The United States in 1986 marks the fortieth and final year of its acceptance of
compulsory jurisdiction under the Optional Clause of the Statute of the International Court
of Justice. This long association and, indeed, many other facts about the United States
experience at the I.C.J. have possibly been overshadowed by the extraordinary events
of 1984-1985, events surrounding the case of Military and Paramilitary Activities In and
Against Nicaragua. This chapter attempts to set out the facts of the whole U.S. experience
and to provide a better perspective for evaluation than that offered by a single year.

The United States began as an active participant in the World Court only in 1946,
even though the seminal proposal for a world court came from the United States delegation
to the Hague Disarmament Conference of 1899. Thus the United States missed the
opportunity taken by most European and many Latin American countries to litigate on
the international level at the Permanent Court of International Justice. Background on the
founding of the P.C.I.J. and the American attitudes toward it are set out elsewhere in
this collection. For the purposes of this chapter it is sufficient to say that failing to adhere
to the P.C.I.J. meant that Americans had less experience than other parties to the I.C.J.
Statute when the U.S. accepted Optional Clause jurisdiction in 1946. More importantly,
the issues which prevented the United States from participating in the P.C.I.J. were not
satisfactorily resolved when the U.S. joined the I.C.J. This is evident from the Connally
Reservation to the American acceptance of I.C.J. jurisdiction. The Connally Reservation
provides a way for the United States to escape from the Court’s compulsory jurisdiction;
yet escape was not what the drafters intended by the scheme of compulsory jurisdiction.
From the beginning of its relationship with the I.C.J., therefore, the U.S. has been in
a dubious position. The great legal scholar Sir Hersch Lauterpacht even maintained that

2. See, inter alia, the chapters by Franck, Gross, and Gordon.
the Connally Reservation prevented the United States from accepting the Court’s compulsory jurisdiction at all.\(^3\)

Nevertheless, the United States has participated in thirteen contentious cases and fourteen advisory opinions, though it must be admitted that Sir Hersch was not far from the truth in a sense. The United States has accepted the Court’s jurisdiction but has never fully resolved to commit itself to dispute settlement through the I.C.J., at least in contentious cases. The United States does seem prepared to accept the Court as a normal means for resolving questions relating to the United Nations as an institution through advisory opinions. As for questions directly concerning the United States, the matter is unresolved. In the early years the U.S. seemed ready to make a commitment to the Court, and it thought that the Court could be useful during the Cold War. On the other hand, it has not been willing to make full use of the Court by modifying the Connally Amendment. Opening itself to suit by other states appeared to be too high a price for the U.S. to pay for being able to sue others before the Court.

The number of cases brought by the U.S. diminished over the years, though recently the Court again proved useful in the Hostages case, and the U.S. turned to it in the Gulf of Maine dispute and is currently preparing to litigate before a chamber of the Court in a dispute with Italy. Nicaragua’s case, however, demonstrates the price of full American commitment to the Court. The current administration feels that price is too high for the tangible benefits gained by commitment to compulsory jurisdiction. This chapter attempts to set out just what the U.S. has gained and how, on a number of occasions, it could have gained more by a full commitment to compulsory jurisdiction—a commitment absent the Connally Reservation.

The experience of the United States in the World Court must, therefore, be interpreted in light of the Connally Reservation. Not only might the outcomes of several cases have been quite different in its absence, but a number of other cases might have been brought by the United States were it not for the presence of that reservation. Although the reservation was at no time treated as a nullity, despite Lauterpacht’s argument, it skirted close to nullifying jurisdiction when applied against U.S. interests. This examination of the U.S. experience in contentious cases before the World Court pays particular attention to the distorting effect of the Connally Amendment. At the same time, it must be borne in mind that the Connally problem was by no means the entire story of U.S. participation at the World Court. Indeed, the United States achieved a number of successes where the Connally Reservation played little or no role. Most significantly, Connally served no purpose in the most controversial case involving the U.S., the case brought by Nicaragua.

The U.S. first contemplated invoking the World Court’s contentious jurisdiction in 1948. In a memorandum to Philip Jessup, Secretary of State George C. Marshall discussed bringing a number of cases on disputes relating to Palestine.\(^4\) Marshall considered bringing a contentious case against Lebanon to stop a threatened blockade of Palestine.

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3. See infra, text at n. 41.
had gone ahead with the blockade, the U.S. might have sued in the I.C.J. The memorandum concluded against bringing a suit on the ground that Lebanon had not in fact carried out its threat. Similarly, a "marine carp incident" noted in the memorandum was effectively handled through diplomatic means and hence did not require adjudication. Marshall also referred to Egypt and Syria and decided that those countries had not taken any concrete steps that could lead to a specific legal claim by the United States. In that light, a lawsuit might interfere with a political solution for Palestine. Nevertheless, the memorandum concluded by recommending to the Department of State that, if a specific dispute were to arise regarding actions taken in the future by Syria or Egypt, the Department ought to reconsider the effect of proceeding with a contentious case against those states in the I.C.J. The memorandum shows that serious consideration was given in the early days of U.S. participation in the I.C.J. to affirmative use of the Court in a complex political context, and that recourse to the Court might have occurred if other nations had carried out their threats, had failed to resolve disputes diplomatically, or had aggravated matters in dispute.

