

The Statute of the International Court of Justice

A Commentary

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Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Lorsqu'un traité ou une convention en vigueur prévoit le renvoi à une juridiction que devait instituer la Société des Nations ou à la Cour permanente de Justice internationale, la Cour internationale de Justice constituera cette juridiction entre les parties au présent Statut.

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A. Introduction

One may wonder about the practical implications of Art. 37 today, almost 60 years after 1 the disappearance of the League of Nations and the establishment of the ICJ. Certainly, one may think, all issues relating to Art. 37 and the consequences of the transition from the old Court to the new Court should have been dealt with by now, and it will be unlikely for a case involving Art. 37 to still come before the Court. Yet, Art. 37 remains relevant today for at least two reasons.

First, a large number of conventions and treaties containing jurisdictional clauses 2 referring to the PCIJ are still in force and can be invoked to establish the Court's

jurisdiction. The precise number of pre-1945 treaties and conventions conferring jurisdiction on the PCIJ is difficult to determine. The UN database does list treaties entered into during the League of Nations period,¹ but it does not specify which of these treaties actually conferred jurisdiction upon the PCIJ. The ICJ Yearbook, in the very first years of its publication, referred to 'the peace treaties . . . and a number of other international agreements . . . that were concluded before 1945, contain[ing] clauses conferring jurisdiction in case of disputes on the former PCIJ'.² The Yearbook, however, does not provide a list of such instruments but refers the reader to 'Collection of Texts Governing the Jurisdiction of the Court'³ and to Chapter X of Series E of the publications of the PCIJ. The purpose of Chapter X of each Series E volume is to provide a yearly update of the list contained in the Collection, with the caveat that such updated list 'does not claim to be absolutely complete or accurate'.⁴ In its Third Part, each Chapter X lists instruments recently entered into which confer jurisdiction on the Court. In order to have the complete list, however, one would have to consult the Collection of 1932 as well as all the addenda included in Series E from 1932 until 1945.⁵ Not only would this be a considerably time-consuming task but it would also fail to indicate which of these treaties are still in force today. For this reason, the following commentary merely points to available sources of reference, such as those mentioned in this paragraph, without attempting to list all instruments presently falling within the scope of Art. 37.

- 3 In addition, Art. 37 has raised, and continues to raise, important issues such as the question of the meaning of the words 'in force' (which is also relevant to other articles of the Statute),⁶ the consequences of a declaration made under the optional clause on an earlier treaty clause, or the question of the status of the 1928 General Act for the Pacific Settlement of International Disputes⁷—to mention only a few examples.

B. History and Purpose of the Provision

- 4 At the UN Conference on International Organization, the Committee of Jurists established a Sub-Committee (IV/1) in charge of Arts. 1 and 37 of the Statute and, specifically, of the question of the relationship between the new Court and the PCIJ.⁸ At the time Art. 37 was being drafted by the Committee of Jurists, two views prevailed as to what the relationship between the PCIJ and the newly established Court ought to be. Was the new Court to be considered a continuation of the old Court, in which case international instruments conferring jurisdiction on the old Court would retain their legal force;⁹ or as a completely new Court, with the former one disappearing, and the said provisions to be considered null and void?¹⁰ In its report, the Sub-Committee chose the former option and recommended that the Court be a new institution. It proposed

¹ Available at [http://157.150.195.4/LibertyIMS:/anon/Command=\\$73FAKzKIP6HTAUHrj;XJo0Lg9=S1WUHR1.Xtk](http://157.150.195.4/LibertyIMS:/anon/Command=$73FAKzKIP6HTAUHrj;XJo0Lg9=S1WUHR1.Xtk).

² ICJ Yearbook (1947–1948), p. 36.

³ PCIJ, Series D, No. 6.

⁴ Cf. e.g. PCIJ, Series E, No. 8, pp. 438 *et seq.*

⁵ For information, the first addendum to the 1932 Collection is published in Series E, No. 8 which contains additional information on instruments conferring jurisdiction to the Court obtained between 31 January and 15 June 1932. The ninth and last addendum to the Collection is published in Series E, No. 16, pp. 329 *et seq.*

⁶ Namely Arts. 35 and 36: cf. *infra*, MN 19.

⁷ General Act for the Pacific Settlement of International Disputes, 26 September 1928, LNTS 93, pp. 345–363.

⁸ UNCIO, vol. XIII, p. 175.

⁹ UNCIO, vol. XIV, p. 637 (Draft Report of the Special Rapporteur, Professor Basdevant).

¹⁰ *Ibid.*; and cf. also *South West Africa cases* (Ethiopia/South Africa; Liberia/South Africa), Preliminary Objections, Sep.Op. Jessup, ICJ Reports (1962), pp. 387, 415.

however a draft of Art. 37, close to the text of today's provision, which it viewed as embodying the ideas that the new Court would be a continuation of the old Court and that jurisdictional clauses dating from the old Court would be preserved.¹¹

To avoid any possible doubt on this interpretation of Art. 37, the ICJ later reaffirmed such interpretation in the *Barcelona Traction case*.¹² In its analysis of Spain's second preliminary objection, the Court restated the intention of the drafters that the purpose of Art. 37 was to ensure the preservation of conventional clauses transferring jurisdiction to the PCIJ by 'automatically' conferring such competence on the ICJ as between the parties to its Statute.¹³ The Court reiterated that Art. 37 was meant to ensure continuity between the old Court and the new Court: 'What was created was a new Court, with a separate and independent jurisdiction to apply in the relations between the parties to the Statute of that new Court'.¹⁴ The specific effect of Art. 37 was the 'reactivation, in relation to the [ICJ], of any jurisdictional clauses referring to the PCIJ, in treaties still in force, by which [the States] were bound'.¹⁵ In his separate opinion, Judge Tanaka compared Art. 37 to a legislative measure designed to effect a smooth transfer of jurisdiction between the old and the new Court.¹⁶ The Court thus reaffirmed that the intention of the drafters was to preserve such jurisdictional clauses from the demise of the League of Nations (which otherwise would have resulted in their extinction).¹⁷ Any other interpretation of Art. 37, the Court said, would run counter to the very purpose of the Article as it was intended by its drafters.

The actual wording of Art. 37 was the object of only limited discussion at the San Francisco Conference. There were few amendments to the draft text proposed by the Sub-Committee,¹⁸ and the text of the article evolved only slightly over the course of the debates. One notable suggestion was to refer not only to 'any institutions established by the League of Nations' but also to the PCIJ specifically, to make clear that the newly created Court would be the designated jurisdiction whenever a treaty refers to the PCIJ. This is why Art. 37 reads: 'provides for reference of a matter to a tribunal to have been instituted by the League of Nations or to the Permanent Court of International Justice'.¹⁹ Although it was suggested that more details on the PCIJ should be provided by adding 'established by the Protocol of December 16, 1920, amended 14 September 1929', this proposition was not retained in the final draft.²⁰ The Sub-Committee further suggested that Art. 37 should apply only to treaties entered into between parties to the Statute.²¹ Eventually, the Sub-Committee decided to delete this

¹¹ Cf. UNCIO, vol. XIII, pp. 524 *et seq.*, 528.

