes and ensuring compliance with treaty obligations”³².

The arc of that decline matters to this article: have compromissory clauses somewhat recouped popularity since 1991? The answer is no. In 2009, Tams could speak of a marked decrease in their conclusion during the then “recent years”³³. The numerical decline in the growth of new clauses has been accompanied by their increasing qualitative thinness: since 1994, virtually all clauses offer States ways to avoid their effect, either by failing to opt-in or by appending a reservation³⁴. Often, the compromissory clauses mention alternative methods alongside, or prior

15

³¹ HIGGINS, *op. cit.*, p. 246. See also ODA, *The International Court of Justice Viewed from the Bench, Recueil des cours*, vol. 244, 1993, p. 37, noting that from 1974 to 1993 only six new bilateral treaties contained compromissory clauses, and only 15 multilateral treaties, the compromissory clauses of which were often the object of reservations. CAFLISCH makes a similar remark in *Cent ans de règlement pacifique des différends interétatiques, Recueil des cours*, vol. 288, 2001, p. 331: “On aurait pu espérer que, une fois le rideau de fer éliminé, on reviendrait aux attitudes d’antan. Il n’en a rien été, toutefois, comme le montre la liste compilée par le Greffe de la Cour pour les années 1981 à 1994. Cette liste contient un total de quinze accords faisant appel à la CIJ, soit moins de deux accords par an”.

³² HIGGINS, *op. cit.*, p. 246.

³³ TAMS, *op. cit.*, p. 476.

³⁴ United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, in *UNTS*, vol. 2225, p. 2019 ff., Article 35, paragraphs 2 and 3. See also clauses below, in footnote 39.

FILIPPO FONTANELLI

to³⁵, the *seisin* of the Court³⁶. Sometimes, the Court is simply listed among the possible methods available to the parties to settle their disputes peacefully, as a reminder³⁷.

The latest multilateral treaty on record with a compromissory clause of some sort is the International Convention for the Protection of All Persons from Enforced Disappearance³⁸, signed in 2006 and entered into force on 23 December 2010. Article 42, paragraph 1, provides for compulsory arbitration, but offers referral to the Court as back-up if the parties “are unable to agree on the organization of the arbitration”. Other treaties follow this model³⁹. The 2013 Minamata Convention on Mercury provides that a party “may declare” upon accession that it recognises compulsory arbitration or the Court’s jurisdiction (or both)⁴⁰. Failing these opt-ins⁴¹, disputes will be deferred to a special conciliation commission⁴². A similar system is envisaged in the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, signed on 4 March 2018 and not yet in force⁴³. These treaties invite members to accept a jurisdictional title, but do not impose it.

16

³⁵ Agreement for the establishment of a Commission for Controlling the Desert Locust in the Western Region, Rome, 22 November 2000, in *UNTS*, vol. 2179, p. 221 ff., Article XXII.

³⁶ Article 29, paragraph 1, of the Convention on Discrimination against Women, New York, 18 December 1979, in *UNTS*, vol. 1249, p. 13, and clauses cited by AKANDE, *op. cit.*, p. 325, footnote 19.

³⁷ Convention on Cluster Munitions, Dublin, 30 May 2008, in *UNTS*, vol. 2688, p. 39 ff. Article 10, paragraph 1, simply lists the Court as a possibility, and is not a title for its jurisdiction.

³⁸ See the text in *UNTS*, vol. 2716, p. 3 ff.

³⁹ For instance, the Convention against Corruption, New York, 31 October 2003, in *UNTS*, vol. 2349, p. 41 ff., see Article 66, paragraph 2; the Convention on Jurisdictional Immunities of States and their Property, New York, 2 December 2004 (not in force), *Int. Legal Materials*, vol. 44, 2005, p. 803 ff., see Article 27, paragraph 2; the International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, in *UNTS*, vol. 2445, p. 89 ff., see Article 23, paragraph 2; the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Beijing, 10 September 2010 (entered into force on 1 July 2018), *Int. Legal Materials*, vol. 50, 2011, p. 141 ff., see Article 20, paragraph 1.

⁴⁰ Minamata Convention on Mercury, Kumamoto, 10 October 2013, Article 25, paragraph 2. A similar system is provided in the International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, in *UNTS*, vol. 2400, p. 303 ff., Article 22, paragraph 3.

⁴¹ A handful of the 125 parties made a declaration recognising both arbitration and Court’s jurisdiction (Austria, German, the Netherlands, Peru, Moldova); Norway accepted only the Court’s compulsory jurisdiction.

⁴² Minamata Convention on Mercury, Article 25, paragraph 6.

⁴³ See Article 19.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

Besides the 2012 Albanian-Austrian agreement mentioned above, another exception is the 2018 “Final Agreement” between Greece and North Macedonia⁴⁴, the evolution of the 1995 *Interim* Accord between the same parties. Like its predecessor, it provides for binding Court’s jurisdiction⁴⁵.

For a comparison, consider how some recent treaties, chosen across different kinds and subject matters, regulate dispute settlement. In their 2019 Memorandum of Understanding on delimitation of the maritime jurisdiction areas in the Mediterranean⁴⁶, Turkey and Lybia referred any potential dispute only to settlement “through diplomatic channel”⁴⁷. The 2019 multilateral Convention on the Facilitation of Border Crossing Procedures for Passengers, Luggage and Load-luggage Carried in International Traffic by Rail⁴⁸ provides for a system of compulsory arbitration deftly sketched, procedure and all, in a single lean clause⁴⁹.

5. (c) *How to read this trend of decline.* — The working assumption is that States discard compromissory clauses by “conscious choice”⁵⁰ rather than oversight. Rosenne remarked that “as a matter of political reality the inclusion of compromissory clauses in these multilateral conventions is likely to prejudice acceptance of their substantive provisions”⁵¹. Parties, seemingly aware of this trade-off, value more the entrenchment of commitments than their justiciability through Court proceedings. The TPNW, just entered into force, is a good instance of this preference.

17

⁴⁴ Final Agreement for the Settlement of the Differences as Described in the United Nations Security Council Resolutions 817 (1993) and 845 (1993), the Termination of the *Interim* Accord of 1995, and the Establishment of a Strategic Partnership Between the Parties, Prespes, 17 June 2018, *Int. Legal Materials*, vol. 58, 2019, p. 1084 ff.

⁴⁵ Article 19, paragraph 3. Interestingly, this is not the approach followed by Cameroon and Nigeria in their Agreement concerning the modalities of withdrawal and transfer of authority in the Bakassi Peninsula, Greentree, New York, 12 June 2006, in *UNTS*, vol. 2542, p. 13 ff. While the agreement purports to express the parties’ recognition of the Court’s judgment of 10 October 2002 concerning *Land and Maritime Boundary (Cameroon v. Nigeria, Equatorial Guinea intervening)*, *I.C.J. Reports*, 2002, p. 303 (Article 1), it defers all disputes not to the Court, but to a Follow-up Committee (Article 6).

⁴⁶ Istanbul, 27 November 2019, entered into force on 8 December 2019.

⁴⁷ See Article IV, paragraph 1.

⁴⁸ Geneva, 22 February 2019, and currently counting only Chad as signatory.

⁴⁹ See Article 25.

⁵⁰ AKANDE, *op. cit.*, p. 325.

⁵¹ ROSENNE, *The Law and Practice of the International Court, 1920-2005*, vol. 1, *The Court and the United Nations*, 2006, Leiden, p. 191 f.

Unsurprisingly, the UN General Assembly, which in 1974 reminded all UN members of “the advantage of inserting in treaties ... clauses providing for the submission to the International Court of Justice”⁵², has more recently changed its pitch and rather encourages States towards making unilateral declarations under Article 36, paragraph 2⁵³.

