COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À DES ACTIONS ARMÉES FRONTALIÈRES ET TRANSFRONTALIÈRES

(NICARAGUA c. HONDURAS)

COMPÉTENCE DE LA COUR
ET RECEVABILITÉ DE LA REQUÊTE

ARRÊT DU 20 DÉCEMBRE 1988

1988

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING BORDER AND TRANSBORDER ARMED ACTIONS

(NICARAGUA *v.* HONDURAS)

JURISDICTION OF THE COURT AND
ADMISSIBILITY OF THE APPLICATION

JUDGMENT OF 20 DECEMBER 1988

Mode officiel de citation :
Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988, p. 69.

Official citation :
Border and Transborder Armed Actions (Nicaragua v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 69.

N° de vente :
Sales number **547**

INTERNATIONAL COURT OF JUSTICE

YEAR 1988

1988
20 December
General List
No. 74

20 December 1988

CASE CONCERNING BORDER AND TRANSBORDER ARMED ACTIONS

(NICARAGUA *v.* HONDURAS)

JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION

Jurisdiction of the Court, burden of proof — Intention of the Parties.

Charter of Organization of American States — Pact of Bogotá, Article XXXI — Relationship with Article 36, paragraph 2, of the Statute and with declarations made thereunder — Article XXXI as an independent source of jurisdiction — Relationship between Articles XXXI and XXXII.

Admissibility of the Application — Political aspects — Division of general conflict into separate bilateral disputes — Res judicata *— Required degree of particularization of claim — Date at which admissibility to be determined: date of filing of Application.*

Pact of Bogotá, Article II — Settlement under that Article by direct negotiations through the usual diplomatic channels — Nature of the "Contadora process".

Pact of Bogotá, Article IV — Question whether any prior pacific procedure for settlement of dispute was "concluded" before proceedings instituted — Case of the "Contadora process" — Good faith.

JUDGMENT

Present: *President* RUDA; *Vice-President* MBAYE; *Judges* LACHS, ELIAS, ODA, AGO, SCHWEBEL, Sir Robert JENNINGS, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN; *Registrar* VALENCIA-OSPINA.

In the case concerning border and transborder armed actions

between

'he Republic of Nicaragua,

'epresented by

H.E. Mr. Carlos Argüello Gómez, Ambassador,

as Agent and Counsel,

Mr. Ian Brownlie, Q.C., F.B.A., Chichele Professor of Public International Law in the University of Oxford; Fellow of All Souls College, Oxford,

Hon. Abram Chayes, Felix Frankfurter Professor of Law, Harvard Law School; Fellow, American Academy of Arts and Sciences,

Mr. Alain Pellet, Professor at the University of Paris-Nord and the *Institut d'études politiques de Paris,*

as Counsel and Advocates,

Mr. Augusto Zamora Rodríguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua,
Mr. Antonio Remiro Brotons, Professor of Public International Law in the *Universidad Autonoma de Madrid,*
Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C., Member of the Bars of the District of Columbia and the State of California,

as Counsel,

and

the Republic of Honduras,

represented by

H.E. Mr. Mario Carías, Ambassador,

as Agent,

H.E. Mr. Jorge Ramón Hernández Alcerro, Ambassador, Permanent Representative to the United Nations,

as Co-Agent,

Mr. Derek W. Bowett, C.B.E., Q.C., LL.D., F.B.A., Whewell Professor of International Law in the University of Cambridge,
Mr. Pierre-Marie Dupuy, Professor at the *Université de droit, d'économie et de sciences sociales de Paris,*
Mr. Julio Gonzáles Campos, Professor of International Law at the University of Madrid,

as Advocates/Counsel,

Mr. Arias de Saavedra Muguelar, Minister at the Embassy of Honduras to the Netherlands,
Mrs. Salomé Castellanos, Minister-Counsellor at the Embassy of Honduras to the Netherlands,

as Counsel,

THE COURT,

composed as above,

delivers the following Judgment:

1. On 28 July 1986, the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the Court an Application instituting proceedings against the Republic of Honduras in respect of a dispute concerning the alleged activities of armed bands, said to be operating from Honduras, on the border between Honduras and Nicaragua and in Nicaraguan territory. In order to found the jurisdiction of the Court the Application relied on the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially known, according to Article LX thereof, as the "Pact of Bogotá", signed on 30 April 1948, and the declarations made by the two Parties accepting the jurisdiction of the Court, as provided for in Article 36, paragraphs 1 and 2 respectively, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Republic of Honduras; in accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. By a letter of 29 August 1986, the Minister for External Relations of Honduras informed the Court that in his Government's view the Court had no jurisdiction over the matters raised in the Application, and expressed the hope that the Court would confine the first written proceedings to the issues of jurisdiction and admissibility. The Parties, consulted pursuant to Article 31 of the Rules of Court, subsequently agreed that the issues of jurisdiction and admissibility should be dealt with at a preliminary stage of the proceedings.

4. By an Order dated 22 October 1986, the Court, taking note of the agreement of the Parties on the procedure, decided that the first pleading should be a Memorial by the Republic of Honduras dealing exclusively with the issues of jurisdiction and admissibility; and that in reply the Republic of Nicaragua should submit a Counter-Memorial confined to those same issues; and fixed time-limits for those pleadings. The Memorial and Counter-Memorial were filed within the relevant time-limits.

5. On 3 November 1986 the Registrar informed the States parties to the Pact of Bogotá that he had been directed, in accordance with Article 43 of the Rules of Court, to draw to their notice the fact that in the Application the Republic of Nicaragua had invoked, *inter alia,* the Pact of Bogotá, adding however that the notification did not prejudge any decision which the Court might be called upon to take pursuant to Article 63 of the Statute of the Court.

6. By a letter of 21 July 1987 the Registrar drew the attention of the Secretary-General of the Organization of American States to Article 34, paragraph 3, of the Statute of the Court and to the Preamble to the Pact of Bogotá whereby that instrument was stated to be concluded "in fulfillment of Article XXIII of the Charter of the Organization of American States". The Registrar went on to inform the Secretary-General of the Organization of American States that the Court, pursuant to Article 69, paragraph 3, of the Rules of Court, had instructed him to communicate to that Organization copies of all the written proceedings. The Secretary-General of the Organization was at the same time informed of the time-limit fixed for any observations the Organization might wish to submit, pursuant to that Article of the Rules of Court.

7. By a letter of 29 July 1987, the Secretary-General of the Organization of American States informed the Registrar that in his opinion he would not as Secretary-General have the authority to submit observations on behalf of the Organization, and that the convening of the Permanent Council of the Organization would require each member State to be provided with copies of the pleadings; he recorded his understanding, however, that the Court had notified all parties to the Pact of Bogotá of the fact that the proceedings appeared to raise questions of the construction of that instrument.

8. By a joint letter dated 13 August 1987, the Agents of the two Parties informed the Court of an agreement concluded between the Presidents of the two countries on 7 August 1987, whereby both Parties would request the Court "to accept the adjournment, for a period of three months, of the opening of the oral proceedings on the question of jurisdiction to be heard, *inter alia,* by the Court". That agreement provided further that the situation would be reviewed by the two Presidents on the occasion of a meeting to be held 150 days later. The Parties were informed by the Registrar the same day that the President of the Court had decided, in application of Article 54 of the Rules of Court, to adjourn the opening of the oral proceedings to a later date to be fixed after consultation with the Agents of the Parties.

9. After the Agent of Honduras had, by a letter dated 1 February 1988, informed the Court of a meeting between the Presidents of the Central American countries held in San José, Costa Rica, on 16 January 1988, it was decided, after the Parties had been consulted, to prolong the postponement of the opening of the oral proceedings.

10. On 21 March 1988 the Government of Nicaragua filed in the Registry a request for the indication of provisional measures under Article 41 of the Statute of the Court and Article 73 of the Rules of Court. This request was forthwith communicated to the Government of Honduras. By letter of 31 March 1988 the Agent of Nicaragua informed the Court that the Government of Nicaragua had instructed him to withdraw the request for the indication of provisional measures. By an Order dated the same day the President of the Court placed on record that withdrawal.

11. By a letter of 12 April 1988, the Agent of Honduras requested that oral proceedings on the questions of jurisdiction and admissibility should be held between 23 May and 10 June 1988. Following a meeting between the President of the Court and the Agents of the Parties on 20 April 1988, at which the Agent of Nicaragua indicated that his Government had no objection to the dates suggested by Honduras, the President decided that the oral proceedings should begin on 6 June 1988.

12. At public hearings held between 6 and 15 June 1988, the Court heard oral arguments addressed to it by the following:

For Honduras: H.E. Mr. Mario Carías,
H.E. Mr. J. R. Hernández Alcerro,
Professor D. W. Bowett,
Professor P.-M. Dupuy.

For Nicaragua: H.E. Mr. Carlos Argüello Gómez,
Professor Abram Chayes,
Professor A. Pellet,
Professor I. Brownlie.

In the course of the hearings, questions were put to both Parties by Members of the Court. Replies were given to some extent orally during the hearings; addi-

tional replies in writing were filed in the Registry within a time-limit fixed under Article 72 of the Rules of Court. Honduras availed itself of the opportunity afforded by that Article to submit to the Court comments on the written replies of Nicaragua.

* *

13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Republic of Honduras,

in the Memorial:

"In view of the facts and arguments set forth in the preceding parts of this Memorial, the Government of Honduras requests that it may please the Court to adjudge and declare that:

As to Admissibility:

The Application of Nicaragua is inadmissible because:

1. It is a politically-inspired, artificial request which the Court should not entertain consistently with its judicial character.

2. The Application is vague and the allegations contained in it are not properly particularized, so that the Court cannot entertain the Application without substantial prejudice to Honduras.