¹² For a detailed overview of the case, cf. *ibid.*, vol. II, pp. 682 *et seq.*

¹³ *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium/Spain)*, Preliminary Objections, ICJ Reports (1964), pp. 6, 31–32. In its judgments of 15 December 2004 on preliminary objections in the two *Legality of the Use of Force cases* between Serbia and Montenegro and Belgium on the one hand, and Serbia and Montenegro and the Netherlands on the other (both available at <http://www.icj-cij.org>), the Court confirmed this approach by observing that the effect of Art. 37 'is that the parties to such a treaty, by becoming parties to the Statute, agree that the reference in their treaty to the Permanent Court shall be read as a reference to the present Court' (para. 123 of the judgment in the case brought against the Netherlands and para. 124 of the case brought against Belgium). On the fact that Art. 37 does not operate as a general substitution, but only between the parties to the Statute, cf. Fitzmaurice, *Law and Procedure*, vol. II, p. 563.

¹⁴ *Barcelona Traction*, Preliminary Objections, *supra*, fn. 13, pp. 6, 32, 33.

¹⁵ *Ibid.*, pp. 6, 32, 36.

¹⁶ *Ibid.*, Sep.Op. Tanaka, pp. 65, 73.

¹⁷ *Ibid.*, pp. 6, 32, 34; and cf. also the judgments in the two *Kosovo cases*, *supra*, fn. 13.

¹⁸ Cf. *supra*, fn. 11.

¹⁹ UNCIO, vol. XIV, p. 637 (emphasis added).

²⁰ UNCIO, vol. XIII, pp. 517 *et seq.*; UNCIO, vol. XIV, pp. 524 *et seq.*

²¹ UNCIO, vol. XIII, pp. 175 *et seq.*; UNCIO, vol. XIV, pp. 524 *et seq.*

limitation and to refer to all treaties so as to avoid having to renegotiate a number of treaties in order to refer cases to the new Court.²² Instead the limitation was inserted into the last part of the article which was approved by the Committee as stating: 'the matter shall, *as between parties to the present Statute*, be referred to the International Court of Justice'.²³

C. Analysis

I. The Court's Jurisprudence

1. General overview

- 7 Article 37 has been invoked 16 times before the Court. The first contentious case in which the provision was invoked was *Ambatielos* (1952) though the Court declined jurisdiction.²⁴ Following *Ambatielos*, Art. 37 was invoked as a basis for jurisdiction in 15 other cases, the most recent being the two *Kosovo cases* brought by Serbia and Montenegro against Belgium on the one hand, and the Netherlands on the other.²⁵ As is clear from its text, Art. 37 is not self-sufficient and must be invoked in conjunction with another treaty or convention.²⁶ However, the type of treaties invoked in conjunction with Art. 37 does not follow a specific pattern; in fact all sorts of treaties have been relied upon, among them commercial treaties or treaties whose very purpose is to provide means of dispute settlement between the parties thereto.

One treaty in particular has been repeatedly invoked as a basis for jurisdiction in connection with Art. 37, namely the 1928 General Act for the Pacific Settlement of International Disputes.²⁷ Yet, for reasons which will be examined below,²⁸ the Court did not accept jurisdiction on the basis of the General Act and Art. 37 in any of the five cases which came before it on that ground (*Norwegian Loans*, *Preah Vihear*, *Nuclear Tests*, *Aegean Sea Continental Shelf* and *Aerial Incident of 10 August 1999*).

In the following cases, Art. 37 was relied upon in conjunction with certain other treaties or conventions:

- the 1920 Mandate for (former German) South West Africa²⁹ in the *South West Africa* advisory opinion requested by the UN General Assembly (1950);
- the 1920 Mandate for (former German) South West Africa in the *South West Africa cases* (Ethiopia/South Africa; Liberia/South Africa) (1962);
- the Treaty of Commerce and Navigation between Great Britain and Greece of 1926³⁰ in *Ambatielos* (1952);
- the Franco-Siamese Treaty of 1937³¹ and the Settlement Agreement of 1946³² (along with the General Act) in *Temple of Preah Vihear* (1960);

²² UNCIÓ, vol. XIII, pp. 459 *et seq.*, p. 460. ²³ *Ibid.*, emphasis added.

²⁴ *Ambatielos case* (Greece/United Kingdom), Order, ICJ Reports (1952), pp. 89 *et seq.*

²⁵ *Cf. supra*, fn. 13. ²⁶ Rosenne, *Law and Practice*, vol. II, p. 680.

²⁷ *Cf. Case concerning the Aerial Incident of 10 August 1999* (Pakistan/India), Jurisdiction, Sep.Op. Oda, ICJ Reports (2000), pp. 36 *et seq.*, for a history of the drafting of the Act.

²⁸ *Infra*, MN 10 *et seq.*

²⁹ 1920 Mandate for German South West Africa, 17 December 1920, British and Foreign State Papers 113, pp. 1109 *et seq.*

³⁰ Treaty of Commerce and Navigation, 30 November 1926, Great Britain-Greece, LNTS 61, pp. 109 *et seq.*

³¹ Franco-Siamese Treaty, 7 December 1937, France-Thailand, LNTS 201, pp. 113 *et seq.*

³² Settlement Agreement, 17 November 1946, France-Thailand, UNTS 344, pp. 59 *et seq.*

- the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration of 1927³³ in *Barcelona Traction* (1964);
- the Convention on International Civil Aviation and the International Air Services Transit Agreement of 1944³⁴ in *ICAO Council* (1972); and
- the Convention on Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia of 1930³⁵ and the Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of Yugoslavia and the Netherlands of 1931³⁶ in the *Legality of the Use of Force cases* (Serbia and Montenegro/Belgium and Serbia and Montenegro/Netherlands) (1999 and 2004).

In two cases—*Aerial Incident of 27 July 1955* (1957) and *Military and Paramilitary Activities in and against Nicaragua* (1986)—the Court referred to Art. 37 merely for purposes of comparison with Art. 36, para. 5, but did not apply it to the case at hand. We refer to these cases because the Court's analysis is helpful in understanding the purpose and implications of Art. 37.³⁷ Finally, it is worth noting that the Court upheld jurisdiction on the basis of Art. 37 in only three cases, namely *South West Africa* (1962), *Barcelona Traction* (1964), and *ICAO Council* (1972).

2. Trends

What the study of these cases shows is that the Court is reluctant to uphold jurisdiction on the basis of Art. 37. In most cases involving Art. 37, the applicant invoked the Court's jurisdiction on a number of grounds, including a declaration of acceptance on the basis of the optional clause (often as the primary basis for jurisdiction) and a treaty or convention, invoked in conjunction with Art. 37 (often as a secondary or alternative basis for jurisdiction). Because of the structure of the applicant's argument, the Court generally accepted jurisdiction on the basis of the optional clause, without having to address the alternative or secondary grounds invoked by the applicant.

