III. JURISPRUDENCE ON THE INTERPRETATION OF OPTIONAL CLAUSE DECLARATIONS

With all the positions of the parties in mind, the Permanent Court's and Court's jurisprudence could provide further information on how the Optional Clause declarations have to be interpreted and whether there is a difference to other treaties.

A. The *Phosphates in Morocco* Case

A case yet neglected is the *Phosphates in Morocco* case which is the most prominent judgment of the Permanent Court regarding the interpretation of Optional Clause declarations.[112] In this case the Permanent Court had to interpret a reservation excluding the retroactive effect of an Optional Clause declaration and considered the terms and the intention of the drafting state to be clear. Therefore, the court said:

> In these circumstances, there is no occasion to resort to a restrictive interpretation that, in case of doubt, might be advisable in regard to a clause which must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it.[113]

This seems to imply that where a declaration is not clear it will be interpreted restrictively. Besides the aforementioned *Free Zones* case, this was the reason for Alexandrov's assumption that the Courts tended to interpret Optional Clause declarations restrictively in order not to exceed the state's consent.[114] Yet, as referred to above,[115] these two cases were based on general contemporary law which does not exist anymore. As also the following cases will show with regard to Optional clause declarations, the Court never made a similar ruling.[116]

One further aspect is that the Permanent Court also emphasised the unilateral character of Optional Clause declarations and said that it can 'on no account' exceed the intention of the declaring state. In line with this the court made clear that the jurisdiction transferred by Optional Clause declaration 'only [existed] within the limits within which it [had] been

[112] For the pleadings of the parties see *Phosphates in Morocco (Italy v France)* (n 65) 23 and above sub-s I D of ch 1 at 19.

[113] *Phosphates in Morocco (Italy v France)* (n 65) 22–24.

[114] SA Alexandrov, *Declarations* 13. See also above in the introduction of this chapter at 125.

[115] See sub-s I B of ch 4 at 129.

[116] See for the decline of the restrictive interpretation in general above sub-s I B of ch 4 at 129. For an early statement in this direction see also Lauterpacht (Lauterpacht (n 6) 339–41) who already emphasised the limited value of the obiter dicta suggesting restrictive interpretation for titles of jurisdiction.

accepted'.[117] These words have been repeated by the Court up until recent cases.[118] Gharbi considered this as being a particular feature of Optional Clause declarations.[119] Maus even wrote that this is a consequence of the unilateral character of Optional Clause declarations.[120] However, it seems as if this is no special feature of the Optional Clause and does not distinguish it from other treaties. In any treaty the consent expressed by a state is the limitation of its obligations arising from that treaty. It does not matter what the subject of the treaty is, in none should the Court transcend the states' consent. Judge Schwebel said in a later judgment that when the Court takes 'liberties not earlier taken the Court risks losing the support of those states which have created and sustained it'.[121] This is true but it is true for all treaties. Independent of the subject of the treaty it can be expected that where the Court takes 'liberties' it risks losing the states' support. The fact that the Permanent Court already ruled likewise for treaties establishing the jurisdiction of the Court under Article 36(1) of the Statute shows that the Optional Clause is at least not different to those.[122]

B. The *Anglo-Iranian Oil Co* Case

The Court's judgment in the case concerning the *Anglo-Iranian Oil Co* is often quoted. In this case the Court made the frequently repeated statement that it interprets Optional Clause declarations in 'a natural and reasonable way of reading the text, having due regard to the intention of the [state concerned] at the time when it accepted the compulsory jurisdiction of the Court'.[123] In the *Anglo-Iranian Oil Co* case the Court first came to the result that a purely grammatical interpretation could support the interpretation of both parties. It then compared the reservation in question to similar ones which had to be known to the government of Persia as it drafted its declaration. The Court then further referred to historical

[117] *Phosphates in Morocco (Italy v France)* (n 65) 23 f.

[118] See eg *Fisheries Jurisdiction (Spain v Canada)* (n 1) para 44; *Aerial Incident of 10 August 1999 (Pakistan v India)* (n 65) para 36.

[119] F Gharbi, 'Déclarations d'acceptation' 267. cp also Rosenne and Ronen (n 41) 780–82; SA Alexandrov, *Declarations* 13 f.

[120] Maus (n 3) 57.

[121] SM Schwebel, 'The Role' 1069. See also Weil's assessment of the judgment in the *Fisheries Jurisdiction* case between Spain and Canada, which he called one of the great judgments in international jurisprudence (Weil (n 85) 138 f).

[122] cp *Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Jurisdiction) PCIJ Series A No 2 5, 16; *Case concerning the Factory at Chorzów (Germany v Poland)* (n 37) 32.