3. Nicaragua has failed to show that, in the opinion of the Parties, the dispute cannot be settled by direct negotiations, and thus Nicaragua fails to satisfy an essential precondition to the use of the procedures established by the Pact of Bogotá, which include reference of disputes to the International Court of Justice.

4. Having accepted the Contadora process as a 'special procedure' within the meaning of Article II of the Pact of Bogotá, Nicaragua is precluded both by Article IV of the Pact and by elementary considerations of good faith from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded; and that time has not arrived.

As to Jurisdiction:

The Court is not competent to entertain the Application of Nicaragua because:

1. The dispute as alleged by Nicaragua is excluded from the jurisdiction of the Court by the terms of the Honduran declaration of 22 May 1986, and such declaration applies whether the jurisdiction is alleged to exist on the basis of Article XXXI of the Pact of Bogotá or Article 36, paragraph 2, of the Statute of the Court.

2. Alternatively, Article XXXI cannot be invoked as a basis of jurisdiction independently of Article XXXII, and the latter Article precludes any unilateral application to the Court except where:

(a) conciliation procedures have been undergone without a solution, *and*

(b) the parties have not agreed on an arbitral procedure.

Neither condition is satisfied in the present case.

3. Jurisdiction cannot be based on Article 36, paragraph 1, of the Statute of the Court because States parties to the Pact of Bogotá have agreed in Article XXXII that a unilateral Application, based on the Pact of Bogotá, can only be made when the two conditions enumerated in *(a)* and *(b)*, paragraph 2 above, have been satisfied, and such is not the case with the Application of Nicaragua."

On behalf of the Republic of Nicaragua,

in the Counter-Memorial:

"A. On the basis of the foregoing facts and arguments the Government of Nicaragua respectfully asks the Court to adjudge and declare that:

1. For the reasons set forth in this Counter-Memorial the purported modifications of the Honduran Declaration dated 20 February 1960, contained in the 'Declaration' dated 22 May 1986, are invalid and consequently the 'reservations' invoked by Honduras in its Memorial are without legal effect.

2. Alternatively, in case the Court finds that the modifications of the Honduran 'Declaration' dated 22 May 1986 are valid, such modifications cannot be invoked as against Nicaragua because on the facts Nicaragua did not receive reasonable notice thereof.

3. Without prejudice to the foregoing submissions, the 'reservations' invoked by Honduras are not applicable in any event in the circumstances of the present case: thus —

(a) the dispute to which the Application of Nicaragua relates is not the subject of any agreement by the Parties to resort to other means for the pacific settlement of disputes; and, in particular, neither the Contadora process nor the provisions of the Pact of Bogotá constitute the 'other means' to which the pertinent reservation refers;

(b) the dispute to which the Application of Nicaragua relates is not a dispute 'relating to facts or situations originating in armed conflicts or acts of a similar nature which may affect the territory of the Republic of Honduras, and in which it may find itself involved directly or indirectly', and, in the alternative, the 'reservation' in question does not possess an exclusively preliminary character and therefore the issue of its application is postponed for determination at the stage of the Merits.

4. The 'reservations' invoked by Honduras are not applicable in any event to the provisions of Article XXXI of the Pact of Bogotá, which provides an independent basis of jurisdiction within the framework of Article 36, paragraph 1, of the Statute of the Court.

5. The application of the provisions of Article XXXI of the Pact of Bogotá is not subject either to the conciliation procedure referred to in Article XXXII of the Pact, exhaustion of which is a condition of recourse to the Court exclusively within the context of Article XXXII, or to the condition of an agreement upon an arbitral procedure which relates exclusively to Article XXXII.

6. The grounds of inadmissibility of the Application alleged to derive

from the provisions of Articles II and IV of the Pact of Bogotá have no legal basis.

7. All the other grounds of inadmissibility alleged in the Honduran Memorial have no legal basis and must be rejected.

B. As a consequence of these conclusions the Government of Nicaragua respectfully asks the Court to adjudge and declare that:

1. The Court is competent in respect of the matters raised in the Application submitted by the Government of Nicaragua on 28 July 1986.

2. The competence of the Courts exists: by virtue of the Honduran Declaration dated 20 February 1960 accepting the jurisdiction of the Court in conformity with the provisions of Article 36, paragraph 2, of the Statute of the Court; *or* (in case the Declaration of 1960 has been validly modified) the Honduran Declaration of 1960 as modified by the Declaration dated 22 May 1986, and the Nicaraguan Declaration dated 24 September 1929; *and/or* by virtue of the provisions of Article XXXI of the Pact of Bogotá and Article 36, paragraph 1, of the Statute of the Court.

3. The Application of Nicaragua is admissible.

C. For these reasons the Government of Nicaragua respectfully asks the Court to declare that it has jurisdiction or, alternatively, to reserve any question which does not possess an exclusively preliminary character for decision at the stage of the merits.

D. In respect of all questions of fact referred to in the Memorial of Honduras not expressly considered in the present *Counter-Memorial,* the Government of Nicaragua reserves its position."

14. In the course of the oral proceedings, each Party confirmed its submissions as made in the Memorial and Counter-Memorial respectively, without modification.

* * *

15. The present phase of the proceedings is devoted, in accordance with the Order made by the Court on 22 October 1986, to the issues of the jurisdiction of the Court and the admissibility of the Application. Honduras has in its submissions contended, first that "the Application of Nicaragua is inadmissible" and, secondly, that "the Court is not competent to entertain" that Application; the Court will however first examine the question of jurisdiction before proceeding, if it finds that it is competent, to examine the issues of admissibility.

* *

16. The Parties have devoted some argument to a question defined by them as that of the burden of proof: whether it is for Nicaragua to show the existence of jurisdiction for the Court to deal with its claims, or for Honduras to establish the absence of such jurisdiction. Each of them has cited, in support of its contention, the Court's dictum that "it is the litigant

seeking to establish a fact who bears the burden of proving it" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984,* p. 437, para. 101).

The existence of jurisdiction of the Court in a given case is however not a question of fact, but a question of law to be resolved in the light of the relevant facts. The determination of the facts may raise questions of proof. However the facts in the present case — the existence of the Parties' declarations under Article 36 of the Statute, the signature and ratification of the Pact of Bogotá, etc. — are not in dispute; the issue is, what are the legal effects to be attached to them? The question is whether in case of doubt the Court is to be deemed to have jurisdiction or not. This question has already been considered by the Permanent Court of International Justice in the case concerning the *Factory at Chorzów, Jurisdiction,* when it observed:

> "It has been argued repeatedly in the course of the present proceedings that in case of doubt the Court should decline jurisdiction. It is true that the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it; consequently, the Court will, in the event of an objection — or when it has automatically to consider the question — only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it." (*P.C.I.J., Series A, No. 9,* p. 32.)

The Court will therefore in this case have to consider whether the force of the arguments militating in favour of jurisdiction is preponderant, and to "ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it".

* *

17. In its Application instituting proceedings in this case, Nicaragua refers, as basis of the jurisdiction of the Court, to

> "the provisions of Article XXXI of the Pact of Bogotá and to the Declarations made by the Republic of Nicaragua and by the Republic of Honduras respectively, accepting the jurisdiction of the Court as provided for in Article 36, paragraphs 1 and 2, respectively of the Statute"

of the Court. In the submissions presented by Nicaragua in the Counter-Memorial it is contended more specifically that

"The competence of the Court exists: by virtue of the Honduran Declaration dated 20 February 1960 accepting the jurisdiction of the Court in conformity with the provisions of Article 36, paragraph 2, of the Statute of the Court; *or* (in case the Declaration of 1960 has been validly modified) the Honduran Declaration of 1960 as modified by the Declaration dated 22 May 1986, and the Nicaraguan Declaration dated 24 September 1929; *and/or* by virtue of the provisions of Article XXXI of the Pact of Bogotá and Article 36, paragraph 1, of the Statute of the Court."

18. The Pact of Bogotá was drafted and adopted at the Bogotá Conference in 1948, at the same time as the Charter of the Organization of American States (OAS). Among the purposes of the OAS as proclaimed in Article 2 of the Charter was the following:

"*(b)* to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States."

One Chapter of the Charter was devoted to Pacific Settlement of Disputes, and consisted of four Articles, originally numbered 20 to 23, which read as follows:

"Article 20

All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council of the United Nations.

Article 21

The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time.

Article 22

In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution.

Article 23

A special treaty will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period."

The Charter was amended by the Protocol of Buenos Aires in 1967, and further amended by the Protocol of Cartagena de Indias in 1988. Nicaragua and Honduras are parties to the Charter, as successively amended.

19. The "special treaty" referred to in Article 23 of the Charter, quoted above, is the Pact of Bogotá, which states in its Preamble that it was concluded "in fulfillment of Article XXIII of the Charter". Nicaragua and Honduras have since 1950 been parties to the Pact, in the case of Honduras without reservation; Nicaragua appended a reservation to its signature to the Pact, which it maintained at the time of ratification. The purpose of the reservation was to reserve the

> "position assumed by the Government of Nicaragua with respect to arbitral decisions the validity of which it has contested on the basis of the principles of international law, which clearly permit arbitral decisions to be attacked when they are adjudged to be null or invalidated".

It has not been contended that that reservation (to be referred to in another context below, paragraph 40) in itself deprives the Court of any jurisdiction in this case which it might have by virtue of the Pact.

20. Article XXXI of the Pact, upon which Nicaragua relies to found jurisdiction, provides as follows:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> *(a)* The interpretation of a treaty;
> *(b)* Any question of international law;
> *(c)* The existence of any fact which, if established, would constitute the breach of an international obligation;
> *(d)* The nature or extent of the reparation to be made for the breach of an international obligation."

21. The other basis of jurisdiction relied on by Nicaragua is constituted by the declarations of acceptance of compulsory jurisdiction made by the Parties under Article 36 of the Statute of the Court.

