CHAPTER II

THE DYNAMIC OF INTERNATIONAL COURT OF JUSTICE IN TERRITORIAL DISPUTES SETTLEMENT

According to international law, one of the alternatives in dispute settlements between countries in a law or judicial settlement may go through the International Court institutions such as: PCIJ or now is International Court of Justice (ICJ), International Criminal Court (ICC), or International Tribunal for the Law of the Sea.[22] However, in line with the focus on this undergraduate thesis, in this chapter the writer would like to explain deeply one of International Courts or institutions in judicial settlements, the International Court of Justice (ICJ), it is UN's organ and has many recorded in handled dispute settlement cases around the world.

A. General Profile of International Court of Justice (ICJ)

The International Court of Justice (ICJ) was established under Chapter XIV of the United Nations Charter. It replaced the Permanent Court of Justice (PCIJ), which existed under the UN's predecessor, the League of Nations. The ICJ is the only major UN body whose headquarters is not in New York City, the Court sits in The Hague, Netherlands. The Court is the principal judicial organ of the UN and all members of the UN are *ipso facto* (automatically) parties to the Statute of the ICJ. The ICJ is consist of fifteen judges of different nationalities,

on the Court for nine-years terms in making decision registered in the ICJ. Based on April 27, 2012 the composition of the Court is as follows.

Table 1. The Composition of International Court of Justice (ICJ)

No	Name	Nationality	Position
1	Peter Tomka	Slovakia	President
2	Bernando Sepulveda Amore	Mexico	Vice-President
3	Hisasi Owada	Japan	Member
4	Ronny Abraham	France	Member
5	Sir Kenneth Keith	New Zealand	Member
6	Mohammed Bennouna	Morocco	Member
7	Leonid Sotnikov	Russia	Member
8	Antonio Augusto C. Trindade	Brazil	Member
9	Abdulqawi Ahmed Yusuf	Somalia	Member
10	Sir Christopher Greenwood	United Kingdom	Member
11	Xue Hanqin	People's Republic of China	Member
12	Joan E. Donoghue	United States	Member
13	Giorgio Gaja	Italy	Member
14	Julia Sebutinde	Uganda	Member
15	Dalveer Bhandari	India	Member

Source: International Court of Justice. 27 April 2012. Retrived December 3rd 2012, from http://www.icj-cij.org/presscom/files/7/16987.pdf.

In fact, the Court has a dual role: to settle in accordance with international law the legal disputes submitted to it by States and to give advisory opinions on

Consequently, the jurisdiction of the Court falls into two distinct parts, namely, "contentious jurisdiction" and "advisory jurisdiction". The ICJ is often considered as the primary means for the resolution of disputes between States and in fact the Court is well-recognized for its significant contribution to the development of international law.[23] However, the Court goes not operate at full capacity. Only four or five cases are referred to the Court for judicial settlement every year. There are some of reasons for this. Foremost among these reasons is the character of the Court itself. In the writer view, the limited nature of the Court's jurisdiction is the essential cause of its ineffectiveness.

The primary purpose of the ICJ is to render opinions on international legal disputes between States. These cases may only be submitted by States that have accepted the jurisdiction of the ICJ. Another purpose of the ICJ is to clarify significant international legal questions brought to it by the UN General Assembly and the Security Council. When a UN body brings an issue before the Court, they are requesting an Advisory Opinion. The ICJ does not have authority to decide disputes involving individuals, the public or private organizations, although the Court may request that public organizations present information in a case. When the states have a case before the Court, participants submit written memorials and present oral arguments. When the Court is asked to render an Advisory Opinion, interested or assigned parties also submit written memorials and present orally before the Court. In both types of cases, interested parties can seek to submit an *Amicus Curiae* memorial, Latin for "friend of the Court." *Amicus Curiae*

[23] Michael Young & Yuji Iwasawa, Op cit, pp. 337-339

memorials may be submitted by any delegation that seeks to assist the Court in defining the issue. These memorials may be submitted by states not specifically named in the case. Moreover, as provided in Article 34 (1) of the Statute of the International Court of Justice, only States may be parties in cases before the Court. This is of far reaching importance since it prohibits recourse before the Court by individuals or international organizations. It reflects the traditional theory that an inter-State dispute resolution forum can be open to States only.[24]

