

# THE PRINCIPLE OF DOMESTIC JURISDICTION AND THE INTERNATIONAL COURT OF JUSTICE†

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1. Different *modus operandi* of Article 2 (7) of the Charter relating to the political and judicial activities.— 2. Applicability of Article 2 (7) to the contentious jurisdiction of the Court.— 3. Applicability of the same provision to the advisory function of the Court.— 4. Legal and non-legal disputes with regard to the matters of domestic jurisdiction. Various types of reservations.— 5. Reservations modelled upon Article 2 (7) of the Charter.— 6. Self-judging or automatic reservation. Question of its validity.— 7. Nature and function of the exclusion clause of domestic jurisdiction with reference to the judicial competence of the Court.— 8. Concluding remarks.

1. The purpose of this article is to examine the operating manners and aspects of the principle of domestic jurisdiction in connection with the judicial activities of the International Court of Justice.

Within the system of the United Nations, the organs such as the Security Council or the General Assembly perform the various political functions—normative and executive (including prevention and settlement of international disputes). On the other hand, the International Court of Justice offers a unique field of judicial activities—contentious and advisory.

Now, as is commonly known, Article 2 (7) of the Charter, adopting the different formulation with the corresponding provision of Article 15 (8) of the Covenant, provides: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .” There is no doubt that Article 2 (7) restricts the activities of the political organs. Either the Security Council or the General Assembly is forbidden to encroach on the matters which are essentially within the domestic jurisdiction of any State. Apart from the question whether Article 2 (7) as such applies also to the judicial activities of the Court, it should be observed that the restrictions derived from the principle of domestic jurisdiction assume different aspects of operation respectively with regard to the activities of political organs and a court of law.

The orthodox concept of reserved domain which is immanent in the international law phenomena, i.e., the sphere of State activities not covered by any international legal obligation is still germane and essential in relation to the activities of the judicial organ. However, as concerns the political organs, the principle embodied in Article 2 (7) of the Charter may

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be interpreted more broadly or more narrowly than the traditional concept of reserved domain. Moreover, its application in a concrete case within these organs is to pose the questions peculiar to political procedures, and alien to formalized process of law.

As to the first substantive point, various interpretations—broad or narrow—are placed to the material scope of “matters which are essentially within the domestic jurisdiction of any State.”<sup>1</sup>

For instance, it is asserted that matters of essentially domestic jurisdiction should be taken as co-extensive with those which are not, in principle (generally), regulated by international law. Consequently, even if a State is bound by any specific obligations derived from a treaty with regard to a certain matter, that matter may still lie within its domestic jurisdiction, provided that it is not, in principle, regulated by international law, in other word, not governed by general or customary international law.

It is argued that this interpretation is consonant with the formulation of Article 2 (7) of the Charter, evidently different from that of Article 15 (8) of the Covenant as well as the original intention of the Charter framers who willed the possible least impairment of matters of domestic jurisdiction. Indeed, given that “domestic jurisdiction” is a juridical concept, and in view of the will of the Charter framers to widen the scope of such matters as far as possible, there would seem no alternative but to paraphrase “essentially” in the above sense.

On the other hand, it is propounded in a variety of versions that the scope of reserved domain in Article 2 (7) should be interpreted as more contracted in favour of the powers of international organs. According to one interpretation, the sphere of State activities free from any international legal obligation is further eroded by the criterion of “essential repercussion” or “international concern.” Thus, even if a matter is not actually regulated by general or particular international law, it is no longer deemed as a matter of essentially domestic jurisdiction in cases where it exerts profound influence on the relevant interests of other States or evokes no small concern of the international community.

Such an interpretation is also affirmed to be in accord with the wording of Article 2 (7)—deletion of “international law” and replacement of “solely” with “essentially”—but also with the intention of the Charter framers who contemplated to establish political organization for the maintenance of international peace and security. It would be absurd that the organs of political organization are authorized only to deal with legal questions or disputes.

It is not necessary here to comment at length on these views—let alone the other exegetic

<sup>1</sup> See, e.g., Preuss, *Article 2, par. 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction*, in *Recueil des Cours*, I, 1949, pp. 567–604; Kelsen, *The Law of the United Nations*, 1950, p. 769 et seq.; Waldock, *The Plea of Domestic Jurisdiction before International Legal Tribunals*, in *B.Y.I.L.*, 1954, pp. 129–130; Verdross, *Die Ausschliessliche Zuständigkeit der Staaten nach der Satzung Vereinten Nationen*, in *Scritti di diritto internazionale in onore di Tomaso Perassi*, II, pp. 381–387; *The Plea of Domestic Jurisdiction before International Tribunals and a Political Organ of the United Nations*, in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Bd. 28, 1968, pp. 33–40; *Le principe de la non intervention dans les affaires de la compétence nationale d'un Etat et l'article 2(7) de la Charte des Nations Unies*, in *Mélanges offerts à Charles Rousseau*, pp. 267–276; Verzijl, *Le domaine réservé de la compétence nationale exclusive*, in *Scritti di diritto internazionale in onore di Tomaso Perassi*, II, pp. 389–403; Ross, *La notion de «compétence nationale» dans la pratique des Nations Unies. Une rationalisation a posteriori*, in *Mélanges offerts à Henri Rolin*, pp. 284–299; Morelli, *La competenza della Corte internazionale di giustizia e la c.d. giurisdizione domestica*, in *Studi sul processo internazionale*, 1963, p. 68.

points of this much discussed provision.<sup>2</sup> For the purpose of this article, it is sufficient to indicate that Article 2 (7) of the Charter delimits the competence *ratione materiae* of political organs in a different way from the judicial organ, assuming that the latter's primary function is to interpret and apply international legal rules.

As to the second procedural point, it should be inquired how the merits of difference whether the matter is or is not within the domestic jurisdiction are to be resolved, and particularly, in whom resides the competence of deciding this difference.

In retrospect, at the San Francisco Conference, the delegate of Greece proposed that "it should be left to the International Court of Justice at the request of a party to decide whether or not such situation or dispute arises out of matters that under international law, fall within the domestic jurisdiction of the State concerned." But this proposal was not adopted. Furthermore, the political organs so far have shown marked reluctance to consult with the Court in handling such issues.