The jurisdiction of the Court under Article 36, paragraph 2, of its Statute has been accepted by Honduras, initially by a Declaration made on 2 February 1948, and deposited with the Secretary-General of the United Nations on 10 February 1948, in the following terms:

[Translation from the Spanish]

> "The Executive of the Republic of Honduras, with due authorization from the National Congress granted by Decree Number Ten of the nineteenth of December, nineteen hundred and forty-seven, and

in conformity with paragraph two of Article thirty-six of the Statute of the International Court of Justice,

Hereby declares:

That it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:

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

This declaration is made on condition of reciprocity and for a period of six years from the date of the deposit of the declaration with the Secretary-General of the United Nations.

National Palace, Tegucigalpa, D.C., the second of February, nineteen hundred and forty-eight." (*I.C.J. Yearbook 1947-1948,* p. 129.)

22. On 24 May 1954, the Government of Honduras deposited with the Secretary-General of the United Nations a Declaration renewing the Declaration of 2 February 1948, "for a period of six years, renewable by tacit reconduction".

23. The Honduran acceptance of jurisdiction was further renewed, this time "for an indefinite term", by a Declaration dated 20 February 1960, and deposited with the Secretary-General of the United Nations on 10 March 1960 ("the 1960 Declaration"):

[Translation from the Spanish]

"The Government of the Republic of Honduras, duly authorized by the National Congress, under Decree No. 99 of 29 January 1960, to renew the Declaration referred to in Article 36 (2) of the Statute of the International Court of Justice, *hereby declares*:

1. That it renews the Declaration made by it for a period of six years on 19 April 1954 and deposited with the Secretary-General of the United Nations on 24 May 1954, the term of which will expire on 24 May 1960; recognizing as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature and extent of the reparation to be made for the breach of an international obligation.

2. This new Declaration is made on condition of reciprocity, for an indefinite term, starting from the date on which it is deposited with the Secretary-General of the United Nations.

National Palace, Tegucigalpa, D.C., 20 February 1960." (*I.C.J. Yearbook 1959-1960,* p. 241.)

24. As noted in paragraph 17 above, Nicaragua claims to be entitled to found jurisdiction on the 1960 Declaration. Honduras asserts that that Declaration has been modified by a subsequent Declaration, made on 22 May 1986 ("the 1986 Declaration"), which it had deposited with the Secretary-General of the United Nations prior to the filing of the Application by Nicaragua. The 1986 Declaration is worded as follows:

[Translation from the Spanish]

"The Government of the Republic of Honduras, duly authorized by the National Congress under Decree No. 75-86 of 21 May 1986 to modify the Declaration made on 20 February 1960 concerning Article 36, paragraph 2, of the Statute of the International Court of Justice, *hereby declares* that it modifies the Declaration made by it on 20 February 1960 as follows:

1. It recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:
   (a) the interpretation of a treaty;
   (b) any question of international law;
   (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
   (d) the nature or extent of the reparation to be made for the breach of an international obligation.
2. This Declaration shall not apply, however, to the following disputes to which the Republic of Honduras may be a party:

   (a) disputes in respect of which the parties have agreed or may agree to resort to other means for the pacific settlement of disputes;
   (b) disputes concerning matters subject to the domestic jurisdiction of the Republic of Honduras under international law;

(c) disputes relating to facts or situations originating in armed conflicts or acts of a similar nature which may affect the territory of the Republic of Honduras, and in which it may find itself involved directly or indirectly;

(d) disputes referring to:

(i) territorial questions with regard to sovereignty over islands, shoals and keys; internal waters, bays, the territorial sea and the legal status and limits thereof;

(ii) all rights of sovereignty or jurisdiction concerning the legal status and limits of the contiguous zone, the exclusive economic zone and the continental shelf;

(iii) the airspace over the territories, waters and zones referred to in this subparagraph.

3. The Government of Honduras also reserves the right at any time to supplement, modify or withdraw this Declaration or the reservations contained therein by giving notice to the Secretary-General of the United Nations.

4. This Declaration replaces the Declaration made by the Government of Honduras on 20 February 1960.

National Palace, Tegucigalpa, D.C., 22 May 1986." (*I.C.J. Yearbook 1985-1986,* pp. 71-72.)

25. In order to be able to show that it is a "State accepting the same obligation" as Honduras within the meaning of Article 36, paragraph 2, of the Statute, Nicaragua relies on the declaration which, as a Member of the League of Nations, it made at the time of signature of the Protocol of Signature of the Statute of the Permanent Court of International Justice, and which read as follows:

[Translation from the French]

"On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.

Geneva, 24 September 1929."

Nicaragua relies further on paragraph 5 of Article 36 of the Statute of the present Court, which provides that:

"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

Nicaragua recalls finally that the Court, in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility* (*I.C.J. Reports 1984,* p. 441, para. 110), found that "the Nicaraguan Declaration of 24 September 1929 is valid", and according to Nicaragua, that Declaration is currently in effect.

26. It is, in short, claimed by Nicaragua that there exist two distinct titles of jurisdiction. It asserts that the Court could entertain the case both on the basis of Article XXXI of the Pact of Bogotá and on the basis of the declarations of acceptance of compulsory jurisdiction made by Nicaragua and Honduras under Article 36 of the Statute.

27. Since, in relations between the States parties to the Pact of Bogotá, that Pact is governing, the Court will first examine the question whether it has jurisdiction under Article XXXI of the Pact.

* *

28. Honduras maintains in its Memorial that the Pact "does not provide any basis for the jurisdiction of the . . . Court". It does not contend that the present dispute by its nature falls outside the scope of the provisions of Article XXXI itself but argues that that Article nevertheless does not confer jurisdiction on the Court in the present case, and puts forward two objections to that effect.

29. Honduras first draws attention to the fact that Article XXXI begins with the words, "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice", and that the wording of the rest of the Article is almost identical with that of Article 36, paragraph 2. It contends that the interpretation of Article XXXI which is at once the most simple, the most logical and the most consistent with the literal wording of the Pact is that it "contains a jurisdiction which can be more precisely defined by means of a unilateral declaration" under Article 36, paragraph 2, of the Statute, by each party to the Pact; and that the seisin of the Court is "subject to the terms in which the jurisdiction of the Court has been acknowledged by the parties to the dispute" in such declarations. According to Honduras,

> "Under the most literal, and therefore the most simple, interpretation of the terms of the Pact, Article XXXI, in establishing the obligatory jurisdiction of the Court, at the same time requires the additional subscription, by each of the Parties, of a unilateral declaration of acknowledgement of its jurisdiction, as provided for by Article 36.2 of the Statute of the Court, to which Article XXXI of the Pact makes express reference. The reservations attached to such declarations, as in the case of the declaration of Honduras of 22 May 1986 [quoted in paragraph 24 above], therefore apply both in the context of the application of Article XXXI and on the sole basis of the Honduran declaration itself."

In the contention of Honduras, the reservations attached to the 1986 Declaration are such as to exclude the present case from the scope of the jurisdiction conferred under Article 36, paragraph 2, by the Declaration. Accordingly it maintains that the Court has no jurisdiction in the case under Article XXXI either.

30. At this stage, Honduras's interpretation of Article XXXI of the Pact was thus that it imposed an obligation to make an optional-clause declaration, and that, in the absence of such a declaration, no jurisdiction existed under that Article. The interpretation of Article XXXI espoused by Honduras was, however, elaborated during the oral arguments and in its replies to questions put by a Member of the Court. First, Honduras conceded that it was "arguable that such a declaration was not necessary, and that Article XXXI operated by its own force, on its own terms, and without need of any companion declaration". Honduras subsequently contended that Article XXXI is an incorporation into the Pact of the system of recognition of the Court's jurisdiction under the régime of the "optional clause", i.e., Article 36, paragraph 2, of the Statute.

Consequently, Honduras considers that States parties to the Pact may choose either to take no further action, in which case Article XXXI itself operates as a joint acceptance of jurisdiction under Article 36, paragraph 2, free of reservations and conditions other than the basic condition of reciprocity; or to make a declaration under Article 36, paragraph 2. According to Honduras, if that declaration contains no reservations, while it will operate in relation to States non-parties to the Pact which have made declarations under the optional clause, it will not modify the situation vis-à-vis other States parties to the Pact, in relation to whom the declarant State is already bound by the joint declaration embodied in Article XXXI. If such a declaration contains reservations, however,

> "it will then be the terms of that declaration which will indicate what is, as far as those States are concerned, the extent of the jurisdiction of the Court established in Article XXXI of the Pact".

31. In short, Honduras has consistently maintained that, for a State party to the Pact which has made a declaration under Article 36, paragraph 2, of the Statute, the extent of the jurisdiction of the Court under Article XXXI of the Pact is determined by that declaration, and by any reservations appended to it. It has also maintained that any modification or withdrawal of such a declaration which is valid under Article 36, paragraph 2, of the Statute is equally effective under Article XXXI of the Pact.

Honduras has, however, given two successive interpretations of Article XXXI, claiming initially that it must be supplemented by a declaration of acceptance of compulsory jurisdiction and subsequently that it can be so supplemented but need not be.

32. The first interpretation advanced by Honduras — that Article XXXI must be supplemented by a declaration — is incompatible with the actual terms of the Article. In that text, the parties "declare that they recognize" the Court's jurisdiction "as compulsory *ipso facto*" in the cases there enumerated. Article XXXI does not subject that recognition to the making of a new declaration to be deposited with the United Nations Secretary-General in accordance with Article 36, paragraphs 2 and 4, of the Statute. It is drafted in the present indicative tense, and thus of itself constitutes acceptance of the Court's jurisdiction.

33. Turning to the second Honduran interpretation, the Court may observe at the outset that two possible readings of the relationship between Article XXXI and the Statute have been proposed by the Parties. That Article has been seen either as a treaty provision conferring jurisdiction upon the Court in accordance with Article 36, paragraph 1, of the Statute, or as a collective declaration of acceptance of compulsory jurisdiction under paragraph 2 of that same Article.