This, for instance, is what happened in the *Temple of Preah Vihear case*.³⁸ Cambodia had based jurisdiction primarily on an optional clause declaration and, alternatively, on Art. 37 (in conjunction with three international instruments, including the 1928 General Act).³⁹ The Court upheld jurisdiction on the first ground without judging the validity of the alternative ground, namely Art. 37. Similarly, in the *Norwegian Loans case*, the parties had raised—albeit at a later stage⁴⁰—the possibility that the 1928 General Act was binding upon them, thereby granting the Court jurisdiction over the dispute. The Court dealt only with the jurisdictional basis of Art. 36, para. 2 and declined to address France's argument referring to the General Act and Art. 37.⁴¹ Choosing the appropriate

³³ Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, Spain-Belgium, 19 July 1927, LNTS 80, pp. 113 *et seq.*

³⁴ Convention on International Civil Aviation and the International Air Services Transit Agreement, 7 December 1944, UNTS 84, pp. 389 *et seq.*

³⁵ Convention on Conciliation, Judicial Settlement and Arbitration, 25 March 1930, Belgium-Kingdom of Yugoslavia, LNTS 106, pp. 343 *et seq.*

³⁶ Treaty of Judicial Settlement, Arbitration and Conciliation, 11 March 1931, Kingdom of Yugoslavia-Netherlands, LNTS 129, pp. 89 *et seq.*

³⁷ On the relationship between the two provisions *cf.* further *infra*, MN 21–29.

³⁸ *Case concerning the Temple of Preah Vihear* (Cambodia/Thailand), Preliminary Objections, ICJ Reports (1961), pp. 17 *et seq.*

³⁹ *Cf. supra*, fn. 31 and 32 for references.

⁴⁰ France referred to the General Act in its submissions on Preliminary Objections. It then mentioned it during oral pleadings, and so did Norway. Nevertheless, the Court refused to take the General Act into consideration.

⁴¹ *Case of Certain Norwegian Loans* (France/Norway), ICJ Reports (1957), pp. 9 *et seq.*

jurisdictional ground, the Court declared in that case, is a matter for its discretion.⁴² The Court made use of this discretion again in the *Aegean Sea Continental Shelf* case: by holding that the dispute was one which related to the territorial status of Greece within the meaning of the Greek reservation to the 1928 General Act, and therefore one which was excluded from the application of the Act, the Court avoided deciding on the applicability of Art. 37.⁴³ Finally, as recently as in 2000, the Court again avoided deciding the issue of the status of the General Act (and therefore of the applicability of Art. 37) in the *Aerial Incident* case (Pakistan/India). The Court held that the General Act had been denounced by India at the time of the initiation of the proceedings and was therefore inapplicable.⁴⁴ As a result, the Court held that there was no need for it to address the status of the Act and Art. 37.

11 Thus, when it has a choice between different jurisdictional grounds on which to take on a case, the Court prefers to uphold jurisdiction on a ground *other than* Art. 37.⁴⁵ Looking at the case law as a whole and at the broad range of justifications used by the Court to refute Art. 37 claims, it appears that the Court is simply unwilling to uphold such claims. In most cases, the Court does not even address the parties' contentions relating to Art. 37 and simply states that it need not deal with the other jurisdictional grounds invoked by the applicant. As a result of the Court's repeated neglect of arguments relating to Art. 37, judges have come to examine such arguments in separate or dissenting opinions, in which most of the law and practice on Art. 37 can be found. This is the case for example in the *Norwegian Loans* case (dissenting opinion of Judge Basdevant)⁴⁶ and the *Nuclear Tests* cases (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock).⁴⁷

12 The reason for the Court's reluctance to uphold claims based on Art. 37 may lie in the fact that Art. 37 is to be invoked in connection with treaties dating back to the League of Nations era, which the Court must then interpret and place in their historical and legal context.⁴⁸ It is somehow unsurprising that rather than subjecting itself to such a delicate exercise, the Court prefers to base its jurisdiction on more recent and more specific optional clause declarations—or simply to deny jurisdiction.

Another reason for the Court not to uphold claims on the basis of Art. 37 may be, as the Court stated in *Barcelona Traction* (Preliminary Objections) in 1964, that any decision relative to Art. 37 'must affect a considerable number of surviving treaties and

⁴² *Case of Certain Norwegian Loans* (France/Norway), ICJ Reports (1957), pp. 9, 25.

⁴³ *Aegean Sea Continental Shelf* (Greece/Turkey), ICJ Reports (1978), pp. 3, 17 (para. 40).

⁴⁴ *Supra*, fn. 27, pp. 12, 15 (para. 26) and 16 (para. 28).

⁴⁵ The Court's recent judgments in the two *Kosovo* cases (Serbia and Montenegro/Belgium) (Serbia and Montenegro/Netherlands), *supra*, fn. 13, confirm this trend. There, the Court again succeeded in avoiding the question of whether the treaties invoked by Belgium and the Netherlands as bases for jurisdiction were in force. Because Serbia and Montenegro was not a party to the Statute at the time it instituted the proceedings, it did not have access to the Court at that time, and thus the treaties could not provide a basis for the Court's jurisdiction. As a result, the Court held, there is no need 'to pronounce on the question whether the [Treaty] was or was not in force at that date' (*cf.* paras. 124–125 of the judgment in the case brought against the Netherlands and paras. 125–126 of the case brought against Belgium).

⁴⁶ *Norwegian Loans*, *supra*, fn. 41, pp. 71 *et seq.*

⁴⁷ *Nuclear Tests* case (Australia/France), ICJ Reports (1974), pp. 312 *et seq.*; *Nuclear Tests* case (New Zealand/France), ICJ Reports (1974), pp. 494 *et seq.*

⁴⁸ *Cf.* Rosenne, *Law and Practice*, vol. II, p. 684, in his analysis of the Court's decision in *Aerial Incident* (Israel/Bulgaria): 'The Court therefore subjected Art. 37 to independent examination, based on the historical setting of Art. 37, its text, its relation to the general theory of the consensual basis for jurisdiction, and its application to the particular treaty in question'.

conventions providing for recourse to the Permanent Court' and that any decision of the Court, 'whatever it might be, would be liable to have far-reaching effects'.⁴⁹ Fourteen years later, the Court still felt that 'any pronouncement of the Court as to the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey'.⁵⁰ This is still true today, as many treaties and conventions having conferred jurisdiction to the PCIJ are still in force.

Finally, the Court's abstention *vis-à-vis* the 1928 General Act may well have to do with the Act itself. At the time of its adoption, the General Act was criticized as being a repetition of Art. 36 of the Statute of the PCIJ, and therefore for not adding anything significant to the international system of dispute settlement already in existence. In addition, the General Act provides that it applies only when the parties have not agreed otherwise.⁵¹ For these reasons, it was feared that the General Act would complicate things.⁵² This somewhat unenthusiastic reception may, to a certain extent, explain the reluctance of the Court to rely on it.

