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The United States and the International Court of Justice: Coping with Antinomies

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I. INTRODUCTION

Since 1946, the United States has had an uneasy relationship with the International Court of Justice (I.C.J. or Court). On the one hand, the United States embraces the rule of law within its own society and, in principle, within the international system of states. The United States has been and remains an active participant in cases before the Court, orally appearing before the court several times even in recent years. On the other hand, the United States has never been willing to submit itself to the plenary authority of the Court, and has typically reacted negatively to decisions by the Court that are adverse to U.S. interests. As is well known, in reaction to decisions that were reached by the Court, the United States refused to participate in the proceedings on the merits of the case brought by Nicaragua in 1984, withdrew from the Court's compulsory jurisdiction in 1986, and recently terminated its acceptance of the Court's jurisdiction over disputes arising under the Vienna Convention on Consular Relations.

This paper addresses certain salient aspects of the United States relationship with the International Court of Justice. Following this Introduction, Part II briefly sets forth three antinomies (or equally rational but conflicting principles) in U.S. foreign relations that have had important ramifications for the U.S. relationship with the Court from the outset. First, the United States operates on the basis of conflicting principles with respect to the relevance of international law and institutions for U.S. foreign policy, which have been referred to broadly in international relations theory as "realism" and "institutionalism." Although discussion of the intricacies of such theories is beyond the scope of this paper, realism at its core emphasizes the role of coercive state power in resolving inter-state

¹ My thanks to Brooke Marcus and José Arvelo-Vélez for research assistance. As a matter of full disclosure, the author served as counsel for the United States before the International Court in several of the cases discussed in this essay.

disputes, within a system that is largely anarchic, by states that are driven by materialist goals. The realist has no or little faith in international institutions, generally insisting that they (including institutions for international dispute resolution) do not exert (or rarely exert) any independent influence on state behavior. Institutionalism (or functionalism) asserts that the logic of realism does not explain actual cooperation that exists among states; states create effective and meaningful international institutions and institutional arrangements so as to address certain problems that states, acting alone, cannot address, such as minimizing externalities, preventing market failures, or avoiding defections that would defeat an optimal game theory outcome. Thus, the institutionalist places far greater weight on the beneficial role that independent, judicial decision-making can have in promoting desired inter-state relations. Both approaches represent powerful and deep-seated instincts in the American attitude toward international law and institutions although, of the two, realism historically has tended to dominate.

Second, the United States operates on the basis of conflicting principles with respect to whether states should be treated as equal sovereigns or as units characterized by inescapable power differentials. While the United States historically has articulated a desire for cooperation with other states as co-equal sovereigns – and, indeed, has been in the vanguard in many respects in the promotion and development of international law and institutions built around the concept of sovereign equality – the United States has innate historical and cultural characteristics that push it toward an attitude of “exceptionalism” in its foreign policy, meaning a belief that the United States formally and informally is entitled to be treated differently from other states. Although similar in nature to the first antinomy stated above, this antinomy reflects certain factors quite unique to the United States, including its present role as the pre-eminent superpower, as an economic powerhouse, and as a country in certain respects uniquely insulated from vicissitudes of international relations. With respect to the U.S. relationship with the International Court, this antinomy pulls the United States toward the Court as an institution before which all states are equal under law, but pushes the United States away when the Court fails to accommodate the special role of the United States on matters such as the maintenance of international peace and security.

Third, the United States operates on the basis of conflicting principles with respect to whether international law should be “embedded” in U.S. law, including the manner in which international courts relate to U.S. law. On the one hand, the United States at its founding saw adherence to international obligations as an important means of establishing the international legitimacy and security of a nascent republic, and so adopted constitutional and judicial principles that promoted the idea of international law as being a part of U.S. law and as superior to the law of the several states. On the other hand, the United States has developed democratic and constitutional traditions that make it difficult to adhere to and to implement internally international law. With respect to its democratic tradition, the United States has always accepted the importance and significance of a

judiciary for the resolution of disputes, but has also viewed unelected judges as potential agents for usurping popular governance, a concern that is aggravated when the judges in question are non-American and issuing their decisions from afar. Further, U.S. constitutional law creates significant obstacles to U.S. adherence to international law and institutions by dividing power between the President and the legislature, and by maintaining a federal system that accords extensive rights to the several states.

Part III suggests that the manner in which the International Court was initially designed subtly sought to accommodate such antinomies (which also exist with respect to other countries, to varying degrees) by providing the means for mediating between these conflicting principles. For example, the formal manner for selecting judges and the types of jurisdiction accorded the Court attempted to satisfy and cultivate those U.S. principles that favored the existence and participation in a global court, while at the same time attempted to limit the role of the Court so as to avoid aggravating conflicting principles. These techniques for mediating antinomies are discussed in the context of the history of the U.S. relationship with the Court from its inception to modern times.

Part IV then briefly highlights the unfolding of these antinomies in some of the recent cases of the United States before the Court, with particular attention to the *Oil Platforms* case, the Israeli *Wall* advisory opinion, and the *Breard/LaGrand/Avena* cases. While the United States fully participated in these cases and did not denounce the Court's decisions as without basis in law, the cases have brought the Court into square conflict with U.S. visions of realism, exceptionalism, and constitutional autonomy.

Among other things, Part V suggests that certain formal and informal means for mediating these antinomies may have been lost in the past twenty years, leading to a point where the Court readily finds fault in the United States and senior leaders in the United States hold the Court in relatively low regard. In particular, while the Court's concern with its reputation and legitimacy in the first thirty years of its existence served as an important informal constraint in the Court's relationship with the United States, over the past twenty years that same concern has led to repeated clashes with the United States. The paper concludes that these antinomies are unlikely to be resolved through the further development of formal or informal mediating techniques. In the near term, U.S. policymakers will seek to avoid any involvement in matters before the Court, while the Court will embrace opportunities to speak to the legality of U.S. actions.

II. ANTINOMIES IN THE U.S. RELATIONSHIP WITH THE I.C.J.

An "antimony" is a contradiction in principles that seem equally necessary and reasonable. In U.S. foreign relations, there are three core antinomies that simultaneously pull the United States toward the idea of having a meaningful international court and push the United States away from that idea. First, there is the conflict between "realism" and

“institutionalism” in the way America thinks about securing its interests. Second, there is the conflict between the U.S. vision of itself as a unique entity that should not be subject to the same constraints of international law and institutions to which other states should be exposed, and the U.S. vision of engaging with co-equal sovereigns through uniform rules on trade, human rights, and other important issues. Third, there is the conflict between, in the first instance, U.S. democratic traditions that promote the autonomy of the U.S. legal system and local governance over local issues and, in the second instance, the U.S. willingness to embed U.S. national law in international law. These antinomies – which are presented as broad concepts though they in practice have overlapping features – have had and will continue to have significant repercussions for the U.S. relationship with the International Court.

A. AMERICAN REALISM VERSUS INSTITUTIONALISM

One antinomy of significance for the U.S. relationship with the International Court arises from the well-known divide within American society, broadly stated, between realism and institutionalism lines of thinking. The social contract theory advanced by Thomas Hobbes,² John Locke,³ and Jean-Jacques Rousseau⁴ to justify the origin of the state focused on the state as a creation by free individuals whose interests – security, freedom, order, justice, and welfare – the state must recognize and serve. As far as relations between states, Hobbes saw an environment of anarchy in which states fear each other, such that a state must use its military and economic power to pursue strategies and policies that advance that state’s interests, which invariably conflict with the interests of other states. While bargains may be struck between states that serve their mutual interests, such bargains are not and should not be driven by abstract ethical or moral considerations, and once struck are often temporary or imposed coercively by one of the parties. In a Hobbesian world, international “law” (or “rules” or “norms”) and international “institutions” (or “regimes”) may exist, but they do not exert independent influence on states and are epiphenomenal in nature. To the extent that states are seen as abiding by such law, it is simply because political or economic factors encourage them to do so, not because of a fidelity to a “legal” system. Rather, states strive relentlessly to increase their relative power position vis-à-vis rival states regards of international law or institutions. Frequently referred to as “realism” in international relations theory, this line of thinking

² THOMAS HOBBS, *LEVIATHAN* (Macmillan 1962) [1641].

³ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* [1698] (Thomas P. Peardon ed., Prentice Hall, 1952) [1698].

⁴ JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT: DISCOURSE ON THE ORIGIN OF INEQUALITY; DISCOURSE ON POLITICAL ECONOMY* (Donald A. Cress trans. & ed., Hackett, 1987) [1762].

appears to be deeply entrenched in U.S. policy-making; legions of U.S. policy-makers are fully versed in the seminal “realist” writings of Hans Morgenthau, Thomas Schelling, and Kenneth Waltz.⁵

The flip side of realism is “institutionalism” (or “functionalism”), which also has a place in U.S. policy-making. Institutionalists assert that the contemporary nature of inter-state relations is demonstrably not Hobbesian; rather, there is an extraordinary amount of cooperation among states that realism theory fails to explain. States pursue their national interests, but those interests include a desire for international law and institutions, including impartial inter-state dispute settlement, since cooperation often yields greater far benefits than does non-cooperation.⁶ States see value in cooperating so as to achieve optimal outcomes; game theory and market theory open the door to a much more sophisticated understanding of why and how cooperative regimes benefit states, why they are sought, and why they work. Among other things, institutionalists observe states developing a web of norms that will compel just, moral and equitable behavior among states; to end warfare through use of collective security, disarmament, and even criminal punishment; to use human rights as a normative tool for restraining government abuses of its people; and to make the world safe for democracy. The intellectual origins of institutionalism lie in the writings of Immanuel Kant, who called upon states to establish a league of peace to prevent war.⁷ At key points in American history, this line of thinking dominated U.S. foreign policy; typically reference is made to Woodrow Wilson’s Fourteen Points after World War I, to U.S. support for the myriad multilateral institutions that arose after World War II, and to the emphasis on human rights in the foreign policies of certain presidents, such as Jimmy Carter. At any given time, U.S. foreign policy may have elements of both realism and institutionalism. The current Bush administration is realist in its tendency to resist empowerment of international organizations, but has elements of institutionalism in its neo-conservative emphasis on the promotion of democracy.

This broad conflict in the U.S. attitude to its foreign relations has affected the U.S. relationship with the Court. On the one hand, institutionalism in the United States favors the existence of a global court and the idea that disputes among states can and should be resolved peacefully by an impartial panel of judges drawn from across the globe, whether

⁵ HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (2d ed. 1955); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960); KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

⁶ *See, e.g.*, ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

⁷ IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* (M. Campbell Smith, trans., A. Robert Caponigri ed., Liberal Arts Press, 1948) [1795].

or not the U.S. wins its cases before the Court. Thomas Franck has referred to such a vision of U.S. engagement with an international court as “messianic” in nature; a belief that the rule of law institutions that have worked so well internally for the United States must be replicated on the international level.⁸ On the other hand, realism in the United States wants to maintain the ability of the United States to protect its national interests through resort to unilateral power, and to that end has opposed a global court with plenary jurisdiction over international disputes involving the United States. For Franck, this is a “chauvinist” vision, one that views the rule of law known within the United States as unique to U.S. history, culture, and values, such that replication of the rule of law internationally is not only implausible but threatens U.S. values and institutions.⁹ While the institutionalism strand accepted the Court’s compulsory jurisdiction in 1946 (discussed further below in Part III), the realism strand virtually eviscerated that acceptance by attaching reservations to the acceptance. The presence, and even swinging back and forth of these lines of thinking, have fostered a constant tension between the United States and the Court, especially in recent years. Arguably the United States has pursued an impossible position of both embracing the idea of the Court and yet distancing itself from the inevitable effects of that idea.

This antinomy is not unique to the United States; other states have similar lines of thinking in their foreign policy. Indeed, the structural aspects built into the I.C.J. that are discussed in Part III – aspects that seek to mediate between the desire of states for an impartial, permanent judicial forum, and the desire of states to control their exposure to I.C.J. decision-making – may be seen as an effort to mediate between institutionalism and realism among all states. A further tension that arises, however, lies in the differences among states in *how* they strike a balance between these lines of thinking in their relationship to the Court. On one end of the spectrum – where realism dominates – lie China and Russia, for whom the institutionalism line of thinking has never taken hold. Those states see no national interest in being exposed to the jurisdiction of the Court and have succeeded in never appearing before the Court in a contentious case. In effect, China and Russia have no relationship with the Court, other than the presence of a judge of their nationality on the Court. A little further along the spectrum is the United States, whose relationship with the Court is dominated by realism but with a patina of institutionalism.

⁸ Thomas Franck, *Messianism and Chauvinism in America’s Commitment to Peace Through Law*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 3, 6 (Lori F. Damrosch ed., 1987); *see also* MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS, 1789-1914* (2004) (finding that “to a surprising extent, the international courts of today were the work of nineteenth-century American Utopians by and large untrained in the law.”).

⁹ Franck, *supra* note 8, at 6.

Much further along the spectrum—moving into where institutionalism dominates—are the Europeans. For Europeans, the carnage of two world wars left them no choice but to opt for an institutionalism approach to foreign relations; a forsaking of national sovereignty and national prerogatives in favor of supra-national institutions (the European Union, the European Court of Human Rights) that would generate and interpret law that would bind European states. As such, their attitude toward the International Court is balanced much more along an institutionalism line. Of the twenty-seven members of the European Union, for example, fifteen have accepted the Court’s compulsory jurisdiction.¹⁰ Finally, also largely on the institutionalism side of the spectrum are the non-Western, developing states. For them, the balance is also oriented toward the institutionalism approach to the Court because in most instances those states cannot rely on military or economic power to advance their national interests—a realism approach to the Court often gains those states very little. By contrast, to the extent that embracing the Court provides a means for resolving intractable disputes among developing states, and a possible means for restricting the power of Western, developed states, the Court provides developing states with leverage that they would not otherwise have on their own. So while many developing states have declined to expose themselves to the uncertainty of the Court’s compulsory jurisdiction, they strongly favor the existence of the Court, are quite interested in using the Court when possible to resolve disputes with neighbors, and are willing to use the Court on occasion against more powerful states.

The differences among these groups create tension because realism-oriented states wish to downplay the authority and significance of the Court, wish to see the Court adopt a narrow approach to its jurisdiction, and are quick to challenge the integrity and impartiality of the Court whenever the opportunity arises, whereas institutionalism-oriented states tend to do the opposite, thus leading to serious divergences among states regarding the proper functioning of the Court.

B. AMERICAN EXCEPTIONALISM VERSUS SOVEREIGN EQUALITY

A second antinomy of significance for the U.S. relationship with the International Court arises from the conflict between accepting an inter-state system fundamentally predicated on the equality of all states, and insisting (formally and informally) upon special prerogatives for major powers, most particularly the United States.¹¹ While there are links

¹⁰ Austria, Belgium, Bulgaria, Denmark, Finland, Greece, Hungary, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Spain, Sweden, and United Kingdom have adhered to the Court’s compulsory jurisdiction. Cyprus, Czech Republic, Estonia, France, Germany, Ireland, Italy, Latvia, Lithuania, Malta, Romania, and Slovenia have not.

¹¹ For a detailed discussion of how international law generally mediates between the principle of sovereign equality and a principle favoring prerogatives of great powers, see GERRY

with the “realism” line of thinking discussed above, exceptionalism is a somewhat different concept, in that whether a realism or institutionalism outlook is taken, the United States is often captivated by a belief that the United States simply should not be treated just like every other state.

The belief in the sovereign equality of all states is a fundamental principle of U.S. engagement in the international system. The international legal system, which the United States has done much to promote, is constructed around the concept of “the state”, and the concept of all states having the same fundamental rights and obligations as an incident of their statehood. As asserted in the General Assembly’s famous *Declaration on Principles of International Law*:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements:

1. States are juridically equal;
2. Each State enjoys the rights inherent in full sovereignty;
3. Each State has a duty to respect the personality of other States;
4. The territorial integrity and political independence of the State are inviolable;
5. Each State has the right freely to choose and develop its political, social, economic and cultural systems.¹²

For this reason, the United States accepts that in the plenary bodies of international organizations, and at international negotiations of new treaties, tiny states in terms of territory or population (such as Nauru) are entitled to the same formal status as behemoths (such as China).

