

The Legal Dilemma and Optimization Path of the Jurisdiction of the International Court of Justice in Litigation

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Abstract: The litigation of the International Court of Justice (ICJ) is a vital avenue for peacefully resolving legal disputes between nations and fostering positive international cooperation. ICJ's aim is to refine and develop its methodology for properly handling and adjudicating various legal disputes among countries, and to optimize the related codified rule framework accordingly. Concurrently, the ICJ harbors the vision of broadening its jurisdiction and gaining recognition from more countries, striving to better maintain international peace, promote the proper resolution of international disputes, and advance the continuous progress and development of the international judicial system. However, in the context of the evolving and progressing international community, the ICJ has encountered numerous challenges in the actual exercise of its jurisdictional authority. This study examines these challenges in depth, focusing on issues related to admissibility, optional compulsory jurisdiction, and delayed jurisdiction. Through this analysis, a series of targeted recommendations are proposed to address these practical dilemmas and to support the ICJ in fulfilling its crucial mandate more effectively.

Keywords: Jurisdiction, admissibility, optional compulsory jurisdiction, forum prorogatum.

1. Introduction

As the accelerating process of global economic integration and the increasing international association, there were more and more disputes between nations. Under this background, Permanent Court of International Justice (PCIJ) emerged as the times required. PCIJ, which was established in 1920, served as the main judicial authority of the League of Nations, aiming to settle international disputes with judicial means. After the World WarII, establishment of the United Nations marked a new stage of the international relationship. On June 26, 1945, the Charter of the United Nations and the Statute of the International Court of Justice was passed on the United Nations Conference on International Organization, through which the International Court of Justice (ICJ) was formally established as the main judicial authority of the United Nations. The ICJ inherited the legal precedents and experience of PICJ, and made some adjustments based on historical development. Formally functioning in 1946, the ICJ worked to maintain international peace and security with judicial means, as well as promote the development and unification of international law.

The ICJ mainly accepts two types of cases: advisory and contention. In the advisory cases, the ICJ gives suggestions to the legal problems which are submitted by the subsidiary organs and specialized

agencies of the United Nations. In the contentious cases, the ICJ makes legally binding judgements to the international disputes. In the litigation process, the jurisdiction of the ICJ is the foundation of accepting and hearing a case, which is of great significance to protect national sovereignty and interests during the international communication.

Despite extensive use, there remains significant research space in dispute settlement, especially through the ICJ's contentious proceedings. Moreover, there is significant controversy in the field of international law surrounding how to determine the jurisdiction of the ICJ when concerning some complex problems. In practice, some nations try various devices to avoid the jurisdiction of the ICJ, in order to evade sanctions from the ICJ. In some other cases, the unclear jurisdiction causes that substantive issues of the disputes could not receive effective settlement. Therefore, this research will mainly focus on some problems that may affect the ICJ's jurisdiction in special circumstances, aiming to give suggestions for settling international legal disputes properly, protecting the legitimate rights and interests of states, and maintaining international peace and stability, as well as making contribution to the development of international legal system and international judicial system.

This paper mainly focuses on three aspects: admissibility, optional compulsory jurisdiction, forum prorogatum. The structure of this paper is as follows. After the introduction, the second part will give a briefing of their current regulations and theoretical foundation, analysis their applicable conditions and scope, and summarize the main opinions and controversy in academic community and judicial practice. In the third part, it expounds the legal dilemmas in these three aspects, including the unclear standard of admissibility, the controversy about automatic reservation when relating to optional compulsory jurisdiction, and the confidence crisis of forum prorogatum. Next, the fourth part will try to give respective optimized paths and detailed measures, such as clearing the standard of admissibility, limiting the use of automatic reservation clause, and develop criteria for the recognition of forum prorogatum. Finally, the fifth part will conclude the main results of this research and look ahead to future research directions.

2. The Current Regulations and Theoretical Foundation

2.1. The Legal Framework of the Jurisdiction of the ICJ

The jurisdiction of the ICJ is determined according to the Statute of the International Court of Justice (hereinafter referred to as "the Statue"). The Statue is the basic legal paper of the operation of the ICJ, which regulates the organization, authority, and proceedings of the ICJ in detail. According to Article 36 of the Statute, jurisdiction of the ICJ includes three types: voluntary jurisdiction, agreement jurisdiction, and optional compulsory jurisdiction.