Even for States, access to the Court is not automatic. There are several ways for a State to gain access to the Court. First, by Article 93 of the UN Charter, all members of the UN are *ipso-facto* (automatically) members of the Statute. Second, States that are not members may become parties, on conditions to be determined in each case by the UN General Assembly, based on the recommendations of the Security Council. Therefore countries such as Switzerland and San Marino, though not members of the UN, may become parties to the *Statute* of the Court. Third, any other State that is neither a member of the UN nor a party to the *Statute* of the ICJ may become a party before the ICJ by depositing a declaration with the Registry of the ICJ. The declaration must state that such State accepts the jurisdiction of the Court and undertakes to comply in good faith with the Court's decisions in respect of all or a particular class or classes of disputes. Many States have found themselves in the third scenario before becoming members of the United Nations. Today, the Court is open to practically every State in the world. As of May 2004, there were 191 States who

Nations organ that helped or initiated in founding PCIJ was Council of League of Nations. In a session at the beginning of 1920, the Board appointed an Advisory Committee of Jurists to report the planned formation of PCIJ. The Commission located in The Hague led by Baron Descamps from Belgium. In August 1920, Baron Descamps issued and submitted a report on the establishment of PCIJ draft to the Board. In the Council discussion, the Plan had changed. In the end the draft was successfully formulated a Statute which established the PCIJ in 1922. Two problems arised at the time were; "how to select the judges and where the seat or headquarters of PCIJ?". The results of a draft Statute of Baron Descamps at that time has been thinking ahead (and now still used). The design of Baron Descamps was that judges were selected to represent civilization and legal systems in the world.

In the process of PCIJ formation, the headquarters problem solved because the initiative and approach the Dutch government in 1919. Netherlands made lobbies for the seat PCIJ in the Netherlands. This effort was success. The League of Nations agreed that the headquarters of PCIJ was in the Peace Palace De Hague. The first session of the Court held on February 15, 1922. The trial led by the Dutch jurist Loder, which is then appointed as the first President of the PCIJ. As an international judicial organ, PCIJ is recognized as a justice (court) that plays an important role in the history of international dispute resolution. The

a) PCIJ is a permanent judicial organ which is governed by the Statute and the Rules of Procedure that was exist and binding on the parties that submit their disputes to the PCIJ.

b) PCIJ has a complete structure permanently registry (registrars), among others and had been appointed as the communication link between the government and the agencies or international organizations.

c) As a judiciary, PCIJ has completed several disputes which have significant value in developing international law. From 1922 to 1940, PCIJ handled 29 cases. Several hundred treaties and conventions contain clauses submission of the dispute to the PCIJ.[26]

d) The Countries have taken advantage of this by subjecting themselves and the problems to the jurisdiction of the PCIJ.

e) PCIJ has the competence to provide legal advice on legal issues or disputes submitted by the Council or the Assembly of League of Nations. During its existence, PCIJ has issued 27 legal advices in the form of an explanation of the rules and principles of international law.

f) PCIJ Statute set out the various sources of law that can be used against the merits of the case submitted to it, including the issues for legal advice. PCIJ are empowered to apply the principle of *ex aequo et bono* if the parties desired.

As stated above, PCIJ is formed by the League of Nations. However, the position of PCIJ is disconnected or is not considered as a part of the League of Nations. There is such a close connection (close relationship) between these two bodies. In fact, the Board periodically is electing the members of PCIJ. The Council right is to seek legal advice from the Court. Similarly, the position of the *Statute* of PCIJ is separated by Covenant League of Nations. Hence, the Covenant of League of Nations members are not automatically a member of the Statute of the PCIJ.

The outbreak of World War II in September 1939 had serious reaction against PCIJ. The war politically has stopped the activities of the Court. The occurrences of this ongoing battle have even made PCIJ be disbanded. In 1942, the Minister of Foreign Affairs of the United States and his colleagues from the United Kingdom dealt to activate and re-establish an international court. In 1943, the British government took the initiative by inviting the experts to come in London to study about the problem. This meeting is a form of a commission, the 'Inter-Allied Committee' led by Sir William Malkin from British. The Commission had issued its report on February 10, 1944. The report makes several recommendations:

a) The necessary to form a new international court based on statute of PCIJ Statute,

c) The new court should not have jurisdiction to force (compulsory jurisdiction).[27]

