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DRAFT ARTICLES FOR THE EXPANSION OF AUTHORITATIVE INTERPRETATION OF UNITED STATES TREATIES*

*Perry L. Pickert***

I. INTRODUCTION

The effectiveness of international law is limited by the absence of community institutions competent to create, interpret, and enforce the law. The United States and other major powers have been unwilling to create international institutions with the legal capacity and physical power to achieve effective centralization. While the United Nations and the International Court of Justice appear to be centralized institutions, they enjoy only guarded allocations of legal power and are further hampered by procedural safeguards such as jurisdictional reservations and the power of veto. The United Nations framework merely masks the decentralized nature of the international legal system.¹

In addition to being the only source of international law, States retain the right to interpret and enforce the law which they create.² This problem is compounded by the fact that under general international law, an interpretation by one State is not binding upon another State without its consent.³ The absence of a dominant, central institution permits States to abuse their right of interpretation and leads to characterization of international law as little more than political rhetoric. The obvious solution would be the establishment of universal compulsory jurisdiction

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1. Gross, *The Charter of the United Nations and the Lodge Reservations*, 41 AM. J. INT'L L. 531 (1947).

2. The international legal system suffers from a "complete lack of a particular organ charged with the application of legal norms to a concrete instance." H. Kelsen, *GENERAL THEORY OF LAW AND STATE* 338 (A. Wedberg transl. 1949) [hereinafter cited as *GENERAL THEORY*].

3. "The fundamental principle of the juridical equality of States is opposed to placing one State under the jurisdiction of another State" or to "subject[ing] . . . one State to an interpretation of a treaty asserted by another State." Jesse Lewis (David J. Adams) Case (*United States v. Great Britain*), 4 Rep. Int'l Arb. Awards 85, 89, 16 AM. J. INT'L L. 315, 318 (1922). According to Chief Justice Marshall, "no nation can prescribe a rule for others, none can make a law of nations. . . ." *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

of the International Court of Justice, but with the contemporary state of international relations and of attitudes toward international institutions,⁴ such a proposal is unrealistic.⁵ However, limited expansion of the Court's jurisdiction can be accomplished.⁶ The United States, for example, has facilitated greater use of the International Court by accepting its compulsory jurisdiction with respect to some treaties.⁷ Furthermore, the United States Senate, while traditionally opposed to expanded use of the International Court, has expressed support for the extension of the compulsory jurisdiction of the Court in disputes arising from interpretation and application of future United States treaties.

This paper discusses the problems caused by the abuse of unilateral interpretation of international law and of treaties and suggests draft articles for inclusion in bilateral and multilateral treaties and in the constitutions of international organizations. The articles provide for compulsory settlement by the International Court of disputes arising from the interpretation or application of such treaties or constitutions. Also presented is a model bilateral treaty for submission to the compulsory jurisdiction of

4. See, e.g., Elkind, *French Nuclear Testing and Article 41—Another Blow to the Authority of the Court?*, 8 VAND. J. TRANSNAT'L L. 39 (1974); Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51 (1974).

5. For example, the Lodge Commission found that since 1946 the United States has committed itself, without reservations, to the jurisdiction of the Court in over 20 multilateral treaties and 20 bilateral agreements with respect to disputes arising from those agreements. This is a commendable way for widening the Court's jurisdiction, but these agreements are only a small portion of the more than 200 bilateral and multilateral treaties subscribed to by the United States since 1946.

REPORT OF THE PRESIDENT'S COMMISSION FOR THE OBSERVANCE OF THE TWENTY-FIFTH ANNIVERSARY OF THE UNITED NATIONS 12 (1971). See Address by Secretary of State Rogers, American Society of International Law Annual Meeting, Apr. 25, 1970, 64 AM. J. INT'L L. 941 (1970).

The number of cases brought before the Court has never been excessive, and has occasionally dwindled to an empty docket. Jessup, *The International Court of Justice Revisited*, 11 VA. J. INT'L L. 299, 300 (1971). At times the Court is unable to provide an acceptable forum. See Deutsch, *The International Court of Justice*, 5 CORNELL INT'L L.J. 35 (1972); Fawcett, *The Function of the International Court of Justice in the World Community*, 2 GA. J. INT'L & COMP. L. 59 (1972); Gross, *The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order*, 65 AM. J. INT'L L. 253 (1971).

6. See Deutsch, *Recent Movements toward Strengthening the International Court of Justice*, 67 AM. J. INT'L L. 741, 744-45 (1973).

7. For a list of the treaties and agreements of the United States which contain a provision for submitting disputes to the Court, see *Hearings on S. Res. 74, 75, 76, 77, 78 Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. 159 (1973).

the Court those disputes which may arise from the interpretation and application of treaties currently in force between the parties to the bilateral treaty and of all future treaties unless a specific agreement is made to the contrary.

II. THE PROBLEM OF AUTOINTERPRETATION

Professor Leo Gross has coined the terms autointerpretation and autoenforcement⁸ to refer to unilateral acts of States, as distinguished from authoritative interpretation⁹ and enforcement by composite organs¹⁰ of the international legal system. Unless consent of other States is obtained, autointerpretation and autoenforcement of the law by a State lack authority within the international legal system. While a State has power to interpret international law and to act upon its own interpretation, even to the extent of using force, such interpretations are valid merely "for the purpose of determining its own conduct," are not binding on other States, and are not actions of a legal organ of the international legal system.¹¹ States have the right of autointerpretation but not of authoritative interpretation. Authoritative interpretation is binding and occurs only upon consent of the parties. International courts and tribunals have consistently denied the binding force of unilateral interpretation of international law. Most significant have been the cases in which a State has proceeded

8. Gross, *States as Organs of International Law and the Problem of Autointerpretation*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 59-88 (G. Lipsky ed. 1953).

9. Authoritative interpretation has binding force. According to Kelsen, the function of authoritative interpretation is "to render binding one of the several meanings of a legal norm" and, therefore, to both create and apply the law. H. Kelsen, *THE LAW OF THE UNITED NATIONS* 15 (1951). The Permanent Court of International Justice stated that "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it." Advisory Opinion on the Polish-Czechoslovakian Frontier, [1923] P.C.I.J., ser. B, No. 8 at 37. In the case of a treaty, this body would be the composite organ composed of the parties to the treaty. See I. VOICU, *DE L'INTERPRETATION AUTHENTIQUE DES TRAITÉS INTERNATIONAUX* 80-87 (1968).

10. Kelsen argues that

When two States conclude a treaty they function as organs of international law. The representatives of the two contracting parties together form the composite organ that creates the contractual norm. It is an organ of the international community constituted by general international law. Of this composite organ, the representatives of the contracting States are part organs. . . . Hence the representative of a contracting State is primarily a (partial) organ of the international community, and only secondarily an organ of his own State.

GENERAL THEORY, *supra* note 2, at 354.