Honduras has advanced the latter reading. Nicaragua, after asserting in 1984, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* that Article XXXI constituted a declaration under Article 36, paragraph 2, of the Statute, has argued in the present case that Article XXXI falls under Article 36, paragraph 1, and therefore confers jurisdiction on the Court on a conventional basis.

34. There is however no need to pursue this argument. Even if the Honduran reading of Article XXXI be adopted, and the Article be regarded as a collective declaration of acceptance of compulsory jurisdiction made in accordance with Article 36, paragraph 2, it should be observed that that declaration was incorporated in the Pact of Bogotá as Article XXXI. Accordingly, it can only be modified in accordance with the rules provided for in the Pact itself. Article XXXI nowhere envisages that the undertaking entered into by the parties to the Pact might be amended by means of a unilateral declaration made subsequently under the Statute, and the reference to Article 36, paragraph 2, of the Statute is insufficient in itself to have that effect.

The fact that the Pact defines with precision the obligations of the parties lends particular significance to the absence of any indication of that kind. The commitment in Article XXXI applies *ratione materiae* to the disputes enumerated in that text; it relates *ratione personae* to the American States parties to the Pact; it remains valid *ratione temporis* for as long as that instrument itself remains in force between those States.

35. Moreover, some provisions of the Treaty restrict the scope of the parties' commitment. Article V specifies that procedures under the Pact "may not be applied to matters which, by their nature, are within the domestic jurisdiction of the State". Article VI provides that they will likewise not apply

"to matters already settled by arrangement between the parties, or by

arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty".

Similarly, Article VII lays down specific rules relating to diplomatic protection.

Finally, Article LV of the Pact of Bogotá enables the parties to make reservations to that instrument which "shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity". In the absence of special procedural provisions those reservations may, in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the Pact or at the time of adhesion to that instrument.

36. These provisions together indicate that the commitment in Article XXXI can only be limited by means of reservations to the Pact itself. It is an autonomous commitment, independent of any other which the parties may have undertaken or may undertake by depositing with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4, of the Statute. Not only does Article XXXI not require any such declaration, but also when such a declaration is made, it has no effect on the commitment resulting from that Article.

Neither the first nor the second interpretation of the text advanced by Honduras is compatible with the actual terms of the Pact.

37. Further confirmation of the Court's reading of Article XXXI is to be found in the *travaux préparatoires*. In this case these must of course be resorted to only with caution, as not all the stages of the drafting of the texts at the Bogotá Conference were the subject of detailed records. The proceedings of the Conference were however published, in accordance with Article 47 of the Regulations of the Conference, in Spanish, and certain recorded discussions of Committee III of the Conference throw light particularly upon the contemporary conception of the relationship between Article XXXI and declarations under Article 36 of the Statute.

The text which was to become Article XXXI was discussed at the meeting of Committee III held on 27 April 1948. The representative of the United States reminded the meeting that his country had previously, under Article 36, paragraph 2, of the Statute, made a declaration of acceptance of compulsory jurisdiction that included reservations; he made it clear that the United States intended to maintain those reservations in relation to the application of the Pact of Bogotá. The representative of Mexico replied that States which wished to maintain such reservations in their relations with the other parties to the Pact would have to reformu-

late them as reservations to the Pact, under Article LV. The representatives of Colombia and Ecuador, members of the drafting group, confirmed that interpretation. The representative of Peru asked whether an additional Article should not be added to the draft in order to specify that adhesion to the treaty would imply, as between the parties to it, the automatic removal of any reservations to declarations of acceptance of compulsory jurisdiction. The majority of Committee III considered, however, that such an Article was not necessary and the representative of Peru went on to say, after the vote, that "we should place on record what has been said here, to the effect that it is understood that adhesion is unconditional and that reservations are automatically removed" [1] *(translation by the Registry).*

38. This solution was not contested in the plenary session, and Article XXXI was adopted by the Conference without any amendments on that point.

As a consequence the United States, when signing the Pact, made a reservation to the effect that:

> "The acceptance by the United States of the jurisdiction of the International Court of Justice as compulsory *ipso facto* and without special agreement, as provided in this Treaty, is limited by any jurisdictional or other limitations contained in any Declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court, and in force at the time of the submission of any case."

It is common ground between the Parties that if the Honduran interpretation of Article XXXI of the Pact be correct, this reservation would not modify the legal situation created by that Article, and therefore would not be necessary; Honduras argues however that it was not a true reservation, but merely an interpretative declaration.

39. That argument is inconsistent with the report, published by the United States Department of State, of the delegation of that country to the Conference of Bogotá, which stated that Article XXXI

> "does not take into account the fact that various States in previous acceptances of the Court's jurisdiction under Article 36, paragraph 2, of the Statute, have found it necessary to place certain limitations upon the jurisdiction thus accepted. This was the case in respect to the United States, and since the terms of its declaration had, in addition, received the previous advice and consent of the Senate, the delegation found it necessary to interpose a reservation to the effect that the acceptance of the jurisdiction of the Court as compulsory

[1] "Pero deben constar en actas las palabras pronunciadas aquí, acerca de que se entiende que es adhesión incondicional y que quedan removidas, automáticamente, las reservas." (*Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, p. 167.)

ipso facto and without special agreement is limited by any jurisdictional or other limitations contained in any declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court in force at the time of the submission of any case." (U.S. Department of State, *Report of the U.S. Delegation to the Ninth International Conference of American States,* Washington, 1948, p. 48.)

In the light of this report, it is clear that the United States reservation on this point was intended to achieve something which, in the opinion of the United States delegation, could not be brought about merely by applying Article XXXI. It obviously was a reservation to the Pact, the existence of which confirms the interpretation of Article XXXI which the Court has given above.

40. That interpretation, moreover, corresponds to the practice of the parties to the Pact since 1948.

They have not, at any time, linked together Article XXXI and the declarations of acceptance of compulsory jurisdiction made under Article 36, paragraphs 2 and 4, of the Statute. Thus no State, when adhering to or ratifying the Pact, has deposited with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under the conditions laid down by the Statute. Moreover, no State party to the Pact (other than Honduras in 1986) saw any need, when renewing or amending its declaration of acceptance of compulsory jurisdiction, to notify the text to the Secretary-General of the OAS, the depositary of the Pact, for transmission to the other parties.

Also, in November 1973 El Salvador denounced the Pact of Bogotá and modified its declaration of acceptance of compulsory jurisdiction with a view to restricting its scope. If the new declaration would have been applicable as between the parties to the Pact, no such denunciation would have been required to limit similarly the jurisdiction of the Court under Article XXXI.

Finally, Honduras has drawn attention to the Washington Agreement of 21 July 1957 between Honduras and Nicaragua to bring the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* before the Court, and has argued that the conclusion of that agreement implies that Nicaragua's reservation to the Pact (quoted in paragraph 19 above) was regarded as applicable to its declaration of acceptance of compulsory jurisdiction, and that Nicaragua thereby recognized the existence of a link between the Pact and the declaration. The Court cannot draw this conclusion from the facts. The conclusion of the Washington Agreement could be explained much more simply by the parties' desire to avoid any controversy over jurisdiction, by preventing any objection being raised before the Court either on the basis of Nicaragua's reservation to the Pact or concerning the validity of its declaration of acceptance of compulsory jurisdiction. It follows that that precedent is in no way

contrary to the consistent practice of the parties in the application of the Pact of Bogotá.

41. Under these circumstances, the Court has to conclude that the commitment in Article XXXI of the Pact is independent of such declarations of acceptance of compulsory jurisdiction as may have been made under Article 36, paragraph 2, of the Statute and deposited with the United Nations Secretary-General pursuant to paragraph 4 of that same Article. Consequently, it is not necessary to decide whether the 1986 Declaration of Honduras is opposable to Nicaragua in this case; it cannot in any event restrict the commitment which Honduras entered into by virtue of Article XXXI. The Honduran argument as to the effect of the reservation to its 1986 Declaration on its commitment under Article XXXI of the Pact therefore cannot be accepted.

* *

42. The second objection of Honduras to jurisdiction is based on Article XXXII of the Pact of Bogotá, which reads as follows:

> "When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute."

43. It is the contention of Honduras that Articles XXXI and XXXII must be read together. The first is said to define the extent of the Court's jurisdiction and the second to determine the conditions under which the Court may be seised. According to Honduras it follows that the Court could only be seised under Article XXXI if, in accordance with Article XXXII, there had been a prior recourse to conciliation and lack of agreement to arbitrate, which is not the situation in the present case.

44. Nicaragua on the other hand contends that Article XXXI and Article XXXII are two autonomous provisions, each of which confers jurisdiction upon the Court in the cases for which it provides. It claims that Article XXXI covers all juridical disputes which, before the conclusion of the Pact, would have been subject to arbitration under the General Treaty of Inter-American Arbitration of 5 January 1929; and that Article XXXII relates to disputes, whatever their nature, previously in the domain of conciliation under the General Convention of Inter-American Conciliation of the same date. It maintains accordingly that the Court can be seised, under Article XXXI, in the cases covered by that text, without there being any requirement to ascertain whether the procedural conditions laid down, in other cases, by Article XXXII have or have not been satisfied.

45. Honduras's interpretation of Article XXXII runs counter to the terms of that Article. Article XXXII makes no reference to Article XXXI; under that text the parties have, in general terms, an entitlement to have recourse to the Court in cases where there has been an unsuccessful conciliation.