Voluntary jurisdiction means that the parties in particular cases agreed to submit the dispute to the ICJ and abide by the court's judgement. This form of jurisdiction is highly flexible but also highly dependent on the agreement of both parties, making it less predictable and potentially unstable. Agreement jurisdiction means that countries approve in advance that they will submit the possible disputes to the ICJ in future. This method is quite common in international treaties and bilateral or multilateral agreements, because of the foreseeability and legal certainty of the possible disputes. Optional compulsory jurisdiction involves countries unilaterally declaring their acceptance of the ICJ's compulsory jurisdiction over certain categories of disputes when they sign or approve the Statute. This type of jurisdiction ensures a more stable and predictable source of cases for the ICJ, enhancing its role in the international judicial system.

2.2. Theoretical Analysis of Related Studies

Nowadays, the studies of the ICJ's jurisdiction mainly focus on certain aspect of it, and the overall researches primarily center at several problems that the ICJ is facing with, such as fuzzy determination

to admissibility, automatic reservation clauses' limitation to optional compulsory jurisdiction, and the ICJ finding it difficult for member states to trust its forum prorogatum [1].

Up to now, the ICJ and the academic circles have not given clear regulations and standards to admissibility. Generally speaking, admissibility problems are proposed and resolved in the preliminary opposition procedure, whose purpose is making sure that certain dispute can be accepted by the ICJ. "Unless the contentious procedure (substantive procedures of the case) is legally acceptable (the case is admissible and the court has jurisdiction), the case cannot enter the substantive trial procedure" [2]. Some scholars argue that one of the biggest jurisprudential problems of the ICJ is the concept overlap between admissibility and jurisdiction. The ICJ's most reasoning under the title "admissibility" is actually the analysis of the condition, "significance or scope of the judgment", of the jurisdiction [3].

Automatic reservation, also known as the Connally Reservation, allows member states to decide which issues are considered internal affairs. It was first proposed by American parliamentarian Connally in the US government's reservation clauses when it declared its acceptance of the jurisdiction of the ICJ in 1946. Following this, dozens of countries declared similar clauses. Although the ICJ has not provided a definitive response to the effectiveness of automatic reservations, it still considers these reservations. The ICJ holds that if both parties question the effectiveness of automatic reservations, the issue could be used as part of the facts and evidence in the trial. This creates a complex legal landscape where the ICJ must navigate between respecting state sovereignty and fulfilling its judicial mandate [4].

Forum prorogatum means that the respondent country agrees the jurisdiction of the ICJ expressly or impliedly. It depends on the discretion of the ICJ whether the actions of the parties can be regarded as acceptance of its jurisdiction, but the ICJ do not give a clear regulation on the implied consent of the respondent country. Believing that implied consent can be flexible and widely used, the ICJ maintains that not regulating the means of implied consent benefits the utilization of its institutional advantages. Nevertheless, the lack of clear standards may cause concerns that the ICJ could overreach its jurisdictional boundaries, encroaching on areas that the parties did not explicitly agree to [5].

3. The Legal Dilemma of the Jurisdiction of the ICJ

3.1. Reviewing Order of Jurisdictional Objection and Admissibility Objection

Admissibility objection and jurisdictional objection both belong to the preliminary objection of the ICJ trial. Admissibility objection means the negative viewpoints on the admissibility of the claims, and the reasons for this negation towards admissibility are not about substantive issues [6]. Admissibility objection usually can be divided into four situations. First of all, whether the dispute is a legal dispute, or a political dispute? Could it be settled through legal principles and rules? Secondly, before the dispute is submitted to the ICJ, have local remedies, including judicial and administrative remedies, been exhausted? Thirdly, are the parties qualified to be the litigants? Namely, they should prove they have a stake to the subject matter of the lawsuit. Finally, whether the third state has a stake to the dispute.

Current research predominantly focusses on reviewing order of jurisdictional objection and admissibility objection. Since the Rules of Court (hereinafter referred to as "the Rules") does not regulate a reviewing order between jurisdictional objection and admissibility objection, there are different precedents in practice. For instance, in *Interhandel (Switzerland v. United States of America)* in 1957, the US totally proposed four preliminary objections. Among them, a jurisdictional objection (part (a) of the Fourth Preliminary Objection) claimed that according to the automatic reservation clause, the dispute was a domestic affair, so the ICJ did not have the jurisdiction. Additionally, the admissibility objection (the Third Preliminary Objection) claimed that the dispute had not exhausted

internal remedies and could not be accepted by the ICJ. When reviewing the Fourth Preliminary Objection, the ICJ firstly reviewed the Third Preliminary Objection, and then reviewed part (a) of the Fourth Preliminary Objection basing on its conclusion [7].

However, in *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, although Honduras proposed a jurisdictional objection after an admissibility objection, the ICJ still reviewed the jurisdictional objection preferentially [8].

