

SUGGESTIONS FOR THE LIMITED ACCEPTANCE OF COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE BY THE UNITED STATES

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In the last few years quite a few international lawyers have been complaining about the 1985 termination (with effect on April 7, 1986) by the United States of its 1946 declaration accepting the compulsory jurisdiction of the International Court of Justice.¹ Little attention has been paid to the fact that during the forty years since the making of this declaration many other states have changed their declarations, often several times,² in order to adapt them to the Court's jurisprudence and to new circumstances. By 1985, the United States declaration was in fact obsolete, and some of the reservations contained in it proved more harmful than useful.³ It should have been changed long ago,

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¹ See, e.g., D'Amato, *The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court*, 80 AM. J. INT'L L. 331 (1986). For the text of the United States 1946 declaration, see 61 Stat. 1218, T.I.A.S. No. 1598, 4 Bevans 140, 1 U.N.T.S. 9. For the notice terminating U.S. declaration, see 24 I.L.M. 1742-45 (1985); see also 80 AM. J. INT'L L. 163-65 (1985). For a thorough analysis of various aspects of the Court's compulsory jurisdiction, see *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* (L. Damrosch ed. 1987) [hereinafter *THE COURT AT A CROSSROADS*]; see also *THE UNITED STATES AND THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* (A.C. Arend ed. 1986) (Papers presented at a workshop sponsored by the Center for Law and National Security at the University of Virginia in 1985).

² For instance, the United Kingdom changed its 1940 declaration in 1955 (twice), 1957, 1958, 1963 and 1969. For the latest declaration, see 1985-86 I.C.J.Y.B. 91 (1986).

³ See D'Amato and O'Connell, *United States Experience at the International Court of Justice*, in *THE COURT AT A CROSSROADS*, *supra* note 1, at 403, 404. See also statement by the Legal Adviser of the U.S. Department of State, Abraham D. Sofaer, 86 DEP'T ST. BULL. 1, 67-68 (Jan. 1986).

but when the crisis arose there was no substitute available and no adequate study of the conditions to be included in a new declaration which would put the United States on a par with the more-cautious other states. At the time, cancellation of the declaration appeared easier than replacing it with a better one.

The purpose of this paper is to explore the possibility that in the not-too-distant future the Government of the United States will reconsider the matter and decide to renew its declaration accepting the compulsory jurisdiction of the International Court of Justice. The debate at that time will primarily revolve around the conditions of that acceptance.

I. THE BASIC ALTERNATIVES

The United States has three main alternatives concerning the compulsory jurisdiction of the Court: acceptance without any substantial conditions, acceptance with broad, practically unlimited conditions, and acceptance with clearly defined, limited conditions.

Acceptance without any substantial conditions proved popular at the beginning of the Permanent Court of International Justice. Some of these declarations have expired, some have been drastically changed, and a few have been added by some new States. It is not likely, however, that the United States would choose this road.

Another possibility, at the other end of the spectrum, would be to curtail drastically the scope of the new United States declaration. Following the example of the so-called Connally Amendment to the original draft of the 1946 declaration, which excluded from the jurisdiction of the Court "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," the United States might enter a reservation excluding the Court's jurisdiction over "disputes which, in the opinion of the United States, affect the vital interests of the United States." When considering such a broad, subjective reservation, however, it must be remembered that, because of the reciprocity rule, as a United States reservation is broadened, the United States ability to utilize the Court when other states violate its rights or those of its citizens is lessened. Consequently, in this situation the proposed cure might be worse than the disease, and would in fact deprive the United States of any possibility of bringing any other state before the Court. This is especially true as other states are more likely to invoke such a reservation than is the United States, which is more susceptible to the pressure of public opinion.

To avoid the danger inherent in such subjective reservations, the content of which depends largely on the subjective judgment of the defendant party, any special interests that the United States might wish to protect would be better safeguarded by more precise reservations. This safeguard can be achieved by allowing the International Court of Justice to objectively determine in each case whether the reservation actually applies to the dispute presented to the Court, while at the same time carefully restricting the latitude of the Court's discretion. The more precise a reservation is, the more difficult it is for an opponent to persuade the Court to deprive the party making the declaration of the protection embodied in the reservation.