The first case to involve the United States before the World Court was actually an advisory opinion proceeding that began in 1947. In that year, the United States and the Soviet Union were hopelessly deadlocked at the United Nations over the question of admitting new states. The United States controlled a majority of votes in the General Assembly and used its control to prevent the admission of new pro-Soviet States. The Soviets used their veto in the Security Council to keep out new pro-American States. To overcome the deadlock, the Soviets proposed a trade. The Belgians, however, felt that admitting new states on this basis was unlawful since the United Nations Charter alone should establish criteria for admissions. The Belgians suggested going to the Court for an authoritative ruling on the scope of permissible criteria for admitting new members. This suggestion was a rather transparent use by the West of the Court to bolster its position against the Soviets in the admissions struggle. As a result, the Soviet Union objected to the resort to the Court. It stated that the Charter did not permit the Court to advise on questions regarding admissions and therefore the Court had no competence in the matter. At the public sittings, representatives of Yugoslavia, Poland and Czechoslovakia all raised another objection. They said questions of admission are political questions which are reserved for consideration by the Security Council, not the Court. The Court replied that it would not

8. In the words of the Yugoslav representative:
   L'Organisation des Nations Unies a été créée pour être le gardien de la paix et de la démocratie. Par
   cela elle était et doit être une organisation très compliquée. Ses devoirs ont exigé et exigent une série
   d'organes principaux. Vous me permettrez d'en citer seulement deux: le Conseil de Sécurité et la Cour
   internationale de Justice.
   Tandis que le Conseil de Sécurité est un organe dont le caractère est nettement politique, la Cour
   internationale de Justice constitue l'organe judiciaire principal des Nations Unies, organe qui est et qui
   doit être libre et indépendant de toute influence de la politique quotidienne, même si en espace de lui
   imposer une influence politique par la voie du camouflage d'une formule abstraite d'apparence juridique.

Id. at 80; see also id. at 106, 113-114.
attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances.9

The Soviet and Yugoslav judges dissented from this part of the decision, stating in their dissenting opinions that the Court should have abstained from deciding a question of an essentially political character.

The Court's opinion on criteria for admission supported the U.S. view that members of the United Nations could not create additional criteria for admitting new states. But the Court's decision had no influence on the deadlock, nor did a subsequent opinion on admissions. In *Competence of the General Assembly for Admission of a State to the United Nations*10 the General Assembly asked the Court to decide if the Assembly could admit new states without an affirmative "recommendation" of the Security Council. The question centered on interpretation of Article 4(2) of the Charter, which establishes the criteria for admissions. It says that new members will be admitted on the "recommendation" of the Security Council and a vote of the Assembly. Argentina tried to break the admissions deadlock by arguing that the term "recommendation" does not imply "favorable recommendation"11 so the Assembly could still vote even if there was a veto in the Security Council of a new member. The U.S. opposed this view.11 The Court agreed with the U.S., though it first had to dismiss another Soviet objection. The Soviets maintained that the Court was incompetent to interpret the provisions of the Charter on admissions, and that interpretation of the Charter must be left to the General Assembly and Security Council.12 The Court quoted its opinion in the first *Admissions* case and ruled that questions of treaty interpretation, which include interpretation of the Charter, are within the Court's competence.13

In 1948, the Court was asked for a more constructive opinion, one that actually had a chance of being put into effect. After the assassination of Count Bernadotte, the General Assembly by a unanimous resolution asked the Court to advise on the scope of the United Nations' capacity to bring claims against Israel.14 The Court unanimously found that the U.N. had capacity to bring claims for reparation due in respect of the damage caused to the United Nations. On two related questions, however, the Court was divided. It voted 11 to 4 in favor of finding that in addition to claims for injury to itself, the U.N. also

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11. Pomerance considers that this opinion was requested at the insistence of the Argentines and not because the United States or other states hoped to gain anything from it. M. Pomerance, *The Advisory Function of the International Court in the League and U.N.* Era, 103-106 (1973).
could maintain claims for the damage caused to the victim or persons entitled through him. The U.S. judge voted against this finding as did the Soviet judge. The U.S. government wrote to the Court of its objections on the issue; the Soviets were silent. The Court also voted 10 to 5 for a holding that when the U.N. brings claims for damage caused to its agents, it must base its claim upon breach of obligations owed to the U.N., in order to prevent conflict with the rights of the state of the agent’s nationality. In 1950, the Court was asked to intercede in another Cold War dispute. This time the United States wanted to take some action against Bulgaria, Hungary and Rumania for violations of their peace treaties with the United States. The violations concerned human rights abuses prohibited in the treaties. Since the three Soviet bloc states would not cooperate in the dispute settlement provisions of the treaties, the United States turned to the Court for an opinion which would define their obligation. The Court advised that the three countries did have an obligation to cooperate in the dispute settlement provisions, but would not go so far, in the absence of consent by the three countries, to allow the United States and the United Kingdom to substitute new dispute settlement procedures for those required in the treaties. This result left the injured parties with no relief.

The Peace Treaties case is one of only two advisory proceedings with U.S. participation which was not a United Nations-related question (the other was the Reservations case). The Soviet Union fought the U.S. move to use the Court’s advisory function allegedly for a contentious purpose, but the Soviets lacked the votes in the General Assembly to block the U.S. request. All the Soviets could do was to warn, in the words of one writer, of “the necessity to resist attempts to transform the I.C.J. into a mere branch of the American State Department or the British Foreign Office.” The Court’s decision in Peace Treaties did not get the Eastern bloc states to participate in the dispute settlement process contained in their peace treaties with Western states.

Nor was the Court successful in another case in 1950 in which it tried to get the South Africans to cooperate with the United Nations. The Court issued a series of decisions on South West Africa beginning in 1950. The U.S. government participated in the second and third of these proceedings by submitting its views to the Court. Its judge voted in the majority in all three South West Africa cases. South Africa did not follow the Court’s advice in these cases and no reform of South Africa’s administration followed in South West Africa. The cases did, however, provide a forum for legal debate on highly sensitive issues.

In 1951, the United States supported another request for an advisory opinion, this time, on the validity of reservations to treaties. The United States would have preferred

16. The American, Judge Hackworth, discusses only the second question and not the third in his dissenting opinion.
18. See infra, text at n. 21.
19. Pomerance, supra n. 11, at 100.
going to the International Law Commission; it was the United Kingdom that insisted on the I.C.J. A compromise was reached whereby the general question relating to the validity of reservations went to the I.L.C., and the specific question of reservations to the Genocide Convention went to the Court. The decision reached by the Court reflected the U.S. view that the reservations rule should be flexible. Once again, the Soviet Union opposed going to the Court at all.