At the same time, the conflicting vision of American exceptionalism pushes back against such notions of equality. Thus, when constructing a U.N. Security Council in 1944-45, there was no question that the United States should be a permanent member with special rights and privileges that, among other things, protect the United States from Security Council action. When establishing a World Bank or International Monetary Fund, a weighted voting system should be created that protects U.S. influence in the development

SIMPSON, GREAT POWERS AND OUTLAW STATES (2004).

¹² Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, G.A. Res. 2625 (XXV), annex (Oct. 24, 1970).

of international economic policy. When creating international criminal tribunals, ad hoc tribunals that are coercive as against a particular country (the former Yugoslavia or Rwanda) are acceptable, but an International Criminal Court is not unless the United States has an ability to preclude prosecution of U.S. nationals. In other words, this antinomy notes the conflict between a vision of international law and institutions in which all states participate as equal sovereigns, and a vision of exceptionalism by which the United States habitually reaches for policies and structures that it alone controls, or that apply generally to states but not to the United States.

Such tendency toward exceptionalism arises from a confluence of factors. Perhaps the most important is the history of the United States over the past century as a country untouched by sustained armed conflict on its soil, protected by vast oceans from any serious threat of invasion (the sense of shock from, and aggressive response to, the isolated attacks of September 11 in part demonstrate this deeply felt sense of U.S. security), which tends both to undermine arguments for why the United States must adhere to global norms and instruments, and to foster an instinct to avoid “entangling” alliances that might draw the United States into the conflicts of other states. Other factors include: the demise of the Cold War, eliminating the one dominant threat to the United States in the form of the Soviet empire; the United States emergence as the sole global superpower, capable of projecting considerable power through unilateral action rather than relying on cooperation with other states; the increasingly conservative political environment in the United States vis-à-vis other developed states (including the existence of a concentrated and active conservative minority in the United States that, as Andrew Moravcsik has pointed out, has taken advantage of the fragmented nature of U.S. political institutions to resist U.S. implementation of international human rights norms¹³); an indifference to the norms and institutions of other states due to a belief that American norms and institutions, over time, have proven superior to anything found abroad (i.e., the United States leads others, it does not follow them); a distinctive “rights culture” in the United States which emphasizes negative protections against government interference in private liberties, and does not emphasize, unlike other Western states and emerging democracies, activist provision by government of socio-economic and welfare rights (i.e., entitlements to food, health care, etc.); and important demographic and cultural shifts that distinguish the United States from even its traditional allies (i.e., the continuing and increasing role of Christian faith in the United States as compared with the secularization of Europe; the gradual “Islamicization” of Europe due to immigration, such that if Turkey joins the European Union there will be more Muslims than Protestants in Europe¹⁴).

¹³ See Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 147 (2005).

¹⁴ Niall Ferguson, *The Widening Atlantic*, THE ATLANTIC, Jan./Feb. 2005, at 40.

This presence of exceptionalism in U.S. relations with the International Court affects the U.S. attitude toward the International Court in two important ways. First, exceptionalists are inherently unhappy with any international institution that can issue pronouncements regarding the legality of U.S. conduct. For exceptionalists, an international court may be a good thing for keeping other states in line, but the United States almost always does the right thing and, when it does not, any repercussions should flow from U.S. legal and political institutions, not from abroad. Second, even when the International Court is not passing upon the legality of U.S. conduct, the exceptionalist is skeptical about the International Court because the Court at times reaches conclusions that differ from those of the United States, and therefore (for the exceptionalist) the Court is simply wrong.

C. AUTONOMOUS NATIONAL LAW VERSUS NATIONAL LAW EMBEDDED IN INTERNATIONAL LAW

A third antinomy of significance for the U.S. relationship with the International Court arises from the conflict between favoring a national legal system that is embedded in international law as a means of ensuring U.S. adherence to and implementation of its international obligations, and disfavoring such incorporation to the extent that it transgresses U.S. democratic and constitutional traditions that promote diffusion of power and governance of persons by their freely elected officials.

The United States at its founding saw adherence to international obligations as an important means of establishing the international legitimacy and security of a nascent republic, and so adopted constitutional and judicial principles that international law was a part of U.S. law and superior to the law of the several states. The U.S. Constitution provides for treaties to be part of the “supreme law of the land”¹⁵ and provides for the supremacy of federal law over state law.¹⁶ Further, the Supreme Court has been favorably disposed toward the incorporation of customary international law into U.S. law,¹⁷ and to

¹⁵ U.S. CONST. art. VI, § 2.

¹⁶ *Id.*

¹⁷ *See* *Ware v. Hylton*, 3 Dall. 199, 281, 1 L.Ed. 568 (1796) (Wilson, J.) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”); *The Nereide*, 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is a part of the law of the land.”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“[I]t is, of course, true that United

the interpretation of U.S. law whenever possible so as to avoid conflicts with international law.¹⁸

At the same time, strong currents in the U.S. constitutional and democratic tradition seek to keep international law at a distance, such as through the doctrine of non-self-executing treaties and the trumping of customary international law by later-in-time statutes or “controlling executive acts.”¹⁹ Further, from the beginning of its history, America has been proud of the manner in which it has divided power among the three branches of its federal government, and between the federal government and the several states. Such division of power was designed to promote a democratic but well-functioning government, and to preclude concentration of power in a single organ. While this constitutional tradition is a marvel, there can be little doubt that it has impeded the integration of the United States into the international legal system. Dividing power between the President and the Senate may have helped prevent the emergence of an American monarch in foreign policy, but it has also prevented presidents from embracing broad-ranging jurisdiction of a global court from the early twentieth century forward. Restraining the federal government from being able to regulate on certain matters of individual rights prevents a governmental denial of civil liberties, but places the United States in a difficult position internationally on matters such as regulating the free speech of the tobacco industry or on matters of race. Dividing power between the federal government and the several states allows for greater local governance and numerous “laboratories” for developing laws, but it also makes it extraordinarily difficult for the United State to adhere to international norms that require greater national uniformity in an increasingly diverse number of areas.

Consequently, there is an enduring schizophrenia in the U.S. constitutional and democratic tradition regarding the manner in which it incorporates international law, and this conflict is aggravated when the issue of courts is added to the picture. The United States has always accepted the importance and significance of a judiciary for the resolution of disputes; the importance and legacy of the U.S. Supreme Court from early U.S. history

States courts apply international law as a part of our own in appropriate circumstances.”); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (recognizing that “international disputes implicating . . . our relations with foreign nations” are one of the “narrow areas” in which “federal common law” continues to exist); *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2764 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”).

¹⁸ See *Murray v. The Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (the same).

¹⁹ *The Paquete Habana*, 175 U.S. at 700.

to the present is ingrained in every American schoolchild. Yet the American democratic tradition strongly favors rule by the people principally through their popularly-elected officials, such that there is an enduring suspicion of judges (local, let alone foreign) whose decisions do not hew closely to the laws enacted by the people. By and large, Americans do not favor their judges undertaking teleological interpretations of law; to the extent that laws need to be adapted, they look to the legislatures to do it. U.S. judges have been activist at times, both for conservative and liberal causes, but the practice does not sit well with the American democratic tradition, and repeatedly evokes controversy. This conflict between a belief in an independent judiciary and distrust of activist judges explains in part the U.S. ambivalence to the International Court (as well as efforts in some quarters to prevent U.S. judges from applying in U.S. courts norms generated outside the United States, whether formed by customary international law, within treaty regimes, under foreign law, or otherwise).

As discussed in Part IV, this antinomy recently has presented the United States with difficult issues regarding the relationship of International Court decisions to the conduct of law enforcement officials and courts in the several states.²⁰ Among other things, it has led the United States toward acknowledgment that final judgments of the International Court are binding upon the United States as a matter of international law, but to assertions by the Executive Branch that such judgments have no direct effect within U.S. law.

III. TECHNIQUES FOR MEDIATING THE ANTINOMIES

When the International Court was created, certain methods or mechanisms, formal or informal, were established that essentially mediate the antinomies discussed above. Such techniques do not attempt to eliminate the conflicting principles captured by those antinomies; rather, the techniques take for granted that such antinomies exist and seek to find a path for the Court between the conflicts presented. In essence, these mediating techniques²¹ seek to play to U.S. tendencies (and similar tendencies in other states) of

²⁰ See Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783 (2004) (“The democratic tradition of the US, in which the government cannot rely on a majority in the legislature, sometimes stands in the way of the acceptance of rulings by ‘unelected’ international judges. Fifty state systems differ in their respect for international rulings.”)

²¹ For discussions of such techniques, see W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* (1992); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Robert Adieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, CAL. L. REV. (forthcoming

institutionalism, of sovereign equality, and of incorporation of international law into U.S. law, while accepting that conflicting principles of realism, exceptionalism, and autonomous national law circumscribe the role the Court may play. The discussion of such techniques below is combined with brief highlights of the history of the U.S. relationship with the International Court.

As is well-known, the predecessor to the International Court of Justice—the Permanent Court of International Justice (P.C.I.J.)—was created in the aftermath of World War I. Caught up in the rising tide of institutionalism of the late nineteenth/early twentieth century, the United States was actively engaged in the negotiations that led to the establishment of the P.C.I.J., due in part to a belief that reliance solely on international arbitration for resolution of inter-state disputes was not good enough.²² Though such arbitration had its place, U.S. international lawyers or policy-makers—such as Elihu Root—argued that international arbitration tended toward “an essentially political process of negotiation and compromise on the basis of expedience rather than the judicial procedure of impartial adjudication of rights and duties in strict accordance with the rules

2005).

²² U.S. interest in international arbitration dates from early in its history, see Janis, *supra* note 8, at 97-116, but that interest for more than 100 years was principally focused on disputes with its “mother country,” the United Kingdom. The Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-U.K., 8 Stat. 116, T.S. No. 105 (commonly referred to as the “Jay Treaty” after U.S. Secretary of State John Jay), established three boards of arbitration to resolve disputes between the United Kingdom and its former colony. The Treaty of Washington, May 8, 1871, U.S.-U.K., 17 Stat. 863, T.S. No. 133, established four arbitrations for addressing Britain’s conduct during the U.S. civil war, including Britain’s responsibility for allowing the construction of the Confederate raider *Alabama*. See Tom Bingham, *The Alabama Claims Arbitration*, 54 INT’L & COMP. L.Q. 1 (2005). Other U.S./U.K. arbitrations addressed fur seals, the Venezuela-British Guiana boundary, and Alaska. In the years leading up to World War I, the United States entered into a few treaties providing for international arbitration, principally with Latin American states, but broader efforts foundered in the U.S. Senate.

The other principal U.S. inter-state arbitration prior to World War II concerned Mexico. In September 1923, the United States and Mexico signed a convention in Washington D.C. (which took effect in March 1924) creating a General Claims Commission. The purpose of the commission was to settle claims arising after July 4, 1868, “against one government by nationals of the other for losses or damages suffered by such nationals or their properties” and “for losses or damages originating from acts of officials or others acting for either government and resulting in injustice.” Composed of three members (from the U.S., from Mexico, and from a third country), the Commission met from 1924 to 1937 in Washington, D.C. and Mexico City. Final settlement was reached in 1941.

of law.”²³ The latter process was an option that states should have, since judicial decisions, being grounded more firmly in a rigorous application of law by persons not selected by the disputants, could serve as a means for definitively and convincingly resolving certain kinds of disputes. The United States had pressed without success for the creation of such a court at the 1907 Hague peace conference; now, after the carnage of world war, other states were willing to go along.

As is also well-known, however, the U.S. Senate never consented to U.S. ratification of the Covenant of the League of Nations, nor of the separate protocol embodying the Statute of the P.C.I.J. While the P.C.I.J. had its supporters in the United States, strong voices of realism and exceptionalism, particularly in the U.S. Senate, argued that submission to the jurisdiction of a world court would harm U.S. national interests, and would diminish or jeopardize U.S. sovereignty. When put to a vote in 1935, U.S. adherence to the protocol secured 52 votes in favor and 36 against, thus falling seven votes short of a two-thirds majority.²⁴ Throughout the life of the P.C.I.J. from 1922 to 1945 – during which time the court issued 27 advisory opinions and 32 judgments²⁵ – the United States never participated in any litigation before the court, although a judge of U.S. nationality always served on the Court.²⁶ The substantive and procedural decisions of the P.C.I.J. remain of interest today, since the Statute of the I.C.J. is essentially the same as that of its predecessor. Indeed, while states decided in the aftermath of World War II to create a new international court, they also decided to maintain continuity in its concept and function.²⁷

Unlike the experience with the League, the United States joined the United Nations in 1945 and therefore *ipso facto* became a party to the I.C.J. statute.²⁸ Institutionalists emphasized that the success of a new system of international organizations to maintain peace and security, one built upon the rule of law, necessarily entailed the creation of an international court. The U.S. delegation to the San Francisco conference reported to President Franklin D. Roosevelt that “[a]s the United States becomes a party to a Charter which places justice and international law among its foundation stones, it would naturally

²³ See FRANCIS ANTHONY BOYLE, FOUNDATIONS OF WORLD ORDER 37 (1999).

²⁴ 79 CONG. REC. 1147 (1935).

²⁵ See SHABTAI ROSENNE, THE WORLD COURT AND HOW IT WORKS 16 (4th ed. 1995).

²⁶ The P.C.I.J. judges of U.S. nationality were: John Bassett Moore (1922-28); Charles Evan Hughes (1928-30); Frank B. Kellogg (1930-35); and Manley O. Hudson (1936-42).

²⁷ See AMRY VANDENBOSCH & WILLARD N. HOGAN, THE UNITED NATIONS: BACKGROUND, ORGANIZATION, FUNCTIONS, ACTIVITIES 190 (1952).

²⁸ See U.N. CHARTER art. 93.

accept and use an international court to apply international law and to administer international justice.”²⁹ Testifying prior to the Senate’s consent to ratification, the head of the U.S. delegation in San Francisco, Edward Stettinius, asserted that the Court will “have a most important part to play in the further development and strengthening of international law, just as the courts of England and America have helped to form the common law.”³⁰ The State Department Legal Adviser (and later first U.S. judge on the new Court), testified that the United States historically stood for

the settlement of international cases by the judicial process; that we did try as far back as 1907 to establish a court; that such a court was established in 1922 and has been functioning ever since, and that while we did not go into that Court, there was strong sentiment in this country, as you well know, for our becoming a party. Here we have provision for a Court, in the creation of which we have played an important part. Speaking for myself and for those who have been associated with me in this work, I think that we cannot too strongly urge . . . that we have here provided for the creation of an International Court of Justice that will be worthy of the name, and one that will make a great contribution to the maintenance of international peace and security. The Court is not as spectacular as some of the other organizations provided for in the Charter, but we think that it will serve an extremely important purpose, and that an International Organization without such a Court would be lacking in a very important essential.³¹

The Charter and the Court, of course, had their U.S. realism and exceptionalism detractors, who argued among other things that adherence to the Charter would “make slaves of our free citizens,”³² and that the I.C.J. would unconstitutionally usurp the jurisdiction of the U.S. Supreme Court “over all foreign disputes of this Nation.”³³ Notwithstanding such views, the Senate in 1945 gave consent to U.S. ratification of the Charter, by a vote of 89 to

²⁹ *The Charter of the United Nations: Hearings before the Senate Committee on Foreign Relations, 79th Cong., 121 (1945) [hereinafter 1945 Senate Hearing]* (report to the President on the Results of the San Francisco Conference, dated June 26, 1945).

³⁰ *Id.* at 219 (statement of Edward R. Stettinius, Jr., personal representative of the U.S. President to the San Francisco Conference).

