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***Abstract**: The jurisdiction of the International Court of Justice is non-compulsory. States have the possibility to submit cases by compromise or compromissory clauses, on the basis of article 36 (1) of the Statute of the Court[1], by forum prorogatum, or by the means of the "optional clause", as provided by article 36 (2) of the Statute. Following the public debate that ended in June 2013, Romania drew a proposal for a bill containing a draft declaration accepting the compulsory jurisdiction of the ICJ. Romania deposited the declaration on 23 June 2015, becoming the 72nd State to take such step.*

***Key-words**: compulsory jurisdiction, declaration, reservations, optional clause*

I. Introduction

It is well known that the jurisdiction of the International Court of Justice is non-compulsory. States have the possibility to submit cases by compromis or compromisory clauses, on the basis of article 36 (1) of the Statute of the Court,[2] by *forum prorogatum*, or by the means of the "optional clause", as provided by article 36 (2) of the Statute. It would be important to point out that the "optional clause" is the only means by which the jurisdiction of the Court is not a limited *ratione materiae.*[3] Conceptually, the declaration accepting the compulsory jurisdiction, or the "optional clause" represents the basis for a potential "universal" mandatory jurisdiction of the Court.[4]

A decision to submit a declaration for accepting the compulsory jurisdiction of the International Court of Justice is always a legal and a political decision. The initiators of the project, the drafters of the declaration, have to bear in mind simultaneously the global interest of supporting the international rule of law, the State's position of upholding this goal, as well as the State's sensible points in possible disputes with other States. The draft is not just a "product" of the legal department of the Ministry of Foreign Affairs, but is in turn a "compromise" between the various views of different institutions.

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[1] In these cases, the jurisdiction of the Court is limited *ratione materiae*. See, for example, C. Tomuchat, *Article 36*, in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (ed.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, p. 589.

[2] In these cases, the jurisdiction of the Court is limited *ratione materiae*. See, for example, C. Tomuchat, *Article 36*, in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm (ed.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, p. 589.

[3] G. Merrills, *Optional Clause Revisited,* British Yearbook of International Law, (1993) 64 (1), p. 197-244, 198; M. Fitzmaurice, *The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice,* Australian Journal of International Law, no. 20 (1999), p. 127; H. Waldock, *Decline of the Optional Clause,* British Yearbook of International Law, 32 (1955-1956), p. 244.

[4] Shigeru Oda, *The Compulsory Jurisdiction of the International Court of Justice. A Mith? A Statistical Analysis of Contentious Cases,* International and Comparative Law Quarterly, vol. 49, Issue, 2, April 2000, p 251-277, 252.

This issue of the Romanian Journal of International Law could not ignore a moment which may be labelled as "crucial" in the history of Romania's relation with the International Court of Justice: 60 years after becoming an UN Member and party to the Statute of the International Court of Justice, Romania accepted the compulsory jurisdiction of the International Court of Justice. The declaration was deposited to the Secretary General on 23 June 2015 and it was the result of a lengthy process of debate.

The purpose of this study is to present the most essential elements of Romania's declaration accepting the compulsory jurisdiction of the International Court of Justice, being "dedicated" to the first on-line issue of the Romanian Journal of International Law. The presentation would comprise a short overview of the process leading to the adoption of the declaration, a presentation of the legal aspects that may arise when such a declaration is made and, naturally, the details of the Romanian reservation would be presented.

II. The process

The process of debate concerning the acceptance of the compulsory jurisdiction of the International Court of Justice was launched on 24 September 2012, when Romania announced, within the "High Level Meeting on the Rule of Law at the National and International Levels", held in the margin of the United Nations General Assembly, that a national debate would be started on the possible acceptance of the compulsory jurisdiction of the ICJ.[5] The debate was started on 4 February 2013 (exactly on the day when the fourth anniversary of the judgment in the *Maritime Delimitation in the Black Sea* was held), and continued throughout 2013 with a series of conferences. In March 2013, a conference was held in the "Babes-Bolyai" University in Cluj-Napoca, and in April 2013 a conference was hosted by the "Transilvania" University of Brasov. The series of public debates was closed on 14 June 2013, in a conference in Bucharest, attended as special guest by the President of the International Court of Justice, Judge Peter Tomka.[6]

Following the favourable opinions expressed by the academia, a draft law on the acceptance by Romania of the compulsory jurisdiction of the International Court of Justice that was presented for public debate on the website of the Ministry of Foreign Affairs on 27 November 2013,[7] which incorporated a draft declaration. This draft declaration was presented during the conference *"Romania and the International Court of Justice. 5 Years since the Maritime Delimitation in the Black Sea"*, held in Bucharest, on 3 February 2014: the discussions within that conference were very valuable for shaping the final form of the Declaration.