It is true that one qualification of this observation is required, with regard to the French text of Article XXXII, which provides that, in the circumstances there contemplated, the party has "le droit de porter *la question* devant la Cour". That expression might be thought to refer back to the question which might have been the subject of the dispute referred to the Court under Article XXXI. It should, however, be observed that the text uses the word "*question*", which leaves room for uncertainty, rather than the word "*différend* (dispute)", used in Article XXXI, which would have been perfectly clear. Moreover, the Spanish, English and Portuguese versions speak, in general terms, of an entitlement to have recourse to the Court and do not justify the conclusion that there is a link between Article XXXI and Article XXXII.

Moreover, Article XXXII, unlike Article XXXI, refers expressly to the jurisdiction which the Court has under Article 36, paragraph 1, of the Statute. That reference would be difficult to understand if, as Honduras contends, the sole purpose of Article XXXII were to specify the procedural conditions for bringing before the Court disputes for which jurisdiction had already been conferred upon it by virtue of the declaration made in Article XXXI, pursuant to Article 36, paragraph 2.

46. It is, moreover, quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement. This is also confirmed by the *travaux préparatoires*: the discussion at the meeting of Committee III of the Conference held on 27 April 1948 has already been referred to in paragraph 37 above. At that meeting, furthermore, the delegate of Colombia explained to the Committee the general lines of the system proposed by the Sub-Committee which had prepared the draft; the Sub-Committee took the position "that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice" [1] *(translation by the Registry).* Honduras's interpretation would however imply that the commitment, at first sight firm and unconditional, set forth in Article XXXI would, in fact, be emptied of all content if, for any reason, the dispute were not subjected to prior conciliation. Such a solution would be clearly contrary to both the object and the purpose of the Pact.

47. In short, Articles XXXI and XXXII provide for two distinct ways

[1] "La Subcomisión estimó que el procedimiento principal para el arreglo pacífico de los conflictos entre los Estados Americanos ha de ser el procedimiento judicial ante la Corte Internacional de Justicia; . . ." (*Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, p. 156).

by which access may be had to the Court. The first relates to cases in which the Court can be seised directly and the second to those in which the parties initially resort to conciliation.

In the present case, Nicaragua has relied upon Article XXXI, not Article XXXII. It is accordingly not pertinent whether the dispute submitted to the Court has previously been the subject of an attempted conciliation, nor what interpretation is given to Article XXXII in other respects, in particular as regards the nature and the subject-matter of the disputes to which that text applies. It is sufficient for the Court to find that the second objection put forward by Honduras is based upon an incorrect interpretation of that Article and, for that reason, cannot be accepted.

48. Article XXXI of the Pact of Bogotá thus confers jurisdiction upon the Court to entertain the dispute submitted to it. For that reason, the Court does not need to consider whether it might have jurisdiction by virtue of the declarations of acceptance of compulsory jurisdiction by Nicaragua and Honduras set out in paragraphs 23 to 25 above.

* * *

49. The Court now turns to the question of admissibility of the Nicaraguan Application. Four objections have been raised by Honduras, two of which are general in nature and the remaining two presented on the basis of the Pact of Bogotá.

50. Before examining these objections, it will be convenient to recall briefly the claims of Nicaragua against Honduras, as stated in the Application. Nicaragua alleges the existence of armed bands, generally known as the *contra* forces, openly based in Honduran territory and carrying out armed attacks on Nicaraguan territory (Application, paras. 11 and 13). It claims that these forces operate with the knowledge and assistance of the Honduran Government (*ibid.*, para. 14); that the Honduran military forces not only aid and abet the *contras* but have directly participated in military attacks on Nicaragua and have given vital intelligence and logistical support to the *contras* (*ibid.*, para. 19); and that the Honduran Government has used the threat of force against Nicaragua in both words and facts (*ibid.*, para. 20). Nicaragua therefore claims that Honduras has incurred legal responsibility for the breach of, *inter alia*, the prohibition of the threat or use of force as provided by the Charter of the United Nations (*ibid.*, para. 22); the prohibition of intervention in the internal or external affairs of other States laid down in the Charter of the OAS (*ibid.*, para. 23); and the obligations of customary international law not to intervene in the affairs of another State, not to use force against another State, not to violate the sovereignty of another State, and not to kill, wound or kidnap citizens of other States (*ibid.*, paras. 26-29). On this basis, Nicaragua requests the Court to adjudge and declare that the acts and omissions of Honduras constitute breaches of international law; that Honduras is under a duty immediately to cease and to refrain from all

such acts; and that Honduras is under an obligation to make reparation to the Republic of Nicaragua.

51. Honduras's first objection to the admissibility of the Application is that "It is a politically-inspired, artificial request which the Court should not entertain consistently with its judicial character"; it claims that Nicaragua is attempting to use the Court, or the threat of litigation before the Court, as a means of exerting political pressure on the other Central American States.

52. As regards the first aspect of this objection, the Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible. The purpose of recourse to the Court is the peaceful settlement of such disputes; the Court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement. So far as the objection of Honduras is based on an alleged political inspiration of the proceedings, it therefore cannot be upheld.

53. The second aspect of the first objection of Honduras is its claim that the request is artificial. In its Memorial Honduras explains that in its view the overall result of Nicaragua's action is "an artificial and arbitrary dividing up of the general conflict existing in Central America", which "may have negative consequences for Honduras as a defendant State before the Court", because, it is said, certain facts appertaining to the general conflict "are inevitably absent from the proceedings before the Court", and other facts have already been in issue before the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America).* Honduras contends that no real distinction can be made between the general situation of tension in the region and the various bilateral disputes which Nicaragua claims to exist there, and that the "procedural situation" created by Nicaragua's splitting-up of the overall conflict into separate disputes is contrary to the requirements of good faith and the proper functioning of international justice.

54. The Court cannot uphold this contention. It is not clear why any facts should be "inevitably absent" from the proceedings, since it is open to Honduras to bring to the Court's attention any facts which in its view are relevant to the issues in this case. Nor can it be accepted that once the Court has given judgment in a case involving certain allegations of fact,

and made findings in that respect, no new procedure can be commenced in which those, as well as other, facts might have to be considered. In any event, it is for the Parties to establish the facts in the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same parties (see Article 59 of the Statute).

There is no doubt that the issues of which the Court has been seised may be regarded as part of a wider regional problem. The Court is not unaware of the difficulties that may arise where particular aspects of a complex general situation are brought before a Court for separate decision. Nevertheless, as the Court observed in the case concerning *United States Diplomatic and Consular Staff in Tehran,* "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important" (*I.C.J. Reports 1980,* p. 19, para. 36).

55. The second Honduran objection to admissibility is that "the Application is vague and the allegations contained in it are not properly particularized, so that the Court cannot entertain the Application without substantial prejudice to Honduras". In support of this Honduras asserts that "a large number of the matters put forward by Nicaragua do not constitute concrete acts or omissions, identifiable by reference to place and to time", but concern "indeterminate situations" or "opinions about intentions"; that another large group of these matters are referred to only by the year in which they took place without geographical location; and that the Application confuses facts of a different nature and attributable to different causes.

56. Article 40, paragraph 1, of the Statute requires that an Application indicate "the subject of the dispute". Under the Rules of Court, an Application is required to specify "the precise nature of the claim", and in support thereof to give no more than "a succinct statement of the facts and grounds on which the claim is based" (Art. 38, para. 2). The Court considers that the Nicaraguan Application in the present case, summarized in paragraph 50 above, meets these requirements.

57. Accordingly none of these objections of a general nature to admissibility can be accepted.

* *

58. The Court now turns to the objections to admissibility which Honduras bases upon Articles II and IV of the Pact of Bogotá.

59. Article II of the Pact, upon which Honduras bases its third objection to admissibility, reads as follows:

"The High Contracting Parties recognize the obligation to settle

international controversies by regional pacific procedures before referring them to the Security Council of the United Nations.

Consequently, in the event that a controversy arises between two or more signatory States which, in the opinion of the parties [in the French text "de l'avis de l'une des parties"], cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

60. The submission of Honduras on the application of Article II is as follows:

"Nicaragua has failed to show that, in the opinion of the Parties, the dispute cannot be settled by direct negotiations, and thus Nicaragua fails to satisfy an essential precondition to the use of the procedures established by the Pact of Bogotá, which include reference of disputes to the International Court of Justice."

The contention of Honduras is that the precondition to recourse to the procedures established by the Pact is not merely that both parties should hold the opinion that the dispute could not be settled by negotiation, but that they should have "manifested" that opinion. The opinion of Honduras on the question was stated by its Co-Agent at the hearings. Referring to the requirement in Article II that the dispute should, in the opinion of the parties, not be capable of a negotiated settlement, he stated that

"this first condition of the Pact is not fulfilled in this case, since Honduras is not of the opinion that the Parties have exhausted all possibility of settlement by direct negotiation",

and that,

"at least in the opinion of Honduras, the dispute may be settled by direct negotiations through the usual diplomatic channels; this is confirmed by the intense diplomatic activity which is in progress in Central America . . ."

The diplomatic activity referred to is that of the Contadora process and its aftermath, to be described below (paragraphs 70 to 74 and 81 to 88). Honduras has asserted that the negotiations in that context were "direct negotiations" within the meaning of Article II of the Pact, that throughout the process there were exchanges between the delegations of Honduras and Nicaragua, proposals and counter-proposals; it has also relied on the Court's jurisprudence as to the established modes of international negotiation in order to discount any distinction between the direct bilateral

negotiations between Nicaragua and itself prior to April 1983 and the negotiations in the context of the Contadora process.

61. Nicaragua has argued, first, that it does not necessarily follow from the text of Article II that recourse to pacific procedures is available only when it is the opinion of the parties that the dispute cannot be settled by direct negotiations; that it is perfectly logical to read Article II as setting forth one circumstance — but not the exclusive one — in which the parties bind themselves to use the procedures set forth in the Pact.

62. The Court does not consider that Article II, in the context of the Pact as a whole, can be read in this sense; that provision constitutes, as was argued by Honduras, a condition precedent to recourse to the pacific procedures of the Pact in all cases. The Court has therefore to consider how that condition applies in the present case.