11. Colombian-Peruvian Asylum Case, [1950] I.C.J. 266, 274.

unilaterally to apply or to enforce the law, utilizing coercion or armed force as measures of self-help.¹²

Autointerpretation and autoenforcement are normally tolerated in advanced legal systems. However, courts of advanced systems are competent to judge the accuracy of autointerpretation and the justification for autoenforcement upon application of a disputant or, in the case of criminal law, upon application by an official of the legal system. No such provision exists in the international legal system. There is not even an obligation to submit a dispute to a competent international organ for settlement.¹³ If one State can induce another State to consent to its autointerpretation, such interpretation becomes authoritative. If not, the two autointerpretations remain tentative and the international legal system between the two States contains an unresolved conflict.

In classical international law, legal disputes might have been resolved by recourse to coercion. Legal issues of great concern might have led a State to war; a peace treaty then supplied the element of consent which settled the major issues. Minor issues were simply set aside, remaining unresolved but allowing other business to be conducted as usual. From the perspective of the legal system, a solution was possible because force and war were lawful methods of obtaining consent. However, the Paris Peace Pact¹⁴ and the Charter of the United Nations¹⁵ have technically

12. In the *Naulilaa Incident Arbitration* (Portugal v. Germany), 8 Trib. Arb. Mixtes 409 (1928), a party of German soldiers and civilians had crossed into neutral Portuguese territory during World War I. Owing to a misunderstanding, the Portuguese fired upon and killed three Germans; Germany retaliated by invading Portuguese territory and destroying Angolan forts. The tribunal held the reprisal unlawful because Portugal had not violated international law, Germany had failed to attempt peaceful solution, and Germany's reprisal was out of proportion with Portugal's alleged acts. Similarly, in the *Corfu Channel Case*, [1949] I.C.J. 4, Britain contested Albania's claim that it need not grant the right of passage to foreign warships. When British ships attempted to pass through the Corfu Channel they were damaged by mines. Suspecting that Albania had laid the mines, Britain sent minesweepers through the Channel and discovered newly-laid mines. These forceful measures of self-help were rejected by the Court as a violation of Albania's sovereignty, although the Court upheld Britain's claim of the right of foreign warships to pass through the channel.

13. "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." Advisory Opinion on the Status of Eastern Carelia, [1923] P.C.I.J., ser. B, No. 5 at 27.

14. Renunciation of War as an Instrument of National Policy, done Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.
The Paris Peace Pact, article 2, provides:

foreclosed this classical mode of settlement by limiting the lawful use of force. While both the Charter and the Pact contain obligations to settle disputes by pacific means, there is no compulsory method of settlement which requires a State to consent to a procedure or to a particular interpretation of the law. By simply filing protests and refusing to consent to a settlement of an issue, a State may prevent the international legal system from rendering an authoritative interpretation of a disputed issue.

In the late nineteenth and early twentieth centuries, international arbitral and judicial tribunals were proposed to curb abuse of the rights of autointerpretation and autoenforcement.¹⁶ While arbitral tribunals and the Permanent Court of International Justice were eventually created, their effectiveness was diminished by jurisdictional reservations and procedural loopholes¹⁷ which were "condemned as irreconcilable with a compulsory and organized system of arbitration."¹⁸

The weakness of arbitration agreements containing escape clauses and the use of peremptory domestic jurisdiction reservations are illustrated in the *Interhandel* case.¹⁹ Professor Herbert

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

15. U.N. CHARTER article 2, paragraphs 3 & 4, provides:

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

16. See C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 360 (rev. ed. P. Corbett transl. 1968) [hereinafter cited as DE VISSCHER].

17. The provisions of the French-British Treaty of 1903 are a model of such reservations. Convention with France respecting commercial relations between France and India, Feb. 19, 1903, 2 *Nouveau recueil général de traités* (Martens Nouveaux Recueil) ser. 5, 141, T.S. No. 9 (1905). After stating the principle obligation of the treaty, the explicit condition is attached that the obligation "should not apply to disputes, even those of a legal order . . . touching the vital interest, the independence, or the honor of the signatory states." DE VISSCHER, *supra* note 16, at 360.

18. DE VISSCHER, *supra* note 16, at 360-61.

19. In the initial phase of the *Interhandel* case, Switzerland sought arbitration on the basis of the arbitration treaty between Switzerland and the United States, Treaty with Switzerland on Arbitration and Conciliation, Feb. 16, 1931, art. VII, 47 Stat. 1983, 1987, T.S. No. 844. The dispute related to a wartime appropriation by the United States. The Treaty required the formulation of a special agreement, and also contained a domestic jurisdiction reservation.

Briggs summarizes the American use of the domestic jurisdiction reservation in the arbitration agreement between the United States and Switzerland:

[The Department of State was] using the plea of domestic jurisdiction to reject arbitration prior to a resort to conciliation, to reject arbitration subsequent to a resort to conciliation, and—contrary to the terms of the treaty and our agreed interpretation thereof with Switzerland—to reject any resort to conciliation itself.²⁰

Because the United States contended that the *Interhandel* case fell within its domestic jurisdiction, Switzerland had no recourse. Arbitration required the formulation of a *compromis*.²¹ Conciliation required a minimum of cooperation from the United States.²² Neither was forthcoming.

The United Nations system and the International Court of Justice suffer from the same weaknesses apparent in the *Interhandel* case. Submission to the compulsory jurisdiction of the Court has been made discretionary on the basis of the "optional" clause of the Statute of the Court.

The jurisdiction of the International Court of Justice is defined in article 36 of the Statute.²³ The Court's jurisdiction com-

20. Briggs, *Towards the Rule of Law?*, 51 AM. J. INT'L L. 517, 528 (1957).

21. *Compromis* is the technical term for a special agreement concluded for a given dispute and normally in the form of a treaty. The document usually defines the dispute, establishes an arbitral tribunal, outlines the manner of appointing arbitrators, defines the powers and procedures of the arbitral tribunal, sets time limits, and sometimes specifies the particular rules of law which are to be applied by the tribunal in the case.

22. Switzerland's attempt to bring the case before the Court was rejected during Preliminary Objections on the ground that *Interhandel* had failed to exhaust local United States remedies. The Court did not find it necessary to adjudicate the United States' invocation of the Connally Amendment. However, exhaustion of local remedies was not a bar to referral of the dispute to arbitration on the basis of the arbitration treaty. *Interhandel* case (Switzerland v. United States), [1959] I.C.J. 6.