Existing compromissory clauses, largely, are here to stay, but withdrawals are not absent altogether. Colombia’s denunciation of the Pact of Bogotá (2012) and the United States termination of the 1955 Treaty of Amity with Iran (2018) can be ascribed to these States’ irritation with the use of the respective compromissory clauses⁵⁴. The non-proliferation trend described is undeniable. The awareness that new clauses are not at the horizon, arguably, might encourage would-be-applicants to think long and hard on how to use the clauses available, and accentuate the strategies described in the next sections.

6. *The application of compromissory clauses by the Court.* — The Court has policed the four corners of its jurisdiction, knowing well that its legitimacy hangs in the balance⁵⁵. If the Court is perceived to act within its conferred powers, to act effectively and to enjoy widespread support,

⁵² UN Doc. A/RES/3232(XXIX), 12 November 1974, paragraph 2.

⁵³ ABRAHAM, *Presentation of the International Court of Justice over the Last Ten Years, Journal of Int. Dispute Settlement*, vol. 7, 2016, p. 297 ff. at p. 299; UN Doc. A/RES/60/1, 24 October 2015, paragraph 134; Declaration on the rule of law at national and international levels, UN Doc. A/RES/67/1, 24 September 2012, paragraph 31. The UN Secretary General also endorses this path: *Delivering justice: a programme of action to strengthen the rule of law at the national and international levels, Report of the Secretary-General*, UN Doc. A/66/749, 2012, para. 15.

⁵⁴ In the case of the United States denunciation of 3 October 2018, the reaction followed by a few hours the publication of the Court’s Order of 3 October 2008 on provisional measures in the case concerning *Alleged Violations of the 1955 Treaty*, *I.C.J. Reports*, 2018, p. 623.

⁵⁵ KOLB, *op. cit.*, p. 186, explaining that the inherent limits of the Court’s consensual jurisdiction determine its effectiveness: “Without the confidence that a court such as the ICJ can inspire in its clients, without the inherent authority it is perceived to possess, it would achieve little in the settlement of international disputes. Conversely, by limiting its jurisdiction to cases which States have agreed to submit to it, the chances of an execution of the judgment are greatly increased”. See also GIRAUD, *Le droit international public et la politique, Recueil des cours*, vol. 110, 1963, p. 643: “Dans un monde profondément divisé où la majorité des gouvernements refuse le règlement judiciaire, la Cour ne peut faire autrement que de se montrer prudente et peu novatrice afin de rassurer les gouvernements et de dissiper leurs préventions”. While this remark befits the overly cautious approach of the Court in the early 60s, it might also work in the current contingency, in which States are disarmed with compulsory jurisdiction. States’ concerns, now, are not just the result of prejudice (“préventions”) but also of observation.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

it will be seen to enjoy “justified authority”, that is, legitimacy to issue binding decisions ⁵⁶.

The Court consistently observed that jurisdictional titles should not be interpreted differently from other international norms. There is no principle of restrictive interpretation, but the Court knows that a liberal interpretation of jurisdictional titles can transform them into “trap[s]” ⁵⁷ subjecting respondents to adjudication without clear or informed consent. Conversely, States were traditionally careful not to seise the Court light-heartedly: “States remain reluctant to resort to the Court as a matter of compulsory jurisdiction, perhaps because in doing so, they lose control of the dispute at the root of the case” ⁵⁸. The Institute of International Law declared in 1959 that seising the Court should not be considered an unfriendly act against the respondent ⁵⁹, but practice has exposed a different general attitude. Rosenne noted that the prevalence of the character of the “unwilling respondents” shows that, on average, “the unilateral institution of proceedings is an unfriendly act” ⁶⁰.

Among the cases introduced by unilateral application, the proportion of those in which a compromissory clause is invoked constantly increases ⁶¹, even if we allow for the large portion of cases brought under the Pact of Bogotá (and other general dispute settlement conventions).

It helps to provide a breakdown of all applications relating to the Court’s contentious jurisdiction since 2000 ⁶². There have been 54 cases, of which 4 were introduced by a *compromis*, and 2 through *forum*

⁵⁶ SHANY, *op. cit.*, p. 361.

⁵⁷ TOMUSCHAT, *op. cit.*, p. 743.

⁵⁸ HERNÁNDEZ, *The International Court of Justice and the Judicial Function*, Oxford, 2014, p. 48.

⁵⁹ Resolution on *Compulsory Jurisdiction of International Courts and Tribunals*, Neuchâtel, 11 September 1959, para. 1, available at <https://www.idi-iiil.org>.

⁶⁰ ROSENNE, *The Perplexities of Modern International Law. General Course on Public International Law, Recueil des cours*, vol. 291, 2001, p. 96 and footnote 135. See also KAMTO, *La volonté de l’Etat en droit international, Recueil des cours*, vol. 310, 2004, p. 389: “le défendeur [...] a tendance à y voir une sorte d’ ‘agression judiciaire’”.

⁶¹ KAWANO, *The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes, Recueil des cours*, vol. 346, p. 176. See also, at pp. 465-469, a full list of cases and the clauses invoked therein.

⁶² The cut-off time for the pool, inevitably, is perhaps arbitrary. Year 2000 was chosen to make it possible to update the latest comprehensive study, made by Tams in 2009, while at the same time going back enough so as to include in the cases which, in Tams’s findings, made up for the recent trends at the time.

FILIPPO FONTANELLI

*prorogatum*⁶³. Of the remaining 48 cases, 6 were introduced in relation to previous judgments, asking the Court to interpret or revise them⁶⁴. Of the remaining 42 cases, 34 (or 81%) were brought on the basis of a compromissory clause. By comparison, applications based on the unilateral (optional) declarations of the parties were 16 (or 38%). In 8 cases (or 19%), the application mentioned both titles of jurisdiction (one or more compromissory clauses and the parties' declarations).

Among the 27 cases brought in the last decade (2011-2020), 23 invoked compromissory clauses or declarations under Article 36, para. 2 of the Statute. Of these, 19 (or 82%) were brought on the basis of a compromissory clause. Only in 4 cases were the applications based only on Article 36, paragraph 2 (3 were the simultaneous applications brought by the Marshall Islands).

In both samples, the number of the applications under the Pact of Bogotá warrants a separate comment. In the 2000-2020 period, they were 13 (out of 34, or 38%)⁶⁵. In the 2011-2020 decade, they were 7 (out of 19, or 37%). Even without these cases, compromissory clauses are the most used title to activate the Court's contentious jurisdiction. This is true even discounting the cases in which the applicants invoked multiple titles. However, the relative weight of compromissory clauses overall is markedly increased by the incidence of cases brought under Article XXXI of the Pact of Bogotá — a “general dispute settlement” clause that is not comparable to treaty-specific compromissory clauses.

These data confirm a general trend going back decades: compromissory clauses remain the most invoked title of jurisdiction, and their relative incidence on the docket is increasing⁶⁶. The contentious activity of the Court is generally healthy, although undeniably other courts and tribunals sometimes compete (figuratively or not) with the Court for the same applications⁶⁷.

⁶³ See Article 38, paragraph 5, of the Rules of the Court, whereby the applicant might request the respondent to consent to the Court's compulsory jurisdiction in the application.

⁶⁴ The title of jurisdiction, in those cases, are Articles 60 and 61 of the ICJ Statute.

⁶⁵ In two cases, the applicant invoked treaty-specific compromissory clauses alongside Article XXXI of the Pact of Bogotá: see Judgment of 13 July 2009 in the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, *I.C.J. Reports*, 2009, p. 213, and Order of 13 September in the case concerning *Aerial Herbicide Spraying (Ecuador v. Colombia)*, *I.C.J. Reports*, 2013, p. 278.

