DOMESTIC JURISDICTION AS DETERMINED BY THE INTERESTED STATE

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INTRODUCTION

It is a principle of international law that States are free to choose the appropriate means for settling their disputes peacefully[1]. No State could, therefore, be forced to submit its disputes to adjudicatory means. It is well known that the jurisdiction of international courts and tribunals is based on the consent of States. This consent could be given in different forms, one of which is to make a declaration under Article 36(2) of the Statute of the International Court of justice by which the interested State declare that it accepts, as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the

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(1) See the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*. General Assembly Resolution 2625 (XXV), 24 October 1970; Manila Declaration on the Peaceful Settlement of International Disputes. Resolution 10 24 on the Report of the Sixth Committee. 10/37 -Res. A/37/590; and Khier Guechi, *Preferability between Adjudicatory and Non-Adjudicatory Means for the Settlement of International Disputes*. Cairo (1999), pp. 40 - 45. (in Arabic).

jurisdiction of the Court. This system is known as the *"optional Clause"*[2]. In adhering to this system States have interpreted paragraphs 2 and 3 of the Statute as allowing them to limit the scope of their acceptance by different forms of reservations, including subjective reservations *rations materiae,* i.e. those which confer on the interested States the power to determine their scope, and hence, their applicability. In other words these reservations empower the declarant State explicitly with the decision of whether a matter does come within their scope, and hence they allow it to take by one hand what it appear to have given to the Court by the other.

There is no doubt that the most important of these reservations is that which excludes from the Court's jurisdiction disputes arising from matters that are within the domestic jurisdiction of the declarant State. This kind of reservation has not lost its importance in spite of the fact that no reservation has ever attracted the attention of international lawyers as this one. Therefore it is still maintained in many

(2) See esp. J.G. Merrills, "the Optional Clause Today", 50 B.Y.B.I.L (1979), pp. 87 - 116 and for the same author: *International Dispute Settlement*, (2nd. ed.), London (1991) and "the Optional Clause Revisited", 64 *B.Y.B.I.L.* (1993), pp. 197 - 244; B. Baily, *the Optional Clause Reconsidered: Its Nature and Potential as a Future Source of Jurisdiction*, 1987; G.L. Scott and C.L.Carr, "the I.C.J. and Compulsory Jurisdiction: the Case for Closing the Clause", 81 *A.J.I.L.* (1987), pp. 57 ff.; Leo Gross, "Compulsory Jurisdiction under the Optional Clause: History and Practice", in L.F. Damrosch (ed.), *the International Court of Justice at a Crossroads*, Dobbs Ferry, New York (1987), pp. 19-57; D.J. Ende, "Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New United States Declaration", 61 *Wash. L.R.* (1986), pp. 1145-1183.

declarations and the Court has not pronounced yet on its validity, and hence, most of the questions raised by commentators are still without authoritative response.

Under the P. C. I. J. it would hardly have been conceived that a State would ever accept the Court's jurisdiction under the Optional Clause while withholding for itself the decision whether or not a future dispute would be adjudicated. Yet this happened shortly after the establishment of the present Court when the United States deviated from the established practice by recognizing the Court's jurisdiction with the proviso that the declaration shall not apply to:

"(b) 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"([3])

Thus unlike the objective formula of domestic jurisdictions([4]), this new formula is - at least according to the apparent meaning of its terms - unblushingly "subjective". For its scope cannot be pre-determined according to the words of the reservation but is left for subsequent determination after the seisin of the Court at the discretion of the interested State([5]).

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(3) U.N.T.S., p. 9 (emphasis added).

(4) See Khier Guechi. *Reservations to the Acceptance of the Compulsory Jurisdiction of the International Court of Justice*. Ph.D. thesis, Glasgow University 1988, pp. 240-279.

(5) The term **"subjective"** has been used by many writers. See *e.g.* C.H.M. Waldock. "Decline of the Optional Clause ". *32 B.Y.B.I.L.* (1955-56), pp.244-287. at 271 and S. Rosenne. *the Law and Practice of the International Court*, 2nd. Revised ed.. 1985. =

The circumstances in which the United States reservation was devised have been described(6). These circumstances have,

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= p.395. This formula has also bee described as **'self-judging"** (see e.g. A. Larson, "the **"self-judging"** Clause and Self Interests", 46 *A.B.A.J.* (1960, pp.729-731, at 729) : **"automatic"[this** term was used for the first time by Judge H. Lauterpacht in his Separate Opinion in *Certain Norwegian Loans* case (Judgment, I.C.J. Reports 1957, p.9, at 34) then it has been widely adopted. See e.g. R.Y. Jennins, "Recent Cases on 'Automatic' Reservations to the Optional Clause", 7 *I.C.L.Q.(1958)*, pp.349-366 and F. Gerber, *le Consentement de l'état a la Juridiction de la Cour Internationale de Justice*, thesis (Université d'Orléans, Faculté de Droit et des Sciences Economiques), 1980, pp.177-180)]; if **peremptory"** [this term was also used by judge Lauterpacht in his Separate Opinion in the *Interhandel* case (Interim Measure of Protection, Order of October 24th, 1957 ; I.C.J. Reports, 1957, p.105, at 119). It has also been adopted by many writers: see e.g. H.W. Briggs, "the United States and the International Court of Justice : **A** Re- examination ", 53 A.J.I.L.(1959), pp.301318, at 3071 ; **"Connally Amendment" (this** is the most popular in the U.S. See e.g. J. Dixon, Jr. "the Connally Amendment - the Conflict between Nationalism and an Effective World Court", 53 *Ky.L.J.(1964)*, pp.164-175). G.Schwarzenberger critcises these terms and prefers the term **"daring reservations"**, *International Law -as Applied by International Courts and Tribunals, vol.IV (international Judicial Law*), 1986, p.499. For criticism of these different terms see also J.H. Crabb, "On Judging the Connally Amendment", 50 *Jeorgi.L.J.* (1962), pp.529-545, at 529-530 and J.B. Elkind, *Non- Appearance before the International Court of Justice, 1984*, p. 12 1.

(6) For the history of this reservation see the following documents : Compulsory Jurisdiction International Court of Justice, Hearings before a Subcommittee of the committee on Foreign Relations, U.S. Senate, 79th Congress, 2nd Session on S. Res.196, 1946 (hereinafter Hearings), Report of the Foreign Relations Committee No.1835, 79th congress, 2nd Session, and Congressional Records, 79th Congress, 2nd Session, July 31, August 1, 2, 1946. See also F.O. Wilcox, "the United States Accept Compulsory Jurisdiction", 40 A.J.I.L.(1946), suppt., pp.699719 ; L. Preuss, "the International Court of Justice, the Senate, and Matters of Domestic Jurisdiction", ibid., pp.720-736 ; H.W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", 93 *R.CA.D.I.* (1958), pp.230-363, at 328-335 ; =

however, lost their significance since the withdrawal of the United States declaration in 1985([7]). It may suffice here to recall that apprehensions of judicial encroachment upon certain areas which were deemed of vital interests, such as the navigation of the Panama Canal, immigration into the United States, and tariffs, had led to the insertion of the reservation([8]).

However, the last eight words in the United States reservation, namely, "as determined by the United States of America" have spawned countless of words of polemic and years of controversy ([9]). Focus has been made on two points: the undesirability of similar reservations and their validity. Whilst it has been generally admitted that such reservations are undesirable ([10]), the question of their validity is still unsettled.

= J.B. Elkind, supra note 3. pp.124-139, and D. Kitchel. *Too Grave a Risk- the Connally Amendment Issue.* 1963. pp.13-18.

(7) 7 I.C.J.Y.B., 1985-86, p.60.

(8) See 92 Cong. Rec. No.153. August 1. 1946. pp.10691-10694. 10736-10764 and No. 154. Aug. 2, 1946. pp.10839-10840. For discussion of these subjects, see A. Larson, "the Facts, the Law, and the Connally Amendment", 74 D.L.J. (1961). pp. 74-119. at 103-105. Fear of the alleged vague and unwritten international law had also been maintained. See the State Bar Committee on World Peace through Law. "Pro and Con of the Connally Amendment: Should it Be Maintained, Repealed, or Modified". 35 J.S.B.C. (1960), pp.334-341. at 336 and R. Layton. "the Dilemma of the World Court: the United States Reconsiders Compulsory Jurisdiction", 12 Stanford L.R. (1960), pp.323-354. at 327.

(9) A.E.D. Howard observes that "it is hard to find eight words in Shakespeare or the Bible which have occasioned so much dispute". "the Connally Amendment". 2 J.J.B.M.S. (1961), pp. 1-8. at 1.

(10) See e.g. J. Crawford, "the Legal Effect of Automatic Reservations to the Jurisdiction of the International Court of Justice". 50 B.Y.B.I.L.(1979). pp.63-86, at 63-64.
The undesirability of the reservation is confirmed by the result of a poll conducted in 1961 on whether the U. S. reservation should be repealed. Only 5 out of 3 10 law school deans, law schools =

The validity issue has been approached in different ways, to the extent that almost every conceivable course, whether legal or of opportunity, has been followed. The Court itself has treated such reservations in a different manner as compared to other reservations. This has deepened the doctrinal views as regards these reservations. It is to be observed that the significance of these reservations lies in the fact that they provide a precedent for testing the limits of the freedom of making reservations, more than in the question of their validity as such. They could also be used as a device for testing States' attitude vis-a-vis the development of international law, especially towards adjudication.

We will try to develop some more thoughts on this subject especially as concerns the classification of doctrinal views and to predict the position of the Court towards the validity of the reservation and its effect on the whole declaration. The negative effects of this kind of reservation should be emphasized, especially in the light of the fact that it does not find a place now except in the declarations of developing countries though it was initiated by developed countries.

However, owing to the importance of State practice and its relevance as an element of interpretation, the position of the subjective reservation of domestic jurisdiction in the declarations of acceptance should be clarified first before

= professors and professors of international law , who expressed an opinion, were against repeal. See R.B. Schlesinger. "the Connally Amendment - Amelioration by Interpretation?". 48 Virg. L.R. (1962), pp.685-697.

proceeding to the consideration of the Court's attitude towards the reservation and the different approaches adopted by jurists.

A - THE RESERVATION IN THE DECLARATIONS OF ACCEPTANCE

In arguing against the insertion of the Cannally Amendment in 1946 Senator Pepper of Florida warned that other nations would wish to modify their adherence to the compulsory jurisdiction of the Court in the same way([11]). It did not take long to see his prediction realized. In less than one year the reservation appeared in a new version in the French declaration of February 18, 1947. This declaration excluded from the Court's jurisdiction "differences relating to matters which are essentially within the national jurisdiction *AS UNDERSTOOD BY THE GOVERNMENT OF THE FRENCH REPUBLIC* ([12]). The terms of the French declaration appeared to judge Read as requiring a "genuine understanding". In other words the Court's jurisdiction could not be ousted, he argued, by a mere pretension by the invoking State that it understands or by a declaration that it understands([13]). However, both models seem to raise a problem of interpretation. Thus J B Elkind thinks that exactly the opposite view of the two models is possible. "An 'understanding' would

(11) 92 Con. Rec. Aug. 1, 1946, p.10694.
(12) 26 U.N.T.S., p.91 (emphasis added).
(13) See his Dis. Op. in *Certain Norwegian Loans* case, cited supra note 5, p.94.

seem to relate to a subjective view of the matter which cannot be questioned. A 'determination' is a more objective, almost a judicial process, which might well be opened to review"([14]). A third model was introduced by Mexico. Its declaration excluded "disputes arising from matters that, *IN THE OPINION OF THE MEXICAN GOVERNMENT are* within the domestic jurisdiction of the United States of Mexico"[(15)]. A fourth model is adopted by Liberia and the Philippines. They both exclude from the scope of their declarations any dispute, "which [they] consider essentially within [their] domestic jurisdiction"([16]). In due course the United States' model was included in the declarations of: India of 1956([17]), Malawi ([18]), Sudan ([19]), Pakistan (of 1948 and 1957)([20]), and South Africa ([21]) with the difference that the last two declarations excluded matters which were essentially within the domestic jurisdiction of the *"GOVERNMENT"* of the reserving State, and that the adjective "domestic" was omitted from the declaration of South Africa. The latter simply excluded disputes falling within "the jurisdiction of the Government of the Union of South Africa". It could, thus, have been considered broader

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(14) Supra note 5, p.153.