23. I.C.J. STAT. art. 36, para. 2, makes available the compulsory jurisdiction of the Court. Article 36 provides:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;

prises all cases which parties submit by *compromis* and all matters specifically provided for in the Charter or in treaties and other conventions in force. The nature of this jurisdiction depends upon the language of the *compromis*, Charter, treaty, or convention. Paragraph 2 of article 36 also allows a State to declare unilaterally in advance that it recognizes the jurisdiction of the Court as being compulsory *ipso facto* and without special agreement with any other State accepting the same obligation. Under paragraph 3, such declarations may be made for a particular time period and may be unconditional or conditioned upon reciprocity with other States. Therefore, the compulsory jurisdiction of the Court over a particular State in a given dispute depends upon the specific language of the declaration made under paragraph 2 or upon the language of a treaty binding upon that State.

Declarations of States on the basis of article 36, paragraphs 2 and 3, vary greatly.²⁴ The United States has given only qualified recognition to the compulsory jurisdiction of the Court.²⁵ Pur-

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

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties of the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

24. Haiti simply "recognizes the compulsory jurisdiction of the Court." This is based upon the Haitian recognition of the jurisdiction of the Permanent Court in the declaration of October 4, 1921, [1973-74] I.C.J.Y.B. 59. Declarations recognizing the Permanent Court's jurisdiction are deemed to be an acceptance of the compulsory jurisdiction of the International Court under article 36, paragraph 5, of the Statute, reproduced at note 23 *supra*. The clearest method of accepting the jurisdiction of the Court is to reiterate verbatim article 36, paragraphs 2 and 3, of the Statute. See, e.g., Switzerland's declaration of acceptance, [1973-74] I.C.J.Y.B. 79.

25. International Court of Justice: United States Recognition of Compulsory Jurisdiction, Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9. The text of the United States declaration is as follows:

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

suant to the Connally Amendment,²⁶ the United States retains the right of autointerpretation, which allows the designation of virtually any dispute as falling within the domestic jurisdiction of the United States and, therefore, outside the jurisdiction of the International Court. Under article 36, paragraph 6,²⁷ the Court has the power to settle disputes over the Court's jurisdiction. However, on the basis of the American declaration under article 36, paragraph 2, it is the position of the United States that a unilateral declaration that a dispute involves a matter of American domestic jurisdiction constitutes an "absolute bar" to the compulsory jurisdiction of the Court.²⁸ The American declaration also appears to allow the United States to unilaterally bar the jurisdiction of the Court with respect to multilateral treaties

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- a. the interpretation of a treaty;
 - b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to

- a. disputes the solution 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 are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*; or

- c. Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specifically agrees to jurisdiction; and *Provided further*, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.

61 Stat. 1218, T.I.A.S. No. 1598; 1 U.N.T.S. 9 (emphasis added).

26. The title "Connally Amendment" has often been used to refer to the first two provisos of the United States declaration of recognition of the Court's authority, 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9. However, during Senate debate over the jurisdiction of the International Court, Senator Connally introduced on the floor of the Senate *only* the self-judging phrase of clause b: "as determined by the United States of America." 92 CONG. REC. 10694 (1946).

27. I.C.J. STAT. art. 36, para. 6. Article 36 is reproduced at note 23 *supra*.

28. In the case of the *Aerial Incident of 27 July 1955*, [1959] I.C.J. 127, the United States agreed that

determination under reservation (b) [the Connally Amendment] that a matter is essentially domestic constitutes an absolute bar to jurisdiction irrespective of the propriety or arbitrariness of the determination. Although the United States has adhered to the policy of not making any arbitrary determination under reservation (b), the pursuit of that policy does not affect the legal scope of the reservation.

[1959] I.C.J. Pleadings at 677.

which do not contain provisions for the jurisdiction of the Court.²⁹

It should be noted, however, that jurisdictional reservations are a double-edged sword. In the *Aerial Incident of 27 July 1955*,³⁰ a civil airplane owned by El Al strayed into Bulgarian airspace because of inclement weather and was fired upon by Bulgarian military aircraft. All passengers were killed, including six United States citizens. Relying upon Bulgaria's unconditional acceptance of the compulsory jurisdiction of the Court, the United States instituted proceedings before the Court demanding, *inter alia*, monetary reparations of \$257,875. Bulgaria filed four preliminary objections, including one based upon the Connally Amendment. The United States sought unsuccessfully to controvert Bulgaria's objections. Preservation of the Amendment being paramount, the United States finally agreed that

[u]nder the rule of reciprocity applied by the Court in the case concerning Certain Norwegian Loans (France v. Norway), Bulgaria is accorded the same rights and powers with respect to reservation (b) as [is] the United States.³¹

The United States dropped the claim; its own jurisdictional reservation prevented an authoritative interpretation of the legality of the Bulgarian action.

29. The reservation would seem to require that the United States agree to be subject to the jurisdiction of the Court in each case. By simply not exercising its right to intervene under article 36 of the Statute of the Court, the United States could make certain that not all of the parties to the treaty were parties to the case, thus ensuring that the United States would not be bound by the judgment.

Professor Briggs suggests that the United States Senate, on motion of Senator Vandenberg, adopted the reservation without clarifying debate and without understanding its meaning or implications. The language of the reservation continues to cause confusion. Briggs, *The United States and the International Court of Justice: A Re-examination*, 53 AM. J. INT'L L. 301, 315 (1959). See also Sohn, *Senate Resolutions Relating to the International Court of Justice*, 69 AM. J. INT'L L. 92 (1975).

30. [1959] I.C.J. 127.

31. [1959] I.C.J. Pleadings at 677. In the case of *Certain Norwegian Loans*, [1957] I.C.J. 9, the Court came to the same conclusion. On the basis of reciprocity, it held that Norway was entitled to invoke France's self-judging domestic jurisdiction reservation against France. [1957] I.C.J. at 27. Norway conceded the validity of the reservation in order to invoke it. The Court did not

consider that it should examine whether the French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute which provides: 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'

[1957] I.C.J. 26. Professor Gross suggests that the Court has carefully avoided a decision on the legal effect of the self-judging domestic jurisdiction reservation. Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357 (1962).

Self-judging reservations are inimical to the compulsory jurisdiction of the Court, and there is a strong current of opinion that the United States should replace the Connally Amendment with an unreserved declaration under article 36, paragraph 2. But, this view has not prevailed, despite concerted bipartisan effort.³² Nevertheless, in 1974, the United States Senate passed five resolutions³³ urging expanded use of the International Court of Justice. While the Senate did not take the drastic step of repealing the Connally Amendment, it did suggest some positive steps to expand American use of the Court and even to expand the scope of the compulsory jurisdiction of the Court. Of particular interest in relation to the problem of autointerpretation was Senate Resolution 75,³⁴ which advocated that the United

32. In 1959, Senator Humphrey, with the support of President Eisenhower, introduced a resolution which would have eliminated the Connally Amendment. S. Res. 94, 86th Cong., 1st Sess. (1959). The resolution was referred to the Senate Foreign Relations Committee, 105 CONG. REC. S-4511 (daily ed. Mar. 24, 1959), but was never reported out. See Layton, *The Dilemma of the World Court: The United States Reconsiders Compulsory Jurisdiction*, 12 STAN. L. REV. 323, 324 (1960); Sohn, *Senate Resolutions Relating to the International Court of Justice*, 69 AM. J. INT'L L. 92 (1975).

