hailed by the Western Powers as a "very constructive step." But the equitable and beneficial purpose of the Agreement and its success will depend on legal problems, influenced by political considerations. The minority rights of par. 1 depend on Italian legislation "already enacted or awaiting enactment." The regional autonomy of par. 2 depends equally on Italian legislation. The carrying out of par. 3 depends on Italian action and on the conclusion of further special Austro-Italian agreements. The Agreement is thus rather a program, awaiting implementation.

But the legal status of the Agreement itself has to be considered in the first line. This Agreement is, no doubt, an international treaty which has been signed, but needs, it seems, ratification by Italy and Austria. The ratification by Austria will not prove to be easy politically. For, after all, the Agreement implicitly renounces Austria's territorial claim, a question on which most Austrians and, particularly the North Tyrolese, feel very strongly. The Agreement did not encounter a good reception by the political parties of Austria and caused resentment in North Tyrol. It is, finally, to be noted that the Agreement is not put under the guarantee of the Allies, who, by Article 10, par. 2, simply "take note" of this Agreement.

And yet it is earnestly to be hoped that real good-neighborly relations between Italy and Austria can be established. This will be to the benefit of the South Tyrolese and to the benefit of the two countries. It will promote not only the material but also the spiritual regeneration of Europe, of which Austria and Italy form so important a part. It will benefit the world and the United Nations. A basic precondition for the success of the United Nations, more vital than discussions about its Charter, is the conclusion of sound and just post-war settlements, acceptable to all nations. A solid house must be built upon firm ground, not on shifting sand.

JOSEF L. KUNZ

THE INTERNATIONAL COURT OF JUSTICE AND THE INTERPRETATION OF MULTILATERAL TREATIES

One important function of the Permanent Court of International Justice was to interpret multilateral treaties and presumably the International Court of Justice will be called upon to perform the same function. Construction of the third proviso in the American Declaration of August 14, 1946, accepting compulsory jurisdiction under Article 36 of the Statute of the International Court of Justice, is, therefore, important. This proviso states:

> This Declaration shall not apply to . . . (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.

According to Manley O. Hudson, formerly member of the Permanent Court of International Justice:

> It seems probable that the Court would be inclined to give to the words in the American Declaration the meaning that they have in Article 62; *i.e.*, a party to the treaty would be "affected by the decision" when it "has an interest of a legal nature which may be affected by the decision." Article 63, read with Article 62, seems to indicate that when a treaty or convention is being construed, every party to the treaty or convention is in the position of having such an interest. On this view, it seems necessary to conclude that, whether the phrase "affected by the decision" applies to the *parties to the treaty,* or only to *the treaty itself,* the Court would lack jurisdiction under the American Declaration unless every party to the treaty is a party to the proceeding before the Court.[1]

Such an interpretation might deprive the Court of jurisdiction to interpret any multilateral treaty to which the United States was a party unless the United States gave specific consent in the particular case or unless all the parties to the treaty became parties to the case. Suppose State A, bound by the optional clause, initiates an action against State B, also bound by that clause, on an issue involving interpretation of a multilateral treaty to which the United States is also a party. The United States is notified under Article 63 of the Statute and has the right to intervene. Would it have the right, not only to intervene, but also to insist that the Court cannot exercise jurisdiction because the decision would affect its legal interest? Could it claim that State A, in initiating action against B, would in effect also be initiating action against the United States, and that the United States can, therefore, invoke the proviso to prevent the jurisdiction altogether? That would certainly be an extreme interpretation, and Judge Hudson suggests that the proviso could be invoked only if the United States were the original defendant or plaintiff in the case. He believes, however, that if the American reservation were generally copied by other states, "the usefulness of the Court as the great interpreter of world law would be greatly curtailed."

