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Jurisdiction of the International Court of Justice

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SECTION RECOMMENDATIONS AND REPORTS

American Bar Association Section of International Law and Practice Section of Tort and Insurance Practice Standing Committee on World Order Under Law Report to the House of Delegates

Jurisdiction of the International Court of Justice*

RECOMMENDATION

BE IT RESOLVED that the American Bar Association reaffirms its steadfast commitment to world order under law and to the policies and objectives of its earlier resolutions concerning the acceptance by the United States of the jurisdiction of the International Court of Justice.

BE IT FURTHER RESOLVED that the American Bar Association urges the Government of the United States to initiate efforts to negotiate with various states and groups of states a series of treaties accepting the jurisdiction of the International Court of Justice with respect to disputes arising under international

*This Report was approved by the House of Delegates at the Honolulu meeting in August 1989. The Report was prepared by the Blue Ribbon Committee on The International Court of Justice. Arthur Rovine was primarily responsible.

agreements to which the disputants are parties but which do not contain effective provisions for the settlement of disputes between them, it being understood that any such treaty may provide for submission of such disputes to a Special Chamber of the International Court of Justice should one party to the dispute request it.

BE IT FURTHER RESOLVED that the American Bar Association welcomes and supports the recent initiatives of the United States and the Soviet Union with regard to increasing recourse to the Court for the settlement of legal disputes and recommends that, to this end, the Government of the United States conclude a treaty with the Soviet Union under which the two States would agree to submit to the International Court of Justice or, at the request of either Party, to a Special Chamber of the Court to be established in accordance with a procedure provided for in the treaty, any dispute between them relating to the interpretation or application of international agreements, which are in force, which they have both ratified, and which are listed in an annex to the treaty, it being understood that any other international agreement ratified by both States might be added to the list in accordance with a procedure provided for in the treaty.

BE IT FURTHER RESOLVED that the American Bar Association recommends the conclusion by the United States of similar treaties for the settlement of international disputes with States or groups of States which have close links with the United States, submitting to the International Court of Justice or, at the request of one of the parties to the dispute, to a Special Chamber of the Court established in accordance with a procedure provided for in the treaty, disputes relating to the interpretation or application of any one of the international agreements listed by name or category in an annex to the dispute settlement treaty, which are in force and have been ratified by the parties to the dispute, it being understood any other such international agreement or category of agreements might be added to the list in accordance with a procedure provided for in the dispute settlement treaty.

BE IT FURTHER RESOLVED that the American Bar Association recommends that, in addition, the Government of the United States explore with other States or groups of States the conditions under which they would be willing to submit specified categories of disputes to the International Court of Justice.

REPORT

1. The American Bar Association is on record supporting adjudication before the International Court of Justice as a desirable method by which international disputes may be resolved. In December, 1945, the House of Delegates unanimously passed a resolution urging the President and the Senate to take action "at the earliest practicable time" to accept the compulsory jurisdiction of the Court. In 1947, reaffirmed in 1960 and 1973, the House passed a resolution urging elimination of the Connally reservation (excepting matters within the domestic

jurisdiction of the United States as determined by the United States), on the grounds that it undermined the United States' adherence to the Court's jurisdiction.

Although the judgments in the Nicaragua Case were controversial, the United States has been successful in the Court in other cases. The recent *Hostages in Tehran* and *Gulf of Maine* Cases illustrate how the Court may be beneficially used by the United States. Currently, the United States has before the Court a legal dispute with Italy relating to investments by United States citizens in that country. The United States will always have an interest in the promotion of world order through the rule of law, and in protecting by legal means the rights of United States citizens that have been violated by a foreign country. These interests will be advanced by increased use of the International Court of Justice.

States can confer compulsory jurisdiction on the Court either by making a general declaration under Article 36(2) of the Statute of the Court, or by concluding under Article 36(1) of the Statute an international agreement conferring compulsory jurisdiction on the Court with respect to specified disputes, such as those relating to the interpretation or application of a treaty or of some categories of treaties. This resolution proposes that the United States make a concentrated effort to promote the second method through the negotiation of limited agreements under which clearly specified categories of disputes would be submitted to adjudication before the International Court.