The first contentious case involving the U.S. was decided in 1952: France sued the United States over the rights of American nationals in Morocco. The United States welcomed the case as an appropriate means of settling a dispute of some thirty years' standing, saying in its brief:

Recourse to judicial settlement in international affairs is quite often considered essentially to be a means of settling disputes between States which might create international friction or endanger international security. This emphasis upon the maintenance of peace as the primary function of the technique of judicial settlement is perfectly justified, of course, in the light of past experience. The clash between the conflicting interests of States seeking to achieve ends the attainment of which was limited only by the interplay of their respective policies has too often given recourse to the use of self-help, force and violence.22

The case involved interpretation of a number of treaties to which the United States, Morocco, and other European powers were party, dating from the 18th to the 20th centuries. These treaties gave the U.S. a variety of privileges in Morocco, either directly or through most-favored-nation clauses. The privileges included the right to nondiscrimination in economic affairs, jurisdiction over disputes involving Americans, and the right to assent to laws before they were applied to Americans, including approval of tax laws. In 1917, France became Morocco's mandatory power and requested that other powers renounce Morocco's capitulations. By 1937 all states had acceded to the French request except the United States. A long period of protracted negotiations began between France and the United States. In 1946, Morocco adopted trade legislation that discriminated in France's favor against the United States. The U.S. responded with diplomatic protests. France, in turn, initiated its case at the I.C.J. in 1950.

The Court's judgment favored the United States on the more important issues. The Court found that the U.S. had a right to treatment equal with all other external powers in Morocco, including France. The Court also established the proper method for calculating the value of imports. Further, it restricted somewhat the U.S. consular jurisdiction and right of assent to Moroccan laws. Both countries promptly complied with the judgment.

Writers generally consider this case of little importance.23 Ironically, from the perspective of 35 years, the very fact that this case is a model of the smooth functioning of compulsory jurisdiction makes it important. When negotiations are at an impasse and the

parties cannot even agree to arbitration, the existence of compulsory jurisdiction may compel states to seek resolution of a dispute. In this case, the United States was the major beneficiary even though it was the state sued.

The United States participated in another contentious jurisdiction case in 1954, the Monetary Gold case.\textsuperscript{24} Again, the United States was a defendant, along with two allies from the Second World War. Italy brought the case and founded the Court's jurisdiction on the Washington Agreement, a complex plan concerning the joint custody of France, the United States, and the United Kingdom over gold looted by the Germans. Both Italy and Albania claimed title to the gold. The Agreement called for arbitration, and the arbitrator-awarded title to Albania. Under further terms of the Agreement, the gold would then go to the U.K. in payment for damages which the Court had assessed against Albania in the Corfu Channel case (U.K. v. Albania),\textsuperscript{25} unless within a specified period of time either Italy or Albania applied to the I.C.J. to determine entitlement to the gold. Italy claimed title as against Albania because of actions taken by Albania in 1945 that allegedly damaged Italian interests. Italy applied to the I.C.J. as contemplated by the Washington Agreement, but then it interposed a preliminary objection to the Court's jurisdiction, contending that the question of title to the gold could not be resolved in the absence of Albania, which was a necessary party to the dispute.

The British argued that Italy was estopped from questioning the Court's competence because Italy had filed an application pursuant to the Washington Agreement, but the Court rejected this argument. The practical effect of the Court's ruling was to leave the matter of title to the gold completely unsettled, as it remains to this day. The United States was a party to the dispute by virtue of the Washington Agreement; however, it was only a stakeholder with respect to the gold and had little interest in the outcome of the case.

In the same year the United States initiated the first two of seven contentious cases against various eastern bloc nations and the Soviet Union.\textsuperscript{26} Three years before the suit, in November 1951, the government of Hungary had seized a U.S. Air Force plane and its crew when they entered Hungarian airspace. The U.S. filed a complaint in the I.C.J. arguing that the detention was unlawful, that Hungary was accountable, and that the Soviet Union was also accountable because the detention was accomplished by Hungary and the Soviet Union acting in concert.\textsuperscript{27} Neither respondent had an Optional Clause declaration on file with the I.C.J., so the U.S. lawsuit was in effect an invitation for them to submit the case to the Court's jurisdiction. Hungary replied that it was "unable to submit the case," probably a truer statement than was intended. The Soviets simply said there was "no subject for consideration by the International Court of Justice."\textsuperscript{28}

\textsuperscript{24} 1954 I.C.J. 19.
\textsuperscript{25} 1949 I.C.J. 4.
\textsuperscript{26} Treatment in Hungary of Aircraft and Crew of the United States of America, 1954 I.C.J. 99, 103. For descriptions of some of the early incidents, see Lisztyn, "The Treatment of Aerial Intruders in Recent Practice and International Law," A.J.I.L. 559.
\textsuperscript{27} Whitman, Digest, vol. 9, 340.
\textsuperscript{28} Treatment in Hungary of Aircraft and Crew of the United States of America, supra n. 26, at 105.
Manley O. Hudson reported in the *American Journal of International Law* that "[t]he facts of this case were little known to the general public and it may be that it is wise to attempt publicity through a Court action. Yet as this is the first case in thirty-three years where such an end was sought by an action in the Court, it is extremely doubtful whether this end was justified."

Hudson's assessment appears to be too narrow. Surely in a system where the development of law depends on the practice of states it was useful for the United States to go to the Court in a legal matter. By filing an application the U.S. was making an affirmative statement of its belief that Hungary and the Soviet Union were wrong about the law of overflight. The U.S. could point to the refusal of the two defendants to submit the case as evidence that they were unwilling to defend their position under international law. On the political level the application was a statement that the United States was willing to resolve disputes with the East peacefully, through the Court.

Of course it was unfortunate that there was no jurisdictional basis for the U.S. claims and no way for the U.S. to have the benefit of an authoritative pronouncement from the Court on the law. Nevertheless, the United States position was served by bringing these cases. At least that must have been the assessment of the Legal Adviser's Office, since four more cases, one against Czechoslovakia and three against the Soviets, were brought by the United States without evident jurisdictional basis. These cases concerned attacks on United States Air Force planes in which the crews were killed or injured. A typical response to the Court in these cases was the letter sent by Czechoslovakia:

As the Czechoslovak Government has already stated in its Notes to the Embassy of the United States of America in Prague of March 11th and 30th, 1953, the aerial incident of March 10th, 1953, occurred above Czechoslovak territory as the result of a violation of the Czechoslovak air space by American military aircraft, and all responsibility therefore lies solely upon the Government of the United States of America.