63. Nicaragua then rejects the interpretation of Article II advanced by Honduras, that both parties to a dispute should have manifested the opinion that it cannot be settled by negotiations, contending that it would give a recalcitrant party to a dispute a right of veto of judicial or other settlement which would shatter the whole carefully constructed scheme of compulsory jurisdiction established by the Pact. It further contends that the question is not whether one of the parties or both of them must think that the dispute cannot be settled by diplomatic means, but whether the dispute can in fact be settled by such means; in its view the jurisprudence of the Court supports the principle that when there is disagreement between the parties on the point, the issue is to be resolved not so much on the basis of the particular form of words used in the compromissory instrument, but by an objective evaluation by the Court of the possibilities for settlement of the dispute by direct negotiations.

The Court observes however that that jurisprudence concerns cases in which the applicable text referred to the possibility of such settlement; Article II however refers to the opinion of the parties as to such possibility. The Court therefore does not have to make an objective assessment of such possibility, but to consider what is the opinion of the Parties thereon.

64. Before proceeding further, the Court notes that the Parties have drawn attention to a discrepancy between the four texts of Article II of the Pact (English, French, Portuguese and Spanish). In the French text, what is required is that, "de l'avis de l'une des parties", i.e., "in the opinion of one of the parties", the dispute should not be susceptible of settlement by negotiation. In the English, Portuguese and Spanish texts, the corresponding phrase is "in the opinion of the parties", or the equivalent in the other two languages. For reasons which will appear, the Court's reasoning does not require the resolution of the problem posed by this textual discrepancy, and it will therefore not rehearse all the arguments that have been put forward by the Parties to explain it or to justify the preferring of one version to another.

65. For the purpose of determining the application in this case of Arti-

cle II of the Pact, the Court will proceed on the hypothesis that the stricter interpretation should be used, i.e., that it would be necessary to consider whether the "opinion" of both Parties was that it was not possible to settle the dispute by negotiation. For this purpose the Court does not consider that it is bound by the mere assertion of the one Party or the other that its opinion is to a particular effect: it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it. This is in fact the view of Honduras, as expressed by its Co-Agent at the hearings:

> "It is for the Court to decide for itself whether, by their conduct, the Parties have provided substantive evidence that they consider in good faith that a dispute can or cannot be settled by direct negotiations through the usual diplomatic channels . . .
>
> The Court may disregard what has been said by one of the Parties if it is clearly apparent that the contentions it has put forward are in contradiction with reality.
>
> The Court has to seek for evidence of the Parties' genuine intentions. It cannot substitute its own opinion for that of the Parties as to whether the dispute is susceptible to settlement by direct negotiations."

This statement presupposes that the holding of opinions can be subject to demonstration, and that the Court may expect "the Parties [to provide] substantive evidence that they consider in good faith" a certain possibility of negotiation to exist or not to exist. It even invites the Court "to seek for evidence of the Parties' genuine intentions".

66. The critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962,* p. 344). It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period. Furthermore, subsequent events may render an application without object, or even take such a course as to preclude the filing of a later application in similar terms. In this case, the date at which "the opinion of the parties" has to be ascertained for the application of Article II of the Pact is 28 July 1986, the date of filing of the Nicaraguan Application.

67. To ascertain the opinion of the Parties, the Court is bound to analyse the sequence of events in their diplomatic relations. It is common ground between the Parties that their relations deteriorated seriously when, from 1980 onwards, many active opponents of the Nicaraguan Government formed themselves into irregular military forces and commenced a policy of armed opposition; a substantial group operated from 1981 onwards along the Nicaraguan borders with Honduras. According to Nicaragua, there ensued repeated border incidents, and instances of

material support given to those opponents, which have compelled it to protest diplomatically to Honduras "continuously since 1980". The Presidents of the two States held talks on these matters at El Guasaule, Nicaragua, in May 1981. Bilateral contacts between the Parties continued for some time after this date; the Parties have however made conflicting assertions as to their nature and extent.

68. On 23 March 1982 the Honduran Foreign Minister presented to the Permanent Council of the OAS a draft "plan to internationalize peace in Central America". At a meeting of the two Foreign Ministers in Tegucigalpa on 21 April 1982, Nicaragua responded with a seven-point plan calling *inter alia* for the signing of a bilateral non-aggression pact, a system of joint border patrols and the dismantling of the military encampments said to be maintained in Honduras by opponents of the Nicaraguan Government. Honduras commented on this proposal, without committing itself, two days later. The Honduran Foreign Minister explained to the National Congress that in his reply, a diplomatic Note of 23 April 1982, "without refusing discussion of the bilateral problems" he had reiterated Honduras's position of the prior importance of a solution within a regional context. In that Note, before commenting on the specific Nicaraguan proposals, he said the following:

> "I understand, as was very clearly explained by Your Excellency, that your proposal is of a bilateral nature and is aimed at improving relations between our two countries, while the Honduran initiative is wider in scope, of a regional nature and with perhaps more ambitious objectives. Despite this, my Government considers that the regional approach should prevail since a major part of the problems confronted by the Central American countries go beyond the possibility of a bilateral solution."

69. Thus, it appears that in 1981 and 1982, the Parties had engaged in bilateral exchanges at various levels including, at the very beginning, that of the Heads of State. Broadly speaking, Nicaragua sought a bilateral understanding while Honduras increasingly emphasized the regional dimension of the problem and held out for a multilateral approach, eventually producing a plan of internationalization which led to unsuccessful Nicaraguan counter-proposals.

70. The Foreign Ministers of the countries which were to become known as the Contadora Group — Colombia, Mexico, Panama and Venezuela — met on 8 and 9 January 1983 on Contadora Island, Panama, to consider in what way their countries could contribute to the resolution of the grave and dangerous problems that persisted in Central America.

They urgently called upon all Central American countries "to reduce tensions and to establish the basis for a lasting climate of friendly relations and mutual respect . . . through dialogue and negotiation". Within three months they had visited Nicaragua, Honduras, Costa Rica, El Salvador and Guatemala and had secured the agreement of the Governments of those countries to engage in a common dialogue. On 17 July 1983 the Heads of States of the Contadora countries issued the Cancún Declaration on Peace in Central America, recording the establishment, with the agreement of all those Governments, of "an agenda covering the salient aspects of the problems of the region". Two days later, the President of Nicaragua made a speech in which he expressed his Government's acceptance "that the beginning of the negotiation process promoted by the Contadora Group be of a multilateral character" and proposed immediate discussions with a view to reaching agreements on certain points; he added:

> "Nicaragua states its willingness to assume, with full responsibility, all commitments arising from the said agreements and makes this clear by accepting the point of view of the Heads of States of the Contadora Group to the intent that the task of settling specific differences between countries must be begun initially with the signature of a memorandum of understanding and the creation of commissions allowing the parties to carry out combined actions and guarantee effective control of their territories, especially in the frontier zones."

There followed a joint meeting in Panama at the end of July 1983 between the Contadora Foreign Ministers and those of the five Central American States, at which the Central American Foreign Ministers "made known their acceptance and gave their support to" the Cancún Declaration.

71. On 9 September 1983 the Group drew up a "Document of Objectives" covering a vast range of political, military, social, economic, humanitarian and financial questions. For the purpose of the instant case, it should be noted that the objectives included the following:

> "To promote détente and put an end to situations of conflict in the area, refraining from taking any action that might jeopardize political confidence or prevent the achievement of peace, security and stability in the region.
>
> . . . . . .
>
> To create political conditions intended to ensure the international security, integrity and sovereignty of the States of the region.
>
> . . . . . .
>
> To prevent the use of their own territory [i.e., that of the participant

States] by persons, organizations or groups seeking to destabilize the Governments of Central American countries and to refuse to provide them with or permit them to receive military or logistical support." (UN doc. S/16041.)

The Group having requested concrete proposals towards an agreement aimed at the objectives concerned, Nicaragua responded with the submission of five proposed treaties, collectively called "Legal Bases for Guaranteeing Peace and the International Security of the Central American States" on 15 October 1983, the date which Honduras identifies as marking the beginning of Nicaragua's active participation in what has come to be called "the Contadora process".

72. On 1 May 1984 the Contadora Group issued an information bulletin noting *inter alia* that at a meeting held in Panama the previous day the Foreign Ministers of the Central American States had reaffirmed their conviction that the Contadora process "represented the genuine regional alternative and the appropriate forum for the resolution of the conflicts those countries are currently facing" (UN doc. A/39/226; S/16522). By then the Group had begun the drafting of a "Contadora Act for Peace and Co-operation in Central America", covering in great detail the same vast range of topics as had been covered by the Document of Objectives. This was published in July 1984, and a revised version of the draft Act was circulated on 7 September 1984.

73. On 21 September 1984 the President of Nicaragua informed the Contadora Group that his Government had decided to accept the revised Contadora Act in its totality and without modification. The Government of Honduras took a more guarded attitude, and invited the other Central American Governments to a meeting in Tegucigalpa for the purpose of considering further revisions. At this meeting, held on 20 October 1984, but in which Nicaragua did not participate, a different proposed treaty was provisionally agreed to by Honduras, El Salvador and Costa Rica.

74. No progress appears to have been made toward the adoption of the Contadora Act during the next twelve months, although Nicaragua agreed to negotiate changes in the initial draft; those negotiations lasted through most of 1985. At a meeting in Cartagena (Colombia) on 24-26 August 1985, the Foreign Ministers of the Contadora Group were joined by the Foreign Ministers of Argentina, Brazil, Peru and Uruguay (the "Lima Group", later known as the "Support Group"). Consultations resulted in the preparation of a further draft Act, presented by the Contadora Group and the Support Group to the Central American States on 12-13 September 1985. None of the Central American States fully accepted the draft, but negotiations continued, to break down in June 1986.

