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## Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future

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# Compulsory Adjudication in International Law: The Past, The Present, and Prospects for the Future

Anthony Giustini

## **Abstract**

Given the very clear and limited role that states created for judicial settlement in the United Nations Charter, a serious attempt to expand the International Court of Justice's jurisdiction would inevitably involve an amendment of the Charter itself. In light of the hostility that all but a few states have shown with regard to compulsory adjudication, such an effort would be doomed to failure.

# COMPULSORY ADJUDICATION IN INTERNATIONAL LAW: THE PAST, THE PRESENT, AND PROSPECTS FOR THE FUTURE

*Anthony Giustini* \*

## INTRODUCTION

The creation of the International Court of Justice<sup>1</sup> (ICJ or Court) has not effectively reduced the number or severity of international conflicts. Our world is full of violence between states yet the Court itself is often without a contentious case

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1. With the establishment of the United Nations and the dissolution of the Permanent Court of Justice (PCIJ), the International Court of Justice (ICJ or Court) was created. U.N. CHARTER art. 92. The history of the Court dates back to the 1920's when the Permanent Court of International Justice was established in the wake of World War I. The STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (Statute of the Court) is today appended as a part of the U.N. Charter. *See id.* Article 93 of the U.N. Charter makes the member states of the United Nations *ipso facto* members of the ICJ. U.N. CHARTER art. 93. The U.N. CHARTER, art. 93 provides that:

1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.
2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

*Id.*

The primary jurisdictional provision of the ICJ is article 36 of the Statute of the Court. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 6, 59 Stat. 1055, 1060, T.I.A.S. No. 993 (1945). Article 36 generally provides that the Court has jurisdiction to decide disputes brought before it by states in matters of international law. *Id.* The issue of voluntary jurisdiction as opposed to compulsory jurisdiction was addressed in article 36(2), which became known as the Optional Clause. *Id.* art. 36, para. 2. This provision attempted to reconcile the consensual nature of international law and the desires of the states drafting the Court's Statute to reach a compromise concerning the Court's compulsory jurisdiction. Pursuant to this provision, the ICJ may exercise compulsory jurisdiction only over those states which have consented. *Id.* In order to encourage states to consent to the ICJ's compulsory jurisdiction under the Optional Clause, various reservations to a state's consent were permitted under article 36(3) of the ICJ statute. *Id.* art. 36, para. 3; Merrills, *The Optional Clause Today*, 50 BRIT. Y.B. INT'L L. 87, 88 (1979); *see also* U.N. CHARTER art. 36, para. 3. These reservations to consent reflected concern that the ICJ might use its compulsory jurisdiction under the Optional Clause to assume jurisdiction in a manner to which the state had not consented and thus to overstep state sovereignty.

before it. States have historically been reluctant to submit their interests to an international tribunal. Thus, the Court's jurisdiction for contentious cases is narrow. Many jurisdictional declarations made under article 36(2) of the Court's Statute<sup>2</sup>—the so-called "Optional Clause"—are severely restricted by the use of broad reservations.<sup>3</sup> Moreover, in recent years, the Court has been plagued by the problem of the so-called "non-appearing respondent." Despite their prior acceptances of both the Statute of the Court and, consequently, the Court's power under article 36(6) to decide questions of its own competence, states have adopted a practice of boycotting the Court's proceedings in order to contest jurisdiction.<sup>4</sup> By its decision to withdraw from any further proceedings in the case initiated by Nicaragua, the United States—commonly seen as a supporter of judicial settlement—recently joined the ranks of the non-appearing respondents.<sup>5</sup>

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2. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36, para. 2.

3. For a history of the content and number of reservations under the Optional Clause, see Waldock, *The Decline of the Optional Clause*, 32 BRIT. Y.B. INT'L L. 244 (1957). Merrills, *The Optional Clause Today*, 50 BRIT. Y.B. INT'L L. 87 (1979) gives a comparable, but more recent, survey of the subject.

4. See J. ELKIND, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: A FUNCTIONAL AND COMPARATIVE ANALYSIS* (1984) (exhaustive analysis of the phenomenon of non-appearance). States have boycotted all or part of the following cases: Corfu Channel (U.K. and N.Ire. v. Alb.), 1949 I.C.J. 244 (Judgment of December 15); Anglo-Iranian Oil Company (U.K. v. Iran), 1952 I.C.J. 93 (Preliminary Objection); Nottebohm Case (Leicht. v. Guat.), 1953 I.C.J. 111 (Preliminary Objection); Fisheries Jurisdiction (U.K. and N.Ir. v. Ice.), 1972 I.C.J. 12 (Interim Protection Order of Aug. 17); Trial of Pakistani Prisoners of War (Pak. v. India), 1973 I.C.J. 328 (Interim Protection Order of July 13); Nuclear Tests (Austral. v. Fr.), 1974 I.C.J. 253 (Judgment of Dec. 20), (N.F. v. Fr.) 1974 I.C.J. 457 (Judgment of Dec. 20); Aegean Sea Continental Shelf (Grece v. Turk.), 1978 I.C.J. 3 (Judgment of Dec. 19); Iranian Hostages (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24, 1980).

5. The Republic of Nicaragua submitted an application to the I.C.J. on April 9, 1984 alleging that the United States was using military force against Nicaragua in violation of international law. Nicaraguan Application to the International Court of Justice of April 9, 1984, *quoted in Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392, 429 (Judgment of Nov. 26 on Jurisdiction and Admissibility) [hereinafter cited as *Judgment of Nov. 26*]. The Nicaraguan application stated in pertinent part that:

The United States of America is using military force against Nicaragua and intervening in Nicaragua's internal affairs in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law. The United States has created an "army" of more than 10,000 mercenaries . . . supplied them with arms, ammunition, food and medical supplies, and di-

Because any court can only be effective if it has cases before it to decide, there has been much discussion about compulsory jurisdiction and the need for reforms that would expand the Court's competence.<sup>6</sup> In light of such discussion, the natural question is what chance such reforms have of gaining acceptance in the international community.<sup>7</sup> The key to answering this question lies in the history and structure of international obligations governing dispute resolution. Although the behaviour of non-appearing respondents suggests that

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rected their attacks against human and economic targets inside Nicaragua

*Id.* at 429.

The United States had, three days before the filing of Nicaragua's application, notified the Secretary-General of the United Nations that its 1946 declaration under the Optional Clause would not apply to disputes with any Central American state. 23 I.L.M. 670 (1984) (Secretary Shultz's letter modifying jurisdiction); *Judgment of Nov. 26, 1984 I.C.J.* at 396-97. The Nicaraguan application to the ICJ indicated that Nicaragua intended to rely on the compulsory jurisdiction of the ICJ under article 36(2), see *supra* note 1, of the Statute of the ICJ. Although it was not contested that the United States had accepted the jurisdiction of the ICJ by virtue of the United States Declaration of Consent of 1946, the United States maintained, among other things, that Nicaragua had not accepted the same obligation and that the United States Declaration of consent had been validly modified to exclude cases brought by Central American states. See 1982-1983 I.C.J.Y.B. 88, 88-89 (1983) (text of the United States Declaration); *Judgment of Nov. 26, 1984 I.C.J.* at 558 (Schwebel, J., dissenting). The issues raised by the United States action and discussed in the ICJ's *Judgment of Nov. 26* strike not only at the purpose and effectiveness of the ICJ but also at international law itself, which basically relies on the good faith and cooperation of sovereign states. See Goldie, *Connally Reservation: A Shield for an Adversary*, 9 U.C.L.A. L. REV. 277, 345-52 (1962).

In response to the Court's decision finding jurisdiction, the United States announced in January, 1985 that it would boycott further proceedings in the case. See Secretary of State Schultz's Letter and Related Documents 24 I.L.M. 246-63 (1985). As a result of its general displeasure with the Court's actions, the United States has cancelled its 1946 acceptance of compulsory jurisdiction under the Optional Clause. *Id.* at 1742-45.

6. A thorough discussion of reform of the Court's jurisdiction is found in Gross, *The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order*, 65 AM. J. INT'L L. 253 (1971). For an eloquent argument in favor of compulsory jurisdiction as the centerpiece of international dispute settlement, see Kelsen, *Compulsory Adjudication of International Disputes*, 37 AM. J. INT'L L. 397 (1943). See also H. KELSEN, *PEACE THROUGH LAW* (1973) (author's idea of an international organization headed by a court with compulsory jurisdiction).

7. Another important question is, of course, whether or not the International Court of Justice, or any other tribunal, could actually keep the peace even if it had compulsory jurisdiction. See Kunz, *Compulsory Adjudication and the Maintenance of Peace*, 38 AM. J. INT'L L. 673 (1944) (author makes a strong case against judicial settlement based on the problem of enforcement, the deficiency of international law rules, and the difficulty in distinguishing between political and legal questions).

states may ignore their international obligations with regard to judicial settlement, those obligations are still important. They demonstrate how the international community feels in the abstract about international adjudication in the broader framework of dispute settlement. The obligations show that states have not created significant commitments to the use of judicial settlement and that the passage of time has not increased their willingness to submit their disputes to an international tribunal.

The main current throughout the history of dispute settlement has been the quest to avoid war as a legitimate means of resolving interstate controversies. At least in terms of legal norms, mankind has been successful in this task. The United Nations Charter contains the key principles. Article 2(3) requires states to settle "their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."<sup>8</sup> Article 2(4) then continues: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>9</sup>

Despite the wide acceptance of the principle of peaceful settlement as expressed in the Charter, there remains an important operative issue. What means should states use to resolve their disputes in order that war can be avoided? The problem is a fundamental one. The international community cannot be content with appearances. It is not enough that peaceful settlement is accepted on paper. In a world where disputes can cost millions of lives, it is imperative that the principle of peaceful settlement be given some teeth in the form of procedures for dispute settlement.

As the narrow declarations under the Optional Clause and the actions of the non-appearing respondents suggest, any attempt to structure the procedure of dispute settlement by making a certain method compulsory will be very difficult. Moreover, if the method promoted is to be judicial settlement, the task of introducing compulsion may be impossible. Throughout their discussions of ways to resolve their disputes, states

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8. U.N. CHARTER art. 2, para. 3.

9. U.N. CHARTER art. 2, para. 4.

have almost universally rejected compulsory third party settlement, be it in the form of arbitration or judicial settlement.

### I. EARLY PRACTICE: THE HAGUE SYSTEM AND THE LEAGUE OF NATIONS

The idea of submitting interstate disputes to a third party for settlement is not a new one. As early as the time of the Greek city-states, there existed a relatively well-developed system of dispute settlement by reference to the Delphic Amphictyonies. Scholars describe this process as a rudimentary form of third party settlement based on law and customs of correct behaviour.<sup>10</sup> Elsewhere, the idea of third party settlement is found in early periods of Middle Eastern history, in the sacred codes of the Far East, and in the experience of Islam.<sup>11</sup>

Grotius, the father of modern international law, wrote in 1625 with regard to arbitration:

Christian Kings and States are bound to employ this method of avoiding war . . . And for this reason and many other purposes, it would be helpful—as a matter of fact, necessary—for the Christian powers to hold conferences where those whose interests were not involved might settle the disputes of the rest, and even take measures to compel the parties to accept peace on fair terms.<sup>12</sup>

Although writing in the 1600's, Grotius had examples to cite in support of his view. In 1176, for example, the Kings of Castile and Navarre had concluded a treaty to submit their differences for resolution by Henry II of England, father-in-law of the former and nephew of the latter.<sup>13</sup> In addition, the Italian city-states born during the Renaissance period adopted a practice of referring their disputes to the Catholic Church in Rome, which was to judge, not mediate, the differences between the

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10. IV M. TAUBE, *Les origines de l'arbitrage international: antiquité et moyen âge*, 42 R.A.D.I. 1, (1932); C. PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* (1911).

