

AN UNRESOLVED QUESTION: OPTIONAL
DECLARATIONS AT THE INTERSECTION OF *JURA
NOVIT CURIA*, COMPETENCE-COMPETENCE, AND
NON ULTRA PETITA

BARBARA BAZANTH*

This commentary sheds light on how a procedural tool of international adjudication gradually disappeared as a result of states over-strategizing before international fora. States like the United States, France, and the United Kingdom attempted to limit the scope of their consent to the jurisdiction of the International Court of Justice (ICJ) through the frequent use of self-judging jurisdictional reservations appended to optional declarations before the Court. However, the use of these reservations decreased as states' discretionary exclusion of certain matters from the ICJ's purview multiplied, instances of the reservations' application contrary to the interests of the depository state occurred, and arguments regarding the Court's power to decide its own jurisdiction started to vanish. This commentary will explore the gradual disappearance of self-judging jurisdictional reservations from the ICJ's practice, the reasons thereof, and unsettled questions which may still carry risks for future disputes and the remaining four such reservations.

I.	THE <i>JURA NOVIT CURIA</i> PRINCIPLE	1054
II.	LIMITING THE KNOWLEDGE OF THE COURT: COMPETENCE-COMPETENCE AND <i>NON ULTRA PETITA</i>	1054
III.	OPTIONAL DECLARATIONS AND SELF-JUDGING CLAUSES BEFORE THE ICJ	1056
IV.	JURISDICTIONAL ISSUES AT THE INTERSECTION OF <i>JURA NOVIT CURIA</i> , COMPETENCE-COMPETENCE, AND <i>NON ULTRA PETITA</i>	1057
	A. <i>Norwegian Loans (France v. Norway)</i>	1058
	B. <i>Interhandel (Switzerland v. United States)</i>	1059
	C. <i>Fisheries (Spain v. Canada)</i>	1061
V.	A PRESENT-DAY OUTLOOK	1063

* LL.M. in International Legal Studies, Fulbright Scholar, and Dean's Graduate at New York University School of Law. Ph.D. candidate in International Law at ELTE Law School. I am grateful for the editorial assistance of Elizabeth D. Wiseman from JILP, and the helpful comments of Gergo Barna Balázs and Kálmán Márk Varga on earlier drafts. Any and all errors are my own.

I. THE *JURA NOVIT CURIA* PRINCIPLE

The Latin maxim *jura novit curia* (“the court knows the law”)¹ conveys to courts the power and the obligation² to examine questions of law which have not been raised by the parties.³ As the Permanent Court of International Justice (PCIJ) articulated in *Free Zones*, the Court is free “not only to accept one or other of the two propositions, but also to reject them both.”⁴ Such task emanates from the nature of courts as organs of the law; courts are bound by the law, rather than the submissions of the parties.⁵ Thus, not only are courts and tribunals “deemed to take judicial notice of international law,”⁶ but judges are also empowered to develop the applicable legal provisions by judges.⁷

II. LIMITING THE KNOWLEDGE OF THE COURT: COMPETENCE-COMPETENCE AND *NON ULTRA PETITA*

Although the *jura novit curia* principle represents the freedom of courts and judges within the legal realm of the dispute, it has limitations. These limitations generally flow from the parties’ consent to the dispute, as well as the framework set out in their agreement for dispute settlement and their claims.

1. See, e.g., Aaron X. Fellmeth & Maurice Horwitz, *Guide to Latin in International Law* 147 (1st ed. 2009); Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 299 (Cambridge Univ. Press 2006) (1953).

2. *Continental Shelf (Libya v. Malta)*, Judgment, 1985 I.C.J. 3, 23, ¶ 19 (June 3); *Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1974 I.C.J. 3, ¶ 17 (July 25).

3. See, e.g., *Territorial Jurisdiction of Int’l Comm’n of River Oder (Czech, Den., Fr., Ger., Gr. Brit., Swed., & Pol.)*, Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 18-19 (Sept. 10); Friedrich Rosenfeld, *Jura Novit Curia in International Law*, 6 *Eur. Int’l Arb. Rev.* 131, 132 (2017).

4. *Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.)*, Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, at 46 (June 7).

