EL FANTASMA DE LA JURISDICCIÓN EN LAS CORTES INTERNACIONALES

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I. The Nature of the Problem

A. INTRODUCTION

1. Litigation approach to inform the analysis of international law.
2. This means that international law is perceived through a lens of litigating Parties, rather than as a theoretical construct. What may we deduce from so observing it?
3. The basic principles of consent and institutions.

B. THE PROBLEM

1. Prevalence in Court cases of jurisdictional *pre*-engagement struggles.

2. Unless cases are brought by special agreements, jurisdictional conflicts are inevitable.

3. In arbitration cases it is *post*-award: this is the reverse situation. Yet arbitrations are *ad hoc* and depend largely on international conventions for enforcement (not on the Charter).

4. The only strong case then is an institutional (Court) case brought by special agreement or *compromis*, where the consent is immediate and the framework of the U.N. Charter clearly (??) supports respect for the decision under Article 94 (1) and enforcement of the decision under Article 94 (2).

5. The problem presented may therefore be stated in two positions:

a. In the International Court, most of the argument and much of the decision concerns the *jurisdiction* of the court itself, and this occurs at the outset of the case.

b. In international arbitrations, there is seldom argument about jurisdiction at the *time (ante hoc)*, but quite frequently argument about enforceability or *excès de pouvoirs* after the arbitration *(post hoc)*.

C. REASONS FOR THE PROBLEM

1. **Consent**. This must be manifested in advance: either a long time in advance (ancient treaties), or in a general declaration (the optional clause), or just before the case is brought (*compromis* or special agreement).

2. **Institutional framework.** In Court a State can challenge the commitment, but will be stuck with the results.

3. **Non-institutional framework?** In arbitration, the problem appears to be removed at the time the case is brought, but emerges later on. (*Cf*. the history of Latin American territorial boundary arbitrations, 1880-1910.)

D. CONCLUSIONS

1. A surprising amount of the jurisprudence of the International Court of Justice is consumed by inquiry to jurisdiction.
2. This means an inquiry into the law of reservations to treaties (*i.e*. consents to jurisdiction): *i.e.* treaty law.
3. This is borne out by the current and recent cases in the Court.

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II Examples of the Problem

A. BASIC RULE

1. The basic rule of all litigation is that whenever a defensive argument can be made, it ***will***. Otherwise counsel are not doing their jobs.

2. Translated into terms of ***international law***, this means that wherever a jurisdictional argument can serve as a defensive argument, it will be made.

3. Since there is always a question in cases not brought jointly by special agreement as to whether both States have properly given their consent, this means that the basic rule is:

In every case brought by application, there will always be a jurisdictional argument.

4. In turn, this means that, in the history of the ICJ, the Court has been obliged to examine questions of jurisdiction (interpretation of treaties and reservations) for at least 50% of the time.

5. Since roughly 50% of all jurisdictional objections are successful, this means that approximately *50% of the effort and time* involved in cases brought by application is devoted solely to questions of jurisdiction, and not to questions of substantive international law.

6. It also means that of *all cases brought in the ICJ*, only about 60% concern questions of substantive international law, and 40% overall deal with matters of jurisdiction.

B. COROLLARY

1. Just as reservations can be divided into categories, so can objections to jurisdiction be divided into objections *ratione materiae*, *ratione personae*, or *ratione temporis*.

2. Virtually all cases brought by application are based on *(i)* an optional clause declaration under Article 3b (2) of the Statute, or on *(ii)* [Article 36 (1)] a "compromissory clause" in an existing treaty or convention.

3. What is the relationship between the scope and severity of the (inevitable) jurisdictional arguments that will attend these cases and the "titles of jurisdiction" (optional or compromissory clauses) under which they were brought?

4. It is obvious that the longer the period of time between the signing of the optional or the compromissory clause, the more jurisdictional arguments will be able to be made. Thus the scope of a jurisdictional argument is always in direct proportion to the length of time elapsed since the State's consent was allegedly given.

5. The corollary to the basic rule is therefore:

> The longer the time between execution of the title of jurisdiction and the bringing of the case, the greater is the number and intensity of the arguments on jurisdiction that will be made.

6. Some examples will follow.

C. ANCIENT TREATIES

1. South West Africa Cases

(Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319; Second Phase Judgment, I.C.J. Reports 1966, p. 6.)