11. S. ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT FUNCTIONS* 11 (1973).

12. II H. GROTIUS, *DE JURE BELLI AC PACIS*, ch. 23 sec. 8 (1625) (L. Loomis trans. 1949).

13. See G. SCHWARTZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 242 (5th ed. 1967).

parties.<sup>14</sup>

Modern nation states, particularly the United States and the United Kingdom, continued this tradition. The signing of the 1794 Jay Treaty ended the American Revolution and set up a commission to dispose of the remaining disputes.<sup>15</sup> Although the commission was composed of United States and British nationals, not neutral judges, it applied law and court-like procedure.<sup>16</sup>

Within the United States itself, the idea of international adjudication grew. In 1834 and 1844, the Massachusetts legislature passed resolutions urging creation of an international procedure for the amicable, third party settlement of disputes. Vermont did likewise in 1852.<sup>17</sup>

In May 1871, the United States and the United Kingdom once again chose a form of international adjudication in setting up the *Alabama* tribunal through their signing of the Washington Treaty.<sup>18</sup> During the Civil War the frigate *Alabama* had been particularly successful in preying on Union shipping after leaving British ports and joining Confederate naval forces. The *Alabama* tribunal—composed of one American citizen, one British citizen, and three neutrals<sup>19</sup>—applied specified rules of international law and awarded the United States \$15,000,000 damage.<sup>20</sup> Not only did the British pay the sum, but by 1888 235 members of the British Parliament sent the United States a communication asking that a permanent arbitration treaty be negotiated between the two states.<sup>21</sup>

Thus, by the 1890's when attention became focused on

14. A. BOZEMAN, *POLITICS AND CULTURE IN INTERNATIONAL HISTORY* 266-67 (1960).

15. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States - Great Britain, 52 Parry's T.S. 243 (commonly known as the Jay Treaty).

16. S. ROSENNE, *supra* note 11, at 12-13.

17. D. FLEMING, *THE UNITED STATES AND THE WORLD COURT* 15-17 (rev. ed. 1968). In 1840, New Hampshire farmer William Ladd proposed an international court of nations in his "Essay on a Congress of Nations." See W. LADD, *ESSAYS ON THE CONGRESS OF NATIONS* (reprinted 1916).

18. Treaty for the Amicable Settlement of all Causes of Difference, May 8, 1871, Great Britain - United States, 143 Parry's T.S. 145 (Washington Treaty).

19. D. FLEMING, *supra* note 17.

20. See LAPARDELLE & POLOTIS, 2 *RECEUIL DES ARBITRAGE INTERNATIONALES*, 713 (1923).

21. D. FLEMING, *supra* note 17, at 17.



the establishment of a permanent world adjudicatory body,<sup>22</sup> states had had some experience with third party dispute settlement. That experience taught them that voluntary arbitration was not an adequate, impartial means of settlement.<sup>23</sup> Moreover, arbitration had been exclusively on an *ad hoc* basis. States had to choose to arbitrate and establish a tribunal each time a dispute arose.

Given these problems, states had begun in the latter half of the 1800's to include compromise clauses in a number of international conventions on various subjects, e.g., the Universal Postal Convention of 1874.<sup>24</sup> This trend continued, and between 1899 and 1914 states entered into 125 treaties obligating themselves to accept arbitration for certain types of disputes.<sup>25</sup>

This flurry of activity in international dispute settlement reached a high point with the Hague Conferences of 1899<sup>26</sup> and 1907.<sup>27</sup> Tsar Nicholas II of Russia called the 1899 Conference to discuss the rising level of armaments possessed by the European nations. Armaments in Europe had reached a level that Russia was unable to match.<sup>28</sup> At the Conference, two differing points of view emerged with respect to dispute settlement.<sup>29</sup> The first favored the establishment of a more or less

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22. Patterson, *The United States and the Origins of the World Court*, 91 POL. SCI. Q. 279, 280-81 (1976-77).

23. *Id.* The New York State Bar Association issued a report in 1896 on arbitration as practiced up to that time concluding that the use of partisan arbitrators, and the consequent lack of an impartial judge, prevented impartial decision-making. The report called for the establishment of a new permanent tribunal.

24. M.O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942: A TREATISE* 3 (1943); see Treaty between Great Britain, Austria-Hungary, Belgium, Denmark, Egypt, France, Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Roumania, Russia, Serbia, Spain, Sweden, Switzerland, Turkey, and the United States, relative to the formation of a General Postal Union, Oct. 9, 1874, 147 Parry's T.S. 136 (French text).

25. See M.O. HUDSON, *supra* note 24, at 10 n.4.

26. See, e.g., International Convention for the Pacific Settlement of International Disputes, July 29, 1899, 187 Parry's T.S. 410 (French text) reprinted in 2 MAJOR PEACE TREATIES OF MODERN HISTORY: 1648-1967, 1115 (F. Israel ed. 1967) [hereinafter cited as First Hague Convention].

27. For the 1907 Conference, see 205 Parry's T.S. 216, 216-404 (Conventions signed at the Hague on Oct. 18, concluding the Hague Conference of 1907; French texts); see also 2 MAJOR PEACE TREATIES OF MODERN HISTORY: 1648-1967, 1199 [hereinafter cited as Second Hague Convention].

28. D. FLEMING, *supra* note 17, at 18.

29. S. ROSENNE, *supra* note 11, at 14.

standing court of arbitration that states could use as they pleased. The second also favored the establishment of an arbitral body. In addition, it proposed that states should be placed under an obligation to arbitrate certain types of disputes.

Although third party settlement by arbitration had become a popular idea, it reached the limits of its appeal when discussion came to center on the issue of compulsion. The vast majority of states preferred the idea of a non-compulsory arbitration institution to that of a tribunal with compulsory jurisdiction.<sup>30</sup>

Even the states proposing that some obligation be included in the First Hague Convention showed their distaste for truly compulsory arbitration of disputes. For example, United States Secretary of State John Hay instructed his delegation to push for a permanent court with compulsory jurisdiction, but at the same time to make sure that disputes affecting political independence or territorial integrity be excluded from arbitration.<sup>31</sup> Only the imagination can define the boundaries that such a reservation to jurisdiction might have had.

The 1899 Conference produced the Permanent Court of Arbitration. This court was not really an institutional body at all. Instead, it was a list of seventy-five to one hundred names from which states could select arbitrators if and when they decided to arbitrate a dispute.<sup>32</sup> The decision to arbitrate was purely voluntary, and states were still free to choose their own nationals as arbitrators.<sup>33</sup> While there were as many as fifty arbitrations handled outside the Permanent Court of Arbitration between 1902 and 1914, states employed the mechanism itself only 14 times during the same period.<sup>34</sup>

Although the Russo-Japanese War of 1905 had made it clear that the mere existence of the Permanent Court of Arbi-

30. *Id.* For a full report on the Hague Conferences, see J.B. SCOTT, *THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907* (1917). As Tuchman has noted in her description of the 1899 Conference and the Convention for the Pacific Settlement of Disputes it produced, "[d]elegates [who] worked mightily to draw up a convention of sixty one Articles, while applying 'a zeal almost macabre' to removing any trace of compulsory character." B. TUCHMAN, *THE PROUD TOWER* 266 (1966).

31. J.B. SCOTT, *INSTRUCTIONS TO THE AMERICAN DELEGATION TO THE HAGUE CONFERENCES AND THEIR OFFICIAL REPORTS* 9 (1916).

32. Patterson, *supra* note 22, at 281; D. FLEMING, *supra* note 17, at 18.

33. Patterson, *supra* note 22, at 281.

34. M.O. HUDSON, *INTERNATIONAL TRIBUNALS, PAST AND FUTURE* 7 (1944).

tration could not keep the peace,<sup>35</sup> the system created by the 1899 Conference was changed little at the 1907 meeting. In 1907, the United States did propose a permanent judicial institution with a full-time staff.<sup>36</sup> Though they recognized that use of the Permanent Court of Arbitration was "difficult, time-consuming, and expensive to set in motion,"<sup>37</sup> most states found the idea of creating a real, standing tribunal to be too radical.<sup>38</sup> Moreover, the idea was rejected due to the insistence of the powerful states sponsoring it that they have numerical superiority in judges.

Recognizing, however, that something had to be done to strengthen the dispute settlement system, states seemed ready to accept an obligation to arbitrate at least certain legal disputes. No state, on the other hand, was prepared for truly compulsory arbitration and a large exception to jurisdiction had to be made.<sup>39</sup> Thus, the language of the First Hague Convention exempting from arbitration disputes "involving vital interests, independence, and honor" remained in the Second Hague Convention.<sup>40</sup> The effort to oblige states to arbitrate certain disputes was left to an optional protocol which required arbitration with regard to pecuniary claims and questions under international conventions covering seven stated categories of matters.<sup>41</sup>

The obligations resulting from the two Hague Conventions were, in reality, nothing revolutionary for their time. Hudson has stated that they only confirmed the existing law of pacific settlement that states had theretofore been practicing.<sup>42</sup> Article 1 of the Second Hague Convention required states to "use their best efforts to insure the pacific settlement of international differences."<sup>43</sup> It then recommended that states use Good Offices and Mediation<sup>44</sup> and Commissions of Inquiry<sup>45</sup>

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35. D. FLEMING, *supra* note 17, at 19.

36. D.J. HILL, *THE PROBLEM OF A WORLD COURT* 10-14 (1927).

37. M.O. HUDSON, *supra* note 24, at 80.

38. Patterson, *supra* note 22, at 283.

39. Waldock, *supra* note 3, at 256.

40. *Id.*

41. *Id.*; see also 2 Actes et documents 136 (1907).

42. M.O. HUDSON, *supra* note 24, at 5.

43. 2 MAJOR PEACE TREATIES, *supra* note 27, at 1199.

44. See *id.* arts. 2-8 (Part II of the Second Hague Convention).

45. See *id.* arts. 9-38.

“as far as circumstances allow.” Despite these recommendations, states used such methods very sparingly. For example, although elaborate rules were set down for inquiry, states continued their practice of making only sparing use of this method of settlement. It was used under the Second Hague Convention only three times in forty years.<sup>46</sup>

Article 38 of the Second Hague Convention stated that arbitration of legal questions, especially those arising under international accords, was the most effective and equitable means of settlement. As to an actual obligation to arbitrate, however, article 38 provided little. It said only that “it would be *desirable* that, in disputes about the above-mentioned questions, the Contracting Powers *should*, if the case arose, have recourse to arbitration, *in so far as circumstances permit*.”<sup>47</sup> Article 53 created somewhat of an illusion of compulsory jurisdiction by specifying, on the one hand, that the Permanent Court of Arbitration could be invoked by unilateral application. On the other hand, the same article concluded that “[r]ecourse cannot . . . be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration. . . .”<sup>48</sup> Hudson reports that the severely limited power of unilateral application under article 53 was never successfully exercised.<sup>49</sup> In essence, taken as a whole, the Hague Conventions were not even agreements to arbitrate.<sup>50</sup> Instead, they featured other methods of dispute settlement, left to states the power to choose a means of settlement, and failed to provide truly compulsory arbitration for any disputes.

At the 1907 Conference, two draft conventions were also discussed and ratified—one for the creation of a Court of Arbitral Justice<sup>51</sup> and the other for an International Prize Court.<sup>52</sup>

46. M.O. HUDSON, *supra* note 24, at 37. The incidents were the *North Sea Incident* (U.K. & Russia) (1904), *The Tavignano, Cammouna, and Gaulois* (Italy & France) (1912), and the *Tabautia Inquiry* (Germany & The Netherlands) (1922). *Id.*

47. See Second Hague Convention, 2 MAJOR PEACE TREATIES, *supra* note 27, at 1206 (art. 38) (emphasis added).

48. *Id.*, 2 MAJOR PEACE TREATIES, *supra* note 27, at 124 (art. 53).

49. M.O. HUDSON, *supra* note 34, at 11.

50. *Id.*

51. 1 Actes et documents 702 (1907).

52. Convention for the Establishment of an International Prize Court, Oct. 18, 1907, 205 Parry's T.S. 381 (French text); see also 1 Actes et documents 668 (1907).