The Czechoslovak Government would observe that the claims put forward by the Government of the United States in this connection against Czechoslovakia are without point and that the Application purporting to bring this matter before the International Court of Justice is totally unfounded. The Czechoslovak Government can see no reason why this case should be considered by the International Court of Justice and regards the Application of the United States instituting such proceedings before the International Court of Justice as unacceptable.

The United States finally had a colorable argument for jurisdiction in an aerial incident case against Bulgaria. When Bulgaria shot down an Israeli civilian airliner carrying passengers of United States, United Kingdom, and Israeli nationality, those three states instituted proceedings against Bulgaria in the World Court, basing jurisdiction on

31. See Whitman, supra n. 27, at 340-341.
32. Aerial Incident of 10 March 1953, supra n. 30, at 7-8.
Bulgaria's previous acceptance of the jurisdiction of the P.C.I.J. In a conservative construction, however, the Court found that Bulgaria's former acceptance had lapsed.\textsuperscript{34} Israel's case was dismissed, and the United Kingdom subsequently withdrew. The United States persisted with the case in the hope of getting the Court to reverse its ruling on jurisdiction. Bulgaria responded by submitting objections which included invocation of the Connally Amendment on the basis of reciprocity. For Bulgaria to claim that shooting down a foreign airliner is not a matter of international law but rather one of domestic jurisdiction, was of course without basis. At first the United States argued that the Connally Reservation was circumscribed by a rule of reasonable interpretation. It then had second thoughts about restricting the protection afforded by a self-judging amendment. The United States decided to allow Bulgaria's interpretation to stand and to withdraw from the case. After the withdrawal, the Legal Adviser's office formally repudiated the reasonable interpretation argument, stating that it considered mere invocation of the Connally Amendment a complete bar to jurisdiction.\textsuperscript{35}

In the same year that the United States began the series of Aerial Incident cases, the Court handed down its decision in Effect of Awards of Compensation Made by the United Nations Administrative Tribunal in 1954.\textsuperscript{36} In this case the U.S. joined the Soviet Union to argue against a request for an advisory opinion. The General Assembly requested the opinion after the United States used its influence to have certain United States nationals dismissed from service with the United Nations because certain U.S. government officials felt they had been or were communists. The United Nations Administrative Tribunal had awarded these employees severance pay, but the United States wanted the award to be ignored. It urged the General Assembly not to vote for the necessary funds and argued that the Assembly had the legal discretion to do so. Few states agreed with the United States, but neither did they wish to oppose the U.S. But rather than confront the United States directly, the Assembly chose to go to the Court. The Soviets felt, consistently with past objections, that the advisory opinion was unnecessary since the law was clear. The Court held that the Administrative Tribunal awards could not be ignored and so the appropriations were made.\textsuperscript{37}

The Connally Amendment also played a role in the Interhandel case (Switzerland v. United States),\textsuperscript{38} only seven years after the United States Nationals in Morocco case, where the United States had welcomed international adjudication. Times had changed, because in Interhandel the United States invoked the Connally Amendment to deny the Court's jurisdiction. It is difficult to understand why the United States took such an extreme step. The issue in the case only concerned title to stock of a corporation, and the only antagonist was the friendly nation of Switzerland. Moreover, the United States had strong substantive arguments on the merits in the case and, additionally, a powerful preliminary objection to admissibility on the ground of failure to exhaust local remedies.

\textsuperscript{34} Cf. Temple of Preah Vihear, 1961 \textit{I.C.J.} 17.
\textsuperscript{35} 12 Whittman's Digest 1288-1296.
\textsuperscript{37} Pomee, supra n. 11, at 125-130.
\textsuperscript{38} 1959 I.C.J. 6.
The Interhandel case gave Judge Lauterpacht an opportunity to develop his argument that the presence of the Connally Reservation meant the United States had never effectively accepted the Court’s compulsory jurisdiction. The United States first invoked the amendment in the interim measures phase. At that phase, the Swiss requested an order preventing the United States from selling the shares of G.A.F. which were claimed by the Swiss company Interhandel. The Court found no imminent danger of the shares being sold because the United States Government was prevented from selling them while litigation was pending in United States courts. No order was made, nor did the Court comment on the invocation of Connally. It side-stepped the jurisdictional challenge ostensibly on the ground that this was simply a request for interim measures of protection and thus jurisdiction need not be considered.

When Interhandel reached the jurisdiction stage, the United States made four preliminary objections. Three went to jurisdiction; one went to admissibility. The first two objections were dismissed by the Court by wide margins: First, the United States argued that the dispute had arisen during the war and thus came before the date of U.S. acceptance of Article 36(2), which was August 26, 1946. The United States declaration contains words accepting jurisdiction over “disputes hereafter arising.” Any dispute arising before August 26, 1946 is thus not subject to the Court’s jurisdiction. The Court, however, accepted Switzerland’s argument that only the facts in the case occurred during the War. The dispute itself only occurred when Switzerland demanded the return of G.A.F. assets and the United States refused. That was in 1948.

The second American objection rested on a weaker ground than the first. The Court will allow a respondent state to rely on reservations in an applicant’s declaration. The United States tried to take this allowance a step further. Switzerland had accepted the Court’s jurisdiction in 1948. The United States argued that it could borrow that date and apply it to its own “hereafter arising” reservation just discussed. So instead of just exempting cases arising before 1946, it would also exempt cases before 1948. The Court would not let the United States go so far. Switzerland had no “hereafter arising” reservation. It would not let the U.S. borrow a date of admission rather than a full reservation.

The third objection was that Switzerland failed to exhaust local remedies. The Court characterized this as an admissibility issue, and so it reserved it for later consideration. Instead it turned to the last objection on jurisdiction. The objection had two parts, (a) and (b). In (b) the United States argued that Switzerland’s case was a matter of domestic jurisdiction as determined under international law. The Court ruled that because questions of treaty interpretation and customary international law were involved, the case did not concern domestic jurisdiction. In (a) the U.S. simply stated that any issue concerning the title to or sale of G.A.F. stock “has been determined by the United States of America” to be a matter essentially within the domestic jurisdiction of the United States. In other words, the U.S. invoked the Connally Amendment.