(15) I.C.J.Y.B., 1986-87, p.79 (emphasis added). See B. Maus. *les Réserves dans les Déclarations* d'acceptation de la Juridiction Obligatoire de la Cour Internationale de Justice, thesis (Université de Genève, Faculté de Droit),1959, p.161.

(16) I.C.J.Y.B., 1986-87,pp.74. 84.

(17) 226 U.N.T.S., p.235.

(18) I.C.J.Y.B., 1986-87, p.76.

(19) *Ibid.*, p.87.

(20) U.N.T.S., P.197 and 257 *ibid.*, p.360.

(21) 216 *ibid.*, p. 1 15.

than the other models ([22]).All these models have generally been considered as producing the same effects([23]).

Today, the subjective reservation of domestic jurisdiction appears only in the declarations of Liberia, Malawi, the Philippines and Sweden. This is due to the termination of the declarations of South Africa([24]) and the United States([25]), and the substitution of this reservation by the objective formula in the declarations of India and Pakistan([26]).

In conclusion it is to be noted firstly that the reservation has appeared in two declarations (Malawi and the Philippines) since the end of the fifties when the trend to abandon the reservation was marked. Secondly, all the declarations containing the reservation, except that of the Philippines, have not been subjected to change since they were made for the first time. The Government of the Philippines terminated its previous declaration (of 1947) in 1972 and deposited a fresh one containing four other reservations in addition to the subjective reservation of domestic jurisdiction ([27]).

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(22) See S. Prasasvinitchai, *la Clause Facultative de Juridiction Obligatoire de la Cour Internationale de Justice,* thèses (Université de Paris, Faculté de Droit et des Sciences Economiques), 1962, p. 105.

(23) See e.g. G. Schwarzenberger, supra note 5, at 500 ; H.W. Briggs, Reservations .... supra note 6, p.335, and H. Lauterpacht's Dis. Op. in the *Interhandel* case, Judgment, I.C.J. Reports 1959, p.6, at 117-118.

(24) 595 U.N.T.S., p.363.

(25) See note 3 above.

(26) France also had substituted the objective formula for the subjective one in its declarations of 1959 and that of 1966, which was terminated in 1974.

(27) I.C.J.Y.B., 1986-87, p.84.

B - THE COURT'S POSITION VIS-A-VIS THE RESERVATION

The Court had the following opportunities to put an end to the controversy on the validity of the subjective reservation of domestic jurisdiction.

(I) The U. S. Nationals in Morocco Case ([28])

This was the first case brought under an instrument containing the subjective reservation of domestic jurisdiction. The declarations of both parties (France and the United States) contained such a reservation. The reservation was not invoked. However the United States stated in its counter-memorial that "its abstaining from raising the issue does not affect its legal right to rely in any future case on its reservation contained in its acceptance of the compulsory jurisdiction of the Court"([29]). The responsibility of raising the issue of the consistency of these reservations with the Statute was thus left to the court. Yet, the Court declined to do so and contented itself with recording the parties' reliance on their declarations accepting the "compulsory jurisdiction of the Court" in accordance with the Statute ([30]).

Whether such an attitude by the Court could be considered as a tacit recognition of the validity of the

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(28) *Rights of Nationals of the United States of America in Morocco , Judgment , I.C.J.* Reports 1952, p.176.

(29) *Case Concerning Rights of Nationals of the United States of America in Morocco, I.C.J.* Pleadings, pp. 257, 262.

(30) I.C.J. Reports 1952, p.178.

declarations, despite the reservations, as the Court could not have exercised its jurisdiction based on a void instrument, has been overridden. It is argued that the Court exercised its jurisdiction on the basis of the principle of *FORUM PROROGATUM, in* spite of the fact that the application was based on Article 36 (2) of the Statute, since the movement of the United States withdrawal of its preliminary objection, which was based on account of insufficient clarification of the identity of the parties ([31]).

(II) Certain Norwegian Loans Case

France instituted proceedings against Norway by an application relying on the declarations of the parties made under Article 36(2) of the Statute. France asked the Court to adjudge and declare that the bonds sold to its nationals were international loans, which only could be discharged by repayment or redemption in gold value at the date of the repayment or redemption. Norway lodged four preliminary objections to the jurisdiction of the Court, but only the first is relevant here. The Norwegian argument on this point was in two parts. In the first part the Norwegian Government maintained that the subject matter of the dispute did not fall within any of the categories enumerated in Article 36(2). The dispute was thus "beyond any possible doubt" within its

(31) See e.g. the Sep. Op. of Judge Lauterpacht in the *Norwegian Loans case* , I.C.J. Reports 1957, p.60 ; S. Rosenne, the Law ..., supra note 5, p.397, and I.F.I. Shihata, *the Power of the International Court to Determine its Own Jurisdiction - Competence de la competence, 1965,* p.276.

jurisdiction, the Norwegian Government argued. In the second part it invoked the French subjective reservation of domestic jurisdiction. It argued that if any doubt remained as to the first point, it "would rely upon the reservation made by the French Government"(32). It is worth noting that the Norwegian Government raised the issue of interpretation of the reservation. It emphasized that "such a reservation must be interpreted in good faith and should a Government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a matter which is essentially within the national jurisdiction, it would be committing an *ABUS DE DROIT* which would not prevent the Court from acting"(33).

The 'Court declined to examine "whether the French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute"(34). It accepted Norway's reliance on the French reservation on the ground that the validity of the reservation had not been questioned by the parties and therefore recognized Norway's right to refuse to accept the Court's jurisdiction on the ground of reciprocity. In so holding, the Court said:

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(32) I.C.J. Pleadings, case of *Certain Norwegian Loans, vol.* 1, pp. 121-129.

(33) *Ibid.*, p.131 (English translation quoted from the Sep. Op. of Judge Lauterpacht and the Dis. Op. of Judge Basdevant in this case, I.C.J. Reports 1957, pp. 53 and 73.

(34) *Certain Norwegian Loans* Case, cited supra note 5, p.26.

"[I]t has before it provision which both parties to the dispute regard as constituting an expression of their common will relating to the acceptance of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations, which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it"([35]).

This holding has been criticized - as will be seen - by both some judges of the Court as well as by commentators and different conclusions have been drawn from it. It may suffice here to observe that the Court was criticized for basing its jurisdiction on the sole ground of the invocation of the reservation while it had many other alternatives. It could have based its decision on the interpretation adopted by Norway concerning the use of the reservation in good faith ([36]), or discussed its jurisdiction on the first part of the objection as did judges Moreno Quintana and Badawi ([37]), or could have ignored the declarations completely and based its jurisdiction on the treaties referred to by the parties in the course of the proceedings ([38]).

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(35) *Ibid.*, p.27.

(36) See the Diss. Op. of Judges Basdevant and Read Ibid., pp.76 and 94.

(37) *Ibid.*, pp.28, 29-33.

(38) See I.F.I. Shihata, supra note 31, p.278.

(III) Interhandel Case

This case offered two occasions for the consideration of the question of validity of the subjective reservation of domestic jurisdiction and its effect on the instrument to which it was attached.

(i) Interim measures of protection phase

The Swiss Government asked the Court to indicate - *INTER ALIA* -, that the Government of the United States was requested not to sell the shares of the General Aniline and Film Corporation (G.A.F.C.). The United States Government filed a preliminary objection based on its subjective reservation of domestic jurisdiction. It stated that it had determined that the matter of sale or disposition of the stock of the G.A.F.C. was a matter essentially within its jurisdiction. "This determination ... is not subject to review or approval by the tribunal, It operates to remove definitively from the jurisdiction of the Court the matter which it determines"([39]), Mr. Loftus Backer, the United States Government Agent stated. The terms of the reservation rendered the subject matter of the determination non-justiciable. For, that determination destroyed the *PRIMA FACIE* jurisdiction as a legal basis for indicating provisional measures, Mr. Backer argued ([40]).

On the other hand, professor Guggenheim - Co-agent of the Swiss Government - contested the above interpretation. He

(39) I.C.J. Pleadings, *Interhandel* case (Switzerland v. United States of America), pp.452-453.
(40) *Ibid., p.460.*

doubted that reservation could have such an absolute character. Otherwise it would have the effect of rendering inoperative a provision essential for the exercise of the Court's jurisdiction [i.e. Article 36(6) of the Statute][41]. Although he challenged the validity of the reservation, professor Guggenheim stated that he could not imagine that the Court should wish to adjudicate at that stage "upon so complex and delicate a question as the validity of the American reservation"[42].

Despite these arguments by both parties, the Court took jurisdiction to consider the indication of interim measures pursuant to its Statute, but it rejected, for lack of urgency, the Swiss request [43].

Five of the sixteen members of the Court expressed their disagreement with the Court's reasoning. They all agreed, though in different ways, that since *PRIMA FACIE* the Court would have no jurisdiction on the merits, it manifestly has no right to exercise jurisdiction in this stage of the proceedings[44].

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(41) *Ibid.*, p.461.

(42) *Ibid.*, pp.462-463. Translation quoted from the Court's Order of October 24th, 1957, *Interhandel* case (Interim Measures of Protection), cited supra note 5, at 111.

(43) *Ibid.*, *p.* 112.

(44) Judges Wellington Koo, *ibid.*, *pp.* 113-114 ; Klaestad, with whom the President Hackworth and judge Read agreed. *ibid.*, *pp.* 115-116, and Lauterpacht, *ibid.*, *pp.* 117-120. Note the line of reasoning adopted by Lauterpacht here as compared to that followed in the *Norwegian Loans case* , I.C.J. Reports 1957, pp.34-66.

The clear implication of this holding of the Court is that a declaration containing a subjective reservation of domestic jurisdiction could be relied upon as a basis of a valid seisin, and hence for the conferment of the incidental jurisdiction to indicate provisional measures, and that the invocation of the reservation cannot preclude the Court from exercising that jurisdiction([45]).

It is to be noted, finally, that the Court made a formal finding at this stage. It stated that "whereas [the parties] have, by Declarations made on their behalf, *ACCEPTED THE COMPULSORY JURISDICTION ON THE BASIS OF ARTICLE 36, PARAGRAPH 2,* of the Statute", and continued: "whereas by its subject-matter the present dispute falls within the preview of that paragraph"([46]).

(ii) Preliminary objections phase

The United States Government maintained its previous objection, which had become part (a) of the fourth preliminary objection. The reservation was invoked in regard to the "sale and disposition" of the shares only. The United States Government was thus willing to allow the Court to decide whether the seizure and retention of shares fell within domestic jurisdiction ([47]). The Swiss government also maintained its

(45) See I.F.I. Shihata, supra note 31, p.279 and H.W. Briggs. Reservations .... supra note 6, p.359. For this reason S. Rosenne observes that the subjective reservation of domestic jurisdiction is not "automatic", the Law .... supra note 5, p.399.

(46) I.C.J. Reports 1957, p.110.

(47) I.C.J. Pleadings, supra note 39, pp.319-320. See also Section 2. Chapter 4, above, pp.271273.

previous position that the Unites States reservation was invalid. Relying on the opinions of judges Guerrero and Lauterpacht in the *NORWEGIAN LOANS* case, professor Guggenheim based the invalidity on the inconsistency of the reservation with both paragraphs 2 and 6 of Article 36 of the Statute ([48]). Professor Guggenheim argued also that the reservation must be interpreted in good faith and that the Court would not accept an allegation that a matter was within domestic jurisdiction when in fact it was manifestly not. Such a determination would be an abuse of right, he maintained ([49]).

The Agent of the United States Government (Mr. Backer), on the other hand, argued that the reservation was valid and that it was not used arbitrarily in that case by the United States Government. He exposed the details of the facts to which the reservation was applied, but only for "the information of the Court". Mr. Backer emphasized that the submission of these facts "does not in any way modify the conclusion that the determination of the United States is not subject to review or approval by this Court"([50]). He also seemed to argue that the Court was not entitled to judge whether the reservation was invoked in good faith. He said that "the Court has never examined and we assume will not examine into the motives which lead nations to exercise the automatic reservation".

(48) I.C.J. Pleadings, *Ibid.*, pp. 408-409, 575.
(49) *Ibid.*, p. 579.
(50) *Ibid.*, pp.601, 61 0.

However he stated that, "any examination would nevertheless reveal the reasonableness of the United States position despite the extravagant charges of arbitrariness which have been made here"(51).