In any event, given the Court's tendency to deny jurisdiction on the basis of Art. 37, applicants to the Court may be advised to invoke Art. 37 merely as an alternative or secondary basis for jurisdiction, and to refrain from invoking Art. 37 in connection with the 1928 General Act.⁵³

3. Cases dealing with the 1928 General Act

Cases dealing with the 1928 General Act and Art. 37 were thoroughly analysed by J.G. Merrills, in an article published in 1980.⁵⁴ At the time that article was written, the ICJ had declined to exercise jurisdiction in all four cases where Art. 37 had been invoked in conjunction with the General Act, namely *Norwegian Loans*, *Preah Vihear*, *Nuclear Tests*, and *Aegean Sea Continental Shelf*. Since then, the General Act has been invoked again in the *Aerial Incident case* (Pakistan/India) and the Court once more declined to pronounce on the validity of the Act. The Court's attitude *vis-à-vis* the General Act thus having remained the same since 1980, we can refer the reader to the article by J.G. Merrills for a more detailed analysis of the earlier cases relating to the General Act.

II. Interpretation of 'Treaty or Convention in Force'

One of the conditions for the application of Art. 37, as stated by the Court itself in the *Barcelona Traction case*, is that the treaty or convention conferring jurisdiction on the PCIJ be 'in force'.⁵⁵ This requirement raises a number of issues, the most important of which will be addressed here.

⁴⁹ *Barcelona Traction*, Preliminary Objections, *supra*, fn. 13, pp. 6, 29.

⁵⁰ *Aegean Sea Continental Shelf*, *supra*, fn. 43.

⁵¹ Article 29 of the General Act reads as follows: '1. Disputes for the settlement of which a special procedure is laid down in other conventions in force between the parties to the dispute shall be settled in conformity with the provisions of those conventions. 2. The present General Act shall not affect any agreements in force by which conciliation procedure is established between the Parties or they are bound by obligations to resort to arbitration or judicial settlement which ensure the settlement of the dispute. If, however these agreements provide only for a procedure of conciliation, after such procedure has been followed without result, the provisions of the present General Act concerning judicial settlement or arbitration shall be applied in so far as the parties have acceded thereto'.

⁵² Gallus, *RDI* 9 (1931), pp. 377, 389 and 392; and *id.*, *Rev. de droit internat. et de lég. comp.* 57 (1930), pp. 190, 230.

⁵³ *Cf.* Johnson, pp. 310, 327.

⁵⁴ Merrills, pp. 137 *et seq.*

⁵⁵ *Barcelona Traction*, Preliminary Objections, *supra*, fn. 13, pp. 6, 32. On pp. 32-33, the Court interpreted Art. 37 as setting forth three conditions: (1) the treaty or convention must be 'in force', (2) the matter

The first question arising in relation to the meaning of 'in force' is whether the requirement applies only to the jurisdictional clause or to the treaty as a whole. Back in 1950, the Court held that Art. 7 of the mandate of 17 December 1920 for South West Africa was still in force and that South Africa was bound by the compulsory jurisdiction of the Court resulting from such article and Art. 37 of the Court's Statute.⁵⁶ The Court did not expressly say that the mandate as a whole was a treaty in force: it simply declared that Art. 7 of the mandate was in force and applied Art. 37 accordingly.⁵⁷ What may have created some doubts as to the actual scope of Art. 37 was later settled by the Court in the *Barcelona Traction case*. In that case, the Court made clear that the expression 'in force' relates to the treaty as a whole and not just to the jurisdictional clause.⁵⁸ The Court justified this interpretation by saying that jurisdictional clauses do not exist independently of a treaty. According to the Court, the only extent to which the clause itself should be 'in force' relates to potential causes of extinction. In particular, the Court held that the demise of the League of Nations could not cause the clause to cease to be 'in force', since the purpose of Art. 37 was precisely to maintain jurisdictional clauses in spite of the demise of the League of Nations:

[I]f the 'dissolution argument' were correct, many, or possibly even most, of the jurisdictional clauses concerned would have fallen outside the scope of Art. 37, a result which must have been contrary to what those who framed this provision intended.⁵⁹

Therefore, the treaty (and the jurisdictional clause) remained 'in force' in spite of the disappearance of the League. In short, the jurisdictional clause is inseparable from the treaty itself: if the treaty is still in force, the jurisdictional clause is still operative—and there could be no independent cause of extinction of the jurisdictional clause brought about by the demise of the League of Nations. It is important to note that even a suspension of a treaty does not 'per se render jurisdictional clauses inoperative'.⁶⁰

17 In spite of the Court's efforts to deal with it at length in the *Barcelona Traction case*, the question of the meaning of 'in force' arose again in the *Nuclear Tests case*. France had argued that the General Act and the League of Nations were so closely related that the General Act could not have remained in force following the demise of the League. In response, New Zealand referred to other dispute settlement treaties which had remained in force in spite of the demise of the League of Nations, such as the Franco-Spanish Treaty of Arbitration of 1929 which provided a basis of jurisdiction in the *Lac Lanoux* arbitration;⁶¹ and the Hispano-Belgian Treaty of Conciliation Judicial Settlement and Arbitration of 1927⁶² which had done so in the *Barcelona Traction case*. However, the Court did not address any of the arguments raised by Australia and New Zealand regarding Art. 37 since it declared the claim to be without object.⁶³

must have been referred to a tribunal instituted by the League of Nations or to the PCIJ itself, and (3) the dispute should be between States both of which are parties to the ICJ Statute. Expressly referring to the *Barcelona Traction case*, the Court affirmed these conditions in its judgments in the *Kosovo cases* (*supra*, fn. 13, at paras. 124 and 125 respectively). For further analysis of the conditions set out by the Court *cf.* also Rosenne, *Law and Practice*, vol. II, p. 687.

⁵⁶ *International Status of South West Africa*, Advisory Opinion, ICJ Reports (1950), pp. 128, 138.

⁵⁷ Pursuant to Fitzmaurice (*Law and Procedure*, vol. II, p. 564), 'there is not doubt that [the Court] did so regard the Mandate as a whole'. *Cf.* also Rosenne, *Law and Practice*, vol. II, p. 682.

⁵⁸ *Barcelona Traction*, Preliminary Objections, *supra*, fn. 13, pp. 6, 33. ⁵⁹ *Ibid.*, pp. 6, 34.

⁶⁰ *Appeal Relating to the Jurisdiction of the ICAO Council* (India/Pakistan), ICJ Reports (1972), pp. 46, 53 (para. 16).

⁶¹ *RIAA*, vol. XII, pp. 281 *et seq.*

⁶² *Cf. supra*, fn. 33.

⁶³ ICJ Reports (1974), pp. 253, 268–272 (paras. 48–49) and pp. 457, 473–477 (paras. 50–62) respectively.