Although subsequent discussions took place, both of these initiatives were doomed to failure. The major powers could not agree on the law to be applied in the Prize Court, and no nation ever ratified its convention. With the demise of the Prize Court, the political prospects for the Court of Arbitral Justice worsened, and it was never created.<sup>53</sup>

Outside Europe, the Central American republics also made some attempts at establishing a functioning means of third party settlement. For instance, the 1902 Treaty of Corinto<sup>54</sup> provided for the obligatory arbitration of differences by a permanent tribunal. Although the tribunal was established, it never rendered an opinion and was considered non-existent by 1907.<sup>55</sup> Later, at the Central American Peace Conference of Washington in 1907, the Central American states signed a General Treaty of Peace and Amity<sup>56</sup> as well as a Convention for the Establishment of a Central American Court of Justice.<sup>57</sup> Although article 1 of the General Treaty required the states to "decide every difference . . . amongst them, of whatsoever nature it may be, by means of the Central American Court of Justice,"<sup>58</sup> article 1 of the court's convention—which required states to use diplomatic means before the court could take jurisdiction—narrowed this broad grant of jurisdiction.

The Central American Court of Justice heard ten cases between 1908 and 1918. It intervened on its own motion in a number of circumstances reminding parties of their obligation to settle disputes peacefully and offering to mediate.<sup>59</sup> The Court expired ten years after its creation, as per the terms of its convention. The states involved met and drafted a new con-

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53. Patterson, *supra* note 22, at 284-86; Tomuschat, *International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 313 (1974).

54. Convention of Peace and Arbitration, Jan. 20, 1902, 190 Parry's T.S. 357 (Treaty of Corinto).

55. M.O. HUDSON, *supra* note 24, at 42-43.

56. General Treaty of Peace and Amity and Additional Convention, Dec. 20, 1907, 206 Parry's T.S. 63 (Spanish text), 206 Parry's T.S. 72 (English translation).

57. Convention for the Establishment of a Central American Court of Justice, Dec. 20, 1907, 206 Parry's T.S. 79 (Spanish text), 206 Parry's T.S. 90 (English translation); 2 AM. J. INT'L L. 231-65 (Supp. 1908).

58. General Treaty of Peace and Amity and Addition Convention, Dec. 20, 1907, 206 Parry's T.S. 72, 73.

59. M.O. HUDSON, *supra* note 24, at 52-53.

vention in 1923.<sup>60</sup> This time, however, they limited the tribunal's jurisdiction by exempting disputes affecting sovereignty and the independent existence of states. The convention came into force, but a new court was never organized.<sup>61</sup>

The coming of World War I in Europe created great depression among international scholars.<sup>62</sup> So many international norms and aspirations, including the Hague Conventions on peaceful settlement, were disregarded by states that the American Society of International Law passed a resolution stating, with regard to the war, "the very existence of international law is now at issue."<sup>63</sup> The conflict caused scholars like Lord James Bryce<sup>64</sup> in Great Britain and Elihu Root<sup>65</sup> in the United States to work for the establishment of an international system featuring a court with some measure of obligatory jurisdiction.

The League of Nations system which followed the War did little to live up to these expectations. It focused on the political rather than judicial settlement of disputes. Once again, there was to be no compulsory submission of differences to an international adjudicatory tribunal. Instead, emphasizing political settlement, article 11(2) of the League Covenant gave each state a "friendly right" to bring to the attention of the Council or Assembly any problem which threatened international peace.<sup>66</sup>

Article 12 required that "dispute[s] likely to lead to a rupture" be submitted either to arbitration, judicial settlement, or inquiry by the Council. States further agreed to resort to war only three months after a decision rendered by one of these processes. Thus, states retained the ultimate power to choose, on whatever basis they wished, what form of dispute resolution to use.

Article 13 went into more detail on adjudication. First,

60. *Id.* at 66-67.

61. *Id.* at 68.

62. Patterson, *supra* note 22, at 286.

63. *Minutes of the Meeting of the Executive Council, April 27, 1918*, 1918 AM. SOC'Y INT'L L. PROC. 14.

64. Patterson, *supra* note 22, at 287. Lord Bryce worked principally on defining legal and political questions for use in determining an international court's jurisdiction. *Id.*

65. 2 P. JESSUP, ELIHU ROOT 315-19 (1938).

66. LEAGUE OF NATIONS COVENANT art. 11, para. 2.

paragraph 1 specified that disputes which states "recognize" as suitable for arbitration and judicial settlement—and which are not settled diplomatically—be referred to arbitration or judicial settlement.<sup>67</sup> Furthermore, it stated that treaty interpretation, factual questions, and reparations were considered "generally suitable for submission to arbitration" or judicial settlement.<sup>68</sup> Lastly, paragraph 3 required that such disputes be referred to the Permanent Court of International Justice or "the Court agreed on by the parties."<sup>69</sup> While article 13 seems to provide for some mandatory adjudication, in reality, it left states free to select tribunals other than the Permanent Court, including arbitral bodies, to submit only the disputes in paragraph 2 to adjudication, and to avoid adjudication altogether through the use of diplomatic settlement.

Article 15 underlined the ultimate political nature of settlement in the Covenant.<sup>70</sup> It stated that any dispute not submitted to arbitration or judicial settlement under article 13 was to be decided by the Council. The Council, a political institution, was therefore the one body to which states could always appeal. In fact, the League Covenant did not even create a judicial body. Article 14 said only:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.<sup>71</sup>

Even this mention of a court was absent in Woodrow Wilson's draft of the Covenant. He strongly resisted any suggestion of a court and refused even to appoint any supporter of the idea to the Paris Peace Conference delegation, with the exception of his Secretary of State who had to attend.<sup>72</sup> The Brit-

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67. LEAGUE OF NATIONS COVENANT art. 13.

68. LEAGUE OF NATIONS COVENANT art. 13, para. 2.

69. LEAGUE OF NATIONS COVENANT art. 13, para. 3.

70. *See* LEAGUE OF NATIONS COVENANT art. 15.

71. LEAGUE OF NATIONS COVENANT art. 14.

72. Patterson, *supra* note 22, at 290.

ish draft similarly contained no reference to a court.<sup>73</sup> Although the French, Danes, Norwegians, and Swedes placed a court in their drafts,<sup>74</sup> they made no attempt to secure compulsory submission of disputes to an international tribunal.<sup>75</sup>

Article 14 of the Covenant, as seen above, clearly refers to court jurisdiction with regard to "dispute[s] of an international character *which the parties thereto submit to it.*"<sup>76</sup> Lord Robert Cecil had proposed that article 14 give the Permanent Court jurisdiction over "any dispute or difference of an international character."<sup>77</sup> However, since such wording was considered to point toward obligatory use of the Permanent Court, the League of Nations Commission omitted it from the text of article 14.<sup>78</sup>

In 1920, the Council exercised its duties under article 14 and invited jurists from ten nations to draft the Permanent Court Statute, which states would be free to accept or reject.<sup>79</sup> The Statute was not to be an integral part of the League Covenant. Two major problems faced this 1920 Advisory Committee: the election of judges and the jurisdiction of the new court. The first was solved by the existence of the League itself. To please both small and large states, it was decided that the Council and Assembly would jointly elect the judges.<sup>80</sup>

The jurisdictional issue was more difficult. The majority of the Advisory Committee favored conferring compulsory jurisdiction on the Permanent Court.<sup>81</sup> A minority, pointing to the wording of article 14 of the Covenant, felt that jurisdiction must be based purely on consent.<sup>82</sup> Elihu Root of the United States warned that unless compulsory jurisdiction was limited to certain areas, states would not accept the Statute.<sup>83</sup> The ma-

73. M.O. HUDSON, *supra* note 24, at 93-94.

74. *Id.* at 94.

75. *Id.* at 94-95.

76. LEAGUE OF NATIONS COVENANT art. 14.

77. M.O. HUDSON, *supra* note 24, at 106.

78. *Id.*

79. *Id.* at 114-15. Japan, Italy, Spain, Brazil, Belgium, France, United States, Norway, Netherlands, and Great Britain were represented. *Id.* at 114. The Committee met 35 times between June 16 and July 24, 1920.

80. D. FLEMING, *supra* note 17, at 37.

81. M.O. HUDSON, *supra* note 24, at 190.

82. *Id.*

83. *Id.* at 190-91.



jority carried the day and the Advisory Committee draft gave the Permanent Court obligatory jurisdiction over the disputes listed in article 13 of the Covenant, that is, disputes over treaty interpretation, facts, and reparations.<sup>84</sup> Such a decision was not totally revolutionary. States had at least recognized these subjects as suitable for adjudication through their arbitral practice and the Hague Conventions.<sup>85</sup>

Revolutionary or not, the decision to confer some measure of obligatory jurisdiction met tremendous resistance from the Great Powers in the Council. Italy noted, for example, that only small countries would tolerate being taken before a court without their consent.<sup>86</sup> Great Britain and Japan opposed the Committee recommendation on the basis of the consensual nature of article 14 of the Covenant.<sup>87</sup> Behind the leadership of Great Britain, the Council voted a series of amendments to eliminate compulsory jurisdiction in the Committee proposal.<sup>88</sup>

Smaller countries objected in the Assembly. Supported by Brazil, Panama, and Portugal, Argentina argued that without compulsory jurisdiction the Permanent Court would be nothing more than an arbitral tribunal.<sup>89</sup> However, an Assembly sub-committee saw the uselessness of pushing for compulsory jurisdiction in the face of the opposition of the larger powers and finally decided to approve the Council amendments.<sup>90</sup> Mr. Fernandes of Brazil ultimately resolved the conflict by suggesting that alternate texts be offered. States would then be able to adhere to the jurisdictional clause that they liked best.<sup>91</sup> As a result of his suggestion, the Council drafted the Optional Clause to allow states to accept jurisdiction,<sup>92</sup> if they so de-

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84. *Id.* at 191.

85. *See id.* at 456-57.

86. Minutes of the Council of the League of Nations (8th Session) [1920] LEAGUE OF NATIONS O.J., 33 (1920).

87. J. ELKIND, *supra* note 4, at 87.

88. Minutes of the Council of the League of Nations (10th Session) [1920] League of Nations O.J., 161 (1920) (Annex 118).

89. M.O. HUDSON, *supra* note 24, at 192.

90. I Records of the First Assembly of the League of Nations: Meetings of the Committees (Committee III) [1920] 533-34 (Annex 7: Report to the Third Committee by Mr. Hagerup on behalf of the Sub-Committee).

91. *Id.*

92. League of Nations Council/Minutes of Sessions 9-11 (11th Session) [1920] 137.

sired, as well as to allow them to make reservations to limit their acceptance of the Court's competence.

After the creation of the League of Nations and the Permanent Court, the League Assembly in 1924 drafted a protocol for the Pacific Settlement of International Disputes.<sup>93</sup> The object was to make more attractive the possibility of declarations under the Optional Clause while at the same time preserving for states "the reservations which they regard as indispensable."<sup>94</sup> The Ninth Assembly continued this work and the emphasis on the use of reservations to reduce the scope of jurisdiction under the Optional Clause.<sup>95</sup> The result was the Protocol on the Pacific Settlement of International Disputes of 1928<sup>96</sup> which provided for Permanent Court jurisdiction in certain disputes, but only after conciliation and negotiation had failed to resolve a problem. No case was ever brought before the Permanent Court on the basis of the General Act.

Also during this period, states drafted and signed the famous Kellogg-Briand Pact in Paris.<sup>97</sup> This 1929 treaty was the first to prohibit generally the making of aggressive war. Article 2 of the Pact stated the agreement of the parties that "settlement . . . of all disputes or conflicts of whatever . . . origin they may be . . . shall never be sought except by pacific means."<sup>98</sup> The Pact failed, however, to confer any jurisdiction on the Permanent Court or to specify any obligations as to the type of dispute resolution states were supposed to use.<sup>99</sup>

## II. *THE UNITED NATIONS CHARTER AND JUDICIAL SETTLEMENT*

States were not strangers to the idea of adjudication or

93. League of Nations Doc. C.606. M.211.1924 IV, (1924), *reprinted in* 2 M.O. HUDSON, *INTERNATIONAL LEGISLATION* 1378 (1932).

94. Records of the Fifth Assembly of the League of Nations (27th Plenary Mtg. Oct. 1, 1924) Spec. Supp. No. 23 at 225.

95. Records of the Ninth Assembly of the League of Nations (19th Plenary Mtg. Sept. 26, 1928) 183, Spec. Supp. No. 64.

96. General Act (Pacific Settlement of International Disputes), Sept. 26, 1928, 93 L.N.T.S. 343.

97. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 59.

