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The PLO Observer Mission Dispute: An Argument for U.S. Compliance with the U.N. Headquarters Agreement

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Abstract

This Note argues that the United States must comply with its responsibilities under the Headquarters Agreement, especially its obligation to arbitrate disputes. Part I discusses the negotiations and subsequent interpretations of the Headquarters Agreement. Part II examines the dispute that arose when the United States enacted the ATA. Part III argues that both domestic law and international law require that the United States abide by the dispute settlement clause of the Headquarters Agreement. This Note concludes that the United States must demonstrate respect for its obligations under the Headquarters Agreement, in addition to other U.N.-related obligations, or its status as host country and as a trustworthy treaty partner.

THE PLO OBSERVER MISSION DISPUTE: AN
ARGUMENT FOR U.S. COMPLIANCE WITH
THE U.N. HEADQUARTERS
AGREEMENT

INTRODUCTION

In 1947, the United States and the United Nations signed the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations (the "Headquarters Agreement" or the "Agreement").¹ The Agreement contained a dispute settlement clause that required the United States and the United Nations to submit to arbitration disputes between them arising out of the Agreement's interpretation or application.² In 1987, the United Nations claimed that the United States violated this requirement of the Agreement when the United States passed the Anti-Terrorism Act of 1987 (the "ATA" or the "Act")³ and, pursuant to the Act, petitioned a U.S. court to close the Palestinian Liberation Organization's observer mission to the United Nations (the "PLO Observer Mission").⁴ The United Nations claimed that the United States should have abided by the dispute settlement clause in the Headquarters Agreement before resorting to its domestic court to implement the ATA.⁵ The International Court of Justice (the "ICJ")⁶ held, in an ad-

1. June 26, 1947, United Nations—United States, 61 Stat. 756, T.I.A.S. No. 1676, 11 U.N.T.S. 11 [hereinafter Headquarters Agreement].

2. *Id.* sec. 21, 61 Stat. at 764, T.I.A.S. No. 1676, at 18, 11 U.N.T.S. at 30; *see infra* note 19 (setting forth text of arbitration section).

3. Foreign Relations Authorization Act for Fiscal Years 1988-89, Pub. L. No. 100-204, tit. X, 101 Stat. 1331 (codified at 22 U.S.C.A. §§ 5201-5203 (West Supp. 1989)).

4. *See infra* notes 83-84 and accompanying text.

5. *See infra* notes 76-82 and accompanying text.

6. The International Court of Justice (the "ICJ") was established in 1945 in conjunction with the United Nations at the San Francisco conference of 50 nations that established the United Nations. *See* U.N. CHARTER arts. 92-96; *see also* G. ELIAN, THE INTERNATIONAL COURT OF JUSTICE 40 (1971). The fifty nations met from April 25 through June 26, a period that also marked the German surrender in World War II. *Id.* This conference saw the creation and approval of the U.N. Charter and the Statute of the International Court of Justice (the "Statute"), which was integrally connected with the U.N. Charter. *Id.* Articles 92-96 deal with the creation of the ICJ. U.N. CHARTER arts. 92-96. Article 92 states that the ICJ is the principle judicial organ of the United Nations. U.N. CHARTER art. 92. Article 93 considers all U.N. member states as parties to the statute of the ICJ and allows any non-member state to apply to

visory opinion, that international law required the United States to settle the dispute through arbitration.⁷ However, the U.S. court retained jurisdiction, claiming that domestic law required it to hear the case.⁸

This Note argues that the United States must comply with its responsibilities under the Headquarters Agreement, especially its obligation to arbitrate disputes. Part I discusses the negotiations and subsequent interpretations of the Headquarters Agreement. Part II examines the dispute that arose when the United States enacted the ATA. Part III argues that both U.S. domestic law and international law require that the United States abide by the dispute settlement clause of the Headquarters Agreement. This Note concludes that the United States must demonstrate respect for its obligations under the Headquarters Agreement, in addition to other U.N.-related obligations, or its status as host country and as a trustworthy treaty partner will be jeopardized.

I. *THE HEADQUARTERS AGREEMENT: NEGOTIATIONS AND SUBSEQUENT INTERPRETATIONS*

A. *The Agreement's Elements and Initial Negotiations*

The United States, having played a major role in the foundation of the United Nations,⁹ invited the organization to es-

the General Assembly to become a party to the Statute. *Id.* art. 93. Article 94 calls for U.N. members to comply with ICJ judgments in cases to which they are parties. *Id.* art. 94. Finally, article 96 gives the U.N. General Assembly or the Security Council the right to request advisory opinions on legal questions from the ICJ. *Id.* art. 96; *see also* G. ELIAN, *supra*, at 46. The actual statute of the ICJ deals with its organization, its jurisdiction, its procedures, its advisory opinions, and the process for amending the Statute. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, at 25. Two relevant provisions of the Statute involve, first, the fact that only states, not international organizations, may be parties before the court (the United Nations may only ask the ICJ for advisory opinions) *id.* art. 34, 59 Stat. at 1059, T.S. No. 993, at 29, and second, the fact that ICJ's decisions are based on international law conventions, international custom and, in a lesser sense, judicial precedent. *Id.* art. 38, 59 Stat. at 1060, T.S. No. 993, at 30; *see* G. ELIAN, *supra*, at 55-56.

7. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (U.N. v. U.S.), 1988 I.C.J. 12 (Advisory Opinion of Apr. 26), *reprinted in* 27 I.L.M. 808 (May 1988); *see infra* notes 87-157 and accompanying text.

8. *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988); *see infra* notes 165-200 and accompanying text.

9. I E. LUARD, *A HISTORY OF THE UNITED NATIONS* 18 (1982). In 1940, prior to

establish its headquarters within U.S. borders.¹⁰ After the United Nations accepted this offer,¹¹ the United States and the United Nations approved the Headquarters Agreement,¹² which established the rights and duties of both the United Nations and the United States in relation to this headquarters site.¹³ In general, the Headquarters Agreement contains an

World War II, the U.S. Department of State discussed the formation of a new international body. *Id.* at 17-18. See generally I M. KU, A COMPREHENSIVE HANDBOOK OF THE UNITED NATIONS 94-106 (1978) (providing documents relating to the formation of the United Nations); R. RIGGS & J. PLANO, THE UNITED NATIONS INTERNATIONAL ORGANIZATION AND WORLD POLITICS 1-21 (1988) (historical perspective of the United Nations).

10. H.R. Con. Res. 75, 59 Stat. 848 (1945). This resolution passed by the House of Representatives, with the Senate concurring, on Dec. 11, 1945, invited the United Nations to locate its seat within the United States. *Id.*

11. G.A. Res. 22(B), U.N. Doc. A/64, at 27-28 (1946). This resolution authorized the Secretary-General, together with the negotiating committee, to negotiate with the United States the necessary arrangements involved in the establishment of its seat in the United States. *Id.* The committee agreed to locate its seat in the New York City area. G.A. Res. 99(I), U.N. Doc. A/64/Add. 1, at 195 (1946). The United Nations accepted the offer made by John D. Rockefeller of US\$8,500,000 to purchase a specific tract of land in New York City. G.A. Res. 100(I), U.N. Doc. A/64/Add. 1, at 196 (1946).

12. Headquarters Agreement, *supra* note 1.

13. *Id.* The Headquarters Agreement deals with the following rights and duties: Article II includes the rights of the United Nations to maintain broadcasting facilities and the right to establish an aerodrome if necessary. *Id.* art. II, secs. 4-5, 61 Stat. at 759, T.I.A.S. No. 1676, at 3-5, 11 U.N.T.S. at 14-16. Article III deals with the law and authority in the headquarters district. *Id.* art. III, secs. 7-10, 61 Stat. at 760-61, T.I.A.S. No. 1676, at 6-9, 11 U.N.T.S. at 18-20. Article IV relates to matters of communications and transit. *Id.* art. IV, secs. 11-14, 61 Stat. at 761-62, T.I.A.S. No. 1676, at 9-13, 11 U.N.T.S. at 20-24. Article V refers to resident representatives of the United Nations. *Id.* art. V, sec. 15, 61 Stat. at 762-63, T.I.A.S. No. 1676, at 13-15, 11 U.N.T.S. at 26. Article VI involves police protection of the headquarters district. *Id.* art. VI, sec. 16, 61 Stat. at 763, T.I.A.S. No. 1676, at 15, 11 U.N.T.S. at 26-28. Article VII relates to public services and protection of the headquarters district. *Id.* art. VII, secs. 17-19, 61 Stat. at 763-64, T.I.A.S. No. 1676, at 16-17, 11 U.N.T.S. at 28-30. Article VIII defines matters relating to the operation of the Agreement including the dispute settlement clause. *Id.* art. VIII, secs. 20-21, 61 Stat. at 764, T.I.A.S. No. 1676, at 17-18, 11 U.N.T.S. at 30. Article IX relates to miscellaneous provisions. *Id.* art. IX, secs. 22-28, 61 Stat. at 764-66, T.I.A.S. No. 1676, at 18-22, 11 U.N.T.S. at 30-34. Annex I defines the headquarters district as encompassing the area between First Avenue and the Franklin D. Roosevelt Drive, from 42nd to 48th Streets in Manhattan. *Id.* annex I, 61 Stat. at 766, T.I.A.S. No. 1676, at 23, 11 U.N.T.S. at 36. Annex 2 deals with the maintenance of utilities. *Id.* annex II, secs. 1-2, 61 Stat. at 766-67, T.I.A.S. No. 1676, at 24, 11 U.N.T.S. at 36. In addition, the U.S. Congress, in a joint resolution authorizing the President to bring this agreement into effect, Pub. L. No. 80-357, 61 Stat. 756, attached sections 3-6 into annex 2, section 6 being the security clause. Headquarters Agreement, *supra* note 1, annex 2, sec. 6, 61 Stat. at 767-68, T.I.A.S. No. 1676, at 27-30.

access clause that enables member states and other invitees to enter and exit the headquarters district¹⁴ regardless of their relationship with the United States.¹⁵ Further, the Headquarters Agreement prohibits the United States from enforcing its alien residence laws on those U.N. member states and invitees living in the United States.¹⁶ However, the U.S. Congress added a clause to the Headquarters Agreement that permits the United States to safeguard its own security by restricting the entry of aliens into parts of the United States outside the vicinity of the headquarters district if those aliens pose a threat to the security of the United States.¹⁷ Finally, in light of the purpose of the United Nations to codify international law and to foster world peace, the Headquarters Agreement calls for a broad interpretation in favor of the United Nations.¹⁸

In the event of a dispute between the United States and

14. Headquarters Agreement, *supra* note 1, art. IV, sec. 11, 61 Stat. at 761, T.I.A.S. No. 1676, at 9-10, 11 U.N.T.S. at 20-22. Article IV, section 11 states:

The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of (1) representatives of Members or officials of the United Nations . . . or (5) other persons invited to the headquarters district by the United Nations . . . on official business.

Id.

15. *Id.* art. IV, sec. 12, 61 Stat. at 761, T.I.A.S. No. 1676, at 10, 11 U.N.T.S. at 22. Article IV, section 12 states that "[t]he provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States." *Id.*

16. *Id.* art. IV, sec. 13, 61 Stat. at 761, T.I.A.S. No. 1676, at 10-11, 11 U.N.T.S. at 22. Article IV, section 13 states that "[l]aws and regulations in force in the United States regarding the residence of aliens shall not be applied . . . to interfere with the privileges referred to in section 11 . . ." *Id.*

17. *Id.* annex 2, sec. 6, 61 Stat. at 767-68, T.I.A.S. No. 1676, at 30. Annex 2, section 6 states that

[n]othing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the headquarters district and its immediate vicinity, as to be defined in a supplemental agreement between the Government of the United States and the United Nations in pursuance of section 13(3)(e) of the agreement, and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries.