³¹ *Id.* at 344 (statement of Green H. Hackworth, U.S. Department of State Legal Adviser).

³² *Id.* at 353 (statement of Mrs. Agnes Waters, legislative representative of the National Blue Star Mothers of America).

³³ *Id.* at 381 (statement of David Darrin, United Nations of Earth Association).

2.³⁴

Even so, the United States did not embrace an international court that held wide-ranging and unconstrained authority over the United States. Structural aspects built into the I.C.J. sought to accommodate the desire of all states (including the United States) for an impartial, permanent judicial forum, and yet conflicting desires of some states to control their exposure to I.C.J. decision-making (and, when exposed, to have their concerns be fairly heard and understood). Although not consciously identified as such, these structural aspects may be seen as mechanisms by which the United States is mediating between the antinomies identified in Part II.

A. ONLY STATES, NOT PERSONS

At the time of the creation of the International Court, the idea that individuals might themselves pursue claims before an international tribunal was largely unknown. Consequently, the Statute of the Court provides that only states may appear before it in contentious cases, thus precluding voices that are not vested in the overall system of state sovereignty. This is an important design feature that provides states with a much greater comfort level regarding their exposure to the jurisdiction of the Court. Although today several states have accepted international courts that allow individuals to bring an action against their own government—such as the European Court of Human Rights—many other states (including the United States) have been unwilling to do so. Were the International Court to have such jurisdiction, it would greatly exacerbate the Court's relationship with the United States, for it would invariably result in the Court passing upon matters that traditionally have been handled solely within the national legal system of the United States.

B. CIRCUMSCRIBED JURISDICTION

The dominant structural aspect controlling a state's exposure to the I.C.J. is that states cannot be sued before the I.C.J. absent their consent. While there was considerable support at the San Francisco conference in favor of making the Court's jurisdiction compulsory, the United States and the Soviet Union were adamantly opposed. Faced with a deal-breaker, the other nations backed down.³⁵ Consequently, under the I.C.J. statute, consent to the jurisdiction of the Court does not occur merely by becoming a party to the Court's statute; separate consent must exist. This requirement of state consent is why most of the 192 states of the world have never appeared before the Court in a contentious case, and why the Court is regarded as an important but not dominant player in the field of

³⁴ 91 CONG. REC. 8190 (1945).

³⁵ See RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 884-90 (1958).

international dispute resolution.

While state consent is needed for the Court to have jurisdiction over the case, the Court's statute is structured so as to make such consent as easy as possible for states. First, states can accept the Court's jurisdiction on an *ad hoc* basis for the adjudication of an existing dispute.³⁶ For example, the United States and Canada in 1981 jointly agreed to bring to the Court a dispute over their maritime boundary.³⁷ Since that dispute, the United States has on no other occasion agreed to bring a dispute to the Court on an *ad hoc* basis. Instead, bilateral disputes that might have been addressed by the Court under its *ad hoc* jurisdiction have been dealt with through bilateral negotiation³⁸ or through bilateral arbitration.³⁹ The United States has also promoted *ad hoc* arbitration directly between its injured nationals and foreign states by coercing foreign states into accepting such jurisdiction.⁴⁰

Second, states can adhere to a bilateral or multilateral treaty in which the International Court's jurisdiction is accepted for cases relating to the interpretation or application of the treaty or for any other disputes that might arise.⁴¹ (Treaties pre-dating the existence of the Court that provide for jurisdiction of the P.C.I.J. are also regarded, under the Statute of the I.C.J., as triggering I.C.J. jurisdiction⁴²). This form of jurisdiction is

³⁶ Statute of the International Court of Justice art. 36(1), 59 Stat. 1055, 3 Bemis 1153 [hereinafter I.C.J. Statute].

³⁷ *See Delimitation of the Maritime Boundary of the Gulf of Maine Area*, 1984 I.C.J. 246 (Oct. 12).

³⁸ *See, e.g.*, Treaty with Mexico on Delimitation of Continental Shelf, June 9, 2000, U.S.-Mex., S. TREATY DOC. NO. 106-39 (2000).

³⁹ *See, e.g.*, Heathrow Airport User Charges Arbitration, 102 I.L.R. 215 (1992) (involving dispute between the United States and the United Kingdom over airport user charges at Heathrow Airport).

⁴⁰ *See, e.g.*, *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica* ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000), *reprinted in* 15 ICSID REV.—FOREIGN INVESTMENT L.J. 169 (2000). Costa Rica agreed to submit this and other disputes with U.S. investors to arbitration after being threatened by the United States with a loss of international financing and a suspension of U.S. aid to Costa Rica pursuant to the 1994 "Helms Amendment." *See* 22 U.S.C. §2370a (2000).

⁴¹ I.C.J. Statute, art. 36(1).

⁴² *Id.*, art. 37.

inherently limited, for the jurisdiction only arises from matters within the scope of the treaty. The narrower the scope of the treaty, the narrower the scope of the Court's jurisdiction. The breadth of the treaty may be addressed by including within it only a limited set of positive rights or obligations; it may also be addressed by clauses within the treaty that carve out issues, such as matters relating to national security, from the scope of the treaty.

Moreover, when ratifying a treaty providing for Court jurisdiction over disputes, a state may be entitled to file a reservation to the provision on dispute resolution. For example, the Genocide Convention⁴³ sets forth various obligations of states with respect to preventing and punishing genocide, and it further provides that disputes arising under the convention between parties shall be submitted to the I.C.J. at the request of one of the parties.⁴⁴ When the United States ratified the Genocide Convention in 1988, however, it stated that before any dispute could be submitted to the Court under Article IX, "the specific consent of the United States is required in each case."⁴⁵ Consequently, when Yugoslavia in 1999 sought to sue the United States under the Genocide Convention (for acts associated with the intervention in Kosovo), the I.C.J. found that—in light of the U.S. reservation—there was no jurisdiction and therefore the court dismissed the case.⁴⁶

The United States is a party to many treaties that confer jurisdiction on the Court, enabling the United States to sue and be sued thereunder. (See Table # 1 at end of paper) In the wake of the *Nicaragua* decision (discussed below), there has been repeated discussion within the U.S. government of withdrawing from such dispute resolution provisions under those treaties, but the technical and political difficulties of doing so have so far left most of those provisions intact.

The last case brought to the Court by the United States under this form of jurisdiction was by an application filed in 1987 in the *ELSI* case.⁴⁷ In that case, the United

⁴³ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁴⁴ *Id.*, art. IX.

⁴⁵ See 28 I.L.M. 782 (1989).

⁴⁶ See *Legality of Use of Force* (Yugo. v U.S.), 1999 I.C.J. 916 (June 2).

⁴⁷ See *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (judgment of July 20). While the United States technically "sued" Italy at the International Court, in fact the states agreed diplomatically in advance that the dispute would be brought before the International Court, although Italy maintained its right to raise issues of jurisdiction and admissibility of the

States invoked a compromissory clause contained in a 1948 bilateral Treaty of Friendship, Commerce, and Navigation that provided for Court jurisdiction over disputes arising under the treaty.⁴⁸ The U.S. claim alleged expropriation of and interference with property of a U.S. company's subsidiary in Sicily. The Court ultimately concluded that no harm had occurred from the alleged acts.

Since the *ELSI* case, the only other dispute pursued by the United States that might have led to the filing of an independent⁴⁹ U.S. claim before the International Court appears to have been the “hushkits” dispute between the United States and Europe. On March 14, 2000, the United States initiated a dispute resolution proceeding by filing an application and memorial before the International Civil Aviation Organization (ICAO) Council in its capacity as a judicial body.⁵⁰ The dispute concerned a European Union (EU) regulation adopted in 1999 relating to aircraft noise – one that imposed design-based restrictions on aircraft registered in, or operating into, Europe. In November 2000, the Council rejected certain preliminary objections raised by the European Union.⁵¹ In the aftermath of the ICAO Council decision, neither the United States nor EU member states exercised their right to appeal the Council's decision to the International Court of Justice, in accordance with the procedure set forth in the Chicago Convention.⁵² Rather, the EU member states

matter. As noted below, the two states also agreed to request that the Court form a chamber of five judges specified by the parties, which the Court did.

⁴⁸ Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, art. XXVI, 63 Stat. 2255, 79 U.N.T.S. 171.

⁴⁹ The United States did file a counter-claim based on a bilateral treaty of amity in the case brought by Iran for destruction of Iranian oil platforms in the Gulf. *See Oil Platforms (Iran v. U.S.)*, para. 9 (I.C.J. Nov. 6, 2003), 42 ILM 1334 (2003); *see* Pieter Bekker, Case Report: Oil Platforms (Iran v. United States), 98 AM. J. INT'L L. 550 (2004). The Court rejected that counter-claim.

⁵⁰ Such a dispute is brought under Article 84 of the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention], and Article 2 of the ICAO Rules for the Settlement of Differences, ICAO Doc. 7782/2 (2d ed. 1975).

⁵¹ *See* Decision of the ICAO Council on the Preliminary Objections in the Matter “United States and 15 European States (2000)” (Nov. 16, 2000) (on file with author).

⁵² *See* Chicago Convention, *supra* note 50, art. 84 (“Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc tribunal . . . or to the Permanent Court of International Justice.”) Article 85 clarifies the ambiguity of Article 84 by noting that an ad hoc arbitral tribunal is relied upon where a party to a dispute has not accepted the Statute of the Permanent Court of International Justice and the parties to the dispute cannot agree on the

filed their counter-memorial in December 2000 and the parties thereafter settled the matter.⁵³ This dispute was only the second in ICAO's history that was addressed by the ICAO Council in its judicial capacity, the first being the dispute between India and Pakistan almost 30 years ago, which was appealed to the Court.⁵⁴

Since the 1980's, the United States has consistently declined to accept or incorporate into treaties compromissory clauses calling for adjudication of disputes by the International Court of Justice. If the United States adheres to major multilateral treaties (such as the Genocide Convention) which contain such a clause, then the United States files a reservation to that clause. If the United States adheres to major multilateral treaties that allow parties to opt for I.C.J. jurisdiction, then the U.S. declines to do so. Thus, if the United States ratifies the 1982 U.N. Convention on the Law of the Sea, it has announced that it will opt for arbitral dispute resolution, not resolution by the International Court.⁵⁵ U.S. bilateral investment treaties (BITs) now invariably call for investor-state arbitration before the International Centre for the Settlement of Investment Disputes (ICSID) or another forum,⁵⁶

choice of the arbitral tribunal. While the Convention is not clear on whether a party to a dispute under Article 84 has the right to appeal an ICAO Council decision on jurisdiction, the International Court of Justice has decided that such appeal is possible. Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pak.*), 1972 I.C.J. 46, 60 (Aug. 18).

⁵³ See U.S. Dep't of State Press Release on US Withdrawal of Complaint at ICAO (June 13, 2002), at <<http://www.state.gov/r/pa/prs/ps/2002/11096.htm>>.

⁵⁴ See Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pak.*), *supra* note 52.

⁵⁵ See U.S. Secretary of State Letter of Submittal to the President, in *United Nations Convention on the Law of the Sea, With Annexes, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annex*, S. TREATY DOC. 103-39, V at IX-X (1994); see also Testimony of U.S. Dep't of State Legal Adviser William H. Taft, IV Before the Senate Foreign Relations Committee (Oct. 21, 2003), at <<http://www.state.gov/g/oes/rls/rm/2003/25573.htm>>.

⁵⁶ See, e.g., Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Oct. 25, 2004, U.S.-Uruguay, §B, at <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html>. The current "model" bilateral investment treaty of the United States—upon which the U.S.-Uruguay agreement noted above was based—provides for disputes to be submitted to arbitration under ICSID or under the UNICTRAL rules, or to another arbitral forum agreed upon by the parties. See Treaty Between the Government of the United States of America and the Government of _____ Concerning the Encouragement and Reciprocal Protection of Investment, art. 24 (Nov. 2004), at <<http://www.state.gov/documents/organization/38710.pdf>>.

a striking contrast to the earlier generation of treaties of Friendship, Commerce, and Navigation (FCN treaties), which provided for I.C.J. jurisdiction over state-to-state disputes. Investment disputes arising under the North American Free Trade Agreement (NAFTA) are also sent to investor-state arbitration before ICSID⁵⁷ or an ad hoc panel operating under the UNCITRAL rules.⁵⁸ U.S. trade disputes—under agreements completed in the past fifteen years—are placed before World Trade Organization (WTO) panels,⁵⁹ panels operating under NAFTA Chapter 19⁶⁰ or 20,⁶¹ or panels operating under bilateral trade agreements;⁶² they are not placed before the International Court.

Third, under what is known as the “optional clause,” the states parties to the I.C.J. Statute may, by means of a unilateral declaration, undertake 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 . . .” involving issues of law or fact governed by rules of international law.⁶³ In 1946, the United States accepted the Court’s compulsory jurisdiction, hoping that doing so would encourage

⁵⁷ See, e.g., *Waste Mgmt., Inc. v. Mexico*, Award, para. 98 (NAFTA Ch. 11 Arb. Trib. Apr. 30, 2004), *reprinted in* 43 ILM 967 (2004).

⁵⁸ See, e.g., *GAMI Investments, Inc. v. Mexico*, Final Award (NAFTA Ch. 11 Arb. Trib. Nov. 15, 2004).

⁵⁹ See, e.g., *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WTO Doc. WT/DS103/AB/RW2, WT/DS113/AB/RW2 (Dec. 12, 2002); *Japan—Measures Affecting the Importation of Apples*, WTO Doc. WT/DS245/AB/R (Nov. 26, 2003); *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WTO Doc. WT/DS276/R (Apr. 6, 2004); *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WTO Doc. WT/DS276/AB/R (Aug. 30, 2004).

⁶⁰ See, e.g., *Corrosion-Resistant Carbon Steel Flat Products from Canada*, Full Sunset Review (NAFTA Ch. 19 Panel Oct. 19, 2004).

⁶¹ See, e.g., *Cross-border Trucking Services* (NAFTA Ch. 20 Arb. Trib. Feb. 6, 2001).

⁶² See, e.g., *Free Trade Agreement, June 15, 2004, U.S.-Morocco, Ch. 20*, at <http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html>.

⁶³ See I.C.J. Statute, art. 36(2); see also M. Fitzmaurice, *The Optional Clause System and the Law of Treaties: Issues of Interpretation in Recent Jurisprudence of the International Court of Justice*, 20 AUSTL. Y.I.L. 127 (1999); J.G. Merrills, *The Optional Clause Revisited*, 64 BRIT. Y.B. INT’L L. 197 (1993).

other states to follow suit.⁶⁴ At the same time, the United States placed in its declaration certain reservations, including the so-called “Connally reservation” (or “amendment”) 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*” (emphasis added). The purpose of this “self-judging” clause was to ensure that the United States and not the I.C.J. would decide, as a practical matter, whether a dispute is “domestic” in character and consequently outside the Court’s jurisdiction. Since such a reservation in essence forecloses the ability of the Court to decide whether it has jurisdiction in a case,⁶⁵ many scholars and some I.C.J. judges have expressed doubts as to whether such a reservation is permissible,⁶⁶ but to date the Court has not definitively addressed the issue.

A central problem for the United States with this Connally reservation emerged early in the life of the Court. Since the Court operates on a principle of reciprocity in the application of its compulsory jurisdiction,⁶⁷ the Connally reservation had the effect of

⁶⁴ See U.S. Declaration Accepting the Compulsory Jurisdiction of the International Court of Justice (Aug. 26, 1946). At the time the U.S. declaration was submitted, Herschel V. Johnson, Acting U.S. Representative to the United Nations, asserted:

One of the most elemental functions of the United Nations in the preservation of world peace is the development of procedures of pacific settlement. In these procedures, the role and functions of law is clear. We feel that international law is already sufficiently developed to serve as a guide and basis in international relations. We feel further that the best way of assuring its further development, and the only way of enabling it to fulfill its function, is by referring to a responsible international tribunal all disputes properly justiciable by such a tribunal.