98. *Id.* art. 2.

99. Kelsen saw the failure to endow a court with compulsory jurisdiction as the fatal flaw in the Kellogg-Briand Pact. H. KELSEN, *PEACE THROUGH LAW* 18 (1944).

judicial settlement when they sat down to decide upon a post-World War Two international organization. Apart from the tradition of *ad hoc* arbitrations and the Hague Conventions, states had seen the creation of the Permanent Court under the League of Nations system. What they had not experienced, on the other hand, was any true limitation on their ability to choose between methods of dispute settlement.

Like arbitration under the Hague Conventions, judicial settlement under the League of Nations framework had been purely optional. States were not bound to accept the Permanent Court's Statute. If they did accept it, they were by no means obliged to make declarations under the Optional Clause or bring cases before the Permanent Court for resolution.

The United Nations Charter changed this status of judicial settlement in only one significant way. Under article 92, the International Court of Justice is an organ of the United Nations and is therefore part of the international organization itself.<sup>100</sup> This change means that a state ratifying the Charter automatically accepts the jurisdiction of the Court in three limited ways. The Statute gives the Court jurisdiction with regard to decisions concerning interim measures, intervention, and competence in a particular case.<sup>101</sup> However, states are in reality subject to very few jurisdictional constraints merely by virtue of their acceptance of the Court's Statute. They are still totally free to refrain from making declarations under the Optional Clause and to ignore the Court as a means of dispute settlement.

The Charter does not encourage international adjudication. Instead, it continues the focus on political settlement and the Court is routinely by-passed in favor of the Security Council and the General Assembly.<sup>102</sup>

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100. U.N. CHARTER art. 92.

101. Article 41 of the Statute gives the Court power to order interim measures. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 41. The power to decide questions of jurisdiction lies in article 36(6). The Court can order intervention by virtue of its power in article 61.

102. Steinberger, *The International Court of Justice*, in MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW, JUDICIAL SETTLEMENT: AN INTERNATIONAL SYMPOSIUM 207 (1974); Kearney, *Amid the Encircling Gloom*, in 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 108 (L. Gross ed. 1976); D.W. GRIEG, INTERNATIONAL LAW 693 (1976). As Grieg has concluded:

The Charter is perhaps more of a discouragement than an incentive to judi-

To be sure, the Charter requires states to settle their disputes "by peaceful means, and in conformity with the principles of justice and international law . . . ." <sup>103</sup> In addition, article 2(3) reiterates the duty of peaceful settlement and article 2(4) places a ban on the use of force. The Charter does not, however, give the Court a major role in relation to these provisions.

Article 24 confers "primary responsibility for the maintenance of international peace and security" upon the Security Council, not the Court. In addition, article 33(1) gives states an absolutely free hand in deciding how to resolve their controversies. <sup>104</sup>

Although it is clear that states must choose some form of peaceful dispute settlement, the framers of the Charter—following the tradition they had before them—thought it wise to give states as wide a choice as possible among methods including negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means. <sup>105</sup>

Where the Charter does express some preference for a particular method of settlement, that method is political. Expressing confidence in political resolution of disputes, article 37(1) requires that a failure to reach a solution by one or all of the means listed in article 33 results in an obligation to refer the dispute to the Security Council. <sup>106</sup> In addition, even before negotiations or mediation fail, any state, whether a

cial settlement. The dispute machinery of the Charter provides a new arena for diplomatic exchanges and the advancement of legal arguments without fear of a final determination upon their validity.

*Id.*

103. U.N. CHARTER art. 1, para. 1.

104. U.N. CHARTER art. 33 para. 1. This article states:

The parties to any dispute, the continuance of which is likely to endanger . . . international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

*Id.*

105. 12 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 895-96 (1971); see U.N. CHARTER art. 33, para. 1.

106. Stuenkel, *supra* note 102, at 204; Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, in 1 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 29-30 (L. Gross ed. 1976).

member of the United Nations or not, is permitted access to the Security Council for dispute resolution under article 35. Thus, it is the Security Council, not the International Court of Justice, which has the truly compulsory competence to address disputes in the United Nations system.

The Charter's only hint at a specific role for judicial settlement can be found in article 36. In recommending "appropriate procedures or methods of adjustment," the Security Council under article 36(3) "*should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice . . .*"<sup>107</sup> The very language of article 36(3) does not give judicial settlement a very large role. The Security Council is not empowered to refer a dispute to the Court. Instead, it can only recommend that the parties themselves refer the dispute to judicial settlement. Such a recommendation is not binding on the states involved.<sup>108</sup> Moreover, nothing in article 36 requires the Security Council to make such recommendations in the first place.

As Monaco has noted in describing the Court's minor role in the Charter, article 95 makes clear that states are perfectly free to use tribunals other than the International Court of Justice.<sup>109</sup> Once again, the Court can be by-passed. In addition, decisions issued by the Court are limited in their effect. By the terms of article 94, the Court's decisions are binding only upon the parties in the particular case.

Although states at the San Francisco Conference chose to give judicial settlement this relatively minor role in the framework of the Charter, the ultimate size of that role—that is, the Court's effectiveness in its assigned part—was dependent upon

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107. U.N. CHARTER art. 36, para. 3 (emphasis added).

108. After the Security Council recommended they submit to the ICJ their dispute over the sweeping of mines in the North Corfu Channel, Great Britain and Albania executed a *compromis* to confer jurisdiction on the Court. See 1949 I.C.J. at 310. The Security Council action under article 36 is a "recommendation." Article 25 requires states to carry out the "decisions, not "recommendations", of the Security Council. Because article 36 originally appeared without paragraph three, the United States proposed the language quoted in the text here to make clear that the Security Council action would not be binding. See 12 M. WHITEMAN, *supra* note 105, at 1286-87 (1971). In the *Corfu Channel* case, seven judges signed a joint opinion which held that recommendations under article 36 do not create a new class of compulsory jurisdiction for the Court. See 1947-1948 I.C.J. 15, 20-22.

109. See U.N. CHARTER art. 95; R. MONACO, *MANUALE DI DIRITTO INTERNAZIONALE PUBBLICO* 603 (1971).

the scope of the tribunal's jurisdiction. In drafting the Statute of the International Court of Justice, states were once again confronted with the question of jurisdiction. In response, they chose the Optional Clause.

With an eye toward post war organization, the Committee on the Future of the Permanent Court of International Justice, which was composed of experts of all Allied Powers except the United States, concluded in 1944 that it would "be premature to attempt to impose compulsory jurisdiction by means of the Statute itself."<sup>110</sup> Thereafter, a Committee of Jurists met in Washington in April 1945. Forty-four governments were represented. At least twenty were in favor of compulsory jurisdiction.<sup>111</sup>

The Committee of Jurists ultimately decided to submit two drafts to the San Francisco Conference.<sup>112</sup> The first repeated the Optional Clause from article 36 of the PCIJ Statute, while the second called for compulsory jurisdiction over disputes between the member states of the international organization. Both the United States and the Soviet Union opposed compulsory jurisdiction and favored keeping submission to the Court a purely voluntary act.<sup>113</sup>

Debate at the San Francisco Conference focused on the Optional Clause just as it had in 1920 during discussions of the Permanent Court's jurisdiction. Once again, the stronger

110. *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*, Feb. 10, 1944, 39 AM. J. INT'L L. 1, 18 (Supp. 1945).

111. Preuss, *The International Court of Justice and the Problem of Compulsory Jurisdiction*, 13 DEP'T OF STATE BULL. 471, 474 (Sept. 30, 1945).

112. Doc. Jurist 61 (rev.), G/49, 14 U.N.C.I.O. Docs. 667-68 (1945).

113. Preuss, *supra* note 111, at 474-75. The Rapporteur of the Committee summed up the debate and the jurists' decision as follows:

it does not seem doubtful that the majority of the Committee was in favor of compulsory jurisdiction, but it has been noted that, in spite of this predominant sentiment, it did not seem certain, nor even probable, that all the nations whose participation in the proposed International Organization appears to be necessary, were now in a position to accept the rule of compulsory jurisdiction, and that the Dumbarton Oaks Proposals did not seem to affirm it; some, while retaining their preferences in this respect, thought that the counsel of prudence was not to go beyond the procedure of the optional clause inserted in Article 36, which has opened the way to the progressive adoption, in less than 10 years, of compulsory jurisdiction by many States which in 1920 refused to subscribe to it. Placed on this basis, the problem was found to assume a political character, and the Committee thought that it should defer it to the San Francisco Conference.

powers opposed any form of obligatory settlement. In Committee IV/1 of the Conference, the United States and the Soviet Union made clear their opposition to compulsory jurisdiction.<sup>114</sup> Mexico, arguing for the smaller powers, expressed its dissatisfaction. It argued that the smaller countries were required to accept large power dominance of political settlement in the Security Council, but those same large powers would not accept the concept of legal, impartial settlement by the Court.<sup>115</sup> A sub-committee thereafter appointed to study the issue concluded that "everything being taken into account, the system of optional jurisdiction at the present time would be more likely to secure general agreement."<sup>116</sup> Committee IV/1 finally approved retaining the Optional Clause by a thirty-one to fourteen vote, although the Rapporteur noted that the majority favored compulsory jurisdiction and that several affirmative votes were made only for the sake of agreement and did not indicate states' views of the issue.<sup>117</sup>

The Soviet Union's position at San Francisco was quite consistent with positions it had taken in the past. It had firmly rejected the Permanent Court's role twenty years earlier. The United States seems to have been worried about political repercussions over the United Nations Charter at home.<sup>118</sup> Krylov, a Soviet delegate at the Conference and later a judge of the Court, has written that the USSR was guided by the necessity of defending socialism, and the United States by fear of the United States Senate.<sup>119</sup>

Lissitzyn has concluded that the Soviet Union saw the Court as a possible forum for challenging Marxism with capitalist judges and traditional international law.<sup>120</sup> To the Soviets, there was no impartial third world to adjudicate a dispute.

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114. Doc. 661, IV/1/50, 14 U.N.C.I.O. Docs. (Committee IV/1) 226 (1945); Preuss, *supra* note 111, at 475.

115. Doc. 661, IV/1/50, 14 U.N.C.I.O. Docs. (Committee IV/1) 227 (1945).

116. Doc. 702, IV/1/55, 13 U.N.C.I.O. Docs. (Subcommittee B/IV/1) 558 (1945).

117. *Id.* at 391-92.

118. Wilcox, *The United States Accepts Compulsory Jurisdiction*, 40 AM. J. INT'L L. 699, 699 (1946).

119. I Krylov, *Materialy K Istorii Organizatsii Ob'Edinenmybh Natsii* 212 (1949).

120. See O. LISSITZYN, *THE INTERNATIONAL COURT OF JUSTICE: ITS ROLE IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 63 (1951).

Litvinov is reported to have commented that in a world dominated by the United States, "only an angel could be unbiased in judging Russian affairs."<sup>121</sup>

Hudson once said that this Soviet fear of the Court provided the Soviet Union with a "far more substantial" reason for opposing compulsory jurisdiction than the United States had.<sup>122</sup> Undeniably, the fear of trouble in the United States Senate must have been on the minds of the United States delegates. Only twenty years had passed since the League of Nations fiasco. But Hudson, commenting on this fear, rightly points out that the United States Senate wanted the United States to be able to consent to the Court's jurisdiction in each case.<sup>123</sup> What the United States Senate wanted was, in essence, the antithesis of obligatory judicial settlement. Indeed, the series of crippling reservations that the United States Senate attached to the United States acceptance of the Optional Clause—including the Connally amendment and the multilateral treaty reservation—shows that the United States Senate's hostility was simply a distaste for international adjudication.<sup>124</sup> John Foster Dulles, in proposing sweeping reservations to the United States acceptance, cited a lack of confidence in the Court as an institution, the underdeveloped nature of international law, and the desire to avoid settling political questions by reference to the Court.<sup>125</sup>

The lack of emphasis on judicial settlement in the Charter and the failure to confer compulsory jurisdiction on the Court have prompted Gross<sup>126</sup> and Kearney<sup>127</sup> to talk of a "retrogress-

121. T. A. TARACOUZIO, *THE SOVIET UNION AND INTERNATIONAL LAW* 296 (1935).

122. Hudson, *Compulsory Jurisdiction of the International Court of Justice*, *AM. SOC'Y INT'L L. PROC.* 18 (1946).

123. *See id.*

124. The Connally Amendment removes from the Court's jurisdiction disputes which the United States considers within its jurisdiction. The multilateral treaty amendment requires all parties to a treaty which serves as the source of jurisdiction in a case to be parties in the case if they will be affected by the outcome. *See generally* D. FLEMING, *supra* note 18 (full description of the United States Senate's opposition to the Optional Clause and the Court throughout history). For a summary of the legislative background of the Senate's amendments, see M. WHITEMAN, *supra* note 105, at 1297-1305.