The adoption of the Declaration by a law of the Parliament was chosen as domestic procedure. Even if the Constitution of Romania does not provide for the need to "ratify" or submit to any form of "approval" of the Parliament an *unilateral act* done by Romania on the basis of a treaty provision (article 36 (2)) of the Statute of the Court, the adoption of a law was chosen for several reasons: first, the widest legitimacy would have been ensured, because all the institutions within the State would participate in its adoption (Government, Parliament, President) and the decision would be based on the widest political consensus, second, the adoption of a Law would have been beyond any criticism concerning the constitutionality and, third, it would have been in line with the 1930 "tradition", when the declaration for accepting the jurisdiction of the Permanent Court of International Justice was adopted.

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[5] T. Corlatean, *Introduction* in B. Aurescu *(ed.), Romania and the International Court of Justice*, Hamangiu, 2014, p. 9.

[6] *Ibid.*

[7] Raport privind aplicarea în anul 2013 a prevederilor Legii nr.52/ 2003 privind transparenta decizionala în administratia publica (Report on the application in 2013 of the Law no. 52/2003 concerning transparency in decision-making process within the public administration), available on http://www.mae.ro/sites/default/files/file/transparenta/raport_transparenta_decizionala_2013.pdf (accessed 31 March 2014).

The law no. 137/2015 for the acceptance of the compulsory jurisdiction of the International Court of Justice was published in the Official Journal of Romania no. 408 of 10 June 2015. The votes expressed within the Parliament demonstrated the largest political support for this step. Romania became, thus, the 72nd State to accept the compulsory jurisdiction of the Court (and the 23rd to do so, within the European Union).

III. Short overview of the 1930 Declaration for accepting the compulsory jurisdiction of the Permanent Court of International Justice

Romania's relation with the World Court was long and difficult to assess. This relation had always followed historical developments and foreign policy trends. From the case-law point of view, the relation started in 1927 with the Advisory Opinion of the Permanent Court of International Justice on the *Jurisdiction of the European Commission of the Danube between Galatz and Braila.*[8] Even though he Court did not uphold Romanian's position on the question addressed by the Council of the League of Nations, the advisory opinion had the advantage of putting an end to a dispute that had lasted for more than 40 years.

The fact that the Advisory Opinion brought the dispute to an end seemed to have had an important impact on Romania's view about its relation with World Court. Thus, it is no surprise that less than three years after this Opinion was issued, on 8 October 1930, Romania submitted a declaration of acceptance the jurisdiction of the Permanent Court of International Justice. The jurisdiction of the PCIJ was accepted for a period of 5 years and renewed, in 1935, for a further period of 5 years. Romania has circumscribed the jurisdiction of the Court, excluding certain matters: (i) any question of substance or of procedure which might directly or indirectly cause the existing territorial integrity of Romania and her sovereign rights, including her rights over her ports and communications, to be brought into question, and (ii) disputes relating to questions which, according to international law, fall under the domestic jurisdiction of Romania. The first reservation had in mind sensible issues for Romania, such as its territorial integrity and sovereignty. However, Romania's interests towards the disputes within the "pattern" of the Danube Commission Advisory Opinion can be seen in the reference to "rights over ports and communications".[9]

IV. The significance of submitting a declaration for accepting the compulsory jurisdiction

An important question relates to the significance of submitting a declaration for the foreign policy of a State. First, it sends a signal that the State believes it is desirable to have any disputes of a legal nature with other Sates settled by the International Court of Justice, by the application of international law. It is, consequently, a proclamation of its belief in international law and in particular in the role of the ICJ as promoter and guarantor of the supremacy of law in international relations.

Secondly, it expresses the willingness of a State to establish its foreign policy on the strict compliance with international law – since a State which makes such a declaration must be prepared to defend its interests by advancing legal arguments before the most important international court.

Thirdly, from a pragmatic perspective, the acceptance of the Court's jurisdiction would facilitate the settlement of disputes which cannot be solved through negotiations. Of course, the challenges must not be neglected. From the same

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[8] *Advisory Opinion of 8 December 1927*, Ser. B, no. 14, p. 6.