Id.; see also *id.* annex 1, 61 Stat. at 766, T.I.A.S. No. 1676, at 23, 11 U.N.T.S. at 36 (defining headquarters district as area between First Avenue and the Franklin D. Roosevelt Drive, from 42nd to 48th Streets in Manhattan).

18. *Id.* art. IX, sec. 27, 61 Stat. at 765, T.I.A.S. No. 1676, at 21, 11 U.N.T.S. at 34. Article IX, section 27, states that "this agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United

the United Nations concerning the interpretation or application of the Headquarters Agreement, article VIII, section 21 provides a dispute settlement procedure.¹⁹ If there is such a dispute, the United States and the United Nations must first attempt to negotiate a resolution.²⁰ If these negotiations cannot resolve the dispute, article VIII, section 21 mandates that the United States and the United Nations refer the dispute to a tribunal of three arbitrators, one chosen by each party, the third to be chosen jointly or, if they are unable to agree upon a third, by the President of the ICJ.²¹ During the course of any such dispute, the Secretary-General of the United Nations may request an advisory opinion from the ICJ, which is to be taken into account when the arbitral tribunal renders its final decision.²²

These terms were the result of negotiations between the

States, fully and efficiently to discharge its responsibilities and fulfill its purposes.”
Id. The U.N. Charter states the purpose of the United Nations:

To maintain international peace and security . . . ; [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . ; [t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character . . . ; [and] [t]o be a center for harmonizing the actions of nations in the attainment of these common ends.

U.N. CHARTER art. 1.

19. Headquarters Agreement, *supra*, note 1, art. VII, sec. 21, 61 Stat. at 764, T.I.A.S. No. 1676, at 18, 11 U.N.T.S. at 30. Article VII, section 21, states that

(a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.

(b) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed by both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court.

Id.

20. *Id.* art. VIII, sec. 21(a), 61 Stat. at 764, T.I.A.S. No. 1676, at 18, 11 U.N.T.S. at 30.

21. *Id.*

22. *Id.* art. VIII, sec. 21(b), 61 Stat. at 764, T.I.A.S. No. 1676, at 18, 11 U.N.T.S. at 30.

United States and the United Nations that lasted from June 10 through June 19, 1946,²³ prior to the selection of a permanent site.²⁴ Both the United States and the United Nations agreed that disputes as to whether U.N. regulations would supersede U.S. laws in the headquarters district or whether a U.S. law was inconsistent with a U.N. regulation would be settled by arbitration and that, pending settlement, the U.N. regulation should apply.²⁵ In addition, the original suggestion for settling disputes involved an umpire, but this was replaced, at the suggestion of the United States, by a board of three arbitrators.²⁶ Further, the United States suggested including a provision that the agreement be read in light of the purposes of the United Nations, so that the arbitrators would not construe the agreement so as to limit the right of the United Nations to make regulations.²⁷

Following these negotiations, the United Nations asked the United States about the effect of the Headquarters Agreement under U.S. law. More precisely, the U.N. Secretary-General questioned whether this agreement would operate similarly to a treaty, as the supreme law of the United States.²⁸ The U.S. Attorney General answered in the affirmative.²⁹ Finally, the U.S. Senate Committee on Foreign Relations suggested the addition of a clause pertaining to the right of the United

23. U.N. Doc. A/67 (1946).

24. *Id.* at 2.

25. *Id.* at 7.

26. *Id.* at 9.

27. *Id.* at 7.

A provision . . . which, at the suggestion of the United States representatives, has been inserted at the end of the agreement, and which directs that the agreement "shall be construed in the light of its purpose to enable the United Nations at its headquarters in the United States of America fully and efficiently to discharge its responsibilities and fulfil its purposes" should prevent the arbitrators from placing a narrow construction on the United Nations' right to make regulations.

Id. (quoting Convention/Agreement Between the United Nations and the United States of America (Working Draft), U.N. Doc. A/67, at 11 (1946)).

28. Opinion of Acting Attorney General of the United States Regarding the Effectiveness of the Proposed Headquarters Agreement if Executed by the President Pursuant to Authorization by a Joint Resolution of the Congress, U.N. Doc. A/67/Add. 1 (1946). The United Nations asked for the Attorney General's opinion of the following question: "Would the enclosed agreement when executed by the President pursuant to authorization by a joint resolution of the Congress operate as the supreme law of the land . . . ?" *Id.* at 1.

29. *Id.* at 1-2.

States to safeguard its own security.³⁰ Both the Senate Committee Report and a House Committee Report noted, however, that this security provision was not meant to interfere with access necessary to the functioning of the United Nations.³¹

B. *The Agreement's Subsequent Interpretation*

There was a subsequent disagreement between the United States and the United Nations regarding access to the headquarters district.³² This dispute occurred in 1953, when the United States refused to grant visas to two non-governmental organization representatives, claiming that they both represented a security risk.³³ A U.S. report explained that one of these representatives, a Canadian national representing the communist dominated Women's International Democratic Federation, would probably engage in subversive activities af-

30. SENATE COMM. ON FOREIGN RELATIONS, AUTHORIZING THE PRESIDENT TO ACCEPT ON BEHALF OF THE GOVERNMENT OF THE UNITED STATES THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, S. REP. NO. 559, 80th Cong., 1st Sess. (1947) (accompanying S.J. Res. 144 and S.J. Res. 136).

31. *Id.* The Senate Committee report stated that, in its opinion, the provision of article IV, section 13 of the Headquarters Agreement "adequately protect[s] the security of the United States and that the United Nations could not be expected to maintain its headquarters in this country if the United States were to impose restrictions upon the access to the headquarters district which would interfere with the proper functioning of the Organization." *Id.* at 6. In addition, in H.R. Rep. No. 1093, 80th Cong., 1st Sess. (1947), the House stated:

In general, the United States, as host country, must permit access to the headquarters on the part of all persons who have legitimate business with the Organization. This involves inevitably the admission of a number of aliens, some of whom would not normally be admissible under immigration laws of the United States. The United States has foreclosed itself in undertaking voluntarily the obligations of the host country.

Id. at 10-11.

32. See *infra* note 33 and accompanying text.

33. U.N. Doc. E/2397 (1953), reprinted in [1952-54] 3 FOREIGN RELATIONS OF THE UNITED STATES 257. This memorandum by the legal department of the United Nations on the admission of representatives of non-governmental organizations enjoying observer status states in its summary of the facts that the United States denied visa applications requested by two individuals who were invited by their respective organizations (the Women's International Democratic Federation and the World Federation of Trade Unions) to attend sessions of the U.N. Economic and Social Council. *Id.* at 1-2, reprinted in [1952-54] 3 FOREIGN RELATIONS OF THE UNITED STATES at 258. This denial by the United States was made pursuant to § 6 of the Headquarters Agreement, which deals with the right of the United States to protect its security. *Id.* (quoting U.S. report to the Economic and Social Council); see also Y. Liang, *Notes on Legal Questions Concerning the United Nations*, 48 AM. J. INT'L L. 434, 445-46 (1954).

ter entering the United States.³⁴ All that was revealed about the other representative was the fact that he presented a security risk.³⁵ The United States made it clear that the details regarding the specific reasons for visa denials were of a sensitive nature and would not be disclosed.³⁶

Recognizing that a problem existed, the United States and the United Nations negotiated a resolution to this situation that clarified some of the relevant obligations under the Agreement.³⁷ These included, first, that the United States had the right to assure that people not use the the Headquarters Agreement as a cover under which they could threaten the country's security.³⁸ Second, the United States could grant limiting visas, valid only within the headquarters district and its immediate vicinity, in order to protect its security.³⁹ Third, the United States could reasonably redefine "the immediate vicinity" of the headquarters district, consistent with the headquarters' purpose, and could determine the expiration of the visa following the completion of the official business.⁴⁰ Fourth, the United States could deport people admitted under the Headquarters Agreement who abused their privileges.⁴¹ Fifth, the rights of the United States were limited by the Headquarters Agreement as interpreted above.⁴²

34. [1952-54] 3 FOREIGN RELATIONS OF THE UNITED STATES 250-51 (telegram from the U.S. Representative at United Nations to Department of State).

35. See U.N. Doc. E/2397, *supra* note 33, para. 3, reprinted in [1952-54] 3 FOREIGN RELATIONS OF THE UNITED STATES 257-58 (quoting the U.S. Representative's Report to the Economic and Social Council).

36. [1952-54] 3 FOREIGN RELATIONS OF THE UNITED STATES at 278. For a fuller analysis of this incident, in addition to other similar problems that occurred during this period, see *id.* at 195-312.

37. *Progress Report by the Secretary-General on Negotiations with the United States of America Concerning the Interpretation of the Headquarters Agreement*, U.N. Doc. E/2492 (1953) [hereinafter *Progress Report*]; see *infra* notes 38-48 and accompanying text.

38. *Progress Report*, *supra* note 37, at 1. The Secretary-General and the Permanent Representative of the United States recognized at the beginning of their discussions "that the provisions of the Headquarters Agreement would not be permitted to serve as a cover to enable persons in the United States to engage in activities, outside the scope of their official functions, directed against the security of that country." *Id.* at 1-2.

39. *Id.* at 2.

40. *Id.*

41. *Id.*

42. *Id.*

In the case of aliens in transit to the Headquarters District exclusively on official business of, or before, the United Nations, the rights of the

The Secretary-General, in an oral statement to the Economic and Social Council, stated that in addition to successfully clarifying the rights and duties of both parties under the Headquarters Agreement, he had negotiated with the United States concerning the procedures to apply in such controversies.⁴³ These procedures were based on three principles: (i) an assurance that the United States would deal with such disputes at the highest governmental levels;⁴⁴ (ii) that the United States would give the United Nations a chance to act in a timely fashion;⁴⁵ and (iii) that the United States would supply the United Nations with all relevant information regarding the dispute so that the United Nations could determine whether or not the actions violated the Headquarters Agreement.⁴⁶ In the same council meeting, the Secretary-General noted that although this situation was resolved through negotiations, if it had not been, it would have been necessary to submit the matter to arbitration.⁴⁷ The U.S. representative to this U.N. Council also recognized the Headquarters Agreement's dispute settlement procedure in relation to this matter.⁴⁸

A second incident occurred in 1974, when the United Nations originally invited the Palestine Liberation Organization (the "PLO") to set up an observer mission.⁴⁹ B'nai B'rith sued the United States in a U.S. federal court, claiming that the

United States are limited by the Headquarters Agreement to those mentioned. However, other cases may arise . . . , cases in which there is clear and convincing evidence that a representative of a nongovernmental organization is coming to the United States purportedly for United Nations business but also, or primarily, for a purpose outside the scope of such activities, and where further the competent authorities of the Government of the United States are satisfied that the admission of that person would be prejudicial to the national security of the United States. In the opinion of the United States representatives, such cases are outside the scope of the Headquarters Agreement, and they therefore hold that in such cases the United States Government is entitled to refuse a visa.

Id.

43. *Oral Statement Made by the Secretary-General*, U.N. Doc. E/2501 (1953).

44. *Id.* "The decisions on the United States side will be taken at the highest levels with the guarantees against mistakes and possible arbitrariness . . ." *Id.* at 3-4.

45. *Id.* at 4.

46. *Id.*

47. *Id.* at 2-3.

48. *U.S. ESCOR Representative's Statement to the Council*, reprinted in 13 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 86-87 (1968).