See 15 STATE DEP’T BULL. 452 (Sept. 1, 1946). For Senate consideration, see *Compulsory Jurisdiction, International Court of Justice: Hearings Before a Subcommittee of the Senate Committee on Foreign Relations on S. Res. 196*, 79th Cong., 2d Sess. (1946); see also S. Rep. No. 1835, 79th Cong., 2d Sess. (1946) (report of the Senate Foreign Relations Committee).

⁶⁵ See I.C.J. Statute, art. 36(6).

⁶⁶ See, e.g., *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 95 (Mar. 21) (separate opinion of Judge Lauterpacht); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392, 601–02 (Nov. 26) (dissenting opinion of Judge Schwebel); *Fisheries Jurisdiction (Spain v. Can.)*, 1998 I.C.J. 432, 575 (Dec. 4) (dissenting opinion of Judge Vereshchetin).

⁶⁷ See I.C.J. Statute, art. 36(2) (allowing states to file declarations accepting compulsory jurisdiction “in relation to any other state accepting the same obligation”).

entitling any state that the United States wished to sue to invoke the reservation against the United States, requiring the Court to dismiss a suit brought by the United States. Hence, when the United States sued Bulgaria in 1957 for an attack on an El Al aircraft flying over Bulgarian territory (resulting, among other things, in the death of six U.S. nationals), Bulgaria responded that the matter was “essentially within” Bulgaria’s “domestic jurisdiction,” and thus outside the jurisdiction of the Court. The United States at first objected that such a response was in bad faith, but ultimately concluded that allowing the Court to decide whether it was in bad faith would defeat the entire point of the reservation, and so withdrew its case.⁶⁸

While the United States in theory could have invoked the Connally reservation at will, the United States declined to do so in the case brought by Nicaragua in 1984, no doubt because it simply was not credible to declare that U.S. attacks allegedly occurring in Nicaraguan territory were matters “essentially within the domestic jurisdiction of the United States.” When the Court rejected other jurisdictional objections raised by the United States in the *Nicaragua* case,⁶⁹ the United States in October 1985 notified the Court of its decision to terminate U.S. acceptance of the Court’s compulsory jurisdiction, in accordance with the terms of the declaration.⁷⁰ The termination became effective in 1986 and remains so today.

The reasons stated by the United States for terminating the U.S. declaration fell broadly into four areas.⁷¹ First, the United States was clearly upset at the Court for finding that jurisdiction existed over Nicaragua’s case, which resulted in the Court wading into the

⁶⁸ See Leo Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT’L L. 357 (1962).

⁶⁹ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26).

⁷⁰ See United States: Department of State Letter and Statement concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, 24 I.L.M. 1742 (1985). A year earlier, in an effort to forestall the Nicaragua case, the United States attempted to modify its declaration so as to exclude “disputes with any Central American state.” 84 DEP’T OF STATE BULL. 89 (June 1984). The United States also declined to participate in the ensuing merits phase of the *Nicaragua* case, which led to a judgment against the United States on several counts. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). Thereafter, the United States ignored the Court’s judgment and, as noted below, vetoed measures of implementation sought by Nicaragua at the Security Council.

⁷¹ See Testimony of Abraham D. Sofaer, U.S. Dep’t of State Legal Adviser, to the Senate Foreign Relations Committee (Dec. 4, 1985), *reprinted in* 86 DEP’T OF STATE BULL. 67 (Jan. 1986) [hereinafter Sofaer Testimony].

highly-charged politics of President Reagan's Latin American policy. For the United States, the Court's decision that Nicaragua had accepted the Court's compulsory jurisdiction, that El Salvador could not intervene at the jurisdiction stage, and that Nicaragua's claims were justiciable simply could not be supported as a matter of law. Second, the United States asserted that the benefits anticipated from joining the Court's compulsory jurisdiction had not materialized. The United States originally adhered to the Court's compulsory jurisdiction in the hope that other states would follow, but most states had not filed such declarations, including three other permanent members of the Security Council. Further, most of the cases before the Court that had advanced to the merits were not based on the Court's compulsory jurisdiction, and therefore such jurisdiction had not become a principal part of the Court's overall jurisprudence. The United States itself had tried seven times to sue a state before the Court on the basis of compulsory jurisdiction, but had never been successful in doing so. Third, the United States emphasized the costs of U.S. adherence to the Court's compulsory jurisdiction — three states had sued the United States on the basis of such jurisdiction.⁷² Further, other states could undertake "hit-and-run" tactics, by waiting until they wished to sue the United States before filing a declaration accepting the Court's compulsory jurisdiction, and then after filing the case, withdrawing that declaration to avoid being sued. Finally, the United States attacked the credibility and impartiality of the judges of the Court. The United States noted that most of the judges came from states that had not accepted the Court's compulsory jurisdiction. Moreover, since the judges must be elected by the General Assembly, and since the majority of states in the Assembly do not share the United States' view on important international questions (including the special position of the permanent members of the Security Council in maintaining international peace and security), "[o]ne reasonably may expect at least some of the judges to be sensitive to the impact of their decisions on their standing with the U.N. majority."⁷³

While the termination of this acceptance of the Court's compulsory jurisdiction may be unfortunate, the United States is in the company of its peers. The only permanent

⁷² *Rights of Nationals of the United States in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176 (Aug. 27); *Interhandel (Switz. v. U.S.)*, 1959 I.C.J. 6 (Mar. 21); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

⁷³ Sofaer Testimony, *supra* note 71, at 69. Thomas Franck responded to the charge of bias against the United States by noting that: (1) of the 115 judgments and advisory opinions issued between 1948 and 1985, the U.S. judge voted with the majority 82 times, and dissented in whole or in part only 15 times; (2) an examination of the dissents reveals that the U.S. judge disagreed with the majority "in circumstances that often fail to confirm the contention of bias"; and (3) "[i]n none of these cases could the majority be said to have taken a position that was contrary in any way to the U.S. national interest." See THOMAS M. FRANCK, *JUDGING THE WORLD COURT* 37 (1986).

member of the Security Council that currently accepts the Court's compulsory jurisdiction is the United Kingdom; China, France, and Russia have not done so. Further, the United Kingdom's acceptance is conditioned by several significant reservations that make it quite difficult to sue the United Kingdom before the Court. Moreover, the vast majority of states have not accepted the Court's compulsory jurisdiction. Of 192 member states of the United Nations, only 65 have accepted the Court's compulsory jurisdiction as of January 2005 (see Table # 2 at end of paper), and many of those acceptances contain conditions and reservations that significantly limit the state's consent.⁷⁴ Finally, the United States arguably was terminating an adherence to the Court's compulsory jurisdiction that was, from the start, illusory, given the nature, scope, and effect of the Connally reservation.

C. STATE INFLUENCE ON SELECTION OF JUDGES

Once a state is exposed to I.C.J. decision-making, other structural aspects of the I.C.J. help assure states that their concerns will be fairly heard and understood. A key structural aspect in this regard concerns the manner in which judges are placed on the court. On the one hand, the *de jure* procedure entails a concurrent election of judges by the two principal organs of the United Nations (the General Assembly and the Security Council)⁷⁵ based on the independence, character, and expertise of persons, and not on their nationality.⁷⁶ While judges are precluded from participating in cases in which they were previously involved (which can have the effect of preventing judges from sitting in some cases involving their own states),⁷⁷ there is no absolute bar to a judge sitting in a case involving a state of the judge's nationality.⁷⁸ The judges serve for nine-year terms and cannot be recalled or dismissed by the government of their nationalities during their tenure.

On the other hand, the procedure for selection of judges is not blind to nationality. No two judges on the court may be of the same nationality⁷⁹ and the judges are to be selected so that the principal legal systems of the world are represented.⁸⁰ In contentious

⁷⁴ See John R. Crook, *The International Court of Justice and Human Rights*, 1 NW. U. J. INT'L HUM. RTS. 2 ¶ 19 (2004).

⁷⁵ I.C.J. Statute, arts. 4(1) & 8.

⁷⁶ *Id.*, art. 2.

⁷⁷ *Id.*, art. 17(2).

⁷⁸ *Id.*, art. 31(1).

⁷⁹ *Id.*, art. 3(1).

⁸⁰ *Id.*, art. 9.

cases, if a party has no judge of its nationality sitting on the court, the state may appoint an *ad hoc* judge to sit in the case.⁸¹ Further, while the permanent members of the Security Council do not have a “veto” with respect to the election of I.C.J. judges (a simple majority of eight votes is required),⁸² the five permanent members are in a position to influence strongly the process, such that it is no surprise that a judge of each of their nationalities is represented on the court.⁸³ Indeed, as an informal matter, the seats of the judges on the Court are allocated such that there are a set number of judges from each of the principal regions of the world.⁸⁴

Having a judge of the state’s nationality (or the state’s region), of course, does not guarantee a decision in the state’s favor. The center of gravity for deciding the case remains with the judges not of the state’s nationality, who decide cases by a simple majority vote of the Court, with no “veto” power accorded to judges from particular states. Moreover, some (but not all) studies indicate that historically judges have not automatically sided with their state of nationality.⁸⁵

Even so, the Statute of the Court provides a means for two contending states to move the center of gravity of the Court closer to the value systems of the states if

⁸¹ *Id.*, art. 31(2) & (3).

⁸² *Id.*, art. 10 *see* I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 482 (Bruno Simma ed. 2d ed. 2002). Normally voting by the Security Council requires a majority of nine.

⁸³ A judge from each of the permanent members has been on the Court since its inception, with the exception of a gap between 1967 and 1985 when there was no Chinese judge. II THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 82, at 1161. The I.C.J. judges of U.S. nationality to date have been: Green Hackworth (1946-61); Philip Jessup (1961-70); Hardy Cross Dilliard (1970-79); Richard Baxter (1979-80); Stephen Schwebel (1981-2000); and Thomas Buergenthal (2000-present).

⁸⁴ *Id.* at 1162.

⁸⁵ *See* Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in CROSSROADS, *supra* note 8, 123 at 134 (finding that “the record does not reveal significant alignments, either on regional, political, or economic basis. There is a high degree of consensus among the judges on most decisions.”); *see also* Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 LAW & PRAC. INT’L CTS. & TRIBUNALS 27, 32 (2003); *but see* Eric A. Posner & Miguel de Figueiredo, *Is the International Court of Justice Politically Biased?* (unpublished draft dated Oct. 2004); Eric Posner, *The Decline of the International Court of Justice* (unpublished draft) (finding that I.C.J. judges do not apply the law impartially but favor the interests of their home states or like-minded states).

agreement can be reached between the states on doing so. Article 26 of the Statute allows the Court to establish a chamber of judges to decide a case, which the Court typically is inclined to do if two states appearing before it request such a chamber and identify the judges they wish appointed to such a chamber. Moreover, unlike under the Statute of the Permanent Court of International Justice, there is no obligation to try to compose the chamber so as to represent “the principal legal systems of the world;”⁸⁶ the chamber can consist of judges from just certain regions. Thus, in the *Gulf of Maine* case, Canada and the United States informed the Court that they wished a chamber formed consisting of five judges identified by the parties.⁸⁷ In the *ELSI* case, Italy and the United States informed the Court that they too wished a chamber to be formed consisting of five specific judges.⁸⁸ In both cases, the states were clearly interested in having greater control over the legal and political attitudes being brought to the judicial table, and in both cases the Court complied. Despite this nod toward party control, the judgments of the chambers of the Court are technically⁸⁹ and in practice regarded as judgments of the Court as a whole.

In addition to the Court’s jurisdiction over contentious cases between two states, the Court also has jurisdiction to issue advisory opinions on legal questions. The advisory jurisdiction of the I.C.J. may be invoked only by U.N. organs and by the specialized agencies of the United Nations and the opinions, by definition, are non-binding. Nevertheless, advisory opinions have juridical authority; they can serve to legitimate certain conduct of states and organizations, and invariably have significance for a legal system in which judicial precedents are scarce. In practice, advisory opinions are relied upon and cited as legal authority as frequently as judgments rendered in contentious cases.

D. NO DIRECT ENFORCEMENT OF JUDGMENTS IN NATIONAL LAW

International tribunals can differ markedly in the manner in which their decisions are “embedded” in the national systems of the states who are subject to the tribunal’s

⁸⁶ See P.C.I.J. Statute, art. 9. For background, see Stephen M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT’L L. 831 (1987).

⁸⁷ See *Delimitation of the Maritime Boundary of the Gulf of Maine Area*, 1982 I.C.J. 3 (order of Jan. 20); see also Davis Robinson, David Colson, & Bruce Rashkow, *Some Perspectives on Adjudicating Before the World Court: The Gulf of Maine Case*, 79 U.N. 578 (1985).

⁸⁸ See *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1987 I.C.J. 3 (order of Mar. 2).

⁸⁹ I.C.J. Statute, art. 27.

jurisdiction.⁹⁰ An international tribunal can be constructed so as to give it the power to interpret norms that have direct effect in a national legal system, without any need for governments to take post-hoc implementing action (e.g., through statutes or executive orders), as occurs with respect to the European Court of Justice. Yet, for the most part, international tribunals have not been accorded such a role; while they may generate norms that bind states internationally, the ability of the tribunal's decision to reach into the national legal system is often severely circumscribed. This dualist approach to the effect of the tribunal's decision is yet a further technique for mediating between conflicting visions of what the tribunal should be.

In the spirit of institutionalism, I.C.J. judgments in contentious cases are binding on the parties, are final, and are without appeal.⁹¹ Further, each U.N. member state "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."⁹² Yet in crafting the U.N. Charter and the I.C.J. Statute, states elected not to include any provisions addressing the legal effect of I.C.J. judgments within national legal systems, such as whether they provide a basis for private rights of action in national courts (for the United States, this approach may be seen as a nod to the autonomous democratic and constitutional tradition). Rather, in a nod to exceptionalism, the recourse envisaged by the U.N. Charter is for a victorious party to appeal non-compliance to the U.N. Security Council, "which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."⁹³ Of all the cases lost on the merits at the Court, in only one case did an applicant—Nicaragua—request that the Security Council take action to enforce the judgment. Exercising its prerogative as a permanent member of the Council, the United States vetoed a resolution to that effect.⁹⁴ An effort by private individuals to sue the U.S. government in U.S. court based, among other things, on the ground that U.S. actions violated the Court's decision, was dismissed because there is no private right of action to enforce an International Court decision in U.S.

⁹⁰ See, e.g., Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 458 (2000).

⁹¹ See I.C.J. Statute, Arts. 59-60.

⁹² U.N. CHARTER, art. 94(1).

⁹³ *Id.*, art. 94(2).

⁹⁴ See 25 I.L.M. 1337, 1352-65 (1986); see also CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 199-205 (2004); Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AMER. J. INT'L L. 434 (2004).

courts.⁹⁵

E. DISCURSIVE AND POLITICAL CONSTRAINTS

Separate from formal or quasi-formal techniques, there are also certain political constraints that operate to mediate the antinomies.⁹⁶ The Court knows that its legitimacy and credibility as an institution rest not on some objective correctness of its legal reasoning, but on the acceptance of that legal reasoning by international lawyers, and more broadly the acceptance of its decisions by the global community of states.

Arguably “judicial law-making that consistently results in the loss of dispute settlement cases by a powerful member (as both a complainant and a respondent) would not be sustainable politically, for it would constitute a shift in property rights that would likely engender a political reaction.”⁹⁷ As U.S. Supreme Court Justice Felix Frankfurter once wrote with respect to the U.S. Supreme Court:

the Court’s authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.⁹⁸

The International Court is unlikely to issue a decision that, though perhaps regarded by the members of the Court as soundly based in law, is regarded by international lawyers generally as misguided, or by the global community at large as politically unacceptable. Were the Court to do so, its standing could be severely impaired. Instead, the Court strives to issue decisions that will be well-received within the international legal community and by its primary constituents – states. By doing so, the Court encourages states to bring cases before the Court, which in turn justifies the significance and importance of the Court.