<sup>2</sup> One view which tries to vindicate freedom of action for States to the utmost goes too far as a reaction to liberal interpretation for the competence of the Organization. Considering as if national sovereignty fossilized in the inalienable scope of domestic jurisdiction, it is contended that positivistic element of State consent excludes the possibility of customary alteration through practice as well as the teleological approach to the question (Watson, *Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the UN Charter*, in *A.J.I.L.*, Vol. 1 (1977), p. 60 et seq.). Thus, it minimizes the relative and evolutionary character of this concept, as rightly pointed out by the Permanent Court in 1923, depending upon the development of international relations. Caution being exercised on the resistant attitude of the minority, another view mitigates the rigidity of initial thesis by admitting that the *as hoc* unwritten norm has now been formed to modify the original scope. Thus, in virtue of this norm, it is submitted that the question of treaty obligations, the entire field of colonial problems, and the subject of apartheid have been withdrawn from matters of domestic jurisdiction (Conforti, *Le Nazioni Unite*, Vol. 11, 1974, p. 12 et seq.). However, doubts still subsist with regard to its initial position. Treaties are preeminently matters of international concern, which seem to be artificially set at naught for the sake of plausible construction. From the outset, the United Nations determined to establish "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" (Preamble of the Charter). In return, as to the more liberal interpretation, it is underscored that "concern" or "repercussion" is not a legal concept, but a political one. Therefore, it is insisted that even a matter of international concern may lie within the domestic jurisdiction of a State. For all that, the notion of international concern or interest may well be relevant to frame a normative referent. It may be recast in a public interest of the community in securing the respect of international social norms. In this connection, it is judiciously maintained that not only international law, but extra-legal principles, i.e., "principles of international social ethics" (*principi dell' etica sociale internazionale*) positively recognized among the States, may function to delimit matters of domestic jurisdiction which should be left to the unfettered discretion of each individual State (Sperduti, *Il dominio riservato*, 1970, pp. 52-58). In the same vein, "international community standard" is proposed to be applicable even in the judicial case (Dissenting opinion of Judge Jessup in the *South West Africa* case, *I.C.J. Reports* 1966, pp. 429-442). International morality may have a wider range of application than international law, inasmuch as it applies to the relations between international persons and entities not possessing international personality (Cf. Fedozzi, *Introduzione al diritto internazionale e parte generale*, 1940, pp. 21-22). It may be claimed that such relations are exclusively within the domestic jurisdiction in the sense that international legal obligations are not involved. However, in the light of the relevant principles or standards of international ethics enshrined in the Charter and activated in the consciousness of States, they are no longer considered to be matters of essentially domestic jurisdiction in the sense that on the plane of international political organization, arbitrary action or gross misfeasance in the conduct of such relations may evoke exhortative interference on the part of the organization, irrespective of specific legal obligations—though the technical hallmark of illegal intervention in international law may hold good as the residual criterion with regard to the issue more or less taking on a political character. On the other hand, even assuming that the question is not essentially within the domestic jurisdiction of a State, it does not follow that the organ must interfere in that question. Therefore, additionally, the test of "international concern" or the community interest at stake may be invoked as a factor to legitimize a concrete action of the political organ which normally *de minimis* does not take care.

Under these conditions, one view insists that the interested State itself has the right to decide the question whether the matter is essentially within its jurisdiction. Another view urges that the competence belongs to the organ concerned.

Presumably, the confusing discussion may be due to the mal-position of the question.<sup>3</sup> In legal litigation, if any objection to the jurisdiction of the Court is raised by a party, the proceedings on the merits are suspended until the Court shall give its decision on the jurisdictional question. Political litigation is "unschematic," and nothing is contemplated in Article 2 (7) to institute the comparable preliminary stage of the proceedings before the judicial organ.

Consequently, it should be inferred that applicability of Article 2 (7) in a concrete case is not subject to previous and binding decision of a preliminary character before proceeding to the discussion and examination on the merits of the question.

Needless to say, a State may raise the objection to the question being placed on the agenda, claiming that the matter is essentially within its domestic jurisdiction. But the State is not in a position to impose its self-judgement on the organ or its Members. Otherwise, the activities of the Organization will be fatally impeded. Even granting that the power of auto-interpretation exists for an individual State, it implies at most that the State is not bound to accept the view contrary to its own interpretation.

On the other hand, it may be said that "each organ must in the first place at least, determine its own jurisdiction", inasmuch as there is no procedure for determining the validity of act of organ in the structure of the United Nations.<sup>4</sup> It means that when a difference is revealed to subsist concerning the question of jurisdiction within the organ, it is the organ itself which must proceed to voting in order to form a collective judgement on that issue. The result of voting, in its turn, does not amount to a decision on a statutory basis binding the interested State or the dissenting Members.

As to the position of the organ, it is argued that in such a case the dispute exists between the Organization (or its organ) and the interested State, of which solution cannot be made unilaterally by the one or the other party.<sup>5</sup> However, the dispute, if any and in the beginning at least, is among the Members of the organ comprising the interested State. Formally the organ as such is not a party to the dispute. This being so, it is not proper to equate the process of forming a collective will or judgement with the unilateral determination of dispute by the organ as a party to it.

However, it is equally clear that the organ does not stand on a par with the judicial organ, which is empowered to render a binding and final judgement. Experience has disclosed that it is a political process par excellence.<sup>6</sup>

2. Now turning to the main question, it should be first of all asked whether Article 2 (7) of the Charter applies *ipso jure* to the exercise of contentious jurisdiction by the Interna-

<sup>3</sup> Sperduti, *op. cit.*, p. 72. The author points out that superfluous discussion is caused by erroneous assumption to hold an objection to the competence of the Organization as an objection of incompetence in a technical sense.

<sup>4</sup> *I.J.C. Reports* 1962, p. 168.

<sup>5</sup> Cf. Quadri, *Diritto internazionale pubblico*, 1968, p. 354; Watson, *op. cit.*, p. 64.

<sup>6</sup> Even so, it should be emphasized that both sides ought to act in good faith for the esteem of the relevant limit. Cf. Sperduti, *op. cit.*, p. 74.

tional Court.

The affirmative answer is given by some authors.<sup>7</sup> Article 2 (7) refers to “the present Charter.” Now that the Statute of the Court “forms an integral part of the present Charter” (Art. 92 of the Charter), all the provisions of the Statute—including Article 36 concerning the “competence” of the Court—constitute the provisions of the present Charter.

Even assuming that the term of “the present Charter” should be taken in the narrow sense exclusive of the Statute of the Court, the settlement of dispute by the Court nevertheless falls within the pale of the “settlement under the present Charter,” for it is provided in Article 36 (3) of the Charter that “legal disputes should as a general rule be referred by the parties to the International Court of Justice.” Consequently, the State party to the Statute having recognized the compulsory jurisdiction of the Court under Article 36 (2) of the Statute, will be able to deny the jurisdiction of the Court by virtue of Article 2 (7), claiming that the subject-matter of the dispute is essentially within its domestic jurisdiction.

Other authors set forth the negative view, with which the present writer also agrees.<sup>8</sup> It is true that the Statute of the Court forms an integral part of the Charter, from which it follows that the acceptance of the Charter automatically entails that of the Statute of the Court. However, this fact does not preclude that the Charter and the Statute constitute formally the distinct and separate instruments. Moreover, the term of “the present Charter” is rather regularly used in the narrow sense exclusive of the Statute of the Court (notable examples: Arts. 108 and 109 of the Charter).<sup>9</sup>

Even if the reference to the present Charter is interpreted in the wide sense inclusive of the Charter, the affirmative view cannot be endorsed. Since the principle of Article 2 (7) of the Charter sets the constitutional limitation to the competence of the organs of the United Nations, the principle as such applies in so far as the Charter and / or the Statute directly and immediately authorizes the Court to settle the disputes submitted by the States. Neither the Charter nor the Statute does not give directly such adjudicative powers to the International Court.