49. G.A. Res. 3237, 29 U.N. GAOR Supp. 31 (Agenda Item 108) at 4, U.N. Doc. A/9631 (1974). This resolution states that the United Nations

United States should not allow the PLO representatives to enter the country.⁵⁰ The court dismissed the case, contingent upon an order that gave the United States two choices: the United States either had to show cause why the representatives of the PLO should not be denied entry into the country or issue them restrictive visas.⁵¹ The United States, in accordance with the court's order, issued the PLO representatives restrictive visas.⁵² Although this dispute did not fall under the Headquarters Agreement's dispute settlement mechanism because it was not between the United States and the United Nations, it demonstrated that the United States accepted the presence of the PLO due to the Headquarters Agreement.⁵³ In addition, the U.S. court noted the obligation of the United States to permit even undesired aliens entrance into the country if the alien's purpose involved official U.N. duties.⁵⁴

Thus, the Headquarters Agreement not only explicitly defines the rights and duties of both the United Nations and the United States, but over forty years of practice under the Agree-

1) *Invites* the Palestine Liberation Organization to participate in the sessions and the work . . . of the General Assembly in the capacity of observer;

2) *Invites* the Palestine Liberation Organization to participate in the sessions and the work of all international conferences convened under the auspices of the General Assembly in the capacity of observer;

3) *Considers* that the Palestine Liberation Organization is entitled to participate as an observer in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations.

Id. (emphasis in original). See generally *Suy*, *The Status of Observers in International Organizations*, 160 *RECUEIL DES COURS* 75 (1978) (stating that observers from liberation movements have been granted visas to enter host country under access clause's "invitees" category); *Travers*, *The Legal Effect of United Nations Action in Support of the Palestine Liberation Organization and the National Liberation Movements of Africa*, 17 *HARV. INT'L L.J.* 561 (1976).

50. *Anti-Defamation League of B'nai B'rith v. Kissinger*, No. 74 Civ. 1545 (E.D.N.Y. Nov. 1, 1974), *partially excerpted in* A. ROVINE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 27 (1974).

51. *Id.* at 27-28. The Anti-Defamation League got an order directing the United States to show why the PLO should not be denied entry, or as an alternative, to issue a restrictive visa limiting PLO representatives to a 25-mile radius from Columbus Circle in Manhattan. *Id.* The U.S. government decided to issue this restrictive visa and, therefore, satisfied the court's demand. *Id.*

52. *Id.*

53. Record at 37, *B'nai B'rith* (No. 74 Civ. 1545). Originally the United States was going to issue the PLO representatives a visa that would have permitted them to travel throughout the United States. *Id.* at 4.

54. *Id.* at 37.

ment has helped clarify how these rights and duties should be interpreted. However, these clarifications of the Headquarters Agreement were not extensive enough to resolve the subsequent dispute over the enactment of the ATA.

II. THE ATA, THE ICJ, AND THE U.S. COURT: THE DISPUTE UNFOLDS

The ATA, which was incorporated into the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989,⁵⁵ called for the closing of PLO offices in the United States.⁵⁶ The United Nations claimed that the enactment of the ATA, without any assurance as to the Act's effect on the PLO Observer Mission, created a dispute regarding the Headquarters Agreement's interpretation or application.⁵⁷ The United Nations then implemented section 21 of the Headquarters Agreement⁵⁸ and, following the refusal of the United States to select its arbitrator,⁵⁹ proceeded to the ICJ for an advisory opinion on whether the Headquarters Agreement obligated the United States to arbitrate.⁶⁰ Subsequently, the U.S. Attorney General, pursuant to the ATA, brought suit in a U.S. court to close the PLO Observer Mission.⁶¹

A. The ATA: The Dispute Begins

In response to terrorist actions by the PLO, U.S. Senator Charles E. Grassley introduced legislation to curtail PLO activity in the United States.⁶² This legislation prompted debate between Congress and the U.S. State Department about possi-

55. Pub. L. No. 100-204, tit. X, 101 Stat. 1331 (codified at 22 U.S.C.A. §§ 5201-5203 (West Supp. 1989)).

56. See *infra* note 71 (for relevant text of ATA).

57. *Report of the Committee on Relations with the Host Country: Report of the Secretary-General*, U.N. Doc. A/42/915, para. 5 (1988) [hereinafter *Secretary-General's Report*], reprinted in 27 I.L.M. 780, 781 (1988).

58. *Id.*; see *infra* note 76 and accompanying text.

59. See *infra* note 80 and accompanying text.

60. See *infra* note 82 and accompanying text.

61. See *infra* note 84 and accompanying text.

62. 133 CONG. REC. S6447 (daily ed. May 14, 1987) (statement of Sen. Grassley). "The action . . . is not because of one so-called isolated incident of terrorist activity but because of the years of documented evidence that leaves one with no doubt about the PLO's goals and what its methods are to achieve those goals." *Id.* The specific PLO terrorist acts that Senator Grassley pointed to were as follows:

ble conflicts with the Headquarters Agreement.⁶³ Some senators claimed that the United States had the right to close the PLO Observer Mission to safeguard its own security.⁶⁴ Other senators argued that observer missions were not protected under the terms of the Headquarters Agreement.⁶⁵ The State Department sent a letter to Congress in which it stated that closing the PLO Observer Mission would violate obligations under the Headquarters Agreement.⁶⁶ The U.N. Secretary-

First. . . . [T]he 1972 Black September massacre of 11 Olympic athletes—an American was among those killed.

Second. The 1973 murder of a 16-year-old American.

Third. The 1974 downing of a TWA 707 which resulted in the death of 88 people, some of whom were American.

Fourth. The 1975 bombings in Jerusalem which resulted in the death of three Americans.

Fifth. The 1976 hotel fire set by the PLO which caused the death of two Americans.

Sixth. The 1976 killing of an aide to Senator Jacob Javits.

Seventh. The 1978 killings of [an] American Medical Student and an American photographer.

Eighth. . . . [T]he massacres at the Rome and Athens airports, and the murder of Leon Klinghoffer aboard the *Achille Lauro*.

Id. Nevertheless, at the end of 1988, the United States agreed to speak with the PLO because it recognized Israel and renounced terrorism. *See* Statement of the Opening of Diplomatic Talks with the Palestine Liberation Organization, 24 *WEEKLY COMP. PRES. DOC.* 1625 (Dec. 14, 1988).

63. *See infra* notes 64-69 and accompanying text.

64. 133 *CONG. REC.* S6449 (daily ed. May 14, 1987) (statement of Sen. Dole). Regarding the Headquarters Agreement, Senator Dole stated: "In our agreement with the United Nations, we have reserved our right to defend ourselves; to take any actions necessitated by our national security; and to see that our national laws are fully observed." *Id.*; *see supra* note 17 (text of this security provision).

65. 133 *CONG. REC.* H11425 (daily ed. Dec. 15, 1987) (statement of Rep. Burton).

It is simply a lie that this bill violates the U.S. headquarters agreement

. . . .

The U.N. headquarters agreement does not even contain the words "observer mission." All observer missions exist under a clause pertaining to "invitees" that was never intended to cover permanent offices or missions. All U.N. observer missions remain in New York under the courtesy of the United States and have no—zero—rights in the headquarters agreement.

Id.

66. 133 *CONG. REC.* S16605 (daily ed. Nov. 20, 1987) (statement of Sen. Grassley). Senator Grassley pointed to a letter he received in July, 1985, from Secretary of State George Schultz, which stated in part that "[t]his administration shares the concerns evident in this legislation. We condemn, unequivocally, terrorist acts by all groups, including acts associated with the PLO. . . . [But] closure of the PLO observer mission . . . would be seen as a violation of a U.S. treaty obligation under the U.N. headquarters agreements." *Id.*

General agreed with the State Department's assessment and even sent a letter to the U.S. Ambassador to the United Nations demanding that the U.S. State Department oppose the legislation.⁶⁷

In the end, the ATA was attached to the Foreign Relations Authorization Act⁶⁸ without prior committee hearings⁶⁹ and won approval on December 22, 1987.⁷⁰ The ATA calls for the closing of any PLO office located in the United States.⁷¹ In

67. *Id.* Senator Grassley noted U.N. Secretary General Javier Perez De Cuellar's letter to the U.S. Permanent Representative Ambassador Walters as an example of U.N. pressure on the State Department to oppose the legislation. *Id.* The Secretary General's letter stated:

I would trust, in the circumstances [sic], that the United States Government will continue to vigorously oppose any steps in the Congress to legislate against the Palestine Liberation Organization observer mission to the United Nations. Since the legislation runs counter to obligations arising from the headquarters agreement, I would like to underline the serious and detrimental consequences that it would entail.

Id.

68. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, tit. X, 101 Stat. 1331 (codified at 22 U.S.C.A. § 2651 (West Supp. 1989)). The purpose of this bill was to authorize 1988-89 appropriations for the Department of State, the U.S. Information Agency, and the Board of International Broadcasting. *Id.*

69. 133 CONG. REC. S13852-55 (daily ed. Oct. 8, 1987) (statement of Sen. Bingaman). Senator Bingaman objected to the absence of committee hearings because he felt there were very serious issues that needed to be examined. *Id.* at S13852. Senator Grassley responded that because 50 senators had co-sponsored the legislation, and the need to do something about PLO terrorism was immediate, the hearings would be an unnecessary delay. *Id.* at S13853.

70. Pub. L. No. 100-204, tit. X, secs. 1002-1004, 101 Stat. 1331, 1406-07 (codified at 22 U.S.C.A. §§ 5201-5203 (West Supp. 1989)).

71. Anti-Terrorism Act of 1987, sec. 1003, 22 U.S.C.A. § 5202 (West Supp. 1989). The relevant sections of the Act read:

Sec. 1002. FINDINGS; DETERMINATIONS.

....

(b) DETERMINATIONS.—Therefore, the Congress determines that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States. Sec. 1003. PROHIBITIONS REGARDING THE PLO.

It shall be unlawful, if the purpose be to further the interests of the [PLO]

....

(3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the [PLO] or any of its constituent groups, any successor to any of those, or any agents thereof.

addition, the Act states that it is to be applied irrespective of any contrary laws.⁷² Prior to the enactment of the ATA, the PLO operated an information office in Washington, D.C., but this office was ordered closed on December 1, 1987, pursuant to the Foreign Missions Act.⁷³

After the ATA's enactment, the U.S. representative to the United Nations informed the Secretary-General that the U.S. administration would consult with Congress to try to resolve the conflicting obligations.⁷⁴ But in mid-January, one month after the enactment of the ATA, the United Nations still had no U.S. response regarding the effect of the ATA on the PLO Observer Mission.⁷⁵ Therefore, the United Nations invoked the negotiation portion of the dispute settlement procedure and asked the United States to negotiate a resolution to the dispute.⁷⁶ The United States, however, refused to negotiate formally, maintaining that no dispute had arisen because it had not decided to attempt to close the PLO Observer Mission.⁷⁷ Nevertheless, the United States and the United Nations did hold a series of consultative meetings in an attempt to resolve the issue.⁷⁸ The United Nations was dissatisfied with this U.S. response and, therefore, selected an arbitrator in accordance with the arbitration phase of the Headquarters Agreement's dispute settlement procedure.⁷⁹ The United States, however,

Id. secs. 1002(b), 1003(3), 22 U.S.C.A. §§ 5201(b), 5202 (West Supp. 1989).

72. *Id.* sec. 1003(3), 22 U.S.C.A. § 5202 (West Supp. 1989).

73. Foreign Missions Act, 22 U.S.C. §§ 4301-16 (Supp. V 1987); see Palestine Information Office v. Shultz, 853 F.2d 932 (D.C. Cir. 1988) (upholding State Department closure of Palestine Information Office pursuant to Foreign Missions Act).

74. *Secretary-General's Report*, *supra* note 57, para. 4, reprinted in 27 I.L.M. at 781.

75. *Id.* para. 5, reprinted in 27 I.L.M. at 781. The Secretary-General's report stated that "[t]he assurance sought [by the United Nations] . . . had not been forthcoming . . ." *Id.*

76. *Id.* This report states that on January 14, 1988 the Secretary-General invoked section 21. *Id.*; see Headquarters Agreement, *supra* note 1, sec. 21, 61 Stat. at 764, T.I.A.S. No. 1676, at 18, 11 U.N.T.S. at 30.

77. *Secretary-General's Report*, *supra* note 57, para. 6, reprinted in 27 I.L.M. at 781.