[123] *Anglo-Iranian Oil Co case (United Kingdom v Iran)* (Preliminary Objection) [1952] ICJ Rep 93, 104; repeated in *Fisheries Jurisdiction (Spain v Canada)* (n 1) para 49; *Aerial Incident of 10 August 1999 (Pakistan v India)* (n 65) para 42; *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (Merits) [2014] para 36. cp also *Fisheries Jurisdiction (Spain v Canada)* (n 54) para 54.

circumstances which accompanied the making of a declaration and even considered Iranian law under which the Optional Clause declaration had been approved. This law had not been communicated to other states and had only been published in the Persian language and only inside Persia. The Court, however,

> was unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian laws voted and ratified during the period from January 15th, 1931, to January 15th, 1933. It has thus been available for the examination of other governments during a period of about twenty years.[124]

The Court explained the fact that the Persian government had shown a different intent in some bilateral treaties by pointing at the different relations Persia had maintained with these other states in those days. At the end the Court therefore supported the interpretation Iran had suggested.[125]

Judge Hackworth dissented and criticised that the domestic Iranian law was taken into consideration. For him states are not required to investigate into such material and for him such material can only be of value if it is attached to the declaration and thus publicised.[126] In line with this Malgosia Fitzmaurice argued that under treaties there would have been no such extensive recourse to extraneous matters to find the intent like in this case of Optional Clause declarations.[127] With regard to this case Rosenne similarly wrote that for treaties the interpretation seeks to elucidate the combined intent of the states involved but that 'with a declaration, the whole process is stamped by the particular quality of the declaration as a unilateral act, the product of unilateral drafting'. For Rosenne the Court therefore has to pay attention to the possibility that particular limiting factors have influenced a state when it made its declaration. In the present case for him, too, the Court 'ha[d] accepted as an indication of that Government's intentions extraneous evidence of a type not normally admissible, such as a contemporary domestic law'.[128] However, as established above also for treaties and reservations to treaties the Court refers to domestic material.[129] The material used in the *Anglo-Iranian Oil Co* case has no different quality than that used in the *Oil Platforms* and the *Aegean Sea Continental Shelf* case.[130] As it referred to Greek domestic

[124] *Anglo-Iranian Oil Co case (United Kingdom v Iran)* (n 123) 107.

[125] *Anglo-Iranian Oil Co case (United Kingdom v Iran)* (n 123) 104–06.

[126] Dissenting opinion of Judge GH Hackworth, *ICJ Rep 1952*, 136 f. See also A Gigante, 'Unilateral State Acts' 26.

[127] M Fitzmaurice, 'Interpretation' 139 f. For Lauterpacht (Lauterpacht (n 6) 346) this reference to Iranian domestic material gave the judgment an appearance of restrictive interpretation.

[128] Rosenne and Ronen (n 41) 771 f, 780–82. See also GG Fitzmaurice, *Law and Procedure* 503; Gharbi (n 119) 268 f; Lauterpacht (n 6) 346 f.

[129] See sub-s I A of ch 4 at 127.

[130] cp sub-s I A of ch 4 at 127.

material to establish the meaning of the Greek reservation in the *Aegean Sea Continental Shelf* case, the Court referred to Iranian domestic material to establish the meaning of the Iranian reservation in the *Anglo-Iranian Oil Co* case. The impression that there is no difference gains further support by the way the Court used the cases as reference. In the *Aegean Sea Continental Shelf* case concerning the reservation to the General Act the Court referred inter alia to the *Anglo-Iranian Oil Co* and the *Phosphates in Morocco* case and transferred the rationale without hesitation.[131]

However, it remains that the Court denied to apply the principle of effectiveness and emphasised the unilateral drafting of Optional Clause declarations. The Court wrote:

> It may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran …[132]

This could be read as a complete denial of the application of the principle of effectiveness on Optional Clause declarations.[133] However, the Court simultaneously stressed that the Government of Iran

> appears to have shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundanti cautela*, words which, strictly speaking, may seem to have been superfluous. This caution is explained by the special reasons which led the Government of Iran to draft the Declaration in a very restrictive manner.[134]

Taking this whole passage into consideration it may also be concluded that the Court did not deny the application of the principle of effectiveness on Optional Clause declarations in general. The Court could also not have applied the principle for the reason that it was able to infer the intention of the Persian government completely with the help of the historical circumstances accompanying the making of the declaration. There was then no room to apply the principle of effectiveness as it is only one way to assess the intent of the drafter of a text.[135] Insofar the beginning of the quoted passage could just be read as pointing towards the fact that the Court was able to establish the intent otherwise. This would also be in line with the fact that the Court presented no reason why the principle of effectiveness should not be applied to assess the intention of the drafter making

[131] *Aegean Sea Continental Shelf (Greece v Turkey)* (n 14) paras 55, 69 referring to *Anglo-Iranian Oil Co case (United Kingdom v Iran)* (n 123) 104 and *Phosphates in Morocco (Italy v France)* (n 65) 22–24.

[132] *Anglo-Iranian Oil Co case (United Kingdom v Iran)* (n 123) 105.

[133] So especially Ulimubenshi (n 1) 123 f.

[134] *Anglo-Iranian Oil Co case (United Kingdom v Iran)* (n 123) 105.

[135] For that cp sub-s I D of ch 4 at 133.

a declaration.[136] With such an understanding the Court did not deny the application of the principle on Optional Clause declarations in general.