Also, Mr. Backer maintained that since the local remedies were available, and that the shares could not be sold before a final decision of the Courts of the United States, the objection based on the subjective reservation of domestic jurisdiction had lost practical significance and had become "somewhat moot" and "somewhat academic"(52).

Thus, unlike the situation in the *NORWEGIAN LOANS* case, the reservation was invoked here and maintained by the respondent State; challenged by the applicant State, and was of immediate relevance. The parties to the present case, unlike in the *NORWEGIAN LOANS* case or in the first phase of this case, did not handle - to use judge Sir Percy Spender's words - "the objection tenderly" or walked "discretely around the issue involved"(53). The Court's approach had therefore to differ from that adopted in the *NORWEGIAN LOANS* case.

This approach by the Court seemed to give the impression that the Court cannot consistently consider the issue of admissibility unless its jurisdiction was established. Thus it

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(51) *Ibid., p.610.*

(52) *Ibid.* Judge H. Lauterpacht thought that such an argument could not deprive the Court of jurisdiction. A government could not maintain an objection and at the same time invite the Court to consider it as being of no importance. I.C.J. Reports 1959, p.98.

(53) *Ibid., p.55.*

examined the first and second objections and part (b) of the fourth objection before the third objection, namely, non-exhaustion of local remedies. Yet, it turned to the third objection without disposing of whether its jurisdiction covered the issue in regard to which the United States Government invoked the reservation. Having upheld the third objection, the Court decided by 10 votes to 5 that part (a) of the fourth preliminary objection was "without object"([54]).

The clear implication of this approach is that the Court tried to find ground on which it might have been possible to decline its jurisdiction without pronouncing on the question of validity. Failing to find such a basis, the admissibility issue was the only escape route to avoid the problem of adjudication on the validity of the reservation. Thus, the Court left itself open to criticism from the Bench as well as commentators ([55]).

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(54) *Ibid.*, p.26.

(55) See e.g. the Diss. Op. of Judges H. Lauterpacht, Klaestad and Armand-Ugon ibid., pp.98, 7576, and 91 respectively and the Sep. Op. of Judge Spender *ibid.*, p.54. See also J.B. Elkind, supra note 3, p.151. Comp. M. Dubisson, *la Cour International de Justice*, 1964, p.188 and J.H.W. Verzijl, "the System of the Optional Clause", I *Int7. Rel.* (1959), pp.585-610, at 601-602. For this case in general see H.W. Briggs, "the Interhandel the Court's Judgment of March 21, 1959, on the Preliminary Objections of the United States *53 A.J.I.L.* (1959), pp.547-563 ; C. De Visscher, "l' Affaire de l'Interhandel devant la Cour Internationale de Justice", 30 *R.G.D.I.P.* (1959), pp.413-433, and G. Perrin, "l' Affaire de l' Interhandel- Phase des Exceptions Preliminaires", 16 *An.S.D.I.(1959)*, p.73.

(IV) The Aerial Incident of July 27th, 1955 Case (United States of America v Bulgaria)

Although the Court was not here in a position to decide the validity of the subjective reservation of domestic jurisdiction, the case has significance in throwing light on how the United States Government had interpreted its reservation. In its application instituting proceedings against Bulgaria, the United States Government claimed that the acts committed on July 27, 1955 by the Bulgarian Air force in the Bulgarian Airspace against American Nationals on board a civil airplane fell within the categories of legal disputes listed in Article 36(2)([56]). Bulgaria filed four preliminary objections to the jurisdiction of the Court, the second of which was based on the United States reservation of domestic jurisdiction. The Bulgarian Government maintained that the defense of its territory, the security of the airspace above the south western frontier region, and the disposition of its anti-aircraft defense fell under its domestic jurisdiction ([57]).

Inconsistently with the United States argument in the *INTERHANDEL* case, Mr. Eric H Hager, the United States Agent, declared that "the United States reservation(b) [i.e. domestic jurisdiction reservation] does not permit the United States or any other State to make an arbitrary determination in

(56) I.C.J. Pleadings, *Aerial Incident of July 27, 1955* (Israel v. Bulgaria; United States of America v. Bulgaria, United Kingdom v. Bulgaria), p.22 seq.

(57) *Ibid.*, p.271.

bad faith"([58]). He denied that this reservation empowered a State "to make an arbitrary determination that a particular matter is domestic when it is evidently one of international concern and has been so treated by the parties"([59]).

At this stage the United States Government appeared to adopt judge Read's view - that the reservation left to the Court a residuum of decision-making power as will be seen ([60]). However, being aware of the Court's view in the *ISRAEL v BULGARIA* case that the Bulgarian declaration had been discontinued since the dissolution of the P. C. 1. J., the United States Government withdrew its argument ([61]) and returned to the interpretation made in the *INTERHANDEL* case. This change of view was based on a "further study and consideration of the history and background of [the] reservation ... 11([62]). The result of the study had thus led to the qualification of the interpretation made in this case as "not valid", and that a "determination under reservation (b) that a matter is essentially domestic constitutes an absolute bar to

(58) *Ibid.*, p 323.
(59) *Ibid.*
(60) See pp 27-28 below.
(61) See 1. F. Shihata, supra note 31, p. 283.
(62) I.C.J. Pleadings, supra note 56, pp.676, 677. L. Gross. observes that "it is always possible, of course, to rake over the inentical debate in the Senate and come up with different results. although one should have assumed that the history of the Connally Amendment and the position of the United States in the Interhandel case were well known to all concerned in the Department of State", "Bulgaria Invokes the Connally Amendment", in his book *Essays on International Law and Organization,* vol. 2, 1984, pp.727-75 1, at 741 (reprinted From 56 *A.J.I.L.* (1962), pp.357-382).

jurisdiction irrespective of the propriety or arbitrariness of the determination"([63]). Consequently the United States Government admitted that, "Bulgaria is accorded the same rights and powers with respect to reservation (b) as the United States"([64]). By this recognition the United States Government established - as Rosenne observed - the first precedent in which an applicant accepted a respondent's preliminary objection as justified ([65]).

(V) Military and Paramilitary Activities in and Against Nicaragua Case

The jurisdiction of the Court was based in this case on - *INTER ALIA* the declarations of the United States and Nicaragua made under Article 36(2) of the Statute. The United States objected to the jurisdiction of the Court and the admissibility of the claim on many grounds([66]). However it did not invoke its domestic jurisdiction reservation. Yet it informed the Court that this decision was "without prejudice to the rights of the United States under that proviso [i.e. proviso (b) containing the reservation] in relation to any subsequent pleadings, proceedings, or case before this Court"([67]). The

(63) I.C.J. Pleadings, *ibid.*, p.677.

(64) *Ibid.*

(65) "la Cour Internationale de Justice en 1960", 65 R.G.D.I.P. (1961). pp.473-526, at 475.

(66) Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984, p.392, at 396-397.

(67) Ibid., p.422, para.67. R.N. Gardner observes that the U.S. did not invoke the Connally reservation because it was "ashamed to argue that mining another country's harbors and supporting insurgents

Court was not thus in a position to pronounce on the question of validity of the subjective reservation of domestic jurisdiction except by raising the issue *PROPRIO MATU,* a course which it refused to follow in the *UNITED STATES NATIONALS IN MOROCCO and CERTAIN NORWEGIAN LOANS* cases as has been seen. However, the Court had to satisfy itself that it had jurisdiction under Article 36 (2) of the Statute. For this purpose, the Court observed, first, that, "Nicaragua has to show that it was a "State accepting the same obligation "within the meaning of Article 36, paragraph 2, of the Statute"([68]). Secondly, the Court raised the question whether the United States declaration of 1946 "constitutes the necessary consent of the United States to the jurisdiction of the Court, in the present case, taking into account the reservations which were attached to the declaration"([69]). On the first point the Court found that the parties to the case had accepted *"THE SAME OBLIGATION"* within the meaning of Article 36 (2)([70]). As to the second point, the Court noted that reservation (a) in the United States declaration, referring to disputes, the solution of which is entrusted to other tribunals, had no relevance whatsoever to the present case; referred to the United States decision not to invoke domestic jurisdiction reservation while

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seeking to overthrow its government were within the U. S. domestic jurisdiction". "U.S. Termination of the Compulsory Jurisdiction of the International Court of Justice", 24 Columb.J.I.L. (1986), pp.421-427, at 423.

(68) I.C.J. Reports 1984, P. 398, PARA. 14.

(69) *Ibid,* p.421, para.67.

(70) *Ibid,* pp. 420-421, paras.64-65.

reserving its right to do so in future cases, and proceeded to the examination of the multilateral treaty reservation which was invoked(71). Consequently the Court found, by eleven votes to five, that it had jurisdiction to entertain the application filed by Nicaragua on the basis of Article 36(2) and (5) of the Statute(72).

C - VALIDITY OR NULLITY - DIFFERENT DOCTRINAL APPROACHES

The cautious attitude adopted by the Court has contributed to a large extent to the emergence and development of different views, especially from the Bench, in respect of the question of validity of the subjective reservation of domestic jurisdiction. These views might be grouped into four different approaches.

(I) Invalid Reservations Nullifying the Entire Instrument of Acceptance

As has been said earlier, it was difficult under the P.C.I.J. to conceive an acceptance of the Court's jurisdiction with such a reservation. However, the few earlier writers who had conceived it did not hesitate to declare it contrary to the very purpose of the Optional Clause, devoid of a legal obligation and contrary to the proviso of Article 36 (2) of the Statute, and

(71) *Ibid.*, p.422 seq., paras. 67 seq. For the multilateral treaty reservation see Khier Guechi. *Reservations* , supra note 4,pp.435-466.

(72) *Ibid.*, p.442, para. 113.

therefore invalid ([73]). This approach has been developed by L Preuss ([74]) and Waldock ([75]), and fully exhausted by the late judge Sir H Lauterpacht in the *NORWEGIAN* LOANS([76]) and the *INTERHANDEL*([77]) cases. In these cases, judge Lauterpacht based his view on the understanding that the reservation has an "automatic" effect. By this he meant that the invocation of the reservation rendered the Court function an automatic one limited to "registering" that invocation without examining its merits. The Court, therefore, "is bound to hold ... that it is without jurisdiction"([78]). This

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(73) See H. Lauterpacht. "the British Reservations to the Optional Clause". *10 Economica (1930)*. pp. 137-172. at 154. 169. and M. O. Hudson, *the Permanent Court of International Justice 19201942. A treatise*. 1943. p.397 and "Obligatory Jurisdiction Under Article 36 of the Statute of the Permanent Court of International Justice". 19 *Iowa L.R.* (1934), pp. 190-217. at 208-209.

(74) "Questions Resulting from the Connally Amendment". 32 A.B.A.J. (1946) pp. 660-662. 721.

(75) "The Plea of Domestic Jurisdiction Before International Legal Tribunals", 31 *B.Y.B.I.L.* (1954), pp. 96-142. at 131-137 and Decline of the Optional Clause", 32 *ibid.*, (1955-56), pp.244287. at 271-273.

(76) 76 Cited supra note 5,pp.34-66.

(77) Cited supra note 23. pp.95-125. It is to be observed that the Senate Foreign Relations Committee rejected a reservation similar to the Connally reservation proposed by Senator Austin on the same grounds. The Report of the Committee stated:
"The Committee... decided that a reservation of the right of decision as to what are matters essentially within domestic jurisdiction tend to defeat the purposes which it is hoped to achieve by means of the proposed delegation as well as the purposes of Article 36. paragraphs 2 and 6 of the StatuteoftheCourt.".SenateReportNo.1835,supranote6,pp.4-5.
Senator Papper relied also on these grounds in his argument that the reservation was invalid. 92 Cong. Rec., No. 154. August 2. 1946. p. 10837.

(78) I.C.J. Reports 1957, p.34 and 1959, p.59.

understanding leads to the conclusion that the reservation is invalid, and its invalidity nullifies the entire instrument containing it.

(i) Invalidity of the reservation

In arguing for the invalidity of the subjective reservation of domestic jurisdiction two basic grounds are usually relied on, each of which is said to be capable of nullifying such a reservation: the inconsistency of the reservation with the Statute of the Court and the Charter of the United Nations, and the lack of the element of legal obligation in it.