5. Cheng, *supra* note 1, at 299.

6. *U.K. v. Ice.*, 1974 I.C.J. at ¶ 17.

7. Frederic G. Sourgens, *By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations*, 38 *N.C. J. Int’l L.* 875, 920 (2013); W. Michael Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication (Volume 258)*, in *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW*, 41-42, 52 (1997).

One such principle, the competence-competence doctrine,⁸ is enshrined in the statutes of several international courts and tribunals and stipulates that when the jurisdiction of a tribunal is disputed, that tribunal shall settle the matter of their own jurisdiction.⁹ The court must make an objective assessment on the issue of jurisdiction, irrespective of the parties' position.¹⁰

The principle *non ultra petita* provides a further limitation, prohibiting judges from ruling on issues beyond the scope of the dispute.¹¹ *Non ultra petita* has been recognized in numerous cases as a general principle of judicial procedure, but courts have provided differing interpretations on how it affects the scope of a dispute.¹² Article 38 of the ICJ Statute states that the Court's function is to decide "such disputes as are submitted to it."¹³ Thus, *non ultra petita* is "a derivative of the consent

8. The competence-competence doctrine, also known as *kompetenz-kompetenz* or *compétence de la compétence*, is a principle of international adjudication that courts and tribunals have the power to determine their own jurisdiction. Cheng, *supra* note 1, at 275-78.

9. See, e.g., *Factory at Chorzow* (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 89 (July 26); *Fisheries Jurisdiction* (Spain v. Can.), Judgment, 1998 I.C.J. 432, 450-51 (Dec. 4); *Certain Norwegian Loans* (Fr. v. Nor.), Judgment, 1957 I.C.J. 9, 43-44 (July 6) (separate opinion by Lauterpacht, J.); *Convention for the Protection of Human Rights and Fundamental Freedoms* art. 49, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221; *American Convention on Human Rights* art. 62(3) (Nov. 22, 1969) 1144 U.N.T.S.123; O.A.S.T.S. No. 36; *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* art. 41(1), *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159. Due to its nature as a general principle, the rule is also applicable for *ad hoc* tribunals.

10. Attila Tanzi, *Ultra Petita*, ¶ 25, MAX PLANCK ENCYCLOPEDIA OF INT'L L. (November 2019), <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2239.013.2239/law-mpeipro-e2239>; *Nottebohm* (Liech. v. Guat.), Judgment, 1953 I.C.J. 111, 122 (Nov. 18).

11. Tanzi, *supra* note 10 at ¶ 1.

12. Robert Kolb, *General Principles of Procedural Law*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 895 (Andreas Zimmermann et al. eds., 3d ed. 2019); *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 244, 253 (Dec. 15) (dissenting opinion by Efiar, J.); *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case* (Colom. v. Peru), Judgment, 1950 I.C.J. 395, 402 (Nov. 27); *British Claims in the Spanish Zone of Morocco* (Gr. Brit. v. Spain), 2 R.I.A.A. 615, 650 (1925); Mariko Kawano, *The Role of Judicial Procedures in the Process of the Pacific Settlement of International Disputes (Volume 346)*, in *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 70-80 (2011).

13. Kolb, *supra* note 12, at 870-908.

principle,”¹⁴ and emanates from the jurisdictional competence and the applicable law framed by the parties in each case.¹⁵

This principle has been applied in several instances. In *Asylum*, the ICJ noted that the principle constrains the scope of its adjudicating powers by stating that “it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.”¹⁶ The ICJ similarly abstained from addressing the treatment of shareholders in *Barcelona Traction*, noting that the parties had not raised the issue in their submissions.¹⁷ The ICJ echoed these holdings in *Arrest Warrant*, elaborating that although the ICJ cannot decide *questions* not put forward by the parties, “this does not mean, however, that [it] may not deal with certain *aspects of that question* in the reasoning of its Judgment, should it deem this necessary or desirable.”¹⁸

The *non ultra petita* principle influences the courts’ treatment of facts in that they only consider the assertions and evidence submitted by the parties.¹⁹ In this regard *non ultra petita* complements *jura novit curia*: while *non ultra petita* ensures the consensual nature of the process, *jura novit curia* manifests judicial autonomy within the framework of agreed facts.²⁰ Their appropriate interaction is “key to the good administration of justice in international litigation.”²¹

III. OPTIONAL DECLARATIONS AND SELF-JUDGING CLAUSES BEFORE THE ICJ

Optional declarations appended to Article 36 of the ICJ Statute are a rarely scrutinized confluence of these three principles. Optional clause declarations are *sui generis* unilateral

14. Tanzi, *supra* note 10, at ¶ 6.

15. *Id.*

16. *Colom. v. Peru*, 1950 I.C.J. at 402.