Another question arises as to the date on which the treaty or convention ought to be 'in force'. The expression 'treaties in force' also appears in Arts. 35 and 36.⁶⁴ But according to Rosenne, the expression may have a different meaning from one article to another.⁶⁵ With regard to Art. 37, Rosenne considers that the question is not merely whether the treaty is still in force:

[b]ut whether the modification of that treaty which Article 37 implies operates not as between the parties to that treaty in general, but as between the parties to the litigation when it is invoked as part of the title of jurisdiction in the concrete case, and if so what is the temporal scope of that modification in the event that one or both of the parties to the treaty became bound by Article 37 only after the dissolution of the Permanent Court on 18 April 1946.⁶⁶

Thus, Rosenne analyzes the requirement that the treaty be 'in force' principally as a temporal condition that the treaty must have remained valid following the demise of the League of Nations. For his part, Fitzmaurice interprets the requirement of Art. 37 as a two-pronged test. First, the treaty itself must be in force. Second, it has to be in force for the parties to the dispute, in the sense 'that they have not withdrawn from their participation in the treaty'.⁶⁷ The difficulty with respect to Art. 37, unlike Arts. 35 and 36, therefore is not so much the interpretation to be given to the expression 'in force', but rather, to determine whether events subsequent to the entry into force of the treaty have caused such treaty—and its jurisdictional clause—to lapse.

Yet another question concerns the precise date on which the legal force of the treaty is to be assessed. This matter has to be addressed in relation to both Art. 35, para. 2, and Art. 37. The Court's jurisprudence however suggests that the two provisions may have to be interpreted rather differently. As the Court observed in its judgments in the *Kosovo cases*, the expression 'treaties in force' could be construed in two ways: first, 'as referring to treaties which were in force *at the time that the Statute itself came into force*'; and second, as referring to treaties 'which were in force *on the date of the institution of the proceedings* in a case in which such treaties are invoked'.⁶⁸ While the former reading applied in relation to Art. 35, para. 2,⁶⁹ the Court clarified that for the purposes of Art. 37, the date of the institution of proceedings was relevant.⁷⁰

The difficulty of determining whether a treaty is still 'in force' is well illustrated by the cases relating to the General Act. As mentioned above, the question of the Act's status directly or indirectly came before the Court a number of times. However, the Court never actually settled the question whether the 1928 General Act is still in force.⁷¹ The status of the Act is a matter of contention because the Act was revised in 1949, and the New Revised General Act came into force two years later. General Assembly Resolution

⁶⁴ On the meaning of 'in force' in Art. 35, para. 2 *cf.* Zimmermann on Art. 35 MN 58 *et seq.*, and further Yee, pp. 884 *et seq.* On the meaning of 'in force' in Art. 36 *cf.* also Rosenne, *Law and Practice*, vol. II, p. 661; and more generally Tomuschat on Art 36 MN 46 *et seq.*

⁶⁵ Rosenne, *Law and Practice*, vol. II, pp. 661–662.

⁶⁶ *Ibid.*, p. 680.

⁶⁷ Fitzmaurice, *Law and Procedure*, vol. II, p. 563.

⁶⁸ *Kosovo case, supra*, fn. 13 (Serbia and Montenegro/Belgium), para. 101; (Serbia and Montenegro/Netherlands), para. 100 (emphasis added).

⁶⁹ *Cf. ibid.*, paras. 113 and 112 respectively, as well as Zimmermann on Art. 35 MN 59 *et seq.*

⁷⁰ *Ibid.*, paras. 101 and 100 respectively; and *cf.* already the judgment in the *Barcelona Traction case*, Preliminary Objections, *supra*, fn. 13, pp. 6, 27; Fitzmaurice, *Law and Procedure*, vol. II, p. 563.

As the Court explained in the *Kosovo cases*, it would have been unacceptable for Art. 35, para. 2 to grant access to the Court to States not parties to the Statute without any condition other than a treaty containing a clause conferring jurisdiction to the Court, which might have been concluded any time subsequently to the entry into force of the Statute (*cf. supra*, fn. 13, paras. 113 and 112 respectively). ⁷¹ Merrills, p. 137.

268 (III) on the 'Restoration to the General Act of 26 September 1928 of its Original Efficacy' provided in its Preamble that 'the amendments contained in the Resolution will not affect the rights of such States parties to the Act as established on 26 September 1928 as should claim to invoke it in so far as it might still be operative'.⁷² The discussion has focused on whether the new treaty amended the pre-existing one or whether it replaced it (in which case the General Act would have ceased to be in force). The majority seems to view the General Act as having remained in force in spite of the revision, which was meant to render the Act more efficient for States which were not parties to the Statute of the ICJ.⁷³

III. Relationship between Art. 36, para. 5, and Art. 37

- 20 The resemblance between the language of Art. 36, para. 5, and that of Art. 37 is striking: like Art. 37, Art. 36, para. 5 uses the words 'in force' and provides that it is applicable 'as between the parties to the present Statute'.⁷⁴

The language of the articles is similar because the two provisions were drafted with the same objective in mind, namely to preserve sources of jurisdiction dating from the era of the PCIJ. That Arts. 36, para. 5, and 37 have an identical purpose is apparent from the discussions of the Committee of Jurists on Art. 36, para. 5.⁷⁵ As Sub-Committee IV/1 did with regard to Art. 37, the Committee of Jurists asked itself whether acceptances made under the optional clause of the PCIJ should 'automatically come to an end' or 'should some provision be made for continuing them in force'.⁷⁶ Articles 36, para. 5, and 37 provide for the preservation under the new Court of the compulsory jurisdiction accepted under the old Court, whether the source of the obligation is unilateral or multilateral.⁷⁷ As Judge Wellington Koo observed, 'the form of the instrument in which the compulsory jurisdiction is embodied is immaterial. . . . What matters is that the treaty or convention should in such case continue to be in force'.⁷⁸

Because the two provisions share the same fundamental purpose, it has been argued that the Court should adopt a uniform position regarding Arts. 36, para. 5, and 37.⁷⁹ In the *Aerial Incident case* (Israel v. Bulgaria), the Court held that Bulgaria's declaration under the optional clause of 1921 had lapsed with the demise of the PCIJ in 1946.⁸⁰ Even though the *Aerial Incident case* dealt with Art. 36, para. 5, the preliminary objections raised in *Barcelona Traction* touched upon similar issues which the Court, according to Judge Tanaka, should have decided in light of *Aerial Incident*.⁸¹ However, the Court took a completely different stance and held that the disappearance of the PCIJ could not have been a cause of extinction of the treaty clause. Thus, the decision was at

⁷² GA Res. 268 (III) of 8 April 1949.

⁷³ Both Judge de Castro (ICJ Reports (1978), pp. 62 *et seq.*) and Judge *ad hoc* Stassinopoulos (*ibid.*, pp. 72 *et seq.*) concluded in their dissenting opinions in the *Aegean Sea Continental Shelf case* that the Act was still in force. Opposing this interpretation was Judge Morozov, who appended a declaration to the Court's judgment, expressing the view that the General Act had become invalid as a whole as it was an 'inseparable part of the structure and machinery of the League of Nations' (*ibid.*, p. 54).

⁷⁴ For a detailed assessment *cf.* Tomuschat on Art. 36 MN 96–100.

⁷⁵ On the discussions of the Committee of Jurists, *cf.* *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua/United States), Jurisdiction and Admissibility, ICJ Reports (1984), Diss.Op. Schwebel pp. 558, 571.

⁷⁶ UNCIO, vol. XIV, p. 318.