Dr. Francis O. Wilcox, who served as assistant to the Senate Foreign Relations Committee during its consideration of the Declaration, thinks that such an interpretation of the proviso "undoubtedly goes beyond the intent of the Senate"[2] and the present writer has suggested that the reservation was "designed to protect the interests of third states, parties to multilateral treaties involved in a case," an interpretation which might make the reservation "unnecessary in view of the right of such states to intervene under Article 63 of the Statute."[3]

Interpretation of the proviso, which is certainly far from clear, would seem to require that its intention be ascertained.[4] Was the intention to

[1] *American Bar Association Journal,* Vol. 32, No. 12 (December, 1946), p. 832.

[2] This JOURNAL, Vol. 40 (1946), p. 715.

[3] "Toward Rule of Law," in *Free World,* October, 1946, p. 50.

[4] "The method of interpretation consists in finding out the connection made by the parties to an agreement, between the terms of their contract and the object to which

assure reciprocity of obligations in respect to the decision of the Court concerning a multilateral treaty: (1) among all parties to the dispute before the Court? (2) among all parties to the treaty? (3) among all parties to the treaty who have a legal interest in the dispute before the court?

(1) The first intention seems to have been in the mind of Mr. John Foster Dulles, from whose memorandum of July 10, 1946, submitted to the Senate Foreign Relations Committee, the proviso arose. Mr. Dulles' statement was as follows:

> *Reciprocity.*—Jurisdiction should be compulsory only when all of the other parties to the dispute have previously accepted the compulsory jurisdiction of the Court.
>
> *Comment:* The Court statute embodies the principle of reciprocity. It provides for compulsory jurisdiction only "in relation to any other state accepting the same obligation" (Article 36 (2)). Oftentimes, however, disputes, particularly under multilateral conventions, give rise to the same issue as against more than one other nation. Since the Court statute uses the singular "any other state," it might be desirable to make clear that there is no compulsory obligation to submit to the Court merely because one of several parties in such dispute is similarly bound, the others not having bound themselves to become parties before the Court and, consequently, not being subject to the Charter provision (Article 94) requiring members to comply with the decisions of the Court in cases to which they are a party.[5]

The meaning of this statement is not clear. It is possible that Mr. Dulles was concerned with the derogation from the reciprocity contemplated by the optional clause if intervention by a third party not bound by that clause were permitted. In this connection Judge Hudson has written:

> If two states are before the Court by reason of declarations made under paragraph 2 of Article 36 of the Statute, it would seem a derogation from the conditions of reciprocity in their declarations to allow intervention by a third State which has made no similar dec-

it is to be applied." C. C. Hyde, *International Law*, 1945 (2nd ed.), p. 1468. Hyde, following Anzilloti, insists that evidence of intent should control the meaning even when the instrument appears to be clear. Courts have frequently held that evidence of intent, external to the text itself, can be used only to discover the meaning or sense of the words or phrases used, that is, the fixed association between the symbol and some external object, not to discover directly the will or intention of the parties. With this limitation, courts have tended continually to allow a wider latitude in the use of extrinsic evidence. Wigmore, *The Law of Evidence*, Vol. 4, secs. 2458 and ff.; Hudson, *The Permanent Court of International Justice, 1920–1942*, p. 643 ff. (commenting on the frequent absence of intention in the formulas of international instruments); and Wright, "The Interpretation of Multilateral Treaties," in this JOURNAL, Vol. 23 (1929), p. 97.

[5] *Compulsory Jurisdiction, International Court of Justice*, Hearings before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 79th Cong., 2nd Sess., July 11, 12, and 15, 1946, p. 44.

laration; the situation is not essentially different, however, when two States are before the Court under a special agreement and it allows intervention by a third State which is not a party to the agreement.[6]

But concern for this situation, which is inherent in the generally recognized right of interested third states to intervene,[7] is difficult to construe from Mr. Dulles' words. Rather he seems concerned lest a third state, not bound by the optional clause, might present arguments in a case and yet not be bound by the decision. This is impossible under the Statute if the third state is a "party" before the Court.