17. *Barcelona Traction, Light and Power Company, Limited. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 49 (February 5).

18. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. 3, ¶ 43 (Feb. 14) (emphasis added).

19. Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 205 n.997 (2018).

20. Tanzi, *supra* note 10, at ¶ 13.

21. *Id.*

acts representing state sovereignty.²² Article 36(3) of the ICJ Statute permits a state to enter reservations to those optional clause declarations with which states accept the compulsory jurisdiction of the ICJ, stating that declarations may be made “on condition of reciprocity on the part of several or certain states, or for a certain time.”²³

An issue arises, however, where such reservations are formed as self-judging clauses. These are provisions included in international instruments by which states reserve a right to non-compliance with international legal obligations in certain circumstances, deeming protection of their interests to take precedence over their obligations under international law.²⁴ In the context of the jurisdiction of dispute settlement fora, self-judging jurisdictional clauses provide a mechanism by which a state may unilaterally attempt to escape the court’s jurisdiction.

IV. JURISDICTIONAL ISSUES AT THE INTERSECTION OF *JURA NOVIT CURIA*, COMPETENCE-COMPETENCE, AND *NON ULTRA PETITA*

Self-judging clauses may cause conflicts when they are appended to statutory provisions on issues of jurisdiction as they induce a clash between the inherent powers of the court stemming from *jura novit curia* and competence-competence. Such clauses complicate matters further when the optional declarations and reservations are not challenged by the parties themselves, raising the question of whether *non ultra petita* shall be

22. Christian Tomuschat, *Competence of the Court, Article 36*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 85 (Andreas Zimmermann et al. eds., 3d ed. 2019); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. 392, ¶¶ 46, 52 (Nov. 26); *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 69 (Apr. 5); *Electric Company of Sofia and Bulgaria (Belg. v. Bulg.)*, Judgment, 1939 P.C.I.J. (ser. A/B) No. 77, at 87 (Apr. 4); *Right of Passage over Indian Territory (Port. v. India)*, Judgment, 1957 I.C.J. 125, 146 (Nov. 26).

23. Statute of the International Court of Justice, June 26, 1945, 832 U.S.T.S. 993.

24. Stephan Schill & Robyn Briese, “*If the State Considers*”: *Self-judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. UNITED NATIONS L. 61, 63–64 (2009).

preserved even if the court deems the clauses allegedly underlying its jurisdiction invalid.

A. *Norwegian Loans (France v. Norway)*

This issue arose in *Norwegian Loans* between France and Norway before the ICJ.²⁵ The French application referred to Article 36(2) of the ICJ Statute and to the Declarations of Acceptance of the compulsory jurisdiction submitted by France and Norway. Norway raised preliminary objections which were joined to the merits and had no self-judging reservation. The ICJ held that Norway could, however, by virtue of reciprocity, invoke the French reservation appended to France's optional declaration excluding from ICJ jurisdiction all disputes that fall within French domestic jurisdiction "as understood by the Government of the French Republic."²⁶ As a result, the French reservation precluded the ICJ from exercising jurisdiction over the dispute.²⁷ Thus, the ICJ set precedent by determining that a respondent state, which has made no self-judging reservation under Article 36(2) itself, may nonetheless invoke the self-judging reservation of the applicant and preclude ICJ jurisdiction.²⁸ Notably, by reference to *non ultra petita* and the fact that the parties did not contest the validity of the reservation, the ICJ did not consider questions of validity, only whether Norway could invoke the reservation.²⁹

This ICJ decision was contested among judges on the panel. Judge Lauterpacht and Judge Guerrero, in particular, reflected on the interplay between competence, *jura novit curia*, and *non ultra petita* in writing separately to state that the