⁷⁷ *Barcelona Traction*, Preliminary Objections, *supra*, fn. 13, Sep.Op. Tanaka, pp. 65, 77.

⁷⁸ *Ibid.*, pp. 51, 52. ⁷⁹ Sep.Op. Tanaka, *ibid.*, pp. 65, 72, 76.

⁸⁰ ICJ Reports (1959), pp. 127, 136–142.

⁸¹ *Barcelona Traction*, Preliminary Objections, *supra*, fn. 13, Sep.Op. Tanaka, pp. 65, 71.

odds with *Aerial Incident* but the Court justified it—somewhat unconvincingly—by saying that ‘the case *Israel v. Bulgaria* was in a certain sense *sui generis*.’⁸²

Given that the purpose underlying Arts. 36, para. 5 and 37 is identical, it should 21
follow that solutions and interpretations adopted with respect to one article should apply
to both, so long as such solutions and interpretations relate to their identical purpose.⁸³
It is unfortunate that the Court chose not to take that position.

Articles 37 and 36, para. 5 are indeed structured in a similar fashion and do relate to 22
the same purpose, but they are different in one important way: whereas the former deals
with conventional bases of jurisdiction, the later deals with unilateral bases. A given State
may have accepted the Court’s jurisdiction under one source or the other. But it may also
have done so under both, at different points in time, and under different conditions.⁸⁴
This overlap, or superimposition, of different types of jurisdictional acceptances can lead
to complicated situations where the Court must determine which source prevailed at a
given point in time.

The question of concurrent sources of the Court’s jurisdiction first arose under the 23
aegis of the PCIJ, before the ICJ was even established. In the *Electricity Company of Sofia
and Bulgaria case* (Preliminary Objections), a declaration made under the optional clause
had been subsequently followed by the entry into force of a treaty which also contained a
clause conferring jurisdiction to the PCIJ.⁸⁵ Specifically, the Belgian government had
relied on the Declarations of Belgium and Bulgaria of 1926 and 1921 respectively, and
on the Treaty of Conciliation, Arbitration and Judicial Settlement of 1931 to establish
the Court’s jurisdiction. Both parties agreed that the instruments could not cancel each
other out and that the treaty could not have suspended the operation of the optional
clause. Nevertheless, the Court chose to deal with the question and held that:

... the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence
that the contracting Parties intended to open new ways of access to the Court rather than to close
the old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction
would remain.⁸⁶

The Court, therefore, made clear that a subsequent treaty could not invalidate prior
acceptances of the Court’s jurisdiction under the optional clause. The Court then
analyzed objections to jurisdiction under the Treaty and the declarations independently,
holding that ‘only if both sets of objections are alike held to be well-founded will the
Court decline to entertain the case’.⁸⁷ Eventually, the Court upheld jurisdiction on the
basis of the unilateral declarations. Is this solution equally valid when a treaty clause is
later followed by a unilateral declaration? This is precisely what the governments of
Australia and New Zealand argued in *Nuclear Tests*, and the ICJ’s jurisprudence calls for
an answer in the affirmative.

⁸² *Ibid.*, pp. 6, 29.

⁸³ *Cf. Nicaragua case*, Jurisdiction and Admissibility (*supra*, fn. 75), Diss.Op. Schwebel pp. 558, 586
(stating that *Aerial Incident* was not overruled by *Barcelona Traction*).

⁸⁴ The question of the co-existence of sources of jurisdiction is particularly relevant when one or more
sources are accompanied by reservations, as was the case in *Norwegian Loans* and *Nuclear Tests*.

⁸⁵ *The Electricity Company of Sofia and Bulgaria*, PCIJ, Series A/B, No. 77, pp. 64 *et seq.* The case was
mentioned and analyzed in the memorials submitted by the governments of Australia and New Zealand in
Nuclear Tests: *cf.* ICJ Pleadings, vol. II, pp. 199 *et seq.* and pp. 316 *et seq.*

⁸⁶ *Electricity Company of Sofia and Bulgaria*, *supra*, fn. 85, p. 76. ⁸⁷ *Ibid.*

- 24 That the Court has remained faithful to the *Electricity Company of Sofia and Bulgaria* doctrine is apparent from its decision in the *ICAO Council case*. The applicant (India) had invoked jurisdiction on the basis of two treaties (the Convention on International Civil Aviation and the International Air Services Transit Agreement). Pakistan contested the Court's jurisdiction on the ground that India had made a reservation to a subsequent declaration under the optional clause. The Court upheld jurisdiction on the basis of the clauses included in the treaties, and rejected as 'irrelevant' Pakistan's objections relating to India's reservations under the optional clause. The dissenting judges in *Nuclear Tests* noted the way in which the Court in *ICAO Council* (and Judge Basdevant in *Norwegian Loans*) followed in the footsteps of the PCIJ in considering the two bases for jurisdiction as completely independent of each other.⁸⁸
- 25 The situation in *Nuclear Tests*, once again, was the reverse of that which the PCIJ had faced in *Electricity Company of Sofia and Bulgaria*: following their accession to the General Act, the parties had made declarations under the optional clause to which they had made reservations. The Court did not address the issue but the dissenting judges analyzed the co-existing sources of jurisdiction and clearly stated that the reservations to the unilateral declarations did not affect the terms of the parties' accession to the General Act.⁸⁹ They considered the treaty and the unilateral declarations as two independent sources of jurisdiction, as exemplified by the two separate provisions of Arts. 36, para. 5 and 37 of the Statute. This, they said, was also supported by prior decisions of the Court in *Electricity Company of Sofia and Bulgaria*, *Barcelona Traction*, and *ICAO Council*.⁹⁰ Moreover, the dissenting judges in *Nuclear Tests* refused to view the criticisms made by dissenting judges in *Electricity Company of Sofia and Bulgaria* as carrying any weight.⁹¹ Overall, the Joint Dissenting Opinion in *Nuclear Tests* reinforces the finding of the PCIJ in *Electricity Company of Sofia and Bulgaria* (and the later decisions of the International Court) by extending the solution adopted by the PCIJ to the 'reverse situation', namely when the parties made unilateral declarations following the entry into force of the treaty.
- 26 In the *Norwegian Loans case*, the question was also taken up. In a dissenting opinion, Judge Basdevant (who had been the Rapporteur of the Committee of Jurists entrusted with the issue of Arts. 1 and 37 in 1945) vehemently rejected the idea that the unilateral declaration could have modified the law applicable at the time, e.g. that relating to the jurisdictional clause contained in the treaty.⁹² In his opinion Judge Basdevant extensively quoted *Electricity Company of Sofia and Bulgaria*, and his analysis of jurisdiction in *Norwegian Loans* clearly flows from that decision of the PCIJ. Finally, the Court touched upon the issue in *Aegean Sea Continental Shelf*: had it not declared the General Act to be inapplicable to the case, the Court said that it 'would have been confronted with the problem of the co-existence of different instruments establishing methods of peaceful settlement,' a question, which the Court noted, had been discussed in *Electricity Company of Sofia and Bulgaria*.⁹³
- 27 Thus, it appears from decisions such as *ICAO*, *Norwegian Loans* and *Nuclear Tests* that the solution adopted by the PCIJ in a case where the optional clause preceded the treaty conferring jurisdiction to the Court remains valid even in the opposite situation,

⁸⁸ Cf. *Nuclear Tests case*, *supra*, fn. 47, Joint Diss.Op. Onyeama, Dillard, Jiménez de Aréchaga and Waldock, pp. 312, 355 (para. 91).