States may be parties to a dispute before the Court because of the optional clause (Article 36 (2)), or because they have accepted the jurisdiction for the particular case or are bound by a special treaty conferring jurisdiction (Article 36 (1)). It is clear from Article 59 of the Statute that all parties to a dispute before the Court, whatever may have been the basis of the Court's jurisdiction over them, are bound and are alone bound by the decision. Thus the Statute itself provides that there is complete reciprocity of obligations in respect to the decision, among all the parties to the dispute before the Court. Article 94 of the United Nations Charter merely affirms this rule with reference to members of the United Nations and authorizes the Security Council to apply sanctions. The question whether an intervenor under Articles 62 or 63 of the Statute is a "party" remains, however, and this may have been the question on which Mr. Dulles wanted clarification. A question may also arise if a third state which ought to be bound by the decision fails to intervene.

(2) Mr. Wilcox specifically states that it was not the intention of the Senate to assure complete reciprocity of obligations concerning the Court's interpretation of a multilateral treaty among all parties to that treaty.[8] Such an intention would seem to involve a confusion of the influence of a decision as *res adjudicata* among the parties and its influence as a precedent in future cases involving others. Article 59 of the Statute insists only upon the former influence and denies any absolute application of the rule *stare decisis*. It would certainly be extraordinary if the idea of complete reciprocity of obligations flowing from a judicial decision concerning a statute were held to apply to all persons bound by that statute. Such an idea would require, for example, that no American court could interpret an act of Congress unless all the persons bound by that act, perhaps 140,000,000, were also parties to the dispute before the court. There has been no difficulty in either municipal or international law in recognizing that only parties to the dispute before the court are legally bound by the decision, although many other persons may be affected by the fact that the decision will probably have an influence upon future interpretations of

[6] Hudson, p. 420.

[7] Several treaties recognizing this right are noted in Hudson, p. 420, note 81.

[8] Above, note 2.

their rights under the law. It does not seem likely that the proviso had the purpose of requiring all parties to any treaty to become parties to every dispute about it.

(3) The writer believes that the proviso was intended to assure that states with a legal interest which will be directly affected by a decision concerning a multilateral treaty become, in every sense, parties to the dispute before the Court. It was, therefore, intended to clarify Articles 62 and 63 of the Statute of the Court by requiring (1) that a request under Article 62 shall not be decided arbitrarily, but by a judicial determination of the claim presented by the requesting state that it has "an interest of a legal nature which may be affected by the decision in the case"; (2) that if such an interest is found or if a state intervenes under Article 63, the intervenor shall have the status of a party to the dispute under Article 59 and other articles of the Statute, and, if a member of the United Nations, under Article 94 of the Charter; (3) that a state which has a legal interest of such nature that it ought to be bound by the decision may be required to become a party; and (4) that if the Court does not apply these rules in a case brought against the United States by virtue of its declaration under the optional clause, the United States may deny the jurisdiction. With this construction the reservation would be clarified if it were expanded to read as follows:

> This declaration shall not apply to . . . (c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty, (with an interest of a legal nature which will be) affected by the decision, are also (permitted, or in exceptional circumstances required by the Court to intervene and thereby to become) parties to the case before the Court, or (2) the United States of America specially agrees to the jurisdiction.

It is probable that the first two propositions would be applied by the Court in any case, but Article 62 and perhaps even Article 63 of the Statute could be construed as giving the Court freedom to reject a request for intervention on political grounds[9] and, furthermore, it is not clear whether an intervenor is a party to the dispute before the Court in every sense of the term. Article 59 of the Statute says only that "parties" are bound by the decision. Article 62 throws no light upon the effect of intervention other than what may be drawn from the meaning of the word

[9] The almost identical text of Article 62 of the Statute of the Permanent Court of International Justice was designed to exclude "political intervention" but it has been suggested that intervention might be denied even if a legal interest is shown. Hudson, pp. 209, 420. With reference to Article 63, identical in the Statutes of the two courts, Hudson writes (p. 422): "The action by the Registrar (in notifying states under this article) does not necessarily commit the Court, either to allowing or to excluding the intervention." In practice there has been some flexibility in permitting intervention under this article.