33. S. Res. 74, 75, 76, 77, 78, 93d Cong., 2d Sess., 120 CONG. REC. S-8430-32 (daily ed. May 20, 1974).

34. S. Res. 75, 93d Cong., 2d Sess., 120 CONG. REC. S-8430 (daily ed. May 20, 1974). Senate Resolution 75 provides:

Whereas the United States is committed to the universal rule of law; and

Whereas the effective rule of law requires that provision be made for an agreed third party to settle disputes as to the interpretation of treaties and other international agreements; and

Whereas the absence of such provisions has often resulted in prolonged and acrimonious disputes as to the meaning of these treaties or other international agreements or the existence of a violation of the obligations incurred under them: Now, therefore, be it

Resolved, That it is the sense of the Senate that the United States endeavor to include, in all future treaties and other international agreements to which the United States shall be a party or which shall be negotiated subsequent to the adoption of this resolution, operative clauses providing that any dispute arising from the interpretation or application of these treaties and international agreements which is not settled by agreement between or among the States concerned shall be subject to the jurisdiction of the International Court of Justice or other appropriate body.

Senate Resolution 74 requested that the President direct the Secretary of State to submit to the International Court as many of the outstanding territorial disputes involving the United States as possible for binding decision. S. Res. 74, 93d Cong., 2d Sess., 120 CONG. REC. S-8430 (daily ed. May 20, 1974). S. Res. 76 advocated the use of regional chambers of the Court. S. Res. 76, 93d Cong., 2d Sess., 120 CONG. REC. S-8430-31 (daily ed. May 20, 1974). S. Res. 77 encouraged maximum use of procedures under Chapter VI of the United Nations Charter, especially the use of the Court for legal disputes. S. Res. 77, 93d Cong., 2d Sess., 120 CONG. REC. S-8431 (daily ed. May 20, 1974). S. Res. 78 proposed a study of various ways to make the Court accessible to individuals, corpora-

States endeavor to include in all future treaties and other international agreements a clause providing that any dispute as to interpretation or application which is not settled by agreement of the parties be subject to the jurisdiction of the International Court of Justice or of another appropriate body. Since unreserved acceptance of the compulsory jurisdiction of the Court appears to be a step that Congress is unwilling to take, it seems prudent to move toward wider jurisdiction of the Court by employing an accepted method of authoritative interpretation.

III. AUTHORITATIVE INTERPRETATION: INTERNATIONAL ORGANIZATIONS

Provisions for the compulsory jurisdiction of the International Court have been included in many agreements to which the United States is a party. As early as 1930, the United States was a party to a multilateral agreement on military obligations in certain cases of double nationality³⁵ which provided, with some qualifications, for referral of disputes as to interpretation or application to the Permanent Court of International Justice. However, since the United States was not a party to the Statute of the Court, disputes would have been referred to an arbitral tribunal constituted in accordance with the Hague Convention of 1907.³⁶

The first acceptance by the United States of the compulsory jurisdiction of the International Court came in 1934 with membership in the International Labor Organization (hereinafter referred to as ILO).³⁷ The constitution of the ILO was part of the

tions, and organizations. S. Res. 78, 93d Cong., 2d Sess., 120 CONG. REC. S-8431-32 (daily ed. May 20, 1974). For a discussion of these resolutions and their history, see Comment, *International Court of Justice—Jurisdiction—Resolutions to Expand the Jurisdiction of the International Court of Justice and to Improve the Court's Image as a Viable Alternative to Achieve Pacific Settlement of International Disputes*, 61 KY. L. J. 925 (1973); Sohn, *Senate Resolutions Relating to the International Court of Justice*, 69 AM. J. INT'L L. 92-96 (1975).

35. Protocol relating to Military Obligations in Certain Cases of Double Nationality, done Apr. 12, 1930, art. 7, 50 Stat. 1317, 1321, T.S. No. 913, 178 L.N.T.S. 227.

36. Second Hague Peace Conference, Convention No. I, Pacific Settlement of International Disputes, signed Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536, 1 Bevans 577, 2 AM. J. INT'L L. 90 (Supp. 1908). With the advent of the United Nations, the United States became a party to the Statute of the Court, Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598, 1 U.N.T.S. 9, and thus the provision of the Protocol of 1930 became fully operative.

37. International Labor Organization: Membership of the United States, June 19, 1934, 49 Stat. 2712, T.S. No. 874, IV Trenwith 5531.

1919 Treaty of Versailles,³⁸ to which the United States was not a party, but on June 18, 1934, Congress passed a joint resolution³⁹ authorizing membership in the ILO with a proviso. Article 423 of the ILO constitution provides:

Any question or dispute relating to the interpretation of this Part of the present Treaty or any subsequent convention concluded by the Members in pursuance of the provisions of this Part of the present Treaty shall be referred for decision to the Permanent Court of International Justice.⁴⁰

While interpretation of the constitution was subject to the jurisdiction of the Court, Congress stipulated that the ILO had no legal power to bind the United States.⁴¹

After World War II, many agreements establishing international organizations contained provisions for jurisdiction of the International Court for the settlement of disputes relating to the interpretation or application of the constitutions of those organizations. The first of these was the Convention on International Civil Aviation (hereinafter referred to as CICA).⁴² The CICA provided for settlement of disputes by the Court, or by arbitration

38. Treaty of Peace between the Allied and Associated Powers and Germany, *done* June 28, 1919, 2 Bevans 43, 112 BRIT. AND FOR. STATE PAPERS 1 (1919). *See also* [1919] FOR. REL. U.S., XIII Supp. Paris Peace Conf. 54.

39. J. Res. 131, 73d Cong., 2d Sess., 78 CONG. REC. 12455 (1934). The resolution also provided that in accepting membership, the President assumed no obligations under the Covenant of the League of Nations.

40. International Labor Organization Constitution, *done* June 28, 1919, 49 Stat. 2712, T.S. No. 874, IV Trenwith 5531. The United States is a party to the following ILO conventions: Convention No. 53 concerning Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships, *adopted* Oct. 24, 1936, 54 Stat. 1683, T.S. No. 950, 40 U.N.T.S. 153; Convention No. 55 concerning Liability of the Shipowner in Case of Sickness, Injury, or Death of Seamen, *adopted* Oct. 24, 1936, 54 Stat. 1693, T.S. No. 951, 40 U.N.T.S. 169; Convention No. 58 concerning Minimum Age for the Admission of Children to Employment at Sea, *adopted* Oct. 24, 1936, 54 Stat. 1705, T.S. No. 952, 40 U.N.T.S. 205; Convention No. 74 concerning Certification of Able Seamen, *adopted* June 29, 1946, 5 U.S.T. 605, T.I.A.S. No. 2949, 94 U.N.T.S. 11; Convention No. 80 concerning Partial Revision of ILO Conventions, *adopted* Oct. 9, 1946, 62 Stat. 1672, T.I.A.S. No. 1810, 15 U.N.T.S. 35.