78. *Id.*

79. *Report of the Committee on Relations with the Host Country: Report of the Secretary-General, Addendum*, U.N. Doc. A/42/915/Add.1 (1988) [hereinafter *Secretary-General's Report, Addendum 1*], reprinted in 27 I.L.M. 783 (1988). This report states that on February 11, 1988, the United Nations informed the United States of its selection of Mr. Eduardo Jiménez de Aréchaga, former President and Judge of the International Court of Justice, as the United Nation's arbitrator, and urged the United States to make its choice. *Id.* para. 2, reprinted in 27 I.L.M. at 783.

remained silent, refusing to appoint its arbitrator.⁸⁰ As a result, the United Nations adopted two resolutions in support of the Secretary-General,⁸¹ including a request for an ICJ advisory opinion on the question of whether a situation had developed that obligated the United States to arbitrate the dispute.⁸²

U.S. Attorney General Edwin Meese subsequently informed the PLO Observer Mission that the United States would take the necessary steps to effectuate its closing.⁸³

80. *Id.* As of the date of this report (Feb. 25, 1988), the United States had not communicated with the Secretary General regarding the selection of its arbitrator. *Id.* Subsequently, the Committee on Relations with the Host Country reported that the United States had still not chosen an arbitrator. *Report of the Committee on Relations with the Host Country: Report of the Secretary-General, Addendum*, U.N. Doc. A/42/915/Add.2, para. 2 (1988) [hereinafter *Secretary-General's Report, Addendum 2*], reprinted in 27 I.L.M. 784, 785 (1988).

81. *Report of the Committee on Relations with the Host Country*, G.A. Res. 42/229A & 42/229B, U.N. Doc. A/Res/42/229, reprinted in 27 I.L.M. 772 (1988). Resolution 42/229A was adopted by a vote of 143 in favor and one against (Israel), and Resolution 42/229B was adopted by a vote of 143 in favor and none against, the United States not participating. *United Nations General Assembly: Resolutions Concerning Controversy*, 27 I.L.M. 770 (1988); see *Secretary-General's Report, Addendum 2*, supra note 80, reprinted in 27 I.L.M. at 784.

82. *Report of the Committee on Relations with the Host Country*, G.A. Res. 42/229B, U.N. Doc. A/Res/42/229, reprinted in 27 I.L.M. 773 (1988). In this resolution, the United Nations asked the ICJ for an advisory opinion on the following question:

In the light of facts reflected in the reports of the Secretary-General, 1/ is the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, 2/ under an obligation to enter into arbitration in accordance with section 21 of the Agreement?

Id., reprinted in 27 I.L.M. at 775. The United States had, prior to this dispute, unilaterally altered its consent to jurisdiction from the ICJ Statute because of an earlier dispute in which the ICJ agreed to give jurisdiction to Nicaragua. See Letter from Secretary of State George P. Shultz to the U.N. Secretary-General (Oct. 7, 1985) (announcing termination of U.S. acceptance of ICJ's compulsory jurisdiction), reprinted in 24 I.L.M. 1742 (1985); see also Glennon, *Constitutional Issues in Terminating U.S. Acceptance of Compulsory Jurisdiction*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 447 (L. Damrosch ed. 1987).

83. Letter from Attorney General Edwin Meese to the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations (Mar. 11, 1988), reprinted in 27 I.L.M. 787 (1988). Attorney General Edwin Meese stated that, in accordance with the ATA,

as of March 21, 1988, maintaining the PLO Observer Mission to the United Nations in the United States will be unlawful.

The legislation charges the Attorney General with the responsibility of enforcing the Act. To that end, please be advised that . . . the Department of Justice will forthwith take action in United States federal court to insure your compliance.

Thereafter, on March 22, 1988, the day after the effective date of the ATA, the Attorney General initiated a lawsuit in a U.S. court requesting an injunction to close the PLO Observer Mission.⁸⁴ After the proceedings in the U.S. court had begun, the ICJ issued an advisory opinion that called for the United States to select its arbitrator.⁸⁵ Nevertheless, the United States refused to appoint an arbitrator and continued to seek the closure of the PLO Observer Mission in the U.S. court.⁸⁶

B. *ICJ Advisory Opinion: A Dispute is Defined*

In its advisory opinion, the ICJ conducted a step-by-step analysis to determine whether the situation had risen to a level that obligated the United States to arbitrate.⁸⁷ First, the ICJ determined that a dispute existed between the United States and the United Nations.⁸⁸ Second, the ICJ noted that the dispute concerned the application of the Headquarters Agreement within the meaning of section 21.⁸⁹ Finally, the ICJ de-

Id.; see also Letter from Herbert S. Okun, the Acting Permanent Representative of the United States to the United Nations, addressed to the United Nations Secretary-General (Mar. 11, 1988) [hereinafter Okun Letter], reprinted in 27 I.L.M. 786 (1988). In this letter, Ambassador Okun stated that

the [U.S.] Attorney General . . . has determined that he is required by the [ATA] . . . to close the office of the [PLO's] . . . Observer Mission to the United Nations . . . irrespective of any obligations the United States may have under the Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations. If the PLO does not comply with the Act, the Attorney General will initiate legal action to close the PLO Observer Mission on or about March 21, 1988, the effective date of the Act.

Id. (emphasis added).

84. See Complaint filed by U.S. Attorney General Edwin Meese, *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (No. 88 Civ. 1962) [hereinafter Complaint], reprinted in 27 I.L.M. 790 (1988).

85. See Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (U.N. v. U.S.), 1988 I.C.J. 12 (Advisory Opinion of Apr. 26), reprinted in 27 I.L.M. 808 (1988).

86. See *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988).

87. See *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 26-34, paras. 33-56, reprinted in 27 I.L.M. at 815-19. The ICJ distinguished this question from the question as to the actual conflict between the Headquarters Agreement and the ATA, which it was not called upon to decide. *Id.* at 26, para. 33, reprinted in 27 I.L.M. at 815.

88. *Id.* at 27-30, paras. 34-43, reprinted in 27 I.L.M. at 816-17; see *infra* notes 91-128 and accompanying text.

89. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 30-32, paras. 45-50, reprinted in 27 I.L.M. at 817-18; see *infra* notes 129-33 and accompanying text.

terminated that sufficient negotiations had taken place in accordance with section 21 and that the parties had not agreed to settle the dispute through a means other than arbitration.⁹⁰

In the first step of its analysis, the ICJ defined a dispute as a legal disagreement or conflict of interest,⁹¹ a definition that relied on a decision by the Permanent Court of International Justice (the "PCIJ"), the ICJ's predecessor.⁹² In that case, Greece, which had taken up the cause of one of its citizens,⁹³ claimed that the British authorities in Palestine had denied certain public works concessions to a Greek national.⁹⁴ As a result, Greece alleged that the British were under an international obligation to indemnify that national.⁹⁵ The PCIJ found that a dispute existed between Greece and Britain, because the countries disagreed on whether there was a legal obligation to indemnify this Greek subject.⁹⁶

In subsequent cases, the ICJ has applied and clarified this PCIJ definition of dispute. For instance, in *Interpretation of Peace*

90. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 32-34, paras. 51-56, reprinted in 27 I.L.M. at 818-19; see *infra* notes 134-43 and accompanying text.

91. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 27, para. 35, reprinted in 27 I.L.M. at 816.

92. See *Mavrommatis Palestine Concessions (Greece v. Gr. Brit.)*, 1924 P.C.I.J. (ser. A) No. 2, at 6 (Aug. 30). The exact definition the PCIJ used was: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." *Id.* at 11. The Permanent Court of International Justice (the "PCIJ") was established when the League of Nations adopted the Statute of the Court, Dec. 13, 1920, 6 L.N.T.S. 380. See generally G. ELIAN, *supra* note 6, at 31 (discussing the establishment of the PCIJ).

93. *Mavrommatis*, 1924 P.C.I.J. at 12. The dispute over the Palestine concessions, granted by the Turkish authorities before defeat in the desert war in 1917, was initially between M. Mavrommatis, a Greek national, and Great Britain. *Id.* Great Britain had succeeded to the administration of the former Turkish territories under a League of Nations mandate. See Q. WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 600 (1969) (text of Palestine mandate to Great Britain). Eventually the Greek government took up the cause of its citizen, and it then became a dispute between two countries and, as such, entered into the domain of international law and the jurisdiction of the PCIJ. *Id.*

94. *Id.* at 7. The Greek government claimed that the authorities in Palestine and Great Britain refused to recognize the contractual rights acquired by M. Mavrommatis, under an agreement he made with the Ottoman authorities regarding public works concessions to be constructed in Palestine. *Id.* at 7-8.

95. *Id.* at 7.

96. *Id.* at 12. The court stated: "The fact that Great Britain and Greece are the opposing Parties to the dispute arising out of the Mavrommatis concessions is sufficient to make it a dispute between two States within the meaning of Article 26 of the Palestine Mandate." *Id.*

Treaties with Bulgaria, Hungary and Romania,⁹⁷ the ICJ held that an international dispute had arisen involving opposing views on whether these three countries had committed human rights abuses in violation of certain treaty obligations.⁹⁸ In that case, Bulgaria, Hungary, and Romania contended that no dispute existed because the accusations were false and that there was thus no duty to arbitrate in accordance with the treaties.⁹⁹ The United States argued that these countries had no grounds to declare unilaterally that a dispute did not exist, and further, it argued that the countries' refusal to comply with the dispute settlement clause constituted a serious breach of treaty obligations.¹⁰⁰ Furthermore, the United States claimed that the refusal of these countries to join in the established mode of settlement could be seen only as a deliberate violation of international obligations and a lack of good faith.¹⁰¹ The ICJ agreed with the United States, emphasizing that one side's denial of the existence of the dispute was not proof of its non-existence.¹⁰²

Similarly, in *South West Africa*,¹⁰³ the ICJ noted the earlier PCIJ definition of dispute,¹⁰⁴ and then it stated that a dispute could exist only when one party directly opposed the claims of the other.¹⁰⁵ In this case, Liberia and Ethiopia claimed that

97. (U.N. v. Bulg., Hung., & Rom.), 1950 I.C.J. 65 (Advisory Opinion of Mar. 30).

98. *Id.* at 74. The parties to the peace treaties with Bulgaria, Hungary, and Romania accused these three countries, through the United Nations, of violating the treaties based on alleged human rights violations. *Id.* The United States was a party to these peace treaties. *Id.*

99. *Id.* at 67, 74. Bulgaria, Hungary, and Romania denied the accusations and refused to appoint an arbitrator in accord with the treaties' dispute settlement procedures. *Id.* The United Nations subsequently asked the ICJ for this advisory opinion, submitting the questions of whether a dispute subject to the settlement provisions contained in the treaties had arisen and, if so, if Bulgaria, Hungary, and Romania were obligated to appoint an arbitrator. *Id.* at 73, 75.

100. Letters from the United States (U.N. v. Bulg., Hung., & Rom.), 1950 I.C.J. Pleadings 66-68 (Sept. 19, 1949).

101. *Id.*

102. *Interpretation of Peace Treaties*, 1950 I.C.J. at 74.

103. (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1962 I.C.J. 319 (Preliminary Objections of Dec. 21).

104. *Id.* at 328. The court cited the definition used in *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 6 (Aug. 30); *see supra* note 92 (text of the definition).