With regard to the individual and dissenting opinions in particular the one of Judge Read is of interest here. He argued against a too generous interpretation of Optional Clause declarations. He wrote that he was 'unable to accept the contention that the principles of international law which govern the interpretation of treaties cannot be applied to the Persian Declaration, because it is unilateral'. Judge Read correctly maintained that the making of an Optional Clause declaration was a free exercise of state sovereignty and not just a limitation of state sovereignty. For him it was therefore only necessary to give effect to the intention of the state expressed by the words used. There was no need for a restrictive interpretation and for him the prior jurisprudence of the Court did not demand to act otherwise either.[137]

All in all, if understood as suggested in this sub-section, the Court's judgment in the *Anglo-Iranian Oil Co* case provides no argument that the Optional Clause is somehow different to a treaty. Especially the Court's reference to domestic material is completely accordant to its general approach towards interpretation.

C. The *Right of Passage* and the *Temple of Preah Vihear* Case

The impression that the Court did not deny the application of the principle of effectiveness as such can be further supported with the judgment of the Court in the *Right of Passage* case. The Court had to interpret the Portuguese reservation allowing Portugal to amend its declaration without a period of notice. India argued that the reservation also allowed Portugal to exclude disputes which were already subject of a proceeding before the Court.[138] Portugal argued that its reservation had no such retroactive effect.[139] The Court addressed this issue by first stating that it 'must determine the meaning and the effect of the Third Condition by reference to its actual wording and applicable principles of law'. For the Court the

[136] For the application of the principle of effectiveness on unilateral declarations in general see sub-s I D of ch 4 at 133.

[137] Dissenting opinion of Judge JE Read, *ICJ Rep 1952*, 142 f.

[138] *Case concerning the Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) Memorial (India) para 33 referring to the Swedish letter of 23 February 1956 (see Annex 1). cp also *Case concerning the Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142. See also Whiteman (n 75) 1339 f.

[139] *Case concerning the Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) Observations and Submissions (Portugal) paras 9–11 referring to Portugal's letter of 5 July 1956 (see Annex 2). cp also *Case concerning the Right of Passage over Indian Territory (Portugal v India)* (n 138) 142.

ordinary sense of the wording of the reservation only allowed Portugal to exclude disputes before they were brought to Court. The Court then backed this result with a reference to the rationale of the *Nottebohm* case according to which the lapse of a title of jurisdiction has no influence on the proceedings already before the Court. For the Court this rationale was relevant as '[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it'.[140] Of course this is not exactly like the principle of effectiveness as presented above,[141] because in the present case the Court contrasted the situation of lawful and unlawful effects. But nonetheless this approach also includes, at its core, the general assumption that the declaration is intended to have an effect. For Gross it seemed in this regard 'obvious that the Court was applying, directly or by analogy, principles of treaty law'.[142]

This last impression can be supported with the judgment of the Court in the *Temple of Preah Vihear* case which followed shortly after the judgment in the *Right of Passage* case. In that judgment the Court had to interpret Thailand's Optional Clause declaration and according to the Court itself had to 'determine what is its real meaning and effect if that Declaration is read as a whole and in light of its known purpose'.[143] This seems to suggest an uncommonly strong emphasis on the purpose of the declaration but the Court went on by explaining:

> In so doing, the Court must apply its normal canons of interpretation, the first of which, according to the established jurisprudence of the Court, is that words are to be interpreted according to their natural and ordinary meaning in the context in which they occur.[144]

The fact that the Court went on saying that it can depart from a purely grammatical interpretation where this would lead to 'something unreasonable or absurd' further underlines how close the Court's interpretation of the Optional Clause declaration is to that of treaties which are interpreted likewise.[145] Additionally, the Court then maintained that in case of a contradiction in the wording of a declaration it is 'entitled to go outside

[140] *Case concerning the Right of Passage over Indian Territory (Portugal v India)* (n 138) 142. See also JG Merrills, 'Clause Revisited' 210 f; Whiteman (n 75) 1339 f.

[141] cp sub-s I D of ch 4 at 133.

[142] L Gross, 'Optional Clause' 32.

[143] *Temple of Preah Vihear (Cambodia v Thailand)* (Preliminary Objections) [1961] ICJ Rep 17, 32.

[144] ibid 32. On this page the Court furthermore emphasised that it must interpret Optional Clause declarations 'without any preconceptions of an *a priori* kind' which suggests that there is no kind of presumption for a restrictive interpretation. For more on this issue see the *Fisheries Jurisdiction* case in sub-s III E of ch 4 below at 154.

[145] For the similar rule for treaties in general see sub-s I A of ch 4 at 127.

the terms of the Declaration'. It continued by referring to the 'relevant circumstances' which included 'the history of Thailand's consistent attitude to the compulsory jurisdiction'.[146] In order to establish these rules the Court referred to the judgment in the case concerning the *Polish Postal Service in Danzig*,[147] in which the Permanent Court had interpreted a treaty (the Warsaw Agreement).[148] This heavily supports the assumption that also in the opinion of the Court there is no difference between the interpretation of Optional Clause declarations and treaties.