To a certain extent, this mediating technique has operated in the context of

⁹⁵ See *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (1988).

⁹⁶ For a discussion regarding how a tribunal operates within a “strategic space” that is bounded not just by formal constraints, but by informal constraints that are both “discursive” and “political” in nature, see Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247 (2004).

⁹⁷ *Id.* at 268-69.

⁹⁸ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (dissenting opinion of Justice Frankfurter).

“admissibility” doctrines at the Court. Even if the Court finds that it has jurisdiction over a case, the Court has invoked doctrines of admissibility so as to refuse to pass upon the merits of the case. In doing so, the Court spares itself coming into conflict with certain aspects of the antimonies discussed above.

For example, in certain cases the Court has relied upon the rule of customary international law known as the “local remedies rule” as a means of respecting decision-making by states within their national systems. Under the rule, before a state may espouse a claim on behalf of its national, it must be shown that the latter has exhausted all available legal remedies in the courts and before the administrative agencies of the state against which the claim is brought. In 1959, the United States successfully avoided suit before the I.C.J. by invoking this rule;⁹⁹ in doing so, the Court in effect accepted that resolution of a dispute, at least in the first instance, should be left to U.S. courts. At the same time, the United States successfully proved to the court that the rule has been satisfied in a case brought by the United States against another state.¹⁰⁰ In theory, the rule is designed to permit a state to remedy a wrong at the national level before it is transformed into a dispute on the international plane, where it might disrupt unnecessarily relations between states. In practice, however, it also provides the Court with an opportunity to decline to pass upon a dispute that could place it in direct conflict with the tendency of some states toward strong constitutional autonomy. Similarly, the Court at times has seized upon doctrines of standing¹⁰¹ and mootness¹⁰² to avoid passing upon highly-charged disputes.

Even if a case is addressed by the Court on the merits, it is possible to detect judicial reasoning that reflects sensitivity to the political limits of the Court’s authority. In the *Nuclear Weapons* advisory opinion, the Court engaged in a systematic analysis of why treaties and customary rules of international law did not prohibit the possession or use of nuclear weapons, and then why certain principles of international humanitarian law did prohibit such use. The Court, however, could not quite bring itself to declare nuclear weapons unlawful. No doubt several of the judges were sensitive to the fact that nuclear weapons were unlikely to be eliminated based on a decision by the Court to that effect, and that the most powerful states in the world rejected the idea that the possession and use of such weapons were in all circumstances unlawful. Further, the judges were no doubt conscious that a decision to that effect was not firmly grounded in international law; there

⁹⁹ See *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6 (Mar. 21).

¹⁰⁰ See *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (judgment of July 20).

¹⁰¹ *South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.)*, 1966 I.C.J. 6 (July 18).

¹⁰² *Nuclear Tests (Austr. v. Fr.; New Zealand v. Fr.)*, 1974 I.C.J. 253 (Dec. 20).

were certainly no treaties that expressly stated as much and the Court's application of principles of international humanitarian law was plausible but not obvious. Consequently, the Court reached a final conclusion that the use of nuclear weapons as a general matter was unlawful, but that in certain extreme circumstances, involving the very survival of a state, such use might be lawful. Although this conclusion is problematic as a matter of legal analysis, it was a politically shrewd move by the Court, giving to the anti-nuclear movement strong language against the legality of nuclear weapons, while allowing powerful states a basis for maintaining the status quo.

IV. A LOOK AT U.S. CASES BEFORE THE I.C.J.

A. THE OVERALL TRACK RECORD

Out of a total 109 contentious cases filed before the Court from 1946 to 2006, the United States was involved in twenty-one. (*See* Table # 3 at end of paper). No other state has appeared before the Court so frequently. Moreover, other major powers such as China and Russia have never appeared before the Court in a contentious case.

In ten of the twenty-one cases, the United States was the applicant (or jointly agreed to the submission of the case to the Court). In those ten cases, the United States:

- secured a boundary decision regarded by many as favorable to the U.S. position;¹⁰³
- won one case on the merits;¹⁰⁴
- lost one case on the merits;¹⁰⁵
- had to withdraw or accept removal of seven cases against Soviet bloc states

¹⁰³ *See* Delimitation of the Maritime Boundary of the Gulf of Maine Area, 1984 I.C.J. 246 (judgment of Oct. 12).

¹⁰⁴ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (judgment of May 24). Although this judgment was in the United States favor, the Court concluded its decision by chastising the United States for its failed effort to rescue the hostages in April 1980 (involving the death of eight U.S. soldiers), which the United States undertook from a belief that “the situation in Iran posed mounting dangers to the safety of the hostages” *Id.*, para. 32. The Court informed the United States that the operation was “of a kind calculated to undermine respect for the judicial process in international relations.” *Id.*, para. 93.

¹⁰⁵ *See* Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 (judgment of July 20).

due to lack of jurisdiction.¹⁰⁶

In twelve cases, the United States was the respondent. In those twelve cases:

- two cases were settled or withdrawn prior to a decision on the merits by the Court,¹⁰⁷
- three were dismissed by the Court on jurisdictional or admissibility grounds,¹⁰⁸
- one case was won by the United States on the merits,¹⁰⁹
- one case was partially won and partially lost on the merits;¹¹⁰
- four cases were lost by the United States on the merits.¹¹¹

¹⁰⁶ Aerial Incident of 27 July 1955 (U.S. v. Bulgaria), 1960 I.C.J. 146 (order of May 30); Aerial Incident of 7 November 1954 (U.S. v. U.S.S.R.), 1959 I.C.J. 276 (order of Oct. 7); Aerial Incident of 4 September 1954 (U.S. v. U.S.S.R.), 1958 I.C.J. 158 (order of Dec. 9); Aerial Incident of 10 March 1953 (U.S. v. Czech.), 1956 I.C.J. 6 (order of Mar. 14); Aerial Incident of 7 October 1952 (U.S. v. U.S.S.R.), 1956 I.C.J. 9 (order of Mar. 14); Treatment in Hungary of Aircraft and Crew of the United States of America (U.S. v. Hungary), 1954 I.C.J. 99 (order of July 12); Treatment in Hungary of Aircraft and Crew of the United States of America (U.S. v. U.S.S.R.), 1954 I.C.J. 103 (order of July 12).

¹⁰⁷ See Aerial Incident of 3 July 1988 (Iran v. U.S.), 1996 I.C.J. 9 (Feb. 22) (ordering discontinuance of the case following a settlement); Questions of Interpretation and Application Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 2003 I.C.J. 152 (Order of Sept. 10) (ordering discontinuance of the case).

¹⁰⁸ See Legality of Use of Force (Yugo. v U.S.), 1999 I.C.J. 916 (June 2); Interhandel (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21); Monetary Gold, 1954 I.C.J. 19 (June 15).

¹⁰⁹ Oil Platforms (Iran. v. U.S.) (I.C.J. Nov. 6, 2003), 42 ILM 1334 (2003). At the same time, the Court in the *Platforms* case, as discussed below, engaged in an extensive analysis on why the U.S. use of force could not be justified as a matter of international law.

¹¹⁰ Rights of Nationals of the United States in Morocco (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27).

¹¹¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 11 (Order of Apr. 9), *reprinted in* 37 ILM 810 (1998) (this case only reached the provisional measures stage, where the United States lost); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 27), *reprinted in* 40 I.L.M. 1069 (2001); Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment (Mar. 31, 2004), 43 ILM 581 (2004). In most of these cases, the United States prevailed on certain arguments before the Court that at least narrowed the scope

Of the cases the United States lost on the merits, none was taken to a damages phase, so the existence of a monetary judgement against the United States has not arisen.

As for whether it is possible to detect any trends looking at these cases chronologically, there might be said to be four periods in the history of the U.S. relationship with the Court. Those periods are:

High hopes (1950-1959)	Several efforts by the United States to invoke the jurisdiction of the Court, without success; at the same time, success in avoiding the Court's jurisdiction.
Benign neglect (1960-1979)	Lengthy period of the United States viewing the Court as either a failure or as inconsequential.
Re-engagement and rejection (1980-87)	U.S. return to the Court to handle both a territorial dispute and a major political crisis; bitter U.S. rejection of the Court after losing a politically-charged Cold War case.
Playing defense (1988-present)	Declining to bring any cases to the Court; aggressively defending against cases brought by others; resisting the Court without breaking from it; a turn to other fora (WTO; NAFTA; ICSID; UNCLOS arbitration)

In addition to the Court's contentious jurisdiction, from 1946 to 2006, the International Court of Justice issued 24 advisory opinions. The United States was involved in 22 of those advisory opinions either in the form of written or oral pleadings. (See Table # 4 at end of paper). Again, no other state has participated in such advisory proceedings so frequently. It is harder to see any discernible trends in this practice, although it appears that the United States was more enthusiastic about using the Court's advisory opinion jurisdiction early in the life of the Court, when the United States had greater influence in the General Assembly in requesting such opinions. In more recent years (e.g., the *Nuclear Weapons* advisory opinion; the *Israeli Wall* advisory opinion), the United States has opposed the asking of certain questions to the Court and, once asked, has argued that the Court should decline to answer the question.

B. RECENT CASES

1. OIL PLATFORMS CASE

The realism/institutionalism antinomy may be seen in the United States

of the Court's findings.

involvement in the recent *Oil Platforms* case before the Court. The institutionalism strain in U.S. thinking resulted in the acceptance of a compromissory clause in the 1955 U.S.-Iran Treaty of Amity, providing for International Court jurisdiction over disputes arising under that treaty.¹¹² At the same time, the realism strain sought to avoid application of international law and international dispute resolution to core U.S. interests, thus resulting in the inclusion of a clause stating that the Treaty of Amity “shall not preclude the application of measures . . . necessary to protect its essential security interests.”¹¹³ Iran – a weak state vis-à-vis the United States in terms of military and economic power – embraced the Court as a means of challenging the deployment of U.S. power in the Persian Gulf, specifically U.S. attacks against Iranian oil installations in 1987-88. After the filing of Iran’s 1992 application initiating the case, American realism might have led the United States to simply ignore the case; to decline to participate in the Court’s proceedings, where the United States had no comparative advantage vis-à-vis Iran, and where the United States was politically vulnerable to adverse findings of the Court. Yet the early 1990’s was period of resurgent institutionalism in the United States, especially after the extraordinary multilateralism of the U.N.-authorized action against Iraq, and the creation of new tribunals such as the U.N. Compensation Commission, as well as the war crimes tribunals for the former Yugoslavia and Rwanda.

The United States elected to participate in the proceedings, and ultimately pursued a strategy the contained both realist and institutionalist tendencies. Playing to its realist heritage, the United States emphasized that states had not given the Court plenary jurisdiction over inter-state disputes; that the Court’s jurisdiction only extended so far as states had consented; and that, in this case, the United States had not consented to review of its military operations through the vehicle of a largely commercial treaty. The United States succeeded on most of these points, successfully winnowing Iran’s claims down to a single treaty provision concerning freedom of commerce between the two states¹¹⁴ and convincing the Court that such commerce was not disrupted by the attacks on the oil platforms.¹¹⁵

At the same time, in the context of arguing that the actions taken by the United

¹¹² See Treaty of Amity, Economic Relations and Consular Rights, U.S.-Iran, Aug. 15, 1955, art. XX(1)(2), 8 U.S.T. 899, 284 U.N.T.S. 93.

¹¹³ *Id.*, art. XX(1)(d).

¹¹⁴ *Id.*, art. X(1); see *Oil Platforms (Iran. v. U.S.)*, 1996 I.C.J. 803 (judgement on preliminary objections).

¹¹⁵ See *Oil Platforms (Iran. v. U.S.)*, paras. 98-99 (I.C.J. Nov. 6, 2003), 42 ILM 1334, 1367-68 (2003)

States were necessary to protect U.S. “essential security interests” (and thus outside the scope of the treaty), the United States in essence sought to convince the Court that the U.S. attacks were legitimate self-defense. This approach held out hope that the Court would serve as an impartial arbiter of complicated facts and would acknowledge the rights of even a powerful state to defend itself, without an eye to the U.S. invasion of Iraq unfolding at the same time as oral hearings in the case. Here, the United States failed. Even though the Court found that the United States had not violated the Treaty of Amity by interrupting U.S.-Iran commerce, the Court proceeded to engage in an extensive analysis of why the U.S. attacks on the oil platforms violated international law on the use of force, an analysis questioned thereafter by the U.S. Department of State Legal Adviser.¹¹⁶

In the *Oil Platforms* judgment, the Court circumvented one of the mediating techniques used to address the realism/institutionalism antimony. The Court’s willingness to address the legality of the U.S. use of force even though the Court had no jurisdiction over the case is a “pushing back” against the realist approach of denying the Court plenary jurisdiction. While such action by the Court may be understandable, there may be collateral consequences. The Court’s judgment opens it to arguments that the Court was not acting as an impartial decision-maker, but was set on lecturing the United States at a time when U.S. use of military force in Iraq in 2003 was being harshly criticized.¹¹⁷ Further, the failure of the “essential security interests” clause to insulate the United States from the Court casts into doubt the efficacy of such provisions in myriad existing treaties that provide for the Court’s jurisdiction, such that the United States will periodically consider whether and how it might withdraw from or modify such treaties to avoid the Court’s jurisdiction. (As noted in the next section, the United States in March 2005 terminated its acceptance of the Court’s jurisdiction over matters arising under the Vienna Convention on Consular Relations.) Certainly the cost/benefit analysis of this particular Treaty of Amity strongly suggests that it should be terminated: the United States has engaged in little economic activity and no consular activity with Iran for twenty-five years,¹¹⁸ yet it is exposed at any time to suit at

¹¹⁶ See William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295 (2004). The paper identifies the author as Legal Adviser, U.S. Department of State, and contains no disclaimer that the views are personal.

¹¹⁷ See, e.g., David H. Small, *The Oil Platforms Case: Jurisdiction through the—Closed—Eye of the Needle*, 3 L. & PRAC. INT’L COURTS & TRIBUNALS 113 (2004) (critique by OECD director of legal affairs, in his personal capacity).

¹¹⁸ There do remain U.S. diplomatic and consular properties in Iran, although they are principally protected under other treaties. Arguably the United States benefitted from the Treaty of Amity when private U.S. claims were being adjudicated before the Iran-U.S. Claims Tribunal, since the Tribunal’s decisions on occasion referred to certain standards set forth in the treaty. All U.S. private claims before the Tribunal, however, have now been resolved.

the Court by Iran under the treaty's compromissory clause. Moreover, the Court's willingness to lecture the United States will be viewed as confirmation that the United States should no longer include compromissory clauses providing for the Court's jurisdiction in its new treaty instruments. Finally, the effect of the decision is probably to foreclose any possibility of U.S. adherence to the Court's compulsory jurisdiction, since there appears to be no way to carve out U.S. national security interests without inviting the court to engage in an extended discussion of the underlying matter, even in situations where the United States ultimately succeeds in avoiding the Court's jurisdiction.

2. ISRAELI WALL ADVISORY OPINION

The United States' tendency toward exceptionalism may be seen in its attitude toward the Court's recent advisory opinion regarding the barrier by Israel in the occupied West Bank of the Jordan river. On December 8, 2003, the General Assembly adopted a resolution asking the International Court for an advisory opinion on "the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem" ¹¹⁹ The resolution received 90 votes in favor, 74 abstentions, and 8 opposed (including the United States). In opposing the resolution, the U.S. representative stated:

The international community has long recognized that resolution of the [Israeli-Palestinian] conflict must be through negotiated settlement, as called for in Security Council resolutions 242 (1967) and 338 (1973). That was spelled out clearly to the parties in the terms of reference of the Madrid Peace Conference of 1991. Involving the International Court of Justice in this conflict is inconsistent with that approach and could actually delay a two-State solution and negatively impact road map implementation. Furthermore, referral of this issue to the International Court of Justice risks politicizing the Court. It will not advance the Court's ability to contribute to global security, nor will it advance the prospects of peace. ¹²⁰

The United States instead favored pursuing the "Quartet's road map" – a plan that the United States, the European Union, the Russian Federation, and the U.N. secretary-general developed in 2003 to further the process (initiated at the 1991 Madrid Conference) for peacefully resolving the Israeli-Palestinian conflict. ¹²¹ Thus, the United States was

¹¹⁹GA Res. ES-10/14 (Dec. 12, 2003).

