EDITORIAL COMMENTS

Senate Resolutions Relating to the International Court of Justice

On May 20, 1974, the Senate of the United States passed five resolutions relating to the International Court of Justice.[1] These resolutions were initiated by Senators Cranston and Taft, and were approved almost unanimously, only Senator McClure expressing strong reservations.[2] The main purpose of the five resolutions is to encourage greater use of the International Court of Justice. They do not call for the repeal of the Connally Reservation, which allows the United States to determine in each case, by unilateral action, whether the dispute relates to a matter which is essentially within the domestic jurisdiction of the United States. Instead, the resolutions suggest more modest steps which, if taken, would increase confidence in the Court and would allow the consideration of stronger measures.

S.Res. 74 expresses the sense of the Senate that outstanding territorial disputes between the United States and other countries should be submitted promptly to the International Court of Justice. The resolution mentions specifically twenty-eight disputes relating to small islands or groups of islands in the Caribbean Sea and the Pacific Ocean.

In the Pacific, the islands in dispute involve the United Kingdom and New Zealand, two friendly nations which should find it possible to submit the disputes to the Court in a way similar to the dispute relating to the small islands of Minquiers and Ecrehos, which was submitted to the Court by the United Kingdom and France in 1951. The possibility of submission of the dispute concerning the Pacific islands to arbitration was discussed by the United States and the United Kingdom in 1939, but no action was taken.[3] As the dispute has not been solved in the intervening 35 years, it might be time to dispose of this lingering issue once and for all.

The dispute with Colombia relating to three islands in the Caribbean was the subject of a treaty signed in 1972, but when this treaty was considered by the Senate Foreign Relations Committee in November 1973, the Committee decided that the matter could be more appropriately settled by the International Court of Justice. Consequently, despite objections

[1] For text, see *Official Documents* section, *infra* p. 246. *See also* 120 Cong. Rec. S8429-32 (daily ed. May 20, 1974), S. Rep. 93-842 to accompany S. Res. 74, 75, 76, 77, and 78. For an earlier version of the resolutions, *see* Digest of United States Practice in International Law, 1973, at 458–65. For the views of the Department of State on the original proposals, *see* 67 AJIL 771–77 (1973).

[2] These reservations related to the composition of the Court. Cong. Rec. *op. cit.*, at S8429.

[3] U. S. Foreign Relations, 1939, II, 312.

from the Department of State, S.Res. 74 proposes that this dispute also be sent to the Court.

In addition to these island disputes, there are several minor, but potentially important disputes between the United States and Canada concerning both land and continental shelf boundaries,[4] and there are also some difficulties between the United States and Mexico concerning the delineation of continental shelf boundaries. It might be useful to submit them to the Court before they become more acute and while national feelings are not yet inflamed by them.

S.Res. 75 relates to the adjudication of disputes arising out of the interpretation and application of international agreements. While some rules of international law are disputed by various nations, and others are so vague and general as to cause fear of their too arbitrary application, a treaty establishes the rules accepted by the parties to it and thus narrows the discretion of the Court in applying them. Some countries have contended that various rules of international law have been adopted without their consent, but by ratifying a treaty they gave their consent to the rules embodied in that treaty. Of course, the Court has some freedom in interpreting a treaty and in trying to reconcile the divergent interpretations by the parties to it; on the other hand the rules of interpretation included in the Vienna Convention on the Law of Treaties provide some guidelines in this area, limiting to some extent the discretion of the Court.

Some five hundred treaties, including many multilateral ones, have already conferred on the International Court of Justice or its predecessor, the Permanent Court of International Justice, jurisdiction to decide disputes relating to their interpretation or application. Practically all states in the world, including most of those states of Africa, Asia, and Eastern Europe which have not accepted the jurisdiction of the Court under the optional clause in the Statute of the Court, have accepted that jurisdiction under several of these treaties.

The United States has supported in the past the inclusion in international multilateral and bilateral agreements of special clauses on the submission to the Court of any disputes relating to the interpretation or application of these treaties. Some forty of these treaties have been ratified by the United States, but on a few occasions the Senate did not give its advice and consent to optional protocols providing for such jurisdiction.

It is the present policy of the U. S. Government to favor the insertion of jurisdictional clauses in future international agreements, and the Secretary of State announced in his speech to the American Society of International Law on April 25, 1970, that the Department of State will "examine every future treaty we negotiate with a view to accepting, wherever appropriate, the jurisdiction of the International Court of Justice with respect to disputes arising under the treaty. In a treaty in which we or the other government cannot accept the Court's jurisdiction, we will urge the inclusion of other appropriate dispute-settlement provisions."[5]

[4] *See, e.g.*, DIGEST, *supra* note 1, at 465–67.
[5] ASIL PROC. 64 AJIL (No. 4) 287 (1970).

S.Res. 76 deals with several different questions. In the first place, it suggests that more use be made of the chambers of the Court, and that in particular regional chambers should be convened to resolve regional disputes. In a similar spirit, the Court recently changed its Rules in order to facilitate the use of special chambers and to increase the parties' role in the creation of these chambers.