D. The *Nicaragua* Case

In the *Nicaragua* case the Court had to deal with two reservations made by the United States. First it assessed the reservation allowing the United States to withdraw its declaration with a period of notice of six months. Even though some states introduced such reservations without period of notice after the United States had made its declaration in 1946 the Court interpreted the United States' reservation strictly to its wording.[149] Facing the clear wording and the clear intention of the United States as they drafted their Optional Clause declaration the Court did not even address the United States' argument that changing state practice could have influenced its declaration.[150]

The Vandenberg Reservation, however, led to some more consideration. On the one hand the Court was concerned with establishing whether other states might be 'affected' by its decision and came to the result that El Salvador would be so.[151] In this regard the Court adopted more of the United States' position which was a more teleological approach.[152]

[146] *Temple of Preah Vihear (Cambodia v Thailand)* (n 143) 32–34.

[147] ibid 32 f referring to *Polish Postal Service in Danzig* (Advisory Opinion) PCIJ Series B No 11 5, 39. See also the similar approach which Judge Read had adopted for the Connally Reservation four years earlier (dissenting opinion of Judge JE Read, *ICJ Rep 1957*, 94 f).

[148] cp *Polish Postal Service in Danzig*, ibid 38 f.

[149] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (n 75) paras 61 f, 65.

[150] For that argument see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (n 78) paras 362–64, 399–401. As Oellers-Frahm rightly remarked the United States had had the opportunity to change its declaration in order to adjust it to recent state practice (K Oellers-Frahm, 'Obligatorische Gerichtsbarkeit' 251). If states want to change their Optional Clause declaration according to current state practice they have the possibility (see s II of ch 6 at 279) and also the responsibility to do so. Without adjustment other states can rely on the declaring state's original intent as it appears in the terms used in its declaration.

[151] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (n 75) paras 72, 75; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, paras 47–56; supported by Oellers-Frahm, ibid 254 f.

[152] See sub-s II B iii of ch 4 at 137. Criticised by eg Judge J Sette-Camara, *ICJ Rep 1986*, 193–98 and V Lamm, 'Multilateral Treaty Reservation' 344.

Concerning the question whether the reservation excludes multilateral disputes as such or only disputes as far as they relate to a multilateral treaty the Court referred only briefly to the wording of the reservation and to the position of the two parties including their reference to domestic material. It then rather suddenly concluded:

> It may first be noted that the multilateral treaty reservation could not bar adjudication by the Court of all Nicaragua's claims, because Nicaragua, in its Application, does not confine those claims only to violations of the four multilateral conventions referred to above.[153]

For the Court the customary law which was codified in the treaties remained applicable even though the Vandenberg Reservation applied. The Court took the object and purpose of the reservation, as presented by the United States,[154] into account but considered only that the Statute already protected the interests of third states. At the end the Court followed the presentation of Nicaragua, holding the United States to the words used in the declaration.[155]

Criticism of this interpretation came from the Judges Oda, Ruda and Schwebel.[156] Judge Ruda made use of the domestic material presented by the United States and Nicaragua and referred inter alia to a discussion in the United States Senate, a report of the Committee on Foreign Relations and a memorandum presented to the Committee.[157] From this material Judge Ruda established the intention behind the reservation. For him, '[t]he history of the proviso is well known and it is not of much help to find the intention of its authors, but that is the only source of interpretation available'. He then used his 'reading of this legislative history' to establish the objective of the reservation which for him was the protection of the United States in disputes with several parties. As the United States had a dispute with Nicaragua only and no other state—and as all other states also had a dispute with Nicaragua only—for Judge Ruda the reservation did therefore not apply.[158] Judge Schwebel criticised the Court's

[153] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (n 75) para 73.

[154] See sub-s II B iii of ch 4 at 137.

[155] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (n 75) paras 69, 72–75; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (n 151) paras 56, 172, 182. cp *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (n 76) para 357 f and above sub-s II B iii of ch 4 at 137.

[156] Dissenting opinion of Judge S Oda, *ICJ Rep 1986*, paras 7–14; separate opinion of Judge JM Ruda, *ICJ Rep 1984*, paras 17–27; dissenting opinion of Judge SM Schwebel, *ICJ Rep 1984*, paras 71 f, 78, 87–90. See also Maus (n 3) 164 f.

[157] Separate opinion of Judge JM Ruda, *ICJ Rep 1984*, paras 17–20 referring inter alia to United States of America 'Congressional Record' (1946) 10618 (Thomas of Utah, Vandenberg), 10707 (Report of the Committee on Foreign Relations).

[158] Separate opinion of Judge JM Ruda, *ICJ Rep 1984*, paras 17–27. cp also the presentation in SA Alexandrov, 'Reservations' 114 f, fn 569.

treatment of the reservation for several reasons and emphasised inter alia that according to Article 32 VCLT the Court was not allowed to 'come to a result which is manifestly absurd or unreasonable'. For him this was the case as the Court's interpretation was inconsistent with another provision of the Statute (Article 62). Judge Schwebel referred to the domestic material and came to a result which led him to conclude that customary law is also excluded as far as it is similar to the treaty law in question.[159] Without reference to the domestic material Judge Oda came to the result that the reference to multilateral treaties in the Vandenberg Reservation is 'merely a means of drawing the boundaries' and that the reservation shall exclude the disputes in total and not just sources of law.[160] Judge Mosler, however, supported the interpretation of the Court. He mentioned the domestic material presented and referred to misunderstandings in the United States Senate but then clearly said: 'The basis of the interpretation is however the text itself'.[161]