[9] It can be noted that a similar reservation related to "ports and communications" was submitted by Greece; On "reserved domain" reservation see, Stanimir Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiciton of the ICJ,* Martinus Nijhoff, 1995, p. 70.

pragmatic perspective, the risk is represented by the possibility that the State would undertake procedures against Romania, in a dispute of a legal nature, on the basis of the declarations made pursuant to article 36 (2). In certain cases, such procedures may be regarded as contrary to foreign policy interests. From a legal point of view, practice in submitting the declarations of acceptance of compulsory jurisdiction shows that States anticipate possible sensitive fields and submit their declarations to “limitations” or “reservations”.[10] Thus, inserting such limitations to the Court jurisdiction might be a possible legal tool to “defend” certain sensible policy areas.

The importance of reservations or limitations cannot be neglected. Certain elements from the case-law might seem very useful, in order to examine the type of situations the States had in mind when submitting reservations or limitations. Thus, for example in the *Anglo-Iranian Oil Company Case*[11] the Court recalled that “by these Declarations, jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it”, and jurisdiction must be based on the most restrictive declaration.[12] The Court dealt with the interpretation of the Iranian declaration of 1930, which referred to “any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration”. Iran argued that jurisdiction was limited to the application of treaties or conventions it accepted after the ratification of the Declaration, while the UK argued that only the facts should have been posterior to the Declaration. The Court retained that, although both positions are compatible with the text of the Declaration itself, and even if, strictly speaking, the British position would be closer to the purely grammatical interpretation of the text, the Court must seek the interpretation which is in harmony with a natural and reasonable way of reading the text.[13] The Court upheld the Iranian position, retaining that the clause must not be regarded as a treaty, but as the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text. This dispute thus appears very important for providing an insight on the rules of interpretation that the Court would follow when examining a unilateral declaration.

Also, the *Norwegian Loans Case (France v. Norway) of 1957*[14] confirmed the reciprocal application of limitations: Norway successfully invoked the French reservation excluding from the Court’s jurisdiction “differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic”[15] (the so-called *reserved domain* limitation).[16] On the basis of this limitation, the Court decided not exert its jurisdiction. By contrast, it can be noted that present day *reserved domain* limitations, made by States like Poland or Hungary, refer to national jurisdiction “according to international law”.

Two almost similar situations were dealt with in the cases concerning the *Right of passage over Indian territory*[17] and the *Land and Maritime Boundary between Cameroon and Nigeria.*[18] India objected to the fact that Portugal’s application was introduced before its declaration accepting the compulsory jurisdiction had been notified to all States, including India. Similarly, Nigeria, which accepted the compulsory jurisdiction in 1965, objected to the fact that it could not know and did not know about Cameroon’s acceptance of compulsory jurisdiction on 3 March 1994, since the declaration was notified by the Secretary General within 11 months, while the

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[10] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005,* Martinus Nijhoff Publishers, 4th Ed, 2006, vol II, p. 737; Stanimir Alexandrov, *op. cit.,* Martinus Nijhoff, 1995, p. 67.

[11] *Anglo-Iranian Oil* Co. *case (jurisdiction),* Judgment of 22 July 1952: I .C. J . Reports 1952, p. 93.

[12] *Ibid.*, p. 103.

[13] *Ibid.*, p. 104.

[14] *Case of Certain Norwegian Loans, Judgment of July 6th, 1957* : *I.C. J. Reports 1957,* p. 9.

[15] *Ibid.,* p. 21.

[16] Shabtai Rosenne, *op. cit,* vol. II, p. 748, refers to « subjective reservation of domestic jurisdiction ».

[17] *Case concerning right of Passage over Indian territory, (Preliminary Objections), Judgment of November 26th, 1957: I.C. J. Reports I957,* p. 125.

[18] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports 1998,* p. 275.

application of Cameroon was introduced on 19 March 1994. The Court ruled in both cases that in the first day that a state deposes the declaration, a consensual link is created, which does not entail other further requirements. In order to avoid such situations, practice showed that States submit the so-called "12 month time limitations" (such as the one made in 1974 by India, which excludes from the jurisdiction of the Court "*disputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court*").

Last but not least, it would be useful to point out that the interpretation of a limitation in order to determine its application to the subject-matter of a particular dispute is made by the Court, not by the Applicant State.