Thus, the interests of the United States might be best protected, and the rule of law in international relations best advanced, by a more focused and less drastic revision of the United States declaration. The remainder of this essay sets forth and examines several provisions which might be included in a future declaration in order to modernize it and to correct the deficiencies in the 1946 declaration.

II. PROPOSED DRAFT OF UNITED STATES DECLARATION

1. The United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning:

(a) the interpretation or application of any treaty to which the United States of America and the other party or parties to the dispute are parties and which has been registered with the United Nations in accordance with Article 102 of the Charter of the United Nations; or

(b) the interpretation or application of any rule of customary international law, except when a particular rule has been expressly rejected by the Government of the United States of America at the time of its formation and prior to the commencement of the dispute; or

(c) the existence of any fact which, if established, would constitute a breach of an international obligation, provided that the dispute does not relate to facts involving disclosure of information the presentation of which would be contrary to the essential security interests of the United States; or

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

2. This declaration does not apply to:

(a) disputes the resolution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes with regard to matters which traditionally, in the practice of the United States, have been considered as essentially within the domestic jurisdiction of the United States of America; or

(c) disputes relating to any question which affects the national security of the United States of America or of a State party to a collective security arrangement to which the United States of America is also a party, except when one of the parties to the dispute has referred the matter to the Security Council of the United Nations or the appropriate regional collective security organization and the Security Council or the organization has recommended that certain specific legal questions be referred by the parties to the International Court of Justice; or

(d) disputes relating to the interpretation or application of a multilateral treaty, unless all the parties to that treaty have agreed that any decision rendered in any such dispute between two or more of them will be binding upon all of them; or

(e) disputes submitted by a State which has accepted the jurisdiction of the Court with respect to such disputes less than one year prior to the filing of the application bringing the dispute before the Court.

3. This Declaration may be modified or terminated with effect as from the moment of expiration of six months after notice has been given to the Secretary-General of the United Nations, except that in relation to any state with a shorter period of termination, the notification by the United States of America shall take effect at the end of such shorter period, and in relation to any state which may terminate its declaration as from the moment of notification, the notification by the United States shall take effect as from the moment of notification.

III. COMMENT ON THE PROPOSED DECLARATION

The comments which follow are intended to explain the reasons for particular limitations of jurisdiction of the Court, and for the exceptions (reservations) thereto, that are included in the proposed text of the declaration.

A. *Basic Limitations on the Acceptance of the Court's Jurisdiction*

Preambular clause

The United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning:

Reciprocity. This preambular paragraph contains the usual formula for accepting the jurisdiction of the Court. It emphasizes the condition of reciprocity by employing the phrase "in relation to any other state accepting the same obligation."

It may be noted that both in Article 36 of the Statute of the Court and in many declarations, the idea of reciprocity appears in two forms. Article 36(2) provides that the declarations shall apply "in relation to any other State accepting the same obligation," and Article 36(3) allows the making of declarations "on condition of reciprocity on the part of several or certain States." Some declarations repeat the first formula; some simply accept the jurisdiction of the Court "on condition of reciprocity"; several use a double formula, recognizing the jurisdiction of the Court "in relation to any other State accepting the same obligation," i.e., on condition of reciprocity.

Only Brazil applied Article 36(3) literally and made its 1921 declaration subject to the acceptance of the Court's jurisdiction "by two at least of the Powers permanently represented on the Council of the League of Nations."⁴ The suggestion has been made that the United States should not be out of step with other major powers and should condition the coming into force of a future declaration upon the acceptance of the jurisdiction of the Court to at least a similar extent by the four other permanent members of the Security Council (of which, at present, only the United Kingdom is bound by the optional clause).

In 1959, a committee of the American Bar Association suggested another method to ensure reciprocity. It proposed that the United States should agree to withdraw its subjective domestic jurisdiction reservation if all other nations which have made similar reservations would withdraw them at the same time, and if "as many new adherences as possible to Article 36 of the Statute of the Court" would be deposited simultaneously with the withdrawal of the reservation.⁵

Legal disputes. The proposed declaration, like the previous one, is clearly limited to "legal disputes." The International Court of Justice has adopted a broad definition of legal disputes, and it considers that even in a "mixed" dispute, involving both legal and political issues,

⁴ See M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942*, at 648 (1943); Briggs, *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice*, 93 *RECUEIL DES COURS* 227, 241 (1958).

