EDITORIAL COMMENT

The Connally Reservation Revisited and, Hopefully, Contained

Towards the close of their instructive study of "Legal Aspects of the Geneva Protocol of 1925" [1] the Editor-in-Chief and Professor Buergenthal considered the following "modes of clearing up disagreement" about the Protocol: United States adherence to the Protocol, together with a statement of understanding that it does not apply to certain chemicals,

> might lead a state to bring an action against the United States within the contentious jurisdiction of the Court. In that event, the United States would be forced to assert the defense of the Connally Reservation, whereby the United States excludes from its acceptance of the compulsory jurisdiction of the Court "matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." The United States would probably be protected by its assertion that the use of irritant chemicals and anti-plant chemicals in warfare is within the domestic jurisdiction of the United States as determined by this country. That defense could be waived but probably only with the consent of the Senate.

The reference to the Connally Reservation was *obiter* the principal discussion and probably did not represent considered views. But it reflects, I believe, misconception and misconstruction and, since the Connally Reservation, alas, does not face early repeal, it should not be allowed to acquire meanings which aggravate its unhappy import.

In my view, the United States would not be entitled to invoke the Connally defense in the circumstances envisaged, and failure to do so would not entail a "waiver" of the defense; in any event, the United States would not be "forced" to invoke the Connally Reservation if it did not wish to; and it could agree to go to the Court without seeking the consent of the United States Senate.

My principal difficulty is with the implication that a suit against the United States alleging violation of the 1925 Protocol [2] would entitle (if not require) the United States to reject the Court's jurisdiction. That assumes either that the Connally Reservation gives the United States the right to refuse to go to court at will, or that United States compliance *vel non* with the 1925 Protocol would be an issue which the United States could properly deem "domestic." Both assumptions are untenable.[3]

[1] 64 A.J.I.L. 853 at 879 (1970), footnotes omitted.

[2] The authors apparently assume a contentious proceeding against the United States based on its assertion of an "erroneous" understanding of the Protocol. There may be some question whether the Court would have jurisdiction of a theoretical dispute over the interpretation of the Protocol as distinguished from a "case" arising from action in alleged violation of the Agreement.

[3] I draw here on a report which I helped prepare: "Pending Repeal of the Connally Reservation," Report by the Committee on International Law, Association of the Bar

Recall the history of the reservation. As unanimously reported by the Senate Foreign Relations Committee, the Senate resolution of consent to a declaration by the United States under Article 36(2) contained a proviso that the declaration should not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America."[4] Had the United States said that and no more, the declaration would not have constituted a reservation, being in effect only a summary, negative restatement of the jurisdiction of the Court contemplated by Article 36(2).[5] In any proceeding against the United States, the International Court of Justice would have determined whether it had jurisdiction, exactly as if the United States declaration had contained no such proviso at all.

Senator Connally's amendment on the floor of the Senate, all know, added the words "as determined by the United States." The words, the context, and the discussion on the floor of the Senate leave no doubt that the United States reserved thereby, in effect, the final say that a case against it is not within the Court's jurisdiction under Article 36(2); it did not reserve a right to veto, on any grounds or on no grounds, any suit against it; it did not reserve the right to declare to be "essentially domestic" what under international law clearly is not. (That would have rendered its acceptance of "compulsory jurisdiction" not merely illusory but a cynical mockery.) Senator Connally himself was wholly clear:

> Several Senators have argued that by this amendment the United States would put itself in the position of corruptly and improperly claiming that a question is domestic in nature when it is not, thereby taking advantage of an international dispute and saying that since the question is domestic, we will not abide by the decision of the Court. Mr. President, I have more faith in my Government than that. I do not believe the United States would adopt a subterfuge, a pretext, or a pretense in order to block the judgment of the Court on any such grounds.[6]

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of the City of New York, February, 1964, 19 The Record of the Association of the Bar of the City of New York 162 (1964).

[4] Sen. Rep. No. 1835, 79th Cong., 2d Sess., pp. 1, 2, 5 (1946).

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

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

[6] 92 Cong. Rec. 10695 (1946). See also the statements of Senator Huffman and Senator Ferguson, *ibid.* at 10696. Compare a former Legal Adviser of the Department of State: "Moreover, I have a serious question whether 'as determined by the United States of America,' if fairly applied, would mean any more in the way of excluding the International Court from passing upon truly domestic issues than the words 'as determined by the principles of international law.'" Becker, 1958 Proceedings, American Society of International Law 267.