Article 36 (1) of the Statute provides: “The jurisdiction of the Court comprises . . . all matters specifically provided for in the Charter of the United Nations.” Nowhere in the Charter is any provision to be found establishing directly the jurisdiction of the Court. Article 36 (2) of the Statute concerning the optional clause represents the procedural scheme in order to create the compulsory jurisdiction of the Court founded upon the consent of States to be specifically given. Thus, as indicated by the Court in the *Aerial Incident* case (Israel v. Bulgaria), “. . . Article 36, contrary to the desire of a number of delegations at San Francisco, does not make compulsory jurisdiction an immediate and direct consequence of being a party to the Statute.”<sup>10</sup>

On the other hand, Article 36 (3) of the Charter merely refers to reliable criterion in cases where the Security Council recommends any procedure for the settlement of the dispute to be adopted by the parties. The eventual jurisdiction of the Court is based neither on this provision nor the recommendation of the Security Council.

<sup>7</sup> Kelsen, *op. cit.*, pp. 527–531.

<sup>8</sup> Waldock, *op. cit.*, pp. 121–124; Morelli, *op. cit.*, pp. 57–64; Kopelmanas, *L'Organisation des Nations Unies*, I, 1947, p. 236.

<sup>9</sup> Contra: Keith, *The Extent of Advisory Jurisdiction of the International Court of Justice*, pp. 133–134.

<sup>10</sup> *I.C.J. Reports* 1959, p. 145.

Such being the case, apart from the question of terminology, the conclusion should be that Article 2 (7) of the Charter does not *ipso jure* operate to restrict the jurisdiction of the Court which is derived from the consent of States to be given independently of the Charter and the Statute.<sup>11</sup>

3. Besides the contentious jurisdiction, the International Court is also empowered to give an advisory opinion on any legal question at the request of the General Assembly, the Security Council or other organs (Art. 96 of the Charter, Art. 65 of the Statute).

Since the advisory jurisdiction of the Court is conferred immediately and directly by the Charter and the Statute, Article 2 (7) of the Charter should be deemed to apply *ipso jure* to its exercise by the Court, so much the more because "the reply of the Court, itself, an 'organ of the United Nations' represents its participation in the activities of the Organization."<sup>12</sup>

In fact, it is not without precedent that the objection of domestic jurisdiction based on Article 2 (7) of the Charter was raised against the power of the Court to exercise its advisory function. On that score, the jurisdiction of the Court was contested by the defendant Governments in the *Interpretation of Peace Treaties* case.<sup>13</sup>

As expressly contemplated, the advisory opinion of the Court may be requested to a legal dispute actually pending between two or more States (Art. 102 of Rules of Court). When the organ of the Organization requests for an advisory opinion concerning this kind of question in disregard of Article 2 (7) of the Charter, that request may in itself constitute an *ultra vires* act of the organ. Therefore, the objection of inadmissibility to the request may be addressed by the affected Government to the effect that the Court should not entertain such an invalid request for an opinion. On the other hand, it is for the Court itself to decide whether an opinion may be given or not. Accordingly, the alternative plea may take form in the objection of incompetence, claiming that the Court, as an organ of the United Nations, is bound to observe the provision of Article 2 (7) in the exercise of its advisory function conferred by the Charter.<sup>14</sup>

Viewed from another angle, it should be observed that the Court is not a political organ like the Security Council or the General Assembly. Its role is different from that of a political organ. The Court is not only the organ of the United Nations; it is "the principal

<sup>11</sup> In this connection, it is also significant that the judicial function of the Court is normally confined to the settlement of legal disputes. This is the inherent limitation derived from the very nature of the Court as a court of law. Therefore, it may be presumed that any supposed applicability of Article 2 (7) to the judicial activities cannot derogate from this limitation, nothing being added (extra-legal questions), nor reduced (field of treaty law) with regard to the proper functioning of the International Court.

<sup>12</sup> *I.C.J. Reports* 1950, p. 71.

<sup>13</sup> See below, pp. 17-18. Cf. Pratap, *The Advisory Jurisdiction of the International Court*, 1972, p. 131.

<sup>14</sup> It is asserted that the General Assembly has the right to ask for legal opinions and the Court has the right to give legal opinions requested of it by the Assembly. The whole issue is simply a matter between the Assembly and the Court, and not one in which any individual State has any right to suggest the Assembly is not competent to request an opinion or the Court not competent to give it (Statement by Fitzmaurice in the *Interpretation of Peace Treaties* case, *Pleadings, Oral Arguments, Documents*, p. 313). However, this legal position is predicated upon the assumptions: (1) the interested State is bound by the judgement of the organ concerned; and (2) the request is valid and as such, admissible. An advisory procedure is not evidently an appeal against the decision of international organ by an individual State. However, if the judgement of organ is not binding and final, and the request is believed to infringe Article 2 (7)—this is the point to be decided by the Court—it seems without reason why the affected Government is precluded to raise this point, and why the Court cannot take cognizance of this plea.

judicial organ" of the Organization (Art. 92 of the Charter, Art. 1 of the Statute). For this reason, the advisory jurisdiction of the Court is confined to give an opinion on "legal questions" abstract or otherwise. The Court declared in the *Certain Expenses of U.N.* case: "... the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested." Thus the legal nature of the question which is requested for an opinion delimits the advisory competence of the Court. If it is requested to give an opinion on the question concerning the interpretation or application of international legal rules, the matter is undoubtedly within the advisory jurisdiction of the Court. However, it is not permitted for the Court to go into the sphere of State activities not regulated by international law, and to question the propriety of the exercise of discretionary power left to a State. If this is what is precisely required by Article 2 (7) of the Charter, the very limitation is inherent to the Court as a judicial organ. Put it another way, the import of Article 2 (7) would be reduced to the same thing with the limitation to give an opinion only on a legal question. Should any discrepancy be ascertained in a concrete case, the Court must give priority to the "requirement of its judicial character" in accordance with a criterion of speciality: "*generalibus specialis derogat.*"<sup>15</sup>

For the purpose of the Court's advisory function, the formula of "matters which are essentially within the domestic jurisdiction" should be of a jural nature. It would be hardly conceivable that the true intention of the Charter framers consisted in allowing the function of the Court politically to be governed by a non-jural formula, while they instituted it as a judicial organ.

In any event, given the formula thus qualified, it is a legal question whether a certain dispute concerns a matter of essentially domestic jurisdiction of any State. But in order that the request for an opinion may be entertained by the Court as admissible, the question should be formulated so as to request the legal—not extra-legal—judgement in this regard.<sup>16</sup>

4. International disputes concerning the matter of domestic jurisdiction may take form in either legal disputes or non-legal (political) ones.<sup>17</sup> In some cases, a State intervenes with the matter of domestic jurisdiction of another State, against which the claim of non-legal nature is lodged. When that claim is resisted by the latter State, then a dispute arises between these States. This is a non-legal or political dispute, in so far as the claim of intervening State seeks to gain a modification of the legal status quo.