39. Id. at 95-122.
40. 1957 I.C.J. 105, 106.
As in the request for interim measures, the Court did not squarely face the issue of the Connally Amendment. The U.S. agent argued that although the United States maintained the Connally Amendment was relevant to the case, it only applied to the sale or disposition of the assets held in the U.S. Since the U.S. courts were still reviewing the matter, the U.S. objection was moot—the government could not sell the assets while a case was pending. In any event, the Court side-stepped the issue and instead grounded its holding on the failure of Switzerland to exhaust local remedies.

Judge Lauterpacht, however, took up the Connally Reservation in a separate opinion. He argued that its inclusion in the United States declaration of acceptance of compulsory jurisdiction negated that declaration, and that the United States had not accepted the Court’s compulsory jurisdiction. Judge Klaestad argued instead that the Connally Amendment itself was void and severable from the rest of the United States declaration of acceptance, and hence that the United States was still a party in good standing to compulsory jurisdiction under the Optional Clause of the Court’s Statute. In response to this reasoning Judge Lauterpacht pointed out that the Connally Amendment had been essential to United States acceptance of Article 36(2), and thus it was not possible to sever that sort of reservation. Professor Briggs and others have argued that the amendment, as part of the United States acceptance of the Court’s compulsory jurisdiction, could not nullify the entire declaration of which it was only a part. Hence there was an implied undertaking by the United States only to invoke the Connally Reservation when reasonable. Judge Lauterpacht responded to this argument by pointing out that there was no guarantee the United States would only invoke Connally when it was reasonable to do so, and thus the Briggs theory could not save the U.S. declaration. Judge Lauterpacht’s supposition seems correct since, after the Bulgaria case, the United States issued a statement that the Connally Amendment was an absolute bar to jurisdiction, whether invoked reasonably or unreasonably. On the other hand, it should be noted that Judge Lauterpacht merely said there was no guarantee that the United States would only invoke the Connally Amendment when reasonable. Arguably the Court itself could decide that invoking it would be unlawful in certain instances. The Court has the statutory power to decide upon questions of its own jurisdiction. It could possibly refuse to accept the United States invocation on the grounds of its unreasonableness as a matter of law. Under such a theory, the language in the Connally Amendment “as determined by the United States of America” would in effect be amended as a matter of law to read “as reasonably determined.”

The Aerial Incident cases and the Interhandel case of the late 1950s were the last contentious cases for the United States until the Tehran Hostages case in 1979. During the more than twenty-year interim, the United States must have contemplated bringing a number of cases to the I.C.J. In the 1960s the State Department prepared a list of open

41. 1959 I.C.J. at 116-117 (dissenting opinion of Judge Lauterpacht).
42. Id. at 78 (dissenting opinion of Judge Klaestad).
disputes conducive for settlement through the World Court, including, for example, consideration of a contentious case against a Scandinavian country for compensation for ships used during the Second World War. Other cases considered for the I.C.J. included: disputes with several South American states over fisheries zones, an extradition case, and one with Canada over maritime disputes. It appears that one reason for not bringing these disputes to the Court was that the states could invoke the Connally Amendment.  

These cases clearly involved international issues, but since the official United States position announced after the Bulgaria case is that the Connally Amendment can be invoked unreasonably, the United States has not attempted to bring cases where it might be invoked. Given that official stance, the United States has been in the uncomfortable position of being deterred from instituting cases under the Optional Clause of Article 36(2), while remaining vulnerable to being sued under that Article. It even risked having the Court delimit or even nullify the Connally Amendment in the course of such a suit brought by another state where the U.S. might have tried to invoke it. The amendment was, therefore, less a shield than an obstacle to United States participation at the Court.

The Court gave another advisory opinion in 1960 in relation to the Inter-Governmental Maritime Consultative Organization. The organization needed advice on the nationality of ships pursuant to the IMCO constitution. The United States felt that the nationality of a ship is determined by the place of registration and not the place of beneficial ownership. This was the view adopted by the Court. Two years later the United States was again at the Court arguing its view in another advisory opinion, the Certain Expenses case. The Soviet Union had objected to the assessment of expenses for certain peacekeeping operations as ultra vires. The United States maintained that these operations, approved by the General Assembly, were expenses of the organization which all members were obligated to pay. Again, the Court upheld the U.S. position, though the opinion had no visible effect in getting contributions from the Soviets.

Nine years passed without any United States participation at the I.C.J., whether contentious or advisory, until in 1971 the Court decided the Namibia case. The United States took an active role in this case. It submitted lengthy written and oral statements arguing that "South Africa by virtue of its continued presence in Namibia notwithstanding Security Council Resolution 276 (1970) is occupying Namibia illegally and is obligated to transfer administration of Namibia to the United Nations." The Court agreed with the U.S. position, though as in a number of previous advisory opinions and cases, the country at issue, South Africa, did not heed the Court's opinion.

The U.S. did not take an active role in two subsequent advisory opinions including

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44. The Department has not released these reports to the public, and these reports and other files relating to the World Court remain closed even years after the events. The cases listed here were described to the authors from memory by former State Department officials. No doubt they are representative of a far larger number.

45. Even the State Department's current Legal Adviser has criticized the Connally Amendment in congressional testimony.


47. 1960 I.C.J. 150.

the **Western Sahara** case,⁴⁹ and the **Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal**.⁵⁰

In 1979, the United States turned to the Court on its own behalf in a contentious case against Iran, the **Tehran Hostages** case.⁵¹ The Court found it had jurisdiction in the case based on several treaties between the U.S. and Iran. It unanimously voted in favor of the U.S. request for interim measures.⁵² Its judgment on the merits fully supported the U.S. position that the hostages be released and that Iran owed the United States compensation, despite Iran’s arguments that the United States was itself guilty of international law violations in Iran.⁵³

Iran did not itself appear but sent a letter arguing against the Court’s taking the case on the ground that the dispute was part of a larger political context spanning 25 years of United States-Iran relations. The Court disposed of this argument with the observation that only legal questions were at issue in the case, and that hardly any international legal question lacks a larger background or political context. Such a political context is no reason for denying the possibility of adjudication of the legal issues.

