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International Court of Justice

<p><u>Declarations made under Article 36(2) of the Statute</u></p>	<p>The <u>jurisdiction of the International Court of Justice</u> also exists <u>by virtue of declarations</u> made by States that they recognize as compulsory its jurisdiction in relation to any other State accepting the same obligation in all legal disputes concerning the matters specified in Article 36(2) of the Statute. This method of conferring jurisdiction on the <u>ICJ is also known as the Optional Clause</u>.</p> <p>The States Parties to the present Statute may at any time declare that they <u>recognize as compulsory ipso facto and without special agreement</u> in relation to any of the States accepting the same obligations, the jurisdiction of the court in all legal disputes concerning:</p> <ol style="list-style-type: none">the interpretation of a treaty;any question of international law;the existence of any fact which, if established, would constitute a breach of an international obligation;the nature or extent of the reparation to be made for the breach of an international obligation.
<p><u>The Doctrine of Forum Prorogatum</u></p>	<p>In accordance with the <u>Forum Prorogatum doctrine</u>, the Court <u>infers the consent of the State</u>, expressed in an informal and implied manner, and after the case has been brought before it. <u>The Court has upheld its jurisdiction even where consent has been given after the initiation of proceedings</u>, in an implied or informal way or by a succession of acts.</p> <p>For example, in the <i>Corfu Channel</i> case, the Court pointed out that Albania, not a party to the Statute, would have been entitled to object to the jurisdiction of the Court, by virtue of the unilateral initiation of the proceedings by the United Kingdom. Nevertheless, as indicated in its letter of 2 July 1947 to the Court, Albania accepted the recommendation of the Security Council and the jurisdiction of the Court for this case. Therefore Albania was precluded thereafter from objecting to the jurisdiction.</p>
<p><u>Applicable Law</u></p>	<p>Matters before the International Court of Justice are <u>decided in accordance with International law</u>. According to the Statute, the <u>Court is required</u> to apply:</p> <ol style="list-style-type: none"><u>International conventions</u>, whether general or particular, establishing

	<p>rules expressly recognized by the contesting States;</p> <p>b) International custom, as evidence of a general practice accepted as Law;</p> <p>c) The general principles of law recognized by civilized nations;</p> <p>d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.</p> <p>Further, while the primary function of the Court is to settle the dispute in accordance with international law, Article 38(2) gives power to the Court to decide a dispute <i>ex aequo et bono</i>, that is on the basis of equity, if the parties agree. <i>This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.</i></p>
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PROCEDURES

<p><u>Initiating a Case</u></p>	<p>States parties to a dispute may commence a case after notifying it to the Registrar of the Court. Upon receipt of either the notification of the special agreement or a written application, the Registrar of the Court will communicate the application to all concerned. The Members of the United Nations will be informed through the Secretary-General. The Registrar communicates the application to any other States entitled to appear before the Court (Article 40 of the Statute).</p>
<p><u>Representation of the Parties</u></p>	<p>Agents appointed by the parties represent them before the Court. They may have the assistance of counsels or advocates. The agents, counsel, and advocates of the parties before the Court enjoy privileges and immunities necessary for the independent exercise of their duties (Article 42 of the Statute).</p>
<p><u>Interim Measures of Protection</u></p>	<p>The ICJ may, without prejudice to the decision as to its jurisdiction in the case, where necessary, indicate interim measures for the protection of the rights of one of the parties.(Art 41)</p>
<p><u>Preliminary Objections</u></p>	<p>Article 79 of the Rules of the Court governs decisions on preliminary objections. Preliminary objections are those that require a decision before the Court can proceed to consider the dispute on its merits. As the Court itself pointed out, the purpose of a preliminary objection is to avoid not merely a decision on, but even any discussion of, the merits. In some cases, if issues concerning jurisdiction and merits, on facts, cannot strictly be separated, the Court,</p>