In other cases, a State contends that a certain matter is by international law exclusively within its domestic jurisdiction, which is challenged by another State. This is a clash of juridical views between States regarding the existing legal situation, which gives rise to a veritable legal dispute suitable for judicial determination.<sup>18</sup>

<sup>15</sup> *I.C.J. Reports* 1963, p. 30; "... both the Permanent Court of International Justice and this Court have emphasized the fact that the Court's authority to give advisory opinions must be exercised as a judicial function."

<sup>16</sup> The Court said in one case: "It is not for the Court to pronounce on the political or moral duties which these considerations may involve." *I.C.J. Reports* 1950, p. 140.

<sup>17</sup> Verzijl, *op. cit.*, p. 402.

<sup>18</sup> Cf. Cassese, *The Concept of «Legal Dispute» in the Jurisprudence of the International Court*, in *Il processo internazionale: Studi in onore di G. Morelli*, 1975, p. 171 et seq.

According to the orthodox concept of law, a matter of domestic jurisdiction is nothing other than the sphere of State activities which are not regulated by international law, general or particular. Thus it may be said that "the reserved domain begins where international law ends."

Given this concept, the question whether a certain matter falls within the domestic jurisdiction of a State would be tantamount to asking whether the matter is regulated by international law. If a claim of applicant State is assailed in the judicial proceedings on the ground that the subject-matter falls within the domestic jurisdiction of respondent State, a decision of the Court will be given by ascertaining whether an applicant State has established its alleged right based on international law. In the negative, it should be concluded by the Court that the claim is invalid and not well-founded in international law. The question of domestic jurisdiction, therefore, pertains to substantive international law, and on the plane of legal process, it critically influences the whole merits of the dispute. A respondent State for its part may raise this question against the validity of a claim of applicant State, and the Court in its turn can pass upon the merits of the question.

As to a non-legal dispute relating to a matter of domestic jurisdiction, the case of applicant State should be dismissed on the ground that there exists no legal dispute cognizable by a court of law, the case having no warrant in law.

In spite of the fact that a matter of domestic jurisdiction is protected by substantive international law upon which a State can rely by way of defence on the merits, if cited before the Court, and equally safeguarded against any decision *ex aequo et bono* by the Court, the usual position of States does not stop there in undertaking jurisdictional obligations.

States are deemed to hold the conviction that a matter of domestic jurisdiction should exclude any form of external interference, each positing itself as sole judge for that matter. Hence further—procedural—protection is sought in the sense that a matter of domestic jurisdiction should not be made the object of discussion and examination before the Court. This wishful conviction finds emphatic expression in the specific clause to be inserted in the declaration accepting the jurisdiction of the Court, which excepts therefrom disputes with regard to matters of domestic jurisdiction.

The *ad hoc* clauses which exclude certain or certain category of disputes from the compulsory jurisdiction of the Court within a framework of optional clause are commonly called the "reservations." A number of declarations accepting the compulsory jurisdiction of the Court contain the reservations of domestic jurisdiction, which may be classified into the following three types: (1) the reservation excluding "disputes with regard to questions which by international law fall exclusively within the domestic jurisdiction of a State; (2) the reservation excluding "disputes relating to matters which are essentially within the domestic jurisdiction of a State"; and (3) the reservation excluding "disputes with regard to matters which are essentially within the domestic jurisdiction of a State as determined by that State."<sup>19</sup>

As indicated above, the first type of reservation refers to substantive international law in order to define the scope of its applicability and to delimit the competence of the Court. Hence, even if it intends to prevent the possibility of entering into the substantive

<sup>19</sup> See, Rosenne, *Documents on the International Court of Justice*, 1974, pp. 257-314.



aspect of the case, judicial experience so far has shown that it would be almost ineluctable for a State to see the concrete applicability of reservation summarily *in limine* and fully in the further proceedings examined by the Court. To the extent of referring to the functional limit of the Court solely entitled to decide legal disputes, the reservation may be otiose and too cautious, for the limitation is valid irrespective of any specific reservation. For practical purposes, therefore, the first type of reservation—and presumably the second type alike—appears to be pseudo-judicial in its principal effect, notwithstanding its manifested intent.

In contrast to this, the third type of reservation is wholly operative on the jurisdictional plane. The reserving State pretends to be sole judge of the reserved matter which is distinctly possible not to coincide with the realm of State liberties.

5. With regard to the second type of reservation, i.e., excepting “disputes relating to matters which are essentially within the domestic jurisdiction of a State”—though just a few in number—the question is posed in what sense it purports to restrict the jurisdiction of the Court.<sup>20</sup>

According to one view, the above reservation covers the matters which are not, in principle (generally), regulated by international law—not the matters which are not regulated actually and *in concreto* by international legal rules.<sup>21</sup> Consequently, the jurisdictional question to be raised on the basis of the reservation may be divorced from the question of merits, for it is possible that the matters free from any international obligation still fall within the category of matters which are not, in principle, regulated by international law.

It is asserted that the second type of reservation obviously modelled upon Article 2 (7) of the Charter should be interpreted in this meaning and scope. Because that interpretation—it is asserted—corresponds to the original or textual meaning of Article 2 (7) of the Charter.

It is also pointed out in this connection that with regard to the activities of political organs of the United Nations, the *ad hoc* unwritten norm has been formed through the consistent practice to the effect that all the relations regulated by international law are not exempt from the operation of Article 2 (7); hence it has no longer possible to resort to the concept of domestic jurisdiction even with regard to matters of treaty obligation exceptionally engaged which are not generally regulated by international law. Interpreted in this light, the second type of reservation is exactly similar to the first type of reservation modelled upon Article 15 (8) of the Covenant.

For all that, it is insisted that the same practice of the International Court cannot be deemed to have been established. In fact, the Court treated the preliminary objections of domestic jurisdiction in several cases. But in all these cases, the objections were based on the reservation modelled upon Article 15 (8) of the Covenant, and were applied as such by the Court.

Only in the *Interpretation of Peace Treaties* case, the competence of the Court to exercise its advisory function was challenged by virtue of Article 2 (7) of the Charter. Having

<sup>20</sup> Only two States, namely, Israel and India.

<sup>21</sup> Conforti, *La nozioni di «domestic jurisdiction» nelle riserve all'accettazione della competenza della Corte internazionale di giustizia*, in *Il processo internazionale: Studi in onore di G. Morelli*, 1975, p. 215 et seq.

clarified that the Court was not called upon to deal with the alleged violation of the provisions of the Treaties concerning human rights and fundamental freedoms, the Court held: "The object of the Request is much more limited. It is directed solely to obtaining from the Court certain clarifications of a legal nature regarding the applicability of the procedure for the settlement of disputes by the Commissions provided for in the express terms of Article 36 of the Treaty with Bulgaria . . . . The interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law, by its very nature, lies within the competence of the Court."<sup>22</sup>

It is argued that great caution being exercised, this finding cannot be cited to prove that the Court is favourably inclined towards extending the interpretation peculiar to Article 15 (8) of the Covenant to Article 2 (7) of the Charter. Having shifted accent from the provisions of human rights to those concerning the settlement of disputes, the Court rejected the objection on the ground that the question in hand was neither exclusively nor essentially within the domestic jurisdiction of the States.