⁶⁶ ABRAHAM, *op. cit.*, p. 299.

⁶⁷ AKANDE, *op. cit.*, p. 324.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

In his assessment of the use of *compromis* as jurisdictional titles, Tomuschat surmised that none of the “great political conflicts which the Court had to rule upon”⁶⁸ were brought through a *compromis*; they were roughly split between compromissory clauses and unilateral declarations. Determining whether a dispute refers to a “great political conflict” is a call that this study does not make nor needs making. The purpose of the next paragraphs is to show one kind of applications that the Court had to hear in the past few years⁶⁹. Readers can decide for themselves where these disputes lie, disputed matters ranging from the sovereignty over three square kilometres of wetland and the perpetration of genocide. The concept of “lambda” disputes, evoked by Pellet, might serve as generic benchmark, in opposition to the “great political conflicts” referred by Tomuschat, arguably more akin to “alpha” disputes.

7. (a) *Ratione materiae tactics to drag the respondent to Court.* — Compromissory clauses in treaties creating substantive obligations contain a promise of “perfect symmetry”⁷⁰. Disputes brought to the Court under those clauses can only concern the interpretation or application of that treaty’s provisions. Treaty-specific compromissory clauses, however, cannot insulate a dispute from the rest of international law nor from the rest of the actual dispute, if there is a wider context.

The Court’s *dispositif* must only concern the treaty’s norms⁷¹. How-

⁶⁸ TOMUSCHAT, *op. cit.*, p. 744.

⁶⁹ For reference, SARVARIAN listed in 2019 the cases relating to the disputes between the United States and Iran, some Arab League States and Qatar, and Ukraine and Russia, to argue that “applications featuring the most politically-sensitive disputes of the day have become increasingly commonplace” (see *Procedural Economy at the International Court of Justice, Law and Practice of Int. Courts and Tribunals*, vol. 18, 2019, p. 74 ff. at p. 83).

⁷⁰ CANNIZZARO, BONAFÈ, *op. cit.*, p. 484. The authors draw a symmetry between the treaty norms and the applicable law in the dispute, but that parallel is inaccurate (better, it is an inaccurate assumption to criticise, as they do). The assumption of symmetry is rather between the treaty norms and the Court’s mandate to interpret or apply these norms in a binding manner (i.e., the tribunal’s jurisdiction). It is not really disputed that non-treaty norms could be applicable — chief among them the secondary rules on treaty interpretation, the rules on State responsibility, the rules governing the Court’s procedure, etc.

⁷¹ Hence the widespread puzzlement at the International Tribunal for the Law of the Sea’s decision to determine the responsibility under the prohibition on the use of force in the judgment of 1 July 1999 concerning *The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, *ITLOS Reports*, 1999, p. 10 ff. An Annex VII UNCLOS Tribunal did likewise in the Award of 17 September 2007 in the case concerning *Guyana/Suriname*, Permanent Court of Arbitration (PCA) Case No. 2004-04, para. 405, available at www.pca-cpa.org.

ever, other rules of international law can come into play *en route* to a determination of responsibility or a declaration of those norms' content⁷², and occasionally make their way in the operative part of the decision⁷³. First, this natural consequence of the different width of jurisdiction and applicable law avoids the unnatural fragmentation of international law, defusing the risk that the compromissory clauses pre-determine the range of applicable sources and displace all other international norms that might be relevant in treaty-based disputes⁷⁴. A compromissory clause, in other words, cannot institute proceedings that are clinically isolated from international law as a whole: *tout se tient*. Its function is to limit to a specific source the Court's determination of the respondent's responsibility or the response on the applicant's request for a declaratory judgment; it cannot curtail the effectiveness of international law at large. Second, this approach allows all relevant norms of international law to permeate the Court's decisions, its reasoning in particular, even when the compromissory clause has a narrow scope *ratione materiae*.

22

Interstate disputes relating to matters governed by various international legal sources could be brought to adjudication with respect to the compliance with only one of them, even if the breach invoked is not

⁷² PAUWELYN, SALLES, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)possible Solutions*, *Cornell Int. Law Journal*, vol. 42, 2009, p. 77 ff. at p. 98 distinguish between "field-jurisdiction" and "incidental jurisdiction." For instance, Judgments of 27 February 1998 in the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States)*, *I.C.J. Reports*, 1998, p. 9 ff. at p. 115. The extent of the incidental jurisdiction of a tribunal is still controversial. In his dissenting opinion in the "*Enrica Lexie*" case, Judge Robinson criticised the majority for not explaining why they determined an issue that did not fall under the tribunal's jurisdiction and, in so doing, entered "the murky waters of the law on incidental questions" (Annex VII UNCLOS Tribunal, Award of 21 May 2020 concerning the *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case 2015-28, Dissenting opinion of Judge Robinson, para. 33, available at www.pca-cpa.org).

⁷³ The Court expressly accepted that the invocation of sources falling outside the jurisdictional scope of a compromissory clauses can be considered by the Court. The two alternative course of action (declining jurisdiction in light of that invocation, or ignoring the application of other sources of international law) would frustrate the function of the title of compulsory jurisdiction or, alternatively, the Court's mandate to apply all sources listed in Article 38 of its Statute. For another instance, see the Award of 21 May 2020 on the "*Enrica Lexie*" Incident, cit. The invocation of sovereign immunity interfered with the determination of responsibility under the UNCLOS.

⁷⁴ CANNIZZARO, BONAFÈ, *op. cit.*, p. 495: "the mere inclusion in a treaty of a compromissory clause cannot, by itself, have the effect of fragmenting the unity and the coherence of international law".

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

representative of the real dispute (for example, a claim that hostilities in the framework of an armed conflict entailed human rights violations). Furthermore, an applicant can use a compromissory clause to invoke a breach that does not relate to the main dispute it has with the respondent, but to another peripheral or associated issue (for instance, raising a maritime boundary claim that derives from an ongoing territorial dispute)⁷⁵. Both tactics can be deployed when the real dispute, or the main dispute, falls outside the Court's jurisdiction; applicants must resort to a re-characterised dispute or an incidental one to seise the Court. To the dispute properly before the Court, the other one will just serve as background and context.

This use of compromissory clauses does not accelerate or aggravate the fragmentation of international law, but hits respondents where their guard is down. States' caution with compromissory clauses is never enough: even when they cannot be held accountable for their greater misdeeds, they must endure proceedings for some related issue. This tactic is increasingly deployed also before other jurisdictions⁷⁶.

The Court's established approach is not to treat these cases with special care. In the *Hostages* case, Iran had sent a letter to the Court, arguing that it should not entertain the claim of breaches of diplomatic and consular law, as they were but a "marginal and secondary aspect of an overall problem"⁷⁷. The Court saw no merit in this cursory remark,

23

⁷⁵ HARRIS, *Claims with an Ulterior Purpose: Characterising Disputes Concerning the "Interpretation or Application" of a Treaty*, *The Law and Practice of International Courts and Tribunals*, vol. 18, 2020, p. 279 ff. at p. 280: "an applicant State might intentionally raise an external issue before a court or tribunal because it is the only forum in which the issue can be aired".

⁷⁶ TALMON, *The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals*, *Int. and Comparative Law Quarterly*, vol. 65, 2016, p. 927 ff. at p. 950, referring to the *Chagos* case as "an excellent example of the creative or strategic use of the UNCLOS compulsory dispute settlement mechanism in order to gain a ruling on issues that have nothing to do with the law of the sea." See UNCLOS Annex VII Tribunal, Award of 18 March 2015 *In the Matter of the Chagos Marine Protected Area Arbitration (Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland)*, PCA Case No. 2011-03, available at www.pca-cpa.org; see also UNCLOS Annex VII Tribunal, Award of 29 October 2015 on *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-09, available at www.pca-cpa.org. See FORTEAU, *Regulating the Competition between International Courts and Tribunals: The Role of Ratione Materiae Jurisdiction under Part XV of UNCLOS*, *Law and Practice of Int. Courts and Tribunals*, vol. 15, 2016, p. 190. More recently, see the *Enrica Lexie* dispute, cit.