25. *Certain Norwegian Loans (Fr. v. Nor.)*, Judgment, 1957 I.C.J. 9 (July 6). For cases beyond the ICJ where tribunals deemed reservations contravening their statutes to be invalid, see *Hilaire v. Trinidad and Tobago*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 80, ¶ 97 (Sept. 1, 2001); *Loizidou v. Turkey*, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A), ¶¶ 89-97 (Mar. 23, 1995), <https://hudoc.echr.coe.int/eng?i=001-57920>; *Belilos v. Switzerland*, App. No. 10328/83, 132 Eur. Ct. H.R. (ser. A) 7, ¶ 60 (Apr. 29, 1988), <https://hudoc.echr.coe.int/eng?i=001-57434>.

26. *Norwegian Loans*, 1957 I.C.J. at 21.

27. *Id.* at 27.

28. *The Norwegian Loans Case*, 1960 Duke L. J., 418, 421 (1960) (author unidentified).

29. *Norwegian Loans*, 1957 I.C.J. at 27.

ICJ lacked jurisdiction because the French declaration of acceptance of the Court's compulsory jurisdiction was invalid.

Judge Lauterpacht deemed the reservation to be without effect due to the wording "as understood by the Government of the French Republic." In his opinion, such wording is contrary to the ICJ Statute, and thus cannot result in a legal obligation because the existence of an obligation would be dependent on determinations of the state accepting the optional clause, which itself requires the acceptance of ICJ jurisdiction. Lauterpacht held that such a reservation would make the ICJ completely dependent upon France's own determination regarding jurisdiction for a particular claim and force it to accept France's position irrespective of the ICJ's own determinations.³⁰ In short, based on *jura novit curia*, he stated that such a self-judging clause would contravene the competence-competence doctrine. The clause rests the justiciability of the dispute by the ICJ on the ambit of French national law and would certainly contravene the ICJ's power conferred upon it by Article 36(6), which states that disputes regarding the jurisdiction of the ICJ are to be settled by the ICJ itself.³¹

Judge Guerrero shared this position, positing that despite the possibility of making reservations to the optional clause of Article 36, "it is certain that it was never the intention of the authors of the Statute that such reservations should serve to enable a State to evade the undertakings involved in the declaration . . . or unilaterally to arrogate to itself rights which the Statute confers solely on the Court."³² In short: "[s]uch reservations must be regarded as devoid of all legal validity."³³

B. *Interhandel (Switzerland v. United States)*

The competence-competence doctrine declares that the court itself decides the scope of its jurisdiction. However, a jurisdictional reservation violates this general principle, and the Statute, by transferring the decision on jurisdiction from the ICJ to the parties. This renders the reservation invalid. The ICJ's indirect reference to *non ultra petita* when sidestepping the question of the reservation's validity at all, and Judges Lau-

30. *Id.* at 44 (separate opinion by Lauterpacht, J.).

31. *Id.*

32. *Id.* at 69 (dissenting opinion by Guerrero, J.).

33. *Id.*

terpacht's and Guerrero's opinions suggest that if the validity of an instrument before the Court (or indeed any other procedural issue of similar importance for that matter³⁴) is at issue, and it is not pleaded by the parties, the court is not precluded by *non ultra petita*, and can address the issue under *jura novit curia*.

This issue arose in the *Interhandel* case, wherein Switzerland claimed restitution from the United States.³⁵ The Swiss application invoked Article 36(2) and accepted compulsory ICJ jurisdiction. Analogous to *Norwegian Loans*, the United States submitted preliminary objections to the ICJ, referencing its self-judging reservation in which the United States accepted the compulsory jurisdiction of the court in only a limited category of legal disputes. The United States reserved from its acceptance of ICJ compulsory jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States." Called the Connally reservation,³⁶ this self-judging clause has been characterized as the cause of "a general devaluation of the idea of compulsory jurisdiction"³⁷ and the reason for "the empty courtroom."³⁸

Judge Lauterpacht dissented again, similarly criticizing the ICJ's handling—or rather the lack thereof—of the validity of the United States' self-judging reservation.³⁹ In *Interhandel*, however, Lauterpacht's opinion received more support, with other judges dedicating considerable thought in their individual opinions to the questions of the self-judging reservation's compatibility with the ICJ Statute and its consequences. As Judge Spender noted, whether the ICJ has jurisdiction depends not only upon the parties' consensus as to their declara-

34. In the words of Lauterpacht, "contrary to one of [the Statute's] basic features." *Id.* at 47.

35. *Interhandel* (Switz. v. U.S.), Judgment, 1959 I.C.J. 6 (Mar. 21).