(a) Inconsistency of the reservation with the Statute and the Charter

The Court is obliged to function according to its Statute. This obligation is provided for expressly in both Article 1 of the Statute and Article 92 of the Charter. Article 36 (6) of the Statute provides:

"In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court".

Thus, it is argued that this text does not only confer a right on the Court, but also obliges it, and not the interested party, to decide on its own jurisdiction ([79]). The Court's

(79) Lauterpacht's Sep. Op. in the *Norwegian Loans case* . I.C.J. Reports 1957, p.43. See also C.H.M. Waldock, the Plea .... supra note 75, p.133, R.P. Anand, *compulsory Jurisdiction of the International Court of Justice, 196* 1, p.204. Comp B. Maus, supra note 15, pp. 156-157.

jurisprudence indicates that neither the Court nor the parties to a case before it can depart from the provision of the Statute. In the *FREE ZONES OF UPPER SAVOY AND DISTRICT OF GEX* the P. C. I. J. refused to comply with demands made by both parties to the case that it should communicate to them unofficially the result of its deliberations. It refused to do so because it found that the request was in conflict with "the spirit and letter of its Statute". Consequently the P. C. I. J. said that it "cannot, on the proposal of the parties, depart from the terms of the Statute"([80]).

The present Court has also confirmed this principle. In its Advisory Opinion of July 7,1955 concerning the *VOTING PROCEDURE OF THE GENERAL ASSEMBLY IN THE MATTER OF PETITIONS FROM SOUTH WEST AFRICA* the Court held that the General Assembly cannot act except in accordance with the Charter ([81]).

It is argued that if the Court refused to depart from the Statute at a request made by both parties, it would be still less able to do so at the request of one party alone ([82]). This argument is further supported by the insertion of the new provision in Article I of the Statute and Article 92 of the

(80) *Free Zones of Upper Savoy and District of Gex*, Order of 19 August 1929, P.C.I.J., Series A, No. 22, p. 12.

(81) *Voting Procedure on Questions Relating to Reports and Petitions Concerning the South West Africa*, Advisory Opinion, I.C.J. Reports 1955, p.67, at 76.

(82) C.H.M. Waldock, the Plea ... supra note 75, p.133 and Lauterpacht's Sep. Op. in the *Norwegian Loans* case, I.C.J. Reports 1957, p.45. See also Armand-Ugon's Dis. Op. in the *Internandel case, idid.*, 1959, p.93.

Charter requiring the Court to function in accordance with the Statute([83]).

Accordingly a reservation depriving the Court of its right to decide on its own jurisdiction and preventing it from performing the duty imposed upon it by the Statute by keeping that decision in the hands of the interested State runs against general provisions of the Statute and the Charter as well as against a specific provision of the latter.

To add even further force to this argument, it is said that the subjective reservation also runs against "one of the most fundamental principles of international - and - national - jurisprudence according to which it is within the inherent power of a tribunal to interpret the text establishing its jurisdiction"([84]). Both the present Court and its predecessor, the P. C. I. J., have recognized this principle even in the absence of any provision to that effect ([85]). The most extensive treatment of this principle was in the *NOTTEBOHM* case where the Court said:

"Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international

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(83) See C.H.M. Waldock, *ibid.* and R.P. Anand, supra note. 79, p. 204.

(84) Lauterpacht's Sep. Op. in the *Norwegian Loans* case. I.C.J. Reports 1957, p.44. See also J.B. Elkind, supra note 5, p. 1 19 and H W. Briggs. Reservations ... supra note 6, pp.356-357. For Article 36(6) in general see esp. I.F.I. Shihata, supra note 31 and G. Berlia, "la Jurisprudence des Tribunaux Internationaux en ce qui Concerne leur Competence".88 *R.C.A.D.I.* (1955), pp. 1 12-160.

(85) For an examination of this principle in the jurisprudence of both Courts see I.F.I. Shihata. *ibid.*, pp.34-38.

law in the matter of international arbitration. Since the *ALABAMA* case, it has been generally recognized following the earlier precedents, that in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction"([86]).

The importance of Article 36(2), being inserted deliberately into the Statute as an indispensable safeguard for the operation of the system of compulsory jurisdiction, refutes, it is submitted, the attempt which contemplates bringing the reservation within the four corners of conformity with Article 36(6)([87]) by arguing that it is still for the Court to decide upon the jurisdiction conferred upon it by a declaration containing such a reservation "although it will have to say that no jurisdiction exists when [the invoking State] has determined that a matter is within domestic jurisdiction"([88]). This argument has been criticized as a formal examination of Article 36(6) ignoring its substance ([89]) and transforming the Court's power to determine its jurisdiction to one of a "verbal character" or "dialectical character"([90]), or a ministerial one

(86) *Nottebohm*, Preliminary Objection, Judgement. I.C.J. Reports 1953. p. III, at 1 19.

(87) See Lauterpacht's Sep Op. in the *Norwegian Loans* case, I.C.J. Reports 1957, pp.47-48.

(88) M.O. Hudson, "World Court - America's Declaration Accepting Jurisdiction", 32 *A.B.A.J.* (1946), pp.832-836, 895-897, at 835. See also H. Kelsen, *the Law of the United Nations. 1950*, p.529. But Comp. his view in *Principles of International Law*, 2nd. Revised ed. (R.W. Tucker ed.), 1966, pp.538-539.

(89) C.H.M. Waldock, Decline .... supra note 75, p.272.

(90) Lauterpacht's Sep. Op. in the *Norwegian Loans* case, I.C.J. Reports 1957, pp.47-48.

confined to registering the determination made by the interested State.

(b) Inconsistency of the reservation with the requirement of a legal obligation

An instrument containing this reservation cannot, it is argued, be considered as a declaration in the sense meant in Article 36(2) of the Statute. This Article contemplates an acceptance of "obligation" of "compulsory jurisdiction". A State making such a reservation has undertaken an obligation to the extent that it, and it alone, considers that it has done so. What does this mean? Judge Lauterpacht answered:

"This means that it has undertaken no obligation. An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument. It is a declaration of a political principle and purpose"([91]).

Consequently the reservation is in conflict with the purpose an object of the system of compulsory jurisdiction. For, whereas this system purports to ensure the adjudication of disputes upon the application of single party, the reservation conditions the obligation to adjudicate "upon further expression of consent after the specific dispute has arisen"([92]).

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(91) *Ibid*, p.48. See also A. Yancov, "les Réserves dans les Declarations d'Acceptation de la Juridiction Obligatoire de la Cour International de Justice", 52 *A.U.S.F.D.* (1961), pp.586-597, at 594 ; C. Vulcan, "la Clause Facultative", 18 *Acta S.J.G.* (1947-48), pp.30-55, at 51, and C.H.M. Waldock, Decline supra note 75, p.272.

(92) L. Preuss, Questions .... supra note 74. See also C.H.M. Waldock, the Plea .... supra note 75, p.131 ; M. Rague, "the reservation Power and the Connally Amendment", 11 *N. U.J.I.L.P.* (1978), pp. 323-358, at 343, and J.D. Arndt, "Intentional Court of Justice- Legal Effect, Constitutional and International, of Connally Amendment", 28 *U. Kans. C.L-R.* (1959-60), pp 1-34, at 17.

The natural conclusion of the above arguments is that the subjective reservation of domestic jurisdiction is void. It is a reservation of the same kind as the request made to the P. C. I. J. in the *FREE ZONES* case. It does not differ from a proviso stipulating that the Court's decision would not be binding unless given by unanimity, or one excluding certain judges of certain nationality([93]). This conclusion cannot, it is argued, be affected by the argument that the Statute is interpreted in practice to permit reservations to the Court's jurisdiction, and that since States are free to accept or not to accept the jurisdiction they can limit their consent by whatever reservations they think fit. No doubt, it is true, that Article 36(2) has been interpreted to permit reservation and that the jurisdiction depends on the consensus of the agreement of the parties. Yet the freedom to insert reservations is limited and the Court's jurisdiction depends on a further condition, namely, whether such consensus is compatible with the Statute. Reservations to the functioning and organization of the Court are not permitted. They cannot limit the duties and rights conferred upon the Court by the Statute. The *FREE ZONES* case is illustrative ([94]).

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(93) See the Sep. Op. of Judge Lauterpacht in the *Norwegian Loans* case I.C.J. Reports 1957, pp.44-45.

(94) See the Sep. Op. of Judge Spender in the *Internandel* case. I.C.J. Reports 1959, p.55 : the Diss. Op. of Judge Armand-Ugon. *Ibid.*, p.92 : the Diss. Op. of Judge Lauterpacht, *ibid.*, p. 103 and his Sep. Op. in the *Norwegian Loatis* case, I.C.J. Reports 1957, p.45. and the Diss. Op. of Judge Gueffero, *ibid.*, p.68. The Above arguments for the invalidity of the reservation had been expressly shared by six Judges : Guerrero and Lauterpacht in the *Norwegian Loans* case [I.C.J. Reports 1957, pp.68-69 and 34-66 respectively.], Lauterpacht, Speiider, klaestad, Judge *ad hoc* =

The inequality between the reserving State and a non-reserving one, where the latter is the respondent, is also put forward as another reason for the nullity of the reservation. It is said that the reservation may put the reserving State in an advantageous position. For it can force any other State to come before the Court unless the other party is prepared to resort to a "distasteful and impolite determination". In such a case, it throws on the respondent State the difficulty and embarrassing responsibility of relying on a reservation that it might consider odious, in cases where it might find it wiser not to make a determination that may be quoted against it on another occasion. In such a case only the invalidity of the reservation would remove the inequality ([95]).

(ii) Invalidity of the entire declaration

According to this approach, the criterion upon which the effect of an invalid reservation on the whole declaration is to be determined is the importance of the reservation for the acceptance of the Court's jurisdiction The reservation can be

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= Carry who declared that he agreed with Klaestad. and Armand-Ugon in the *Interhandel case* | I.C.J. Reports 1959. pp.95-118; 54-59; 75-78; 32; 91-94 respectively. Judge Read also shared the same view in case the reservation were to be given an automatic effect.

(95) C.H.H. Waldock. the Plea .... Supra note 75. pp. 135-136 and the Sep. Op. of Judge Lauterpacht in the *Norwegian Loans* case. I.C.J Reports 1957, p. 65 In fact. Judge Lauterpacht had fully agreed with Waldock except on the value of the declaration containing such a reservation. Whereas it appeared to Waldock of certain value as a basis for the operation of jurisdiction *forum prorogatum*, Lauterpacht considered it of no value of whatsoever Ibid., pp. 133-134 and 64 respectively.

severed from the declaration only if it does not constitute an essential part of the instrument. Having found that the subjective reservation of domestic jurisdiction was the crucial part of the declaration, judges Sir H. Lauterpacht ([96]) and Sir Percy Spender ([97]) agree that it could not be ignored, or otherwise the decision would run against the will of the reserving State and the fundamental principle of international judicial settlement confirmed by the established practice of the Court, that the Court cannot uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt. Consequently, declaration containing such a reservation is incapable of conferring any jurisdiction on the Court. However the grounds on which this conclusion was reached were different. While judge Sir P. Spender relied exclusively on the terms of the reservation, which appeared to him clear enough to the extent of precluding any reference to the preparatory works ([98]), judge Sir Lauterpacht relied on both the terms of the reservations and their preparatory works, or the circumstances in which they were made ([99]).

This approach has been adopted by most authorities including Charles De Visscher ([100]), L Preuss ([101]), Dubisson ([102]), R Y Jennings ([103]), and R P Anand ([104]).

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(96) I.C.J. Reports 1957, pp.55-60, and 1959, p.101.
(97) I.C.J. Reports 1959, pp.57-58.
(98) *Ibid.*, p.57. Judge Spender thought that the reference to the preparatory works was not permissible. "Nor, were it permissible, would be necessary or profitable".
(99) CJ. Reports 1957, pp. 57-58, and 1959, pp. 103, 106-111.
(100) Supra note 55, pp. 416-421.

(II) Valid Acceptances Containing Invalid Reservations

The difference between this approach and the previous one lies in the effect of the invalidity of the subjective reservation of domestic jurisdiction. Unlike the first, this approach holds the severability of the reservation, or the offending words in it, namely, "as determined by the declarant State"(105). Different arguments have been advanced in support of this view. While judge Guerrero did not indicate the reason for which he favoured the separation of the reservation from

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(101) Questions .... supra note 74, pp.661-662.

(102) Supra note 55, p.189.