125. *Compulsory Jurisdiction, The International Court of Justice, Hearings on S.R. 196 Before the Committee on Foreign Relations*, 79th Cong., 2d Sess. 43-45 (1946).

126. Gross, *supra* note 106, at 80.

127. Kearney, *supra* note 102, at 105.



sion" in the framework of peaceful dispute resolution. However, these appraisals seem a bit too drastic because they imply that before the advent of the United Nations system there existed more binding obligations with regard to peaceful settlement and adjudication. The research conducted here has been unable to find any such obligations. In reality, the United Nations experience has been a continuation of the emphasis on political settlement and the avoidance of obligatory adjudication. These trends were already established in the Hague Conventions and the League of Nations Covenant. States are now, as they were in the past, free to choose the means of settlement which suit them best. Large states in 1945 successfully opposed compulsory jurisdiction for the world's major judicial organ, just as they had done in 1920. The International Court of Justice, like the Permanent Court before it, operates under a scheme which permits states to reject wholly, or accept subject to reservations, its jurisdiction. Therefore, while the Charter does not represent a leap forward in international adjudication, it does nothing to weaken the already precarious position of judicial settlement in international relations. If there is "retrogression" it is only in the sense that progress toward more binding dispute settlement was not made in drafting the Charter.

### III. THE CURRENT STATUS OF JUDICIAL SETTLEMENT

Under the United Nations system described above, few states refer disputes to the International Court of Justice for resolution. In terms of practice, there is certainly no custom of executing a *compromis* when a dispute arises. In fact, there has actually been a decline in the use of special agreements for jurisdiction. While the Permanent Court adjudicated eleven cases by *compromis* in twenty years, the present Court has had only seven such cases in the last forty years.<sup>128</sup>

Moreover, although there are currently 244 bilateral and multilateral treaties which confer some measure of jurisdiction on the Court,<sup>129</sup> relatively few cases have been brought using these treaties as a source of jurisdiction.<sup>130</sup> The vast majority

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128. 16 P.C.I.J. Ann. R., ser. E. No. 16, at 2; 1983-1984 I.C.J.Y.B. 45 (1984).

129. 1983-1984 I.C.J.Y.B. 92-108 (1984).

130. Since 1970, for example, applicants have commenced only four cases in

of these treaties are subject matter specific, *e.g.* the Constitution of the International Rice Commission of 1961.<sup>131</sup> Jurisdiction exists under these treaties only with regard to controversies related to the particular subject matter involved. This limited scope of jurisdiction may explain the few cases which have been brought under these agreements. It is interesting to note that when the United States in the *Iranian Hostages* case and Nicaragua in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* tried to raise treaties of friendship as bases of jurisdiction, the respondents involved objected to the use of those treaties in such a way.<sup>132</sup>

#### A. *The Quantity and Quality of Declarations Under the Optional Clause*

The practice under the Optional Clause has confirmed the fact that relatively few states are inclined to use the Court. In 1938, forty of the fifty-two member states of the League of Nations had declarations under the Optional Clause of the Permanent Court.<sup>133</sup> In 1947, the number of states with declarations under the new Statute had decreased to twenty-five.<sup>134</sup> Five years later, in 1952-1953 when sixty nations belonged to the United Nations, the number of declarations had increased only to thirty-six.<sup>135</sup>

During the late 1950's and early 1960's, membership in the United Nations blossomed to 110 states. By 1962-1963, however, only thirty-seven nations, including Switzerland, Liechtenstein, and San Marino which are not United Nations members, had Optional Clause acceptances.<sup>136</sup> Ten years

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which treaties have been cited for jurisdiction: Nuclear Tests (General Act), Pakistani Prisoners of War (Genocide Convention), Iranian Hostages (Treaty of Friendship and Operational Protocol to the Vienna Conventions on Diplomatic Relations and Consular Relations), and the Military and Paramilitary Activities in and Against Nicaragua (Treaty of Friendship).

131. Amended Constitution of the International Rice Commission, Nov. 23, 1961, 13 U.S.T. 2403, T.I.A.S. No. 5204, 418 U.N.T.S. 334.

132. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24, 1980); Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Judgment of Nov. 26 on Jurisdiction and Admissibility).

133. Kearney, *supra* note 103, at 160.

134. 1946-47 ANNUAIRE COUR INTERNATIONALE DE JUSTICE 105-06 (1947).

135. See 1952-1953 I.C.J.Y.B. 31 (1953).

136. 1962-1963 I.C.J.Y.B. 17-19 (1963).

later, in 1973, 132 states belonged to the United Nations but the acceptances of the Court's jurisdiction totalled only forty-six.<sup>137</sup> Thus, while over eighty percent of the member states of the League of Nations had declarations in 1938, only about thirty-five percent of United Nations members had Optional Clause acceptances in 1973. In the past decade or so, the trend has remained much the same. In 1983-1984, the last year for which data is available, only forty-four out of 157 United Nations member states, about twenty-one percent, had declarations of acceptance.<sup>138</sup>

The make-up of the forty-seven declarants, the forty-four United Nations members plus Switzerland, Liechtenstein, and San Marino, gives some idea of which of the world's blocs accept jurisdiction—if only partially—and which have rejected it totally. There are eighteen states which are commonly considered among the Western or Developed World.<sup>139</sup> The Third World is represented by twenty-nine states.<sup>140</sup> Cambodia is the only communist nation to have an acceptance, which dates from its non-communist period, before 1957. Absent from the rolls of Optional Clause states are all Communist countries, excluding Cambodia, and other important nations such as France, Argentina, Brazil, and Italy. Of the Security Council's members, only Great Britain now has a declaration. Thus, there is not a system of jurisdiction under the Optional Clause which includes even a majority of the most powerful states of the world. Moreover, since 1951, key states such as Brazil, China, France, Iran, South Africa, Turkey, and most recently, the United States have actually cancelled their acceptances or allowed them to lapse without renewal.

These statistics and the absence of powerful states tell only part of the story. The quality or scope of the jurisdiction which exists by virtue of the declarations that are made is se-

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137. 1972-1973 I.C.J.Y.B. 33 (1973).

138. 1983-1984 I.C.J.Y.B. 57-91 (1984).

139. Australia, Austria, Belgium, Canada, Denmark, Finland, Japan, Israel, Liechtenstein, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Sweden, Switzerland, United Kingdom, and United States. The United States has cancelled its optional clause acceptance. *See supra* note 5.

140. Barbados, Botswana, Colombia, Costa Rica, Cambodia, Dominican Republic, Egypt, El Salvador, Gambia, Haiti, Honduras, India, Kenya, Liberia, Malawi, Malta, Marutitius, Mexico, Nicaragua, Nigeria, Pakistan, Panama, Philippines, Somalia, Sudan, Swaziland, Togo, Uganda, Uruguay.

verely hampered by reservations and conditions. For example, of the forty-seven acceptances of the Optional Clause twenty-five are terminable immediately upon notice.<sup>141</sup> Six states have included multilateral treaty reservations similar to that which the United States raised in its case with Nicaragua.<sup>142</sup> Seven states exclude any case brought by a state with a declaration made less than one year before the filing of the application.<sup>143</sup> In addition, nineteen states exclude matters considered within their domestic jurisdiction from the Court's competence.<sup>144</sup> Among these nineteen declarations, there are five Connally-type reservations with regard to domestic jurisdiction.<sup>145</sup> Finally, nine British Commonwealth nations include reservations prohibiting the bringing of cases against one another.<sup>146</sup>

Apart from the common types of reservations and conditions shared by declarations, there has been no hesitation for states to draft their acceptances with particular exceptions. For instance, Barbados, New Zealand, El Salvador, Canada, and the Philippines exclude different issues relating to sea conservation, pollution, and territorial limits.<sup>147</sup> Egypt confers jurisdiction only with regard to matters concerning its operation of the Suez Canal.<sup>148</sup> El Salvador excludes questions arising out of armed hostilities;<sup>149</sup> Malawi similarly reserves questions relating to "belligerent or military occupation."<sup>150</sup> Israel lim-

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141. These 25 declarations are either terminable at will upon notice or can be amended or modified in anyway if so desired by their makers. Australia, Austria, Barbados, Belgium, Botswana, Canada, Costa Rica, Kahnpuchea, El Salvador, India, Israel, Japan, Kenya, Liberia, Malawi, Malta, Mauritius, Philippines, Portugal, Somalia, Sudan, Swaziland, Togo, and United Kingdom.

142. States having multilateral treaty reservations in their Optional Clause declarations: El Salvador, India, Malta, Pakistan, Philippines, and United States (declaration has been cancelled).

143. India, Malta, Philippines, United Kingdom, Mauritius, New Zealand, Somalia.

144. Barbados, Botswana, Canada, Cambodia, El Salvador, Gambia, India, Israel, Kenya, Liberia, Malawi, Malta, Maritius, Mexico, Pakistan, Philippines, Sudan, Swaziland, United States (declaration has been cancelled).

145. Malawi, Mexico, Philippines, Sudan, United States (declaration has been cancelled).

146. Australia, Barbados, Canada, Gambia, India, Kenya, Malta, Maritius, United Kingdom.

147. See 1983-1984 I.C.J.Y.B. 57-91 (1984).

148. *Id.* at 64.

149. *Id.*

150. *Id.* at 75.

its her declaration by excluding cases brought by states which do not recognize her, cases concerning matters between 15 May 1948 and 20 July 1949, and any case concerning armed hostilities.<sup>151</sup> India's declaration purporting to accept jurisdiction for all disputes actually excludes matters of self-defense, cases brought by a party with a declaration less than one year old, cases commenced by states with which India has no diplomatic relations, all territorial disputes, and any case based on facts arising before the making of the declaration in 1974.<sup>152</sup> Such exceptions effectively nullify any acceptance of compulsory jurisdiction.

An analysis of the reservations under the Optional Clause shows that only twenty-three out of the forty-seven states have made full, significant acceptances of the Court's jurisdiction. These acceptances may be termed "full" in the sense that they are not immediately terminable by their own provisions nor do they contain the types of narrowing reservations described above. Of these twenty-three states, twelve are from the Western or Developed World and eleven come from the group of states normally considered the Third or Underdeveloped World.<sup>153</sup> Of course, it must be remembered that whenever one of these states is faced with a case brought by a state whose declaration contains reservations, those reservations can block the application on the basis of reciprocity. Therefore, in the final analysis, it is only between these twenty-three nations of the world that any form of significant jurisdiction exists for the Court under the Optional Clause.

#### B. *General Assembly Resolutions and the Views of States*

The hesitation on the part of states to make Optional Clause declarations and the large number of sweeping reservations are strong evidence of the real views held by states on the usefulness of judicial settlement in international relations.<sup>154</sup> Other evidence as to the place of adjudication in dispute settle-

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151. *Id.* at 70.

152. *Id.* at 69.

153. Australia, Austria, Belgium, Colombia, Costa Rica, Denmark, Dominican Republic, Finland, Haiti, Honduras, Japan, Liechtenstein, Luxembourg, Netherlands, Nicaragua, Nigeria, Norway, Panama, Sweden, Switzerland, Togo, Uganda, Uruguay.