⁷⁷ Judgment of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, *I.C.J. Reports*, 1980, p. 20, para. 37.

which implied a novel jurisdictional impediment. That the dispute “is only one aspect of a political dispute” should not prevent the Court to resolve questions that are properly before it. To find otherwise would impose a “far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes”⁷⁸.

The issue, in these cases, is not so much that applicants make “clever and even ingenious”⁷⁹ arguments to manufacture the Court’s jurisdiction when there is none. The question, rather, is what to make of cases in which applicants push through the needle’s eye of a compromissory clause the awkward elephant of a wider dispute into the Hall of Justice. This tactic of seising the Court with claims that have an “ulterior purpose”⁸⁰ is irksome for respondents, but has been held so far procedurally legitimate⁸¹. For applicants, these cases might be convenient irrespective of the remedy sought: it is “the fact that the proceedings are pending”⁸² that counts, more than a genuine prospect of a favourable decision.

24 | Thomas Frank took for granted that applicants sometimes seise the Court to advance a ploy: “[i]t is not surprising, nor is it a bad thing, that a State should resort to the ICJ to gain a propaganda victory over a wrongdoer. Why else did the United States implead Iran in the matter of the diplomatic hostages, if not to exert the weight of international public opinion on its behalf?”⁸³. Applicants might see unilateral applications as a goal in themselves, or “instruments in a broader political strategy”⁸⁴, rather than as a means to resolve a dispute or to obtain reparation for their actual grievance. Normally, a narrowly circumscribed claim could only bestow a narrow resolution and a narrow relief, thus deterring pragmatic applicants interested in what adjudication does best. As Treves pointed out, there is a difference between the settlement of a dispute and

⁷⁸ *Ibid.*

⁷⁹ The expression is used by Judge *ad hoc* Robertson in the case *Application of the 1971 Montreal Convention (UK)*, *cit.*, p. 105.

⁸⁰ HARRIS, *op. cit.*, p. 279.

⁸¹ Judgment of 8 November 2019 in the case concerning *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)*, *I.C.J. Reports*, 2019, p. 576, para. 28.

⁸² TREVES, *op. cit.*, p. 218.

⁸³ FRANCK, *Fairness in the International Legal and Institutional System: General Course on Public International Law, Recueil des cours*, vol. 240, 1993, p. 321.

⁸⁴ TREVES, *op. cit.*, p. 215.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

its extinction. While all disputes brought to the Court are settled, “disputes that at least a party considers overwhelmingly political are less likely to be extinguished after they have been settled by a judgment”⁸⁵. If there is a direct correlations between effectiveness and legitimacy of an institution tasked with resolving disputes, these claims are bad news for the Court. Since the real dispute is not properly before the Court, there are no genuine chances that the proceedings will resolve it. Non-extinction is a foregone conclusion for these incidental or re-characterised claims, in light of the large chunk of controversy that remains unaffected by the judgment. Yet, if a State is content with getting its day in Court, some tinkering around compromissory clauses can often suffice to get it, if only over an aspect of the whole controversy.

Trying one’s luck is not a novel tactic. Applicants have always tried to raise as many claims and as many titles as possible, letting the Court sort out for itself any possible matching. If *iura novit curia*, a viable strategy is to adopt the Béziers approach: raise all remotely relevant norms, and “*novit enim [Curia] qui sunt eius*” (the Court will know its own). In the *Armed Activities (New Application 2002)* case, the Democratic Republic of Congo invoked eight compromissory clauses⁸⁶, some of which bore little effective relation to the actual dispute (namely, the World Health Organisation Constitution, the Montreal Convention and the UNESCO Constitution). Alternatively, applicants try to hang myriads of claims on a compromissory clause. In *Pulp Mills*, the Court rejected the applicant’s contention that the compromissory clause of the Statute of River Uruguay could extend to claims against “visual” pollution or “bad odours” under a whole range of multilateral environmental treaties that, allegedly, were incorporated by *renvoi* into that instrument⁸⁷. In those cases, the Court sanctioned the impertinent claims with dismissal, a result that cannot deter the inflation of claims and titles.

The incidental and re-characterising approaches, instead, are less

⁸⁵ *Ibid.*, p. 214.

⁸⁶ Judgment in the case concerning *Armed Activities (New Application, 2002)*, cit., p. 11 f., para. 1 (Article 30 of the Convention against Torture; Article IX of the Genocide Convention; Article 22 of the CERD; Article 29, paragraph 1, of the Convention on Discrimination against Women; Article 75 of the WHO Convention; Article XIV, paragraph 2, of the UNESCO Convention; Article 14, paragraph 1, of the Montreal Convention; Article 66 of the Vienna Convention on the Law of Treaties).

⁸⁷ Judgment of 20 April 2010 in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *I.C.J. Reports*, 2010, p. 14 ff.

naïf, as they do not seek to multiply or re-frame the *claim* before the Court. Applicants knowingly select a viable component of the dispute, which perhaps would not be worth bringing autonomously. The resolution of the real dispute, which is wider than presented to the Court, cannot be their primary goal, and perhaps they have little hope to obtain a satisfactory remedy, let alone one commensurate to their actual grievances. Their motives, therefore, might be “ulterior” to the basic function of adjudication⁸⁸, but the invocation of the jurisdictional title is procedurally proper. These applications are contestable not on the substance (the circumscribed claim is legitimately before the Court), but on the motives (the applicant is not before the Court only to resolve it).

In cases with “ulterior purposes”, it has so far proved useless to invoke the Court’s duties to isolate the “real issue” of the dispute⁸⁹ or ascertain “the true object and purpose of the claim”⁹⁰. If the applicant is diligent enough to argue its claim within the scope of one applicable compromissory clause, the narrow dispute is properly before the Court, and the wider dispute will loom large, unexamined or examined incidentally.

8. (b) *The treatment of incidental issues in UNCLOS-based cases.* — The issue of claims with ulterior motives has emerged in UNCLOS-based arbitration and adjudication, at least in its bolder variety, the “Trojan horse” one. Often, UNCLOS-based claims on maritime entitlements imply a determination of territorial sovereignty falling outside the scope of the United Nations Convention on the Law of the Sea (UNCLOS) and of the arbitration or adjudication clauses. In one case, the applicant invoked a principle of general international law (regarding immunity) to buttress an otherwise unviable UNCLOS-based claim.

A concise survey of these decisions is helpful to appreciate, by contrast, the extreme caution of the ICJ. In these cases, the respondents

⁸⁸ HARRIS, *op. cit.*

⁸⁹ Judgment in the case concerning *Immunities and Criminal Proceedings*, cit., p. 308, para. 48; Judgment of 24 September 2015 in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *I.C.J. Reports*, 2015, p. 602, para. 26; Judgment in the case concerning *Territorial and Maritime Dispute*, cit., p. 848, para. 38.

⁹⁰ Judgments of 20 December 1974 in the cases concerning *Nuclear Tests (Australia v. France)*, *I.C.J. Reports*, 1974, p. 262 f., para. 29 f.; *Nuclear Tests (New Zealand v. France)*, *I.C.J. Reports*, 1974, p. 466 f., para. 30 f. See also Judgment of 4 December 1998 in the case concerning *Fisheries Jurisdiction (Spain v. Canada)*, *I.C.J. Reports*, 1998, p. 448 f., paras. 29-31.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

objected to the application of non-UNCLOS rules, and challenged the Tribunal’s jurisdiction or the claim’s admissibility.