	<p>with the agreement of the parties, may join the preliminary objections to the merits phase of the case. Preliminary objections are an issue only in the cases where one State party, accepting the optional jurisdiction of the Court, brings a case against another State party on the basis of the declaration that State submitted under Article 36(2) of the Statute.</p>
<p><u>Right of Intervention of a Third Party</u></p>	<p>A State which is <u>not a party to a dispute can intervene</u> in the case <u>if it has an interest of a legal nature</u> that is likely to be affected by a decision in the case. However, it is for the Court to decide upon its request.(Art 62)</p>
<p><u>Written and Oral Proceedings</u></p>	<p>Proceedings before the Court take place <u>in two phases</u>: the written and the oral proceedings.</p> <p><u>Written Proceedings</u></p> <p>The written memorials and counter-memorials, and, if necessary, replies, are presented to the Court through the Registrar in the order prescribed and within the time fixed by the Court for this purpose. The President of the Court, in consultation with the Registrar convenes a meeting of the parties before deciding upon the deadlines and the order in which the written memorials and counter-memorials should be submitted (Article 49 of the Rules of the Court).</p> <p><u>Oral Proceedings</u></p> <p>The Court determines the number of sittings and the time allocated to each party. For this purpose, the Court passes the necessary orders and makes all necessary arrangements for the taking of evidence (Article 48 of the Statute). The oral proceedings before the Court involve the presentation of arguments by the agents, counsel and advocates and also the hearing of witnesses and experts. The hearings of the Court are under the control of the President or, in his absence, of the Vice President, and, in the absence of both, under the control of the most senior judge of the Court. The oral hearings are open to the public unless the Court decides otherwise or unless the parties demand that the public not be admitted. Minutes are prepared at each hearing and signed by the Registrar and the President, and they alone are authentic.</p>
<p><u>Evidence and Visit to Site</u></p>	<p>Where <u>service of a notice upon a person</u> other than the agents, counsel and advocates is necessary, the <u>Court sends such a notice to the government of the State</u> in whose territory the notice has to be served. A <u>similar procedure is also applied to obtain evidence on the spot</u> (Article 44 of the Statute). Similarly,</p>

	<p>the Court may at any time entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion (Article 50 of the Statute). The Court may make an on-site visit for a better appreciation of the case (e.g. <i>Gabcikovo- Nagymaros</i>).</p>
<p><u>Deliberations of the Court</u></p>	<p>Once the Court declares the hearing closed, it <u>deliberates on the matter in private and the proceedings of the Court are kept confidential</u>. The <u>deliberation of the Court are based on issues or questions for decision identified by the President of the Court</u> and finalized in consultation with other judges.</p> <p>Each judge, in the reverse order of seniority (i.e. commencing from the most junior judge), presents his/her views by way of answers to the questions drawn up by the Court. These comments are in the form of notes, which are circulated to all the judges. These notes are strictly for the Court, and enable it to form an initial idea of where the majority opinion may lie. At the end of the case, the registry destroys the notes. Further deliberations follow, with judges expressing their comments orally.</p>
<p><u>Drafting and Adoption of the Judgement</u></p>	<p><u>Once the Court forms a broad idea of the decision</u> involved and the majority ascertained, <u>a drafting committee of three members of the Court</u> is constituted. <u>The preliminary draft judgement is secret and is open to further discussions and suggestions</u>. The <u>drafting committee revises the draft in the light of the discussion, and presents a revised draft</u> for two readings by all the judges. <u>At the end of the second reading, the final vote is taken</u>.</p> <p><u>Each decision is taken by an absolute majority of the judges present</u>. Abstentions are not allowed. A judge who has failed to attend a part of the oral proceedings or deliberations, but who has nevertheless not missed anything essential, can participate in the vote. If a judge is incapable of attending the meeting, he/she can send his/her vote by correspondence. In case of a tie in the votes, the vote of the President determines the outcome of the decision.</p>
<p><u>Judgement</u></p>	<p>The Court may give a <u>declaratory judgement</u> or <u>judgement requiring performance</u>. A <u>declaratory judgement covers questions of jurisdiction</u>, interpretation of international treaties concerning the <u>existence or non-existence of a legal principle or relationship</u>, and <u>questions of whether there has been an infringement of a right</u> (without pronouncing upon a wrong resulting from such infringement).</p>