"intervene" itself.[10] Article 63 says that an intervenor under this Article is bound only by "the construction (of the treaty) given by the judgment," not by other aspects of the decision.[11]

In the writer's opinion the interpretation here suggested is supported by the following considerations.

(1) With a proper grammatical construction of the proviso, the phrase "affected by the decision" modifies the subject of the clause "parties," and not the word "treaty."

(2) The intention of the state which makes it should be the standard for interpreting a unilateral instrument such as this.[12] It is clear that the proviso, though a declaration of the United States, emerged from the Senate. Consequently, evidence of the Senate's intention should be sought and may be provided by extraneous materials such as the statement made by Mr. Wilcox and the proposal made by Mr. Dulles from which the proviso developed. This evidence, it is believed, suggests the intention of assuring reciprocity of obligation among parties to a multilateral treaty with an interest in the dispute greater than that arising from their participation in the treaty. Thus Mr. Wilcox refers to a possible case involving interpretation by the Court of a treaty of mutual guarantee.

> States A, B, C, D, and E are parties to the treaty. State A obtains judgment from the court that B has violated the treaty. This decision might obligate States C, D, and E to join with State A in application of sanctions against B, even though States C, D, and E were not actually involved in the original dispute. Clearly the legal rights and duties of States C, D, and E are so materially affected that they might well become parties to the case before the Court.[13]

Clearly such a situation would not be adequately dealt with by assuring that these three states should have the privilege of becoming parties by intervention. State A has an interest that they *shall* be bound by the decision.

[10] A study of the drafting of this text in the Statute of the Permanent Court of International Justice does not clarify the intention in this regard, but Hudson writes (pp. 209, 421): "If the request is granted, the intervenor (under Article 62) becomes a party to the pending case on a footing with the other parties."

[11] An intervenor under Article 63 "becomes a party . . . in so far as the proceeding relates to the construction of the convention, and the construction given by the judgment will be binding upon it; but apparently it does not become a party generally for all purposes." Hudson, p. 422.

[12] While the proper evidence for the interpretation of general treaties, like statutes, may be general or legal usage, and the proper evidence for the interpretation of bilateral treaties, like ordinary contracts, may be mutual usage understood at the time by the parties, any evidence of individual intention may be useful for the interpretation of unilateral instruments like declarations or wills. Wigmore, Sec. 2458; Francis Wharton, *Commetaries on Law*, 1884, Sec. 612; Wright, this JOURNAL, Vol. 23 (1929), pp. 96–97; Harvard Research in International Law, *Treaties*, in this JOURNAL, Vol. 29 (1935), Supplement, p. 957; Hudson, pp. 643 and ff.

[13] This JOURNAL, Vol. 40 (1946), p. 715.

(3) The broad construction suggested by Judge Hudson would nullify such a considerable part of the jurisdiction conferred by the declaration that it is not reasonable to assume that the construction was intended.

(4) The Court can usually assume that a state which fails to intervene under Articles 62 or 63 has no legal interest which may be affected by the decision of the case. It is certainly outside the usual province of a court to hunt for persons who have legal interests which they have failed to assert. But a party before it may, as in the case of a guarantee, have a legal interest that other parties to a multipartite treaty be bound by the decision.

(5) The right of intervention under Article 63 should not be assumed to mean that all parties to a multilateral treaty have an interest of a legal nature in every case in which the construction of the treaty is involved.[14] The fact that intervention because of a legal interest in the case and intervention because of participation in a multilateral treaty are dealt with in separate articles and in a different manner creates a presumption against that construction. In municipal law it has never been held that every person who might be bound by a statute has a legal interest in every case which may involve a construction of that statute and there seems to be no authoritative pronouncement that every party to a multilateral treaty necessarily has a legal interest in every case involving its construction.[15]

The conceptions (1) of being a party to a case, (2) of having a legal interest affected by the decision, and (3) of being a party to a convention construed by a decision are distinct. The proviso under discussion does involve all of these conceptions but it should not be assumed that it identifies the second with the first (which would make the proviso in large measure meaningless) or that it identifies the second with the third (which would make it in considerable measure destructive of the declaration). It should be construed as requiring the Court to treat claims of legal interest judicially and to require that a party to a multilateral treaty involved if found to have a legal interest becomes a party to the case in the sense of Article 59 and other articles of the Statute.