Taking into consideration the positions of the Judges Mosler and Ruda it becomes clear that at the end the decision upon the effect of the Vandenberg Reservation had, to a certain degree, been the choice between an interpretation close to the wording of the reservation and an interpretation taking into consideration the domestic *travaux préparatoires*. The United States had the intention to exclude multilateral disputes but this did not appear in the wording.[162] If the Court had referred to domestic material in the *Nicaragua* case as it did in the *Anglo-Iranian Oil Co* case it would have been very likely that it would have interpreted the Vandenberg Reservation in another way. An explanation for the behaviour of the Court might have been that it considered 'disputes arising under a multilateral treaty' as sufficiently clear. In such cases Article 32 VCLT demands no recourse to *travaux préparatoires* or the circumstances of the drafting either.[163] All in all the Court's judgment in the *Nicaragua* case likewise provides no material

[159] Dissenting opinion of Judge SM Schwebel, *ICJ Rep 1984*, paras 71 f, 78, 87–90.

[160] Dissenting opinion of Judge S Oda, *ICJ Rep 1986*, paras 13 f. However, Judge Oda's emphasis on the facts that states accept the Optional Clause declarations voluntarily and that their reservations limit the consent given (ibid paras 11 f, 48 f) is less convincing. As said above (see s I of ch 3 at 86), the named facts hold true for all treaties and particular rules for the Optional Clause cannot be inferred from this.

[161] Separate opinion of Judge H Mosler, *ICJ Rep 1984*, 468.

[162] cp SA Alexandrov, *Declarations* 114 f, fn 569; Maus (n 3) 164 f. For the original intention see United States of America 'Congressional Record' (1946) 10618 (Vandenberg) and the memorandum of *Dulles* on this point (Whiteman (n 75) 1302 f).

[163] See sub-s I A of ch 4 at 127. Another question is whether the interpretation of the Court is accordable with Art 38 of the Statute (cp JHW Verzijl, 'Optional Clause' 599 and the argumentation by Pakistan in *Aerial Incident of 10 August 1999 (Pakistan v India)* (Jurisdiction) Memorial (Pakistan) para H(4)). If the answer is negative, the principle of effectiveness (sub-s I D of ch 4 at 133) as applied in the *Right of Passage* case (sub-s III C of ch 4 at 149) might demand a different interpretation.

which could support the assumption that the rules of interpretation for the Optional Clause are different from those for a treaty.

E. The *Fisheries Jurisdiction* Case Between Spain and Canada

The next relevant judgment on the interpretation of Optional Clause declarations is the one in the *Fisheries Jurisdiction* case between Spain and Canada. The Court's following statement has attained great attention: 'The régime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties'. The Court made this statement after it repeated its perception of how the unilateral Optional Clause declarations together form consent. It came to the result that the rules of the VCLT may only apply as far as they are 'compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction'.[164] According to Pellet, the judgment was a 'warning' by the Court not to apply treaty law to Optional Clause declarations too eagerly.[165] It is, however, not obvious how exactly the two regimes differed from one another. As reference the Court points at a paragraph of its judgment in the *Bakassi Peninsula* case which was, however, not related to the interpretation of Optional Clause declarations at all.[166]

The difference mentioned by the Court could be the *contra proferentem* rule. For that rule the Court decided in the *Fisheries Jurisdiction* case:

> [It] may have a role to play in the interpretation of contractual provisions. However, it follows from the foregoing that the rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada under Article 36, paragraph 2, of the Statute.[167]

'[T]he foregoing' has to be understood as expressing the unilateral character of the Optional Clause declarations and the way they create consent.[168] However, having in mind what has been said concerning the rule of *contra proferentem* above,[169] there seems to be no difference from treaty law in this regard. Moreover, the way the Court treated the Optional Clause declaration is perfectly in line with what has been said there. As under the Optional Clause no state dictates the terms of an Optional Clause

[164] *Fisheries Jurisdiction (Spain v Canada)* (n 1) para 46. See also Rosenne and Ronen (n 41) 776 f; Ulimubenshi (n 1) 122 f.

[165] ILC 'Summary Records of the Meetings of the 53rd Session' (n 19) 186, para 3 (Pellet).

[166] *Fisheries Jurisdiction (Spain v Canada)* (n 1) para 46 referring to *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria*: *Equatorial Guinea intervening)* (Preliminary Objections) [1998] ICJ Rep 275, para 30.

[167] *Fisheries Jurisdiction (Spain v Canada)* (n 1) para 51.

[168] ibid para 46.

[169] See above sub-s I C of ch 4 at 132.

declaration it is right that the rule cannot play a role here. The fact that the Court cautiously added that the rule *contra proferentem* 'may have a role to play in the interpretation of a contractual provision' does not change this result. Therefore, this rule of interpretation, too, provides no basis to argue that the Optional Clause is different from a treaty.