41. J. Res. 131, 73d Cong., 2d Sess., 78 CONG. REC. 12238 Z1934). The stipulation provided that

special provision had been made in the constitution of the International Labor Organization by which membership of the United States would not impose or be deemed to impose any obligation or agreement upon the United States to accept the proposals of that body as involving anything more than recommendations for its consideration.

42. International Civil Aviation Convention, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (effective Apr. 4, 1947).

for those States which had not adopted the Statute of the Court. Since the United States had already ratified the Charter of the United Nations and the Statute of the Court, the provisions of article 84 of the CICA came into force, along with the convention, in 1947.⁴³ Article 84 provides:

If any disagreement between two or more contracting States relating to the interpretation or application of this convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.⁴⁴

The CICA began the post-war trend toward United States acceptance of provisions for authoritative interpretation of legal norms by the International Court of Justice.

Since the advent of the CICA, the United States has assumed obligations to submit to the Court disputes over interpretation and application of the constitutions of many international organizations of which it is a member.⁴⁵ A good example is the obligation assumed under the constitution of the United Nations Food and Agriculture Organization.⁴⁶ In article 17,⁴⁷ States parties

43. Art. 85, 61 Stat. 1180, 1204, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

44. Art. 84, 61 Stat. 1180, 1204, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

45. See, e.g., Constitution of the United Nations Food and Agriculture Organization, Oct. 16, 1945, art. XVII, 12 U.S.T. 980, 996, T.I.A.S. No. 4803; Constitution of the United Nations Educational, Scientific and Cultural Organization, *entered into force* Nov. 4, 1946, art. XIV, 61 Stat. 2495, 2503, T.I.A.S. No. 1580, 4 U.N.T.S. 275; Constitution of the World Health Organization, *opened for signature* July 22, 1946, art. 75, 62 Stat. 2679, 2693, T.I.A.S. No. 1808, 14 U.N.T.S. 185; Constitution of the Intergovernmental Committee for European Migration, Oct. 19, 1953, art. 30, 6 U.S.T. 603, 611, T.I.A.S. No. 3197, 207 U.N.T.S. 189; Statute of the International Atomic Energy Agency, *done* Oct. 26, 1956, art. XVII, 8 U.S.T. 1093, 1110, T.I.A.S. No. 3873, 276 U.N.T.S. 3; Constitution of the International Rice Commission, *adopted* Nov. 20, 1960, art. XI, 13 U.S.T. 2403, 2409, T.I.A.S. No. 5204, 418 U.N.T.S. 334; Indo-Pacific Fisheries Council Agreement, *adopted* Jan. 20, 1961, art. XIII, 13 U.S.T. 2511, 2518, T.I.A.S. No. 5218, 418 U.N.T.S. 348. An exception to this general pattern is the ILO Convention, which refers solely to interpretation. Instrument for the Amendment of the Constitution of the International Labor Organization, art. 37, 62 Stat. 3485, 3550-52, T.I.A.S. No. 1868, 15 U.N.T.S. 35.

46. Constitution of the United Nations Food and Agriculture Organization, Oct. 16, 1945, 12 U.S.T. 980, T.I.A.S. No. 4803.

47. Art. 17, 12 U.S.T. 980, 996, T.I.A.S. No. 4803. Article 17 provides:

are subject to the competence of the Court in disputes arising over interpretation and application of specific provisions of the constitution of the organization.⁴⁸

Unfortunately, as with the Food and Agriculture Organization, obligations to submit disputes contain vague or ambiguous language.⁴⁹ The compulsory jurisdiction provision in a constitution or convention must be precise. In particular, the provision must state unequivocally that disputes between two or more parties to the constitution are referable as a matter of last resort to the International Court for authoritative interpretation upon petition of a party to the dispute.

The following is proposed as a draft article to be included in

1. Any question or dispute concerning the interpretation of this Constitution, if not settled by the Conference, shall be referred to the International Court of Justice in conformity with the Statute of the Court or to such other body as the Conference may determine.

2. Any request by the Organization to the International Court of Justice for an advisory opinion on legal questions arising within the scope of its activities shall be in accordance with any agreement between the Organization and the United Nations.

3. The reference of any question or dispute under this Article, or any request for an advisory opinion, shall be subject to procedures to be prescribed by the Conference.

48. Art. 17, 12 U.S.T. 980, 996, T.I.A.S. No. 4803.

49. In other constitutions, language is employed to provide various procedural bars to the jurisdiction of the Court. See note 47 *supra*. In many agreements these provisions are vague, permitting a claim that a particular dispute is not ripe for consideration by the Court. Since it can be argued that negotiation can solve any international dispute, the current use of the phrase "cannot be settled by negotiations" invites abuse; a State might delay proceedings by arguing that diplomatic solution is still possible. Addition of the phrase "has not been settled by diplomacy" or its equivalent can eliminate this delaying tactic. See, e.g., treaties cited note 45 *supra*.

Another problem is created by the use of the phrase "unless the parties to the dispute agree to another method of settlement," as in article 84 of the Convention on International Civil Aviation, 61 Stat. 1180, 1204, T.I.A.S. No. 1591, 15 U.N.T.S. 295, in which the phrase appears at the end of the requirement to submit disputes to the Court. The Constitution of the International Rice Commission, 13 U.S.T. 2403, T.I.A.S. No. 5204, 418 U.N.T.S. 334, for example, begins with a non-binding referral to a committee for recommendation of a solution; if a settlement is not achieved thereby, the dispute "shall be referred to the International Court of Justice in accordance with the Statute of the Court, unless the parties to the dispute agree to another method of settlement." 13 U.S.T. 2403, 2409, T.I.A.S. No. 5204, 418 U.N.T.S. 334. Such a procedure facilitates delay. Parties may agree to another method of settlement which is not binding and which has little chance of success. The best way to insure that binding methods are employed is to provide for compulsory jurisdiction of the Court. The Court could determine whether or not the dispute has been settled or has been referred to a binding mode of settlement. A mere commitment to arbitrate, as in the *Interhandel* case, is quite different from a tribunal competent to decide the case. For this reason, the language "unless the parties have submitted the dispute to another mode of binding settlement" ought to be employed.

the constitutions of future international organizations. The article provides for authoritative settlement of disputes between member States in regard to the interpretation or application of the constitution. Paragraph one requires the organization to attempt settlement by seeking an advisory opinion of the International Court. If this is unobtainable or does not resolve the dispute, paragraph two then provides for compulsory jurisdiction of the Court over the disputant member States. This two-step approach is necessary because the Statute of the Court provides that only States may be parties in cases before the Court.⁵⁰

DRAFT ARTICLE I

1. Any dispute concerning the interpretation or application of this Constitution, which is not settled by negotiation or by the (Council, Assembly, Director-General, etc.), shall be referred by the Organization to the International Court of Justice for an advisory opinion in accordance with the Statute of the Court unless the Member States concerned have agreed to another mode of settlement.
2. If, as a result of this procedure, a dispute between two or more Member States is not settled, it shall, upon the application of any Member State concerned, be referred for decision to the International Court of Justice, unless the Member States concerned have submitted the dispute to another mode of binding settlement.