75. At this stage the Court is not called upon to pronounce on the legal consequences of this breakdown, but merely to determine the nature of the procedure which was followed, and to ascertain whether, as Honduras claims, the negotiations conducted in the context of the Contadora process could be regarded as direct negotiations through the usual diplomatic channels, within the meaning of Article II of the Pact of Bogotá.

This process, during the period now in question, was a "combination of consultation, negotiation and mediation", as Honduras has observed, and the General Assembly of the OAS in Resolution 702 of 17 November 1984, noted with pleasure "the intensive effort made by the Foreign Ministers of the Contadora Group in consulting, mediating between, and negotiating with, the Central American governments . . .".

While there were extensive consultations and negotiations between 1983 and 1986, in different forms, both among the Central American States themselves, and between those States and those belonging to the Contadora Group and the Support Group, these were organized and carried on within the context of the mediation to which they were subordinate. At this time the Contadora process was primarily a mediation, in which third States, on their own initiative, endeavoured to bring together the viewpoints of the States concerned by making specific proposals to them.

That process therefore, which Honduras had accepted, was, as a result of the presence and action of third States, markedly different from a "direct negotiation through the usual diplomatic channels". It thus did not fall within the relevant provisions of Article II of the Pact of Bogotá. Furthermore, no other negotiation which would meet the conditions laid down in that text was contemplated on 28 July 1986, the date of filing of the Nicaraguan Application. Consequently Honduras could not plausibly maintain at that date that the dispute between itself and Nicaragua, as defined in the Nicaraguan Application, was at that time capable of being settled by direct negotiation through the usual diplomatic channels.

76. The Court therefore considers that the provisions of Article II of the Pact of Bogotá relied on by Honduras do not constitute a bar to the admissibility of Nicaragua's Application.

* * *

77. The fourth and last objection of Honduras to the admissibility of the Nicaraguan Application is that:

> "Having accepted the Contadora process as a 'special procedure' within the meaning of Article II of the Pact of Bogotá, Nicaragua is precluded both by Article IV of the Pact and by elementary considerations of good faith from commencing any other procedure for

> pacific settlement until such time as the Contadora process has been concluded; and that time has not arrived."

Article IV of the Pact of Bogotá, upon which Honduras relies, reads as follows:

> "Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded."

78. It is common ground between the Parties that the present proceedings before the Court are a "pacific procedure" as contemplated by the Pact of Bogotá, and that therefore if any other "pacific procedure" under the Pact has been initiated and not concluded, the proceedings were instituted contrary to Article IV and must therefore be found inadmissible. The disagreement between the Parties is whether the Contadora process is or is not a procedure contemplated by Article IV. Honduras contends that the Contadora process is a "special procedure" for the purposes of Article II of the Pact, which refers to "such special procedures as, in their [the parties'] opinion, will permit them to arrive at a solution" of the dispute, as an alternative to "the procedures established in the present Treaty". This special procedure has, in the contention of Honduras, been entered into by agreement between the Parties, and thus must be regarded as a "pacific procedure" for the purposes of Article IV. Nicaragua on the other hand denies that the Contadora process can be treated as a "special procedure" for purposes of Articles II and IV of the Pact, because, *inter alia,* its subject-matter is distinct from the dispute before the Court.

79. It is clear that the question whether or not the Contadora process can be regarded as a "special procedure" or a "pacific procedure" within the meaning of Articles II and IV of the Pact would not have to be determined if such a procedure had to be regarded as "concluded" by 28 July 1986, the date of filing of the Nicaraguan Application. The date of the institution of proceedings is the date at which the admissibility of a claim has to be assessed (paragraph 66 above); for the application of Article IV, the question is specifically whether any initial pacific procedure which may have been instituted has been "concluded" before any other procedure, including judicial procedure, is "commenced".

80. For the purposes of Article IV of the Pact, no formal act is necessary before a pacific procedure can be said to be "concluded". The procedure in question does not have to have failed definitively before a new procedure can be commenced. It is sufficient if, at the date on which a new procedure is commenced, the initial procedure has come to a standstill in such circumstances that there appears to be no prospect of its being continued or resumed.

81. In order to decide this issue in the present case, the Court will resume its survey of the Contadora process. The initial stages of the process have already been described in paragraphs 70 to 74 above. Subsequently, from 5 to 7 April 1986 a meeting of the Foreign Ministers of the Contadora Group and of the Support Group was held in Panama for the purpose of reviewing progress. On the outcome of this meeting, the Contadora Group

> "invited the five Central American Governments to a meeting on 6 June 1986 at Panama City for the purpose of declaring the negotiation of the text of the Contadora Act officially concluded and proceeding to its formal adoption" (letter addressed by the Group to the Secretary-General of the United Nations on 26 June 1986 (see paragraph 85 below); UN doc. A/40/1136; S/18184, Ann. I).

The five Governments responded in a communiqué of 18 May 1986 announcing their intention "to gather for the signing of the Act on 6 June 1986" and by the Declaration issued at Esquipulas, Guatemala, on 25 May 1986, in which their Presidents stated *inter alia*:

> "That they are willing to sign the 'Contadora Act for Peace and Co-operation in Central America', and agree to comply fully with all the undertakings and procedures contained in the Act. They recognize that some aspects remain outstanding, such as military manœuvres, arms control and the monitoring of compliance with the agreements. Today, however, in this dialogue among the leaders of fraternal peoples, they find the various proposals put forward by the countries to be sufficiently productive and realistic to facilitate the signing of the Act."

82. Immediately after the meeting of Presidents at Esquipulas, their plenipotentiaries resumed discussions with a view to settling such differences as remained, but came to the conclusion that it would be impossible for the Act to be signed on the appointed date; they nevertheless "communicated the determination of their respective Governments to continue to promote the diplomatic negotiation process" (letter of 26 June 1986 to the Secretary-General cited in the previous paragraph). In that context, all Foreign Ministers concerned met at Panama City on 6-7 June 1986 for the formal delivery of "that which, in the opinion of the Contadora Group, constitute[d] the final draft of the Act of Contadora for Peace and Co-operation in Central America", to quote the letter dated 6 June 1986 addressed by the Group to the Central American Foreign Ministers on that occasion. The Group explained that the text "incorporates the essential political commitments related to the substantive aspects", and went on:

"Once this question is resolved, we propose to proceed immediately to another phase of the negotiations, referring to matters of an operational character and which will refer mainly to the establishment of the Verification and Control Commission."

83. On 12 June 1986, the Governments of Costa Rica and El Salvador released a joint statement rejecting the draft Act of Contadora. On 13 June 1986, the Government of Honduras issued a press communiqué, stating, in particular:

"1. The last project for an instrument ('acta') proposed by Contadora does not constitute, in the opinion of the Government of Honduras, a document that establishes reasonable and sufficient obligations for guaranteeing its security.

2. The Contadora Group stated in that meeting that the project in reference exhausted its mediation efforts with relation to the substantive elements of the 'acta', but that notwithstanding they were available for collaborating in the negotiation of the operative and practical elements of the 'acta'.

3. The Government of Honduras reiterates its willingness to continue exploring new formulas that effectively guarantee the legitimate interests of all the States . . ."

On 21 June 1986 the Government of Honduras addressed a letter to the Contadora Group, expressing its attitude to the Final Act. In that letter, *inter alia,* it quoted paragraph 1 of the press communiqué, and referred to paragraph 2; it noted that the Contadora Group "would remain ready to collaborate in the negotiation of [the] operative and practical aspects" of the Act, and stated that in its view

"it would only be possible to systematically approach these matters insofar as the agreement dealing with the substantive aspects of the Act, would have been clearly established and accepted".

84. The Foreign Minister of Nicaragua, in a letter of 17 June 1986, gave the formal response of his Government, to the effect, *inter alia,* that the Final Act was the only instrument "capable of producing a quick and efficient conclusion of the negotiating process", and offered to implement a number of proposals it contained, in particular on military and logistical matters.

85. On 26 June 1986, the Foreign Ministers of the Contadora Group called on the Secretary-General of the United Nations (UN doc. A/40/1136; S/18184), and handed to him a letter recounting developments since September 1985; in that letter the Group stated:

"Now that the substantive issues of the Contadora Act have been resolved, as the Central American Governments have unequivocally

stated, and in order that the Act may be signed, we propose that we should pass on immediately to another phase of the negotiation. In this phase we will deal jointly and systematically with matters of a procedural and operational nature referring principally to the statute of the Verification and Control Commission for Security Matters which will be an integral part of the Act and to other regulatory matters."

The Act, and the proposal for negotiation, were not accepted, and the Contadora process was thus at a standstill.

86. The situation in the area deteriorated, and on 1 October 1986 the Foreign Ministers of the Contadora Group and the Support Group, meeting in New York during the United Nations General Assembly, expressed their concern in a declaration in which they said that they had decided to take a new peace initiative. For this purpose they visited the five Central American States, and following that mission, in a communiqué issued in Mexico in January 1987, they could do no more than reiterate their "determination to maintain dialogue with all the countries directly or indirectly involved in the conflict", and "to continue to push on with diplomatic negotiations" between the Central American States.

87. A new stage in the situation in Central America began when President Oscar Arías of Costa Rica, on 15 February 1987, presented the Peace Plan which bears his name. This plan contemplated new approaches and new mechanisms for the settlement of the problems facing the countries of the region. The Foreign Ministers of the Contadora Group and the Support Group, meeting in Buenos Aires on 13 April 1987, again expressed their concern at the standstill in the negotiation process since June 1986, emphasized the importance of President Arías's proposal and noted the stated intention of the Government of Costa Rica to sponsor, at the proposed meeting of the five Central American Presidents at Esquipulas, an agreement by the five countries to resume negotiation of the Contadora Act together with the signing of President Arías's proposal.