3.2. The Force of Automatic Reservation Clause

Optional compulsory jurisdiction of the ICJ grants parties a certain degree of flexibility and control. According to Article 36 of the Statue, parties can declare to recognize the compulsory jurisdiction of the ICJ. In practice, state parties usually propose several reservation clauses when recognizing the optional clause in order to maintain their self-interest and power of control. Among those reservation clauses, automatic reservation clause particularly worths paying attention to.

Automatic reservation clause stipulates that it is decided by state parties that whether a dispute is a domestic affair, causing a limitation to the jurisdiction of the ICJ and then weakened judicial authority of the ICJ. As a result, the academia and judicial practice of the ICJ widely discuss how to determine the effectiveness of automatic reservation clause. Some scholars, represented by Judge Sir Hersch Lauterpacht, argue that the ICJ should determine automatic reservation clauses as invalid, because they conflict with Article 36 of the Statue. Moreover, since the automatic reservation clauses have close connection with the parties' declaration of acceptance to optional compulsory jurisdiction, the ICJ should determine the whole declaration as invalid [9]. However, some others, represented by Judge Read, believe that the effectiveness of automatic reservation clause should be judged by the court case-by-case[9].

Automatic reservation clause plays an important role in harmonizing the interests of all parties and is of great significance in balancing national sovereignty and international cooperation relations. The ICJ has always been committed to enlarge the scale of its jurisdiction and encourage more parties to accept its jurisdiction, in order to promote the peaceful settlement of international legal disputes and the construction of international legal system. As a result, it is not proper to directly determine the declaration of acceptance to arbitrary compulsory jurisdiction as invalid just because of automatic reservation clause. And as to the method of judging its effectiveness case-by-case, the ICJ is facing with the problem of how to balance the parties' discretion based on automatic reservation clauses and the optional compulsory jurisdiction of the ICJ.

3.3. The Lack of the Criteria of Implied Consent in Forum Prorogatum

Forum prorogatum means when a party submits a dispute to the ICJ, the ICJ has not recognized its jurisdiction on the case. Only if the other party declares to accept jurisdiction of the ICJ, or makes implied consent through its action, the ICJ can exercise jurisdiction over this case.

Forum prorogatum was firstly established as an explicit regulation in the Rules in 1978. This regulation is actually the summary and codification of precedents and experience of the PCIJ and ICJ, and it truly restricted some arbitrary or unfounded lawsuits. It stipulates that without consent of the respondent party, the registrar cannot take any further actions, like listing the submission in the list of cases, except handing over the submission to the respondent party, in order to avoid damaging judicial administrative rules [10]. This regulation enables the ICJ not to directly refuse the submission of a party who has the right to appear in court and is beneficial for the ICJ to enlarge its jurisdiction, in order to make good use of its function and help the settlement of international legal disputes and development of international relationships.

Nonetheless, forum prorogatum rules has also caused widespread concern in the international community. The trend of actively applying forum prorogatum obviously cause countries' perturbation in terms of sovereignty infringement. The lack of criteria of implied consent especially increases these concerns. Although Article 38, Paragraph 5 of the Rules reduces the space for implied consent to a certain extent, it is not totally equal to "consent must be declared expressly".

Therefore, under current rules and practices, the implied consent of a party is completely judge by the discretion of the ICJ. For example, the ICJ may determine whether the party accept the jurisdiction of the ICJ by examining the party's defense against the dispute in some normal occasions [5]. In this situation, it is hard for parties to accept that the ICJ may determine they accept its jurisdiction without clear criteria, because there is a risk of sovereignty infringement. Additionally, it may have bad effect on a party's reputation if the party is involved into an international litigation before its express consent.

Moreover, from the perspective of the operation of the ICJ, the lack of criteria of implied consent also influences the efficiency of the ICJ. Because it costs a plenty of time and energy to review the relevant actions of the accused party, rather than quickly screening behaviors that may constitute implied consent through specific criteria. Even though the ICJ can determine the party accepts its jurisdiction, it still has to discuss and determine the scope of the implied consent.

Overall, the lack of the criteria of implied consent in forum prorogatum not only causes the parties are unwilling to accept this institution, but also may cause a waste of judicial resources of the ICJ. As a result, the problem obstructs the realization of the original intention of establishing this system and the development of international legal system, and further exploration of its improvement path is needed in legislation and practice.

4. The Optimization Path of the Jurisdiction of the ICJ

4.1. The Reviewing Order of Jurisdictional Objection and Admissibility Objection

Usually, the ICJ first reviews jurisdictional objection, and then admissibility objection. This is because before ICJ makes judgements to any claim or other relevant issues, it should make sure that it has the right to give a ruling. Thus, only if the ICJ has the jurisdiction, it has the right to review admissibility objection. However, in some special situation, due to the consideration of judicial economy, or when the admissibility may affect the establishment of jurisdiction, the ICJ will change the order and review admissibility objection in advance.