V. The Romanian declaration

The aforementioned cases revealed how important the jurisdiction's reservations or limitations can be in certain cases. Hence, following the public debate that ended in June 2013, the Department for Legal Affairs drew a proposal for a bill containing a draft declaration accepting the compulsory jurisdiction. It was posted on the website of the Ministry of Foreign Affairs for public consultation and it was sent to the relevant Romanian institutions to hear their opinion. The text of the declaration was slightly amended after the debate held during the Conference *"Romania and the International Court of Justice. 5 Years since the Maritime Delimitation in the Black Sea",* held on 3 February 2015, to incorporate valuable comments made during those debates.

Firstly, it was meant to operate in an overt non-retroactive manner, referring to "all legal disputes related to facts or situations arising after this declaration is made". Indeed, the Court had dealt with such issues in cases like, for example, *Legality of Use of Force (Serbia and Montenegro v. Netherlands,[19] Belgium,[20] United Kingdom[21])* and *Interhandel.[22]*

Secondly, even if the "initial draft" of the declaration, submitted in 2013 to the public debate, had in mind that the acceptance of the compulsory jurisdiction would be valid for a period of 5 years (in a similar manner to the 1930 declaration), this approach was changed following the debate held during the Conference of 3 February 2015. Initially, the declaration provided for a 5 year term and for Romania's shall right to extend, withdraw or modify the Declaration at any time and by means of a notification addressed to the Secretary-General of the United Nations. However, even if redundant, a mention shall be inserted in that sense.[23] Moreover, a *domestic* mechanism for the Government to accomplish the extension of the validity was initially envisaged. The final version of the Declaration, submitted to the Secretary General of the UN, is made for *undetermined period*. At the same time, following suggestions made during the Conference held on 3 February 2015, the following formula was added: " […] shall remain in force until such time as notice may be given to the Secretary- General of the United Nations withdrawing or modifying this declaration, *and with effect from the moment of such notification*" (emphasis added).

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[19] *Legality of Use of Force (Serbia and Montenegro* v. *Netherlands), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 1011.

[20] *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 279.

[21] *Legality of Use of Force (Serbia and Montenegro* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 1307.

[22] *Interhandel Case, Judgment of 21 March 1959*: *I.C. J . Reports I959, p. 6.*

[23] Shabtai Rosenne, *op. cit.*, vol. II, p. 783 ; It can be noted that certain States reserved the right of "immediate termination" – se for example the UK, as mentioned in Michael Wood, *loc. cit.*, p. 635.

Thirdly, the text provides expressly for the "condition of reciprocity", even if this formula has the sole purpose of reinforcing the legal effects of the words of the Statute "in relation to any other State accepting the same obligation".[24]

Fourthly, an option for a set of limitations (or "reservations") has been made. In 2014, following the debate held on 3 February, the "structuring" of the limitations was made, in order to reflect: first, procedural limitations, and second, substantial ones.

The first procedural limitation concerns "any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement for its final and binding decision". This limitation would appear normal, taking into account the provisions, for example, of article 344 of the Treaty on the Functioning of the European Union or article 55 of the European Convention on Human Rights. It is also very often encountered in the practice of States.[25] It can be noted that the words "for its final and binding decision" have been added following the debate on 3 February 2014: only dispute settlement methods which lead to final and binding decisions – as other Courts or Tribunals – could have the effect of excluding the jurisdiction of the ICJ.

The other "procedural limitation", "any dispute with any State which has accepted the compulsory jurisdiction of the International Court of Justice under Article 36(2) of the Statute less than twelve months prior to filing an application bringing the dispute before the Court or where such acceptance has been made only for the purpose of a particular dispute", shall be excluded from the jurisdiction. This limitation has the purpose of preventing "surprise applications" – situations such as those occurring in the *Right of passage over Indian territory*[26] and *Land and Maritime Boundary between Cameroon and Nigeria.*[27] Similar limitations have been provided, for example, by Bulgaria, Hungary or UK.[28]

The substantial limitations concern: environment and "use of force" issues. Thus, disputes regarding the protection of the environment shall be excluded. Similar reservations are made by countries like Slovakia or Poland. Also, following consultations with relevant authorities, reservations shall be made with respect to "any dispute relating to, or connected with, hostilities, war, armed conflict, individual or collective self-defence or the discharge of any functions pursuant to any decision or recommendation of the United Nations, the deployment of armed forces abroad, as well as decisions relating thereto" and "any dispute relating to, or connected with, the use for military purposes of the territory of Romania, including the airspace and territorial sea, or maritime zones subject to its sovereign rights and jurisdiction".[29] It may be argued that such reservations may look complex and, in certain places, even redundant. Some elements have indeed been "inspired" from the practice of States. It has to be underlined that its main purpose is to cover in a manner as exhaustive as possible disputes involving issues of a "military" nature. But the drafting is the result of a "compromise" between views of different institutions.