⁵ American Bar Association, Section of International and Comparative Law, Report on the Self-Judging Aspect of the United States' Domestic Jurisdiction Reservation with Respect to the International Court of Justice 62 (1959).

it is entitled to deal with the legal questions submitted to it.⁶ It would seem undesirable to exclude from the jurisdiction of the Court such legal questions, though it might be possible to devise a formula for excluding from its jurisdiction "any dispute that necessarily involves the concurrent consideration of political questions." It might be better to deal with this matter indirectly by allowing a party to a dispute to terminate the proceedings before the Court by submitting the matter to the Security Council of the United Nations, or to a regional collective security organization, as suggested in reservation (c) discussed below.

Non-retroactivity. The proposed declaration is not retroactive; it applies only to "disputes hereafter arising," namely, to disputes arising after the date of deposit of the new declaration with the Secretary-General of the United Nations. This proposed limitation also appears in the 1946 United States declaration. As the Permanent Court of International Justice pointed out in the *German Interests in Upper Silesia Case*, a dispute arises "as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views."⁷

Interpretation and application of treaties

(a) the interpretation or application of any treaty to which the United States of America and the other party or parties to the dispute are parties, and which has been registered with the United Nations in accordance with Article 102 of the Charter of the United Nations.

In the proposed declaration, the United States would recognize the compulsory jurisdiction of the International Court of Justice over disputes concerning the interpretation or application of any treaty to which the United States and the other party or parties to the dispute are parties.

This formulation departs from the language of Article 36(2)(a) of the Statute of the Court and the 1946 United States declaration, both

⁶ In *The United States Diplomatic Staff in Tehran Case*, the International Court of Justice pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, "however important," and that, in particular, "never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them." *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 19-20, paras. 36-37. These statements were repeated by the Court in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Jurisdiction)* (*Nicar. v. U.S.*), 1984 I.C.J. 392, 439, para. 105.

⁷ 1925 P.C.I.J. (ser. A) No. 6, at 14.

of which simply refer to disputes concerning "the interpretation of a treaty." The new language of this subparagraph follows the phrasing of hundreds of so-called compromissory clauses contained in international agreements, which usually provide for the reference to the Court or to an arbitral tribunal of disputes relating to the interpretation or application of a particular agreement.⁸ The United States is a party to 40 multilateral agreements containing such clauses.⁹ As there might be objections to the adjudication of disputes relating to certain old or unpublished agreements, it is suggested that the declaration be further limited to encompass only those treaties "registered with the United Nations in accordance with Article 102 of the Charter of the United Nations."

A more extreme change would restrict United States acceptance to only the interpretation or application of treaties and would omit entirely paragraph (b) of the declaration relating to other rules of international law, perhaps omitting paragraphs (c) and (d) also. The main reason for such a step would be to address the concern that the reluctance of states to accept the jurisdiction of the Court is due to their fear that the Court will apply to them some rules of customary law which they have been reluctant to accept but which the Court may consider sufficiently crystallized to justify their general application.

On the other hand, states may be more willing to accept the jurisdiction of the Court if it were limited to disputes relating to the interpretation or application of international agreements, both bilateral and multilateral. This option has been exercised by some states, which have restricted the jurisdiction of the Court under Article 36 of the Statute to specified treaties. Thus far, no official objections have been raised to the validity of such declarations.¹⁰ It would be possible,

⁸ See Sohn, *Settlement of Disputes Relating to the Interpretation and Application of Treaties*, 150 RECUEIL DES COURS 195, 259 (1976); Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855, 856 (1987).

⁹ SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. EXEC. REP. No. 50, 98th Cong., 2d Sess. 37-41 (1984); see also Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, in THE COURT AT A CROSSROADS, *supra* note 1, at 58, 80-81.