Another relevant aspect of this judgment is that the Court again used internal material to interpret the Canadian reservations. With reference to the *Anglo-Iranian Oil Co* case the Court said that since an Optional Clause declaration '[was] a unilaterally drafted instrument, the Court [had] not hesitated to place a certain emphasis on the intention of the depositing State'. The Court repeated that also 'the context' of an Optional Clause declaration and 'the evidence regarding the circumstances of its preparation and the purposes intended to be served' had to be taken into consideration. Therefore, the Court took into consideration 'Canadian ministerial statements, parliamentary debates, legislative proposals and press communiqués'.[170] As Gaya pointed out these materials were not easy to find for a state which wants to interpret the Canadian reservation.[171] In line with this Weil, too, noted that the Court interpreted the Optional Clause declarations with a strong emphasis on the intention of the parties and the *travaux préparatoires*.[172] Judge Torres Bernárdez called this a '*free interpretation* of Canada's purported "underlying intention"' which neglected the actual text of the declaration.[173] However, as said in relation to the *Anglo-Iranian Oil Co* case, there is no difference to the Court's jurisprudence for treaties and reservations to declarations of accession.[174]

Moreover, for the Court there seems to be no difference regarding the question whether there is a kind of restrictive interpretation. As Tomuschat analysed inter alia for the *Fisheries Jurisdiction* case between Spain and Canada, the Court held that there is no restrictive interpretation of Optional Clause declarations.[175] Expressly the Court only wrote: 'There

[170] *Fisheries Jurisdiction (Spain v Canada)* (n 1) paras 48 f, 60. The Court endorsed this approach also in the recent *Whaling in the Antarctic* case. In that case the Court followed Australia's arguments and considered 'a press release issued by the Attorney-General and the Minister for Foreign Affairs of Australia' and a 'National Interest Analysis submitted by the Attorney-General to Parliament' to determine the scope of Australia's reservation (*Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (Merits) [2014] paras 36, 38). Judge Abraham criticised the Court's interpretation of Australia's reservation but his criticism did not refer to the use of the named material (cp Declaration of Judge R Abraham, *2014*, paras 11–14).

[171] ILC 'Summary Records of the Meetings of the 53rd Session' (n 19) 187 f, para 15 (Gaya).

[172] Weil (n 85) 127–29. See also ILC 'Documents of the 52nd Session' (n 30) 279 (Austria).

[173] Dissenting opinion of Judge S Torres Bernárdez, *ICJ Rep 1998*, paras 150, 157–60.

[174] cp sub-s III B of ch 4 at 146.

[175] Tomuschat (n 27) para 35. See also Ulimubenshi (Ulimubenshi (n 1) 125) according to whom the Court spoke out for the application of the principle of effectiveness on the reservations attached to Optional Clause declarations.

is thus no reason to interpret [conditions or reservations] restrictively'. Yet, in the same paragraph the Court said, too, that all elements of an Optional Clause declaration 'are to be interpreted as a unity, applying the same legal principles of interpretation throughout'.[176] This suggests that the first quote also referred to the declaration as such. This position of the Court on the Optional Clause is therefore in line with what has been said concerning restrictive interpretation in general.[177]

All in all, also the Court's judgment in the *Fisheries Jurisdiction* case between Spain and Canada provides no basis to argue that the Court interprets the Optional Clause differently from other declarations of accession. Even though the Court reduced the application of treaty law to application by analogy, its interpretation of reservations made to the Optional Clause completely corresponds with its interpretation of reservations made to other treaties. As Judge Torres Bernárdez remarked, '[w]hen the Judgment invokes the *sui generis* character of declarations …, it does so not with reference to particular aspects of the application of one or more interpretative elements accepted by international law'.[178]

F. The *Use of Force* Cases

In the decision upon the request for provisional measures in the *Use of Force* cases the Court had to interpret the word 'dispute' in the Yugoslavian declaration.[179] The Court did so in line with the pleading of Canada and without referring to the circumstances in which Yugoslavia had made the declaration. The Court only maintained that all the attacks on Yugoslavia were to be considered as being all part of one dispute. This dispute therefore arose before the making of the declaration and was therefore excluded by its terms.[180] Similarly Judge Higgins approached the terms of the Yugoslavian declaration without considering how the drafter might

[176] *Fisheries Jurisdiction (Spain v Canada)* (n 1) para 44.

[177] See sub-s I B of ch 4 at 127. Another part of the judgment for which the Court deserves endorsement is the distinction between reservations to Optional Clause declarations and the compatibility of excluded acts with international law. The potential illegality of an excluded behaviour is no factor for the reservation's interpretation (*Fisheries Jurisdiction (Spain v Canada)* (n 1) paras 54 f. See also separate opinion of Judge SM Schwebel, *ICJ Rep 1998*, paras 4 f; Weil (n 85) 129–39. But see also the criticism by Judge CG Weeramantry, *ICJ Rep 1998*, paras 10, 24–28, 37–42, 69 and the criticism referred to in *Hilaire v Trinidad and Tobago* (Preliminary Objections) IACtHR Series C No 80 (2001) fn 24).

[178] Dissenting opinion of Judge S Torres Bernárdez, *ICJ Rep 1998*, para 155.

[179] In the later judgment the Court denied its jurisdiction for another reason (cp eg *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279, para 127).