After several meetings and discussions regarding the establishment of a new court, they are finally managed to reach an agreement on the San Francisco conference in 1945. This conference decided a new International Court will be established and became the main organ under United Nations (UN) corporate. The position of the Court is parallel or equal to the General Assembly, Security Council, Economic and Social Council, the House of Representatives, and the Secretariat. The decision states: "to create an international court of justice in law roommates would be a new entity and not a continuation of the existing Permanent Court". The court must be: 'a new court, with a separate and independent jurisdiction to apply in the relations between the parties to the Statute of that new Court.[28] It also decided that the *Statute* of the Court is an attachment and an integral part of the UN charter. The main reasons for the conference in decide to establish new judicial bodies are:

a) Because the Court will be the major United Nations legal entity, then improper this role is filled by the PCIJ that at that time (in 1945) is no longer active.

b) The establishment of a new court is more consistent with the provisions of the UN Charter that all members are *ipso facto* (automatically) members of the Statute of the Court.

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[27] ICJ. (1986). *The International Court of Justice*. The Haque, 3rd.ed. pp. 16-17.
[28] ICJ Report. (1964). *International Law as Applied by International Courts and Tribunals.* International Judicial Law. London. p. 33

c) Some countries participants in the PCIJ *Statute*, did not participate in the conference San Francisco and *vice versa* several countries participating in the conference is not a party to the Statute of the PCIJ.

d) There is a feeling of a quarter of the conference participants at the time that PCIJ was part of the old order, where the European countries dominate the political and law and the international community that the establishment of a new court will make it easier for countries outside of Europe to play more influential role. These things evident from the significant growing of UN membership from 51 in 1945 to 159 in 1985.[29]

Furthermore, the San Francisco Conference realized that the continuation of the practice and experience of old PCIJ. In particular statute has been going well. Hence, in Article 92 of the UN Charter clearly states that the Statute of the ICJ is a decision-operand (continued) of the Statute of the PCIJ.[30] In the last of PCIJ meeting in October 1945, the meeting was decided to take all necessary actions to transfer files and property to the ICJ (new PCIJ) that will also be based in the Peace Palace The Hague, Netherlands. The first judge meeting of PCIJ held on February 5, 1946. It happened at the same time when the first session of the UN General Assembly took place.

In April 1946, the PCIJ officially was over. At the first meeting of the ICJ, Judge Querrero was elected as the first president of the Court, which also was the

mostly came from the PCIJ. Then the event was on April 18, 1946. Moreover, in Article 92 of the UN's Charter, the legal status of ICJ explicitly stated as the main UN judicial organ. In addition to the ICJ, there are other judicial bodies in the United Nations, the UN Administrative Tribunal. The agency serves as a judicial body that handles disputes over the company's administrative or grammatical between UN employees. Entity status is referred to as 'a subsidiary judicial organ'.

C. The Jurisdiction of International Court of Justice (ICJ) in Settling the Disputes

As mentioned in the second part of this chapter, the jurisdiction of the ICJ falls into two distinct parts: its capacity to decide disputes between States and its capacity to give advisory opinions when requested so to do by particular qualified entities.

1. Contentious Jurisdiction

a) Special agreements (Compromis)

Article 36 (1) of the *Statute* provides that the jurisdiction of the Court comprises all cases that the parties refer to it. [31] Such cases normally come before the Court by notification to the Registry of an agreement known as a special agreement (Compromis) and concluded by the parties especially for this purpose. This method was used in The Corfu Channel Case and in a number of others. In some cases, one or more of the involved parties refuse to accept the jurisdiction of the Court, thus resulting in the Court being ineffective.

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[31] Statute of the International Court of Justice (1945). Op.cit. article 36 (1).

b) Jurisdiction Provided for in Treaties and Conventions

Article 36 (1) of the *Statute* also provides that the jurisdiction of the Court also comprises all matters specially provided for in treaties and conventions in force. The Lockerbie cases aid understanding of this type of jurisdiction.[32] The Lockerbie cases were brought by Libya against the United Kingdom and the United States under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The defendants had claimed that there was no dispute between the parties concerning the interpretation or application of the Montreal Convention as demanded by Article 14,[33] however, if at all, only between the applicant and the Security Council on the effects of the Security Council resolutions (SC Resolutions) 748 in 1992 and 883 in 1993. In the opinion of the Court, however, several disputes existed between the parties concerning the Montreal Convention: first, on the Convention's applicability to the present case (a jurisdiction which the Court calls "general"). The Second is; on the alleged right of Libya itself to prosecute its nationals (Article 7) and third, on the alleged lack of assistance by the respondents to the Libyan prosecution (Article 11). On a vote of 13 votes to three, the Court upheld its jurisdiction.[34] By maintaining ICJ jurisdiction, the judgment conceals rather than unfolds the disagreements within the Court on the impact of the SC Resolutions.