IV. AUTHORITATIVE INTERPRETATION OF MULTILATERAL CONVENTIONS

The multilateral conventions in force for the United States which contain clauses providing for submission of disputes concerning interpretation to the Court are generally narrow and technical in scope or prohibit activities which are against public

50. Article 34 of the Statute of the Court provides that only States may be parties in cases before the Court. Under article 65 of the Statute and article 96 of the Charter, only the General Assembly, the Security Council, and other organs of the United Nations may request advisory opinions, upon authorization of the General Assembly. This means that there is no direct way for a particular State to challenge an action of an international organization unless the General Assembly or the Security Council is persuaded to request an advisory opinion. For a comprehensive study of proposals to improve the Court, including amendment of the Statute to permit direct access to the Court for international organizations, see Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253 (1971).

policy. In the latter category are conventions relating to slavery,⁵¹ opium,⁵² pollution,⁵³ hijacking,⁵⁴ and the manufacture and distribution of narcotic drugs.⁵⁵ In the former category are technical treaties which relate to road traffic,⁵⁶ sanitary regulations,⁵⁷ copyright,⁵⁸ diplomatic and consular relations,⁵⁹ settlement of investment disputes,⁶⁰ status of refugees,⁶¹ protection of industrial property,⁶² health regulations,⁶³ and military obligations in cases of dual nationality.⁶⁴ The one significant exception to this narrow and technical subject matter is the Peace Treaty with Japan of 1951,⁶⁵ which provided for submission of disputes with respect to "interpretation or execution" of the treaty. Article 33 of the Road

51. Convention to Suppress the Slave Trade and Slavery, *done* Sept. 25, 1926, art. 8, 46 Stat. 2183, 2192, T.S. No. 778, 60 L.N.T.S. 253.

52. Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, *done* June 23, 1953, art. 15, 14 U.S.T. 10, 25, T.I.A.S. No. 5273, 456 U.N.T.S. 3.

53. International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, art. 13, 12 U.S.T. 2989, 2998, T.I.A.S. No. 4900, 327 U.N.T.S. 3.

54. Convention of Offenses and Certain Other Acts Committed on Board Aircraft, *done* Sept. 14, 1963, art. 24, 20 U.S.T. 2941, 2952, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *done* Dec. 16, 1970, art. 12, 22 U.S.T. 1641, 1647, T.I.A.S. No. 7192.

55. Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, *done* July 13, 1931, art. 25, 48 Stat. 1543, 1577, T.S. No. 863, 139 L.N.T.S. 301.

56. Convention on Road Traffic, with annexes, *done* Sept. 19, 1949, art. 33, 3 U.S.T. 3008, 3020, T.I.A.S. No. 2487, 125 U.N.T.S. 22.

57. International Sanitary Regulations: World Health Organization, *adopted* May 28, 1959, art. 112, 7 U.S.T. 2255, 2294, T.I.A.S. No. 3625, 274 U.N.T.S. 30.

58. Universal Copyright Convention, *done* Sept. 6, 1952, art. 15, 6 U.S.T. 2731, 2743, T.I.A.S. No. 3324, 216 U.N.T.S. 132.

59. Optional Protocol to the Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *done* Apr. 18, 1961, 23 U.S.T. 3374, T.I.A.S. No. 7502; Optional Protocol to the Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 487.

60. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *done* Mar. 18, 1965, art. 64, 17 U.S.T. 1270, 1294, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

61. Protocol relating to Status of Refugees, *done* Jan. 31, 1967, art. 4, 19 U.S.T. 6223, 6226, T.I.A.S. No. 6577.

62. Convention for the Protection of Industrial Property, *done* Mar. 20, 1883, *as revised* July 14, 1967, art. 28, 21 U.S.T. 1583, 1665, T.I.A.S. No. 6923.

63. International Health Regulations, *adopted* July 25, 1969, art. 106, 21 U.S.T. 3003, 3034, T.I.A.S. No. 7026.

64. Protocol relating to Military Obligations in Certain Cases of Double Nationality, *done* Apr. 12, 1930, art. 7, 50 Stat. 1317, 1321, T.S. No. 913, 178 L.N.T.S. 227.

65. Treaty of Peace with Japan, *done* Sept. 8, 1951, art. 22, 3 U.S.T. 3169, 3188, T.I.A.S. No. 2490, 136 U.N.T.S. 45.

Traffic Convention of 1949⁶⁶ is illustrative of these multilateral agreements and contains a binding commitment for submission to the Court. It provides:

Any dispute between any two or more Contracting States concerning the interpretation or application of this Convention, which the Parties are unable to settle by negotiation or by another mode of settlement may be referred by written application from any of the Contracting States concerned to the International Court of Justice for decision.⁶⁷

This language is unsatisfactory because it apparently does not preclude a State from bringing a dispute to the International Court while an arbitral tribunal is in the process of rendering a decision. Such premature application to the Court should be prevented without foreclosing the possibility of later submission to the Court if the dispute is not settled by the arbitration. While the provisions contained in the post-World War II treaties are generally strong, the following draft article is suggested to correct the weaknesses which remain:

DRAFT ARTICLE II

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by application of any Contracting State party

66. Convention on Road Traffic, *done* Sept. 19, 1949, art. 33, 3 U.S.T. 3008, 3020, T.I.A.S. No. 2487, 125 U.N.T.S. 22.

67. Art. 33, 3 U.S.T. 3008, 3020, T.I.A.S. No. 2487, 125 U.N.T.S. 22. Other conventions with similar strongly worded provisions are the Treaty of Peace with Japan, art. 22, 3 U.S.T. 3169, 3188, T.I.A.S. No. 2490, 136 U.N.T.S. 45, and the International Sanitary Regulations: World Health Organization Treaty, *adopted* May 28, 1959, art. 112, 11 U.S.T. 2553, 2592, T.I.A.S. No. 4643, 377 U.N.T.S. 380. These clauses contrast sharply with the language in treaties concerning pre-war narcotic drugs, Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, *done* July 13, 1931, art. 25, 48 Stat. 1543, 1577, T.S. No. 863, 139 L.N.T.S. 301, or slavery, Convention to Suppress the Slave Trade and Slavery, *done* Sept. 25, 1926, art. 8, 46 Stat. 2183, 2192, T.S. No. 778, 60 L.N.T.S. 253, or military obligations, Protocol relating to Military Obligations in Certain Cases of Double Nationality, *done* Apr. 12, 1930, art. 7, 50 Stat. 1317, 1321, T.S. No. 913, which contain elaborate discretionary procedures. Other weak treaties are limited by use of the phrase "cannot be settled by negotiation," and by ambiguous reference to the Statute of the Court which would only theoretically require unreserved submission. The phrasing of these qualifications may prove significant in light of the Court's hesitance to decide international disputes which lend themselves to settlement by negotiation. Such reluctance has recently been demonstrated in the *Fisheries Jurisdiction Case*, [1974] I.C.J. 3. After providing some basic guidelines, the Court returned the case to the parties for settlement by negotiation. But the cod war continues.

to such dispute, unless the parties have submitted the dispute to another mode of binding settlement.