36. Senator Tom Connally introduced the amendment during the U.S. Senate debate. 92 CONG. REC. 10683-97 (1946).

37. Louis B. Sohn, *International Tribunals: Past, Present and Future*, 46 A.B.A.J. 23, 25 (1960).

38. 105 CONG. REC. 5037-40 (Mar. 24, 1959) (address by Mr. Rhyne, Chairman, Committee on World Peace through Law, American Bar Association, on March 10, 1959).

39. *Interhandel*, 1959 I.C.J. at 101-104 (dissenting opinion by Lauterpacht, J.).

tions, but also upon compatibility with the ICJ Statute.⁴⁰ He argued that if the U.S. reservation is inconsistent with the ICJ Statute or its inclusion renders the whole optional declaration “inoperative as an acceptance of the Court’s jurisdiction,” then the Court is bound to declare it void.⁴¹ This statement echoes *jura novit curia*—the court’s duty to declare the law. Spender concluded that the impermissible phrase “as determined by the United States of America” in the reservation was inseparable from the intent of the document, rendering both the optional declaration and the automatic reservation invalid, and without a valid declaration, there was no basis for ICJ jurisdiction.⁴² Judges Armand-Ugon and Klaestad emphasized the inadmissibility of reservations submitted to Article 36(6), which embodies the competence-competence of the ICJ, yet disagreed with this view of severability, arguing that the United States’ intent to accept the ICJ’s jurisdiction was apparent from their participation in the case.⁴³

The opinions in *Interhandel* further illustrate that if the validity of an instrument before the Court is at issue and not precluded by *non ultra petita*, the Court can and should deal with the issue pursuant to *jura novit curia*. Thus, in cases where a fundamental issue arises, such as the breach of the competence-competence of a court through a self-judging jurisdictional clause, *non ultra petita* should be bypassed.

C. *Fisheries (Spain v. Canada)*

The *Interhandel* holding gained support in the latest ICJ case concerning the validity of a self-judging reservation appended to an optional declaration: the *Fisheries* case between Spain and Canada.⁴⁴ Spain attempted to characterize paragraph 2(d) of the Canadian optional declaration—on which Canada sought to rely to exclude the ICJ’s jurisdiction—as a self-judging reservation.⁴⁵ The reservation concerned the enforcement of conservation and management measures in a

40. *Id.* at 55 (dissenting opinion by Spender, J.).

41. *Id.* at 56.

42. *Id.* at 57.

43. *Id.* at 92-93 (dissenting opinion by Armand-Ugon, J.); *id.* at 76-78 (dissenting opinion by Klaestad, J.).

44. *Spain v. Can.*, 1998 I.C.J. 432 (Dec. 4).

45. *Id.* at ¶ 40.

designated regulated fishing area, pursuant to which a Spanish vessel was boarded and seized.⁴⁶ Ultimately, the ICJ dismissed the Spanish claim by interpreting the Canadian reservation in “a natural and reasonable way,”⁴⁷ an issue which prompted individual judges to revisit the ICJ’s relationship with the self-judging jurisdictional clause.

Judge Torres-Bernárdez, in dissent, unequivocally stated that self-judging clauses are manifestly incompatible with the object and purpose of the optional declarations system established by the Statute.⁴⁸ He considered such instruments to abuse the good faith and expectations of other depository states, and urged the ICJ to exercise supervision of such reservations under *jura novit curia*.⁴⁹ Judge Vereshchetin similarly characterized the self-judging reservation as an abuse of rights that contravenes the competence-competence principle, therefore precluding the ICJ from recognizing the validity of such provisions.⁵⁰ Finally, Judge Bedjaoui’s dissent also subscribed to the view that the ICJ should—by means of the *jura novit curia* principle—declare reservations that aim to nullify or distort one or more of the provisions of the Statute invalid, especially a self-judging reservation which effectively deprives the ICJ of its power to determine its own jurisdiction.⁵¹ As such, there is a continuously held view by ICJ members for over sixty years that self-judging jurisdictional reservations are incompatible with the competence-competence principle. Thus, the ICJ should rely on its *jura novit curia* powers to deem them invalid, even if such an argument is not briefed by the parties themselves.