To address the objection, the UNCLOS *Chagos* Tribunal employed the “weight” argument, and engaged in a characterisation of the dispute: “... the Tribunal must evaluate *where the relative weight of the dispute lies*. Is the Parties’ dispute primarily a matter of the interpretation and application of the term ‘coastal State’, with the issue of sovereignty forming one aspect of a larger question? Or does the Parties’ dispute primarily concern sovereignty, with the United Kingdom’s actions as a ‘coastal State’ merely representing a manifestation of that dispute? In the Tribunal’s view, this question all but answers itself. There is an extensive record, extending across a range of fora and instruments, documenting the Parties’ dispute over sovereignty”⁹¹. The observation of the actual dispute led the Tribunal to dismiss the claims requiring a determination of whether the United Kingdom was, in fact, the coastal State.

Interestingly, the International Tribunal for the Law of the Sea (ITLOS) in 2021 decided a maritime delimitation case largely hinging — again — on whether the United Kingdom or the Mauritius was the relevant coastal State with respect to the Chagos archipelagos⁹². The Maldives objected to the Tribunal’s jurisdiction arguing that the claim “primarily” related to the same territorial dispute identified by the UNCLOS *Chagos* Tribunal. The Tribunal acknowledged that Mauritius’ claims were based on the premise that it had sovereignty over the archipelagos⁹³. Mauritius managed to avert the outcome of the *Chagos* arbitration because, in the meanwhile, the ICJ had issued an advisory opinion⁹⁴ stating, in essence, that the United Kingdom had unlawfully maintained a colony over Chagos⁹⁵. ITLOS argued that this determination, respectively, had “unmistakable implications for the United King-

⁹¹ Award in *Chagos*, cit., para. 211; italics added.

⁹² International Tribunal for the Law of the Sea, Judgment of 28 January 2021 in the case concerning *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case No. 28, available at www.itlos.org.

⁹³ *Ibid.*, para. 113.

⁹⁴ International Court of Justice, Advisory Opinion of 25 February 2019 in the case concerning the case *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *I.C.J. Reports*, 2019, p. 95 ff.

⁹⁵ *Ibid.*, p. 137, para. 174, and p. 139 f., para. 182.

FILIPPO FONTANELLI

dom's claim to sovereignty"⁹⁶ and "considerable implications for the sovereignty claim of Mauritius"⁹⁷. Through criss-crossed implications, therefore, ITLOS held that the incidental issue of the territorial dispute was no longer a live one, because de-colonization ruled out the possibility of United Kingdom's sovereignty⁹⁸. Without the incidental issue, it saw no impediment to proceed to the merits of the UNCLOS claim.

On the contrary, the *South China Sea* Tribunal was satisfied that the claim's "objective basis"⁹⁹ related to maritime entitlements and activities, and confirmed that it could assess them without making a determination on the territorial sovereignty of the parties over maritime features. The Tribunal — which had to consider *ex officio* its jurisdiction due to China's failure to participate in the arbitration — did not consider so much whether the territorial dispute was in fact the "genuine" one, but took pains to explain that its award would not have implication on matters outside its competence¹⁰⁰.

In the *Coastal Rights* dispute, conversely, the Tribunal stumbled onto the roadblock of the Russian claims to sovereignty over Crimea, opposed by Ukraine. This central controversy was not governed by UNCLOS, and its determination, however obvious, would have been necessary to answer Ukraine's UNCLOS-based claim. Effectively, "a significant part of Ukraine's claims under consideration rests on the premise that Ukraine is sovereign over Crimea, the validity of which is challenged by the Russian Federation"¹⁰¹. The Tribunal therefore declined jurisdiction on all claims premised on a determination of whether Russia or Ukraine is the coastal State with respect to the maritime zones surrounding Crimea.

In the *Enrica Lexie* case, the UNCLOS Tribunal accepted Italy's claim under UNCLOS, rejecting India's argument that the real dispute hinged on an issue of international law (the alleged immunity of the Italian marines from India's criminal jurisdiction) on which the Tribunal had no competence. The Tribunal briefly observed that, "while the Convention may not provide a basis for entertaining an independent

⁹⁶ Judgment on *Maritime Boundary between Mauritius and Maldives*, cit., para. 173.

⁹⁷ *Ibid.*, para. 174.

⁹⁸ *Ibid.*

⁹⁹ Award on *South China Sea*, cit., para. 150.

¹⁰⁰ *Ibid.*, paras. 153, 711.

¹⁰¹ UNCLOS Annex VII Tribunal, Award of 21 February 2020 in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russia)*, PCA Case No. 2017-06, para. 153, available at www.pca-cpa.org.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

immunity claim under general international law, the Arbitral Tribunal's competence extends to the determination of the issue of immunity of the marines that necessarily arises as an incidental question in the application of the Convention" ¹⁰². Judge Robinson, dissenting, explained that the conduct of the parties evinced that the question on immunity was a "core element of the dispute" ¹⁰³. In his view, the correct characterisation of the dispute could be inferred from the conduct of the parties. He also refused to abide by the majority's remark that the determination of the immunity question was incidental to the discharge of its (principal) jurisdiction: "... the issue of immunity of the marines is a core element of the dispute dividing the Parties. A core element of a dispute cannot at the same time be an incidental question in relation to that dispute" ¹⁰⁴.

These cases make clear the age-old difficulty of tribunals trying to draw the lines between interpretation and application ¹⁰⁵, jurisdiction and applicable law ¹⁰⁶, and primary and incidental jurisdiction ¹⁰⁷. In all these cases, the major difficulty was not the mere existence of a wider actual dispute surrounding a narrow claim. In these cases, at stake was whether the narrow claim's resolution required the tribunal to make a determination on a legal issue falling outside its competence. Whether incidentally, surreptitiously or inevitably, the wider dispute had made its way into the arbitrated or adjudicated one: the non-UNCLOS matters did not just serve as context and background.

In these cases, the tribunals assessed whether the UNCLOS claim, like a Trojan horse, was used to smuggle a non-UNCLOS issue into the proceedings to obtain from the tribunal a determination on it. The *Coastal Rights* Tribunal dismissed the claims using this approach. The

¹⁰² Award on *Enrica Lexie*, cit., para. 809.

¹⁰³ Dissenting Opinion of Judge Robinson on *Enrica Lexie*, cit., para. 23.

¹⁰⁴ *Ibid.*, para. 39.

¹⁰⁵ GOURGOURINIS, *The Distinction between Interpretation and Application of Norms in International Adjudication*, *Journal of Int. Dispute Settlement*, vol. 2, 2011, p. 31.

¹⁰⁶ See BARTELS, *op. cit.*, and footnote 15, above.

¹⁰⁷ PAUWELLYN, SALLES, *op. cit.*; but see also Judge Gevorgian's Declaration in the Judgment of 14 July 2020 in the case concerning *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)*, para. 13, available at <http://www.icj-cij.org>, criticising the Court for blurring the notion between the two, in its review of the activity of the ICAO Council: "the Council is not deprived of jurisdiction *ratione materiae* simply because the respondent characterizes a defence on the merits as falling outside the Council's competence. Instead, whether willingly or unwillingly, the Court appears to widen the competence of the ICAO Council — a body whose role is to settle discrete aviation disputes".

South China Sea Tribunal took pains to explain that such determination was not necessary at all, whereas the ITLOS in *Mauritius/Maldives* found that such determination had already been made by the ICJ. The *Enrica Lexie* Tribunal, instead, submitted to the applicant's request for a fresh determination on a non-UNCLOS issue.