Therefore, it is concluded that the second type of domestic jurisdiction modelled upon Article 2 (7) of the Charter should be interpreted in the original or textual meaning of that provision without regard to the modifications brought about by the consistent practice within the political organs of the Organization.<sup>23</sup>

On more scores than one, this interpretation is open to doubt.

In the first place, as indicated above, Article 2 (7) of the Charter does not *ipso jure* restrict the contentious jurisdiction of the Court. There is no inevitability that the interpretation formulated to restrict the jurisdiction of the Court should be linked functionally, if not derivatively, with Article 2 (7) of the Charter. Even if such an approach should be adopted, it is questionable whether the suggested interpretation of Article 2 (7), i.e., imposing the least restriction on the freedom of States, is the only possible and correct interpretation as the limitation on the functions of the Organization.

Secondly, it is almost a truism that a State cannot behave as sole judge as regards the matters of treaty obligation. The matters are not within the domestic jurisdiction of a State in the sense that it is not authorized to impose its own view on the other State. As was cogently pleaded in the *Interpretation* case, "when the 'matter' involved is a question of treaty observance . . . then *that* 'matter' is the treaty itself and cannot, *ex naturae*, be a matter 'essentially within the domestic jurisdiction of any State'; such questions are, on the contrary, essentially and inherently matters of international jurisdiction of the very nature of a treaty, which is an international instrument."<sup>24</sup>

Thirdly, it is only right and proper that the reply which the Court is called upon to give should be limited to the requested question. However, in the relevant context, the Court takes notice of the fact that the General Assembly justified the adoption of its resolution having referred to Article 55 of the Charter. The phrase of "for this purpose" is cautiously used to make clear the limited task of the Court in that case. However, it would be hardly justifiable to use this phrase as a lever to elicit the Court's presumed adherence to the

<sup>22</sup> *I.C.J. Reports* 1950, pp. 70-71.

<sup>23</sup> Conforti, *La nozione di «domestic jurisdiction»* . . . , pp. 230-231.

<sup>24</sup> Statement by Fitzmaurice, *Pleadings*, p. 314.

restrictive interpretation of Article 2 (7) of the Charter.<sup>25</sup> It is difficult to see why the interpretation of the terms of a treaty for other relevant purposes, ceases to be "a question of international law which, by its nature, lies within the competence of the Court."<sup>26</sup>

Finally, the Court itself has not pronounced so far any conclusive view that matters of essentially domestic jurisdiction coincide with matters which are not, in principle, regulated by international law, setting aside any treaty obligations in these matters as irrelevant. On the contrary, the Court has reiterated the statement that the interpretation of a treaty provision is "an essentially judicial task"; "the interpretative function falls within the normal exercise of its judicial powers."<sup>27</sup> On the other hand, granting that the original meaning of Article 2 (7) has been altered in virtue of the *ad hoc* unwritten norm that has widened its province so as to encompass the matters of treaty obligation, there would be no warrantable reason why a court of law, whose task is essentially to state the law, should be precluded to take cognizance of the subsequent change of law. It is indeed curious that political organs can take up this category of legal questions, while it is an impossibility for a judicial organ.

For these reasons, it is doubtful whether the preliminary objection relied upon this type of reservation for the purpose of excluding a particular category of treaty obligations will be granted by the Court. The States acceding to the optional clause and recognizing the compulsory jurisdiction of the Court in legal disputes, must be aware of the fact that "interpretation of a treaty" is listed as the foremost category of these disputes.<sup>28</sup> To exclude a particular class of disputes concerning the interpretation of a treaty seems to need unambiguous indication which is not satisfied by recourse to vague and non-committal formula.

6. The third type of reservation excludes the dispute with regard to "matters which are essentially within the domestic jurisdiction of a State as determined by that State." This reservation, inserting the formula of "as determined by that State", obviously intends to retain the discretionary faculty of preclusive characterization of the dispute.<sup>29</sup>

In fact, if the State as a party in international litigation determines that the subject-matter of the dispute is essentially within its domestic jurisdiction, eventuation will be that the Court has no jurisdiction to examine and decide the merits of the dispute. In this way, invocation of this type of reservation is contemplated to produce a decisive effect. And as such, the exclusion clause containing this reservation functions to delimit the judicial competence of the Court; the objection operates wholly on the jurisdictional plane.

This interpretation is in accord with the official position of the reserving State. In

<sup>25</sup> The view is stated by the eminent author: "The passage quoted does not make it clear whether the factor which made the question of domestic jurisdiction irrelevant was that the subject of a procedural nature or that it pertained to the interpretation of a treaty. Apparently the Court attached importance to both considerations" (Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 273).

<sup>26</sup> Verdross / Simma, *Universelle Völkerrecht*, 1976, p. 158. The authors generalize the statement by eliminating the words of "for that purpose" in citing the same passage of the Opinion.

<sup>27</sup> *I.C.J. Reports* 1948, p. 61.

<sup>28</sup> Incidentally, it should be also recalled that "*pacta sunt servanda*" is the most elementary principle of international legal order, not merely treaty law. Recitals in the Preamble of the Vienna Convention indicate "the fundamental role of treaties in the history of international relations" and "the ever-increasing importance of treaties as a source of international law."

<sup>29</sup> This type of reservation is contained in the declarations of Liberia, Malawi, Philippines, South Africa, Sudan and the United States of America.

the *Aerial Incident* case, the Government of the United States informed to the Court: "... when the United States has made a determination under reservation (b) that a particular matter is essentially within its domestic jurisdiction, that determination is not subject to review or approval by any tribunal, and it operates to remove definitely from the jurisdiction of the Court the matter which it determines."<sup>30</sup>

This type of reservation was invoked before the Court in the cases of *Certain Norwegian Loans*, *Interhandel*, and *Aerial Incident of 27 July 1955*. In these cases, the Court did not *ex officio* raise the question concerning the validity of the so-called automatic or self-judging reservation, which the Court ought to have taken up the matter, if it should conflict with a norm of *jus cogens* from which no derogation is permitted even by virtue of the common will of the parties.

However, several Judges directed the most trenchant criticisms against the reservation and contended the reservation to be invalid by reason that it contravenes the terms of the Statute. According to certain Judges, even the total invalidity of the declaration of acceptance will be entailed on that scope. In legal doctrine as well, the view of invalidity appears to be prevalent.

First, it is asserted that the reservation plainly infringes Article 36 (6) of the Statute, which provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." In defiance of this provision, the reservation empowers the party exclusively on its own determination to say in the event of a dispute whether the Court has or has not jurisdiction. It disregards the basic position of the Court and deprives it of the "*compétence de la compétence*," which should be described in this sense as the reservation *ratione potestatis decidendi* of the Court.<sup>31</sup>

Secondly, it is affirmed that the acceptance of the Court's jurisdiction to which this type of reservation is attached, cannot be regarded as a juridical act undertaking the obligation under Article 36 (2) of the Statute. This provision contemplates the declarations to be made on the part of the States parties to the Statute recognizing "as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same jurisdiction, the jurisdiction of the Court." However, the reservation empowers the party to make preclusive characterization of a dispute exclusively on its own determination, and decide the existence or scope of the obligation undertaken. Therefore, it cannot be possibly said that the reserving State has previously assumed the obligation to accept the compulsory jurisdiction of the Court.