2. The draft resolution proposes that the United States take four steps towards promoting the increased use of the jurisdiction of the International Court of Justice: (a) adopt a policy encouraging the negotiation of special agreements with individual states and groups of states consenting to the jurisdiction of the International Court of Justice with regard to disputes between them that arise under international agreements to which such states are parties; (b) open negotiations to produce a carefully circumscribed treaty consenting to International Court of Justice jurisdiction over certain agreements to which the United States and the Soviet Union are parties; (c) negotiate treaties with friendly States willing to consent to the Court's jurisdiction over a broader category of treaty disputes; (d) explore with other countries the possibility of finding some categories of disputes which might be submitted to the Court, subject to specified conditions.

3. The draft resolution proposes that the United States take the initiative to negotiate bilateral and multilateral agreements consenting to the jurisdiction of the International Court of Justice with respect to certain legal disputes that may arise between it and other states. Many international agreements to which the United States is a party establish legal rights and duties that may give rise to disputes. Some of those agreements contain compulsory and binding dispute settlement systems. Others do not. It is in the interest of the United States to provide for a mechanism by which the International Court of Justice, or a Special Chamber thereof, may resolve legal disputes arising out of such agreements if effective dispute settlement mechanisms are not available to the parties to the

dispute (for instance, because of reservations made by them). The policy suggested in the instant resolution would encourage adjusting each jurisdictional clause to the political and economic relationship existing between the United States and various states or groups of states.

4. The proposed agreement with the Soviet Union would be limited to multilateral agreements which both parties have ratified. Some of them contain clauses conferring jurisdiction on the Court, which the United States has accepted, but to which the Soviet Union has made a reservation. Others contain optional clauses, which have to be accepted by a declaration recognizing the jurisdiction of the Court with respect to a particular treaty; the United States made such declarations in some, but not in all, cases; the Soviet Union has not made any such declarations. In a few cases, where reservations were not permitted, the Soviet Union nevertheless ratified the treaties and became bound by the Court's jurisdiction to interpret those treaties; it did that, for instance, with respect to several international labor conventions which United States has not yet ratified. Recently, the Soviet Union withdrew reservations to the jurisdiction of the Court under a few human rights treaties.

This resolution recommends that the United States attempt to reach agreement with the Soviet Union on the submission to the Court of disputes arising under clearly specified treaties.

5. It would be rather incongruous for the United States to accept a certain amount of jurisdiction of the International Court of Justice with respect to the Soviet Union, when no such jurisdiction exists with respect to States which have close links with the United States, and who are tied to the United States by many strong bonds of history and tradition. Despite such close links, the United States has no general agreement with these States accepting an international tribunal's jurisdiction in cases of legal disputes with any one of them. There are jurisdictional clauses in a few bilateral agreements with some of these countries, but they are usually of a limited scope, applying only to disputes under a particular agreement. The American Bar Association believes that within the community of Western nations, in particular, there is a general acceptance of the principle that the relations between them are subject to the rule of law and should be, therefore, justiciable before an international tribunal. Consequently, with respect to such States the United States should be able to accept the jurisdiction of the Court with respect to a much broader list of agreements than the one included in the treaty with the Soviet Union, and as soon as the experiment should prove successful, the United States might be willing to increase the jurisdiction of the Court by adding new categories of treaties to the list.

6. After taking these two important steps, the United States should explore the possible acceptance of the jurisdiction of the Court with respect to other States. The United States might agree with some States to recognize the jurisdiction of the Court under carefully drawn conditions, taking into account reservations made in the past by the various States concerned and the need to prevent a

recurrence of situations in which the jurisdiction of the Court would not be acceptable to one or the other party to the dispute. Finally, there might be other situations in which no agreement might be possible at this time, or only one limited to certain precisely delimited disputes, or requiring a considerable number of carefully drawn reservations.

7. As was noted above, this cautious "building block" approach is justified by the fact that the United States has diverse relationships with different groups of States, requiring distinct approaches in each category of cases. Nevertheless, through the several steps outlined above, the United States might be able to accept the jurisdiction of the Court to the extent appropriate for each State or group of States, leaving the door open for increasing the Court's jurisdiction, step by step, should the circumstances justify it.

8. It must be noted also that the resolution suggests that arrangements be made in the various treaties for establishing Special Chambers of the Court, similar to some extent to those agreed upon in several recent cases before the Court, thus facilitating further the acceptance of the jurisdiction of the Court by the United States. Each treaty would provide an appropriate procedure for selecting the members of the Chamber in a manner similar, to some extent, to that being used for selecting members of international arbitral tribunals, but taking into account the Court's rules of procedure relating to Special Chambers.

Respectfully submitted,
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of International Law and Practice
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