105. *South West Africa*, 1962 I.C.J. at 328. The court stated that "[i]t must be shown that the claim of one party is positively opposed by the other." *Id.*

South Africa had violated treaty obligations by practicing apartheid in South West Africa.¹⁰⁶ South Africa, for its part, claimed no dispute existed concerning its treaty obligations.¹⁰⁷ The ICJ noted that the mere assertion or denial of the existence of a dispute does not make it so.¹⁰⁸ Thus, in *South West Africa*, the court found that a dispute existed, because Ethiopia and Liberia held one view of the applicable treaty, while South Africa held a directly opposing view.¹⁰⁹

Applying this case law to the United States and United Nations dispute submitted to the ICJ by the United Nations, the ICJ held that the United States and the United Nations directly opposed each others' claims.¹¹⁰ The United Nations claimed that the enactment of the ATA, without an assurance by the United States that the PLO Observer Mission would not be closed, violated the Headquarters Agreement.¹¹¹ The United States claimed that the ATA was not a violation of the Headquarters Agreement, especially in light of its assurance that it would not take any action against the PLO until the U.S. court made its decision.¹¹² Further, the United States said that it would implement the ATA irrespective of its obligations under the Headquarters Agreement.¹¹³ Therefore, the ICJ saw the

106. *Id.* at 323. The treaty at issue in the case was the Mandate for German South-West Africa, Dec. 17, 1920, LEAGUE OF NATIONS O.J. 89 (1921), *reprinted in* 17 AM. J. INT'L L. 175 (Supp. 1923).

107. *South West Africa*, 1962 I.C.J. at 327.

108. *Id.* at 328. The court stated that "it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence." *Id.*

109. *Id.* at 321-22, 328. The treaty in the case was a mandate, whereby in 1920, the government of South Africa was, by this mandate, given administrative responsibility over the territory of South West Africa. *Id.* at 322. Ethiopia and Liberia, as members of the United Nations, brought this suit in accordance with the mandate's dispute settlement procedure, claiming that South Africa's practice of apartheid in these territories violated the mandate. *Id.* at 322-23, 367.

110. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (U.N. v. U.S.), 1988 I.C.J. 12, 30, para. 43 (Advisory Opinion of Apr. 26), *reprinted in* 27 I.L.M. 808, 817 (1988). The court stated that it was "obliged to find that the opposing attitudes of the United Nations and the United States show the existence of a dispute between the two parties to the Headquarters Agreement." *Id.*

111. *Id.* para. 16, *reprinted in* 27 I.L.M. at 812 (quoting Letter from U.N. Secretary-General to U.S. Ambassador Walters (Jan. 14, 1988)).

112. *See infra* note 122 and accompanying text.

113. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 22-23, para. 24, *re-*

disagreement between the United States and the United Nations about whether the enactment of the ATA violated the Headquarters Agreement as viewpoints that clearly opposed one another.¹¹⁴

The ICJ noted that the U.S. refusal to appear and to advance an argument to justify its conduct under international law did not prevent the ICJ from finding the existence of an international dispute.¹¹⁵ To support this position, the ICJ referred to *The United States Diplomatic and Consular Staff in Tehran*.¹¹⁶ In that case, the court found the existence of an international dispute between Iran and the United States even though Iran did not take part in any U.N. debates regarding the situation, engage in prior discussions with the United States,¹¹⁷ or advance an argument at the ICJ.¹¹⁸ The ICJ saw no need to inquire into the attitude of Iran in order to rule that a dispute existed, because the claims involved a dispute regarding the interpretation or application of the conventions.¹¹⁹ Similarly, in the present case, the ICJ recognized that a dispute could exist even though the United States refused to submit its

printed in 27 I.L.M. at 813-14 (quoting Okun Letter, *supra* note 83, reprinted in 27 I.L.M. at 786).

114. *Id.*

115. *Id.* at 28-29, para. 38, reprinted in 27 I.L.M. at 816-17. The court stated that, in its view,

where one party to a treaty protests against the behavior or a decision of another party, and claims that such behavior or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.

Id.

116. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24). In *U.S. Staff in Tehran*, when Iranians occupied the U.S. Embassy and held U.S. personnel as hostages, the United States claimed that Iran violated its obligations under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 and the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820, 596 U.N.T.S. 262. *U.S. Staff in Tehran*, 1980 I.C.J. at 6.

117. *U.S. Staff in Tehran*, 1980 I.C.J. at 25, para. 47.

118. *Id.* at 22-23, paras. 41-42.

119. *Id.* at 25, para. 47. The court determined that the dispute fell within the scope of article I of both Conventions. *Id.* Article I stated: "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the [ICJ] and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol." *Id.* at 24, para. 41.

views on the matter to the ICJ,¹²⁰ and even though it took the position that no dispute existed.¹²¹

In addition, the ICJ dismissed the U.S. assertions that a dispute would not exist until the PLO Observer Mission was actually closed and that the United States would not take any action to close the PLO Observer Mission until after the U.S. court ruled on the issue.¹²² The court explained that it would not allow this unilateral U.S. position to prevail over pre-existing multilateral obligations,¹²³ and that the existence of a dispute does not require a contested decision by one side to be carried into effect.¹²⁴ The court added that a dispute can still arise even if a party promises to wait until its domestic court rules on the present conflict.¹²⁵

The ICJ described the claim made by the United Nations under the Headquarters Agreement, without any counterclaim made by the United States, as just the type of situation that would give rise to the Headquarters Agreement's arbitration procedure.¹²⁶ The court added that prior recourse by the United States in its domestic courts would violate both the let-

120. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (U.N. v. U.S.), 1988 I.C.J. 12, 29, para. 39 (Advisory Opinion of Apr. 26), *reprinted in* 27 I.L.M. 808, 817 (1988). The ICJ cited a letter from the U.S. Ambassador to the Netherlands to the ICJ, which stated that the United States declined to submit its views to the ICJ because, as long as the matter was pending in the U.S. court, it did not believe that arbitration was appropriate or timely. *Id.* Letter from John Shad, U.S. Ambassador to the Netherlands, to the Honorable Eduardo Valencia-Ospina of the International Court of Justice (Mar. 25, 1988) [hereinafter Shad Letter], *reprinted in* 27 I.L.M. 806 (1988).

121. Shad Letter, *supra* note 120, *reprinted in* 27 I.L.M. at 806. This U.S. position was pointed out in a report of the Secretary-General. *Secretary-General's Report, supra* note 57, para. 6, *reprinted in* 27 I.L.M. at 781. The report stated that "the United States . . . had not concluded that a dispute existed . . . because the legislation in question had not yet been implemented." *Id.*

122. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 29-30, paras. 39-42, *reprinted in* 27 I.L.M. at 817.

123. *Id.* at 29, para. 40, *reprinted in* 27 I.L.M. at 817. Here the court stated that it would "not allow considerations as to what might be 'appropriate' to prevail over the obligations which derive from section 21 of the Headquarters Agreement, as 'the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decision on considerations of pure expediency . . .'" *Id.* (quoting *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1930 P.C.I.J. (ser. A) No. 24, at 15 (Order of Dec. 6)).

124. *Id.* at 29-30, para. 42, *reprinted in* 27 I.L.M. at 817.

125. *Id.*

126. *Id.* at 29, para. 41, *reprinted in* 27 I.L.M. at 817. "The purpose of the arbitration procedure envisaged by . . . [the Headquarters] Agreement is precisely the

ter and the spirit of the Headquarters Agreement, because the Agreement's dispute settlement provision did not call for the exhaustion of local remedies prior to its application.¹²⁷ Therefore, the ICJ concluded that the actions taken by both the U.S. Attorney General in seeking to close the PLO Observer Mission and the Secretary-General in challenging this action clearly rose to the level of dispute as defined by past courts.¹²⁸

The ICJ then entered the second step of its analysis, and examined whether the dispute, in accordance with section 21, concerned the interpretation or application of the Headquarters Agreement.¹²⁹ The court noted that both the United States and the United Nations considered the PLO to be covered by the Headquarters Agreement's access clause, because the United Nations had invited the PLO as an observer.¹³⁰ Therefore, the ICJ determined that there was no dispute as to the Headquarters Agreement's interpretation.¹³¹ The ICJ held, however, that there was a dispute as to the Headquarters Agreement's application, because the United States claimed that it acted irrespective of any obligations under the Headquarters Agreement.¹³² In addition, the ICJ held that whether or not the ATA had been implemented was not determinative, because the Headquarters Agreement's dispute settlement clause was meant to apply to any dispute that "concerned" the agreement's interpretation or application.¹³³

The final phase of the ICJ's analysis was to examine if the parties had attempted to settle the dispute by negotiation or

settlement of such disputes as may arise between the Organization and the host country without any prior recourse to municipal courts" *Id.*

127. *Id.*

128. *Id.* at 30, para. 43, reprinted in 27 I.L.M. at 817.

129. *Id.* at 30-32, paras. 45-49, reprinted in 27 I.L.M. at 817-18.

130. *Id.* paras. 46-47; see *supra* note 49.

131. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 32, para. 48, reprinted in 27 I.L.M. at 818.

132. *Id.* at 32, para. 49; see Okun Letter, *supra* note 83, reprinted in 27 I.L.M. at 786.

133. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 32, para. 50, reprinted in 27 I.L.M. at 818. The court stated that whether or not the ATA is applied and the PLO Observer Mission is actually closed is "not decisive as regards section 21 of the Headquarters Agreement, which refers to any dispute 'concerning the interpretation or application' of the Agreement, and not concerning the application of the measures taken in the municipal law of the United States." *Id.*

had agreed to some other settlement procedure.¹³⁴ The U.N. Secretary-General interpreted the Headquarters Agreement's dispute settlement procedure as a two-stage process.¹³⁵ In the first stage, the parties should attempt to settle the dispute through negotiation or some other mode, and in the second stage, the parties should submit to compulsory arbitration.¹³⁶ Therefore, the court pointed to the U.N. Secretary-General's letter to the United States in which he invoked the negotiation stage.¹³⁷ Subsequently, in early 1988, the parties held a series of unsuccessful consultations.¹³⁸ While the United States did not consider these consultations to be negotiations within the framework of section 21,¹³⁹ the ICJ saw these meetings as fulfilling the negotiation requirement, because the U.S. refusal to work within the framework of section 21 served as a clear indication that the dispute could not be settled by negotiation.¹⁴⁰

134. *Id.* at 32-34, paras. 51-56, *reprinted in* 27 I.L.M. at 818-19.

135. *Id.* at 32-33, para. 52, *reprinted in* 27 I.L.M. at 818-19 (quoting Letter from the U.N. Secretary-General to U.S. Ambassador Walters (Jan. 14, 1988)).

136. *Id.*

137. *Id.* at 33, para. 53, *reprinted in* 27 I.L.M. at 819.

138. *Secretary-General's Report*, *supra* note 57, paras. 6-10, *reprinted in* 27 I.L.M. at 781-82. This report states that

[b]eginning on 7 January 1988, a series of consultations were held . . .

. . . .
The Secretary-General learned on 10 February 1988 that the United States Administration ha[d] not made its decision with respect to the PLO Observer Mission . . . [H]aving regard to the time constraints . . . a stage in the negotiations . . . has been reached where . . . [the Secretary-General] must inform the General Assembly in accordance with the terms of resolution 42/210 B of 17 December 1987.

Id. In an addendum to that report, the U.N. Secretary-General stated:

Since the previous report of . . . 10 February 1988, there have been no substantive developments . . . [and] the Legal Counsel of the United Nations was advised unofficially that there would be a high-level meeting in Washington on 18 February 1988 to consider the question. On 18 February 1988, however, the Legal Counsel was informed orally by the State Department Legal Advisor that a decision had still not been taken by the United States Government There have been no further communications . . . since that date.

U.N. Doc. A/42/915/Add.1, para. 1, *reprinted in* 27 I.L.M. 783 (1988).

139. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 33, para. 54, *reprinted in* 27 I.L.M. at 819 (U.N. Secretary-General's written statement regarding U.S. position).

140. *Id.* at 33-34, para. 55, *reprinted in* 27 I.L.M. at 819. The ICJ cited *Mavromatis Palestine Concessions* as stating that if the parties reach a point where one refuses to give way, there can be no doubt that the dispute cannot then be settled by negotiation. *Id.* (citing *Mavromatis Palestine Concessions*, (Greece v. U.K.) 1924 P.C.I.J.