V. AUTHORITATIVE INTERPRETATION OF BILATERAL TREATIES

The basic legal structure which links the United States to the free world economy is provided by commercial treaties which contain provisions for the submission of disputes relating to interpretation or application of these treaties to the compulsory jurisdiction of the International Court of Justice. The treaties are broad in scope and provide for national or most-favored-nation treatment for nationals and companies of the parties. As a practical matter, these treaties regulate most of the relations between the States. Bilateral commercial treaties currently in force referring disputes over interpretation and application to the International Court are those with Belgium,⁶⁸ Nationalist China,⁶⁹ Denmark,⁷⁰ Ethiopia,⁷¹ France,⁷² West Germany,⁷³ Greece,⁷⁴ Iran,⁷⁵ Ireland,⁷⁶ Israel,⁷⁷ Italy,⁷⁸ South Korea,⁷⁹ Luxembourg,⁸⁰ the Netherlands,⁸¹ Nicaragua,⁸² Pakistan,⁸³ Togo,⁸⁴ and South Vietnam.⁸⁵

68. Treaty with Belgium on Friendship, Establishment and Navigation, Feb. 21, 1961, art. 19, 14 U.S.T. 1284, 1306, T.I.A.S. No. 5432, 480 U.N.T.S. 149.

69. Treaty with Nationalist China on Friendship, Commerce and Navigation, Nov. 4, 1946, art. 28, 63 Stat. 1299, 1321, T.I.A.S. No. 1871, 25 U.N.T.S. 69.

70. Treaty with Denmark on Friendship, Commerce and Navigation, Oct. 1, 1951, art. 24, 12 U.S.T. 908, 935, T.I.A.S. No. 105.

71. Treaty with Ethiopia on Amity and Economic Relations, Sept. 7, 1951, art. 17, 4 U.S.T. 2134, 2147, T.I.A.S. No. 2864, 206 U.N.T.S. 41.

72. Convention with France on Establishment, Nov. 25, 1959, art. 11, 11 U.S.T. 2398, 2417, T.I.A.S. No. 4625, 401 U.N.T.S. 75.

73. Treaty with West Germany on Friendship, Commerce and Navigation, Oct. 29, 1954, art. 27, 7 U.S.T. 1839, 1867, T.I.A.S. No. 3593, 273 U.N.T.S. 3.

74. Treaty with Greece on Friendship, Commerce and Navigation, Aug. 3, 1951, art. 26, 5 U.S.T. 1829, 1913, T.I.A.S. No. 3057, 224 U.N.T.S. 279.

75. Treaty with Iran on Amity, Economic Relations and Consular Rights, Aug. 15, 1955, art. 21, 8 U.S.T. 899, 913, T.I.A.S. No. 3853, 284 U.N.T.S. 93.

76. Treaty with Ireland on Friendship, Commerce and Navigation, Jan. 21, 1950, art. 23, 1 U.S.T. 785, 801, T.I.A.S. No. 2155, 206 U.N.T.S. 269.

77. Treaty with Israel on Friendship, Commerce and Navigation, Aug. 23, 1951, art. 24, 5 U.S.T. 550, 575, T.I.A.S. No. 2948, 219 U.N.T.S. 237.

78. Treaty with Italy on Friendship, Commerce and Navigation, Feb. 2, 1948, art. 26, 63 Stat. 2255, 2294, T.I.A.S. No. 1965, 42 U.N.T.S. 171.

79. Treaty with South Korea on Friendship, Commerce and Navigation, Nov. 28, 1956, art. 24, 8 U.S.T. 2217, 2233, T.I.A.S. No. 3947, 302 U.N.T.S. 281.

80. Treaty with Luxembourg on Friendship, Commerce and Navigation, Feb. 23, 1962, art. 17, 14 U.S.T. 251, 262, T.I.A.S. No. 5306, 474 U.N.T.S. 3.

81. Treaty with the Netherlands on Friendship, Commerce and Navigation, Mar. 27, 1956, art. 25, 8 U.S.T. 2043, 2082, T.I.A.S. No. 3942, 285 U.N.T.S. 231.

The most recent of these agreements is that with Togo, which provides in article 14 that

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding such representations as the other Party may make with respect to, any matter affecting the operation of the present treaty.
2. Any dispute between the Parties as to the interpretation or application of the present treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice unless the Parties agree to settlement by some other pacific means.⁸⁶

The International Court would probably accept an application for jurisdiction in a dispute over the interpretation of a treaty containing the provision quoted above, but the language must be more precise. A basic problem is the failure to include a provision for referral upon the application of either party. Because the second paragraph is phrased in terms of "the Parties," the argument may be made that both States must submit the case to the Court and that a *compromis* is necessary. In addition, the clause "unless the Parties agree to settlement by some other pacific means" would preclude referral to the Court in the event of an agreement to adopt a mode of settlement, even though such settlement were not binding. If both States were parties to the Hague Convention of 1907,⁸⁷ it could be argued by one State that it was willing to commence settlement according to the Hague procedures. A State could stall for many years, doggedly promoting various avenues of settlement. There must be a point at which either party may request the jurisdiction of the Court.

82. Treaty with Nicaragua on Friendship, Commerce and Navigation, Jan. 21, 1956, art. 24, 9 U.S.T. 449, 466, T.I.A.S. No. 4024, 367 U.N.T.S. 3.

83. Treaty with Pakistan on Friendship and Commerce, Nov. 12, 1959, art. 23, 12 U.S.T. 110, 123, T.I.A.S. No. 4683, 404 U.N.T.S. 259.

84. Treaty with Togo on Amity and Economic Relations, Feb. 8, 1966, art. 14, 18 U.S.T. 1, 10, T.I.A.S. No. 6193, 680 U.N.T.S. 159.