As to the first contention, it may be argued that reservation does not *per se* violate Article 36 (6), though it will be incompatible with the spirit of this provision. Because it is still for the Court to decide the jurisdiction conferred by the declaration of that State. But this is only nominal; the Court takes note of the determination of the party and declares that it has no jurisdiction. Rather, it would be more relevant that Article 36 (6) of the Statute is applicable on the premise that there exists a legal dispute as to whether the Court has or has not jurisdiction. A dispute may arise in so far as there exist uncertainties whether the Court has jurisdiction or not. Such would not be the case where it is certain that the Court has not jurisdiction.<sup>32</sup> The Court's jurisdiction depends upon the will of States. Accord-

<sup>30</sup> *Pleadings, Oral Arguments, Documents*, pp. 676-677.

<sup>31</sup> Verzijl, *The System of the Optional Clause*, in *International Relations*, 1959, pp. 600-601.

<sup>32</sup> Sperduti, *Il dominio riservato*, cit., p. 37.

ingly, by excepting the dispute relating to the matters which the State considers to be essentially within its domestic jurisdiction, the State expresses its will not to accept the substantive jurisdiction of the Court relating to such a category of disputes. Indefinability of that category imports "*engagement si voluero*," but it would be another thing whether it infringes Article 36 (6) of the Statute in a technical sense.

A certain dissenting Judge in the *Interhandel* case made the following statement: "It appears from the debate in the United States Senate concerning the acceptance of the compulsory jurisdiction of the Court . . . that fear was expressed lest the Court might assume jurisdiction in matters which are essentially within the domestic jurisdiction, particularly in matters of immigration and the regulation of tariffs and duties and similar matters. The navigation of the Panama was also referred to. Such were the considerations underlying the acceptance of Reservation (b)."<sup>33</sup>

Hence the primary object of this type of reservation seems to consist in eliminating any possibility that the questions which concern vitally the domestic interests might be discussed and examined before the International Court. There are other instances of excluding from the Court's jurisdiction the disputes relating to the matters which profoundly influence the national interests of a State, irrespective of any specific international obligation (e.g., the whole subject of continental shelf, control of pollution in marine areas, activities connected with national defense). On the other hand, a vague concept of matters of essentially domestic jurisdiction of a State which may be objectified in its way under the judicial control is to become a subjectified category with the appendant formula incorporating a faculty of sovereign appraisal.

Notwithstanding, the applicability of Article 36 (6) of the Statute to preliminary objections derived from the reservations or conditions contained in the declaration of the United States, is not entirely excluded with regard to pertinent issue, in so far as it is a question of law and fact. Thus, in the *Interhandel* case, the preliminary question was decided by the Court whether the dispute arose before August 26th, 1946, the date on which the acceptance of the compulsory jurisdiction of the Court by the United States came into force.<sup>34</sup> However, if a preclusive determination under this type of reservation is not from its inception envisaged as a question of legal nature and incidence, and as such, is reserved for a sovereign appraisal of the State, then Article 36 (6) will not be brought into apposite operation.<sup>35</sup> A dispute as to whether the Court has jurisdiction does not exist, apart from any eventual non-legal controversy concerning the propriety of a concrete determination.

As to the second contention, the reason set forth seems to be deeper and compelling. In any case, the procedural norm of optional clause contemplates a juridical act previously accepting the compulsory jurisdiction of the Court. But it is clear that the declaration carrying with it the self-judging reservation of domestic jurisdiction does not amount to previous undertaking of definite legal obligation. The entailed inoperability of Article 36 (6), as seen above, is a critical element—rather than an illegality *per se*—which makes the declaration uncertain and undependable. For this reason, it may be doubted whether the

<sup>33</sup> Opinion of Judge Klaestad, *I.C.J. Reports* 1959, p. 77.

<sup>34</sup> *I.C.J. Reports* 1959, pp. 20–22.

<sup>35</sup> If so, it would be needless to inquire whether Article 36 (6) will resume its operability by virtue of the principle of *perpetuatio jurisdictionis*. Cf. Starace, *La competenza della Corte internazionale di giustizia in materia contenziosa*, 1970, p. 226.

declaration of acceptance as a whole is legally valid.

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It needs no reiteration here that the “*nouvelles pratiques*” introduced by the United States into the field of international adjudication is both undesirable and impugnable.<sup>36</sup> So it is all the more in view of the position of leadership assumed by the United States in international relations. It registers a manifest retrogression towards the classical form of arbitration based upon a special agreement between the States.

More than that, it is questionable whether the whole declaration of the United States is legally valid. Should it be invalid, it must follow that the United States is placed in the same situation as the States which have not made declarations accepting the compulsory jurisdiction of the Court. Can it be supposed that this is precisely what the United States intended?

In this regard, it is sensibly remarked by the learned author: “True though it may be that the United States has always displayed a strong political aversion against committing itself too strictly to compulsory arbitration and jurisdiction, this does not alter the fact . . . the United States *has* accepted and *intended* to accept, the compulsory jurisdiction of the International Court of Justice by means of unilateral declaration as foreseen in the ‘Optional Clause,’ and it must be presumed to have done this with due regard to the conditions laid down for the performance of this specific juridical act in Article 36 of the Statute of the Court . . . .”<sup>37</sup>

It is stressed that “this presumption should prevail over any contrary presumption.” The present writer basically shares this view. However, it is difficult to see why it becomes possible for that reason to treat the specific limitation in the United States declaration as if it were not written. It is right to hold that the United States has intended to accept the compulsory jurisdiction of the Court. However, the presumption of regularity should stop at the point of severing the words of “as determined by the United States,” and of considering the remainder as expression of its true intention.

The Court is undoubtedly authorized to construct the terms of the declaration. But the Court cannot substitute itself for the State concerned to redraft the declaration. The optional clause is becoming a shadowy existence as obligatory system, and recourse to *vitiatur sed non vitiat* apparently yields to the consensual principle of international jurisdiction in the sense of its incapability to transform one consent into another consent. Instead, the presumption of will, together with the guarded realization that the International Court is independent of, but not above the sovereign States, appears to operate as a self-restraint causing a certain reluctance on the part of the Court to take up a definite position on this problem—problem of policy in a sense.

7. On the basis of the reservations as set out above—and in virtue of reciprocity within the framework of optional clause—a party in international litigation is entitled to raise *in limine*

<sup>36</sup> It is affirmed by the American author that: “The reservation by which states accepted the jurisdiction of the Court as compulsory are studded with reservations, the most damaging of which is probably still the so-called self-judging and automatic Connally Amendment to the United States Declaration of 1946.” Leo Gross, *The Future of the International Court of Justice*, Vol. I (1976), p. 30.