(103) Supra note 5, pp.361-362.

(104) Supra note 79, p.203. This is, of course, in addition to those mentioned before such as C.H.M. Waldock, the Plea .... supra note 75. pp. 131-137 and Decline ...., supra note 5, pp.371-273 ; G. Berlia, supra note 84, pp. 1 15-118 ; B. Maus, supra note 15, p. 1 57, and M.A. Rague. supra note 92. See also K. Holloway, *Modern trends in treaty Law,* 1967, pp. 687-688. Comp. the cautious attitude adopted by S. Rosenne, the Law ..., supra note 5. pp.398-399 and J.P. Kelly, the International Court of Justice: Crisis and reformation", 12 *N.YJ.I.L.* (1987), pp. 342-374, at 359. Many other writers hold the view that the reservation is invalid but without indicating the effect of such invalidity on the declaration as a whole. See e.g. D.H. Ott, *Public International Law in the Modern World,* 1987, p.343 and C. Vulcan, supra note 90. p.5 1.

(105) While Judge Geffero did not raise the issue (Diss. Op. in the *Norwegian Loans* case, I.C.J. Reports 1957, pp.67-70), Judges Lauterpacht *(ibid.,* pp.55-56), Klaestad and Armand- Ugon (Diss. Ops. in the *Interhandel* case, I.C.J. Reports 1959, pp. 76 and 93) referred to the severance of the offending words. In fact Judge Lauterpacht rejected the possibility of severing the whole reservation, *Ibid.* However this seems to be a theoretical question if it is admitted that the objective reservation of domestic jurisdiction is unnecessary. See Khier Guechi, Reservations, supra note 4, pp. 240-279.

the declaration([106]), the intention of the reserving State appeared to judges Klaestad and Armand-Ugon in the *INTERHANDEL* case to be the determinant factor. This is in spite of the fact that the former thought that the invalidity of the offending words precludes the Court from acting upon them([107]) and the latter believed that the Court may, in performing its duty to safeguard its Statute, "appraise the legality of the different parts of the declaration in order to determine whether the relevant clauses of the Statute have been correctly applied"([108]). However, they both agreed that an interpretation invalidating the whole declaration as a result of the nullity of the reservation would lead to results contrary to the intention of the declarant State. The consequences of the invalidity of the declaration would be that the reserving States could neither sue nor be sued under Article 36 (2). In other words, the reserving state could find itself in the same position as States, which have not submitted to the compulsory jurisdiction. Both judges had no doubt that the reserving State - at least in this case - intended to make a real and effective declaration, though with far reaching reservations([109]).

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(106) *Ibid.* Comp. his view in "la Qualification unilatérale de la Competence Nationale", in Constantopoulos *et al* (eds.), *Grundprobleme des Internationalen Rechts,* 1957, pp.207-212.

(107) I.C.J. Reports 1959, p.76.

(108) *Ibid.,* p.91. However, Judge armand- Ugon had come to the conclusion that the Court should regard the offending words in the reservation as "unwritten and inoperafive. They should be declared without effect *vis-a-vis* the Court." *Ibid.* Comp. G. Schwarzenberger, supra note 5, pp.502-503.

(109) *Ibid.,* pp.77-93.

Judge Armand-Ugon advanced another argument. A declaration accepting the Court's jurisdiction under Article 36(2) consists, in his view, of two elements: acceptance, and reservations. They are distinct elements of a single judicial act. Nothing justifies treating them as an indivisible whole. He considered the offending words in the reservation as "an accessory stipulation"([110]).

The implication of these arguments is that it might lead to the same result as the first approach, i.e. the invalidity of the whole declaration. This would be the case where evidence is to the effect that there would have been no acceptance without this reservation being attached to it.

Professor Briggs adds two other arguments for the severability of the reservation. The first is based on the rule of interpretation adopted by the Court in the *RIGHT OF PASSAGE* case, according to which "a text emanating from a government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it"([111]). The second is based on the rule in the *NOTTEBOHM* case, which prevents a unilateral attempt to withdraw jurisdiction in a case already pending before the Court from depriving the Court of jurisdiction already established([112]).

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(110) *Ibid.*, p.91.

(111) *Right of Passage over Indian Territory*, Preliminary Objections. Judgement, I.C.J. Reports 1957, 125, at 142. See H.W. Briggs. Reservations .... supra note 6, p.361.

(112) H.W. Briggs, *Ibid.* For this rule see Khier Guechi, Reservations . supra note 4, p. 101. Shihata describes this argument as =

In order to release the Court from the invidious task of pronouncing the validity of the reservation while at the same time holding its jurisdiction in a case referred to it under a declaration containing such a reservation, Professor Leo Gross advances the rule governing the conflict between the obligation undertaken and the Charter of the United Nations and other obligations. Since the Statute "forms an integral part of the Charter" (Article 92 of the Charter) an obligation leaving the determination of jurisdiction to the parties concerned cannot, by virtue of Article 103 of the Charter, prevail over the obligation resulting from Article 36 (6) of the Statute, the Court can ignore the reservation without having to declare on its validity. In other words, by invoking Article 103 of the Charter, the Court would need only to find whether there exists a conflict between two obligations ([113]). Professor Gross argues that the application of the charter would be in line with the practice of the Court in showing respect for the sovereignty of a State and at the same time allows the Court to perform its duty as a guardian of the system of compulsory jurisdiction([114]).

= a "weak" one, supra note 31, p.289. Comp. J.B. Elkind. supra note 5, p.160. There is a difference between the "unilateral attempt " referred in the *Nottebohm* case and the subjective reservation of domestic jurisdiction. While the letter is "an intrinsic fact build into and forms an integral part of the declaration", the former was an extrinsic fact of the termination of the declaration after the seisin. See L. Gross, Bulgaria Invokes ..., supra note 62. p.748 and I.F.I. Shihata *ibid.*

(113) L Gross, *ibid.*, pp.749-750.

(114) *Ibid.*, p.750.

(III) Reasonableness and Good Faith Tests: "Amelioration by Interpretation"

During the debates over the United States reservation of domestic jurisdiction many Senators, among whom Senator Connally himself - the author of the reservation - expressed the view that the United States would never use its reservation unreasonably and in bad faith ([115]). Many writers have also shared the same view without indication to what would happen if the reservation is used arbitrarily. Nor did they indicate the criterion to be applied for the determination of reasonableness or good faith([116]). The invocation of these tests besides that of *ABUS DE DROIT* in some cases before the Court - as has been seen – ([117]) has given new life to this approach([118]). The basic understanding of this approach is the rejection of a rigid and literal interpretation of the words of the reservation ([119]). It is

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(115) See e.g. Senator Connally's statement on August 2, 1946. 92 Cong. Rec. No.154, p.10833. See also Senator Morse's view , *ibid.*, p. 10831.

(116) See e.g. A.J. Schweppe, "the Connally Reservation Should not be Withdrawn", 46 *A.B.A.J.* (1960), pp. 732-736, at 736, O.J. Lissitzyn, *the International Court of Justice, : Its Role in Maintenance of International Peace and Security*, 1951, p.65 ; L Henkin, "the Connally Reservation Revisited and, Hopefully, Maintained", 65 *A.J.I.L.* (1971), pp.374-377, at 376, and F.O. Wilcox, supra note 6,.712.

(117) Seethe *Norwegian Loans; Interhandel, and Aerial Incident* cases, pp. 6 - 10 above.

(118) L. Gross has attributed this approach to Professors Guggenheim and Bourqui in their arguments in the *Norwegian Loans* case as Co- Agent and Advocate of the Swiss Government. See Bulgaria Invokes .... supra note 62, p.745.

(119) See e. g. the Diss. Op. of Judge Read in the *Norwegian Loans* case, I.C.J. Reports 1957, p.92, but see his interpretation of the words of the French reservation , Khier Guechi, Reservations, =

argued that the view that the words of the reservation are clear and therefore do not require an interpretation begs the decisive questions, namely, which interpretation should prevail, the literal or equitable? Moreover, the maxim *UT RES MAGIS VALEAT QUAM PEREAT* comes into play as long as the absolute interpretation - i.e. that giving to the reservation a peremptory effect - might lead to doubts as to whether the reservation, and hence the whole declaration is valid ([120]).

Two other principles have also been advanced against the absolute interpretation. The first is that cited above, which was pronounced by the Court in the *RIGHT OF PASSAGE* case requiring the interpretation of any text emanating from a government "as producing or intended to produce effects in accordance with the existing law and not in violation of it"([121]). The second is that laid down by the P. C. I. J. in the *POLISH POSTAL SERVICES IN DANZIG*([122]) case and confirmed by the present Court in its advisory opinion on *COMPETENCE OF ASSEMBLY REGARDING ADMISSION TO THE UNITED NATIONS*([123]) that:

"It is a cardinal principle of interpretation that words must be interpreted in the sense they would normally have in

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= supra note 4,p 390 . See also R.B. Schlesinger, supra note 10, pp.689- 690.

(120) R.B. Schlesinger, *ibid.*

(121) See note III above.

(122) *polish Postal Service in Danzig*, Advisory Opinion, 1925, P.C.I.J. Series B, No. I I, p.39.

(123) *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p.4, at 8.

their context, unless such interpretation would lead to something unreasonable or absurd".

An interpretation leading to the nullification of the acceptance must thus be rejected ([124]).

However, this interpretation was canvassed particularly by the supporters of the first and second approaches, but has been rejected. The application of good faith, reasonableness and abuse of rights tests have been criticized on many grounds. Firstly, it is argued that the Court has no power to exercise control over the determination made by a State. If the Court attempts to do so, it would arrogate to itself a power which has been expressly denied to it and kept by the reserving State for itself([125]). For instance, it was observed that the requirement of good faith would add the proviso "provided it is so determined by [the declaring State] in good faith"([126]). Secondly, it is difficult for the Court to attribute bad faith; unreasonableness, or *ABUS DE DROIT* to a sovereign State. The Court must be guided with great caution in this respect([127]). Furthermore, the comprehensiveness of the scope of the reserved domain makes it very difficult to conceive situations where a State uses so

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(124) See the Diss. Op. of Judge Read, I.C.J. Reports 1957, pp.94-95 and J.B. Elkind, supra note 5, pp. 163-164.

(125) The Sep. Op. of Judge Lauterpacht in the *Norwegian Loans* case, I.C.J. Reports 1957, pp. 52-53, and his Dis. Op. *Interhandel* caseibid.,1959, p.112, see also J. Crawford, supra note 10, p.67.

(126) The Sep. Op. of Judge Spender's in the *Norwegian Loans* case, I.C.J. Reports 1957, p.59.

(127) The Diss. Op. of Judge Lauterpacht in the *Interhandel* case. I.C.J. Reports 1959, p.1 12.

extravagantly and arbitrarily its reservation([128]). Finally, it is said that the practice of the Court excludes the application of these tests. Thus it did not apply them in the NORWEGIAN LOANS case([129]).

In reply to this criticism, it is argued that this approach had been adopted by States, though inconsistently by some, before the Court ([130]). The cases in which the reservation was invoked show that the reservation was not invoked in a way putting an end to the proceedings. Rather, it was invoked as a preliminary objection in the same manner as other reservations are invoked ([131]). It is also observed that if the intention of the reserving State was to exclude any control over a determination made by itself, the reservation would have been phrased as follows: "Provided, that this declaration shall not apply to any dispute which this government decides to withdraw from the jurisdiction of the Court", instead of using the reservation in question as a subterfuge ([132]). Even if there is still some doubt as to the intention of the reserving State, it might be argued that intention is respected. For the determination of the nature

(128) *Ibid.*, and the Sep. Op. in the *Norwegian Loans* case, I.C.J. Reports 1957, p.53. See also Ch. de Visscher, supra note 55, pp.418-419 and S. Prasasvinitchai, supra note 22, pp.108-109. G Schwarzeiiberger, considers Lauterpacht's argument on the non-applicability of the good faith principle as one "gratuitously attested" to the protagonists of the subjective reservations, supra note 5, p.504.

(129) The Diss. Op. of Judge Lauterpacht , *ibid., p.* II 1.

(130) See the Norwegian, Swiss and American arguments in the *Norwegian loans; Interhandel, and Aerial Incident* cases, pp. 6-11.

(131) J.H. Crabb, supra note 5, pp.534-535.