In addition, the ICJ determined that the United States and the United Nations had not agreed to another mode of settlement.¹⁴¹ The ICJ observed that the U.S. court proceeding did not fall within this category, because it was initiated by the United States to enforce the ATA, rather than to settle a dispute with the United Nations.¹⁴² Moreover, the United Nations entered the U.S. proceedings as *amicus curiae*, not as a party, to avoid the appearance that it consented to resolving the dispute in the U.S. court.¹⁴³

In response to the U.S. position that its actions against the PLO Observer Mission were taken regardless of any Headquarters Agreement conflicts,¹⁴⁴ the ICJ cited the principle that international law prevails over domestic law.¹⁴⁵ The court

(ser. A) No. 2, at 13 (Judgment of Aug. 30)). The ICJ also quoted *United States Staff in Tehran*, which stated:

When the United States filed its Application [to the ICJ] . . . its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a "dispute . . . not satisfactorily adjusted by diplomacy"

Id. (quoting United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. at 21, para. 51 (Judgment of May 24)).

141. *Id.* at 34, para. 56, *reprinted in* 27 I.L.M. at 819.

142. *Id.* The U.S. court gave the same explanation as its justification for agreeing to decide the issue before it. *See* United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1462 (S.D.N.Y. 1988). The U.S. court stated that "[b]ecause these proceedings are not in any way directed to settling any dispute, ripe or not, between the United Nations and the United States, Section 21, is, by its terms, inapplicable." *Id.*

143. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 34, para. 56, *reprinted in* 27 I.L.M. at 819. The U.N.'s memorandum of law submitted to the U.S. court stated that its submission "should not be construed in any way as a motion on the part of the United Nations to intervene or otherwise appear as a party to this action." *Amicus Curiae Memoranda of Law and Appendices Submitted by and on Behalf of the United Nations at Preliminary Statement, United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (No. 88 Civ. 1962) [hereinafter U.N. Memorandum]. The United Nations also stated that "[t]he *amicus* appearance by [it] before [the U.S. court] cannot be construed in any way as a tacit agreement . . . to a mode of settlement other than arbitration under Section 21 of the Headquarters Agreement." *Id.* at 40.

144. Okun Letter, *supra* note 83, *reprinted in* 27 I.L.M. at 786.

145. *Applicability of the Obligation to Arbitrate*, 1988 I.C.J. at 34-35, para. 57, *reprinted in* 27 I.L.M. at 819-20. Judge Oda voted in favor of the advisory opinion. He stated in a separate opinion, however, that the issue of international law's priority in these circumstances would have better helped to solve the problem. *Id.* at 41, para. 10, *reprinted in* 27 I.L.M. at 823. But he noted that, although the court asserted this

stated that even if the U.S. position was intended to encompass both the substantive obligations of the access clause and the procedural obligations of section 21, the principle of international law prevailing over domestic law would sufficiently negate it.¹⁴⁶ The court noted that in an arbitral proceeding over one hundred years ago and in a PCIJ case, this principle had been recognized.¹⁴⁷ First, in the *Alabama* arbitration,¹⁴⁸ involving the first major international arbitral tribunal,¹⁴⁹ the United States demanded compensation from Great Britain for non-neutral acts committed during the Civil War.¹⁵⁰ The United States argued, as a general principle of law, that the international duties of a country are independent of its own municipal law, and that such municipal laws do not rise to the height of the law of nations or of a particular treaty obligation.¹⁵¹

Second, in *Greco-Bulgarian "Communities,"*¹⁵² the PCIJ rendered an advisory opinion at the request of a mixed Greek-Bulgarian Commission, based on questions raised by the Commission and the Greek and Bulgarian governments regarding the interpretation of a convention between the two governments.¹⁵³ The Greek government asked the court whether the convention in question or internal law would prevail if a conflict arose between the two.¹⁵⁴ The PCIJ responded that an

priority, it did not hear or consider arguments on this point because it was not the issue that it was requested by the United Nations to address. *Id.*

146. *Id.* at 34-35, para. 57, reprinted in 27 I.L.M. at 819-20.

147. *Id.*, reprinted in 27 I.L.M. at 819-20.

148. This arbitration took place pursuant to the Treaty Between the United States and Great Britain (Treaty of Washington), May 8, 1871, 17 Stat. 863, 7 Bevans 170, 1 Malloy 700, resolving all the disagreements between these two countries. One such disagreement, known as the Alabama claims, involved the claim of the United States that Great Britain built and aided Confederate warships, the most destructive being the Alabama, during the Civil War, and that such actions violated international law according to the treaty. Three arbitrators eventually determined that Great Britain was liable to the United States for an amount exceeding US\$15 million. The Alabama Claims Arbitration Between Great Britain and the United States, 1 Malloy 717 (award of Sept. 14, 1872).

149. See A. COOK, THE ALABAMA CLAIMS—AMERICAN POLITICS AND ANGLO-AMERICAN RELATIONS, 1865-1872, at 9 (1975).

150. ALABAMA CLAIMS, ARGUMENT FOR THE UNITED STATES, DELIVERED TO THE TRIBUNAL OF ARBITRATION AT GENEVA 5-25 (June 15, 1872); see also A. COOK, *supra* note 149, at 9.

151. ALABAMA CLAIMS, *supra* note 150, at 33.

152. (Gr. v. Bulg.), 1930 P.C.I.J. (ser. B) No. 17 (July 31).

153. *Id.* at 4-5.

154. *Id.* at 7. One question, drawn up by the Greek government, stated: "If the

international convention should prevail over the internal laws of either side because of the generally accepted principle that provisions of local law do not prevail over those of a treaty.¹⁵⁵ Likewise, the ICJ stated that the U.S. claim that it would implement the ATA irrespective of its international obligations under the Headquarters Agreement violated the principle of international law prevailing over domestic law.¹⁵⁶ In concluding, the ICJ held that a dispute concerning the application of the Headquarters Agreement had arisen, and that the United States was required to select its arbitrator under the Headquarters Agreement's dispute settlement procedure.¹⁵⁷

C. *The U.S. Court's Opinion: The Dispute Ends—or Does It?*

The U.S. Attorney General initiated proceedings in the U.S. District Court for the Southern District of New York to enjoin the operations of and to close permanently the PLO Observer Mission.¹⁵⁸ The United States claimed in a memorandum to the U.S. court that the ATA required the closing of the PLO Observer Mission for two reasons. First, the United States claimed that Congress clearly intended for the Act to be applied to the PLO Observer Mission notwithstanding any contrary laws.¹⁵⁹ Second, the United States argued that under U.S. law, when a statute and a treaty conflict, the last in time prevails.¹⁶⁰ Thus, the United States claimed that since the ATA was passed forty years after the Headquarters Agreement, that it should supersede the Agreement.¹⁶¹ Therefore,

application of the Convention of Neuilly is at variance with a provision of internal law in force in the territory of one of the two signatory Powers, which of the conflicting provisions should be preferred—that of the law or that of the Convention?" *Id.*

155. *Id.* at 32.

156. Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (U.N. v. U.S.), 1988 I.C.J. 12, 34-35, para. 57 (Advisory Opinion of Apr. 26), *reprinted in* 27 I.L.M. at 819-20 (1988) (quoting Greco-Bulgarian "Communities," 1930 P.C.I.J. (ser. B) No. 17 at 32 (July 31)).

157. *Id.* para. 58, *reprinted in* 27 I.L.M. at 820.

158. *See* Complaint, *supra* note 84.

159. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motions to Dismiss and in Support of Plaintiff's Motion for Summary Judgment at 8-13, *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (No. 88 Civ. 1962) (United States arguing that "[t]here can be no question that the Act on its face requires the closing of the Observer Mission").

160. *Id.* at 15-16.

161. *Id.*

the United States concluded that the ATA directed it to close the PLO Observer Mission.¹⁶²

On the other hand, the PLO, along with the United Nations and the Association of the Bar of the City of New York as amici, argued that the U.S. court should stay the proceedings until the arbitration phase of section 21 could be completed.¹⁶³ In addition, the PLO argued that the ATA did not apply to the PLO Observer Mission, because neither the Act nor its legislative history indicated an intent to violate the Headquarters Agreement.¹⁶⁴

The U.S. court determined that U.S. law required it to interpret the Act in light of the international agreement and to give effect to both if possible.¹⁶⁵ But the court disagreed with the defendant's argument that it was required to submit the matter to arbitration.¹⁶⁶

The U.S. court determined that it was not required to stay its proceeding prior to the Headquarters Agreement's arbitration proceeding for several reasons.¹⁶⁷ First, the court looked to the express language in section 21, emphasizing its reference only to disputes between the United States and the United Nations.¹⁶⁸ This led the court to conclude that because the United Nations was an amicus curiae in the proceeding, rather than a named party, section 21 should not be applied to its proceedings.¹⁶⁹

162. *Id.* at 39.

163. The Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiff's Motion for Summary Judgment, *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (No. 88 Civ. 1962) [hereinafter Defendants' Memorandum]; U.N. Memorandum, *supra*, note 143, at 41; Brief of Amicus Curiae for the Association of the Bar of the City of New York, *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988).

164. Defendants' Memorandum, *supra* note 163, at 4-31.

165. *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988). The court stated that "[u]nder our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them Whenever possible, both are to be given effect." *Id.*

166. *Id.* at 1464. The court did not agree with either the defendants' or amici's positions, stating that "it is not deprived of subject matter jurisdiction by Section 21 of the Headquarters Agreement and that any interpretation of the Headquarters Agreement incident to an interpretation of the ATA must be done by the court." *Id.*

167. *Id.* at 1462-64.

168. *Id.*, 695 F. Supp. at 1462; *see supra* note 19 (text of section 21).

169. *United States v. P.L.O.*, 695 F. Supp. at 1462; *see supra* notes 142-43.

Next, the court explained that it would exceed its powers under article III of the U.S. Constitution if it abided by section 21 every time one of its decisions involved an interpretation of the Headquarters Agreement.¹⁷⁰ The court found that the executive branch made a discretionary foreign affairs decision not to arbitrate, and therefore, the political question doctrine called for it to defer to that branch's decision.¹⁷¹ As support, the court cited to a long line of Supreme Court cases, going back to *Marbury v. Madison*,¹⁷² where the Supreme Court stated it should not impede upon the discretionary duties of the executive or of the executive officers.¹⁷³ The court also referred to *Baker v. Carr*,¹⁷⁴ where the Supreme Court held that questions relating to foreign relations were typically political questions, which defy judicial involvement.¹⁷⁵ The Court in *Baker* defined the elements found in questions that would make them political.¹⁷⁶

170. *United States v. P.L.O.*, 695 F. Supp. at 1462. The U.S. Constitution Article III states:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish *Section 2.* [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority

U.S. CONST. art. III, §§ 1-2; *see infra* note 173 (noting Supreme Court's interpretation of a court's Article III powers).

171. *United States v. P.L.O.*, 695 F. Supp. at 1463. "Resolution of the question whether the United States will arbitrate requires 'an initial policy determination of a kind clearly for nonjudicial discretion.'" *Id.* at 1463 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

172. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

173. *Id.* at 170.

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

United States v. P.L.O., 695 F. Supp. at 1462 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

174. 369 U.S. 186 (1962).

175. *Id.* at 211.

176. *Id.* at 217.

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discre-

In the present case, the court applied two of these elements.¹⁷⁷ First, the court held that it could not order the United States to arbitrate after an executive decision not to, because this would show a lack of respect for the executive branch.¹⁷⁸ Second, the court held that such a decision would lead to a clear embarrassment due to various branches answering this one question on arbitration in different ways.¹⁷⁹ Thus, the court determined that the executive branch's initial decision not to arbitrate was one in which the court could not exercise its discretion.¹⁸⁰

The court further noted the Supreme Court's historical support for the view that the U.S. executive makes the ultimate decision regarding how the United States should honor its treaty obligations.¹⁸¹ For instance, in 1979, the Supreme Court dismissed a suit brought by individual members of Congress to enjoin President Carter from terminating a treaty without Congressional approval.¹⁸² In 1947, the Supreme Court noted that the President and the Senate could terminate treaties.¹⁸³ In 1918, the Supreme Court held that a U.S. court could not decide whether a Mexican general violated a treaty by confiscating leather goods, because the U.S. Constitution commits the conduct of foreign affairs to the executive and leg-

tion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

177. *United States v. P.L.O.*, 695 F. Supp. at 1463.

178. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

179. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

180. *Id.*

181. *Id.* "[T]he ultimate decision as to how the United States should honor its treaty obligations with the international community is one which has, for at least one hundred years, been left to the executive to decide." *Id.* (citing *Goldwater v. Carter*, 444 U.S. 996, 996-97 (1979)).

182. *Goldwater v. Carter*, 444 U.S. 996 (1979).

183. *Clark v. Allen*, 331 U.S. 503, 509 (1947). In *Clark*, a California resident died and left property to German residents. *Id.* at 505. At the time, the United States and Germany were at war and article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany, Dec. 8, 1923, United States-Germany, 44 Stat. 2132, was at issue. The Court stated: "It is not for [the courts] to denounce treaties generally, *en bloc*. Their part it is . . . to determine whether . . . the provision is inconsistent with the policy or safety of the nation . . ." *Id.* at 509 (quoting *Techt v. Hughes*, 229 N.Y. 222, 242-43, 128 N.E. 185, 192 (1920)).

islative branches.¹⁸⁴ There, the Court stated that the plaintiff's remedy could be found either in the courts of Mexico or in the political branches of the U.S. government.¹⁸⁵ Finally, in 1889, the Court barred a Chinese laborer from re-entering the United States in accordance with an act of Congress.¹⁸⁶ The Court held that it was not a judicial function to determine whether the act was valid in so far as it abrogated previous treaty stipulations.¹⁸⁷

However, the court in *United States v. Palestine Liberation Organization* also realized that the political question doctrine does not prevent a court from interpreting both an international agreement and a domestic statute, even if that interpretation has political repercussions.¹⁸⁸ To support this seemingly inconsistent principle, the court cited to *Japan Whaling Association v. American Cetacean Society*,¹⁸⁹ where the Supreme Court ruled against a Japanese petitioner's contention that its action was a political question not suitable for judicial review.¹⁹⁰ The Court stated that because the case involved the interpretation of a statute, it was mandated to hear it even if the decision would have significant political overtones.¹⁹¹ Similarly, the court in

184. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918). "The conduct of foreign relations of our Government is committed by the Constitution to the Executive and the Legislature—the Political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Id.* at 302. The treaty allegedly violated in the case was the Hague Convention of 1907 Respecting Laws of War on Land, Oct. 10, 1908, 36 U.S.T. 860, T.S. No. 9. *Oetjen*, 246 U.S. at 209.

185. *Oetjen*, 246 U.S. at 304.

186. *Chae Chan Ping v. United States (The Chinese Exclusion Cases)*, 130 U.S. 581 (1889) (Chinese laborer refused re-entry into United States pursuant to Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504).

187. *Id.* "The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts This Court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct." *Id.* at 602-03.

188. *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1463 n.22 (S.D.N.Y. 1988).

189. *Id.* (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986)).

190. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

191. *Id.* at 229-30.

[T]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts . . . [U]nder the Con-

United States v. Palestine Liberation Organization held that it was mandated to hear the matter, since the controversy involved the interpretation of the ATA.¹⁹²

Finally, the court reasoned that to interpret section 21 as decisive would raise serious constitutional questions.¹⁹³ The court cited as support *NLRB v. Catholic Bishop of Chicago*,¹⁹⁴ where the Supreme Court declined to interpret the NLRB Act as giving the NLRB jurisdiction to represent lay teachers in religious schools, because such an interpretation would give rise to serious constitutional issues involving the Establishment Clause.¹⁹⁵ Likewise, in *United States v. Palestine Liberation Organization*, the court held that giving an arbitral panel jurisdiction would be a repudiation of its constitutional duty to interpret the ATA to resolve the controversy before it.¹⁹⁶

In concluding, the U.S. court determined that for the reasons noted above, it would not postpone its proceedings for the sake of the Headquarters Agreement.¹⁹⁷ The court, however, in its final holding, determined that the Headquarters Agreement was a valid treaty in force, and therefore the court did not grant the injunction to close the PLO Observer Mission.¹⁹⁸ Instead, the court based its decision on the U.S. law requirement that calls for Congressional acts to be read in light of prior international agreements if possible.¹⁹⁹ In addi-

stitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases presents a justiciable controversy

Id. at 230.

192. See *United States v. P.L.O.*, 695 F. Supp. at 1464.

193. *Id.*

194. *Id.* (citing *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)).

195. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

196. See *United States v. P.L.O.*, 695 F. Supp. at 1464.

197. *Id.*

198. *Id.* at 36.

The Anti-Terrorism Act does not require the closure of the PLO Permanent Observer Mission The PLO Mission to the United Nations is an invitee of the United Nations under the Headquarters Agreement and its status is protected by that agreement. The Headquarters Agreement remains a valid and outstanding treaty obligation of the United States. It has not been superseded [sic] by the Anti-Terrorism Act, which is a valid enactment of general application.

Id.

199. *Id.* at 27. The court stressed "[t]he lengths to which our courts have some-

tion, the court did not see the ATA provision calling for implementation irrespective of any 'contrary law to apply to this treaty, because when Congress meant to overrule treaties, it explicitly did so.²⁰⁰ The U.S. Justice Department did not appeal the district court decision.²⁰¹

III. *AN ARGUMENT FOR U.S. COMPLIANCE IN THE FUTURE*

There are several reasons why the United States should abide by the Headquarters Agreement's arbitration clause in the future. First, until Congress or the President clearly modifies or terminates the Headquarters Agreement or the Agreement's arbitration clause, it is the law of the United States.²⁰² Second, under international law, the terms of treaties must be followed.²⁰³ Third, the United States should act in accord with its stance taken in earlier cases, where it argued that parties must abide by their international agreements and that such international obligations supersede domestic law.²⁰⁴ Finally, the refusal on the part of the United States to arbitrate, combined with its denial to admit Yasir Arafat into the country to speak at the United Nations,²⁰⁵ its refusal to pay U.N. dues,²⁰⁶ and its

times gone in construing domestic statutes so as to avoid conflict with international agreements" *Id.*; see, e.g., *Chew Heong v. U.S.*, 112 U.S. 536 (1884).

200. *United States v. P.L.O.*, 695 F. Supp. at 1468. The U.S. court cited to another section of the Foreign Relations Act, which specifically used the word treaty. *Id.* That section refers to "United States law (including any treaty)." See 22 U.S.C.A. § 4315 (West Supp. 1989).

201. See Pear, *U.S. Will Allow P.L.O. to Maintain Its Office at U.N.*, N.Y. Times, Aug. 30, 1988, at A1, col. 6 (noting decision by United States not to appeal). This article points out that the Justice Department wanted to appeal, while the State Department was against an appeal, and that President Reagan made the final decision not to appeal. *Id.*

202. See *infra* notes 210-14 and accompanying text.

203. See *infra* notes 225-37 and accompanying text.

204. See *infra* notes 238-41 and accompanying text.

205. *Statement Denying Visa for Arafat*, N.Y. Times, Nov. 27, 1988, at A5, col. 1 (quoting the official text of the State Department's denial of Arafat's visa application).

206. Foreign Relations Authorization Act for Fiscal Years 1986 and 1987, 22 U.S.C. § 2651 (Supp. V 1987), was the Act in which the United States first reduced its contributions to the United Nations to a maximum of 20% of the U.N.'s annual budget until the organization made certain reforms. See S. REP. NO. 39, 99th Cong., 1st Sess. 93, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 369-71. However, on July 22, 1988, the United States announced that it would restore funding withheld

withdrawal from the ICJ's compulsory jurisdiction,²⁰⁷ suggests a course of conduct that has caused many members of the international community to question U.S. credibility with respect to its international obligations.²⁰⁸ In addition, this conduct by

because the United Nations had made the requested changes. 23 WEEKLY COMP. PRES. DOC. 853-54 (July 27, 1988) (text of announcement).

207. See Letter from Secretary of State George P. Shultz to the U.N. Secretary-General (Oct. 7, 1985) (announcing termination of U.S. acceptance of ICJ's compulsory jurisdiction), reprinted in 24 I.L.M. 1742 (1985); see also L. DAMROSCH, THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 447 (1987) (discussing constitutionality of Shultz's decision). Yet in 1989, the U.S. agreed to submit an international dispute for arbitration to the ICJ for the first time since its 1985 rejection of the ICJ's jurisdiction. Lewis, *U.S. in Shift, Asks Arbitration in World Court*, N.Y. Times, Feb. 13, 1989, at A5, col. 1.

208. See Franck, *Taking Treaties Seriously*, 82 AM. J. INT'L L. 61 (1988). Franck asserts that nations that violate treaties "simply stop being trusted." *Id.* at 62. Moreover, Franck claims that "[t]he U.S. Congress . . . heedlessly mandates actions that its own Government admits are in flagrant breach of treaty obligations." *Id.* Finally, Franck concludes that "[a] nation that deliberately sets out to debase its treaty-worthiness, quite simply, is in danger of becoming a global street person: self-destructive and heedless of its own best interest." *Id.* U.N. representatives from various countries made statements at the U.N. General Assembly in which they questioned the commitment and credibility of the United States in relation to its treaty obligations. For instance, Mr. Badawi of Egypt stated that "[a]ll the members of the international community . . . [must] base their relations with others on a recognized order and system The gravity of this question lies . . . in the fact that it can establish a precedent . . . to evade treaty obligations . . . in similar cases." *General Assembly Provisional Verbatim Records of the One-Hundred and First Meeting*, 42 U.N. GAOR (101st mtg.) at 57, U.N. Doc. A/42/PV.101 (prov. ed. 1988) [hereinafter General Assembly Records]. The representative from Singapore, Mr. Mahbubani, stated at this meeting that

[i]t is easy enough to demonstrate adherence to principle when to do so is convenient and advantageous The test of a country's adherence to principle is when it is inconvenient to do so. . . . Those who try to subvert long-standing and widely accepted international laws should bear in mind the words ascribed to Sir Thomas More in the play *A Man for All Seasons*:

"This country's planted thick with laws from coast coast . . . and if you cut them down . . . do you really think that you could stand upright in the winds that would blow then?"

Id. at 76. The Czechoslovakian representative, Mr. Zapotocky, stated that "this is not only a deliberate violation of international obligations . . . but also a gesture of arrogance towards the opinion of the international community, one that calls into question the United States commitment to the ideals and principles underlying the United Nations Charter." *Id.* at 83. Mr. Abulhasen from Kuwait questioned "how . . . anyone [can] take the pains of formulating and concluding international agreements when the United States seeks to impose the concept of the precedence of national legislation over international agreements?" *General Assembly Records, supra*, 42 U.N. GAOR (105th mtg.) at 48-50, U.N. Doc. A/42/PV.105 (prov. ed. 1988). Mr. Maksoud from the League of Arab States noted that "[i]here is too much at stake, foremost the quality of the United States commitment to the United Nations and to

the United States has caused certain members of the United Nations to question the Organization's continued maintenance of headquarters in the United States.²⁰⁹

A. Domestic Law Requires Compliance with the Arbitration Clause

The U.S. Constitution refers to treaties as part of the supreme law of the United States.²¹⁰ Although the Headquarters Agreement is not a treaty, but an executive agreement authorized by a joint resolution of Congress, it is still considered

international law and obligations: United States credibility." Finally, Mr. Mudenge from Zimbabwe asked "[w]hy [the United States was] working so hard to damage its prestige and influence internationally?" General Assembly Records, *supra*, 42 U.N. GAOR (109th mtg.) at 11, U.N. Doc. A/42/PV.109 (prov. ed. 1988).