85. Treaty with South Vietnam on Amity and Economic Relations, Apr. 3, 1961, art. 14, 12 U.S.T. 1703, 1713, T.I.A.S. No. 4890, 424 U.N.T.S. 137. This agreement is listed as "in force," but a footnote indicates that its status is "under review pending clarification of the situation in Vietnam." TREATIES IN FORCE 299 (1976).

86. Treaty with Togo on Amity and Economic Relations, Feb. 8, 1966, art. 14, 18 U.S.T. 1, 10, T.I.A.S. No. 6193, 680 U.N.T.S. 159.

87. Second Hague Peace Conference, Convention No. I, Pacific Settlement of International Disputes, signed Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536, 1 Bevans 577, 2 AM. J. INT'L L. 90 (Supp. 1908).

Paragraph one of article 14 of the treaty with Togo⁸⁸ did not become an element of United States agreements until its inclusion in a 1951 treaty with Israel.⁸⁹ Before that time, standard provisions consisted only of paragraph two.⁹⁰ While a commitment to grant "sympathetic consideration" is an optimistic addition, it is a subjective and imprecise term which creates an opportunity for controversy. Paragraph one should be redrafted to exclude the phrase "sympathetic consideration." The requirement for consultation should be retained, however, since it prevents a surprise referral to the Court without opportunity for prior negotiation. Paragraph two should be adjusted to make access to authoritative interpretation a right of last resort. A draft article for future bilateral treaties should provide the following:

DRAFT ARTICLE III

1. The Parties shall extend to one another opportunity for consultation with respect to any matter affecting the operation of the present treaty.
2. Any dispute between the Parties as to the interpretation or application of the present treaty, which is not settled by diplomacy, shall be submitted to the International Court of Justice upon the application of either Party, unless the Parties have submitted the dispute to another mode of binding settlement.

VI. EXPANSION OF AUTHORITATIVE INTERPRETATION IN BILATERAL TREATY SYSTEMS

Most States are hesitant to accept a universal mandatory system for authoritative interpretation of treaties.⁹¹ The United States and the Union of Soviet Socialist Republics, for example, are not likely to consent to submit interpretation and application of the SALT agreements to the compulsory jurisdiction of the International Court. This hesitance may be attacked on two levels. First, there is no utility in pressing for inclusion of provisions

88. Art. 14, 18 U.S.T. 1, 10, T.I.A.S. No. 6193, 680 U.N.T.S. 159.

89. Treaty with Israel on Friendship, Commerce and Navigation, Aug. 23, 1951, art. 24, 5 U.S.T. 550, 575, T.I.A.S. No. 2948, 219 U.N.T.S. 237.

90. The treaties with Nationalist China, Treaty of Friendship, Commerce and Navigation, Nov. 4, 1946, 63 Stat. 1299, T.I.A.S. No. 1871, 25 U.N.T.S. 69; Italy, Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965, 79 U.N.T.S. 171; Ireland, Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, 1 U.S.T. 785, T.I.A.S. No. 2155, 206 U.N.T.S. 269, and Ethiopia, Treaty of Amity and Economic Relations, Sept. 7, 1951, 4 U.S.T. 2134, T.I.A.S. No. 2864, do not contain paragraph 1.

91. See REPORT OF THE SECRETARY GENERAL, U.N. Doc. A/8382 (1971).

for authoritative interpretation in legal instruments which rely upon autointerpretation and autoenforcement for their political usefulness, but provision for authoritative interpretation may be made in those treaties where there is no intervening political element.⁹² Secondly, compulsory authoritative interpretation of existing and future treaties may be established through bilateral agreements between the United States and countries with which it has stable relationships and long-standing economic and political ties. The following draft bilateral treaty would provide for the compulsory jurisdiction of the Court. Article one includes a list of the treaties and other international agreements to be covered. Article two provides for settlement of disputes either by negotiation or other method of peaceful settlement or by submission to the Court. Article three allows denunciation upon notice and provides that the Court will continue to maintain its competence with respect to cases pending on the date of termination, thus preventing a State from denouncing the treaty on account of a particular case.

DRAFT BILATERAL TREATY

Article One

The Parties to the present treaty agree that its terms will apply to the following treaties and other international agreements:

(1) The bilateral agreements listed below, as long as they remain in force:

(a) _____

(b) _____;

(2) The multilateral agreements listed below, as long as they remain in force between the Parties to the present treaty:

(a) _____

(b) _____;

(3) The bilateral or multilateral treaties or other international agreements which shall in the future come into force between the Parties to the present treaty unless specific agreement to the

92. See *Report on the Gradual Extension of the Compulsory Jurisdiction of the International Court of Justice*, International Law Association, Report of the Fifty-first Conference 23-64, 71-116 (1964)(Louis B. Sohn, Rapporteur). The approach suggested by the International Law Association was to extend the jurisdiction of the Court to include all treaties and a list of certain specialized topics of general international law. Ten topics were to be tried for ten years and if the approach proved successful, ten more were to be added every ten years. But the universality of this approach causes difficulties. An issue of general international law which is uncontroversial between two States might be highly sensitive in relations between two other States.

contrary is made by the Parties to the present treaty regarding a particular treaty or other international agreement.

Article Two

Any dispute which may arise between the Parties to the present treaty concerning the interpretation or application of the treaties or other international agreements referred to in Article One which is not settled by negotiation or other method of peaceful settlement shall be submitted to the International Court of Justice for decision upon the application of either of the Parties to the present treaty, unless the Parties to the present treaty have submitted the dispute to another mode of binding settlement.

Article Three

This treaty may be denounced by either contracting Party upon notice to the other contracting Party and to the Registrar of the International Court of Justice. Upon the expiration of three months from the giving of notice, the treaty shall cease to be in force. However, the International Court of Justice will maintain competence to adjudicate any dispute pending before the Court at the moment this treaty ceases to be in force between the contracting Parties.

By limiting the scope of the compulsory jurisdiction of the Court to particular treaties and by selecting bilateral treaty partners with whom stable and friendly relations have existed for some period of time, the United States may greatly expand the jurisdiction of the Court with a minimum of risk. The draft treaty provides for denunciation because of the impermanence of international relationships. Shifts from friendship to animosity are generally gradual, and three months should be sufficient time to give notice.

VII. CONCLUSION

The role of international law in the foreign relations of the United States can be expanded while curtailing abuse of autointerpretation and autoenforcement. The attitude of the United States Senate signals a way. American treaties should include operative clauses providing that any dispute arising from the interpretation or application of future treaties be subject to authoritative interpretation of the International Court of Justice. The draft articles for bilateral and multilateral treaties and for constitutions of future international organizations provide language to accomplish this objective. The draft bilateral treaty would not only provide for compulsory jurisdiction of the Court for future

treaties, but would also include treaties already in force as selected by the parties. Such an approach would diminish abuse of autointerpretation and autoenforcement and would facilitate expanded use of the International Court.