[180] See eg *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Provisional Measures) [1999] ICJ Rep 124, paras 22 f, 28 f; supported by Judge PH Kooijmans, *ICJ Rep 1999*, para 30.

have understood it. She interpreted the terms of the declaration in light of prior judgments of the Court on similar reservations and came to the same result as the Court.[181]

Judge Koroma on the other hand interpreted the term 'dispute' with reference to Article 25 of the ILC's Draft Articles on State Responsibility. He inferred from that article and its commentary that there had been a new dispute after the making of the declaration and that in this respect the Court therefore made a wrong decision.[182] Judge Weeramantry likewise referred to the said article to support his prior and rather long assessment of the word 'dispute'. Also addressing Yugoslavia's intention as it drafted its declaration he came to a result which is different from that of the Court.[183] Another dissenting opinion came from Judge Shi who similarly referred to the said Article 25. He further assessed the meaning of the Yugoslavian reservation in light of earlier jurisprudence and maintained inter alia that the prior dispute had been a dispute with the North Atlantic Treaty Organization (NATO) which, he emphasised, is not identical with the respondent state.[184] Lastly, Judge Vereshchetin, too, presented an interpretation different to that of the Court. For him the wording of the reservation in question was 'not without ambiguity'. He then assessed the meaning of the terms by referring to other judgments. Additionally, '[a]nother ground on which [he] disagree[d] with the majority [was] their complete disregard of the clear intention of Yugoslavia'. Judge Vereshchetin argued that it was 'absurd' to conclude that the reservation excluded the dispute in the present case due to Yugoslavia's obvious original intention.[185]

Regarding these opinions together with the judgment of the majority it becomes obvious that again there was a certain disharmony between the wording of the Optional Clause declaration and the intention of its drafter. The Court and Judge Higgins only referred to the wording of the declaration and not to the circumstances of the declaration's drafting. The Judges Weeramantry and Vereshchetin came to a different result by referring inter alia to these circumstances. Again this seems to be at least very similar to an application of Article 32 VCLT. While for the Court and Judge Higgins the result of their interpretation was not ambiguous and therefore no

[181] Separate opinion of Judge R Higgins, *ICJ Rep 1999*, paras 3–8. With reference to other judgments Judge Higgins nonetheless maintained that 'this particular jurisdictional problem, as any other, requires close attention to be given to the intention of the State issuing its declaration with limitations or reservations'.

[182] Declaration of Judge AG Koroma, *ICJ Rep 1999*, 142 f. See also the dissenting opinion of Judge M Kreća, *ICJ Rep 1999*, 246 f.

[183] Dissenting opinion of Judge CG Weeramantry, *ICJ Rep 1999*, 185–88.

[184] Dissenting opinion of Judge J Shi, *ICJ Rep 1999*, 205–07.

[185] Dissenting opinion of Judge VS Vereshchetin, *ICJ Rep 1999*, 210–12.

reference to the circumstances of the drafting was necessary,[186] especially for Judge Vereshchetin the wording of the declaration was not unambiguous and so he referred inter alia to the circumstances of the drafting of the declaration.

G. The Case Concerning the *Aerial Incident of 1999*

The last case presented here is the case concerning the *Aerial Incident of 1999* in which the Court had to decide upon India's Vandenberg and India's Commonwealth reservations. Starting with the latter the Court began by reiterating its prior findings on how to interpret Optional Clause declarations. It then added:

> While the historical reasons for the initial appearance of the Commonwealth reservation in the declarations of certain States under the optional clause may have changed or disappeared, such considerations cannot, however, prevail over the intention of a declarant State, as expressed in the actual text of its declaration … Whatever may have been the reasons for this limitation, the Court is bound to apply it.[187]

Concerning the Simla Accord the Court just said that it demands the peaceful settlement of disputes and has no influence on the invocation of the Commonwealth reservation.[188] The way the Court referred to the drafting state's original intention consequentially upholds the rationale of the judgment in the *Nicaragua* case.[189] If India had no longer wanted its reservation it would have had to adjust it. As it did not, India was still able to rely on it just like Pakistan would have also been. As the Commonwealth reservation therefore applied, the Court did not decide about the Vandenberg Reservation.[190]

H. Result

Taking into consideration all of the two Courts' jurisprudence there is not much left of the Court's statement that the regime concerning the

[186] cp sub-s I A of ch 4 at 127 and the similar situation in the *Anglo-Iranian Oil Co* case (sub-s III B of ch 4 at 146).

[187] *Aerial Incident of 10 August 1999 (Pakistan v India)* (n 65) paras 41–44. For criticism see Judge Pirzada (dissenting opinion of Judge SSU Pirzada, *ICJ Rep 2000*, paras 27–42) who considered the Commonwealth reservation as obsolete.

[188] *Aerial Incident of 10 August 1999 (Pakistan v India)* (n 65) para 45.

[189] See sub-s III D of ch 4 at 151.