¹²⁰U.N.Doc. A/ES-10/PV.23, at 19 (Dec. 8, 2003).

¹²¹See Letter Dated 7 May 2003 from the Secretary-General Addressed to the President of the Security Council, annex, U.N.Doc. S/2003/529 (May 7, 2003) (containing "A Performance-Based Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict").

committed to an approach for the Israeli-Palestinian conflict entailing diplomacy by the United States and certain other leading powers, not by the international community at large. The United States opposed placing such a matter before the International Court, despite support for doing so by a majority of the General Assembly, because doing so could intrude upon the unique ability of the major powers to influence and shape the peace process.

In its written pleading to the Court, of course, the United States did not advance legal arguments predicated on exceptionalism, for there was no legal basis for doing so. Instead, the United States sought to take advantage of some of the mediating techniques referred to above. The United States argued that the Court should decline to answer the question of grounds of judicial propriety because the question was, in essence, a bilateral dispute in disguise.¹²² The United States hoped to convince the Court that it would be stepping over the bounds of the structural constraints on the Court's jurisdiction if the Court were to pass upon a dispute when the relevant parties to the dispute had not consented to the Court's jurisdiction. Implicit in this argument was a further argument that it was improper to decide a bilateral dispute between two parties when one of the parties had not yet even been recognized by the United Nations as a state (a decision in part controlled by the Security Council), and could not appear before the Court as a state. Further, the United States reiterated its view that it was not for the Court to address an issue that was more properly addressed by the major powers through political negotiations.¹²³

Ultimately, the Court determined that answering the question asked by the General Assembly would not impede the Middle East peace process.¹²⁴ That conclusion was no doubt shared by a majority of states represented in the General Assembly, as was the Court's conclusion on the merits that Israel was violating international law by constructing the barrier. For the American exceptionalism, however, the majority of states are wrong about whether it is a good idea for the Court to be involved in this issue, and also misguided more generally in their opposition to Israeli policies. The Court's attitude in the advisory opinion may well reflect the dominant views of policy-makers in other countries,

¹²² Written Statement of the United States of America, paras. 3.3–3.10 (filed Jan. 30, 2004), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (I.C.J. July 9, 2004). The United States made no oral submissions to the Court.

¹²³ *Id.*, para. 4.6 (“Any expression of legal views by the Court on the permanent status issues can be expected to make the necessary political accommodations between the parties on these issues far more difficult or even impossible.”)

¹²⁴ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9).

but for the exceptionalist, that does not mean the Court is right.

3. BREARD/LAGRAND/AVENA CASES

The recent cases before the Court concerning the treatment of aliens on death row in the United States highlights the U.S. democratic and constitutional tradition antimony. The crux of the *Breard/LaGrand/Avena* line of cases is that aliens arrested by state law enforcement officials often have not been advised of their right to have their consulate notified of their arrest, a right that is supposed to be accorded to them under Article 36 of the Vienna Convention on Consular Relations.¹²⁵ Thereafter, certain aliens have been convicted of serious crimes and sentenced to death. Paraguay, Germany, and Mexico each brought a case against the United States before the International Court by invoking the Optional Protocol Concerning Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations.¹²⁶ In each instance, the applicant state asked the Court to order provisional measures of protection so that the individuals would not be executed prior to a decision by the Court on the merits; Germany and Mexico also asked the Court for decisions on the merits regarding whether the United States had violated its obligations under the Vienna Convention and what consequences should flow from those violations. The United States has fully participated (when permitted) in all aspects of these cases before the Court, presenting extensive written and oral pleadings.

The U.S. reaction to the *Breard/LaGrand/Avena* line of cases may be considered in terms of the U.S. reaction both to the Court's provisional orders and to the Court's decisions on the merits. In all three cases, the Court issued an order on provisional measures that the United States "take all measures at its disposal to ensure" (*Breard, LaGrand*) or "all measures necessary to ensure" (*Avena*) that the relevant aliens not be executed pending a final decision by the Court.¹²⁷ Prior to the Court's own statement on the matter, the U.S. government argued both to the International Court and to U.S. courts that such an order by the Court on provisional measures was not legally binding, and further was not directly incorporated into U.S. law. Such a position has realism overtones, but the dominant feature appears to have been a concern with the constitutional autonomy of the

¹²⁵ Apr. 24, 1963, art. 36, 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292.

¹²⁶ Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

¹²⁷ Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 11 (Order of Apr. 9), *reprinted* in 37 ILM 810, 819 (1998); Vienna Convention on Consular Relations (F.R.G. v. U.S.), Provisional Measures, 1999 I.C.J. 9 (Order of Mar. 3), *reprinted* in 38 ILM 308, 310 (1999); *Avena and Other Mexican Nationals* (Mex. v. U.S.), Provisional Measures (Feb. 5, 2003), *reprinted* in 42 ILM 309, para. 59 (2003); *see* William Aceves, Case Report, 97 AM. J. INT'L L. 923 (2003).

several states and a political concern with intruding upon the democratic decision by those states to use the death penalty in their penal processes. Weighing that concern against the reality that the U.S. constitutional system does incorporate international law into U.S. law, the U.S. government looked for credible legal arguments for why the Court's decision was not binding and not a part of U.S. law. Thus, after the first provisional measures order was issued on April 9, 1998 in the *Breard* case, the U.S. Department of Justice filed a brief before the U.S. Supreme Court stating that

The better reasoned position is that such an order is not binding. Article 41(1) of the ICJ statute provides that the ICJ shall have "the power to *indicate* any provisional measures which *ought to be taken* to preserve the respective rights of either power." Article 41(2) further states that, "[p]ending the final decision [of the ICJ], notice of the measures *suggested* shall forthwith be given to the parties and the Security Council." The use of precatory language ("indicate," "ought to be taken," "suggested") instead of stronger language (e.g.: the ICJ may "order" provisional measures that "shall" be taken) strongly supports a conclusion that ICJ provisional measures are not binding on the parties. The distinction in Article 41(2) between the "final decision" ultimately foreseen and the "measures suggested" in the interim also suggests that the "measures suggested" are not binding.

Petitioners have relied on the United Nations Charter to argue that provisional measures are binding, but the language of the Charter does not support that conclusion. Article 94(1) provides that "[e]ach member . . . undertakes to comply with *the decision* of the [ICJ] in any case to which it is a party." (Emphasis added.) "The decision," in the context of Article 94(1) of the Charter, evidently refers to the final decision of the International Court. Article 94(2) of the Charter elaborates that "[i]f any party to a case fails to perform the obligations incumbent upon it by *a judgment* rendered by the [ICJ], the other party may have recourse to the Security Council." (Emphasis added.) Significantly, the Security Council has never acted to enforce provisional measures indicated by the ICJ. See *Restatement [Third on the Foreign Relations Law of the United States]*, at 368 (discussing Security Council's response to ICJ's order indicating provisional measures in dispute between United Kingdom and Iran).

Moreover, the ICJ itself has never concluded that provisional measures are binding on the parties to a dispute. That court has indicated provisional measures in seven other cases of which we are aware; in most of those cases, the order indicating provisional measures was not regarded as binding by the respondent."¹²⁸

¹²⁸ Brief for the United States as *Amicus Curiae* at 46–51, *Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214) (footnote omitted).

In addition to these representations to the U.S. Supreme Court, the U.S. Secretary of State sent a letter to the Governor of Virginia *requesting* that he stay the execution of Breard since the “execution of Mr. Breard in the face of the Court’s April 9 action could be seen as a denial by the United States of the significance of international law and the Court’s processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.”¹²⁹ Here, again, may be seen a balancing act, in which the State Department sought to uphold U.S. adherence to international law and institutions, while respecting the constitutional autonomy of Virginia.

The Supreme Court denied the petitions for certiorari that had been filed in the case.¹³⁰ The Supreme Court did not focus on the binding nature of the International Court’s provisional measures order. Rather, the Supreme Court said that it was “clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts.”¹³¹ Further, the Court stated:

[W]hile we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. . . . This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention “shall be exercised in conformity with the laws and regulations of the receiving State,” provided that “said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.” Article 36(2), 21 U.S. T., at 101. . . .

Second, although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. We have held “that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.” *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969. But in 1996,

¹²⁹ Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *partially reprinted in* 92 AM. J. INT’L L. 671–72 (1998).

¹³⁰ *Breard v. Greene*, 523 U.S. 371 (1998).

¹³¹ *Id.* at 373.

before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner alleging that he is held in violation of “treaties of the United States” will, as a general rule, not be afforded an evidentiary hearing if he “has failed to develop the factual basis of [the] claim in State court proceedings.” 28 U.S.C. § 2254(a), (e)(2) [(2000)].¹³²

After the Supreme Court denied the petitions for certiorari that had been filed in the case, the Governor of Virginia decided not to stay the execution, and Breard was executed.

With respect to the International Court’s order on provisional measures in the *LaGrand* case, the order was issued on March 3, 1999, at 7 P.M. (Hague time) without having heard the views of the U.S. government.¹³³ In the late afternoon of March 3, the U.S. government transmitted the order to the Governor of Arizona. Just before the scheduled execution, Germany filed a case before the U.S. Supreme Court against the United States and Arizona seeking a temporary restraining order or preliminary injunction to enforce the order of the International Court of Justice. The U.S. solicitor general filed a letter with the Court opposing any stay, asserting that the “Vienna Convention does not furnish a basis for this Court to grant a stay of execution,” and that “an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief.” In declining to exercise its original jurisdiction (with two justices dissenting), the Supreme Court explained in part:

[A] foreign government’s ability here to assert a claim against a State [i.e., Arizona] is without evident support in the Vienna Convention and in probable contravention of the Eleventh Amendment [to the U.S. Constitution] principles. This action was filed within only two hours of a scheduled execution that was ordered on January 15, 1999, based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992. Given the tardiness of the pleas and the jurisdictional barriers they implicate, we decline to exercise our original jurisdiction.¹³⁴

¹³² *Id.*

¹³³ The International Court’s order was, for the first time, based wholly on the views of one party, without providing the opportunity to receive the views of the other party (here the United States) in writing or by oral hearing. The Court characterized its order as based on Article 75(1) of the Rules of the Court, which permits the Court to examine *proprio motu* (by its own motion) whether provisional measures should be ordered, although in fact there had been a request by Germany for such measures.

¹³⁴ *Germany v. United States*, 526 U.S. 111, 112 (1999).

In dissent, Justices Breyer and Stevens said that they favored a stay of the execution so as to give more time to brief fully “the jurisdictional and international legal issues involved.”¹³⁵ The Governor of Arizona decided not to stay the execution. Walter LaGrand was executed on March 4.¹³⁶

While the executions in *Breard* and *LaGrand* in the face of the Court’s order on provisional measures on the surface may suggest a complete U.S. disregard for the views of the Court, the United States took seriously the issue of whether such orders bound the United States, and reached a entirely plausible conclusion that they did not. Yet the animating feature of the U.S. position was the problem presented by federal-state relations. Criminal justice in the United States is a matter almost entirely left to the several states; persons committing crimes in the United States are typically tried under state laws and often in state courts. Further, whether to adopt the death penalty is a matter left to the several states; some states have elected to include the death penalty as a possible sanction whereas other states have abolished or never had the death penalty. Those laws are adopted by the peoples of the states, through enactments by elected state legislators. The decision to convict a violent criminal and to impose the death penalty is a matter decided by the local community in form of an indictment by a grand jury, and a conviction and sentencing by a jury of the offender’s peers. For the federal government to intrude upon that process by declaring that an execution must be stayed due to the decision of a court consisting almost entirely of foreigners residing an ocean away would have been an extraordinary and deeply unpopular undertaking by any administration, Democratic or Republican.

Despite the executions in *Breard* and *LaGrand*, the U.S. government embarked on an aggressive campaign to educate and train state law enforcement officers regarding U.S. obligations arising under the Vienna Convention, to the point of printing cards that officers were to carry with them and read out when arresting an alien.¹³⁷ Moreover, after the Court held – in its judgment on the merits of the *LaGrand* case¹³⁸ – that provisional measures

¹³⁵ *Id.* at 112-13.

¹³⁶ *See World Court’s Effort to Stay Execution Fails*, WASH. POST, Mar. 4, 1999, at A16.

¹³⁷ *See* U.S. Dep’t of State, Consular Notification and Access, at <http://travel.state.gov/law/consular/consular_636.html>; *see also* *LaGrand* (Ger. v. U.S.), 2001 I.C.J. 466, at para. 121, 123-24 (June 27), *reprinted in* 40 ILM 1069 (2001); Verbatim Record (Jan. 21, 2003), *Avena and Other Mexican Nationals* (Mex. v. U.S.), Provisional Measures, I.C.J. Doc. CR 2003/2, paras. 3.13–3.22.

¹³⁸ *LaGrand Case* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27), *reprinted in* 40 I.L.M. 1069 (2001); *see* William J. Aceves, Case Report, 96 AM. J. INT’L L. 210 (2002).

orders were binding upon the United States, and a further provisional measures order was issued in the *Avena* case,¹³⁹ the United States did not publicly reject the *Avena* measures. Rather, the United States sought to implement those measures, albeit with extraordinary difficulty, principally by encouraging the commutation of death sentences of the relevant convicts by governors or parole boards.¹⁴⁰

One of the central problems for the U.S. federal government in these cases concerned the “procedural default rule,” a rule designed to help limit federal court review of state court decisions. In brief, under the procedural default rule, state law procedural rulings that are both sufficiently independent from federal law and adequate to sustain the judgment against the defendant (“procedural defaults”) often preclude consideration of the merits of federal legal claims. Thus, if a defendant fails to file in state court proceedings a timely motion for a new trial or sentencing proceeding because he was not informed of his right to request consular notification, that procedural failure may bar filing such a motion not only thereafter before that state’s courts, but also before federal courts.

Turning to the Court’s judgements on the merits in *LaGrand* and *Avena*,¹⁴¹ the Court found that the United States had violated its obligations under the Vienna Convention by not informing the aliens of their right of consular notification, by not notifying their consulates of their detentions, and by effectively depriving the consulates of their ability to communicate with and have access to the aliens. In both cases, the Court also found that the failure to provide judicial review of the aliens convictions and sentences in light of the lack of notification constituted a further violation of the Vienna Convention. As for what the United States must do prospectively, the Court stated in *LaGrand* that “should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties” without their right to consular notification having been respected, the United States, “by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth” in the Vienna Convention.¹⁴² The Court reached a similar finding on “review and reconsideration” with respect to the some

¹³⁹ *Avena* (Provisional Measures), *supra* note 127, at para. 59.

¹⁴⁰ See Counter-Memorial of the United States, paras. 5.6–5.9 (Nov. 3, 2003), *Avena and Other Mexican Nationals* (Mex. v. U.S.), Judgment (Mar. 31, 2004).

¹⁴¹ *Avena and Other Mexican Nationals* (Mex. v. U.S.), Judgment (Mar. 31, 2004), *reprinted in* 43 ILM 581 (2004); see Dinah L. Shelton, Case Report, 98 AM. J. INT’L L. 559 (2004).