¹⁰ For instance, the International Court of Justice noted in the *Anglo-Iranian Oil Co. Case* that the 1930 declaration of Persia (later Iran) granted to the Court jurisdiction "only when a dispute relates to the application of a treaty or convention accepted by Iran." *Anglo-Iranian Oil Co. Case (Preliminary Objection) (U.K. v. Iran)*, (July 22) 1952 I.C.J. 93, 103. Egypt accepted the Court's jurisdiction even more specifically by

therefore, for the United States to file a declaration accepting the jurisdiction of the Court limited to the "interpretation and application of international agreements to which the United States is a party."¹¹ While such a limited declaration would be much narrower in scope, its advantage might be that it would be less necessary to make broad exceptions to it. Of the reservations listed in Section 2 of the proposed declaration only a few might still be necessary — for instance, the exception relating to disputes the resolution of which has been entrusted by the parties to another tribunal. This approach would simplify the declaration and would probably make a better general impression than would a declaration with a flock of reservations.

Customary international law

(b) the interpretation or application of any rule of customary international law, except when a particular rule has been expressly rejected by the Government of the United States of America prior to the commencement of the dispute;

This subparagraph differs in several respects from the corresponding clauses in Article 36 of the Statute of the Court and in the 1946 United States declaration, which provided for the jurisdiction of the Court over all legal disputes concerning "any question of international law." These clauses contain a very broad jurisdictional grant, and it might be desirable to restrict it in several respects. First, it should be made clear that this clause refers to "customary" international law, which—as specified in Article 38 of the Statute of the Court—is evidenced by the practice of states, and depends on the general acceptance by the vast majority of states.¹² As international law does not require complete unanimity of all the states, more than 160 today, it is possible that some states may have dissented from a particular rule. Such dissent

limiting it to disputes relating to "the Suez Canal and the arrangements for its operation," thus referring indirectly to the Convention of Constantinople of 1888. For the text of Egypt's declaration, see 1957-1958 I.C.J.Y.B. 211 (1957); for the text of the Constantinople Convention, 171 THE CONSOLIDATED TREATY SERIES 241 (C. Parry ed. 1978).

¹¹ See Sohn, *International Tribunals: Past, Present and Future*, 46 A.B.A.J. 23, 25 (1960). The same result could be accomplished by concluding a separate treaty conferring on the Court jurisdiction over disputes relating to the interpretation or application of a clearly specified category of treaties. See Sohn, *Step-by-Step Acceptance of the Jurisdiction of the International Court of Justice*, 1964 AM. SOC. INT'L L. PROC. 131, 132 (1964).

¹² See Sohn, "Generally Accepted" *International Rules*, 61 WASH. L. REV. 1073 (1986).

may not stop the emergence of a rule, but such a rule does not necessarily bind the dissenting states.¹³ It would seem useful, therefore, to specify in the proposed declaration that where a dispute relates to a rule which the United States has clearly rejected at the time of its formation, the United States will not be bound to submit such a dispute to the Court so long as the rejection of the rule occurred before the commencement of the dispute at issue. If, however, the United States has remained silent when the new rule has been generally agreed upon, it may not object to the submission to the Court of a dispute relating to it. Finally, in order to make this provision parallel to the one relating to treaties, it is suggested that the clause should apply only to disputes relating to "the interpretation or application" of any rule of customary international law.

Facts constituting breaches of international law

(c) the existence of any fact which, if established, would constitute a breach of an international obligation, provided that the dispute does not relate to facts involving disclosure of information the presentation of which would be contrary to the essential security interests of the United States;

In this provision, which appears in both Article 36 of the Statute of the Court and in the 1946 United States declaration, a clause has been added to address the touchy situation that may arise where, in order to explain certain facts involved in a dispute, sensitive classified information would have to be disclosed. To avoid this, a formula excluding such disputes has been inserted, which is modeled on Article 302 of the United Nations Convention on the Law of the Sea of 1982. That article provides that, without prejudice to the right of a State Party to resort to the procedures for the settlement of disputes provided for in that Convention, "nothing in this Convention shall be deemed to require a State Party, in the fulfillment of its obligations under this Convention, to supply information the disclosure of which is contrary to the essential interests of its security."¹⁴ This provision's

¹³ See Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985); Colson, *How Persistent Must the Persistent Objector Be*, 61 WASH. L. REV. 957 (1986); Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BR. Y.B. INT'L L. 1 (1985).