The question was whether the compromissory clause contained in the League of Nations Mandate for German South-West Africa (1920) was brought forward under the United Nations system under Article 37 of the Statute. Article 7, paragraph 2 of the Mandate provided that "The Mandatory agrees that if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice …". Article 37 of the Statute provided that: "Wherever a treaty or convention in force provides for reference of a matter to the Permanent Court of International Justice, the

matter shall, as between the parties to the present statute, be referred to the International Court of Justice."

In particular, (why did Article 37 of the statute apply automatically to South Africa?) the questions presented included: (1) whether the Mandate was "a treaty or convention"; (2) whether it was "in force"; (3) whether either of the Applicant States (Ethiopia and Liberia) were "Members of the League of Nations"; (4) whether the Mandate itself possessed any content following the dissolution of the League in 1946; (5) whether there was a "dispute" between the Parties; and (6) if so, whether there had been any effort to settle it by negotiation. *Ratione materiae, ratione temporis, and ratione personae (personarum).*

2. **Military and Paramilitary Activities in and against Nicaragua**
(Admissibility, Judgment, Jurisdiction and I.C.J. Reports 1984, p. 392; Merits, Judgment, I.C.J. Report 1986, p. 14.)

The question was whether Nicaragua had a valid optional clause declaration in effect that would entitle her to sue the United States, on the basis of reciprocity; also the question was whether the Nicaragua-United States Treaty of Friendship covered this situation. *Rationae materiae* and *ratione temporis;* also *ratione personae.*

D. OTHER AGREEMENTS

1. **Anglo-Iranian Oil Co.**
(Judgment, I.C.J. Reports 1952, p. 93.)

The question was whether an optional clause declaration applied to pre-existing contractual arrangements, *ratione temporis.*

2. **Nottebohm**
(Preliminary Objections, Judgment, I.C.J. Reports 1953, p. 111; Second Phase, Judgment, I.C.J. Reports 1955, p. 4.)

This was a question of *admissibility* (similar to the rule of exhaustion of local remedies prior to espousal of a case) concerning citizenship. The question was whether Liechtestein could properly espouse a claim by Mr. Nottebohm against Guatemala: *i.e.* whether he was a Liechtestein subject; *ratione personae.*

3. **Fisheries Jurisdiction**
(Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, pp. 3 and 49; Merits Judgment, I.C.J. Reports 1974, pp. 3, 175.)

The question was whether an understanding by the government had been intended to provide jurisdiction in certain instances and whether it had lapsed; *ratione materiae* and *ratione temporis.*

E. OTHER STATEMENTS

1. **Aegean Sea Continental Shelf**
(Judgment, I.C.J. Reports 1978, p. 3.)

The question was whether a joint ministerial press release constituted an undertaking sufficient to bring the dispute before the Court. (Answer: **no**.) (*Ratione materiae,* or *personae.*)

2. **Maritime Delimitation and Territorial Questions between Qatar and Bahrain**
(Jurisdiction and Admissibility Judgment, I.C.J. Reports 1994, p. 112; Judgment, I.C.J. Reports 1995, p. 6.)

The question was whether a joint resolution minuted at a meeting of the Gulf Cooperation Council constituted an undertaking sufficient to bring the dispute before the Court. (Answer: **yes**.) (*Ratione materiae* and *personae*.)

F. EXCEPTIONS

1. **Elettronica Sicula S.P.A**
(Judgment, I.C.J. Reports 1989, p. 15.)

This was a case brought by application under the 1948 Treaty of Friendship between Italy and the United States, but in every way it resembled an *ad hoc* arbitration (including the use of a Chamber of the Court).

2. **Maritime Delimitation in the Area between Greenland and Jan Mayen**
(Judgment, I.C.J. Reports 1993, p. 38.)

This was a case brought by application under the optional clause; although the respondent Norway decided not to object to jurisdiction on the grounds of the law of the sea, it made internal arguments concerning the extent to which the Court should go in its resolution of the dispute.

F. ARBITRATIONS

1. No "*preliminary* objections," but "*subsequent* objections."

2. Examples tested in the International Court:

a. **Arbitral Award made by the King of Spain on 23 December 1906**
(Judgment, I.C.J. Reports 1960, p. 192.)

In which the authority of the King of Spain to render his award was questioned because of expiration of the time-limit in the *compromis*.

b. **Arbitral Award of 31 July 1989**
(Judgment, I.C.J. Reports 1991, p. 53.)

In which the validity of an arbitral award between Guinea-Bissau and Senegal was questioned on the ground that the arbitrators failed to answer both the questions asked by the parties.