The Court’s opinion admonished the United States in only one respect. The judges said that the United States military mission sent to attempt a rescue on Iranian soil while the case was in progress was contrary to the Court’s order barring both sides from exacerbating the dispute.⁵⁴ Significantly, however, the Court did not order a set-off against the compensation due the United States for the military mission’s violation of Iranian sovereignty.

The **Hostages** case was so clear and simple that on the main issue of violation of diplomatic immunity even the Soviet judge voted for the United States. Thus, some observers have felt that the case was rather pointless from the legal perspective. To the contrary, the U.S. decision to go to the Court opened a forum for Iran to raise whatever justifications it wanted. It was the lack of such justifications—including the attempted argument on political context made by Iran—that enhanced the United States legal position in the eyes of the world. The Court’s decision awarding reparations to the United States strengthened the U.S. legal basis for continuing to freeze Iranian assets even in overseas branches of U.S. banks until the eventual settlement was reached. Indeed, the Court’s judgment may in the long run have contributed to the conditions facilitating the settlement, which required a substantial Iranian contribution to the Iran-United States Claims Tribunal at The Hague.

In 1980, while the **Hostages** dispute was being resolved, 20 Arab states petitioned for the removal of the World Health Organization regional office from Egypt to Jordan. The petition appeared to be a reaction to the Camp David Accords. The United States

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⁴⁹ 1975 I.C.J. 12.
⁵⁰ 1973 I.C.J. 166.
⁵⁴ 1980 I.C.J. 43.
joined Egypt in arguing that the organization was required to abide by the two-year notice period established in the agreement between the W.H.O. and Egypt. In response to the World Health Assembly's request for an advisory opinion, the Court found that there is both a requirement that the parties to the agreement negotiate over arrangements for transfer of the headquarters to a new location, and that a period of notice is necessary before an actual transfer is made. Only the Soviet judge dissented on all three parts of the decision. The Polish judge joined him in only one part.

In May 1981, the United States applied to the United Nations Committee on Applications for Review or Reconsideration of United Nations Administrative Tribunal Judgment No. 273. The Judgment was sent by the Committee as per the United States request to the I.C.J. for an advisory opinion. The case involved a new General Assembly requirement that employees produce evidence they intend to repatriate at the end of United Nations service before they can qualify for a repatriation grant. In No. 273 the Court found that certain employees need not produce this evidence. The United States disagreed with this decision, but it was approved by the I.C.J. The Court also devoted a major portion of its decision to pointing out the procedural irregularities committed by the United States and the U.N. Committee on Review.

The next contentious case involving the United States was the Gulf of Maine. Canada and the United States went to great lengths to secure a special chamber of the Court instead of the full Court, ostensibly on the grounds that the dispute, between two countries from the common law tradition, would raise novel and complex issues of law, fact, and procedure requiring specially qualified judges. However, the three non-national judges selected by both parties were all from civil-law countries. The chamber succeeded in drawing the boundary through the Gulf of Maine and resolving a dispute of almost twenty years' standing between the United States and its neighbor.

Finally, the case of Military and Paramilitary Activities In and Against Nicaragua was instituted against the United States in 1984. The Court's preliminary judgment of November 1984, finding that it had jurisdiction over the parties and that the issues were justiciable, led to a United States decision in January of 1985 to refuse to participate further in the case. It is this case that has given rise to the present controversy surrounding the role of the United States in the World Court.

It is hardest to obtain a perspective on something that is very close to the observer. The case of Nicaragua v. United States pre-occupies American observers concerned with reassessing or reformulating United States policy toward the compulsory jurisdiction of

55. I.C.J. Pleadings, Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, at p. 182.
57. 1982 I.C.J. 325.
58. 1984 I.C.J. 246. See further discussion of this case in the Leigh chapter in this volume.
60. 1984 I.C.J. 392. Two other cases involving the U.S. are currently pending or contemplated. One is an advisory opinion: Application for Review of Judgment No. 333 of the United National Administrative Tribunal, 1984 I.C.J. 212, and the other, a case involving Italy (Raytheon/Machiet Dispute) to be submitted by compromise to a chamber of the Court. See Press Statement issued by the Dept. of State, Oct. 7, 1985, 24 I.L.M. 1774-1775 (Nov. 1985), Annex F.
the Court. An important purpose of the present chapter is to place the *Nicaragua* case in the perspective of previous United States experience at the World Court and future projected costs and benefits of continued participation or disengagement. But we must also deal with the *Nicaragua* case itself despite the difficulties of perspective.

The public heard about the case when a hasty notification was issued by the United States on April 6, 1984, just before Nicaragua submitted its pleadings to the Court, purporting to exclude from the Court’s compulsory jurisdiction all disputes between the United States and any Central American state for a period of two years. The notice did not comply with a provision of the U.S. declaration requiring a six-month period of notice before termination. The Senate Committee on Foreign Relations had noted in 1946 that the six-month clause “has the effect of a renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding.” The Court not surprisingly held in its preliminary judgment of November 1984 that the April 6th notification had no legal effect in light of the six-month clause.

The April 6th notification had a deeper significance: it signalled a preference on the part of the United States government to avoid adjudication on the merits in the *Nicaragua* case. When the U.S. arguments on the Court’s jurisdiction were decisively rejected in the Court’s judgment on preliminary objections of November 1984, the United States decided to walk out of the proceedings. The decision to avoid adjudication on the merits stands in sharp contrast to the first contentious case against the United States which, as reported above, was positively welcomed by the United States in 1952 as an appropriate means of settling a dispute and in contrast to the positive attitude shown toward the Court by the U.S. in the *Hostages* case.