⁸⁹ *Ibid.*, pp. 312, 349 (para. 82).

⁹⁰ *Ibid.*, pp. 312, 348 (para. 81).

⁹¹ *Ibid.*, p. 312, 352 (para. 87).

⁹² *Norwegian Loans case*, *supra*, fn. 41, Diss.Op. Basdevant, pp. 71, 75.

⁹³ *Aegean Sea Continental Shelf*, *supra*, fn. 37, pp. 3, 38.

e.g. when the declaration made under the optional clause followed the entry into force of the treaty. Accordingly, Art. 37 can still be invoked when a State has made a declaration under the optional clause after the entry into force of a treaty conferring jurisdiction to the Court. The later acceptance under the optional clause does not affect the acceptance of the Court's jurisdiction under the treaty, or the applicability of Art. 37.⁹⁴

In other words, treaty clauses and optional clause declarations independent means of access to the Court. They do not cancel each other out: a later instrument does not automatically override an earlier instrument, and a more specific instrument does not automatically override a less specific one. In any given case, co-existing sources of jurisdiction must be analyzed independently in order to determine whether or not jurisdiction exists under each source.

D. Evaluation

Article 37 is reminiscent of another era, and it is clear from the jurisprudence of the ICJ 28 that the new Court has done (almost) everything to distance itself from that era. By mostly denying jurisdiction based on Art. 37, the Court has shown that it views Art. 37 as a jurisdictional basis of last resort, to be used only when all other jurisdictional means have been exhausted. Applicants to today's Court would thus be well advised to avoid relying on Art. 37 when another jurisdictional ground can be found. With time, as claims brought under Art. 37 become less frequent, such claims may stand out as jurisdictionally 'weak,' and thus will be all the more likely to be dismissed.

Nevertheless, Art. 37 is far from irrelevant. As we have seen, the jurisprudence of the 29 Court on Art. 37 teaches us important principles to be applied in cases of successive and conflicting acceptances of the Court's jurisdiction. It is increasingly common today for countries to accept the Court's jurisdiction in both a treaty and a declaration made under the optional clause, or in two successive (but different) declarations made under the optional clause. In these complicated situations, Art. 37 provides guidance by setting forth the principle that sources of jurisdiction must be analyzed separately—as if there had been no other acceptance.

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⁹⁴ A minority even views a later unilateral declaration as a confirmation of the earlier conventional provision conferring jurisdiction to the Court: Sep. Op. Bustamante in the *South West Africa cases*, *supra*, fn. 9, pp. 349, 376.

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Annex
Application of, or Reference to Article 37 by the ICJ

Case	Date	Treaty relied upon	Article 37 Accepted or Rejected as Basis for Court's Jurisdiction	Further Comments
International Status of South-West Africa Advisory Opinion	11 July 1950	Art. 7 of the Mandate of 17 December, 1920 for South West Africa.	Accepted: The Court held that Art. 7 of the Mandate was still in force and therefore South Africa was under an obligation to accept the compulsory jurisdiction of the Court according to its provisions (p.138).	
Ambatielos Preliminary Objections Greece/United Kingdom	1 July 1952	Treaty of Commerce and Navigation between Great Britain and Greece, 16 July 1926.	Rejected: The Court declined jurisdiction on the ground that the treaty did not have any retroactive effect (the facts submitted to the Court occurred before the conclusion of the treaty of 1926).	Greece had not made any unilateral declaration under Art. 36, para. 2, so the only possible basis of jurisdiction was the 1926 treaty.
Case of Certain Norwegian Loans France/Norway	6 July 1957	Article. 17 of the General Act for the Pacific Settlement of International Disputes, 1928; Second Hague Convention of 1907 respecting the limitation of the employment of force for the recovery of contractual debts; Franco-Norwegian Arbitration Convention of 1904.	Rejected: The Court declined jurisdiction on the ground that the dispute fell within France's declaration under the optional clause. The Court stated that France's application to the Court was based solely on the unilateral declarations and held that it could not base its jurisdiction on any of the treaties mentioned by France in its Observations and Submissions on the Preliminary Objections.	In his dissenting opinion, Judge Basdevant noted that the parties were bound by the General Act and criticized the Court for ignoring it, especially since no doubt had been raised by the parties as to the applicability of the Act. Judge Basdevant analyzed the successive acceptations of the Court's jurisdiction. Following their accession to the Act, the parties made declarations under the optional clause. Both of France's acceptances of the Court's jurisdiction were accompanied by reservations; its acceptance was more limited under the subsequent declaration than under the Act. According to Judge Basdevant, the declaration made pursuant to 36, para. 2 could not have modified the law applicable at the time, i.e. the acceptance made under the treaty.

Case	Date	Treaty relied upon	Article 37 Accepted or Rejected as Basis for Court's Jurisdiction	Further Comments
Case concerning the Aerial Incident of July 27, 1955 <i>Preliminary Objections</i> Israel/Bulgaria	26 May 1959	The Court referred to Art. 37 in conjunction with Art. 36, para. 5, without mentioning any specific treaty to which it would be applied.		Israel (applicant) relied on a unilateral declaration made by Bulgaria in 1921 and Article 36, para. 5. The Court restricted the application of Art. 36, para. 5 to signatories of the Court's Statute. At the time Bulgaria became a member of the United Nations, its declaration had lapsed: a declaration accepting the jurisdiction of the PCIJ became devoid of object as soon as that Court was no longer in existence, so that Article 36, para. 5 could not produce effects in relation to a State which became a party to the Statute after that date since the declaration would not then be 'in force'.
Case concerning the Temple of Preah Vihear Cambodia/ Thailand	26 May 1960	Franco-Siamese Treaty of 7 December 1937; Settlement Agreement of 17 November 1946; General Act, 1928.	Article 37 invoked as alternative basis for jurisdiction. It was unnecessary to consider Art. 37 because the first basis for jurisdiction was accepted (first basis: combined effect of Cambodia's declaration under the optional clause of 1957 and Thailand's declaration of 1950).	
South West Africa cases <i>Preliminary Objections</i> Ethiopia/South Africa, Liberia/ South Africa	21 December 1962	Article 7 of the Mandate of 17 December 1920 for South West Africa.	Accepted: The Court recalled the findings of its advisory opinion of 1950 that Art. 7 of the mandate was still in force (p. 334) and held that jurisdiction was transferred to the court despite the dissolution of the League of Nations. The Court held (p. 335) that this transfer was 'voluntarily assumed' when a State joined the United Nations.	
Barcelona Traction Preliminary Objections Belgium/Spain	24 July 1964	Article 17, para. 4 of the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, 1927.	Accepted: Preliminary Objection of Spain that the jurisdictional obligation contained in Art. 17, para. 4 had lapsed with the dissolution	The Court decided the case independently of the <i>Aerial Incident case</i> (Israel/Bulgaria)(which dealt with Art. 36, para. 5) and other