3. Other examples:
a. **Venezuela – Colombia** arbitration of 1899 (lands of the King of Spain).
b. **Venezuela – Guyana** arbitration.
c. **Beagle Channel** case (Argentina/Chile).
d. **Chamizal** arbitration (United States/Mexico).

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III The Future of International Adjudication

A. EL TIBURÓN DE LA JURISDICCIÓN

1. The jurisprudence of the International Court has become concentrated on jurisdictional questions. This involves:

a. Constant reconsideration of "consent."
b. Close examinations of jurisdictional clauses in treaties.

2. Cases now in course of litigation, to be watched, include:

a. *Qatar/Bahrain*
b. *Fisheries Case* (Spain v. Canada)
c. *Cameroon v. Nigeria*

B. ARBITRATIONS

1. Arbitrators are becoming more careful. *Guinea-Bissau/Senegal* was a hard lesson (President Berberis' declaration). Arbitrators pay much closer heed to their terms of reference.

2. However, the international system has matured somewhat.

3. First, there have been a number of arbitrations that have been without incident: *France/U.K. Continental Shelf* (18 U.N. Report of International Arbitral

Awards 3, 1979), 1977; *Rainbow Warrior I and II* (France/New Zealand); *La Bretagne* and *St. Pierre and Miquelon* (France/Canada); of course, the Iran/United States arbitrations in The Hague, and the *Palena* and *Laguna del Desierto* arbitrations between Argentina and Chile.

4. Second, where arbitrations have been considered unacceptable, the Parties have worked generally within the system to remedy the problem (*King of Spain* and *Guinea-Bissau/Senegal* cases). (Query as to the *Beagle Channel* arbitration.) This appears in contrast to the history of the late XIX Century, and is doubtless grounded on the existence of an institutional world court.

C. NEW TRIBUNALS

1. Law of the Sea Tribunal in Hamburg. Part XV of the 1982 Convention on the Law of the Sea.

2. New major State arbitration, *Eritrea/Yemen*: proceedings conducted under the auspices of the Permanent Court of Arbitration.

(*Question*: Why does it not have cases? *Possible answer*: hard to separate maritime and territorial questions.)

D. OVERALL TRENDS

1. Number of new *special agreements: Danube case*; Namibia case; potential cases Malaysia/Singapore and Indonesia/Malaysia.

2. Are States more discreet than before? (*No*: unrealistic question.)

3. Is the Court more liberal in construing jurisdictional consent? (*Yes:* see *Qatar/Bahrain*.)

E. CONCLUSIONS

1. How do international tribunals substantially differ from domestic courts?

2. International tribunals are constantly defining and redefining their roles by the constant need for them to be reassured that the *tiburón* of jurisdiction is not a threat to their disposition of a case.

3. One can then conclude that international law bears a strong resemblance only to domestic or municipal *constitutional law* in that it is constantly in the course of defining itself (but perhaps even more significantly than in the national constitutional context). This self-definition is continuous, and has long contributed not merely to the growth of international law, but also to the way in

which decision-taking institutions (the International Court and other international tribunals) perceive the very process by which it grows.

4. This process is analogous to the constant redefinition of legal rules in the process of determining the crystallization of customary international law (*e.g. "Lotus"*, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10; *Anglo-Norwegian Fisheries case*, Judgment, I.C.J. Reports 1951, p. 116; *North Sea Continental Shelf*, Judgment, I.C.J. 1969, p. 3; and *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, I.C.J. Reports 1986, p. 14).

5. Just as the Vienna School and logical positivism have dominated contemporary philosophical inquiry since the 1920s, so have the incessant examinations of jurisdiction affected and increased what may be called the self-consciousness of the international adjudicative process, with the ironic but positive result that – rather than being more tentative – the international tribunals have become more assertive, both concerning the development of customary international law (*Nicaragua* case) and the formal requirements of "consent" to jurisdiction (*Qatar/Bahrain* case).

6. The *speculum* of jurisdictional consent can therefore serve as a lens through which the progressive and self-conscious development of international law may be obscured.

7. Through its exponential growth in the last fifty years, international law has developed immensely in terms of substance. Yet the system remains "immature" to a large degree in terms of access to deliberative tribunals and agreement to jurisdiction.

8. This will remain true, necessarily, as long as these remain an international system composed of sovereign States, and not one Super-State. One may therefore perceive that the existence of the international system necessarily implies that the issues of jurisdiction and consent must always be debated in dispute-resolution between and among the sovereign States who are its members.