¹⁴ For text of the Law of the Sea Convention, see United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea*, U.N. Sales No. E.83.V.5.

applicability is broader in scope than the clause proposed for the new declaration, but its spirit is clearly similar.

Reparation for breaches of international obligations

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

No change has been made in this provision, which appears both in Article 36 of the Statute of the Court and in the 1946 United States declaration. It might be suggested, however, that subparagraphs (c) and (d) be omitted completely, and replaced by a completely different provision which would ensure that the Court would not decide any issues relating to breaches of international obligations. Some states are reluctant to submit to the Court concrete cases of violations of international law in which the Court would have to decide not only whether a party to the dispute has committed a violation of international law, but also what should be the remedy for the violation (for instance, restitution or compensation). In some recent cases, the parties to a dispute have asked the Court instead to decide only what are the applicable "principles and rules of international law," and the Court has accepted this limitation on the scope of its functions and the character of the judgment to be rendered.¹⁵ If the United States find this approach desirable, it may restrict its declaration accepting the jurisdiction of the Court to "disputes in which the International Court of Justice is requested to decide only the principles and rules applicable to the questions presented to the Court by the parties to the dispute."

B. Exceptions

Sections 2 and 3 of the proposed declaration contain various exceptions (or reservations) to the Court's jurisdiction. A few of them also appear in the 1946 United States declaration, but some of them have been revised to take into account various criticisms. In addition, several other exceptions have been added; some are modeled on reservations made by other states; a few are new.

¹⁵ See, e.g., North Sea Continental Shelf Cases (FRG v. Den., FRG v. Neth.), 1969 I.C.J. 3, 13, para. 2, and 53 para. 101(c) (Feb. 20).

Submission to other tribunals

(a) disputes the resolution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

The proposed declaration would not apply to disputes for which the parties have made other arrangements, entrusting them to other tribunals. This exception applies both in case of agreements already in existence at the time of the declaration and to those which may be concluded in the future.

This clause, which also appeared in the 1946 United States declaration, is contained in some form in the declarations of most other nations. The clause does not erode the rule of law in international relations, but merely recognizes the fact that nations can agree that tribunals other than the International Court of Justice are better suited to assist in the peaceful resolution of certain types of disputes.

Domestic matters

(b) disputes with regard to matters which traditionally, in the practice of the United States, have been considered as essentially within the domestic jurisdiction of the United States of America.

While some have argued that the reservations relating to matters within the exclusive or essential jurisdiction of states are not necessary, as international law does not relate to such matters, a sufficient number of states seem to have doubts on the subject, and it would seem safer to retain a reservation of this type. It might, however, be desirable to change the Connally Amendment from a subjective unilateral determination of the domestic character of a matter to a more objective one, retaining at the same time sufficient control over the content of this reservation. The most objectionable feature of the old reservation was that it allowed a state to arbitrarily determine its content after a case had already been brought before the International Court of Justice. This may be avoided to a large extent by restricting the reservation to "matters which traditionally, in the practice of the United States, have been considered as essentially within the domestic jurisdiction of the United States." As Senator Thomas (Utah), the original proponent of the idea that the United States accept the compulsory jurisdiction of the Court, pointed out, questions such as immigration and customs

tariffs are among "the vital matters over which the sovereign state has traditionally exercised complete control" and would not be within the jurisdiction of the Court.¹⁶ Senator Connally similarly referred to these two examples, but added a reference to the regulation of tolls through the Panama Canal.¹⁷ They did not contemplate complete arbitrariness but only the need to preserve the traditional rights of the United States.

The proposed clause would enable the United States to prove in a case that a particular matter, even if differently considered by other states, has been traditionally classified in the practice of the United States as essentially domestic. If on a certain matter a new rule of international law should be accepted by other states, taking that matter out of the domestic jurisdiction of states, it will remain domestic as far as the United States is concerned as long as the United States expressly rejects that new rule. Of course, it is generally agreed that if the United States ratifies a treaty dealing with a matter previously considered as domestic, the matter ceases to be domestic at least with respect to disputes with other parties to the treaty.

National and collective security questions

(c) disputes relating to any question which affects the national security of the United States of America or of a State party to a collective security arrangement to which the United States of America is also a party, except when one of the parties to the dispute has referred the matter to the Security Council of the United Nations or the appropriate regional collective security organization and the Security Council or the organization has recommended that certain specific legal questions be referred by the parties to the International Court of Justice.