154. Schwartzberger, *supra* note 13, at 208.

ment is found in the resolutions and discussions of the United Nations General Assembly.

In 1947, the General Assembly passed a resolution asking that the United Nations organs use the Court more often for advisory opinions. In addition, the resolution directed the attention of states to the Optional Clause and recorded "as a general rule that states should submit their legal disputes to the International Court of Justice."<sup>155</sup> This language was to be by far the strongest endorsement of judicial settlement ever to come from the General Assembly. In 1949, the General Assembly went on to update the General Act of 1928<sup>156</sup> by changing its references to the Permanent Court into provisions regarding the International Court of Justice.<sup>157</sup> The changes were met with a frigid response by the international community. Only seven states have ever adhered to the revised version of the General Act.<sup>158</sup>

The lack of enthusiasm on the part of states in the General Assembly for judicial settlement reached an all-time high in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States (1970 Declaration).<sup>159</sup> It emphasizes the right of states to choose a suitable means of resolving disputes and provides that parties will agree upon such peaceful means as may be appropriate to the circumstances and the nature of the dispute. International disputes are theoretically settled on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.<sup>160</sup> The effort to include a reference to the Court in the 1970 Declaration failed even though sponsors asked only for language recommending that legal disputes be submitted to the Court.<sup>161</sup> Opposing states felt that no refer-

155. G.A. Res. 171, U.N. Doc. A/519, at 103 (1947).

156. General Act on the Pacific Settlement of International Disputes, Sept. 26, 1928, 93 L.N.T.S. 343.

157. Revised General Act for the Pacific Settlement of International Disputes, Apr. 28, 1949, 71 U.N.T.S. 101, fn.2.

158. Belgium, Denmark, Luxembourg, Netherlands, Norway, Sweden, and Upper Volta.

159. G.A. Res. 2625, 25 U.N. GAOR (Supp. No. 28), at 121, U.N. Doc. A/8082 (1970).

160. *Id.*

161. Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation Among States, 20 U.N. GAOR C.6 (—th mtg) at 56, U.N. Doc. A/6230 (1966).

ence to the Court should be made because the Charter gives no priority to judicial settlement and because the Court had not yet established itself as a trustworthy decision-maker.<sup>162</sup> During the drafting of the document, all states recognized the importance of freedom to choose between means of dispute settlement. It was felt that states cannot and should not try to decide in advance which method will be used to settle their controversies.<sup>163</sup>

Finally in 1974, the General Assembly managed to express a little more confidence in judicial settlement by reaffirming that recourse to the Court should not be considered an unfriendly act. As to the actual use of the Court, however, delegates could muster only lukewarm language. Their resolution stated only the "desirability that states study the possibility of accepting with as few reservations as possible" the Optional Clause.<sup>164</sup>

Perhaps no situation better underscores the hostility of some states toward judicial settlement and the Court than that surrounding two resolutions passed by the General Assembly in 1970 and 1971.<sup>165</sup> The object of these resolutions was to persuade states to respond to a questionnaire as part of a proposed review of the role of the Court. The idea of even reviewing the Court's role was strongly opposed by Socialist and some Third World states.

Basically, Western countries and their allies supported the idea. Underscoring the potential importance of the Court in dispute settlement, Japan spoke in favor of the review.<sup>166</sup> Denmark, lamenting the exclusion of the Court from the 1970 Declaration, maintained that judicial settlement was a "natural means" of dispute resolution.<sup>167</sup> Belgium supported the review noting that resort to judicial settlement was not inconsis-

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162. *Id.* at 57.

163. *Id.* at 52.

164. G.A. Res. 3232, 29 U.N. GAOR Supp. (No. 31) at 141, U.N. Doc. A/9846 (1974).

165. G.A. Res. 2723, 25 U.N. GAOR Supp. (No. 28) at 128, U.N. Doc. A/8238 (1970); G.A. Res. 2818, 26 U.N. GAOR Supp. (No. 29) at 137, U.N. Doc. A/8568 (1971).

166. Minutes of the Meetings of the Sixth Committee, 25 U.N. GAOR C.6 (1210th mtg) at 189, U.N. Doc. A/C.6/SR.1210 (1970). (Mr. Tsuruoka).

167. *Id.* (Mr. Fergo).

tent with sovereignty.<sup>168</sup> The Netherlands focused on the role of the Court in resolving legal disputes.<sup>169</sup> France pointed out the need for acceptance of the Optional Clause with as few reservations as possible.<sup>170</sup> Mexico, noting the need to find ways to persuade states to make Optional Clause acceptances, also supported the review of the Court.<sup>171</sup> India, Italy, the United Kingdom, Australia, Norway, Madagascar, Pakistan, the Philippines and the United States all spoke in favor of the review and ways of getting states to use the Court.<sup>172</sup> Sweden made the strongest argument for adjudication claiming that methods of settlement under article 33 of the Charter are not equal, that binding means such as arbitration and judicial settlement are more important, and that states must accept compulsory jurisdiction as soon as possible.<sup>173</sup>

Of course, these statements by Western nations and their allies must be weighed against reality. It was the West that dominated the post-war period and the drafting of the United Nations Charter which relegates judicial settlement to a minor role. As noted, only nineteen Western states have made Optional Clause declarations, many with substantial reservations. The United States is a good example. Given its opposition to compulsory adjudication in 1945, the sweeping reservations in its Optional Clause acceptance,<sup>174</sup> its decision to boycott the

168. *Id.* at 190 (Mr. Suy).

169. Minutes of the Meetings of the Sixth Committee. 25 U.N. GAOR C. 6 (1211th mtg) at 194, U.N. Doc. A/C.6/SR.1211 (1970) (Mr. Houben).

170. Minutes of the Meetings of the Sixth Committee, 25 U.N. GAOR C. 6 (1212th mtg) at 199, U.N. Doc. A/C.6/SR.1212 (1970) (Mr. Deleau).

171. Minutes of the Meetings of the Sixth Committee. 25 U.N. GAOR C. 6 (1215th mtg) at 213, U.N. Doc. A/C.6/SR.1215 (1970) (Mr. Vallarta).

172. Minutes of the Meetings of the Sixth Committee. 25 U.N. GAOR C. 6 (1215th mtg) at 214, U.N. Doc. A/C.6/SR. 1215 (1970) (Mr. Jagota); 25 U.N. GAOR C. 6 (1210th mtg) at 191, U.N. Doc. A/C.6/SR.1210 (1970) (Mr. Sperduti); 25 U.S. GAOR C. 6 (1216th mtg) at 217, U.N. Doc. A/C.6/SR.1216 (1970) (Mr. Freeland); 25 U.N. GAOR C. 6 (1216th mtg) at 219, U.N. Doc. A/C.6/SR. 1216 (1970) (Mr. Brennan); 25 U.N. GAOR C. 6 (1217th mtg) at 230, U.N. Doc. A/C. 6/SR.1217 (1970) (Mr. Ofstad); 26 U.N. GAOR C. 6 (1280th mtg) at 194, U.N. Doc. A/C.6/SR.1280 (1971) (Mr. Rakotoson); 26 U.N. GAOR C. 6 (1281th mtg) at 200, U.N. Doc. A/C.6/SR. 1281 (1971) (Mr. Faruki); 26 U.N. GAOR C. 6 (1281th mtg) at 201-02, U.N. Doc. A/C.6/SR.1281 (1971) (Mr. Bejasa); 25 U.N. GAOR C. 6 (1211th mtg) at 193, U.N. Doc. A/C.6/SR.1211 (1970) (Mr. Javits).

173. Minutes of the meetings of the Sixth Committee. 25 U.N. GAOR C. 6 (1216th mtg) at 218. U.N. Doc. A/C.6/SR.1216 and Corr. I (1970) (Mr. Persson).

174. The United States Declaration under the Optional Clause (1946) contained the following reservations:



proceedings initiated by Nicaragua, and its termination of acceptance under the Optional Clause, the United States cannot be considered a strong supporter of international adjudication. As Lissitzyn has concluded, Western powers have not distinguished themselves by strong leadership in favor of greater use of the Court.<sup>175</sup>

Every Socialist country which spoke with regard to the proposed review of the Court clearly opposed any attempt to enhance the role of judicial settlement. The Soviet Union maintained that the Court was an "irrelevant organ" subject to the biased influence of "certain forces." It further noted that any enlargement of the Court's activities or importance would undermine the Charter, particularly if it involved compulsory jurisdiction which could not be imposed on sovereign states.<sup>176</sup> The USSR made it clear that a change in the Court's role would require amendment of the Charter and would in no event be tolerated.<sup>177</sup> Soviet leaders have generally taken a negative attitude toward referral of disputes to adjudication and have opposed all attempts to expand the Optional Clause.<sup>178</sup>

In general, the influence of the Soviet bloc has been strongly against the extension of the judicial function in international relations.<sup>179</sup> The Socialist response in this case continued the trend. Poland urged that states not exaggerate the

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- a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future.
  - b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or
  - c. disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties before the Court, or (2) the United States of America specially agrees to jurisdiction.

See (1983-1984) I.C.J. Yearbook 90-91 (1984).

175. O. LISSITZYN, *supra* note 120.

176. 25 U.N. GAOR (193 1st plen. mtg.) Vol. III (Sept.-Dec. 1970) at 4 U.N. Doc. A/PV.1931 (Mr. Kolesnik).

177. Minutes of the meetings of the Sixth Committee, 25 U.N. GAOR C. 6 (1212th mtg) at 199, U.N. Doc. A/C.6/SR.1212(1970) (Mr. Kolesnik); 29 U.N. GAOR C.6 (1470th mtg) at 36-37, U.N. Doc. A/C.6/SR.1470 (1974) (Mr. Fedorov).

178. O. LISSITZYN, *supra* note 120, at 63. See generally Anand, *Attitude of 'New' Asian-African Countries Toward the International Court of Justice*, 55 AM. J. INT'L L. 383 (1961).

179. *Id.*

role of the Court.<sup>180</sup> The Byelorussian Socialist Republic emphasized the incompatibility of sovereignty and judicial settlement as well as the freedom of choice of means.<sup>181</sup> Romania, Hungary, Bulgaria, the Ukrainian Socialist Republic, and Cuba all underlined the dangers to "sovereign equality" of empowering the Court with broad jurisdiction.<sup>182</sup> In particular, Czechoslovakia noted that compulsory jurisdiction would make the Court a supra-national organ more powerful than the Security Council.<sup>183</sup> Hungary, summing up the feelings of the Socialist world, maintained: "[a]s long as the principle of the sovereign equality of States applied, the Court could play only an auxiliary role in the peaceful settlement of disputes."<sup>184</sup>

The Third World took what might be called a pragmatic approach to the Court and judicial settlement. While Algeria and Nigeria emphasized the need for judicial settlement,<sup>185</sup> Liberia noted that the fight over the Court and over jurisdiction was mainly a political one: the large states, namely the United States and the Soviet Union, had always opposed it.<sup>186</sup> Ethiopia agreed, noting that as long as the bigger powers continued to keep their vital interests from judicial settlement, the Court would remain a marginal institution.<sup>187</sup> Kenya asserted that wide and reasonably unqualified acceptances of the Optional Clause were in order, but the older, larger states must take the lead in making such declarations. Kenya and a number of

180. Minutes of the meetings of the Sixth Committee, 26 U.N. GAOR C. 6 (1277th mtg) at 178, U.N. Doc. A/C.6/SR.1277 (1971) (Mr. Klafkowski).

181. Minutes of the meetings of the Sixth Committee, 25 U.N. GAOR C. 6 (1214th mtg) at 210-211, U.N. Doc. A/C.6/SR. 1214 (1970) (Mr. Shardyko).

182. Minutes of the meetings of the Sixth Committee, 25 U.N. GAOR C.6 (1217th mtg.) at 227, U.N. Doc. A/C.6/SR.1217 (1970) (Mr. Secarin); *id.* at 228 (Mr. Prandler); *id.* at 229 (Mr. Kostov); 25 U.N. GAOR C.6 (1218th mtg.) at 234, U.N. Doc. A/C.6/SR.1218 (1970) (Mr. Makarevich); 29 U.N. GAOR C.6 (1467th mtg.) at 18, U.N. Doc. A/C.6/SR. 1467 (1974) (Mr. Tabio).