(132) *Ibid.*, p.537.

of the dispute is to be made by the interested State, but such a determination is subject to the Court's control ([133]).

The difficulties of attributing bad faith, unreasonableness, abuse of right, and those inherent in arriving at a classification of "domestic" or "international" jurisdiction are generally admitted. However it is argued that such difficulties scarcely warrant the conclusion that the reservation confers on the reserving State an absolute power to defeat the Court's jurisdiction([134]). They should not prevent the Court from applying these tests. On the contrary, the Court must apply - at least the principle of good faith - pursuant to Article 38 (c) of its Statute, since it is a general principle of law([135]). The Court's jurisprudence, it is submitted, is clear on this point. In the *NUCLEAR TESTS* case, second phase, the Court said:

"One of the basic principles governing the creation and performance of legal obligations, whatever their sources, is the principle of good faith"([136]).

This holding was confirmed by the Court in the *MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA case* Jurisdiction and admissibility)([137]).

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(133) D.W. Greig, *International Law*, 2nd ed.,1976, pp.655-656.
(134) See J.B. Elkind, supra note 5, p.163 and J.H. Crabb, supra note 5, p.541.
(135) J.B. Elkind, ibid., pp.162-163.
(136) *Nuclear Tests* (Australia v. France), Judgment, I.C.J. Reports 1974, p.253, at 473.
(137) Cited supra note 66, p.418, para.60.

As to the non-exercise of control over the determination made by Norway in the *NORWEGIAN LOANS* case, it is maintained that the Court did not adopt the absolute interpretation, although it declined jurisdiction because of Norway's reliance on the reservation. The Court had no occasion to consider the question of reasonableness or good faith raised by Norway because France did not contend whether Norway's determination was made in bad faith or unreasonableness ([138]).

Although the supporters of this approach agree that the absolute interpretation should be avoided, they do not agree as to how the reasonableness and good faith tests are to be applied. While judge Read had limited his view to the reasonableness test according to the specific circumstances of every case([139]), others seem to generalize on the application of these tests([140]). However, there is a general agreement among the supporters of this approach that the Court examines its control over the truth or falsity of a declaration or whether it

(138) R.B. Schlesinger, supra note 10, pp.687-688 and J. H. Crabb, supra note 5, p.539.

(139) See his Diss. Op. in the *Norwegian Loans* case, I.C.J. Reports 1957, p.94. Judge Read was disclined to apply the test of good faith or *abus de droit* because the Court could not examine a dispute between two sovereign States on the basis of these pfinciples. However he found in the Norwegian argument of the international question in 134 pages an indication that Norway intended to leave the determination of the character of the matter to the Court. *Ibid., p.93.*

(140) See e.g. J.B. Elkind, supra note 5, pp.157-164 ; R.B. Schlesinger, supra note 10, pp.685697, and J.H. Crabb, supra note 5, pp.531-543.

was made in good faith or bad faith according to an objective criterion, namely, international law ([141]).

Thus, the net result of this approach seems to be similar to that of the second approach. They both lead to the conclusion that only matters which are according to international law within domestic jurisdiction are covered by the reservation in question.([142]) In other words, the reservation is not subjective but it is another variant of the objective formula of the reservation of domestic jurisdiction. The only difference between them is that according to the latter the Court decides whether a matter is DOMESTIC as a matter of law, regardless of the determination alleged by the parties concerned, or whether it is reasonable and made in good faith([143]).

(IV) Valid Reservation

Unlike the previous approach, which holds the validity of the reservation as long as the intention of the reserving State is not clear that it intended to give the reservation an absolute effect, this approach is based on the understanding that the meaning of the reservation is clear. It has an automatic effect depriving the Court of jurisdiction if it is invoked. Yet it is not incompatible with the Statute. The difficult task of this

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(141) See D.W. Greig, supra note 133, pp.655-656 and R.B. Schlesinger, supra note 10, p.687 note 6. See also I.F.I. Shihata, supra note 31, p.290.

(142) See I.F.I. Shihata, *ibid.*, p.291.

(143) See J.H. Crabb, supra note 5, p.539.

approach is, thus, to counter the arguments of invalidity put forward by the proponents of approaches 1 and 2.

(i) Consistency with Article 36 (6) of the Statute

To prove the consistency of the reservation in question with Article 36(6), reliance has been made on the interpretation limiting the Court's power under Article 36(6) to what the proponents of the first and second approaches described as a "verbal" or "dialectal" power confined to if registering" the determination made by the interested State([144]). There is nothing wrong, it is observed, in limiting the Court's power to determine its jurisdiction to a ministerial one. The Court's function is sometimes confined to registering a course of action taken by the parties and suspend or terminate proceedings([145]). This is so where the parties, for example, pursuant to a common reservation "agree to have recourse to another means of peaceful settlement"([146]). In support of this argument the attention is drawn to the circumstances in which the reservation might leave a residuum of decision-making power. This would be the case where the reservation is not invoked in the first responsive pleading. In such a case the Court, and the

(144) See Khier Guechi, Reservations , supra note 4. pp.403-404

(145) See J. Crawford. supra note 10. p.72. Professor E.J. Macdonald is of the same view. In spite his admission of the merits of the inconsistency argument, he points out that if paragraph 6 of Article 36 "can be interpreted as consistent with the automatic reservation. then presumably it is the duty of the Court to so interpret it ". "'Automatic Reservations and the World Court". 47 *Georgt.L.J* (1958). pp.106-123. at 117.

(146) Crawford, *ibid.*

Court alone, would be empowered to decide its jurisdiction(147). However, assuming the correctness of this argument, no explanation is given to the case where the reservation is not invoked at that stage, but the right to do so later is reserved.

(ii) Consistency with Article 36 (2)

Although it is conceded that it is hard to see exactly what obligation is accepted by a declaration containing the subjective reservation of domestic jurisdiction, it is maintained that the reservation is not inconsistent with Article 36 (2) of the Statute. This is because, firstly, Article 36 (2) does not require implicitly that a substantive obligation is assumed. Such a requirement is not clear in spite of the reference to the terms "obligation" and "compulsory". For, the former "is more descriptive of what is recognized than a requirement of what should be" and the latter "is certainly stronger, but an automatic declaration does constitute *SOMETHING*, even if only a procedure"(148). Secondly, it is pointed out that the argument depriving the declaration of the character of a legal obligation because of its inconsistence with the requirement of a "legal obligation" is based on private law standard the application of which would

(147) E.J. Macdonald, supra note 145, p. 1 19. It is argued also that Art. 36(6) does not empower the Court to invalidate an acceptance or to interpret reservafions included therein. See E.J. Macdonald. *ibid.*, *pp.* 1 12-115 and G. Cottereau. *la Position de la France a l' Egard de la Jurisdiction International*. thesis (Univesitd de Paris V). 1980. pp.388-390. For counter arguments see R. Layton supra note 8. pp.323-354. Comp. M.J. Glennon, "Protecting the Court's Institutional Interests : Why not the Marbury Approach?", 81 *A.J.I.L.* (1987). pp. 121-129. at 124-125.

(148) j. Crawford. supra note 10. p.75 (emphasis added).

invalidate a large number of declarations made under Article 36(2). This is so because declarations terminable at any time without notice would also fall down. "It should be evident that these acceptances and these containing the automatic reservation stand in PARI DELICTO, and attempts to denounce the one while justifying the other can only be idle folly"([149]).

State practice has also been relied on as a proof of consistency of the reservation with the Statute. It is argued that the reservation has come to be accepted in practice as a permissible reservation to Article 36 (2). This is because it has been accepted by a number of States and its validity has never been contested through diplomatic channels even by those which have shown themselves assiduous in protecting the compulsory jurisdiction. Thus they are, prepared, at least tacitly, to acquiesce in it. This practice constitutes therefore a subsequent interpretation of Article 36 (2)([150]).

Two further grounds for the validity of this reservation have been added recently by James Crawford: the "applicable principles of law" and the consideration of "automatic declarations" as another way of access to the Court ([151]). Under the first, he argues that declarations of acceptance, being not

(149) E.J. Macdonald, supra note 145, p.122.
(150) See J. Crawford, supra note 10, pp.81, 82, 85 and D.W. Greig, supra note 133, pp. 652-654. Comp. S. Rosenne, the Law .... supra note 5, pp. 397-399. For this argument see also M.A. Rague, supra note 92, pp.341-342.
(151) *Ibid.*, pp.75-85.

multilateral treaties, are not governed by treaty reservation rules. If these rules, viz. Article 20 of the Vienna Convention on the Law of Treaties (V.C.L.T.) are extended to declarations by analogy, being customary international law, they would prohibit reservations altogether on two distinct grounds. Firstly, Article 36(3) of the Statute allows declarations to be made unconditionally or on condition of reciprocity for a certain time only [Article 19 (c) of V.C.L.T.]. Secondly, the Court has not expressly accepted particular reservations to its "constituent instrument".

[Article 20(3) of V.C.L.T.][(152)]. As he thinks that the reservation in question is not inconsistent with Article 36(6) of the Statute and therefore not if prohibited" by that Article, Crawford emphasizes that the relevant issue must be whether the reservation is "inconsistent with the object and purpose" of the Optional Clause [Article 19 (c) of V.C.L.T.]. He argues that this test is not applicable to the declarations of acceptance, because it can entail different interpretations [(153)]. The Court should be reluctant to substitute its own view for a consistent State practice either in accepting a particular view of the object and purpose of a treaty or in not objecting to the reservation in question on that ground, Crawford argues. He concludes that:

(152) *Ibid.*, p.79.

(153) *Ibid.*, p.81. Thus he adopts Kelsen's view that " if almost any reservation has the effect of restricting the purposes and objects of Article 36, it is not easy to determine at what point the cumulative effect of such reservation, or the quality of a particular reservation, may prove incompatible with such purposes and objects.". *Principles of International Law* , supra note 88, pp.538-539 note 114.

"The application of treaty reservation rules could well entail that automatic reservations have been accepted, under the customary analogue to the treaty reservation rules in the Vienna Convention, as not inconsistent with the object and purpose of the Optional Clause"[(154)].

In the light of State practice as mentioned above, Crawford argues also that the application of ordinary principles of vires leads to the same result, namely, the validity of the reservation. This is so because States, on a bilateral basis, so long as no underlying issue of *JUS COGENS,* or basic element of the Court's structure is involved, can accept States making the subjective reservation of domestic jurisdiction as parties vis-a-vis themselves [(155)].

Under the second ground, namely, "automatic declarations" as another way of access to the Court, which is the most convincing approach in his view, Crawford argues that even if the instrument containing the automatic reservation is incapable of generating legal consequences or entails no immediate legal obligation, it does not follow automatically that such instrument is void. A conclusion drawn on the existence of general principle invalidating that instrument "fails to distinguish the voidness of an instrument, for example where an overriding legal rule deprives it absolutely of legal effect, and the presence of obligation or legal content of an instrument which is capable of generating legal consequences, for instance by a subsequent course of conduct"[(156)]. The reservation in

(154) J. Crawford, *ibid.*, pp.81-82.
(155) *Ibid.*, p.82.
(156) *Ibid.*, p.83.

question falls, in Crawford's view, in the latter category. Explaining this point, Crawford points out that an instrument is void where it fails to comply with the requirements of the procedure set forth for the achievement of the results for which the instrument was made only where there exists no other procedure. However, if that object can be achieved by another procedure fulfilling the required conditions, the instrument will not be invalid. "An act ULRA VIRES under the intended head of power may turn out to be valid under another"(157).

Thus Crawford cannot see anything that could prevent a State accepting the Court's jurisdiction under Article 36 (2) of the Statute; from considering a State, which has made a declaration to similar effect, but under Article 36 (1) as if the latter was party to the compulsory jurisdiction system under Article 36 (2). This is so inasmuch as the difference between acceptance of the Court's jurisdiction under paragraphs 1 and 2, of Article 36 is that, under the former, the obligation is assumed vis-a-vis other declarants and not just any State which has accepted the Court's jurisdiction *AD HOC* or by treaty. Thus he likens a declaration containing subjective reservation to one made by a non-member of the United Nations according to Security Council Resolution 9(1)(158). Accordingly Crawford concludes that:

"an automatic reservation is not void: it is in law an Article 36 paragraph I procedure which is intended to have effect vis-a-vis parties to the Optional Clause, but which

(157) *Ibid.*
(158) See the text in I.C.J.Y.B., 1986-87, p.47.

requires the latter's consent or acceptance to operate as such"[159].