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[32] Andreas L. Paulus. (1998). *Jurisprudence of the International Court of Justice*, Lockerbie Cases: Preliminary Objections.

[33] Convention for the Suppression of Acts Against the Safety of Civil Aviation (Sabotage), (23 Septembet 1971), article.14.

According to a broad interpretation of the judgment, the relationship between the Montreal Convention and the subsequent SC Resolutions is a matter within the jurisdiction of the Court. Another narrower reading is provided by Judges Fleischhauer and Guillaume in their joint declaration: it states that ICJ jurisdiction extends only to the interpretation and application of the Montreal Convention and not to the SC Resolutions. The latter view seems more in line with the treaty-based jurisdiction of the Court in the present case; it would considerably limit judicial review of resolutions of the Security Council by the Court. It has become apparent that there is no agreement within the Court as to whether its jurisdiction is limited to a pronouncement on the rights and duties of the parties pursuant to the Montreal Convention itself, or whether it also enables the Court to decide on the relationship between the Convention and subsequent Security Council resolutions. By a narrow margin, the Court seems to favor the second option.

c). Declarations Accepting the Compulsory Jurisdiction of the Court ("Optional Clause" System)

A third means of consent to the Court's jurisdiction is described in paragraphs 2 and 3 of Article 36 of the Statute. Paragraph 2 provides that:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established,

nature or extent of the reparation to be made for the breach of an international obligation."

Article 36 (3) of the *Statute* provides that the declarations referred to in paragraph 2 above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

A total of 63 States have recognized the compulsory jurisdiction of the Court (with or without reservations). Besides the limited number as compared with the number of the States that are parties to the Statutes are 187 states in 1995, matters are further complicated by reservations to the acceptance of compulsory jurisdiction, which serve to limit their scope. Among those reservations, there are two reservations that are considered as the ones important. One relates to other methods of pacific settlement and is found in 33 declarations. The other relates to matters of domestic jurisdiction and is found in 23 declarations. These two reservations correspond to Article 95 and Article 2(7) of the United Nations Charter. The declarations are made for a specific period, generally for five years with tacit renewal as a rule and usually provide for the declarations to be terminated by simple notice, the notice to take effect after a specified time or immediately. For instance, in 1985, the United States withdrew its acceptance of the ICJ's jurisdiction.

A good illustration of jurisdiction by declaration is the Fisheries Jurisdiction Case. On December 4, 1998, the ICJ ruled 12 (5) that it lacked jurisdiction to adjudicate the dispute brought by the Kingdom of Spain

the declarations made by the two parties in accepting the Court's compulsory jurisdiction under Article 36(2) of the ICJ Statute. Canada challenged the Court's jurisdiction, invoking a reservation contained in its 1994 declaration excluding from jurisdiction "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area". The Court agreed with Canada that the words of an Optional Clause declaration, including a reservation contained in it, must be interpreted in a natural and reasonable way, having due regard to the intention of the State making the reservation at the time when it accepted the Court's compulsory jurisdiction. Such state's intention, in turn, may be deduced not only from the text of the relevant clause, but also from its context, the circumstances of its preparation and the purposes intended to be served.

The Court rejected Spain's argument that Canada's reservation should be interpreted in accordance with the legality under international law of the matters sought to be exempted from the Court's jurisdiction, which matters in Spain's view violated international law by involving the use of force on the high seas against a Spanish vessel. The Court explained that there is a fundamental distinction between a State's acceptance of the Court's jurisdiction and the compatibility of particular acts with international law. The latter is a question that can be addressed only once

offering its interpretation of Canada's reservation, the Court held the reservation's purpose was to prevent it from exercising jurisdiction over matters that might arise with regard to the international legality of Canadian legislation and its implementation. Unfortunately, the ICJ could not proceed to the merits of this case because it lacked jurisdiction.