<p><u>Revision</u></p>	<p>A judgement once rendered, can be revised on application made by a party if some fact, of such a nature as to be a decisive factor, was, when the judgement was given, unknown to the Court and also to the party claiming revision (Article 61 of the Statute). However, the earlier lack of knowledge of the fact on the part of the State seeking revision of the decision of the Court should not be due to any negligence on its part.</p>
<p><u>Enforcement of a Judgement</u></p>	<p>A judgement is <u>binding upon the parties in accordance with Article 2 and Article 94(1) of the United Nations Charter</u>. In case of failure by one party to comply with the obligations arising from the decision of the Court, the other parties can have recourse to the Security Council for the enforcement of the decision.</p>

RELEVANT CASES

<p><u>Rights of Nationals of the United States of America in Morocco, (France v. United States of America)</u></p>	<p>The Court found that the decree of French Resident General of 1948, prescribing import regulations for goods coming from the United States, was discriminatory in favour of France. Accordingly, France could not enjoy commercial or economic privileges, which the United States did not equally enjoy.</p>
<p><u>Nottebohm (Liechtenstein v. Guatemala)</u></p>	<p>The Court accordingly confined its examination to whether the naturalization conferred on Nottebohm could be legally upheld as a basis for the proceedings before the Court. The Court did not question the right of Liechtenstein to grant its nationality to any person according to its laws. It was mainly concerned with the legal right of that State at the international level to provide diplomatic protection in respect of every person claimed as its nationals against another State.</p>
<p><u>Barcelona Traction, Light and Power Co. Ltd., (Belgium v. Spain).</u></p>	<p>The Court first addressed itself to the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company incorporated in Canada. The complaint concerned measures taken not in relation to Belgian nationals, but to the company itself. The Court noted that in municipal law the concept of company was founded on a firm distinction between the rights of the company and those of the shareholders. Accordingly, only the company was endowed with a legal personality, and only it could pursue a legal action on its own behalf in</p>

respect of injuries suffered, even if such an injury in fact was also an injury to several of its shareholders. In the present case, the measures complained about were not aimed at shareholders directly, and the injury suffered was a consequence of such measures against the company itself.

The Court also considered whether there might not be, in the present case, special circumstances serving as exceptions to the general rule. Two situations were studied: (a) the fact that the company had ceased to exist; and (b) whether the protecting State of the company lacked the capacity to take action. The Court found that while Barcelona Traction had lost all its assets in Spain and had been placed in receivership in Canada, the corporate entity of the company had not ceased to exist, nor had the company lost its capacity to take corporate action. Similarly, there was no dispute about the incorporation of the company in Canada where it had its registered office, and about the company's Canadian nationality, which was generally acknowledged. Canada, therefore, being the national State of the company, in fact had exercised protection for Barcelona Traction for a number of years. According to the Court, whatever the reasons for the Canadian Government's change of attitude, which resulted in that Government not acting on behalf of Barcelona Traction after a certain point in time, that fact could not constitute a justification for the exercise of diplomatic protection by another State. In the view of the Court, Canada continued to retain its capacity to protect Barcelona Traction.

Belgium argued that it could make a claim when investments by its nationals abroad were prejudicially affected and thereby affected the State's national economic resources. However, the Court noted such a right could only exist in the form of a treaty or a special agreement, which Belgium could not establish. Belgium further based its rights to espouse the claims of its nationals, shareholders in Barcelona Traction, on grounds of equity. The Court rejected this also on the ground that acceptance of any such right on the part of Belgium would open the door to competing claims on the part of different States, which would create a climate of insecurity in international economic relations.