D - A LIMITED CHOICE

Since the likelihood is remote, if not impossible, that a State would contest the validity of its own reservation, the question of validity might be raised by a non-reserving State in two hypotheses: as a respondent or applicant. In the first hypothesis, It may argue that the reservation is invalid and its validity entails the nullity of the whole declaration. Although this hypothesis is not excluded especially if the defendant State finds it wiser - as already mentioned - [160] not to make a determination that may be quoted against it on another occasion, it may find it easier to invoke the reservation being sure that the applicant State cannot contest its validity. The most likely hypothesis in which the question of validity of the reservation would be raised is thus where the respondent State relies on its own reservation claiming that the dispute concerns matters falling within its domestic jurisdiction. In such hypothesis the applicant may argue that the reservation is invalid - as happened in the *INTERHANDEL* case[161] - but such invalidity does not entail the nullity of the whole declaration[162].

The sensitive question, however, is what approach amongst those discussed above would be adopted by the Court if it finds itself obliged to take a position on the point?[163],

(159) J. Crawford, supra note 10, p.85.
(160) See p.21 above.
(161) See pp. 9 and seq.
(162) D.W. Greig, supra note 133, p.653 ; I.F.I. Shihata, supra note 31, pp. 295-296, and EJ. Macdonald, supra note 145, p. I IO.
(163) See p. 17 seq. above.

(I) The First Approach is rejected by the Court

The conclusion drawn from the invalidity of the reservation, namely, the invalidity of the whole declaration is in contradiction to the Court's jurisprudence. This has been admitted even by the most protagonist of this approach. Thus judge Sir H Lauterpacht admitted in the *INTERHANDEL* case that the Court had decided, at least provisionally, that a declaration containing such a reservation was "a valid legal instrument cognizable by the Court"(164). Also in the first phase of the same case the Court - as already pointed out - made a formal finding that the parties had accepted its jurisdiction "on the basis of Article 36(2)". In the *NORWEGIAN LOANS* case the Court also made a statement implying the validity of the declaration. It said:

"The French Declaration *ACCEPTS* the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently; *THE COMMON* WILL of the parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservations"(165).

The Court's judgment in the *MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA* case seems, however, to remove all doubt on the question. Although

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(164) I.C.J. Reports 1959, p. 119. In agreement with Lauterpacht. H.W. Briggs, the U. S. and the I.C.J. ..., supra note 5, p.559 ; L. Gross, Bulgaria Invokes .... supra note 62, p.745, and J. Crawford. supra note 10, p.66 note 8.

(165) I.C.J. Reports 1957, p.23 (emphasis added). See H.W. Briggs, Reservations .... supra note 6. p.343. Comp. L. Gross, Bulgaria Invokes .... supra note 62..745.

the United States reserved its right to invoke its reservation in future - i.e. did not abandon it - the Court found that the United States had "*ASSUMED AS INESCAPABLE OBLIGATION TOWARDS OTHER STATES ACCEPTING THE OPTIONAL CLAUSE*"[(166)]. In another passage the Court said also that the 1984 notification excluding some disputes from the United States declaration of 1946 with immediate effect "cannot override *THE OBLIGATION OF THE UNITED STATES TO SUBMIT TO THE COMPULSORY JURISDICTION OF THE COURT VIS-A-VIS NICARAGUA, A STATE ACCEPTING THE SAME OBLIGATION*"[(167)].

Moreover, since the view of the inseverability of the reservation from declarations is based almost completely on the intention of the reserving State, in other words on the understanding that the reservation is an essential part of the acceptance, the argument seems more theoretical so long as that intention is unknown [(168)]. However, what appears to be certain is that the intention of one State cannot be substituted by that of another State. Thus, it is hard to understand Lauterpacht's reliance on the intention of the United States and those of South Africa and India while he was considering the French reservation[(169)]. In fact, it is not inconceivable, so long

(166) Cited supra note 66. p.419, para. 61 (emphasis added).

(167) Ibid., p.421, para. 65 (emphasis added).

(168) This is because, unlike the case in the U. S. A., the acceptance of the Court's jurisdiction in the other States making the reservation seems to be a governmental act which does not require the intervention of the legislative branch. See B. Maus. supra note 15. p. 151.

(169) Sep. Op. in the *Norwegian Loans* case, I.C.J. Reports 1957, p.57.

as the intention of States making the reservation is unknown, that a reserving State may argue that the reservation was not a crucial part of its acceptance, and therefore it is severable. If confirmation of this hypothesis is needed, it is provided by the Portuguese argument in the *RIGHT OF PASSAGE OVER INDIAN TERRITORY* case [170].

(II) The Fourth Approach - Insufficient Grounds for Invalidity

The grounds on which the fourth approach stand do not seem strong enough to justify the adaptation of an important system as the compulsory jurisdiction to the reservation of a question instead of attempting, at least, to adapt the latter to the former. However, before discussing these grounds it might be better to return to the Court's position towards the reservation and reflect a little on the reasons which prevented the Court from pronouncing on the question of validity.

In spite of the rare self-revelations in the judges' individual opinions on this question in the *NORWEGIAN LOANS and INTERHANDEL* case, a careful reading of some opinions indicates that the Court avoided taking a position on the question for reasons of a non-legal nature. The majority preferred to "postpone a decision on the subject"[171] because of, firstly, the "political implications" of such a decision on

(170) See I.C.J. Pleading, case concerning *Right of Passage over Indian Territory* (Portugal v. India), vol. IV, p. 145. See also Khier Guechi, Reservations , supra note 4, Section 2. Chapter 2.

(171) Diss. Op. of Judge Lauterpacht in the *Interhandel* case, I.C.J. Reports 1959, pp.98, 102, 117, 118.

other declarations containing similar reservations [172]. This cause seems to have found strong support in the fact that most of the States, which have made such reservation, were the client of the Court, or to use Lauterpacht's words "traditionally wedded to the cause of *international judicial settlement*"[173]. The second reason, which is almost a corollary of the first, was the moral value of the declarations containing such reservations as a support to the principle of compulsory jurisdiction [174]. Thirdly, the idea that a decision invalidating a reservation could be considered as an "offensive to the dignity of a sovereign State" seems to have found a place in the deliberations of the Court[175]. These reasons were described by judge Lauterpacht as "reasons outside the realm of legal consideration"[176]. They should not, therefore, have led a judicial tribunal to postpone a decision on the validity of the reservation, he thought. These reasons also led judge Sir P. Spender to express himself as follows:

"There is more than a little practical wisdom to recommend this as a course to follow. The objection [i.e. that based on the reservation in question] presents issues of far reaching significance. They concern not only the interests of the two States engaged in the present proceedings but these of other States as well. *I WOULD HAVE PREFERRED TO*

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(172) *Ibid.*, pp. 104-105.
(173) Sep. Op. in the *Norwegian Loans* case, I.C.J. Reports 1957, p.63.
(174) Dis. Op. in the *Interhandel* case, I.C.J. Reports 1959, pp. 104-105.
(175) *Ibid.*
(176) *Ibid.*, p.98.

ADOPT PART (a) OF THE FOURTH OBJECTION IN THE SAME ATTITUDE AS HAS THE COURT, BUT AFTER CONSIDERABLE REFLEXION I REGRET THAT THIS IS NOT OPEN TO ME"[(177)].

What is the significance of these statements? Do not they suggest that the *INVALIDITY* of the reservation prevailed in the minds of the majority of the members of the Court over its validity? Otherwise what implications would a decision holding the validity of the reservation here had on other declaration containing a similar reservation? Only a decision invalidating the reservation could have such implications. Furthermore, the fact that seven judges had declared expressly the invalidity of the reservation and none of the judges declared its validity may provide some support for this view.

However, the arguments advanced for supporting the validity of the subjective reservation of domestic jurisdiction call for the following observations [(178)].

(177) Sep. Op., *ibid.*, p.54 (emphasis added). See G Schwarzenberger, supra note 5, pp.503-504 ; Ch. de Visscher, supra note 55, p.420 : F. Gerber, supra note 5, p. 180 ; H.W. Briggs, the U. S. and the I.C.J. ..., supra note 5, .558, and R. Layton, supra note 8, p.335.

(178) This of course in addition to the arguments of invalidity advanced by the proponents of the first and the second approaches whose weight has been recognized even by the supporters of this approach. See e.g. D.W. Greig, supra note 133, pp.51, 54 and J. Crawford, supra note 10, p.64. Crawford points out that the object of his Article is "to examine what seems almost the settled view- at least among commentators- of the legal effect of the "automatic reservation"., ibid.

(i) Inconsistency with Article 36 (6)

The example put forward to prove that the Court's function is sometimes confined to registering a course of action taken by the parties does not seem to be relevant here. For Article 36(6) of the Statute empowers the Court to determine its jurisdiction "in the *EVENT OF A DISPUTE* as to whether the Court has jurisdiction". It is obvious that there is no dispute as to jurisdiction in case the parties agree to settle their dispute by another means of settlement. Furthermore, the parties' action in such a case is exercised according to the Statute (Article 88 of the Rules of the Court), which enables them to ask the Court to remove the case from the list[179].

(ii) Inconsistency with Article 36 (2)

I. If the object of the argument that Article 36(2) does not require the assumption of a substantive obligation is to adapt the compulsory jurisdiction system to the reservation, its result seems to exceed that object. For such an argument denies the very existence of something that can be called "compulsory jurisdiction". However, it is perhaps not expected that such an important document as the Statute should explain in detail that the obligation undertaken under it "must be substantive".

2. There exists a basic difference, which could justify the nullity of the subjective reservation of domestic jurisdiction and sustain the validity of the reservation of the right to terminate the acceptance without a previous notice. While the

(179) See Khier Guechi, Reservations, supra note 4, at 339 seq.

former seeks to defeat the Court's jurisdiction even after the application has been filed in the case, the *NOTTEBOHM* rule prevents the latter from having such an effect (180).

3. As to the argument that the reservation has come to be accepted in practice as a permissible reservation, the following remarks may be made. In considering State practice in regard to domestic jurisdiction reservation it must not be forgotten that the declarations of 41 States out of the 46 currently in force do not contain such a reservation, and that 14 out of the 41 have included in their declaration the reservation in its objective form (181). Furthermore, Article 36(6) of the Statute has also been interpreted in this manner, i.e. as empowering the Court, and the Court alone, to decide on its own jurisdiction even by some States making the reservation in the subjective form. Thus the United States had argued before the Court in the case concerning the *INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND RUMANIA* that "it has long been recognized in international law and *PRACTICE*" that an international tribunal has an authority to determine its own jurisdiction (182). It also argued that:

"Even if the Peace Treaties expressly provide that their provisions should not be construed to affect matters which are

(180) *Ibid., p.* 101 seq.; p.125 seq.; 136 seq. See also C.H.M. Waldock, Decline...., supra note 75, p.273 and R.P. Anand. Compulsory .... supra note 79, p.215.

(181) See Khier Guechi, Reservations, supra note 4. pp.278-279.

(182) I.C.J. Pleadings, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, pp. 277-278 (emphasis added).

solely or essentially within the domestic jurisdiction of any State, these States could not by unilateral declarations determine for themselves what matters were solely within their domestic jurisdiction"[183].

It is true that non-reserving States have not protested against the reservation through diplomatic channels. Yet it cannot be taken for granted that they have accepted this as a valid reservation. They do not feel obliged to do so, as long as they have the opportunity to raise the question of invalidity whenever they deem it necessary before the Court. Thus Switzerland had not been prevented from contesting the validity of the reservation. Nor had India or Australia been prevented from doing so in regard to the Portuguese third condition [184] and the national security[185] reservations. Also, it should not be forgotten that some States abandoned the practice of making such a reservation in a period during which hopes had been expressed not only in standard writings but also by legal institutions[186] as well as some governments[187]

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(183) *Ibid.*, p.278.

(184) See Khier Guechi, Reservations, supra note 4, p.133.

(185) Ibid., p. 429.

(186) See e.g. the Resolution adopted by the *Institut de Droit International* in 1959, 48(11) *Annuaire I.D.I.* (1959), pp.358-361 and the American Bar Association, "Association's Assembly Deplores Connally Amendment", 32 *A.BA.J.* (1946), p.873, at 874.