The ICJ has mostly had to deal with another type of cases, in which incidental findings were not necessary. The (supposedly) real dispute remained outside the adjudicated one, making it even more difficult for the Court and the respondents to contest the admissibility of the narrow claim that was properly lodged.

9. (c) *The Court's reluctance to declare itself forum inconueniens.* — The Court, so far, has resisted all invitations to “characterise” the dispute to evaluate its centre of gravity. Instead, it has normally followed a conventional approach, which boils down to assessing whether the breaches as alleged fall under the invoked instruments¹⁰⁸. A gallery of recent cases can illustrate this approach.

30

These cases, largely, are not of the variety cropping out in UNCLOS disputes. Rather than presenting the Court with incidental questions, the applicants carefully kept in the claim only the section of the real dispute that could be put properly before the Court. The running thread in these cases, rather, is that the real dispute between the parties was larger, and often more pressing, than the fragment brought to the Court. The Court, for its part, has never objected to this strategy. In fact, it has accepted that “applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties”¹⁰⁹.

In *Georgia v. Russia*, the respondent took heads-on this aspect of the application: “the real dispute in this case concerns the conflict ... in relation to the legal status of Abkhazia and South Ossetia, a conflict that has on occasion erupted into armed conflict. It is manifest that there was a period of armed conflict between Georgia and Russia, following on from Georgia's unlawful use of force on 7 August 2008. This is not a case

¹⁰⁸ HARRIS, *op. cit.*, p. 286.

¹⁰⁹ Judgment of 24 September 2015 in the case concerning *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, I.C.J. Reports, 2015, p. 592, para. 32.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

about racial discrimination”¹¹⁰. This is effectively an unorthodox objection. As long as the claim is properly before the Court, it does not matter which claims *are not* before the Court, even if the applicant’s motivations are transparent¹¹¹. The applicants know that a careful packaging of the application is enough to overcome jurisdictional objections *ratione materiae*: “the case ... is *only* about ethnic discrimination, and more particularly it is only about discriminatory conduct prohibited by the 1965 Convention. Georgia’s *Application* raises only claims of ethnic discrimination by Russia in violation of the Convention”¹¹².

That “Georgia’s conflict with Russia includes other disputes”¹¹³ was ultimately irrelevant. Pointing to the *Oil Platforms* judgment, Georgia noted that “Russia’s ethnic cleansing of the Georgian population from South Ossetia and Abkhazia does not cease to be properly characterized as a dispute about discrimination in violation of the 1965 Convention because it was perpetrated by the use of force”¹¹⁴. Likewise, Russia’s objections that, since the Geneva Conventions contained no compromissory clauses, the breaches of humanitarian law were not properly before the Court, were unsuccessful¹¹⁵.

Ten years later, the same respondent objected again to Article 22 CERD being used as fishing net for primarily non-CERD wrongdoing. Russia argued that the applicant repackaged the claim relating to aggression and sovereignty into one on discrimination, a matter with little role

¹¹⁰ Case *Application of CERD*, cit., Russia’s Preliminary Objections of 1 December 2009, p. 17.

¹¹¹ Judgment of 5 October 2016 in the case concerning *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, *I.C.J. Reports*, 2016, p. 255 ff., Dissenting Opinion of Judge Crawford, p. 521, para. 18: “in *Georgia v. Russian Federation* ... the doubt was whether that dispute really concerned racial discrimination ... or whether Article 22 was being used as a device to bring a wider set of issues before the Court”.

¹¹² Case *Application of CERD*, cit., Georgia’s Written Statement of 1 April 2010 in response to the preliminary objections, p. 37; italics in the original.

¹¹³ *Ibid.*, p. 39.

¹¹⁴ *Ibid.*, p. 39.

¹¹⁵ For a comparison, see how the European Court of Human Rights addressed a similar issue in the *Georgia v. Russia* case. It declined jurisdiction over the part of the application relating to human rights breaches committed during the active phase of the hostilities not because these were better characterised as breaches of international humanitarian law, but because it failed to establish the “threshold criterion” of jurisdiction under Article 1 and, therefore, the Convention’s application to the Russian extra-territorial conduct (European Court of Human Rights (Grand Chamber), Judgment of 21 January 2021 in the case *Georgia v. Russia (II)*, applic. No. 38263/08, paras. 129, 144, available at <http://hudoc.echr.coe.int>).

FILIPPO FONTANELLI

in the actual dispute¹¹⁶: “Ukraine’s position that ‘the conviction that Crimea is part of Ukraine, and that the Russian occupation of the peninsula is unlawful’ is a key part of ethnic identity evidences that the real issue in the present case is the status of Crimea, which Ukraine is artificially trying to frame as a case of racial discrimination. Such an issue does not fall within the Court’s jurisdiction *ratione materiae* under CERD”¹¹⁷.

Ukraine rebutted this objection comfortably. As long as there is a plausible CERD dispute and the applicant does not seek a legal determination on the “contextual” allegations, the context can be brought as a fact before the Court without repercussions on the application of the compromissory clause invoked: “Russia’s argument confuses factual background with legal claims asserted under the Convention. ... Neither the substance of this case nor the relief requested concern the status of Crimea, even if Russia’s unlawful intervention there is a necessary part of the story in explaining the roots of the subsequent campaign of racial discrimination Ukraine is required to set out that context to assist the Court in its understanding of the background to the substantive violations of the CERD for which Ukraine seeks relief. In doing so, Ukraine is not prohibited from describing Russia’s actions consistent with the overwhelming *consensus* of the international community that has condemned Russia’s occupation of Crimea. But Ukraine’s description of Russia’s conduct in 2014 as unlawful does not change the substance of its CERD claims, because Ukraine does not seek relief in this proceeding for Russia’s prior acts of aggression”¹¹⁸.

The Court heeded the applicant’s warning: that a dispute exists which is not properly before the Court is irrelevant to the justiciability of

¹¹⁶ I do not address here the claim relating to the financing of terrorism, to which the same comments apply.

¹¹⁷ Case *Application of ICSFT and CERD*, cit., Russia’s Preliminary Objections of 12 September 2018, p. 154.

¹¹⁸ Case *Application of ICSFT and CERD*, cit., Ukraine’s written statement in response to the preliminary objections of 14 January 2019, pp. 148-150. Ukraine went on to say: “... A determination that Russia is violating the CERD does not require any determination, implicit or otherwise, about the legality of the occupation. ... Similarly, for contextual reasons Ukraine refers in several instances to Russia’s violations of the international humanitarian law prohibition on the extension of an occupying power’s laws to an occupied territory. Ukraine does not, however, ask the Court to rule or to grant relief with respect to such violations. To the extent Ukraine seeks relief in relation to such laws, it is solely on the basis of their discriminatory effect or application”.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

the dispute that is properly before it. Incidentally, the same two parties rehearsed roughly at the same time this script before the UNCLOS Tribunal in the *Coastal Rights* dispute, with the outcome commented earlier¹¹⁹. It is possible to see how applicants effect the “disaggregation” of wider disputes, in order to second the scope of the compromissory clauses at hand¹²⁰.

This script has become commonplace in the past few years. In the cases *Alleged Violations* and *Certain Iranian Assets* under the 1955 Amity Treaty, the United States argued that the real dispute concerned other international obligations that did not provide for the Court’s jurisdiction (the Joint Comprehensive Plan of Action and the customs on sovereign immunity), but the Court did not accept the invitation to pierce the veil of the application, as it were¹²¹. In the oral hearings in the *Alleged Violations* case, Iran characterised its approach as “a reading of compromissory clauses in treaties at face value”¹²². The United States in turn argued that “disputes that are ‘very largely concerned with’ an instrument other than the one whose jurisdictional basis is invoked, cannot properly be brought within the scope of the compromissory clause in a treaty”¹²³.