In view of the above, the Court held that the third preliminary objection was valid.

The Court did not consider it necessary to deal with the fourth preliminary objection on the exhaustion of local remedies, as it upheld the third preliminary

objection.

By 15 votes to 1 the Court further held that it had no jurisdiction. Despite this vote, three judges supported only the operative portion of the judgement for different reasons. Judge Tanaka felt that the third and fourth preliminary objections should have been dismissed, and that the Belgian Government's allegation concerning the denial of justice was unfounded. Judge Jessup came to the conclusion that a State, under certain circumstances, had a right to present a diplomatic claim on behalf of shareholders who were its nationals, but Belgium had not succeeded in proving the Belgian nationality, between the critical dates, of those natural and juristic persons on whose behalf it had sought to claim. Judge Gross held that it was the State whose national economy was adversely affected that possessed the right to take action but that proof of Barcelona Traction's direct connection to the Belgian economy had not been produced.

Of the other 12 members of the majority who supported the operative paragraphs of the judgement, several appended separate opinions. Judges Fitzmaurice, Tanaka and Gross felt that the measures taken by the Spanish authorities were in the nature of expropriation, amounting to confiscation, which was contrary to international law, as claimed by Belgium. Some judges felt that, by denying the *jus standi* of Belgium and refraining from pronouncing upon the fourth preliminary objection on exhaustion of local remedies, the Court had missed an opportunity to contribute to the clarification and development of international business litigation and international economic relations in international law, and even simply the general international law obligations in the sphere of the treatment of foreigners. (See the separate opinions of Judges Fitzmaurice, Jessup and Tanaka.)

Electronica S.p.A. (ELSI) case (United States v. Italy)

At the outset, the Court rejected the Italian objection that the United States companies had not exhausted the local remedies available in Italy. Before doing so it rejected two United States arguments: first that the requirement of exhaustion of local remedies was not applicable to the present case as its claim was based on the FCN Treaty; and second, that Italy could not raise that objection, as it had not indicated until the time of filing of the counter-memorial that the parties could plead their case before United States courts in accordance with their rights under the FCN Treaty. While rejecting the Italian objection, the Court held that Italy had not shown the existence of a local remedy. Further, since Italy could not satisfy

the Chamber that there clearly remained some remedy which Raytheon, independently of ELSI, ought to have pursued and exhausted, it could not accept Italy's objection on the ground of non-exhaustion of local remedies.

As to the merits, the majority of judges found that it had not been sufficiently established that an orderly liquidation of ELSI's assets would still have been feasible at the time of its requisitioning. Accordingly, in its view, the requisition order had not interfered with the control and management of the company in any real sense. Thus the Chamber felt that the requisition, while unlawful, was not the cause of ELSI's bankruptcy.

The Chamber also dismissed the United States claims alleging violation of Article V(1) and (3) of the FCN Treaty, which were concerned with the protection and security of nationals and their property. It noted in this regard that although the requisition could be an expropriation, it was not so in the present case, since ELSI was already under an obligation to file for bankruptcy.

The Chamber also held that the requisition order did not violate Article 1 of the Supplementary Agreement to the FCN Treaty, which prohibited arbitrary or discriminatory measures. According to the Chamber, arbitrariness would require more than mere unlawfulness. As the requisition order was made consciously, in the context of an operating system of law and of appropriate remedies of appeal, it could not be considered arbitrary.

Finally, the Chamber stated that it was ELSI's precarious financial situation that deprived its shareholders from disposing of the company's properties in an orderly manner, and that their loss therefore was not due to any action taken by the Italian authorities. Accordingly, there had been no violation of Article VII of the FCN Treaty, which provided for the rights of the parties to dispose of their property and interests.

In view of the above, the Chamber first unanimously rejected the Italian objection to consider the United States' application, and second, by 4 votes to 1, found that Italy did not commit any breach of the FCN Treaty of 1948 between the parties, or of the Supplementary Agreement of 1951.