In view of the strong United States opposition to the Court's consideration in the *Nicaragua Case* of questions affecting national security or the security of allies connected with the United States by a collective security arrangement,¹⁸ it appears necessary to include a clause on the subject in the proposed declaration. In the practice of states, several such clauses have been employed.

¹⁶ 92 CONG. REC. 10,615 (1946).

¹⁷ *Id.*, at 10,695.

¹⁸ See Observations by the Department of State, 79 AM. J. INT'L L. 423, 429 (1985). For the Court's response, see the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)* (Nicar. v. U.S.), 1986 I.C.J. 26-28, paras. 32-35.

The proposed formula avoids the overly subjective character of a similar reservation made by the United Kingdom in 1957¹⁹ by declining to state that the "opinion of the United States" shall be the sole arbiter of whether a question affects its national security. The provision relating to the Security Council is based upon the assumption that the jurisdiction of the Court over a dispute would be terminated if the United States should refer the dispute to the Security Council of the United Nations, or a competent regional collective security organization, on the ground that the dispute relates to a question affecting the national security of the United States or of a state party to a collective security arrangement to which the United States is also a party. The self-judging element in this situation is reduced by the proposal that the jurisdiction of the Court would revive if the Security Council or the regional organization should recommend that certain specific legal questions be referred by the parties (or by either of them) to the International Court of Justice.²⁰

It may also be suggested that in the light of the *Nicaragua Case*, the United States should follow the example of El Salvador and India²¹

¹⁹ That reservation, abandoned in the next United Kingdom declaration, excluded from the Court's jurisdiction disputes "relating to any question which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom, affects the national security of the United Kingdom or of any of its dependent territories." 1956-1957 I.C.J.Y.B. 224 (1957). A 1959 French declaration excluded "disputes arising out of any war or international hostilities and disputes arising out of a crisis affecting the national security or out of any measure or action relating thereto." 1959-1960 I.C.J.Y.B. 240 (1960). In 1966, France added to this formula by providing an exclusion for "disputes concerning activities connected with national defence." 1966-1967 I.C.J.Y.B. 52 (1967). In 1973, France completely terminated its declaration accepting the Court's jurisdiction. 1973-1974 I.C.J.Y.B. 49 (1974). Concerning similar reservations contained in both bilateral and multilateral agreements, see Metzger, *The Connally Reservation and the World Court*, JAG. J. Mar.-Apr. 1960, at 13, 15-16.

²⁰ The 1954 Australian declaration contained a similar provision, but one of a more temporary character. It was based on pre-1939 declarations of the United Kingdom and the other Commonwealth countries. The Australian declaration exempted from the jurisdiction of the Court any dispute under consideration by the Security Council, "provided that notice to suspend is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that the suspension shall be limited to a period of twelve months or such longer period as may be agreed by the Parties to the dispute or determined by the Security Council." 1956-1957 I.C.J.Y.B. 209 (1957). Australia abandoned this provision. 1974-1975 I.C.J.Y.B. 49 (1975). For an early discussion of the merits of this approach, see Sohn, *Exclusion of Political Disputes from Judicial Settlement*, 38 AM. J. INT'L L. 694, 700 (1944).

²¹ For the declarations of El Salvador and India, which contain this exception, see 1985-1986 I.C.J.Y.B. 67, 72 (1986).

by excluding from the jurisdiction of the Court "disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defense, resistance to aggression, fulfillment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which the United States is, has been or may in the future be involved." Given the proposal discussed in the preceding paragraph, however, this suggestion would have to be broadened by adding some reference near the end not only to situations directly involving the United States, but also situations in which "a State party to a collective or mutual security treaty to which the United States is also a party" is involved. The reference to a mutual security treaty has been added to take care of bilateral mutual security treaties concluded between the United States and a few foreign countries.

Although some would consider such a reservation extremely useful from the point of view of protecting the United States from undesirable complaints by other states, it is necessary to remember that any other state would be entitled by reciprocity to invoke it against the United States, thus depriving the reservation of its power to protect the worldwide interests of its United States and its allies against encroachments by other states.