(187) The executive branch of the U.S.A. had regularly expressed its doubts over the consistency of this reservation with the Statute of the Court. See S. Rosenne, the Law.... supra note 5, p.391 note 1 and the references cited therein. It is to be noted that the Senate Resolution 94, which intended to repeal the Connally Amendment, was introduced by Senator Herbert Humphrey with the support of the American Bar Association, the White House and the

that such practice should be abandoned because of its inconsistency with the Statute (188). Another fact that must be kept in mind is that the reservation represents a practice of only 5 States not amongst the 60 States, which accept the jurisdiction of the Court under Article 36(2), but amongst the 185 States (189) members of the United Nations. For although 135 States are still outside the system of compulsory jurisdiction they are very much concerned with any attempt to modify the Statute, a modification which requires a majority of two thirds of the States members of the Statute.

The permissibility of the subjective reservation of domestic jurisdiction seems thus far from established.

Departments of State and Justice. For this resolution see, *Compulsory Jurisdiction, International Court of Justice, Hearings before the Committee on Foreign Relations, United States Senate, 86 Congress, 2nd. Session on S. Res. 94, a resolution to Amend S. Res. 196, 1960.*

(188) The reservation was abandoned by France (337 U.N.T.S.. p.375) ; India (260 *ibid.,* p.459), and Pakistan (374 *ibid.,* p.127). The United Kingdom also abandoned one reservation belonging to the same category, see Khier Guechi, Reservations , supra note 4, pp. 429-430 . However it is to be observed that the reservation was not abandoned for this reason only but basically, perhaps, because of the effect of reciprocity

(189) See I.C.J.Y.B., 1996-97, pp.68, 89. It may be worth noting that in a survey conducted by Judge Lauterpacht in 1957 of more than 200 treaties he found no more than six treaties containing the reservation in question most of which were concluded by States making this reservation in their declarations of acceptance of the Court's compulsory jurisdiction. See his Sep. Op. in the *Norwegian Loans* case, I.C.J. Reports 19-57, pp.62-63

(iii) The invalidity of the reservation according to the "applicable principles of law"

1. It is doubtful that the application of treaty reservation rules, by analogy to declarations, would lead to the prohibition of reservations altogether because of the argument advanced by Crawford. For, firstly, it was made clear in 1945 that paragraph 3 of Article 36 of the Statute had been interpreted to allow reservation and therefore there was no need to amend it in order to clarify this point [(190)]. Secondly, the Court has in practice accepted reservations and it has recently expressed clearly the view that reservations other than those mentioned in Article 36 (3) are permissible [(191)].

2. As to the argument that the Court should be very hesitant in applying the "object and purpose" rule because it might entail different interpretations, it might be said that there seems to be no doubt that the object of compulsory jurisdiction is at least to ensure the adjudication of disputes upon an application of a single party without need for a further expression of consent after the dispute has arisen [(192)].

More to the point, the Court has applied this rule - as has been seen in the *RIGHT OF PASSAGE OVER INDIAN TERRITORY* case [(193)].

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(190) See Kh. Guechi, Reservations, supra note 4, pp. 58-59.
(191) See *Military and Paramilitary Activities* case, cited supra note 66, p.418, para.59.
(192) L. Preuss, Questions .... supra note 74, p.661.
(193) See Kh. Guechi, Reservations, supra note 4, pp. 135-136.

(iv) The "automatic declarations" as another way of access to the Court - approach

The difficulty with this approach is that the declarations containing subjective reservations of domestic jurisdiction are made expressly pursuant to Article 36, paragraph 2, and not paragraph I. This distinction is not theoretical but has a practical effect. As Crawford observes, a State making a declaration under paragraph 2 of Article 36 intends to accept the Court's jurisdiction - vis-a-vis - other declarant States. The question thus is whether such a "result" can be achieved by considering a declaration containing such a reservation as made according to the "procedure" set forth in paragraph I of Article 36? To condition the effect of such declarations on the consent of other States parties to the compulsory jurisdiction of the Court is to put these States in a privileged position. For, in such a case any of these States can sue a reserving State at any time. Whereas the latter can only sue those which have accepted that State as a party vis-a-vis themselves. It is doubtful whether States making the reservation in question intended to put themselves in such a position or they will accept such interpretation. If such inequality is established by Security Council Resolution 9 (1946), it is justified by the desire to open the Court to States *NOT PARTIES TO THE STATUTE.* There seems to be no justification for generalizing such inequality between States *PARTIES TO THE STATUTE.* Moreover, this approach leaves the main question unanswered,

namely, whether this reservation can be made even in a declaration made under Article 36 (1)?[194]

From the above considerations it appears that all the ways conceived for preserving subjective reservations of domestic jurisdiction lead to their nullity.

(III) Choice Between the Second and Third Approaches

The choice left to the Court is thus the adoption of either the second or third approach. It is difficult to state categorically in abstract terms what course of action would be followed by the Court if the issue of validity were raised before it and it did not find another way of disposing of the case without pronouncing on the validity of the reservation. The intention of the reserving State has been given much weight by every approach. Yet, the intention of the five States making the reservation is unknown [195]. The circumstances in which the reservation might be invoked would be of great importance for determining the course of action to be followed. An argument by the reserving State that the reservation was not an essential part of its acceptance, or that it did not intend to deprive the Court of the power to control a determination made by itself,

(194) See C.H.M. Waldock, the Plea .... supra note 75, p.132 and I.F.I. Shihata supra note 31, pp.47-52. Comp. S. Rosenne, the Law .... supra note 5, pp.438-441 and B. Maus, supra note 15, p. 1 56.

(195) It is difficult to prove that the Philippines, for example, terminated its declaration of 1947 in order to introduce this reservation because the new declaration (1972) includes 4 other reservations of no less importance especially the multilateral treaty reservation and that concerning the law of the sea. See I.C.J.Y.B. , 1986-87, p.84.

or its attempt to prove that the matter in dispute fell within its domestic jurisdiction according to international law in spite of its invocation of the reservation may facilitate the Court's task and affect its decision.

However, the *MILITARY AND PARAMILITARY ACTIVITIES* case has provided two new grounds in support of approach 3. The non-invocation of the reservation by the United States, despite its attempt not to leave any stone unturned, proves that there are cases in which the reserving State cannot, in good faith, assert that the dispute concerned matters of domestic jurisdictional[196]. This precedent cannot, however, be generalized and there is no guarantee that other States will use the reservation in such a way. The second, and the most important, is the clear statement made by the Court that the declaration of acceptance, and the reservations and conditions embodied therein are governed by the principle of good faith. After indicating that the declaration of acceptance, as a unilateral act, establishes a series of bilateral engagements "in which the conditions, reservations and time-limits clauses are taken into consideration", the Court said:

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(196) See D.E. Ende, "Reaccepting the Compulsory Jurisdiction of the International Court of Justice. A Proposal for New United States Declaration ", *61Wash.L.R.(1986)*, pp. 1145-1165, at 1 166. This precedent seems to contradict Crawford's argument that the term "domestic jurisdiction "is not used as a term of art in the reservation but as an escape clause, supra note 10, p.70. It might be argued also that the very existence of other reservations alongside with the subjective reservation of domestic jurisdiction indicates that it is not intended to play the role of an absolute escape clause as that played by the reservations of vital interests and honour

"In the establishment of this network of engagements, which constitute the Optional Clause system the *PRINCIPLE OF GOOD FAITH PLAYS AN IMPORTANT ROLE: the Court HAS EMPHASIZED THE NEED IN INTERNATIONAL RELATIONS FOR RESPECT FOR GOOD FAITH* and confidence in particularly unambiguous terms, also in the *NUCLEAR TESTS* case"[(197)].

Then it quoted its statement in the latter case that the creation and performance of legal obligations, regardless of their sources, are governed by the basic principle of good faith[(198)]. Consequently, the Court applied this principle in this case. It refused to take the view that declarations of indefinite duration can be terminated immediately. It said that "the requirements of good faith" justified the treatment, by analogy, of such declarations according to the law of treaties, which requires a reasonable time for the termination of treaties of indefinite duration [(199)].

The Court can thus rely on this principle and exercise its power provided for in Article 36 (6) of the Statute. It might also consider it wiser not to rely on this principle for the reasons advanced especially by the supporters of the first approach against its application and choose to declare the invalidity of the reservation or ignore it and proceed to the examination of the merits of the case, i.e. adopt the second

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(197) *Military and Paramilitary Activities* case, cited supra note 66, p.418, para.60 (emphasis added).
(198) See Khier Guechi, Reservations , supra note 4, p.35.
(199) I.C.J. Reports 1984, p.420, para.63.

approach. This might be the case especially where the circumstances of the case were in favour of such approach; if, for instance, the reserving State took the same position taken by Portugal in the *RIGHT OF PASSAGE OVER INDIAN TERRITORY* case[200]. The disappearance of one of the reasons which had prevented the Court from pronouncing on the validity of the issue, namely, the abandonment of the reservation by client States, may encourage the Court to follow the second approach. Furthermore, it might be argued that the Court is fully justified in following this approach. It is true that the basic principle, which governs the Court's jurisdiction, is the consent of States. However in exercising its jurisdiction in spite of the invocation of the reservation the Court might not be considered as disregarding that principle. For, States have expressed their consent to the Court's jurisdiction and, to use Schwarzenberger's words "dares the Court to annul"[201] the reservation in question. The Court would thus exercise its function to "imbue parties to the Statute with due respect for the Court's JUS COGINS and manifest the Court's credibility"[202]. There is no doubt that reserving States were fully aware that the Court rejected demands contrary to the Statute. The possibility of a decision invalidating the reservation had also been expressed - as has been seen - by seven judges of the Court. What are those States thus expecting the Court to do if it were forced to take position on

(200) See Khier Guechi, Reservations , supra note 4, p. 133 seq.
(201) Supra note 5, p.499.
(202) *Ibid*

the question? They have been offered the opportunity to revise their acceptances, either to renounce the reservation in question or to annul their declarations completely, but they chose not to do so. The Court therefore seems fully justified in adopting the second approach.

E - Conclusions

From what has been said the following conclusions ought to be drawn.

In spite of the fact that the Court had been offered many opportunities to pronounce on the validity of subjective reservations of domestic jurisdiction, it cautiously stepped aside for reasons of a non-legal character.

The Court will not raise the issue of validity *EX PROPRIO MATU,* but will exercise its jurisdiction on the basis of the parties' declarations if the validity issue is not raised.

If the invalidity of the reservations is invoked the Court will not decide the question of validity except when all other grounds have failed to dispose of the case.

The weight of arguments seems to be in favour of the nullity of these reservations, being contrary to both constitutional provisions governing the Court's functioning and the object and purpose of the Optional Clause.

The Court cannot hold the invalidity of the whole declaration without revising its previous jurisprudence.

The Court might thus ignore or declare the invalidity of these reservations and proceed to the examination of the merits of the case. The intention of the reserving States and the circumstances of the case would be of much significance in the Court's choice of what approach should be followed.

These reservations proved to be not in the interest of States making them. The application of the principle of reciprocity renders them a defense that backfires (203). In fact reciprocity is, perhaps, the most efficace legal sanction of the reservation (204). Thus, it is not difficult to understand why the reservation had been dropped from many declarations (205).

Although these reservations were initiated by developed countries, they do not find a place now except in the declarations of developing countries. They are still kept by States, which have never appeared before the Court either as a respondent or applicant on the basis of Article 36(2). They did not, therefore, pay the price of making them though they should have learned the lessons of the others.

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(203) For the effect of reciprocity on the reserving State see A. E. Howard, supra note 9, p.12 ; A. Larson, the facts, the Law .... supra note 8. pp.79-85, A D 'Amato, "Modifying U.S. acceptance of the Compulsory Jurisdiction of the World Court", 79 *A.J.I.L.* (1985), pp.385-405, at 392-394, and F.L. Grieves, *Supranationalism and International Adjudication*, 1969, pp.98- 100.

(204) See the Diss. Op. of Judge Lauterpacht in the *Interhandel* case. I.C.J. Reports 1959, p. 1 16. Professor Briggs observes that the Court might have found it more appropriate to leave it for the reserving State "to worry whether the Connally reservation is not more dangerous to [the reserving State] interests than protective thereof", Interhandel.... supra note 55, p.559.

(205) See J.B. Elkind, supra note 5, p.147 and M. Dubisson, supra note 55, p.186.