Finally, the "reserved domain" limitation was included, in order to address concerns of certain Romanian institutions. Even if it can be questioned whether

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[24] John Collier, Vaughan Lowe, *The Settlement of Disputes in International Law,* Oxford University Press, 2000, p. 150.

[25] Michael Wood, *United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court*, in Festkrift til Carl August Fleischer, Universitetsforlaget, Oslo, 2006, p. 637.

[26] *Case concerning right of Passage over Indian territory, (Preliminary Objections), Judgment of November 26th, 1957: I.C. J. Reports I957,* p. 125.

[27] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I. C. J. Reports 1998,* p. 275.

[28] The UK invoked the clause in the *Legality of Use of Force Case, Serbia v. UK,* ICJ Reports, 1999, p. 835, para. 23-25, see Michael Wood, *United Kingdom's Acceptance of the Compulsory Jurisdiction of the International Court,* in Festkrift til Carl August Fleischer, Universitetsforlaget, Oslo, 2006, p. 640.

[29] Reservations related to military and security matters have been made by other countries such as: Djibouti Germany, Greece, Hungary, Honduras, Malawi, Lithuania, India; Before 1963, the United Kingdom had a "subjective national security reservation", H. Briggs, *Reservations to acceptance of the compulsory jurisdiction of the International Court of Justice*, Recueil des Cours de l'Academie de Droit International, vol. 93 (1958-I), p. 303.

contemporary international law still allows for what it had been traditionally understood by "reserved domain",[30] the usefulness of inserting such a reservation should not be totally excluded. It can be noted that the definition of the "reserved domain" is understood by Romania as to be found in international law (the limitation provides "any dispute relating to matters which *by international law* fall exclusively within the domestic jurisdiction of Romania" – emphasis added), in contrast, for example, with the French reservation in the *Norwegian Loans* case.[31]

IX. Conclusion

The Romanian declaration may be regarded as a balanced one. Although from the "textual" point of view, the reader may think that it contains a high number of limitations (reservations), it has to be underlined that from the substantive point of view, there are only two areas where Romania reserves the right not to submit disputes to the International Court of Justice: disputes concerning the *protection of the environment* and *disputes concerning issues of a military nature.* The other two reservations are merely procedural limitations related to: first, avoidance of "surprise" applications and second, excluding from the competence of the Court issues for which the parties have agreed on other methods of binding dispute settlement. This latter reservation might seem useful in the context of other commitments towards the European Court of Human Rights and the European Court of Justice.[32] The "reserved domain" limitation might be seen as a supplementary "safety belt" (including for domestic purposes) as the scope of the "exclusive jurisdiction of Romania" is to be determined by international law.

It would be important to underline the essential importance that the *Maritime Delimitation in the Black Sea Case* had for shaping a general public opinion in the sense that international law, international justice and rule of law represent the just option for Romania. Without the awareness that this case had arisen, questions might have been raised whether this demarche would have been possible. But, as history has shown, not all procedures before the World Court had been favorable for Romania. However, a commitment towards the rule of law entails the acceptance of such scenarios, and shall decisively contribute to raising awareness among institutions and decision-makers in Romania towards this commitment.

It must also be underlined that the declaration submitted on 23 June 2015 may be seen as marking a final point of a "paradigm" shift in Romania's position towards international jurisdiction. In 1969, Romania has not even sign the Vienna Convention on the Law of Treaties merely because its dispute settlement mechanism: the Romanian delegation rejected even a "mild" form of dispute settlement, the conciliation, which was "a compromise" between the Soviet Union and the Western Block. Today, Romania is one of the States that shows the highest degree of support for international justice: and the acceptance of the compulsory jurisdiction of the ICJ is the most natural step in this direction.

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[30] Ian Brownlie, *Principles of Public International Law,* 7th Ed., Oxford University Press, 2008, p. 293, mentioning: "the extent of this domain depends on international law and varies according to its development; *Nationality Decrees in Tunis and Morocco*, PCIJ, Sec B., no. 4 (1923), p. 24.

[31] *Case of Certain Norwegian Loans, Judgment of July 6, 1957 : I.C. J. Reports 1957, p. 9, 21.*

[32] See also Michael Wood, *loc. cit.*, p. 643.

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