Multilateral treaties

(d) disputes relating to the interpretation or application of a multilateral treaty, unless all the parties to that treaty have agreed that any decision rendered in any such dispute between two or more of them will be binding upon all of them.

This proposed provision is related to the so-called Vandenberg amendment, inserted in the 1946 United States declaration. Because of the difficulties encountered in the *Nicaragua Case*,²² a different approach to this subject is taken in the new formula.

Senator Vandenberg proposed the old reservation with respect to disputes arising under a multilateral treaty in order to answer objections raised by John Foster Dulles. Dulles feared that the United States could become bound by a decision of the Court relating to such a

²² For the Court's discussion of the Vandenberg amendment, see *Nicaragua Case (Merits)*, *supra* note 18, at 28-38, paras. 36-56. See also Damrosch, *Multilateral Disputes*, in *THE COURT AT A CROSSROADS*, *supra* note 1, at 376, 393-99.

treaty but other parties to the treaty would not be required to comply with that decision and might not be subject to the Court's jurisdiction for the purpose of ensuring such compliance.²³ Some writers have considered the Dulles proposal incomprehensible; clearly, it could have been given substance by a better drafted text. In the form incorporated in the United States 1946 Declaration, the Court in the jurisdictional phase of the *Nicaragua Case* easily disregarded the provision, relying on the ambiguity of the phrase "all parties to the treaty affected by the decision."²⁴ Though the Court applied the provision to some extent in the decision on substance, the method employed deprived the provision of any effect on the case.²⁵

The basic United States concern is that any decision applicable to the United States should also bind other states parties to the treaty being interpreted by the Court. This is prevented by Article 59 of the Statute of the Court, which provides that a "decision of the Court has no binding force except between the parties and in respect of that particular case." If no parallel action can be brought against some important parties to the treaty, they may contend that they are not bound by the obligations the Court imposed on the United States. Consequently, the United States may wish to restrict its obligation to submit to the Court's jurisdiction to only those cases in which all other affected parties have become parties to the case. Several other countries went even further, requiring the participation in the case by "all the parties to the treaty."²⁶ The new formula would apply to "all the parties" to the treaty, but does not require that all states parties to the treaty must participate in the case. Instead they will have to agree to accept the decision either in advance or after the decision has been rendered. Such acceptance may be by separate declarations of the states concerned or by a collective decision. The decision of the Court would become binding on the United States only when all such acceptances have been received by the Court or by the United States.

Unexpected complaint

(e) disputes submitted by a State which has accepted the jurisdiction of the Court with respect to such disputes less than one year prior

²³ *Compulsory Jurisdiction [of the] International Court of Justice: Hearings before a Subcommittee of the Senate Committee on Foreign Relations, 79th Cong., 1st Sess. 44 (1946).*

²⁴ *Nicaragua Case (Jurisdiction)*, *supra* note 6, at paras. 72-76.

²⁵ *Nicaragua Case (Merits)*, *supra* note 18, at 38, 92-97, paras. 56, 172-182.

²⁶ *Nicaragua Case (Jurisdiction)*, *supra* note 6, at 424, para. 72 (citing declarations of El Salvador, India and the Philippines).

to the filing of the application bringing the dispute before the Court.

This provision would protect the United States against an attack from an unexpected quarter, i.e., by a state not previously bound by the optional clause contained in Article 36(2) of the Statute of the Court.²⁷ To avoid such a surprise, the United Kingdom has excluded from the jurisdiction of the Court any dispute "where the acceptance of the Court's compulsory jurisdiction on behalf of the other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court."²⁸ The United States may safeguard its interests by a similar provision.

Even if this type of reservation had been made, another difficulty may still arise because of the right of termination at a moment's notice which is contained in many declarations. It makes possible for a state to wait for a year, file an application against the United States, and soon thereafter file a notice of termination of its own declaration in order to protect itself against a retaliatory suit by the United States or one of its allies. A suggestion has been made by Professor D'Amato that to avoid such a case the United States may condition its acceptance of the jurisdiction of the Court on "the presence of at least a six-month notice of withdrawal provision in the declaration of the plaintiff state."²⁹ Of course, the plaintiff state can avoid the impact of such a reservation by including in its declaration a six-month withdrawal clause, filing a notice of termination, and suing the United States a few days before its own declaration has expired.