It is not clear, however, whether it is desirable to use small chambers of three or five judges when there is not enough work for the Court as a whole. There is the ever-present danger of generating regional rules of international law, especially in the developing regions, which might be quite different from generally accepted rules of traditional international law. Special functional courts, similar to the Court of Justice of the European Communities and the European Court of Human Rights, might be useful but not regional courts of general jurisdiction, which might lead to the weakening rather than the strengthening of international law. While the United States might look with favor on the creation of a regional chamber to deal with disputes between NATO powers, it might not be too happy about a chamber deciding general issues of international law from the point of view of Latin America, Africa, or Asia.

On the other hand, it would be helpful, as suggested in S.Res. 76, to encourage the Court to sit from time to time outside The Hague at places more convenient to the parties in a particular dispute. This innovation, which is permissible under the Court's Statute, would give the Court greater visibility and would make it more acceptable to countries outside Europe.

Apart from the regional issue, S.Res. 76 deals also with the expansion of the advisory jurisdiction of the International Court of Justice. This jurisdiction has been exercised by the Court successfully in several cases, and some of its advisory opinions established important new rules of the constitutional law of the world community. The resolution proposes that regional organizations, and even two or more states acting jointly, should be allowed to seek advisory opinions from the Court. This proposal would require either an amendment of Article 92 of the Charter of the United Nations or the establishment of some adequate screening procedure which would ensure that the Court would not be flooded with minor disputes and that two states, in collusion, do not submit to the Court an issue of general importance or involving vital interests of third states, under the guise of a bilateral dispute. It might be feasible, for instance, to establish a special screening committee of the General Assembly similar to the one which at present decides on the submission to the Court for advisory opinions of appeals from judgments of the Administrative Tribunal of the United Nations.

S.Res. 76 also proposes the improvement of the process whereby persons are nominated and elected to serve as judges of the Court. While the proposal mentions no specifics, many private suggestions have been made to ensure greater impartiality of the judges of the Court. This is a very difficult problem and needs to be approached with great caution.

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S.Res. 77 is very general in scope and merely encourages more effective use of the existing procedures for the settlement of international disputes which are specified in Chapter VI of the Charter of the United Nations.

An earlier version of this resolution would have established an obligation to submit a case to the International Court of Justice if the Security Council should so recommend under Article 36(3) of the Charter. As this proposal was phrased in a rather complicated, roundabout way, it was strongly opposed by the Department of State. Nevertheless, if the optional character of this proposal were more clearly stated and if no attempt were made to limit the veto in the Security Council, thus safeguarding the United States and other major powers against any abuse of this procedure, there might have been less opposition to this proposal.

As the resolution notes, Article 36, paragraph 3, of the Charter of the United Nations provides that, in recommending appropriate procedures for the settlement of a dispute referred to it, the Security Council "should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice." Such a recommendation was in fact made by the Security Council in the *Corfu Channel* case, and that recommendation seems to have contributed to the acceptance by Albania of the jurisdiction of the Court. There is, however, no general obligation to accept such a recommendation of the Security Council. While the International Court of Justice found it unnecessary to pass on that question in its judgment in the *Corfu Channel* case, a separate opinion by seven judges pointed out that the contention of the United Kingdom that Article 36 of the Charter conferred jurisdiction on the Court was unjustified.

It would be an important step forward if states could be given an option to accept a recommendation of the Security Council under Article 36(3) of the Charter as binding upon them. Provided both parties to a dispute accepted such a clause, one of them could ask the Security Council to recommend that the case be referred to the Court; and such a recommendation would constitute a sufficient basis for the Court's jurisdiction because of the prior acceptance by the parties of this optional provision.

A declaration limited to accepting the jurisdiction of the Court in case of a recommendation of the Security Council would remove the possible fear of some nations that, by accepting the present optional clause in the Statute of the Court, they would open themselves wide to many frivolous claims by other states which would bring before the Court any grievances they may have regardless of their legal merits. The proposed declaration would require a preliminary determination by the Security Council that the dispute is serious and that important legal issues are actually involved. It is not likely that the Council would make such determination without carefully considering the whole situation, including the possibility that one of the parties might not accept the decision of the Court. After a while, a line of precedents would be established for determining which types of cases might most usefully be referred to the Court and in which ones other means of settlement might prove more fruitful.

S.Res. 78 suggests that a special study be made of the question of access of individuals and corporations to the International Court of Justice. This issue has been frequently discussed in legal literature, but the proposals made in the past have not been found feasible. In particular, governments are reluctant to allow individuals or corporations to sue them before an international tribunal. Nevertheless, the possibilities have not been exhausted and further study may discover some new approach which might prove more acceptable. In any case, no jurisdiction in such cases can be imposed on any state; it would be based on voluntary acceptance by a state of the Court's jurisdiction in a specified category of cases. What is important is to formulate options which some states at least would be willing to accept. If no dire consequences follow, other states might be willing to take similar steps.

The five resolutions present an alternative to the all-or-nothing attempts to repeal the Connally Resolution. It may be hoped that this step by step approach, if followed not only by the United States but also by other countries, may result in greater use of the International Court of Justice. All those who are interested in strengthening the rule of law in the world community should support vigorously this successful initiative, for which Senators Cranston and Taft should be strongly commended.

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