46. *Id.* at ¶¶ 14, 19.

47. *Id.* at ¶¶ 49, 86 (“having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. . . [which] deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.”).

48. *Id.* at ¶¶ 136-137 (dissenting opinion by Torres-Bernárdez, J.).

49. *Id.* at ¶ 136-38.

50. *Id.* at ¶¶ 10-11 (dissenting opinion by Vereshchetin, J.).

51. *Id.* at ¶¶ 44 (dissenting opinion by Bedjaoui, J.).

V. A PRESENT-DAY OUTLOOK

On a practical note, controversial self-judging jurisdictional reservations have largely disappeared from optional declarations recognizing the ICJ's compulsory jurisdiction. This phenomenon can be partly attributed to the forceful dissents expressed by various members of the Court,⁵² and to the pragmatic challenges created by such a reservation. Due to the principle of reciprocity, a self-judging reservation essentially functions as a "trap" that can be invoked against the depositary state,⁵³ limiting the state's ability to successfully establish jurisdiction for its own claims, as exemplified by France in *Norwegian Loans* and the United States in *Aerial Incident*.⁵⁴

Even though the post-*Interhandel* approach of the United States has been to refrain from the bad faith invocation of its self-judging clause in both the aforementioned *Aerial Incident* case⁵⁵ and the *Nicaragua* case,⁵⁶ other states' arbitrary reciprocal reliance on the United States' self-judging clause led to the discontinuation of its use.⁵⁷ France also terminated its optional declaration for similar reasons in 1973.⁵⁸ Other states employing identically-worded self-judging reservations—such as the United Kingdom's 1957 declaration—have amended them, replacing the state's own determination with that of in-

52. Tomuschat, *supra* note 22, at 773.

53. Anthony D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L L. 385, 392-94 (1985).

54. Stanimir A. Alexandrov, RESERVATIONS IN UNILATERAL DECLARATIONS ACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 87-88 (1995 ed.).

55. *Aerial Incident of 27 July 1955 (U.S. v. Bulg.)*, Correspondence, 1960 I.C.J. 146, 676-677 ¶ 81 (May 13) (showing the U.S. government petitioning the Court to discontinue the proceedings). For further analysis on *Aerial Incident*, see Leo Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357 (1962).

56. Abraham D. Sofaer, *Legal Adviser Sofaer Statement Dec. 4, 1985*, in 86 DEP'T OF STATE BULL. at 69 (Jan. 1986) (reprinting statement made before the Senate Foreign Relations Committee); see also T.M. Franck & J.M. Lehrman, *Messianism and Chauvinism in America's Commitment to Peace Through Law*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 3, 17 (L. Damrosch ed., 1987) (arguing that the lack of invocation of the Connally Reservation by the United States in *Nicaragua* implies a "good faith" caveat in the reservation, not licensing the U.S. to refuse litigation based on it for any reason in any case).

57. Sofaer, *supra* note 56, at 69; see also ALEXANDROV, *supra* note 54, at 90.

58. ALEXANDROV, *supra* note 54, at 92.

ternational law in an attempt to render them compatible with the ICJ Statute.⁵⁹ Despite these developments, however, four states nonetheless retain their optional declarations deposited with similarly formulated reservations.⁶⁰ Without a clear pronouncement by the ICJ, the issue of self-judging jurisdictional reservations remains unresolved.

59. *Id.* at 91-92.

60. Malawi, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE (Dec. 12, 1966), <https://www.icj-cij.org/en/declarations/mw>; Mexico (Oct. 28, 1947), <https://www.icj-cij.org/en/declarations/mx>; Philippines (Jan. 18, 1972), <https://www.icj-cij.org/en/declarations/ph>; Sudan (Jan. 2, 1958), <https://www.icj-cij.org/en/declarations/sd>.