If some restriction on this type of an application were desirable, the United States could combine such a restriction with the one contained in subparagraph 2(e), and exclude from the jurisdiction of the Court "any dispute submitted to the Court by a party to the dispute if at the time of the filing of the application the declaration of the applicant state remained in force for less than one year or was subject to termination by a notice of less than six months."

²⁷ See D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L L. 385, 387 (1985). D'Amato calls this ploy the "sitting duck problem," and cites the Portuguese complaint against India which was filed only three days after Portugal accepted the Court's jurisdiction. *Id.*, note 4.

²⁸ 1985-9186 I.C.J.Y.B. 91 (1986).

²⁹ D'Amato named this method the "hit and run problem." D'Amato, *supra* note 27, at 389.

Notice of termination

3. This declaration may be modified or terminated with effect as from the moment of expiration of six months after notice has been given to the Secretary-General of the United Nations, except that in relation to any state with a shorter period of termination, the notification by the United States of America shall take effect at the end of such shorter period, and that in relation to any state which may terminate its declaration as from the moment of notification, the notification by the United States shall take effect as from the moment of notification.

In the *Nicaragua Case*, the International Court of Justice held that the April 1984 modification made by the United States with the intent "to secure a partial and temporary termination" of the Court's jurisdiction with respect to Central American disputes, was invalid in view of the six-month notice of termination required by the original United States Declaration.³⁰ The United States tried to rely, by reciprocity, on the fact that the Nicaraguan declaration was of unlimited duration and could therefore be terminated at any time; but the Court held that even in such a case the principle of good faith requires a reasonable period of notice and that a period of only a few days (from April 6 to 9) did not amount to a "reasonable time."³¹

Of the declarations in force in 1986, twenty-five (more than half) contained a clause allowing their termination by notice, usually in the form of a notification to the Secretary-General of the United Nations, to take effect from the moment of such notification.³² Some of these declarations provide expressly not only for termination but also for additions to, or amendments of, reservations contained in the declaration. In addition, as noted above, the Court has pointed out that a declaration containing no statement about its duration may be terminated by giving "reasonable" notice.³³ As there are currently nine declarations which do not mention duration, only eleven declarations remain that still have provisions, similar to the one in the terminated United States declaration, requiring a six-month or a one-year notice. Several of these are limited by the further requirement that such a notice may be given only at predetermined intervals, usually five years.³⁴

³⁰ *Nicaragua Case (Jurisdiction)*, *supra* note 6, at 417-19, paras. 58-61.

³¹ *Id.*, at 419-20, para. 63.

³² 1985-1986 I.C.J.Y.B. 61-92.

³³ *Supra* note 31.

³⁴ *Id.*

In accordance with this general trend, it would seem that the United States would be justified in abolishing the six-month notice requirement and substituting a provision allowing termination or modification of the declaration by notification to the Secretary-General, to take effect at the moment of such notification. This would, however, diminish even further the value of the declaration, and may encourage other countries to do the same.

The formula suggested here would retain the six-month notice but would afford adequate protection by ensuring more effective reciprocity with respect to countries with a shorter period of notice.

IV. CONCLUSION

It is necessary to emphasize that the ability of the United States to castigate other states for their non-acceptance of the jurisdiction of the Court has been greatly diminished by the United States termination of acceptance of that jurisdiction. On the other hand, future frustration can be avoided by reconsidering the United States Declaration, clarifying its provisions, and adding a few reservations which have become common since 1946. Only by taking such action will the United States be able to reclaim its image as the main defender of world order under law and the opponent of those whose lawless acts rely on brute force. The United States government should also take into account that many countries consider that international law can better protect their interests than can their limited ability to defend themselves against ruthless neighbors; and that these countries are thus inclined to accept the Court's jurisdiction, and will do so with a little encouragement. Consequently, any improvements in the terms of the United States declaration would enable the United States, by reciprocity, to more effectively protect its own citizens and corporations against violations of international law by these countries. The United States is not likely to use force against these countries, but it might be able to use the law and the prestige of the Court to ensure compliance with their international obligations.