<sup>37</sup> Verzijl, *The Jurisprudence of the World Court*, Vol. II (1966), p. 336.

*litis* a preliminary objection to the jurisdiction of the Court in cases where the dispute is believed to concern the matter falling within its domestic jurisdiction.

Now assuming that the matter of domestic jurisdiction is co-extensive with the sphere of State activities which are not regulated by international law, the preliminary objection thus brought up cannot be divorced from the substantive question whether the claim of applicant State is validly founded on international law. From such a hybrid nature of procedural and substantive elements in the preliminary objection based on the domestic jurisdiction, the following set of questions shall be posed:

(a) The first point for consideration is the real nature of the exclusion clause of reserved domain.<sup>38</sup>

The reservation as textually formulated appears to purportedly delimit the Court's judicial competence, excluding the dispute concerning the matter of domestic jurisdiction from it. Nevertheless, it is contended that this specific clause cannot be properly constructed as functioning to delimit the Court's competence for the reason that the reserved domain is nothing other than the sphere of legal liberties of a State.<sup>39</sup>

In reality—it is asserted—this clause confers on a State a faculty of raising a plea of reserved domain at the outset *qua* objection of merits. A number of such clauses inserted in the titles of jurisdiction simply reflect the prevailing conviction of States that the matter of domestic jurisdiction should be protected in international litigation through rejecting *in limine* and by priority the claim of applicant State.

However, it is difficult to see why the clause in question cannot be delimitative of the judicial competence of the Court for the reason that it concerns the domain of State liberties in relation to the judicial function. No *a priori* reason seems to exist why the will of State should be thwarted or transformed when it declares expressly that its acceptance of jurisdiction does not apply to the dispute concerning the matter of its domestic jurisdiction. Rather, according to the tested principles, the Court should "give effect to the reservation as it stands."

Furthermore, and on a broader basis, it should be recalled that the judicial function of the International Court is normally confined to the settlement of legal disputes. Any dispute which may arise as a result of a State's intervention with the reserved domain of another State is not by definition a legal dispute to the extent that the intervening State demands a modification of the legal status quo. In the final analysis, therefore, recourse to the concept of domestic jurisdiction has a residual aspect bearing on the inherent function and competence of the Court regardless of the *ad hoc* clause of exclusion.

Setting aside this point, the view insists that the exclusion clause secures for a party a faculty of raising objection of merits to the effect that the claim of applicant State should be rejected by the Court. Moreover, this objection can be put forth at the preliminary stage of the proceedings. In this sense it is called a preliminary objection of merits (*exception préliminaire de fond*), of which a typical example is afforded by the objection based on

<sup>38</sup> This question was a polemical subject between Morelli and Sperduti on a high level of theory. See, Sperduti, *La recevabilité des exceptions préliminaires de fond dans le procès international*, in *Rivista di diritto internazionale*, 1970, p. 461 et seq.; Morelli *Questioni preliminari nel processo internazionale*, in *Nuovi studi sul processo internazionale*, 1972, p. 147 et seq.; Sperduti, *Le eccezioni tratte della nozione di dominio riservato quali eccezioni preliminari di merito*, in *Rivista*, 1974, p. 649 et seq.; Morelli, *Eccezioni preliminari di merito?*, in *Rivista*, 1975, p. 5 et seq.; Sperduti, *Ancora sulle eccezioni preliminari di merito*, in *Rivista* 1975, p. 657 et seq.

<sup>39</sup> Sperduti, *Eccezioni tratte della nozione di dominio riservato . . .*, cit., p. 654.

the reserved domain of a State.

Assuming that the question of domestic jurisdiction pertains to the merits of the case, in order that it may be raised as a preliminary question even at the stage anterior to the proceedings of the merits, it seems that there remains no alternative but to frame in advance the reservation of domestic jurisdiction as against the judicial competence of the Court. Therefore, it should be asked in what sense and for what reason the question of domestic jurisdiction may be treated as preliminary, even if the exclusion clause has no relationship with the competence of the Court.

(b) It is generally admitted that any objection by the respondent State to the jurisdiction of the Court or to the admissibility of the application is preliminary in relation to the merits of the case. Because, unless the objection is not decided, it is logically impossible for the Court to go into the merits of the case.

If the objection based on the reservation of domestic jurisdiction is brought up to challenge the jurisdiction of the Court, it should be examined whether the claim of applicant State is at least apparently founded on international law to decide the objection. Thus the substantive question of domestic jurisdiction is logically antecedent to the decision of preliminary jurisdictional question. According to the skilled interpretation, however, the notion of "antecedency" should be distinguished from that of "preliminary," inasmuch as the decision of jurisdictional question may also be sought *aliunde vel aliter*.<sup>40</sup>

The opposite view contends that it is still justifiable to label this antecedent question equally as preliminary, for a decision of this question involves an immediate decision of the principal question of merits. Viewed in this light, this type of questions and procedural questions are by no means heterogeneous, both being characterized as having the common element of "logically necessary consequentiality." Indeed, if this objection is upheld by the Court, nothing remains for the respondent State that can be legally demanded by the applicant State, the same thing being true with the Court that has no longer anything to decide.<sup>41</sup>

Bearing in mind that preliminary objection is not only a logical concept, but also a term of positive law, and quite apart from any scholastic discussion of classification, it should be asked whether the question pertaining to the merits of the case may be filed as a preliminary question to be decided at the stage anterior to the proceedings on the merits. It is argued that no hindrance—logical, rational, or practical—is placed in this way. Still there remains to be seen whether it proves to be true within the existing framework of international procedural law.

(c) Now Article 79 of the new Rules of the Court (1978), having eliminated the joinder of preliminary objection to the merits heretofore, provides: "After hearing the parties, the Court shall give its decision in the form of judgement, by which it shall either uphold the objection, reject it or declare that the objection does not possess, in the circumstances of

<sup>40</sup> Morelli, *Nuovi studi*, cit., pp. 147-151. The term of "pregiudizialità" is used in contrast to "preliminalità."

<sup>41</sup> Sperduti, *Ancora sulle eccezioni...*, cit., pp. 661-662. Thus it is suggested that more fitting terminology is to call the procedural objection as "preliminary objection in the strict sense," both to be comprised in the wider category of preliminary objection.



the case, an exclusively preliminary character" (par. 7).<sup>42</sup> On the other hand, Article 79 contemplates that besides any objection to the jurisdiction of the Court or the admissibility of the application, "other objection the decision upon which is requested before any further proceedings on the merits" may be made by the respondent State (par. 1).

It is judiciously pointed out that in view of the consensual basis of international jurisdiction and evident requirement of procedural economy, the decision of the Court to join the preliminary objection to the merits should have been an exceptional measure in case of imperative necessity.<sup>43</sup> As a principle, the Court must decide at once the preliminary objection raised by the respondent State. Now that the joinder of the preliminary objection to the merits was eliminated, all the more weight should be attached to the principle as well as its inspirational basis, i.e., consensual jurisdiction and procedural economy.