The second paragraph in the proviso "or the United States of America

[14] Hudson writes (p. 420) that the "interest of a legal nature" referred to in Article 62 "would seem to require a special interest, in addition to a State's general interest in the development of international law" but suggests (p. 422) that "Perhaps Article 63 may be considered as a special application of the general principle laid down in Article 62, and the fact that a State is a party to a convention to be construed may be regarded as establishing that State's legal interest so that a judgment by the Court will not ordinarily be required." See also note 1, above. There was a tendency to recognize that a state had a legal interest in the observance of Mandates because of its membership in the League of Nations even if no special interest of its own or of one of its nationals was involved in a particular instance but this may have arisen because of the assumption that all Members of the League had an interest in the protection of the inhabitants of these territories. Parties to the Treaty of Versailles not Members of the League had no such interest. Q. Wright, *Mandates under the League of Nations*, pp. 158, 473–6, 493–5.

specially agrees to jurisdiction" seems to mean that the United States can deny the jurisdiction of the Court in a case brought against it, if the Court has demonstrably failed to act in the manner suggested, that is, if the Court has arbitrarily refused to permit the intervention of a party to a multilateral treaty involved in the case or has refused to treat an intervenor as a party entitled to the rights and bound by the obligations of a party, or has failed to require a state which ought to be bound by the decision to become a party before it. This does not give the United States a right of unilateral veto as does the Proviso in the American Declaration dealing with domestic jurisdiction. It might, however, raise an unfortunate controversy between the United States and the Court as to whether the Court has properly interpreted the reservation. It suggests inadequate confidence in the judgment of the Court.

The veto on matters which the United States considers within its domestic jurisdiction is absolute, although the United States would be violating a moral obligation if it exercised this veto without adequate grounds for asserting that the matter in dispute was really essentially within its domestic jurisdiction. Under the proviso dealing with multilateral treaties, however, the United States can not deny the Courts jurisdiction unless it is clear that the Court has failed to live up to the requirements of the proviso. The Court itself has final decision on the meaning of the proviso under Article 36 (6) of the Statute: "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, the United States could not exercise a veto under this proviso unless the Court refused to decide the issue, or possibly if it reached a conclusion so obviously unjustified by the terms of the proviso that it would come within the category of cases in which, under international law a state may reject an arbitral award or judicial decision.[16]

It would, therefore, appear that if the Court gives the consideration to intervenors probably intended by Articles 62 and 63 of the Statute, treats them in every respect as "parties," and gives heed to direct interests of the parties that other participants in multipartite treaties involved be bound by the decision, it will be carrying out the requirements of the American proviso.

QUINCY WRIGHT

[15] Do neutral states if parties to the Hague Convention regulating the conduct of war necessarily have a legal interest in any dispute concerning those conventions between belligerents who are parties? Before becoming a member of the League, did Germany, a party to the Treaty of Versailles which included the League of Nations Covenant, have a legal interest in every dispute between two members of the League concerning the interpretation of the Covenant? Practice suggests a negative answer to these questions. On types of multipartite treaties see Hudson, *International Legislation*, 1931, Vol. 1, p. xvi, and Wright, *Legal Problems in the Far Eastern Conflict*, 1941, pp. 85 and ff.

[16] Moore, *Digest of International Law*, Vol. 7, pp. 59 and ff.; Hackworth, *Digest of International Law*, Vol. 6, pp. 125 and ff. But see Articles 60 and 61 of the Statute.