In this regard, the Statue and the Rule do not give detailed regulation but allow the ICJ to decide reviewing order based on the different situation of the cases. Although this method can ensure the judicial justice to some level, it may cause the waste of judicial resources and procedural uncertainty. To further clarify the order of review and save judicial resources, the ICJ should establish more specific rules. For instance, clearly stipulate the situation when admissibility objection can take priority over jurisdictional objection or stipulate that the ICJ should review the objections in order of the relevance between the objections and the substantive issues of the case, from the most complete prerequisite ones to the ones most related to the substantive issues [11].

4.2. The Effectiveness of Automatic Reservation Clause

The current review criteria adopted by the ICJ is good faith review. Namely, automatic reservation cannot definitely cause the ICJ loses its jurisdiction but should be reviewed by the court according to the principle of good faith, making sure that the parties do not invoke the automatic reservation clauses for the purpose of maliciously evading the jurisdiction of the ICJ. In *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, the ICJ recognized that automatic reservation clauses can empower the party with discretion, and ICJ should review whether the purpose of them is of good faith [12]. In the case, Judge Keith analyzed detailly the criteria of reviewing

automatic reservation clauses. He invoked the court's statement in Gabčíkovo-Nagymaros project and pointed out that "good faith obligation reflected in Article 26 of the Vienna Convention "obliges the Parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized"[12].

However, the relevant guidelines for the specific application of the principle of good faith still need further established. To review the legitimacy of automatic reservation clauses, the ICJ should summarize the past experience and establish a series of standard procedures and specific details, which fully consider whether the reservation affairs obstruct the object and purpose of the treaty and if an affair is recognized as domestic affair, whether the party considers irrelevant factors or for improper purposes. Besides, the ICJ should ensure the transparency of the procedure, in order to reduce the abuse of automatic reservation clauses, and strive for jurisdiction to the greatest extent possible.

4.3. The Recognition of Implied Consent in Forum Prorogatum

As to the recognition of implied consent, there are two problems needing solving: how to recognize the party accepts the jurisdiction of the ICJ and how to ascertain the scope of the jurisdiction the party accepts. In the circumstances of implied consent, the defendant party has not declared to accept the jurisdiction of the ICJ, so the recognition should be more prudent, showing that the ICJ only expects to achieve jurisdiction over the dispute itself, in order to dispel the concerns of the parties as much as possible.

Therefore, the ICJ could review the purpose of applicant states, ensuring that they do not maliciously file lawsuit for any other purpose, and their claims have a high degree of relevance to the dispute. This method can make the accused party believes in the impartiality of the ICJ and thus easily accept its jurisdiction.

Besides, the ICJ can also list the basis or relevant circumstances for determining implied consent in the rules, enabling the parties to have a certain understanding of the judgment criteria. As to the scope, the ICJ should strictly and clearly state in its documents about which claim is deemed to have implied consent from the parties.

Implied consent actually is the ICJ's understanding about particular action of the parties, so there is a possibility of misunderstanding. To prevent this problem, the ICJ can stipulate that the significant issues such as something involving national sovereignty and security, can only be heard by the ICJ with the parties' express consent. Besides, the ICJ can give a period for objection. If the party thinks that its action should not be recognized as implied consent, it can raise an objection to the ICJ during this period.

5. Conclusion

With the development and changes of international society, the ICJ faces many challenges in the practical operation of its jurisdiction in litigation. This research further clarifies the relevant issues of the jurisdiction of the ICJ based on the current academic perspectives, especially gives suggestions on how to deal with the legal dilemmas related to admissibility, automatic reservation, and forum prorogatum. Regarding the reviewing order of jurisdictional objection and admissibility objection, the ICJ should clearly stipulate situations where admissibility objections can take priority over jurisdictional objections, or review objections based on their relevance to the substantive issues of the case. For the effectiveness of automatic reservation clause, the ICJ should establish a series of standard procedures and specific details to review the legitimacy of automatic reservation. Concerning the recognition of implied consent in forum prorogatum, the ICJ should develop more specific supporting regulations to clarify the criteria and processes involved.

By optimizing the relevant regulations and operational procedures about its litigation jurisdiction, the ICJ can settle international legal disputes much more effectively and enhance its authority and credibility in the international community. Future research can further explore other issues that may affect the jurisdiction of the ICJ and propose more comprehensive solutions to promote the improvement of the international judicial system.

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