¹⁴² *LaGrand* (Judgment), *supra* note 138, para. 128(7).

fifty Mexican nationals at issue in the *Avena* case.¹⁴³ As to how such “review and reconsideration” should occur, the International Court found in both *LaGrand* and *Avena* that a procedural default rule cannot justify precluding review of a petitioner’s claim.¹⁴⁴ Further, the Court found in both cases that Article 36 of the Vienna Convention creates “individual rights,” which arguably means rights enforceable in U.S. courts.¹⁴⁵ Apparently with an eye to the U.S. approach of relying on governors and parole boards to commute death sentences in light of the Vienna Convention violations, the Court in *Avena* also stated that the process must entail “a procedure which guarantees that full weight is given to the violations of the rights set forth in the Vienna Convention” and “should occur within the overall judicial proceedings relating to the individual defendant concerned.”¹⁴⁶ The Court specifically noted that “the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements.”¹⁴⁷

The initial fall-out from the decisions on the merits in *LaGrand* and *Avena* is a story of the federal government encouraging the several states to take into account the decisions of the International Court, without actually telling the states that they must do so as a matter of federal law. Not surprisingly, different courts went in different directions. In *Madej v. Schomig*, a federal district court found that the *LaGrand* judgment on the merits foreclosed strict reliance by U.S. courts on the procedural default rule for violations of the Vienna Convention.¹⁴⁸ In *Torres v. Oklahoma*, a concurring state court judge found that the state court was bound by the Vienna Convention Optional Protocol to abide by the International Court’s *Avena* decision.¹⁴⁹ At the same time, a state court in *Cauthern v. Tennessee* concluded that, notwithstanding the International Court’s judgments, the Vienna Convention does not create an individual right that is privately enforceable in the United States, nor that violations of the Vienna Convention may be raised as part of a petition for

¹⁴³ *Avena* (Judgment), *supra* note 141, para. 153(9).

¹⁴⁴ *LaGrand* (Judgment), *supra* note 138, paras. 90-91; *Avena* (Judgment), *supra* note 141, paras. 110-13, 153.

¹⁴⁵ What the Court actually said was “Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person.” *LaGrand* (Judgment), *supra* note 138, para. 77.

¹⁴⁶ *Avena* (Judgment), *supra* note 141, paras. 139-40.

¹⁴⁷ *Id.*, para. 143.

¹⁴⁸ *Madej v. Schomig*, 223 F.Supp.2d 968 (N.D. Ill. 2002).

¹⁴⁹ *Torres v. Oklahoma*, No. PCD-04-442, slip. op. at 2-5, 8-12 (Okla. Crim. App. May 13, 2004) (Chapel, J., concurring) (footnotes omitted), *reprinted in* 43 ILM 1227 (2004).

post-conviction relief.¹⁵⁰ Similarly, in *Medellin v. Dretke*, the Fifth Circuit found that the Supreme Court's order denying certiorari in the *Breard* case supported application of the procedural default rule regardless of what the International Court said in its *LaGrand* and *Avena* judgments, and further that the Vienna Convention did not create an individual right that is privately enforceable.¹⁵¹

In December 2004, the Supreme Court granted a writ of certiorari in the *Medellin* case. The U.S. government filed in February 2005 an amicus brief urging the Court to affirm the Court of Appeals. Playing strongly to the vision of democratic and constitutional autonomy, the government argued that Article 36 of the Vienna Convention on Consular Relations does not provide a basis for private judicial enforcement in U.S. courts. The government supported this position through an analysis of the language and structure of the Vienna Convention, read in context, its ratification history, and state practice, as well as the long-standing position of the Executive Branch.¹⁵² While the International Court's position might imply a right of private judicial enforcement in U.S. courts, the U.S. government asserted: "While the I.C.J.'s understanding of the Convention's requirements is entitled to respectful consideration, it is ultimately the responsibility of this [U.S. Supreme] Court to interpret the meaning of a federal treaty."¹⁵³ The U.S. government also argued that the Vienna Convention does not preclude application by U.S. courts of the procedural default rule. The government stated that the International Court was simply wrong when it found otherwise.

[T]he I.C.J. in *LaGrand* concluded that applying procedural default to bar consideration of a challenge to a defendant's conviction and sentence violates [Vienna Convention] Article 36(2)'s requirement that laws of the forum state "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." But a general "full effect" clause cannot be understood to override application of rules that are as deeply embedded in the criminal justice system as rules of procedural default. . . .

....

[W]hile the I.C.J.'s interpretation of Article 36(2) is entitled to respectful

¹⁵⁰ *Cauthern v. Tennessee*, 145 S.W.3d 571 (Tenn. Crim. App. 2004).

¹⁵¹ *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). For a similar result before the Fifth Circuit in a different case, see *Plata v. Dretke*, 2004 WL 1814089 (5th Cir. Aug. 16, 2004).

¹⁵² See Brief for the United States as Amicus Curiae Supporting Respondent, *Medellin v. Dretke*, No. 04-5928, at 18-30 (U.S.) (filed February 28, 2005).

¹⁵³ *Id.*, at 30.

consideration, it does not provide a basis for the [U.S. Supreme] Court to overrule its controlling decision in *Breard*.¹⁵⁴

As for whether the International Court's decision in the *Avena* judgment could itself be privately enforced in U.S. courts, the U.S. government argued that it could not. The U.S. position was: (1) while the United States adhered to the Optional Protocol to the Vienna Convention, that protocol operates only to grant jurisdiction to the International Court over Vienna Convention disputes – it does not commit the United States to comply with the I.C.J.'s judgment, nor make the judgment privately enforceable in a criminal proceeding by an individual; (2) rather, U.S. compliance with I.C.J. judgments is addressed in the U.N. Charter, which creates an international duty upon the United States to comply with the judgment,¹⁵⁵ but does not make the I.C.J. judgment privately enforceable in court; (3) the mechanism for taking non-compliance before the U.N. Security Council confirms that I.C.J. judgments were not meant to be privately enforceable; (4) the U.S. ratification history confirms this interpretation, as does the one U.S. court decision that has addressed the matter; (5) the I.C.J. Statute states that I.C.J. judgments have no binding effect except between the parties in the case, thus negating the possibility of private judicial enforcement; and (6) the International Court itself stated that the U.S. obligation was to provide, *by means of its own choosing*, review and reconsideration, which means that the U.S. political branches are entitled to pursue the matter by a choice of their means.¹⁵⁶

Despite this strong statement in favor of U.S. autonomy, the U.S. government accepted that it had an international obligation to abide by the International Court's judgment and, further, decided that it had to do something about that obligation vis-à-vis the several states. So, President Bush on February 28, 2005, issued a memorandum to the Attorney General stating:

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (I.C.J.) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States

¹⁵⁴ *Id.* at 31, 33.

¹⁵⁵ The U.S. government interpreted the "judgment" of the International Court to apply only to the dispositif, not to the Court's legal reasoning. *Id.*, at 38-39, n. 12.

¹⁵⁶ *Id.*, at 33-38.

will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 I.C.J. 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.¹⁵⁷

Thus, although the U.S. government argued against the direct incorporation into U.S. law of international norms emanating from the Vienna Convention or from the judgments of the International Court, the government proceeded to demand compliance by the states with the International Court's *Avena* judgment on the basis of the President's "constitutional foreign affairs authority and his authority under Article 94 of the U.N. Charter" to determine how the United States will respond to an I.C.J. judgment.¹⁵⁸ In November 2006, the Texas Court of Criminal Appeals rejected the U.S. government's approach, stating that

we hold that the President's memorandum ordering us to give effect to the ICJ *Avena* decision cannot be sustained under the express or implied constitutional powers of the President relied on by Medellín and the United States or under any power granted to the President by an act of Congress cited by Medellín and the United States. As such, the President has violated the separation of powers doctrine by intruding into the domain of the judiciary, and therefore, Medellín cannot show that the President's memorandum preempts [Texas procedural law].¹⁵⁹

The final act of the *Medellín* case is yet to be written,¹⁶⁰ but for now that U.S. government's approach can be seen with the context of the third antimony. The government's approach maintained the overall democratic and constitutional autonomy of the United States, while simultaneously seeking to achieve compliance *as a matter of*

¹⁵⁷ See Brief for the United States as Amicus Curiae, *supra* note 152, at attachment (memorandum from President George W. Bush for the Attorney General dated February 28, 2005).

¹⁵⁸ See *id.*, at 42. The United States cited to various cases in support of the President's foreign affairs power: *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936); *Amer. Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore, v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

¹⁵⁹ *Ex Parte José Ernesto Medellín*, 2006 WL 3302639, at *21 (Tex. Crim. App. Nov. 15, 2006).

¹⁶⁰ A petition for certiorari has been filed with the Supreme Court. See 75 U.S.L.W. 3398 (Jan 16, 2007) (No. 06-984).

comity with the International Court's judgment. At the same time, the United States sought to ensure that it would never again be placed in such a position; in March 2005, the government informed the U.N. Secretary-General that it terminated its adherence to the Optional Protocol, thereby foreclosing future cases against the United States before the International Court based on that protocol.¹⁶¹

When one steps back from the intricacies of these cases, the overall thrust of the Court's decisions may reflect a movement away from the normal approach for mediating the autonomous national law/embedded national law antinomy. Normally, international dispute fora have accepted that they have the power to determine that a state has acted unlawfully and, as a consequence, to order reparations. Such fora, however, generally eschew powers for ordering specific performance by a state, preferring not to interfere in internal national processes. While ordering that specific acts be taken internally is by no means unprecedented,¹⁶² international fora, by and large, accept that the autonomy of states must be respected; that there is only so far an international court or tribunal may go before its authority will be rejected. In the *Breard/LaGrand/Avena* line of cases, the International Court evinced sensitivity to such autonomy when it ordered that the United States, "by means of its own choosing . . . allow the review and reconsideration" of convictions and sentences. Yet despite this leeway, the Court was remarkably willing to assume an authority to oversee the detailed circumstances of criminal law cases unfolding before U.S. state and federal courts, concerning terrible crimes committed in the United States against U.S. nationals, and to order the United States to undertake further review of the cases through the U.S. judicial system. Were the Court's judgments firmly anchored in language of the Vienna Convention setting forth what type of remedy should flow from a Vienna Convention violation, then the resistance of the United States to the Court's judgments would be much less defensible. As it is, however, it is understandable that the United States was a bit surprised to find that, by joining the Vienna Convention's optional protocol, it inadvertently laid the basis for the International Court to upend U.S. state court criminal proceedings.

For Europeans, the concept of a supra-national court reaching decisions that directly

¹⁶¹ Journal of the United Nations: Programme of Meetings and Agenda, No. 2005/48, at 13 (Mar. 12, 2005) (reporting receipt of the withdrawal on Mar. 7); see Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1.

¹⁶² See, e.g., Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 I.C.J. 33 (ordering Belgium to cancel an arrest warrant issued by a Belgian judicial official because the warrant violated the international immunity of the Congo Minister of Foreign Affairs). On the other hand, it may be noted that, in the *Arrest Warrant* case, the issuing of the arrest warrant itself was the unlawful act, whereas in *Breard/LaGrand/Avena* cases the conviction and death sentence were not themselves the unlawful acts.

affect the lives of individuals is nothing new; the European Court on Human Rights has existed for almost fifty years, and has handed down hundreds of cases that reach deeply into the national legal systems of EU member states. Likewise, the European Court of Justice reaches directly into national legal systems in various ways. Regional human rights courts in the Americas and now in Africa have a less strong pedigree, but nevertheless, for states adhering to their jurisdiction, the concept of such supra-national adjudication as having effects on internal decision-making is understood.

For Americans, however, there is no such tradition of allowing such intrusiveness into the U.S. legal system (for example, the United States has not accepted the jurisdiction of the Inter-American Court of Human Rights). One often sees reference to the U.S. willingness to adhere to compulsory dispute settlement before the World Trade Organization, and explanations for doing so tend to focus on trade law being a more “technical” area or that the United States is in a relatively weaker position vis-à-vis other states (China, the EU, Japan) on trade matters than on other matters. Those issues are important, but it should also be noted that the outcome of WTO decision-making does not directly intrude into the U.S. legal system. There is no mechanism by which a WTO panel decision has a legally binding effect upon an internal U.S. entity, such as a state court. Rather, the result of a U.S. loss at the WTO is that the U.S. government has a choice to make: conform its law or practice; or face WTO-authorized retaliation.¹⁶³ The result in the *Breard/LaGrand/Avena* line of cases is different. There is no mechanism by which the United States can simply accept that Mexico will also not conduct full-fledged judicial review of the effects of violations of the Vienna Convention (were such an option available, the United States would likely accept it). Instead, the only avenue for redress is that directed by the International Court, which purports to have a dispositive effect on the decision-making of sub-state entities. In this sense, adherence to the jurisdiction of the International Court—in terms of its effects on U.S. democratic decision-making and constitutional autonomy—is considerably different from adherence to WTO decision-making.

IV. CONCLUSION

The formal means for mediating antimonies have been largely unchanged since the inception of the Court: the Court has jurisdiction over many disputes, but that jurisdiction is circumscribed (as recognized in Yugoslavia’s *Legality of Use of Force* cases); the judges reflect the global community, but also the major powers; etc. Yet, the Court may have entered a phase where it is more likely to resist the constraints on its power contained within those formal means. Although only states may appear before the Court, the Court

¹⁶³ Similarly, in the context of NAFTA Chapter 11 dispute resolution, the United States has a choice: conform its law or practice (invariably, the law or practice of one of the several states with respect to a foreign investor) or pay damages.

now finds that a non-state entity (Palestine) may do so if a dispute is placed before the Court in the guise of an advisory opinion. While its jurisdiction is circumscribed, the Court is comfortable engaging in an extended review of the legality of a U.S. use of military force based on a treaty that the Court has found was not violated. While the Vienna Convention on Consular Relations, and other relevant treaties, contain no provisions regarding the effect of violations of the Convention upon national court proceedings, the Court sees no difficulty in determining that U.S. courts must engage in further judicial review of criminal convictions and sentences, trumping local procedural rules. One gets the impression that the Court—fifty years after its creation—is tired of some of the formal constraints that applied earlier in its life and—looking around at the robustness of dispute resolution in other international fora—is ready to expand the reach of its power.

Moreover, it may be that some of the informal means for mediating antimonies have been lost in the past twenty years. While the Court's concern with its reputation and legitimacy in the first thirty years of its existence served as important political constraint in the Court's relationship with all states, including the United States, over the past twenty years that same concern has led to several clashes with the United States. Having stood up to the United States in the *Nicaragua* case, the Court became a hero to the states of the developing world, and ushered in a period of increased activity on its docket. Of the cases filed before the International Court since its inception, approximately forty percent were filed in the last fifteen years.¹⁶⁴ Thus, while from 1947 to 1989, the Court received on its docket approximately two cases per year, after 1990 the Court received more than three cases per year. The U.S. withdrawal from the Court's compulsory jurisdiction has far from crippled the Court; arguably, it has enhanced the Court's stature as a place of authority in interstate relations un beholden to the major powers. For the Court, the lesson may be not to tread lightly with respect to the United States but, rather, to tread heavily unless doing so would be viewed generally as bias.

In its foreign policies, contemporary America appears to be going a different route than much of the world, even its former close allies in Europe. The consequence is that the judges of the I.C.J. now reflect predominantly the views of states with whom the United States often disagrees. Perhaps this reflects success in the prescription for the Court made by Richard Falk in his 1986 book, *Reviving the World Court*.¹⁶⁵ Falk argued for the Court to turn away from what he viewed as Anglo-American and West European ways of thinking, and move more toward reflecting the viewpoints associated with non-Western legal traditions (including, at that time, Marxist outlooks on law). Arguably, this is now what has happened, which has strengthened the Court's position among most states of the

¹⁶⁴ See Douglass Cassel, *Is there a New World Court?*, 1 NW. U. J. INT'L HUM. RTS. 1 ¶ 18 (2004).

¹⁶⁵ RICHARD FALK, *REVIVING THE WORLD COURT* (1986).

world, but seriously alienated the United States.