The State Department has said that there is no point in arguing a case on the merits before a tribunal that is capable of a totally unfounded decision on jurisdiction. The United States argued that Nicaragua had never accepted compulsory jurisdiction because it failed to deliver a formal notice of ratification of the Protocol of Signature of the P.C.I.J.’s Statute, even though its legislature had voted in 1939 to accept the P.C.I.J.’s jurisdiction. Yet in 1945, Nicaragua became a party to the United Nations Charter, which established the I.C.J. as successor to the P.C.I.J. By 1984, it would appear that any defect in Nicaragua’s jurisdiction had been cured by the passage of time and by Nicaragua’s admittance into the United Nations as a founding member. The Court’s vote sustaining jurisdiction on this point was 11 to 5.

Was the Court’s decision totally without merit? One could indeed imagine the tables being reversed and Nicaragua appearing in Court as a defendant to argue that the Court had no jurisdiction because of Nicaragua’s willful failure to cure the defect in its ratification. Such an argument would be quite plausible. Surely, then, the United States could argue its entitlement to a similar decision when it invoked Nicaragua’s failure to ratify reciprocally as a basis for defeating Nicaragua’s invocation of the Court’s jurisdiction.

But it is a close call. The question is not clear one way or the other. What is clear is that the Court construed its jurisdiction liberally in the present case.

Yet a liberal construction is not the same thing as an impermissible construction. The failure of the United States to convince the Court on this matter is hardly proof that the Court was unwilling to listen to reason. It should be noted that the Court's decision that Nicaragua is party to the Court could at any time be invoked against Nicaragua by any plaintiff state; in other words, Nicaragua is now forever precluded from arguing that there is indeed a fatal defect in its acceptance of the Court's jurisdiction.

But even if the United States should have won on this point, there was still a basis for asserting jurisdiction under the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua. The Court found, by a vote of 14 to 2, that this treaty provided an independent basis for the assertion of jurisdiction over the United States. Here too the Department of State vehemently objected to the Court's construction of the treaty. But the objection this time was based on an interpretation of the treaty—that the parties never intended the treaty to apply to a non-commercial situation such as the present one involving armed hostilities. This position, while arguable, certainly is not decisive. There is at least a plausible basis for the proposition that a treaty that promotes friendship, commerce, and navigation may be violated by one party's actions in laying mines in the harbor of the other party, mines that succeeded in damaging several commercial vessels. The position of the United States that the treaty is totally inapplicable to the present case has the appearance of a self-serving argument, and at the very least is not grounds for asserting that the Court reached its decision unreasonably or extravagantly. Altogether 15 out of 16 judges found some basis for jurisdiction. The 16th judge was the U.S. Judge Schwebel.

The attitude of the United States to the Nicaragua case will be forever colored by the loss sustained by the United States on the question of jurisdiction and its decision to walk out of the Court. Consequently it is hard to argue that the entire experience could have and should have been different. Yet the argument should be considered.

The United States could have taken the bolder stance of welcoming adjudication on the merits. It could have mounted an impressive case in defense of its actions in and around Nicaragua. It could have used the merits phase of the case for a further development of arguments sketched out in the context of preliminary objections to admissibility, including the theory relating the Contadora process to collective self-defense as argued by Professor John Norton Moore at The Hague. Moreover, American lawyers are expert in "big litigation" cases; the United States could have mounted an impressive evidentiary case on Nicaraguan aggression against its neighbors; its lawyers could have cross-examined to good effect the many witnesses for Nicaragua who instead were allowed to testify without cross-examination when the United States walked out of court; and finally the United States could have counterclaimed against Nicaragua. On the legal questions, the United States could have challenged Nicaragua's invocation of Article 2(4) of the Charter, and might have been able to demonstrate that customary international law now favors the position asserted by the United States regarding events in and around Nicaragua.
The Court's judgment in the case, handed down on June 27, 1986, is open to serious question as a matter of law. Article 53 of the Court's Statute requires that, when a party fails to defend its case (as did the United States), the Court is bound to "satisfy itself" that the claim of the party appearing (Nicaragua) is well-founded in fact and law. In the Fisheries Jurisdiction case the Court elaborated on this statutory provision, saying that the Court must "consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute."\(^{63}\) Yet a relevant rule of international law that was not available to the Court in the Nicaragua case because of the U.S. Vandenberg Reservation (which the Court interpreted as excluding all multilateral treaties from its jurisdiction) was Article 51 of the U.N. Charter containing a provision for the right of collective self-defense in the event of armed attack. Article 51 of the Charter was indeed the most relevant and important rule of international law for the United States, and was repeatedly invoked by the United States in its pleadings and oral arguments during the jurisdiction phase of the case. The failure of the Court to consider Article 51 as a defense to the Nicaraguan claims renders its judgment inconsistent with the Fisheries requirement of consideration of all relevant legal rules as well as inconsistent with Article 53 of the Court's Statute providing that any judgment be well-founded in law.

Two arguments, however, may be offered in mitigation of this view. First, the United States may be said to have waived the applicability of the U.N. Charter by its multilateral treaty reservation to the jurisdiction of the Court (the Vandenberg Reservation). The reservation had the primary effect of precluding any Nicaraguan claim based on the Charter because of the absence of an "affected" party (El Salvador) whose presence was required by the reservation. Although the Court threw out Charter-based claims, it allowed Nicaraguan claims based upon customary international law. Hence the question is whether the Vandenberg Reservation has the secondary effect of precluding the invocation by the United States of the Charter in defense to the charge of a customary-law violation. Only if the effect of the Vandenberg Reservation is a waiver of all defenses based upon multilateral treaties would the United States be so precluded. There is nothing in the legislative history of the Vandenberg Reservation to suggest that the United States intended to disable itself from the protection of multilateral treaties when it made its reservation. A more reasonable interpretation of the effect of the Vandenberg Reservation would be to deprive the Court of jurisdiction of any legal claims against the United States if the omission from consideration of multilateral treaties means that the Court cannot render a judgment that would take into account all relevant rules of international law such as those contained in relevant multilateral treaties.

Second, one might argue that there is no appreciable gap between Article 51 and customary international law with respect to the norm of collective self-defense. The Court in its judgment fully considered the claim of collective self-defense under customary international law and found that the United States' actions in and against Nicaragua did not meet the standard necessary to constitute collective self-defense. Accordingly, if the

customary law standard is the same as, or very similar to, the Article 51 standard, there would be no substantive difference between the two. If there is no appreciable substantive gap between customary and treaty law on this point, then even though the United States was entitled in theory to the treaty defense such a defense would not have made a difference.