Once, indeed, the United States urged that "an arbitrary determination, in bad faith," an attempt to invoke a "Connally Reservation" in regard to a matter clearly not within a state's domestic jurisdiction under international law, could be rejected by the Court.[7] That position was later withdrawn and the United States agreed that when a party invoked the reservation the Court was bound thereby, "irrespective of the propriety or arbitrariness of the determination." [8] At the same time the United States agent confirmed that "the United States has adhered to the policy of not making any arbitrary determination" under its reservation.[9]

In sum, then, the United States declaration reserved a final say on a legal question—whether a proceeding against it raises issues within the jurisdiction of the Court under Article 36(2). Whether use by the United States in war of certain chemicals would be consistent with its undertakings in the Protocol would depend of course on the proper construction of that Protocol—obviously not a domestic question, obviously an issue within the Court's jurisdiction under Article 36(2).[10] For the United States to invoke the reservation in such a case would be "arbitrary"; would, in Senator Connally's words, "corruptly and improperly" assert that a question is domestic in nature when it clearly is not; would be "a subterfuge, a pretext, or a pretense in order to block" the jurisdiction of the Court.

If the United States could not properly invoke its reservation, not to invoke it is no "waiver" of any defense. But even if a proceeding against the United States involved matters which it believed, *bona fide*, to be essentially within its domestic jurisdiction under international law, it would not be "forced" [11] to invoke Connally. Nothing in the declaration or the reservation, nothing in international law or the laws of the United States, forbids the United States to waive its right to judge for itself and allow the Court to determine whether it had jurisdiction. And, under our Constitutional system, whether the United States is entitled to invoke Connally, whether if it is so entitled it should do so, are questions for the President, and the Senate has no Constitutional rôle in regard to them. The Connally Reservation reserved rights to the United States, not to the Senate.

Perhaps the argument is that by its reservation the Senate forbade the United States to submit to the risk that the Court might find it had jurisdiction where the United States is satisfied that the Court did not, and the United States could not take that risk unless the Senate removed its pro-

[7] Case concerning the Aerial Incident of 27 July 1955 (United States of America *v.* Bulgaria), I.C.J. Pleadings at 308, 322–325.

[8] *Ibid.* at 676–677.

[9] *Ibid.* 677.

[10] Since the discussion assumed that the United States would not enter a reservation but only assert an understanding, and, under one of the options considered, would do so, not as a condition of ratification, I assume that the contentious proceeding envisaged would charge violation of the Protocol. If there were also a preliminary issue as to whether the United States had effectively entered a controlling reservation, that too, surely, would not be a domestic matter.

[11] Perhaps the authors meant only that the United States would be forced to consider whether to invoke the reservation; or that it would have to invoke the reservation if it wished to block the suit; or that political forces within the United States might compel its invocation.

hibition. In my view that interpretation of Connally is fetched much too far: the evidence is that Senator Connally sought to protect the United States against possible abuse by the Court; there is no evidence that he sought also to protect the United States against the President of the United States. There is no evidence that he sought to prevent the President from doing what might well be the wise thing in many a case—to have the Court determine whether it had jurisdiction.

That interpretation of Connally, moreover, would achieve no purpose. Under Article 36(1) of the Statute of the Court, the United States can join with another party to refer a case to the Court, and the President can do that for the United States without Senate consent.[12] The Connally Reservation did not and could not [13] modify the rights and obligations of the United States (or the power of the President) under that article. If in a proceeding under Article 36(2) the United States decides not to invoke its reservation where it could properly do so, it is in practical effect as though the United States joined voluntarily with its adversary to refer the case to the Court under Article 36(1). Surely the Senate did not intend to compel the President to reject a proceeding under Article 36(2) and begin all over under Article 36(1).[14]

Given its proper interpretation, the Connally Reservation

> would be small indeed (as was intended). The Reservation, then, would not render American acceptance of the Court's jurisdiction wholly illusory. The United States, then, would have accepted as compulsory the Court's jurisdiction for the large majority of disputes to which the United States is a party. The United States could then, in turn, bring to the Court its complaints involving international law or obligation, and urge and expect that other countries also refrain from invoking this reservation improperly or arbitrarily. The Connally Reservation, while damaging still to the national interest and ignoble to maintain, would be reduced to the small, remote and contingent import intended for it, pending its total abrogation.[15]

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[12] Compare the memorandum of the Legal Adviser of the Department of State, Eric H. Hager, in Hearings, May 17, 1960, before the Senate Committee on Foreign Relations, 86th Cong., 2d Sess., pp. 14–15, reprinted in 54 A.J.I.L. 941 (1960); compare also Bishop and Myers, "Unwarranted Extension of Connally-Amendment Thinking," 55 A.J.I.L. 135 (1961).

[13] The United States, having adhered to the Statute of the Court with Senate consent, the Senate could not later limit the power of the United States (or of the President) under Art. 36(1). Compare Fourteen Diamond Rings *v.* United States, 183 U. S. 176 (1901).

[14] Under Art. 36(1), there is nothing to prevent the parties from submitting a dispute in which a preliminary issue is whether the matter in controversy is or is not "essentially domestic."

[15] See Report of the Committee on International Law, note 3 above, at 164–165.