2. Advisory Jurisdiction (Advisory Opinion)

The Court is authorized by Article 65 of the Statute to give advisory opinions on any legal questions at the request of whatever body may be authorized by the UN Charter to make such a request. According to UN's Charter Article 96, the General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question.[35] Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.[36] In one case involving the request for an advisory opinion by the World Health Organization (WHO) on the legality of the use of nuclear weapons by a State during armed conflict (the WHO Opinion Case),[37] the court held that three conditions must be satisfied in order to find that the Court has advisory jurisdiction: first, the agency request that the opinion must be duly authorized under the Charter to request opinions from the Court; second, the opinion requested must be on a legal question; and third,

[35] Charter of the United Nations (June 26, 1945), article. 96 (1).
[36] Ibid., art. 96 (2).

this question must be one arising within the scope of the activities of the requesting agency. This three-prong test is a further explanation of the Article 96 of the UN Charter. From the Court's point of view, none of WHO's functions, as provided in Article 2 of the WHO Constitution, had a sufficient connection with the question before it for that question to be capable of being considered as arising "within the scope of the activities" of the WHO. The ICJ again lost an opportunity to explain or even develop international law.

Moreover, the ICJ is an independent subsidiary organ of the United Nations by referral through a *compromis* (special agreement) between two or more states, by a treaty provision committing disputes arising under the treaty to the court, or by the parties' statements of compulsory jurisdiction.[38] Under Article 38 of the Statute of the International Court of Justice (Statute), when deciding cases "in accordance with international law," the court applies the following sources of law:

a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b) International custom, as evidence of a general practice accepted as a law;

c) The general principles of law recognized by civilized nations;

d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Furthermore, if the parties agree, the court may decide a case under Equity principles, *ex aequo et bono* (equitable and good). Territorial claims before the ICJ usually fall within one of the above four categories. Treaty claims are the easiest to assert, because the existence of a treaty is easier to prove than the existence of customary international law, which requires evidence of state practice and *opinio juris* (state behavior result from a sense of legal obligations), or the existence of the highly enigmatic general principles of law "recognized by civilized nations". However, in the absence of treaties, litigants must resort to claims based on the other three international law categories and to non-legal or political claims. Among the several categories into which scholars classify these justifications, the most common nine are treaties, geography, economy, culture, effective control, history, *uti possidetis*, elitism, and ideology. Although several claims may cross lines between categories, this Note attempts to place claims in the category that best describes the underlying justification for sovereignty.

For example, the case of *sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, in 1998 Indonesia and Malaysia, by special agreement, asked the ICJ "to determine on the basis of the treaties,

over the islands of *Ligitan* and *Sipadan*, off the coast of Borneo.[39] The parties presented arguments based on treaty law, *uti possidetis*, effective control, and history. The court began its analysis with the 1891 British-Dutch Convention and found that it did not address the boundary in question. Lacking a treaty law basis for its decision, the court turned first to subsequent agreements between Great Britain and the Netherlands, and then to the parties' subsequent practice, in an unsuccessful attempt to understand the parties' mutual intent. The court then examined the competing claims of *effectivités* as an independent basis for the judgment and held that Indonesia's claimed *effectivités* were not of a "legislative or regulatory character," rendering them unpersuasive. The court considered, however, that Malaysia's regulation of the commercial collection of turtle eggs and establishment of a bird sanctuary on the islands were sufficiently administrative to demonstrate effective control. The court thus found the *effectivités* arguments a sufficient basis for its decision.

Another good example in Territorial dispute handled by ICJ is *Minquiers and Ecrehos (France/United Kingdom)* by special agreement, France and the United Kingdom submitted their dispute over the sovereignty of the Minquiers and Ecrehos island groups, located in the English Channel between Jersey (U.K.) and the French mainland to the ICJ. The parties made arguments based on treaty law, history, and effective control. The court rejected all arguments based on feudal land grants and

fisheries agreements, all of which antedated 1648,[40] because none specified a border or "which islands were held by the Kings of England and France respectively". Judge Basdevant, writing a separate opinion, concurred: "Suzerainty . . . is not sovereignty," noting the important distinction that the court implicitly made in dismissing claims based ambiguously on feudal titles. In the absence of a valid treaty claim, the court considered the effective control arguments and found that the British government exercised sovereign jurisdiction and local administration over Minquiers and Ecrehos through such acts as judicial proceedings, local ordinances regarding the handling of corpses, levying taxes, licensing commercial boats, registering deeds to real property and conducting census enumerations and customs affairs. Thus, the court awarded the territory to the United Kingdom.

[40] the Treaty ended the Eighty Years' War and part of the Thirty Years' War. Retrived December