A similar exchange occurred in the *ICAO Article 84* case. This dispute is interesting because the Court did not have to handle a re-characterised claim itself, but had to examine whether the ICAO Council could properly entertain one of those. According to the appellants, the ICAO Council had exceeded its jurisdiction, accepting to resolve a dispute relating to airspace closures under the ICAO Convention, even if this conduct was allegedly a countermeasure, the legality of which depended on the assessment of a prior breach that exceeded the Council’s jurisdiction. One of the appellants borrowed the *Chagos* Tribunal’s test: “The ‘relative weight’ of our dispute ... lies clearly on the side of the dispute over the violations of the Riyadh Agreements and of

¹¹⁹ Award on *Coastal State Rights*, cit.

¹²⁰ HILL-CAWTHORNE, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, *Int. and Comparative Law Quarterly*, vol. 68, 2019, p. 779.

¹²¹ Order on *Alleged Violations of the 1955 Treaty*, cit., p. 631 f., para. 30; Judgment of 13 February in the case concerning *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, *I.C.J. Reports*, 2019, p. 23, para. 36.

¹²² CR 2020/13, 21 September 2020, p. 12, para. 2 (Lowe).

¹²³ CR 2020/12, 18 September 2020, p. 13, para. 5 (Bethlehem), attempting to import this test from the Judgment on *Fisheries Jurisdiction*, cit., p. 448, para. 87.

international law concerning terrorism and non-interference. The aviation measures are but the manifestation”¹²⁴. The Court was not impressed, and extended to the ICAO Council the same latitude that it reserves for itself: “that this disagreement has arisen in a broader context does not deprive the ICAO Council of its jurisdiction”¹²⁵.

In the case-law of the Court, there is no *species* of inadmissibility for this scenario. Respondents do not even raise a “political dispute” objection, but one that refers to the litigation tactics of the applicants. The “real dispute” argument is familiar to *forum non conveniens* objections, arguing that if the tribunal seised considered the real nature of the dispute, it would agree on the inconvenience of exercising its competence, and would relinquish it to another more convenient forum¹²⁶. This principle has little or no authority (or applicability) in international litigation. In any event, the principle would presuppose the possibility of parallel proceedings before different *fora*, as a precondition for coordination between tribunals. Instead, in cases where claimants have ulterior motives, when respondents raise the “real dispute” argument they often do not request its deferral to a *forum conveniens*, but to no forum at all¹²⁷.

10. *The Court’s reluctance to look into the ulterior motives, and its potential effects on the States’ willingness to subject themselves to its jurisdiction.* — In 2009, Tams accounted for the high number of dormant compromissory clauses and wondered “how the Court would respond if States decided to avail themselves of the jurisdictional options presented to them more frequently”¹²⁸. The past twelve years of litigation before the Court have seen frequent resort to compromissory clauses and, more critically, a more intensive and disruptive use thereof. The Court has been cautious, but has not hinted to a new category of inadmissibility, which might be a blunt tool to address aggressive applications. The

¹²⁴ Case *ICAO Article 84*, cit., CR 2019/16, 5 December 2019, p. 34, para. 22, for United Arab Emirates (Shaw).

¹²⁵ Judgment on *ICAO Article 84*, cit., p. 21, para. 48.

¹²⁶ BRAND, *Forum Non Conveniens*, in *Max Planck Encyclopaedia of Public International Law* (2019), available at <https://opil.ouplaw.com>.

¹²⁷ McLACHLAN, *Lis Pendens in International Litigation*, *Recueil des cours*, vol. 336, 2009, p. 545 described thus one of the general principle of litispendence: “No tribunal should decline its own jurisdiction unless it is satisfied that there is another court of competent jurisdiction which will determine the dispute”.

¹²⁸ TAMS, *op. cit.*, p. 471.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

Court, after all, has no control on the conclusion of, and resort to, compromissory clauses. The Court exercises its jurisdictional function (and duty ¹²⁹) within the ambit of the States' consent. In a sense, it lacks an original "jurisdictional power" ¹³⁰, as it must serve as vehicle for the States' commitments ¹³¹.

Perhaps, more attention should be paid to "how *States* would respond" to the more frequent and more insidious use of compromissory clauses. Pellet's admonition, quoted at the outset, indicates a pathway of sustainability. If States limited themselves to bring to the Court "lambda" disputes, i.e. disputes of the garden variety, they could reap the benefits of dispute settlement: resolution, de-politicisation, relief. Some States appear to share this view: the constant flux of disputes brought under the Pact of Bogotá mostly fit this description. The Court's exercise of jurisdiction over these cases does not undermine its legitimacy: States are happy customers and the service provided to applicants is worth the risk of being respondent from time to time. The "ulterior motives" cases (and the *acciones populares* brought by the Marshall Islands and Gambia, for what matters) are not "lambda" cases: they are "alpha" disputes. Squeezing into a compromissory clause these disputes, which are often truly irresolvable through law, is an understandable tactic to exploit the Court for political gain ¹³². There is no hard and fast distinction between claims: all applications are also political acts, and all political disputes can have a resolvable legal element. My point is non-normative, and I would not invite blame on the victims of international wrongful acts, which struggle to invoke the responsibility of the wrongdoers before an international forum. My point is simply to emphasise an under-reported correlation and its implications: increased use of the Court as actor in "alpha" cases

¹²⁹ BASTID, *La jurisprudence de la Cour internationale de justice, Recueil des cours*, vol. 78, 1951, p. 677: "la Cour indique qu'il n'y a pas une simple faculté d'agir, mais une obligation juridique".

¹³⁰ MORELLI, *op. cit.*, p. 281 f.: "Dans l'ordre international aussi, on peut parler de juridiction ou de fonction juridictionnelle. Mais il s'agit là d'une fonction dont aucun sujet n'est le titulaire. Par conséquent, on ne peut imaginer un pouvoir juridictionnel".

¹³¹ WEIL, *Le droit international en quête de son identité: cours général de droit international public, Recueil des cours*, vol. 237, 1992, p. 153: "Si le jugement ou la sentence engendre des droits et des obligations pour les parties, ce n'est pas, en dernière analyse, en vertu du pouvoir de décision unilatérale de l'organe judiciaire ou arbitral, mais parce que les parties ont choisi de recourir au règlement judiciaire ou arbitral et sont convenues de reconnaître effet obligatoire à la décision à intervenir".

¹³² TREVES, *op. cit.*, pp. 225-230.

FILIPPO FONTANELLI

can wear down the Court's legitimacy, and can chill States' (already lukewarm) enthusiasm towards compulsory jurisdiction.

The UN's calls to States to submit their disputes under new sources to the Court's compulsory jurisdiction have been falling on increasingly tired and suspicious ears. At least as far as new compromissory clauses go, States prefer to adhere to a "formal cult of compulsory jurisdiction"¹³³ without practically submitting themselves to it. There still is, whether by cult, inertia or calculation, a general acquiescence to existing clauses. But the litigation trends in the past twenty years have taught risk-averse States¹³⁴ that compromissory clauses cause the risk of unwanted litigation and are not worth their putative benefits.