It is too early to expect an exhaustive examination of the question whether the gap is wide or narrow. Hopefully, scholars of international law will address this question at their leisure. Here it may be said generally that any provision of the U.N. Charter must be interpreted in light of all the other provisions, the legislative history of the Charter, the practice under the Charter including reports and resolutions, and the constitutive rules of Charter interpretation. These are quite different interpretive principles from those that apply to the determination of customary international law. It therefore seems unlikely that a Charter provision and a rule of customary law will somehow evolve into identity. To be sure, the treaty rule impacts upon custom, and customary practice helps interpret the treaty (the "subsequent practice of the parties"), but even so the contexts are dissimilar and the principles of interpretation are different. For instance, what constitutes a triggering "armed attack" under customary law and under the Charter may be substantially different, depending on how customary law has evolved on the one hand, and how the mechanism of the U.N. would resolve the question of determining an armed attack on the other hand.

Despite all the foregoing considerations, we submit here that what was done in the Nicaragua case should not so cloud our vision as to make it impossible to place that case in proper perspective. Other things could have been done. Other outcomes were possible. Adherence to the compulsory jurisdiction of the I.C.J. does not rigidly require a single litigative strategy or a prescribed approach to a given case. It was possible to deal with Nicaragua's complaint and to promote the ideal of the rule of law at the same time. The U.S. failure to do so in the Nicaragua case does not mean that there will be a similar failure in the next case. One may learn from one's experience in a more enlightened manner than the fabled cat who sat on a hot stove. The cat never sat again on a hot stove, but also never sat on a cold stove either. We should not derive the wrong lesson from the Nicaragua case and then compound our error by avoiding all future nonconsensual litigation. The record of the past forty years does not support such a conclusion.

The preceding considerations presuppose that the Court is an unbiased tribunal. The United States, however, has made serious allegations that this is not the case. To the extent the allegations bear scrutiny, the United States was surely justified in avoiding the Court. While it is not the purpose of this chapter to fully examine the question of judicial integrity of the Court, Judge Schwebel has presented certain evidence that the Court did exhibit bias. We set forth this evidence since it has played an important part in the U.S. perception of its experience at the Court. 64

64. The evidence may not be sufficient to prove a case of bias against the Court, but the Court should be above even suspicion of bias. The fact that it is not should encourage the Court to undertake immediate internal reforms. The greatest strength of the International Court of Justice has surely been its reputation as the preeminent court of international law. It should do whatever is necessary to preserve that reputation.
First, Judge Schwebel cites the name given to the case, "Military and Paramilitary Activities In and Against Nicaragua." He writes in his dissenting opinion that no other case in the I.C.J. was ever entitled so as to embrace the contentions of one of the parties and that the United States wrote to the registrar and asked that the name be changed but no action was taken.66 Judge Schwebel does not explain how names are chosen nor does he draw any links to the judges themselves in choosing the name; but because he is well-placed to know and would not make such a serious allegation without some basis, it is cause for concern that he views the choice of the name as indicating a lack of objectivity on the part of his colleagues.

The second indication is an interview given by Judge Elias, the president of the Court, on December 27, 1984. Judge Schwebel reports Judge Elias as saying that the United States invasion of Grenada in 1983 was "gunboat diplomacy" and "contrary" to "behaving according to the rule of law."67 He added, "[S]maller nations wonder what happened to the rule of law when the United States can behave like this. . . ."68 While these statements do not concern United States actions in Nicaragua, obviously, Nicaragua is also a "smaller nation" in the same region as Grenada, and Nicaragua did accuse the United States of unlawful intervention. It would have seemed the better part of judicial rectitude for Judge Elias not to have commented as he did.

A third indication is the Court’s treatment of El Salvador’s attempt to intervene. El Salvador filed a declaration of intervention under Article 63 of the Statute of the International Court of Justice, claiming that it should be allowed to intervene as of right in the jurisdiction phase, to support the arguments of the United States that the Court lacked jurisdiction in the case.69 The Court denied El Salvador’s request. But before it even met to make its decision, President Elias issued a press release indicating that El Salvador’s request would not be granted.70 Again, the Court should have taken every precaution to avoid even the appearance of bias.

The United States is now in a position to argue that the tribunal was biased. It could raise this argument as a defense if Nicaragua attempts to use third-country courts to enforce a judgment. If the charges have merit, the damage to the Court’s reputation would be inestimable.

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Up until the walkout by the United States in the Nicaragua case, the experience of the United States as a litigant before the World Court at The Hague was, as we have

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66. Id. at para. 115.
67. Id.
68. Id. at para. 107.
69. Schwebel dissent, para. 108. Judge Schwebel also suggests that bias was shown when the Court failed to grant El Salvador an oral hearing after its request to intervene. Id. at para. 108-110.
seen, satisfactory indeed. More significantly, the United States was able to set an example of what Professor Thomas Franck has called "40 years of leadership in the cause of world peace through law." To what extent has the Nicaragua case impaired those ideals?

Perhaps the most important lesson to be drawn is not to draw too many important lessons. The Nicaragua case, by virtue of the unfortunate examples of judicial bias that have been recounted, the unprecedented walk-out by the United States after the jurisdiction phase, the severe evidentiary problems faced by the Court without the United States as a participating litigant, and other idiosyncratic elements, should not loom so large in the U.S. experience as to obliterate from memory the previous 40 years of acceptance of the compulsory jurisdiction of the World Court.

Certainly the ideal of international adjudication of big as well as small disputes should not be quickly jettisoned in overreaction to the Nicaragua case. If repair work is needed regarding the World Court as presently constituted, that does not mean that the ideal is tarnished. For a long time international adjudication has been more or less synonymous with the World Court, but there is no necessary connection between world law and the particular institution that is housed in the Peace Palace in The Hague.

Reform of the World Court will probably be a priority item in the near future. When these reforms are made, the set-backs associated with the handling of the Nicaragua case will diminish in community consciousness, and national commitments to international adjudication of disputes may become invigorated and take on a fresh and hopefully permanent life.