183. Minutes of the meetings of the Sixth Committee, 25 U.N. GAOR C.6 (1216th mtg) at 224, U.N. Doc. A/C.6/SR.1216 (1970) (Mrs. Slamova).

184. Minutes of the meetings of the Sixth Committee, 25 U.N. GAOR C.6 (1217th mtg) at 228, U.N. Doc. A/C.6/SR. 1217 (1970) (Mr. Prandler).

185. Minutes of the meetings of the Sixth Committee, 25 U.N. GAOR C.6 (1216th mtg.) at 223, U.N. Doc. A/C.6/SR. 1216 (1970) (Mr. Boulbina and Mr. Shitla-Bey).

186. Minutes of the meetings of the Sixth Committee, 25 U.N. GAOR C.6 (1226th mtg.) at 273, U.N. Doc. A/C.6/SR. 1226 (1970) (Mr. Brewer).

187. Minutes of the meetings of the Sixth Committee, 25 U.N. GAOR C.6 (1216th mtg.) at 222, U.N. Doc. A/C.6/SR. 1216 (1970) (Mr. Kibret).

other Third World states pointed out deficiencies in the Court, such as the traditional procedure and law applied, dissatisfaction with recent decisions, and the cost of litigation. These deficiencies were cited as reasons for not accepting judicial settlement at the present time.<sup>188</sup>

In general, the Third World has shown at best a guarded enthusiasm for judicial settlement.<sup>189</sup> Only twenty-nine Third World states have Optional Clause declarations.<sup>190</sup> Moreover, these states join all the Socialist powers and most Western states in emphasizing both the freedom of states to choose what means of dispute resolution should be used in a particular situation and the consensual basis of all adjudicatory jurisdiction.

### C. *Other Treaties and Instruments Governing Dispute Resolution*

The generally negative attitude that all three blocs have taken with regard to judicial settlement is also found in instruments outside the United Nations system. In setting up various types of relationships, states have generally avoided any significant use of judicial settlement. For example, several important codification conventions<sup>191</sup> contain no clause for the use of judicial settlement in the event of disputes over legal interpretation. Under the Geneva Conventions on the Laws of the Sea of 1958,<sup>192</sup> the Vienna Convention on Diplomatic Relations of 1961,<sup>193</sup> the Vienna Convention on Consular Relations of 1963,<sup>194</sup> the Convention on Consent to Marriage of

188. *See, e.g.*, the statements made by the Algerian and Kenyan representatives, 25 U.N. GAOR C.6 (1216th mtg.) at 222, U.N. Doc. No. A/C.6/SR 1216 (1970) (Mr. Boulbina); 25 U.N. GAOR C.6 (1213th mtg.) at 205, 25 U.N. Doc. A/C.6/SR 1213 (1970) (Mr. Nienga).

189. O. LISSITZYN, *supra* note 120, at 93.

190. *See supra* notes 139-46 and accompanying text.

191. *See* Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, TIAS No. 5969, 559 U.N.T.S. 285.

192. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

193. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95; *id.* 500 U.N.T.S. 241 (optional protocol on dispute settlement).

194. Vienna Convention on Consular Relations, Apr. 24, 19863, 21 U.S.T. 77,

1962,<sup>195</sup> the Human Rights Conventions of 1966,<sup>196</sup> and the Convention on Special Missions of 1969,<sup>197</sup> there exists no jurisdictional grant to the Court.<sup>198</sup> Instead, dispute settlement by reference to the Court is left to optional protocols.<sup>199</sup>

Similarly, while articles 66(a) and (b) of the Vienna Convention on the Law of Treaties do allow parties to a dispute over *jus cogens*<sup>200</sup> to submit the question to the Court, they do so only after twelve months have passed, after the means in United Nations Charter article 33<sup>201</sup> have failed to resolve the problem, and subject to the parties' power to choose arbitration.<sup>202</sup>

In the North Atlantic Treaty of 1949,<sup>203</sup> the NATO partners agreed to settle disputes by peaceful means but made no commitment to judicial settlement. Although a 1956 North Atlantic Council resolution requires settlement by good offices within the NATO framework before resort to any other international agency, it exempts legal disputes from this rule. They can be directly submitted to a judicial tribunal.<sup>204</sup> There is, however, no particular tribunal endowed by the resolution with jurisdiction for this purpose.

The 1948-1950 amendments to the General Act of 1928 reproduced in substance the original document requiring sub-

T.I.A.S. No. 6820, 596 U.N.T.S. 261; *id.*, 21 U.S.T. 325, 596 U.N.T.S. 487 (optional protocol on dispute settlement).

195. Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1982, 521 U.N.T.S. 231.

196. International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, 6 I.L.M. 360; International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368.

197. Convention on Special Missions and Optional Protocol concerning the Compulsory Settlement of Disputes, Dec. 16, 1969, 9 I.L.M. 149.

198. *See supra* notes 191-96.

199. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

200. Vienna Convention on the Law of Treaties, May 23, 1969, U.N.T.S.

201. U.N. CHARTER art. 33.

202. Articles 66(a) and (b) can be found at 63 AM. J. INT'L L. 875 (1969); UN Doc. A/Conf. 39/27 (1969).

203. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

204. *See* Resolution on the Peaceful Settlement of Disputes and Differences Between Members of the North Atlantic Treaty Organization, 36 DEP'T ST. BULL. 17 (January 7, 1957).

mission of disputes of all kinds of conciliation committees.<sup>205</sup> In addition, by virtue of article 17, disputes can be referred to the International Court of Justice subject to reservations made by states and only in the event the parties do not choose an arbitration tribunal.<sup>206</sup> Article 39 permits wide reservations to exclude disputes concerning facts prior to a state's accession, questions of domestic jurisdiction, and disputes in certain types of subject matters and categories as defined by states.<sup>207</sup>

In the European Convention for the Peaceful Settlement of Disputes of 1957,<sup>208</sup> states bound themselves to submit all treaty disputes, questions of international law, and questions of fact or reparations to the International Court of Justice.<sup>209</sup> Article 3 requires that all other disputes be settled by conciliation or, if that fails, by arbitration.<sup>210</sup> According to article 28, these requirements do not apply to disputes that the parties agree to submit to any other form of settlement. Parties are free to choose other means as long as the disputes mentioned in article 1 are settled by a procedure with a binding decision.<sup>211</sup> Thirteen countries have signed and ratified the convention.<sup>212</sup>

The Charter of the Organization of American States<sup>213</sup> (O.A.S. Charter) similarly gives states free choice of means. Article 21 lists direct negotiation, good offices, mediation, judicial settlement, conciliation, inquiry, arbitration, and any other method the parties choose as possible means of settlement.<sup>214</sup> The Pact of Bogota (Pact)<sup>215</sup> is part of the O.A.S. Charter by virtue of article 26.<sup>216</sup> In the Pact, parties agree to

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205. Revised General Act for the Pacific Settlement of International Disputes, Apr. 28, 1949, 71 U.N.T.S. 101.

206. *Id.* art. 17.

207. *Id.* art. 39.

208. Apr. 29, 1957, 320 U.N.T.S. 243.

209. *Id.* art. 1.

210. *Id.* art. 4.

211. *Id.* art. 28.

212. Austria, Belgium, Denmark, GFR, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Sweden, Switzerland, United Kingdom. 2 P. ROHN, *WORLD TREATY INDEX* 875 (1983).

213. Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3.

214. *Id.* art. 21.

215. American Treaty on Pacific Settlement, Apr. 30, 1948, 30 U.N.T.S. 55.

216. *Id.* art. 26.

use peaceful means to settle their differences before going to the United Nations Security Council.<sup>217</sup> The Pact specifies good offices and mediation,<sup>218</sup> inquiry and conciliation,<sup>219</sup> judicial settlement,<sup>220</sup> and arbitration.<sup>221</sup> Article 3 gives states the ability to choose between these methods.<sup>222</sup> Recourse to the International Court of Justice under chapter 4 is based on the Optional Clause declarations of the states (the Pact itself does not create an independent base of jurisdiction) and is only available in the event there has been no agreement to arbitrate and no solution has been found through conciliation.<sup>223</sup>

By contrast, there is no mention whatsoever of judicial settlement or the Court in the Charter of the Organization of African Unity.<sup>224</sup> Under article 19, all members commit themselves to the peaceful settlement of disputes and to the establishment of a Commission of Mediation, Conciliation, and Arbitration.<sup>225</sup> A protocol enacted to bring this Commission to life provides procedures for mediation, conciliation, and arbitration.<sup>226</sup> Article 19 of the protocol guarantees states the right to choose the means of dispute settlement they prefer.<sup>227</sup>

The Convention on the Settlement of Investment Disputes of 1966<sup>228</sup> established an International Centre for the Settlement of Investment Disputes. The Centre is designed to operate through the written consent of the parties involved and on the basis of conciliation or arbitration.<sup>229</sup> There is no provision for judicial settlement.

Creating the exception to the non-use of judicial settlement, the Europeans have taken the unique step of forming specialized courts with limited jurisdiction in various contexts.

217. *Id.* arts. 1-2.

218. *Id.* ch. 2.

219. *Id.* ch. 3.

220. *Id.* ch. 4.

221. *Id.* ch. 5.

222. *Id.* art. 3.

223. *Id.* art. 32.

224. 479 U.N.T.S. 39, 2 I.L.M. 766 (1963).

225. Protocol of the Commission of Mediation, Conciliation and Arbitration, 3 I.L.M. 1116 (1964).

226. *Id.*

227. *Id.* art. 19.

228. Convention on the Settlement of Investment Disputes, Mar. 18, 1965, 575 U.N.T.S. 159, art. 1.

229. *Id.* art. 28.

For instance, the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>230</sup> created the European Court of Human Rights. However, it left to states the ultimate decision as to whether or not to accept the competence of the Court.<sup>231</sup> States are permitted to accept only on the basis of reciprocity should they so desire.<sup>232</sup> A similar but more binding arrangement was used in creating the European Court of Justice. It has been charged with compulsory jurisdiction over questions under the European Coal and Steel Community Treaty, the Euratom Pact, and the European Economic Community Treaty.<sup>233</sup>

This use of judicial settlement by the Europeans is the exception, not the rule. Their use of adjudication can be attributed to their common cultural backgrounds and, more importantly, to their need for authoritative interpretation of important economic instruments. The European Community is a fact of life which touches millions of European citizens and businesses every day. Questions cannot go without resolution. Compulsory jurisdiction and judicial settlement ensure that questions of Community law do not go unanswered and that economic instruments can be interpreted on the basis of a stream of consistent jurisprudence. In addition, it must be remembered that the European Court of Justice is not just a smaller version of the International Court of Justice. Its jurisdiction is strictly limited to matters arising under the treaties establishing the various European Communities.<sup>234</sup> Moreover, although cases are often as highly political and emotional as one can imagine, states rarely bring actions against one another.

Even in the European context, judicial settlement has limits. The European Court of Justice is undoubtedly highly respected in its interpretation of the Community's economic instruments. However, the European Court of Justice was not consulted in 1966 when France decided to abstain from further

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230. Convention on the Protection of Human Rights and Fundamental Freedom, Nov. 4, 1950, 213 U.N.T.S. 221, art. 19.

231. *Id.* art. 46(1).

232. *Id.* art. 46(2).

233. See Convention Relating to Certain Institutions Common to the European Communities, 1973 Gr. Brit. T.S. No.1 (5179-11), 289 U.N.T.S. 269.