The weary debate of whether certain legal disputes are not "justiciable" is no longer relevant, and has not been for a while¹³⁵. The point seems rather whether States are keen to face the risk of Court proceedings in circumstances for which they had not prepared. The Court's docket since 2000 has shown that, at least for certain applicants, the gloves are off, and several States are not of the age-old view that "[t]he first rule of international litigation is to avoid it if it all possible"¹³⁶. The Court's hands are largely tied, but there is some margin to draw from existing notions (abuse of process, *forum non conveniens*, characterisation of the real dispute, the "weight" of incidental claims) to police extreme examples. The practice relating to the UNCLOS disputes, described above, shows the growing pains of what could unfold into a discrete doctrine of inadmissibility. UNCLOS Tribunals have quickly developed some test to weed out "Trojan horse" claims, looking at whether the parts of a claim that lie outside their jurisdiction require

36

¹³³ DE VISSCHER, *Cours général de droit international public, Recueil des cours*, vol. 136, 1972, p. 182: "culte formel de la juridiction obligatoire".

¹³⁴ SCHACHTER, *op. cit.*, p. 208: "It is no great mystery why [States] are reluctant to have their disputes adjudicated. Litigation is uncertain, time consuming, troublesome."

¹³⁵ MCWHINNEY, *Judicial Settlement of Disputes: Jurisdiction and Justiciability, Recueil des cours*, vol. 221, 1990, p. 72, relates the story of Judge Mosler, who theorised the category of non-justiciable cases in the 70's (after serving as *ad hoc* judge on the Court's bench) and then recanted on this point after serving (and retiring) as full member of the Court. As Mosler himself remarked: "This distinction is more a pragmatic one than a logical one: legal disputes always have a greater or smaller political dimension" (MOSLER, *The Area of Justiciability, in Essays in International Law in Honour of Judge Manfred Lachs* (Makarczyk ed.), 1984, Leiden, p. 409 ff. at p. 415).

¹³⁶ LAUTERBACHT, *Principles of Procedure in International Litigation, Recueil des cours*, vol. 345, 2011, p. 485.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

determination by implication¹³⁷, what their relative weight is, whether they are ancillary or not. This approach is sensible, and can be contrasted with the judge-made tests used to reject claims implicating an indispensable third party¹³⁸. Yet, a test to filter indispensable questions might do very little in the case of re-characterised claims with “ulterior motives”, which are irritating *precisely* because they do not seek nor implicate ulterior findings.

New compromissory clauses are seen with suspicion, not least because of the increase in number of possible applicants¹³⁹. States realised that the “political dispute” argument will not serve unwilling defendants, and have not yet succeeded to articulate the “real dispute” defense successfully against pedantic claims¹⁴⁰. All respondents, perhaps, are somewhat unwilling respondents, and every new compromissory clause increases its parties’ chance to become one down the line: “[a]ccess to the forum, which may be promoted by a liberal rule on the scope of compromissory clauses, therefore forces a reluctant State into adjudication, provides a forum to publicize the issue, puts pressure on the respondent State to settle the matter before judgment and holds forth the possibility that the Court will find facts and law that will influence the behavior of the interested parties. These benefits of international adjudication may be realized by the applicant State even if it loses its claim on the merits”¹⁴¹.

37

11. *Concluding remarks.* — The Court bears no responsibility for the current scenario. It has acted with caution in exercising jurisdiction, without a hint of activism. If anything, the Court has been a rigorous

¹³⁷ TZENG, *The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction*, *New York University Journal of Int. Law and Policy*, vol. 50, 2017, p. 447.

¹³⁸ PAPANINSKIS, *Revisiting the Indispensable Third Party Principle*, *Rivista*, 2020, p. 49 ff.; FONTANELLI, *Reflections on the Indispensable Party Principle on the Wake of the Judgment on the Preliminary Objections in the Norstar Case*, *ibid.*, 2017, p. 112 ff.

¹³⁹ SOFAER, *The United States and the World Court*, in *Proceedings of the American Society of International Law*, 1986, p. 204 ff. at p. 207: “Whereas in 1945 the United Nations had 51 members, most of which were aligned with the United States and shared its views regarding world order, there are now 160 members. A great many of these cannot be counted on to share our view of the original constitutional conception of the UN Charter ...”.

¹⁴⁰ KAWANO, *op. cit.*, p. 266: “from a strategic viewpoint for the Respondent, fruitful results cannot be expected from raising an objection regarding the admissibility of the claims because of the political nature of the dispute.” See the case concerning *Alleged Violations of 1995 Treaty*, cit., CR 2020/12, 18 September 2020, p. 13 ff, para. 3 ff. (Bethlehem).

¹⁴¹ CHARNEY, *op. cit.*, p. 861.

FILIPPO FONTANELLI

guardian of the States' consent, rigour being both a virtue and a survival strategy¹⁴². The Court (assuming that there is a consistent policy or instinct running across compositions) has preserved the credibility gains of the *Military and Paramilitary Activities* judgment, which cost the withdrawal of the United States of America's optional declaration, but won over the trust of many Latin American and African countries. The Court's backbone in the face of political cases has been duly noted, and applicants, while exercising their rights¹⁴³, have employed bolder yet procedurally viable strategies to take advantage of it. Aggrieved parties can bring the human-rights fragment of an armed conflict dispute before the Court, or employ comparable salami-slicing tactics, to urticate the respondents without really aspiring to the resolution of the dispute. Respondents must cope with these two scenarios, because the Court's case-law offers no grounds of inadmissibility¹⁴⁴.

38

The critical point, rather, is that fewer of these cases were brought in the past, and their rise tells a cautionary tale. These applications often seek to involve the Court in the broadcasting of political grievances, rather than to obtain a judicial remedy from it. The Court does not investigate the applicants' motives, but the international community will. As Lucius Caflisch noted in 2002: "Cette tendance vers *l'utilisation de la Cour à des fins politiques* paraît dangereuse car, quelle que soit par ailleurs la qualité de ses interventions, la Cour, de ce fait, risque de perdre sa clientèle 'sérieuse', celle qui a des litiges à résoudre dans les domaines 'classiques' du droit international. Pour cette raison, la présente situation, aussi encourageante qu'elle puisse paraître sur le plan des chiffres, doit être évaluée avec prudence"¹⁴⁵.

Almost 20 years later, counsel for the United States warned the Court of the systemic pitfalls of its approach, which makes it vulnerable to applicants' manipulation: "Article XXI, paragraph 2, of the Treaty, its compromissory clause, does not give the Court jurisdiction in respect of any and all disputes that a party, through the wiles of creative lawyering,

¹⁴² HERNANDEZ, *op. cit.*, p. 50, noting that the safeguard of consent shapes the Court's reasoning "above all," as States can always withdraw their consent, or even penalise the Court.

¹⁴³ CHARNEY, *op. cit.*, p. 864: "a State with a grievance that it believes is properly subject to adjudication should be able to bring the matter to court".

¹⁴⁴ HARRIS, *op. cit.*, p. 292, explaining why the cases *Nuclear Tests* and *Fisheries Jurisdiction* are not good authority for the "characterisation" approach taken by the UNCLOS tribunals in *South China Sea* and *Chagos*.

¹⁴⁵ CAFLISH, *op. cit.*, p. 334; italics in the original.

THE USE OF COMPROMISSORY CLAUSES BEFORE THE ICJ

attempts to shoehorn into an interpretation or application matrix. *This stratagem raises, and such an outcome would raise even more, significant concerns about the abusive use of compromissory clauses in treaties*¹⁴⁶.

This might be just defendant's talk. Yet, its warning rings true: if applicants repeatedly use compromissory clauses to take respondents by surprise, the trust in compromissory clauses wanes. This correlation does not depend on whether these tactics are abusive or legitimate; it is enough that States resent these stratagems as unfair, for them to take precautionary measures, including a moratorium on new compromissory clauses. "Love like you have never been hurt," the saying goes, but that advice does not work for Governments; understandably, they draft like they (or their friends) have been hurt before. Once burned, twice shy.

¹⁴⁶ Case *Alleged Violations of 1995 Treaty*, cit., CR 2020/10, p. 29, para. 34 (Bethlehem). Italics in the original.