Case	Date	Treaty relied upon	Article 37 Accepted or Rejected as Basis for Court's Jurisdiction	Further Comments
			of PCIJ was rejected by the Court. The Court also held that Article 17, para. 4 was an integral part of the Treaty as a whole and that its judicial fate could not be considered in isolation (p. 37); and that the date on which a State became a party to the Court's Statute was irrelevant for purposes of Art. 37 (p. 34).	cases which had dealt with Art. 37 such as <i>Preah Vihear</i> (pp. 29–30). Comparison with Art. 36, para. 5: Art. 36, para. 5 has the same purpose as Article 37, i.e. it maintains continuity between the jurisdiction of the PCIJ and the ICJ ('preserving the existing conventional jurisdiction from becoming inoperative by reason of the prospective dissolution of the Permanent Court', p. 31). Difference: (1) different type of instrument: Art. 36, para. 5 relates to unilateral declarations whereas Art. 37 relates to conventional instruments; (2) the 'in force' requirement in Art. 37 applies to the treaty (<i>i.e.</i> the instrument containing the clause), whereas it applies to the jurisdictional clause itself in Art. 36, para. 5.
Appeal Relating to the jurisdiction of the ICAO Council India/Pakistan	18 August 1971	Art. 84 of the Convention on International Civil Aviation (1944); and Art. II of the International Air Services Transit Agreement (1944).	Accepted: The Court has jurisdiction under Arts. 36, para. 1, and 37 (para. 25).	The treaties may be suspended between the parties, which does not mean that the treaties are not 'in force' for purposes of Art. 37 (para. 16).
Nuclear Tests Cases <i>Request for the indication of provisional measures</i> Australia/France New Zealand/ France	22 June 1973	Art. 17 of the General Act for the Pacific Settlement of International Disputes, 1928.	The Court did not address the arguments raised by Australia and New Zealand with respect to Art. 37 since it declared the case to be without object and withdrew it from the docket on an entirely different ground.	The joint dissenting opinion of Judges Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock dealt with the jurisdiction of the Court under the 1928 General Act—which had been invoked as the primary basis for jurisdiction. The parties had also made declarations under the optional clause, but the Court chose to

Case	Date	Treaty relied upon	Article 37 Accepted or Rejected as Basis for Court's Jurisdiction	Further Comments
				<p>analyze the sources of jurisdiction separately. The General Act continued to apply following the demise of the League of Nations; the latter was not a cause of extinction. Art. 37 substituted the ICJ for the PCIJ as the tribunal designated in Art. 17 of the General Act (para. 42). The Revision of the Act in 1949 did not have the effect of terminating the 1928 General Act (para. 50).</p> <p>The opinion noted that its analysis of the Act followed from <i>Barcelona Traction and Norwegian Loans</i>.</p> <p>Co-existence of different sources of jurisdiction: the declarations of France and Australia under the optional clause did not prevail over the terms of their accession under the Act. The optional clause is an independent source of jurisdiction, as reflected by Art. 36, para. 5 and Art. 37, and stated by the PCIJ in <i>Electricity of Sofia and Bulgaria</i>, by the ICJ in <i>Barcelona Traction and ICAO Council</i>, and by Judge Basdevant in <i>Norwegian Loans</i>. The conditions of accession to the Act were not modified by the later reservations to the optional clause.</p>
Aegean Sea Continental Shelf <i>Jurisdiction of the Court</i> Greece/Turkey	19 December 1978	Art. 17 of the General Act for Pacific Settlement of International Disputes, 1928.	Rejected: because the General Act was not applicable to this dispute (the dispute was one which related to the territorial status of Greece within the meaning of the Greek reservation. Therefore the dispute was excluded from the application of Art. 17 of the General Act) (para. 90).	On the applicability of the General Act, see the declaration of Judge Morozov and the dissenting opinion of Judge Stassinopoulos.

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Case	Date	Treaty relied upon	Article 37 Accepted or Rejected as Basis for Court's Jurisdiction	Further Comments
			The Court did not have to decide whether the General Act is 'still in force' or not since it declared the Act inapplicable on another ground (para. 93).	
Military and Paramilitary Activities in and against Nicaragua Jurisdiction and Admissibility Nicaragua/ United States of America	26 November 1984	Art. 37 was mentioned three times, but not as a possible basis for jurisdiction: 1. In the judgment, the Court pointed out generally that it can exercise jurisdiction under Arts. 36 and 37 (at p. 411) 2. In his separate opinion Judge Jennings referred to Art. 37 in order to compare the meaning of 'in force' in Arts. 37 and 36, para. 5 (at p. 538). 3. Judge Schwebel mentioned Art. 37 in his dissenting opinion (at p. 586).		Nicaragua (applicant) relied on Art. 36, para. 5. On the history and purpose of Art. 36, para. 5 and for an analysis of the words 'in force' and 'en vigueur', see the dissenting opinion of Judge Schwebel (at p. 571) and the separate opinion of Sir Robert Jennings (at p. 536).
Legality of Use of Force Request for the indication of provisional measures Yugoslavia/ Belgium Yugoslavia/ Netherlands	2 June 1999	Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia of 1930; and the Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of Yugoslavia and the Netherlands of 1931.	The Court did not take position on Art. 37 because the treaties were invoked during the second round of oral arguments on a request for the indication of provisional measures and could not be taken into consideration at that stage of the proceedings.	
Case concerning the Aerial Incident of 10 August 1999 Jurisdiction of the Court Pakistan/India	21 June 2000	Art. 17 of the General Act for Pacific Settlement of International Disputes, 1928.	Rejected: The Court avoided dealing with Art. 37 and the General Act by holding that, in any event, India ceased to be bound by the General Act of 1928 at the latest in 1979, when its denunciation of the Act took effect.	
Legality of Use of Force Preliminary Objections Yugoslavia/ Belgium Yugoslavia/ Netherlands	15 December 2004	Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia of 1930; and the Treaty of Judicial Settlement, Arbitration and Conciliation between the Kingdom of Yugoslavia and the Netherlands of 1931.	Rejected: because applicant had no access to the Court under Art. 35, para. 2	The Court affirmed the conditions under which Art. 37 can be relied on (as set out in <i>Barcelona Traction</i>); and clarified that the requirements of Arts. 34 and 35 would have to be satisfied before Art. 37 could be interpreted.

Article 47 (von Schorlemer)	1073
Article 48 (Torres Bernárdez)	1081
Article 49 (Tams)	1099
Article 50 (Tams)	1109
Article 51 (Tams)	1119
Article 52 (Tams/Rau)	1129
Article 53 (von Mangoldt/Zimmermann)	1141
Article 54 (Fassbender)	1171
Article 55 (Fassbender)	1177
Article 56 (Damrosch)	1183
Article 57 (Hofmann/Laubner)	1199
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