209. U.N. Representatives of various countries made statements at the General Assembly questioning the United Nations continued maintenance of headquarters in the United States. For instance, Mr. Al-Masri from the Syrian Arab Republic stated that U.S. "[i]nsistence on [the ATA's] implementation places the future of the Headquarters of the United Nations in New York in jeopardy." General Assembly Records, *supra* note 208, 42 U.N. GAOR (101st mtg.) at 87, U.N. Doc. A/42/PV. 101 (prov. ed. 1988). Mr. Mansour from the Arab Republic of Yemen stated that "we must make the host country choose between keeping the United Nations on its territory . . . as an independent and dignified Organization governed only by the will of its Member States . . . or deciding that the United Nations should leave and make its Headquarters in some other country." General Assembly Records, *supra* note 208, 42 U.N. GAOR (106th mtg.) at 21-22, U.N. Doc. A/42/PV. 106 (prov. ed. 1988). Mr. Shah Nawaz from Pakistan stated that "the atmosphere is being vitiated by the spectacle of a head-on collision between the United Nations and one of its founding Members which threatens to undermine the proper functioning of the United Nations in New York." General Assembly Records, *supra* note 208, 42 U.N. GAOR (107th mtg.) at 4, U.N. Doc. A/42/PV. 107 (prov. ed. 1988). Mr. H. M. Ali from the Democratic People's Republic of Yemen stated that "[w]e must also consider whether the location of the Organization in this country in the light of the present violation is the best location possible." *Id.* at 43-45. Finally, Mr. Rabetafika from Madagascar made the following statement:

How long ago, it seems, since the House of Representatives and the United States Senate unanimously invited the United Nations to establish its permanent Headquarters in the United States. And how soon may we have to act out the classical drama of *Tite et Bérénice*, in which Titus was compelled to send Bérénice away, despite what either of them wished?

General Assembly Records, *supra* note 208, U.N. GAOR (108th mtg.) at 28, U.N. Doc. A/42/PV. 108 (prov. ed. 1988).

210. U.S. CONST. art. VI. Article VI reads:

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

part of the supreme law of the land.²¹¹ Prior to U.N. acceptance of the Headquarters Agreement, the United Nations, concerned that the agreement was not a treaty, asked the United States whether U.S. law would treat an executive agreement the same as a treaty.²¹² The U.S. Attorney General responded that the Headquarters Agreement would act as the supreme law of the land.²¹³ In addition, the U.S. court in the present dispute referred to the Headquarters Agreement as a treaty, noting that the relevant law implicated all forms of international agreements.²¹⁴

The United States is obligated to abide by the Headquarters Agreement unless and until there is some clear intent shown to terminate or modify the Agreement on the part of either the United States or the United Nations, as parties to the agreement,²¹⁵ or the U.S. Congress, through the enactment of subsequent legislation.²¹⁶ However, there was no such intent, for neither party expressed any desire to change the Agreement's status.²¹⁷ Further, the ATA does not specifically mention the PLO Observer Mission, nor does it state any intention to override pre-existing treaties.²¹⁸ Moreover, those legisla-

211. See, e.g., *United States v. Belmont*, 301 U.S. 324 (1937) (“[W]hile [the supremacy] rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government . . .”).

212. See *supra* note 28 and accompanying text.

213. See *supra* note 29 and accompanying text.

214. *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1458 n.2 (S.D.N.Y. 1988).

215. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 332 (1988) [hereinafter RESTATEMENT THIRD]. The Restatement Third states that “[t]he termination or denunciation of an international agreement may take place only (a) in conformity with the agreement or (b) by consent of all parties.” *Id.*

216. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains”); see also RESTATEMENT THIRD, *supra* note 215, § 114. Section 114 states that “[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.” *Id.* Section 115 states that “[a]n act of Congress supersedes an earlier . . . provision of an international agreement as law of the United States if the purpose of the act is to supersede the earlier . . . provision is clear or if the act and the earlier . . . provision cannot be fairly reconciled.” *Id.* § 115.

217. See *supra* notes 55-86, 158-64 and accompanying text.

218. See Anti-Terrorism Act of 1987, sec. 1003, 22 U.S.C.A. § 5202 (West Supp. 1989); *supra* note 71.

tors who sponsored the ATA did not indicate an intent to override the Headquarters Agreement.²¹⁹ The focus of the legislators' argument was that the ATA could be enforced without violating the Headquarters Agreement.²²⁰ Further, the State Department did not take any actions to suggest that it intended to modify or terminate the Agreement.²²¹ Thus, the U.S. court determined that the Headquarters Agreement was still a binding treaty and, therefore, that the ATA did not supersede it;²²² but the U.S. court held that it could not enforce the Headquarters Agreement's arbitration clause due to the political question doctrine.²²³ This decision was supported by a vast body of Supreme Court case law.²²⁴ Thus, the obligation to arbitrate in the future rests entirely with the executive branch.

B. International Law Requires Compliance with the Arbitration Clause

Article 38 of the ICJ's statute states that international law arises from three sources: international agreements, customs, and other general principles found in major legal systems.²²⁵ If a custom is generally accepted by sovereign states, it becomes established as a general rule of international law, and thereby binds those states that have not opposed it.²²⁶ Trea-

219. *See supra* notes 65-66 and accompanying text.

220. *Id.*

221. *See supra* note 66 and accompanying text.

222. *See supra* note 198 and accompanying text.

223. *See supra* notes 170-71 and accompanying text.

224. *See supra* notes 172-87 and accompanying text.

225. Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060, T.S. No. 993, at 30. Article 38 lists the following as sources of international law:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of general practice accepted as law;
- c) the general principles of law recognized by civilized nations

Id.; reprinted in S. ROSENNE, *DOCUMENTS ON THE ICJ* 79 (1979); *see also* I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 3 (2d ed. 1973) (considering article 38 to be the most complete statement on sources of international law).

226. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW, CASES AND MATERIALS* 65 (2d ed. 1987) [hereinafter *INTERNATIONAL LAW*] ("[I]f custom becomes established as a general rule of international law, it binds all States which have not opposed it, whether or not they themselves played an active part in its formation." (quoting Waldcock, *General Course on Public International Law*, 106 *RECUEIL DES COURS* 1, 49-53 (1962))); *see also* *RESTATEMENT THIRD*, *supra* note 215, § 102(2) ("[C]ustomary international law results from a general and consistent practice of States followed by them from a sense of legal obligations.").

ties, through custom, have become the generally accepted mode by which parties regulate their relations.²²⁷ Behind this acceptance of treaties lies the principle of *pacta sunt servanda*, perhaps the most important concept in international law.²²⁸ It refers to the binding nature and good faith observance of treaties and includes the implication that international obligations survive domestic law restrictions.²²⁹ *Pacta sunt servanda* was codified in the 1969 Vienna Convention on the Law of Treaties²³⁰ and the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations.²³¹ In addition, the Charter of the United Nations (the "UN Charter"),²³² of which the United States is a party, recognizes in its preamble the importance of parties maintaining their treaty obligations.²³³

227. INTERNATIONAL LAW, *supra* note 226, at 10 ("[O]ne of the norms of international law created by custom authorizes the states to regulate their mutual relations by treaty." (quoting KELSON, *Pure Theory of Law* 215-17 (1967))).

228. See RESTATEMENT THIRD, *supra* note 215, § 321; see also Black's Law Dictionary 999 (5th ed. 1979) (defining *pacta sunt servanda* as meaning that "[a]greements (and stipulations) of the parties (to a contract) must be observed").

229. See RESTATEMENT THIRD, *supra* note 215, § 321; see also INTERNATIONAL LAW, *supra* note 226, at 433 (quoting LORD McNAIR, THE LAW OF TREATIES 433 (1961), regarding the binding effect of treaties).

In every uncodified legal system there are certain elementary and universally agreed principles for which it is almost impossible to find specific authority. In the Common Law of England and the United States of America, where can you find specific authority for the principle that a man must perform his contracts? Yet almost every decision on a contract presupposes the existence of that principle. The same is true of international law. No Government would decline to accept the principle *pacta sunt servanda*, and the very fact that Governments find it necessary to spend so much effort in explaining in a particular case that the *pactum* has ceased to exist, or that the act complained of is not a breach of it, either by reason of an implied term or for some other reason, is the best acknowledgement of that principle.

Id.

230. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 8 I.L.M. 679, 690 (1969) (defining *pacta sunt servanda* as meaning that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

231. Vienna Convention on the Law of Treaties Between States and International Organizations, Mar. 21, 1986, art. 26, 25 I.L.M. 543, 560 (1986) (defining *pacta sunt servanda* as meaning that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

232. June 20, 1945, 59 Stat. 1031, T.S. No. 993 (effective Oct. 24, 1945); see *supra* notes 6, 9.

233. U.N. CHARTER, preamble (stating that one of its aims is "to establish conditions under which justice and respect for the obligations arising from treaties . . . can be maintained").

Furthermore, article 33 of the UN Charter²³⁴ and part I of the Manila Declaration on the Peaceful Settlement of International Disputes²³⁵ both highlight the importance of dispute settlement treaty obligations.²³⁶ An ICJ judge has also written on the need to respect arbitration treaties.²³⁷ Therefore, the U.S. refusal to abide by its international obligation to arbitrate under the Headquarters Agreement, especially after the ICJ advisory opinion directing it to do so, violated the basic tenets of international law.

C. The Use of International Law as Both a Shield and a Sword

In the past, the United States has argued that obligations under a treaty take precedence over a party's domestic laws.²³⁸ When the United States made these arguments, however, it was the nation alleging a treaty violation. For instance, as far back as the *Alabama* arbitration of 1872, the United States argued that a country's international duties under a treaty take precedence over those of its own domestic laws.²³⁹

In 1950, the United States argued to the ICJ that the sovereignty of Bulgaria, Hungary, and Romania was limited by their treaty obligations and, consequently, these nations had

234. *Id.* art. 33. Article 33 states:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Id.

235. G.A. Res. 37/10, 37 U.N. GAOR Supp. (No. 51) at 261, U.N. Doc. A/37/51 (1982). This resolution, states that "[s]tates shall in accordance with international law, implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes." *Id.* para. 11.

236. *See supra* notes 234-35.

237. *See* S.M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* (1947). Schwebel states the following:

Arbitration treaties clearly are treaties; their interpretation is governed by the rules of treaty interpretation. Where States have undertaken by treaty to arbitrate, their obligation is binding. It is an obligation they are bound to fulfill. Arbitration treaties, like other international contractual instruments, are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the treaty's object and purpose.

Id. at 149.

238. *See supra* notes 100, 151 and accompanying text.

239. *See supra* notes 148-51 and accompanying text.

no grounds to refuse to arbitrate in accordance with each of their treaty obligations.²⁴⁰ In addition, the United States claimed that these countries were acting illegally by not selecting arbitrators.²⁴¹

In the current case, the United Nations, and not the United States, was the party making the claim and seeking to invoke the Agreement's dispute settlement clause.²⁴² In comparing the U.S. position in this case with its previous position, it appears that the United States has changed its position to suit its needs and, in effect, has used the law as both a shield and a sword. This inconsistent adherence to the principles of international law will likely cause the international community to approach skeptically the United States with respect to international obligations in the future.

CONCLUSION

The refusal of the United States to arbitrate in accordance with the Headquarters Agreement is an example of this country's recent attitude towards the United Nations. As a founding member, the United States should show a greater respect for the agreements it makes with the United Nations, in addition to the basic international law concept of abiding by treaty commitments. Therefore, the United States should abide by the Headquarters Agreement and willingly submit to arbitration all future disputes with the United Nations that concern the interpretation or application of the Agreement to arbitration.

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240. See *supra* notes 97-100 and accompanying text.

241. *Id.*

242. See *supra* note 76.

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