In order to decide the question of jurisdiction at the preliminary stage of the proceedings, the Court should determine the real nature of objection, that is, whether it is exclusively preliminary in the circumstances of the case. What is the objection not possessing an exclusively preliminary character?

Not infrequently, jurisdictional decision may have to touch upon the merits of the case. But the objection does not cease to be exclusively preliminary simply for that reason. Certain substantive questions which are distinct from the ultimate merits (*le fond même*) of the case may be put forward and decided at the preliminary stage of the proceedings, not to speak of purely procedural questions.<sup>44</sup>

In this connection, it is clearly stated that such an interpretation is justified not only the *ratio* of the new Article, which intends to confirm the primary duty of the Court to pronounce upon the preliminary objection at once—thus restricting the discretionary power of the Court in that matter—but also by paragraph 6 of the same Article which empowers the Court to request the parties to argue all question of law and fact for the determination of the jurisdiction at the preliminary stage of the proceedings.<sup>45</sup>

It is true that the new Article envisages "other objection the decision upon which is requested before any further proceedings on the merits." Whatever the objection may be—procedural or substantive—it must screen a test of whether it is "of exclusively preliminary character in the circumstances of the case."

On the other hand, as long as the proceedings on the merits are suspended, it stands to reason that the Court is not in a position to decide the questions forming the merit of the case. Therefore, it would be very doubtful whether the so-called preliminary objection of merits shall be entertainable as of exclusively preliminary character within the purview of the new Rules of Court, inasmuch as it puts forward the question critically affecting the ultimate merits of the case, not merely the substantive points which may be separated from the merits, and at the same time, purports to obtain the outright rejection of the claim of

<sup>42</sup> Article 62 of the Rules of the Court (1946) provided: "After hearing the parties the Court give its decision on the objection or shall join the objection to the merits." The text of Article 79 of the new Rule is identical with the corresponding Article 67 of the amended Rule of 1972.

<sup>43</sup> Ago, *Eccezioni «non esclusivamente preliminare»*, in *Il processo internazionale: Studi in onore G. Morelli*, 1975, p. 8.

<sup>44</sup> The lack of *jus standi*—even in a substantive sense—may be raised as the preliminary point. Cf. Tanaka, *The Character of World Law and the International Court of Justice*, in *Japanese Annual of International Law*, No. 15 (1971), p. 5.

<sup>45</sup> Ago, *Eccezioni . . .*, cit., p. 13.

applicant State, not to suspend the proceedings on the merits.

(d) The final point for consideration concerns the procedural treatment of the preliminary objection of reserved domain under the new Rules.

When the reservation of domestic jurisdiction is relied upon by the respondent State to contest the jurisdiction of the Court, the concept of "*fumus boni juris*" and the technique of "*effouement*" as explored by the Permanent Court in 1923 may be continuously utilized for first establishing its competence to examine the merits. Accordingly, as was held by the Court in the *Interhandel* case, the examination should be confined "whether the grounds by the applicant State are such as to justify the provisional conclusion that may be of relevance in this case and if so, whether questions relating to the validity and interpretation of those grounds are questions of international law."<sup>46</sup>

It is possible that the Court reaches to the provisional finding that the applicant State, whether rightly or wrongly *in concreto*, raises the arguable questions of international law. Then the Court should reject the objection of respondent State. Needless to say, it does not imply in any way the decision on the merits in favour of the applicant State.

In the jurisprudence of the Court, the provisional finding in this respect has been invariably for the assumption of the jurisdiction by the Court, having rejected the objection of respondent State. This is not without reason.<sup>47</sup> If the objection of reserved domain is directed to the jurisdiction of the Court, the possibility cannot be excluded that the Court upholds the objection of respondent State. But such a case may be only hypothetical where it is *ictu oculi* manifest that the claim of applicant State has no element of international law or treaty, and as such does not bring into existence any legal dispute. In the ordinary circumstances of the case, the judgement of upholding the preliminary objection of domestic jurisdiction, if rendered, will exceed the normal limit of jurisdictional decision, being almost on a par with the decision of the merits, even though without force of *res judicata*. This being so, under such conditions, the third choice may well be taken to declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character.<sup>48</sup>

8. From the foregoing considerations, the present writer is led to the conclusion that in the last analysis, the exclusion clause based on the principle of domestic jurisdiction will be of doubtful utility, if it intends thereby to win the judgement of upholding the objection to the jurisdiction of the Court. Contrary to the intention of its framer, the exclusion clause is pseudo-jurisdictional in its principal effect.<sup>49</sup>

As stated above, certain hypothetical cases will not be inconceivable, where the Court accepts the objection of respondent State, denying the existence of legal dispute. However,

<sup>46</sup> *I.C.J. Reports* 1959, p. 24.

<sup>47</sup> Cf. Starace, *La competenza* . . . , cit., pp. 199-200.

<sup>48</sup> It is pointed out by Judge Aréchaga that "if . . . the objection that has been raised by a party as preliminary is so intertwined with elements pertaining to the merits that a hearing of the issues would siphon off into the preliminary stage the whole of the case, then the Court would declare that in the circumstances raised as preliminary does not really possess such a character." *The Amendments to the Rules of Procedure of the International Court of Justice*, in *A.J.I.L.* No. 1 (1973), p. 17.

<sup>49</sup> The self-judging reservation concerning the matter of domestic jurisdiction, whatever a peremptory effect it may produce on the jurisdictional plane, should be discouraged for another evident reason.

even without appending the specific reservation, the same result will be attained from the more general premise of the Court's function and competence. It may be argued also that in virtue of the exclusion clause, any decision with force of *res judicata* on the substantive questions involved can be impeded.<sup>50</sup> The argument is of secondary importance seeing that the judgement upholding the objection of reserved domain is exceptional.

Turning again to the concept of preliminary objection of merits, its true value seems to consist in bringing out that appearance does not change substance. However, appearance is created and maintained by States themselves which compels the Court to go by a round-about way. A reality is that appearance does engender semi-jurisdictional effect, but the shortcircuit to a "preliminary decision of merits" is technically problematical for the Court.

The present writer, though dubious whether procedural delays and a crop of merely procedural decisions may be contributory to the higher prestige of international adjudication and in its turn to the development of international law, cannot share the view that the so-called preliminary objection of merits can be entertainable as such and particularly, with reference to a plea of reserved domain within the existing system of international procedure.

In lieu of this concept, but in the same vein, it is propounded here that for the State parties to the Statute, recommendable course of action is not to insert the reservation of domestic jurisdiction in the declaration accepting the jurisdiction of the Court under Article 36 of the Statute.<sup>51</sup> It is open for the parties in international litigation to put forward the question of domestic jurisdiction, if occasion calls, as a defence on the merits during the proceedings. Another recommendable course of action is contemplated in the very Rules of Court, that is, "agreement between the parties that an objection be heard and determined within the framework of the merits" (Art. 79, par. 8).

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<sup>50</sup> Morelli, *Eccezioni . . .*, cit., n. (11) at p. 10.

<sup>51</sup> The declaration of Japan recognizing the compulsory jurisdiction of the Court (1958) does not contain any specific reservation concerning the matter of domestic jurisdiction.