234. See, e.g., *infra* note 235.

participation in the European Economic Community due to a dispute over voting. The procedure for voting on the financing of the Community's massive Common Agricultural Policy was scheduled to change in that year from a unanimity to a majoritarian system. France, fearing adverse changes in the policy, argued that unanimity should be preserved and boycotted its Community obligations creating perhaps the most serious crisis in the Community's history. Although France was, at the very least, arguably in violation of her obligations under the Treaty of Rome, no other member state challenged her in the European Court of Justice. Instead, recognizing the vital interests involved, the Europeans set about finding a resolution to the crisis through political negotiations which ultimately resulted in the Luxembourg Accords.<sup>235</sup>

In 1979, the Andean Pact nations adopted the European Community approach and signed a treaty establishing a Court of Justice to settle their differences.<sup>236</sup> The Court is one of the principal institutions of the Cartagena Economic Agreement. The jurisdiction of the Court is therefore limited to challenging actions of the executive authority of the Cartagena community and the non-compliance of member states.<sup>237</sup> Article 1 makes it clear that the Court does not have competence to rule on questions outside the Cartagena framework.<sup>238</sup>

Finally, in the Law of the Sea Convention,<sup>239</sup> states expressed what was perhaps the greatest unity of opinion on judicial settlement in history. All states, even the Soviet Union and Eastern Europe, agreed that the compulsory jurisdiction of an international tribunal was necessary.<sup>240</sup> Consequently, article 286 of the Convention reads:

235. For a description of the French objection and the Luxembourg Accords, see P. KAPTEYN & P. VERLOREN VAN THEMMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* (1973); D. LASOK & J.W. BRIDGE, *AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* (1982).

236. Treaty Creating the Court of Justice of the Cartagena Agreement, 18 I.L.M. 1203 (1979), art. 6.

237. *Id.* art. 17-27.

238. *Id.* art. 1.

239. United Nations Convention On the Law of the Sea, 21 I.L.M. 1261 (1982) [hereinafter cited as *Convention on the Law of the Sea*].

240. Jaenicke, *Dispute Settlement Under the Convention on the Law of the Sea*, 43 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT* 813, 815 (1983).



Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by reference to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.<sup>241</sup>

As the wording of article 286 suggests, however, there was a price for the agreement on compulsory jurisdiction.<sup>242</sup> Section 3, to which the use of judicial settlement is subject, automatically excludes from jurisdiction any dispute relating to the exercise of "sovereign rights" by a coastal state within its maritime zone.<sup>243</sup> Moreover, it provides that states may, at their option, exclude from adjudication military activities at sea and law enforcement within the coastal zone<sup>244</sup> as well as disputes over the delineation of boundaries.<sup>245</sup> This last subject, boundary disputes, was considered particularly appropriate for judicial procedures. However, so many states felt that judicial settlement would infringe on sovereignty in this area that the possibility for reservations was created in order to secure agreement.<sup>246</sup>

Another concession made in order to get agreement on judicial settlement was flexibility in the choice of tribunal. States can choose to submit differences to the International Court of Justice, the Law of the Sea Tribunal, or an *ad hoc* arbitration.<sup>247</sup> Without such flexibility, adjudication would play a much smaller role in the Convention than it now does.<sup>248</sup> In any case, the recourse to judicial settlement under article 286 is limited by the parties' power in section 1 of the chapter on dispute settlement to choose any other means of settlement they desire, including direct negotiations and conciliation.<sup>249</sup>

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241. Convention on the Law of the Sea, *supra* note 239, art. 286.

242. *Id.*

243. *Id.* art. 297.

244. *Id.* art. 297(1).

245. *Id.* art. 298(a).

246. Janeicke, *supra* note 240, at 819.

247. Convention on the Law of the Sea, *supra* note 239, art. 287(1).

248. Janeicke, *supra* note 240, at 823.

249. Convention on the Law of the Sea, *supra* note 239, art. 286.

#### IV. EXPLAINING HOSTILITY TOWARD JUDICIAL SETTLEMENT

Any number of reasons can be advanced to explain the hostility of states toward international adjudication. States themselves have not hesitated to explain their dislike. The Socialist states have been clear in their position that judicial settlement on a compulsory basis is incompatible with sovereignty. The idea is that if and when a court can force states to present their disputes, the right of choice in foreign affairs will be non-existent and sovereignty thus violated. The Soviet Union's stand against judicial settlement is thus based on the principle of equality of sovereigns.<sup>250</sup> The United Nations is a voluntary organization. If it were compulsory, it would have the characteristics of a supra-national body and would rob its members of their sovereignty.<sup>251</sup> The same is said to be true of the compulsory settlement of disputes by a court.<sup>252</sup>

The opposition of the Third World is less theoretical. Although Northrop explains the Third World reluctance on the basis of its cultural and religious differences with the Western world,<sup>253</sup> Sohn, Stone, and Anand have shown that the real reasons lie elsewhere.<sup>254</sup> The Third World's heavy reliance as debtor upon the West,<sup>255</sup> the remoteness of the Court and lack of international law expertise,<sup>256</sup> and the fear of losing cases on political grounds<sup>257</sup> better account for the Third World's reluctance to dive headlong into judicial settlement. For these countries, the law with regard to important issues such as nationalization, sea bed use, and collective defense is still in a developing stage.<sup>258</sup> Therefore, there are not adequate rules

250. I. LAPENNA, *CONCEPTIONS SOVIETIQUES DE DROIT INTERNATIONAL PUBLIC* 293 (1954).

251. *Id.*

252. *See supra* notes 177-84 and accompanying text.

253. NORTHROP, *TAMING OF NATIONS* 80-81 (1952).

254. Stone, *A Common Law for Mankind*, 1 *INT'L LEGAL STUD.* 430, 431 (1959-60); Sohn, *Proposals for the Establishment of a system of International Tribunals*, *TRADE ARBITRATION* 64 (1958); Anand, *The Role of the 'New' Asian-African Countries in the Present Legal Order*, 50 *AM. J. INT'L L.* 383 (1961).

255. Stone, *supra* note 254, at 430.

256. Sohn, *supra* note 254, at 64.

257. Anand, *supra* note 254, at 404.

258. *See P. BUIRETTE-MAURAU, LA PARTICIPATION DU TIERS-MONDE À L'ELABORATION DU DROIT INTERNATIONAL* (1983) (discussion of the Third World's views with respect to these and other legal issues).

for an international judiciary to apply in cases involving issues vital to these nations. The statements made by Third World representatives in the United Nations support the above explanation of the Third World attitude toward adjudication.<sup>259</sup>

The real problem underlying Western reluctance to accept compulsory jurisdiction is simply the lack of political will to submit their disputes to a court.<sup>260</sup> This attitude is evidenced by the reservations attached to Optional Clause acceptances, the attitude of non-appearing respondents—including recently the United States—and the structure of international organizations. It is not impossible for states to use judicial settlement effectively. Where the West has chosen to use it, judicial settlement has functioned reasonably well. For example, there is unanimity of opinion that the common social milieu and the need for final decisions in the European Community has increased the political will to use, and consequently the effectiveness of, judicial settlement.<sup>261</sup> Where the desire to create and use appropriate judicial structures exists, adjudication can become an important dispute mechanism.

A number of things work against the development of Western political will with regard to judicial settlement. As early as 1907, Root noted that those entrusted with being judges of an international judiciary often act more like diplomatic agents than neutral decisionmakers.<sup>262</sup> Brownlie has cited the political facts that recourse to a court is often considered an unfriendly act, that judges are distrusted, and that states prefer to keep their dispute settlement options open.<sup>263</sup>

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259. The representative of Ethiopia cited changes in the world community and balance of power, the need for new international legal norms, and the pro-Western orientation of the Court's judges. Minutes of the meetings of the Sixth Committee, 26 U.N. GAOR (6th C.) at 173, U.N. Doc. A/C.6/SR. 1277 (1971) (Mr. Woldeg Giorges); Uruguay similarly focused on the distrust of the Third World with regard to international legal norms and the wide divergence of opinion as to content of the norms themselves. Minutes of the meetings of the Sixth Committee, 26 U.N. GAOR (6th C.) at 179, U.N. Doc. A/C.6/SR.1278 (1971) (Mr. Gonzalez Laperpe).

260. The very same point was made by the French delegate to the Sixth Committee. *Id.* (Mr. Deleau).

261. Tomuschat, *supra* note 53, at 397; Golson, *Report in JUDICIAL SETTLEMENT: AN INTERNATIONAL SYMPOSIUM* 115-117 (1974); C. DE VISSCHER, *ASPECTS RECENT DU DROIT PROCEDURAL DE LA COUR INTERNATIONALE DE JUSTICE* 178 (1966).

262. See O. LISSITZYN, *supra* note 120, at 41 (discussion on Root's communications to the United States Delegation).

263. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 731 (3d ed. 1979).

Fitzmaurice emphasized the fear of losing a case as well as the loss of tools like propaganda, bargaining, lobbying, and manipulation of votes.<sup>264</sup> He also noted a general lack of confidence in the International Court of Justice as an institution actually capable of settling disputes.<sup>265</sup> Apart from their official statements to the contrary, Socialist states probably object to adjudication and compulsory jurisdiction for these very same reasons. In the end, it is undoubtedly a combination of these factors which, when weighed against other forms of dispute settlement, inclines states to stay away from judicial resolution.

Responding to the hostility and doubts of the world's three blocs of nations, the United Nations Charter and other international instruments make judicial settlement but one of many methods of dispute resolution open to states. The free choice of means is emphasized. Where recourse to a court is possible, it is limited both in terms of subject matter and conditions prerequisite to its use, i.e. diplomatic negotiations and reservations to adjudication. Often, no tribunal is endowed with jurisdiction where the treaty or convention calls for judicial settlement. Of course, these instruments did not appear like Moses and the Ten Commandments from Mount Sinai. Instead, they are the product of the will of governments, and as such, they are the strongest evidence available for the aversion of states to judicial settlement.

##### V. *THE PROSPECTS FOR JUDICIAL SETTLEMENT*

Judicial settlement is and will probably remain a secondary method of international dispute resolution. The prevailing attitude among states shows that acceptance of compulsory jurisdiction in the near future is highly unlikely. The very structure of the Court's Statute and its Optional Clause provide testimony of the inherent weaknesses of the Court's compulsory jurisdiction. States can and do ignore the Court. Acceptances of jurisdiction that are made can and do possess any number of crippling reservations and conditions. Moreover, as the phenomenon of the non-appearing respondents shows, states feel

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264. Fitzmaurice, *Enlargement of the Contentious Jurisdiction of the Court* in 2 *FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 463 (L. Gross ed. 1976).

265. *Id.* at 465-67.

free in certain circumstances to disregard the obligations they have made with regard to mandatory judicial settlement.

Even more fundamentally, there exists no significant obligation requiring states to resolve disputes through judicial means. The tradition of creating international instruments which feature other methods of dispute resolution continues. The United Nations system is based upon the ultimate political resolution of disputes by the Security Council. In most other relationships, states have chosen to feature conciliation, negotiation, and arbitration over judicial processes. The emphasis in almost all systems is on the freedom of states to choose the appropriate means of dispute settlement. Thus, even the first steps toward establishing a court as a key dispute mechanism have not been taken. There is, therefore, little tradition of serious, mandatory use of judicial settlement to build on in persuading states to accept reform of the Statute of the International Court of Justice.

At best, only a handful of states show a tendency to accept a compulsory form of international adjudication. Their support for adjudication can only be termed a "tendency" because none of these states has actually been called before the Court in a dispute.<sup>266</sup> The rest of the world, including the United States, most major Western nations, the Soviet Union, and the Eastern Bloc, confirms the secondary importance of judicial settlement by its reluctance to use the International Court of Justice. In addition, states clearly reject any form of compulsory jurisdiction by their votes in the General Assembly, by the views they publicly express with regard to adjudication, and by the quantity and quality of declarations they make under the Optional Clause. This opposition is so pervasive that it would be unrealistic to expect judicial settlement to soon become a serious factor in resolving international controversies.

Given the very clear and limited role that states created for judicial settlement in the United Nations Charter, a serious attempt to expand the International Court of Justice's jurisdiction would inevitably involve an amendment of the Charter it-

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266. This "handful" of countries is composed of states with significant, broad declarations under the Optional Clause. *See supra* note 153. None of these nations has been called before the Court as a respondent on the basis of their declarations. It is, therefore, impossible to tell how seriously even they would take their Optional Clause obligations if important interests were involved.

self. In light of the hostility that all but a few states have shown with regard to compulsory adjudication, such an effort would be doomed to failure. Perhaps then, it is time for the world to look to other methods of dispute resolution. The time for the compulsory resolution of disputes by an international judiciary has not yet come.