The antinomies identified in Part II are unlikely to be resolved through the further development of formal or informal techniques for mediation. While the United States is not happy with the decisions being rendered by the Court, there is no support in the global community for altering the formal mechanisms by which the Court operates. If the United States saw concrete benefits in being more closely associated with the Court, it might look for ways to improve the U.S.-I.C.J. relationship, but for the world's premier superpower, the benefits appear slim while the costs appear quite high. Consequently, the United States may take steps to further isolate itself from the reach of the Court's jurisdiction, through terminating some or all of the outstanding treaties that provide for the Court's jurisdiction over the United States. In the near term, U.S. policymakers will seek to avoid any involvement in matters before the Court, while the Court will welcome opportunities to speak to the legality of U.S. actions.

Table #1

**List of Multilateral or Bilateral Treaties
to Which the U.S. is a Party
That Provide for I.C.J. Jurisdiction¹⁶⁶**

The treaties contained in the following table do not all provide for compulsory jurisdiction. For example, the first treaty listed simply provides that, when a dispute arises, the parties may mutually agree to bring the matter to the I.C.J. (it also notes that organs of the Convention may seek an I.C.J. advisory opinion if authorized by U.N. General Assembly). The second treaty listed allows states to file a declaration opting for I.C.J. jurisdiction for disputes arising under the treaty and with respect to other states filing similar declarations; with respect to that treaty, the United States filed no such declaration. For some treaties providing for compulsory jurisdiction, the United States filed a reservation when ratifying the treaty that rejects such jurisdiction (e.g., the Torture Convention; the Genocide Convention). The table does not include treaties pre-dating 1945 that provide for jurisdiction by the Permanent Court of Justice and that therefore, per I.C.J. Statute Article 36, also provide for I.C.J. jurisdiction.

Treaty Name	Date Signed/Nature of Jurisdiction
Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (multilateral)	Jan. 13, 1993
United Nations framework convention on climate change (multilateral)	May 9, 1992
Convention on the marking of plastic explosives for the purpose of detection (multilateral)	Mar. 1, 1991
United Nations convention against illicit traffic in narcotic drugs and psychotropic substances (multilateral)	Dec. 20, 1988

¹⁶⁶ Table is based on information from the U.N. treaty database, from U.S. DEP'T OF STATE, TREATIES IN FORCE (2004), and from information found at the I.C.J. website, <http://www.I.C.J.-cij.org/I.C.J.www/ibasicdocuments/ibasictext/ibasictratiesandotherdocs.htm> (visited March 4, 2005).

Convention for the suppression of unlawful acts against the safety of maritime navigation (multilateral)	Mar. 10, 1988
Vienna convention for the protection of the ozone layer (multilateral)	Mar. 22, 1985
Convention against torture and other cruel, inhuman or degrading treatment or punishment (multilateral)	Dec. 10, 1984
Convention on the conservation of Antarctic marine living resources (multilateral)	May 20, 1980
International convention against the taking of hostages (multilateral)	Dec. 17, 1979
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (multilateral)	Dec. 14, 1973
Convention for the suppression of unlawful acts against the safety of civil aviation (multilateral)	Sept. 23, 1971
Universal copyright convention, signed at Geneva on 6 September 1952, as revised (multilateral)	July 24, 1971
Convention on psychotropic substances (multilateral)	Feb. 21, 1971
Convention on the suppression of the unlawful seizure of aircraft (multilateral)	Dec. 16, 1970
Consular convention (bilateral with Belgium)	Sept. 2, 1969
International health regulations (multilateral)	July 25, 1969
Convention for the protection of industrial property signed at Paris on 20 March 1883 as revised (multilateral)	July 14, 1967
Protocol relating to the status of refugees (multilateral)	Jan. 31, 1967

International convention of the elimination of all forms of racial discrimination (multilateral)	Mar. 7, 1966
Treaty of amity and economic relations (bilateral with Togo)	Feb. 8, 1966
Convention on the settlement of investment disputes between States and nationals of other States (multilateral)	Mar. 18, 1965
Convention on offences and certain other acts committed on board aircraft (multilateral)	Sept. 14, 1963
Consular convention (bilateral with Seoul)	Jan. 8, 1963
Treaty of friendship, establishment and navigation (bilateral with Luxembourg)	Feb. 23, 1962
Amended Constitution of the International Rice Commission (multilateral)	Nov. 23, 1961
Amended agreement for the establishment of the Indo-Pacific Fisheries Commission (multilateral)	Nov. 23, 1961
Optional protocol to the Vienna convention on diplomatic relations concerning the compulsory settlement of disputes (multilateral)	Apr. 18, 1961
Treaty of amity and economic relations (bilateral with Vietnam)	Apr. 3, 1961
Single Convention on narcotic drugs (multilateral)	Mar. 30, 1961
Treaty of friendship, establishment and navigation (bilateral with Belgium)	Feb. 21, 1961
Antarctic treaty (multilateral)	Dec. 1, 1959
Convention of establishment (bilateral with France)	Nov. 25, 1959
Convention placing the International Poplar Commission within the framework of FAO (multilateral)	Nov. 19, 1959

Treaty of friendship and commerce (bilateral with Pakistan)	Nov. 12, 1959
Treaty of friendship, commerce and navigation (Bilateral with Rep. Of Korea)	Nov. 28, 1956
Supplementary convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery (multilateral)	Sept. 7, 1956
Treaty of friendship, commerce and navigation (bilateral with the Netherlands)	Mar. 27, 1956
Treaty of amity, economic relations, and consular rights (bilateral with Iran)	Aug. 15, 1955
Treaty of friendship, commerce and navigation (bilateral with F.R.G.)	Oct. 29, 1954
International convention for the prevention of pollution of the sea by oil (multilateral)	May 12, 1954
Protocol amending slavery convention signed at Geneva on Sept. 25, 1926	Dec. 7, 1953
Economic aids agreement (bilateral with Spain)	Sept. 26, 1953
Treaty of friendship, commerce and navigation (bilateral with Japan)	Apr. 2, 1953
Convention on the political rights of women (multilateral)	Mar. 31, 1953
Universal copyright convention (multilateral)	Sept 6, 1952
Agreement for economic assistance (bilateral with Israel)	May 9, 1952
Treaty of friendship, commerce and navigation (bilateral with Denmark)	Oct. 1, 1951
Treaty of peace with Japan (multilateral)	Sept. 8, 1951
Treaty of amity and economic relations (bilateral with Ethiopia)	Sept. 7, 1951
Treaty of friendship commerce and navigation (bilateral with Israel)	Aug. 23, 1951

Treaty of friendship, commerce and navigation (multilateral)	Aug. 3, 1951
Convention on road traffic (multilateral)	Mar. 21, 1950
Treaty of friendship, commerce and navigation (bilateral with Ireland)	Jan. 21, 1950
Agreement for facilitating the international circulation of visual and auditory materials of an education, scientific and cultural character (multilateral)	July 15, 1949
Convention on the prevention and punishment of the crime of genocide (multilateral)	Dec. 8, 1948
Economic co-operation agreement (bilateral with Portugal)	Sept. 28, 1948
Economic co-operation agreement (bilateral with United Kingdom)	July 6, 1948
Economic co-operation agreement (bilateral with Turkey)	July 4, 1948
Economic co-operation agreement (bilateral with Sweden)	July 3, 1948
Economic co-operation agreement (bilateral with Luxembourg)	July 3, 1948
Economic co-operation agreement (bilateral with China)	July 3, 1948
Economic co-operation agreement (bilateral with Iceland)	July 3, 1948
Economic co-operation agreement (bilateral with Norway)	July 3, 1948
Economic co-operation agreement (bilateral with Belgium)	July 2, 1948
Economic co-operation agreement (bilateral with Greece)	July 2, 1948
Economic co-operation agreement (bilateral with Netherlands)	July 2, 1948

Economic co-operation agreement (bilateral with Austria)	July 2, 1948
Economic co-operation agreement (bilateral with Denmark)	June 29, 1948
Economic co-operation agreement (bilateral with France)	June 28, 1948
Economic co-operation agreement (bilateral with Italy)	June 28, 1948
American treaty on pacific settlement (multilateral)	April 30, 1948
Treaty of friendship, commerce and navigation (bilateral with Italy)	Feb. 2, 1948
Treaty of friendship, commerce and navigation (bilateral with China)	Nov. 4, 1946
International air services agreement (multilateral)	December 7, 1944

Table #2

**List of States Accepting the Compulsory Jurisdiction
of the International Court of Justice**

Name of State	Year Declaration was filed
Australia	2002
Austria	1971
Barbados	1980
Belgium	1958
Botswana	1970
Bulgaria	1992
Cambodia	1957
Cameroon	1994
Canada	1994
Colombia	1937
Costa Rica	1973
Côte d' Ivoire	2001
Cyprus	2002
Democratic Republic of the Congo	1989
Denmark	1956
Dominican Republic	1924
Egypt	1957
Estonia	1991
Finland	1958
Gambia	1966
Georgia	1995
Greece	1994

Guinea	1998
Guinea-Bissau	1989
Haiti	1921
Honduras	1986
Hungary	1992
India	1974
Japan	1958
Kenya	1965
Lesotho	2000
Liberia	1952
Liechtenstein	1950
Luxembourg	1930
Madagascar	1992
Malawi	1966
Malta	1966, 1983
Mauritius	1968
Mexico	1947
Nauru	1992
Netherlands	1956
New Zealand	1977
Nicaragua	1929
Nigeria	1998
Norway	1996
Pakistan	1960
Panama	1921
Paraguay	1996
Peru	2003

Philippines	1972
Poland	1996
Portugal	1955
Senegal	1985
Slovakia	2004
Somalia	1963
Spain	1990
Sudan	1958
Suriname	1987
Swaziland	1969
Sweden	1957
Switzerland	1948
Togo	1979
Uganda	1963
United Kingdom	1969
Uruguay	1921

Table #3

**Contentious Cases Involving the United States
at the International Court of Justice**

Applicant	Respondent	Name of Case	Citation to case	U.S. Overall Prevailed?
Mexico	United States	Avena and Other Mexican Nationals	Mar. 31, 2004 (merits judgment) Jan. 9, 2003 (provisional measures)	No (lost on provisional measures and on the merits).
Yugoslavia	United States	Legality of Use of Force	1999 I.C.J. 916 (June 2) (provisional measures)	Yes (dismissed for lack of jurisdiction).
Germany	United States	LaGrand	2001 I.C.J. 466 (June 27) (merits judgment) 1999 I.C.J. 9 (March 3) (provisional measures)	No (lost on both interim measures and on the merits).
Paraguay	United States	Vienna Convention on Consular Relations	1998 I.C.J. 426 (removal) (November 10) 1998 I.C.J. 266 (April 9) (provisional measures)	No (lost on provisional measures).
Iran	United States	Oil Platforms	2003 I.C.J. 161 (Nov. 6) 1996 I.C.J. 803 (Dec. 12) (preliminary obj.)	No (regarding jurisdictional). Yes (regarding merits).

Libya	United States	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the aerial Incident at Lockerbie	2003 I.C.J. 152 (Sept. 10) (discontinuance) 1998 I.C.J. 115 (Feb. 27) (preliminary objections) 1992 I.C.J. 114 (Apr. 14) (provisional measures)	Discontinued due to settlement
Iran	United States	Aerial Incident of 3 July 1988	1996 I.C.J. 9 (Feb. 22) (removal)	Discontinued due to settlement
United States	Italy	Elettronica Sicula S.p.A. (ELSI)	1989 I.C.J. 15 (July 20)	No (lost on merits).
Nicaragua	United States	Military and Paramilitary Activities in and against Nicaragua	1991 I.C.J. 47 (Sept. 26) (removal) 1986 I.C.J. 14 (June 27) 1984 I.C.J. 392 (Nov. 26) (jurisdictional)	Discontinued.
Canada	United States	Delimitation of the Maritime Boundary in the Gulf of Maine Area	1984 I.C.J. 246 (Oct. 12)	Not applicable although U.S. position largely sustained.
United States	Iran	United States Diplomatic and Consular Staff in Tehran	1980 I.C.J. 3 (May 24) 1979 I.C.J. 7 (Dec. 15) (provisional measures)	Yes (won on provisional measures and on the merits).
United States	Bulgaria	Aerial Incident of 27 July 1955	1960 I.C.J. 146 (May 30) (removal)	Discontinued
United States	USSR	Aerial Incident of 7 November 1954	1959 I.C.J. 276 (Oct. 7) (removal)	Dismissed by the Court

Switzerland	United States	Interhandel	1959 I.C.J. 6 (Mar. 21) 1957 I.C.J. 105 (Oct. 24) (Interim protection)	Dismissed by the Court
United States	USSR	Aerial Incident of 4 September 1954	1958 I.C.J. 158 (Dec. 9) (removal)	Dismissed by the Court
United States	Czecho- slovakia	Aerial Incident of 10 March 1953	1956 I.C.J. 6 (Mar. 14)	Dismissed by the Court
United States	USSR	Aerial Incident of 7 October 1952	1956 I.C.J. 9 (Mar. 14) (removal)	Dismissed by the Court
United States	Hungary	Treatment in Hungary of Aircraft and Crew of the United States of America	1954 I.C.J. 99 (July 12) (removal)	Dismissed by the Court
United States	USSR	Treatment in Hungary of Aircraft and Crew of the United States of America	1954 I.C.J. 103 (July 12) (removal)	Dismissed by the Court
Italy	France, United Kingdom, United States	Monetary Gold Removed from Rome in 1943	1954 I.C.J. 19 (June 15)	Dismissed by the Court
France	United States	Rights of Nationals of the United States of America in Morocco	1952 I.C.J. 176	Yes on some issues.

Table # 4

**Advisory Opinions at the International Court of Justice
Showing U.S. Participation**

Name of Opinion	Year Decided	U.S. Written Pleading	Oral Pleading
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory	2004	Jan. 30, 2004	
Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights	1999	Oct. 7, 1998	
Legality of the Threat or Use of Nuclear Weapons	1996	June 20, 1995	Oct. 30-Nov. 15, 1995
Legality of the Use by a State of Nuclear Weapons in Armed Conflict	1996	June 10, 1994	Oct. 30-Nov. 15, 1995
Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations	1989	July 31, 1989 I.C.J. Pleadings p. 208	
Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (1988)	1988	Mar. 25, 1988 I.C.J. pleadings p. 187	
Application for Review of the Judgement no. 333 of the United Nations Administrative Tribunal	1987	Mar. 5, 1985 I.C.J. pleadings p. 230	
Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal	1982	I.C.J. pleadings p. 160	

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt	1980	Aug. 27, 1980 I.C.J. pleadings p. 182	Oct 21-23, Dec. 20 1980 I.C.J. pleadings p. 230
Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276	1971	I.C.J. pleadings p. 843	
Certain Expenses of the United Nations	1962	February 1962 I.C.J. pleadings p. 180	May 21, 1962 I.C.J. pleadings p. 282
Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization	1960	I.C.J. pleadings p. 114	Apr. 26-May 4 1960 and June 8, 1960 I.C.J. pleadings p. 262
Admissibility of Hearings of Petitioners by the Committee on South West Africa	1956	I.C.J. pleadings p. 26	
Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco	1956	I.C.J. pleadings p. 184	
Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa	1955	Feb. 25, 1955 I.C.J. pleadings p. 69	
Effect of Awards of Compensation Made by the United Nations Administrative Tribunal	1954	I.C.J. pleadings p. 131	June 10-14, 1954 and July 13, 1954 I.C.J. pleadings p. 280
Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide	1951	I.C.J. pleadings p.23	
International Status of South West Africa	1950	I.C.J. pleadings p. 85	

Competence of the General Assembly for the Admission of a State to the United Nations	1950	I.C.J. pleadings p. 110	
Interpretation of Peace Treaties with Bulgaria, Hungary and Romania	1950	Nov. 7, 1949 I.C.J. pleadings p. 131	Feb. 28, Mar. 1, and Mar. 30, 1950 I.C.J. pleadings p. 242
Reparations for Injuries Suffered in the Service of the United Nations	1949	Feb.. 14, 1914 I.C.J. pleadings p. 19	
Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)	1948	Jan. 29, 1948 I.C.J. pleadings p. 19	