[190] *Aerial Incident of 10 August 1999 (Pakistan v India)* (n 65) para 46. The Judges Al-Khasawneh and Pirzada who dealt with the Vandenberg Reservation in their dissenting opinions did not interpret it again and only applied it as it had been applied in the earlier *Nicaragua* judgment (dissenting opinion of Judge AS Al-Khasawneh, *ICJ Rep 2000*, para 7; dissenting opinion of Judge SSU Pirzada, *ICJ Rep 2000*, para 86).

interpretation of Optional Clause declarations is not identical to that established for the interpretation of declarations of accession in general treaty law.

As already maintained by Tomuschat, there is no restrictive interpretation of Optional Clause declarations just as there is no restrictive interpretation in general.[191] The same holds for the rule *contra proferentem* which the Court did not apply to the Optional Clause declarations.[192] The principle of effectiveness exists as it exists for treaties.[193] As far as the Court interprets Optional Clause declarations 'in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the [declaring state] at the time when it accepted the compulsory jurisdiction of the Court,'[194] there is in fact not much difference to the interpretation of other treaties. In this regard Rosenne correctly wrote:

> For the canons of interpretation, the tendency of the Court is to approach a declaration in much the same way that it approaches all questions of textual interpretation, whether relating to a treaty, a unilateral statement or declaration, a resolution of an international organization or another document. It attempts to establish what the words used mean in their context. Its point of departure, for declarations as for all other texts, is the ordinary meaning of the words used in their context, provided that this will not lead to what the Permanent Court first called 'something unreasonable or absurd', or what the present Court—interpreting a compromissory clause in a treaty—has called a meaning 'incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained'.[195]

In total, the difference between the interpretation of Optional Clause declarations and the law of treaties is therefore marginal at most also in the jurisprudence of the two Courts.[196] As Hersch Lauterpacht wrote the view that the general principle of interpretation cannot be applied to the Optional Clause declarations 'is not the view of the Court'.[197] For Gharbi the two Courts have basically applied the rules of interpretation for treaties. He wrote that their way of interpretation is 'pleinement compatible

[191] Tomuschat (n 27) paras 35, 72. cp also Kolb (n 5) 489 f; Lauterpacht (n 6) 338–41, 346 f; M Schröder, 'Streitbeilegung' para 92 and furthermore Rosenne and Ronen (n 41) 779–82: '[Passages of the Court's judgments] are far from supporting a view that the declarations *per se* have to be subjected to restrictive interpretation simply because they belong to a class of document which is automatically subject to restrictive interpretation'.

[192] cp above IV A 3.

[193] For the Optional Clause cp Ulimubenshi (n 1) 126.

[194] *Anglo-Iranian Oil Co case (United Kingdom v Iran)* (n 123) 104; *Fisheries Jurisdiction (Spain v Canada)* (n 1) para 47.

[195] Rosenne and Ronen (n 41) 779. For the fact that Rosenne, like Gerald G Fitzmaurice (GG Fitzmaurice, *Law and Procedure* 366), also emphasised that the Court had paid special attention to the intention of the drafting states see sub-s III B of ch 4 at 146.

[196] Tomuschat (n 27) para 72.

[197] Lauterpacht (n 6) 347.

avec l'esprit et les dispositions des articles 31 et 32 de la *Convention de Vienne sur le droit des traités*'.[198]

IV. RESULT

The Optional Clause and the Optional Clause declarations have not been interpreted differently from other treaties and their declarations of accession with reservations.[199] Neither the Statute nor state practice demands a different treatment. Most states have interpreted the Optional Clause declarations as declarations of accession to a treaty. The jurisprudence of the Court provides no reason for a different interpretation, either. In this regard, the jurisprudence even provides many examples in which the Court treated the Optional Clause like a treaty. Also with regard to the ILC's new Guideline 4.2.6 GPRT on the interpretation of reservations there seems to be absolutely no difference between the law of treaties and the law applied to the Optional Clause at all. Without hesitation the ILC based this guideline on jurisprudence concerning Optional Clause declarations.[200] It seems as if the *sui generis* factor of the Optional Clause has never been more than the fact that under the Optional Clause the two Courts had to interpreted declarations of accession with reservations in times in which there have been no established rules for interpreting these.

V. EXCURSUS: INTERPRETATION OF THE CONNALLY RESERVATION

For a long time there has been a discussion under the Optional Clause whether there are reservations which allow subjective determination. The discussion focused on the Connally Reservation which in its original form excluded disputes 'with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America'.[201] A similar reservation was introduced by the United Kingdom in 1957. It excluded disputes 'relating to any question which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or of any of its dependent

[198] Gharbi (n 119) 267, 270. As far as Gharbi saw certain particularities in the Courts' way of interpreting Optional Clause declarations (ibid 264, 267–71), these have been already addressed above (146 and 147).

[199] See also Buigues (n 9) 285 f; Tomuschat (n 27) paras 35, 72; ILC 'Summary Records of the 40th Session' (24 April–29 June 1962) UN Doc A/CN.4/Ser.A/1962 56, para 72 (Liang). For the ACHR cp A Úbeda de Torres, 'Contentious Jurisdiction' 11.

[200] ILC 'Report of the International Law Commission on the Work of Its 63rd Session' (n 12) 468–72.

[201] UNTS, Volume 1 (1946–1947). cp also the similar Mexican declaration of 1947 (UNTS, Volume 9 (1947)).