88. It was in these circumstances that the Presidents of the five Central American States adopted on 7 August 1987 a "Plan to Establish a Firm and Lasting Peace in Central America", known as the Esquipulas II Accord. This agreement comprised a number of commitments, directed in particular to national reconciliation, an end to hostilities, democratization, free elections, a halt to aid to irregular forces or insurrectionist movements, and the non-use of territory to attack other States. The role which was thereafter to be attributed to the Contadora Group and the Support Group was defined in Section 7 and Section 10 *(a)*. Section 7 provided for participation of the Contadora Group in connection with security, verification and control. Section 10 *(a)* provided for an International Verifica-

tion and Monitoring Commission whose membership was to include the Foreign Ministers of the Contadora and Support Group countries. The implementation of the agreement was entrusted to an executive committee made up of the Foreign Ministers of the five Central American States. The details of the negotiations which began on this basis do not have to be gone into here, save that at the joint meeting between the Central American States and the Contadora Group on 10 December 1987, it was decided that various provisions of the draft Final Act of Contadora should be re-examined, and that the necessary proposals would be made by the Central American countries.

89. From this account it is clear that the Contadora process was at a standstill at the date on which Nicaragua filed its Application. This situation continued until the presentation of the Arías Plan and the adoption by the five Central American States of the Esquipulas II Accord, which in August 1987 set in train the procedure frequently referred to as the Contadora-Esquipulas II process. The question therefore arises, for the purposes of Article IV of the Pact, whether this latter procedure should be regarded as having ensured the continuation of the initial procedure without interruption, or whether on 28 July 1986 that initial procedure should be regarded as having "concluded", and a procedure of a different nature as having got under way thereafter. This question is of crucial importance, since on the latter hypothesis, whatever may have been the nature of the initial Contadora process with regard to Article IV, that Article would not have constituted a bar to the commencement of a procedure before the Court on that date.

90. The views of the Parties in this respect were given in particular in their replies to a question put by a Member of the Court. Nicaragua indicated that "the Contadora process has not been abandoned or suspended at any moment". As for Honduras, it declared that "the Contadora process has not been abandoned" and that, after the non-signature of the Act of Contadora, the Contadora Group and the Support Group continued their efforts up to the time of the approval of the Esquipulas II Accord. Since that time the process, according to Honduras, continued without interruption.

91. The Court fully appreciates the importance of this concordance of views between the Parties on the subject of regional initiatives which are highly regarded by them. But it cannot see in this a concordance of views as to the interpretation of the term "concluded" in Article IV of the Pact of Bogotá, in relation to the position of the Contadora process at the moment of the filing of the Nicaraguan Application. In the Court's view, on the basis of the facts described above the action of the Contadora Group before June 1986 cannot be regarded, for the purposes of the application of the Pact, as on the same footing as its subsequent action.

While the peacemaking process has continued to bear the name "Contadora", the fact is that that title has become practically a symbol of all the

stages traversed and all the multilateral initiatives taken in the last few years to restore peace to Central America. In fact however the Contadora process, as it operated in the first phase, is different from the Contadora-Esquipulas II process initiated in the second phase. The two differ with regard both to their object and to their nature. The Contadora process, as has been explained above, initially constituted a mediation in which the Contadora Group and Support Group played a decisive part. In the Contadora-Esquipulas II process, on the other hand, the Contadora Group of States played a fundamentally different role. The five countries of Central America set up an independent mechanism of multilateral negotiation, in which the role of the Contadora Group was confined to the tasks laid down in Sections 7 and 10 *(a)* of the Esquipulas II Declaration, and has effectively shrunk still further subsequently.

92. The facts show that the Contadora Group regarded its mission as completed, at least so far as the negotiation of any substantive accord is concerned, with the presentation to the Central American States on 6-7 June 1986 of the final and definitive Act of Contadora. The signature of that Act would have crowned the mediation with a success; its non-signature had the opposite effect. Moreover, it should not be overlooked that there was a gap of several months between the end of the initial Contadora process and the beginning of the Contadora-Esquipulas II process; and it was during this gap that Nicaragua filed its Application to the Court.

93. The Court concludes that the procedures employed in the Contadora process up to 28 July 1986, the date of filing of the Nicaraguan Application, had been "concluded", within the meaning of Article IV of the Pact of Bogotá, at that date. That being so, the submissions of Honduras based on Article IV of the Pact must be rejected, and it is unnecessary for the Court to determine whether the Contadora process was a "special procedure" or a "pacific procedure" for the purpose of Articles II and IV of the Pact, and whether that procedure had the same object as that now in progress before the Court.

*

94. The Court has also to deal with the contention of Honduras that Nicaragua is precluded not only by Article IV of the Pact of Bogotá but also "by elementary considerations of good faith" from commencing any other procedure for pacific settlement until such time as the Contadora process has been concluded. The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations" (*Nuclear Tests, I.C.J. Reports 1974,* p. 268, para. 46; p. 473, para. 49); it is not in itself a source of obligation where none would otherwise exist. In this case however the contention of Honduras is that, on the basis of successive acts by Nicaragua culminating in

the Esquipulas Declaration of 25 May 1986 (paragraph 81 above), Nicaragua has entered into a "commitment to the Contadora process"; it argues that by virtue of that Declaration, "Nicaragua entered into a commitment with which its present unilateral Application to the Court is plainly incompatible". The Court considers that whether or not the conduct of Nicaragua or the Esquipulas Declaration created any such commitment, the events of June/July 1986 constituted a "conclusion" of the initial procedure both for purposes of Article IV of the Pact and in relation to any other obligation to exhaust that procedure which might have existed independently of the Pact.

* *

95. The Court concludes from the foregoing that the third and fourth objections raised by Honduras to the admissibility of the Application must be dismissed.

96. The Court would add the following. It has to determine the admissibility of an Application brought before it as a matter of law. Accordingly, in the present case the question whether a particular "procedure" is, or is not, to be regarded as "concluded" for the purposes of Article IV of the Pact of Bogotá has been appreciated in the light of the position at the moment of the Nicaraguan Application to the Court. This does not mean that the Court is unaware that, subsequent to that date, efforts to resolve the difficulties existing in Central America took a new lease of life with the agreement known as Esquipulas II. Nor should it be thought that the Court is unaware that the Application raises juridical questions which are only elements of a larger political situation. Those wider issues are however outside the competence of the Court, which is obliged to confine itself to these juridical questions.

* *

97. The Court also takes note of the fact that the Contadora Group did not claim any exclusive role for the process it set in train. Paragraph 34 of the Preamble to the revised draft Contadora Act of 7 September 1984 provided the following:

> "The Governments of the Republics of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua ...
>
> . . . . . .
>
> *Reaffirming,* without prejudice to the right to resort to competent international forums, their willingness to settle their disputes in the framework of the negotiation process sponsored by the Contadora Group ..."

The similar wording of preambular paragraph 35 of the Final Act dated 6 June 1986 makes it clear that the dispute settlement procedures to be

adopted under that instrument were not intended to exclude "the right of recourse to other competent international forums".

* *

98. The Court concludes that it has jurisdiction to entertain the present case under Article XXXI of the Pact of Bogotá, and that the Application filed by Nicaragua on 28 July 1986 is admissible.

* * *

99. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction under Article XXXI of the Pact of Bogotá to entertain the Application filed by the Government of the Republic of Nicaragua on 28 July 1986;

(2) Unanimously,

Finds that the Application of Nicaragua is admissible.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and eighty-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Nicaragua and to the Government of the Republic of Honduras, respectively.

(Signed) José María RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge LACHS appends a declaration to the Judgment of the Court.

Judges ODA, SCHWEBEL and SHAHABUDDEEN append separate opinions to the Judgment of the Court.

(Initialled) J.M.R.
(Initialled) E.V.O.

DÉCLARATION DE M. LACHS

[Traduction]

L'arrêt de la Cour doit nécessairement ne traiter et ne résoudre que des questions de procédure (compétence et recevabilité). On peut reprocher aux arrêts de ce genre d'être apparemment empreints de juridisme.

C'est cependant une des activités essentielles de tout tribunal que de trancher des questions de procédure puisque ces questions déterminent l'attitude qu'il adopte quant au sort à réserver à un différend porté devant lui. En prenant une telle décision, la Cour peut soit statuer définitivement sur ce différend, soit ouvrir la voie à l'examen au fond. Lorsqu'elle se prononce, la Cour doit veiller avec le plus grand soin à décourager toute tentative de porter devant elle un différend en l'absence de fondement de juridiction adéquat, sans pour autant nier aux Etats le droit qui est le leur de bénéficier de ses décisions lorsqu'il existe un tel fondement. Il suffit parfois d'ouvrir la voie à l'examen au fond pour qu'un différend trouve sa solution.

Dans la présente affaire, la Cour a dû prendre des décisions qui n'étaient pas sans soulever de délicates questions, ainsi qu'il ressort de la lecture de l'arrêt. La responsabilité des juges était grande, qu'il s'agisse de l'examen de la situation dans laquelle l'affaire s'inscrivait ou de l'aspect juridique de leur responsabilité.

La Cour n'a pas préjugé l'avenir. Les Parties conservent donc leur liberté d'action et toutes possibilités de trouver des solutions.

Toutes ces considérations m'ont conduit à donner mon appui à cette décision de la Cour. Sur les dix-neuf arrêts à l'élaboration desquels j'ai participé, c'est le dix-huitième pour lequel j'ai voté affirmativement.

(Signé) Manfred LACHS.

DECLARATION BY JUDGE LACHS

The Court's Judgment has necessarily to dwell on and resolve only issues of procedure (jurisdiction and admissibility); judgments of this type may be exposed to criticism as being apparently legalistic.

Yet solutions of matters of procedure are essential in the activities of any court, as they determine its role in the fate of a dispute brought before it. Such decisions may constitute the Court's last word in such a dispute, or they may open the door to substantive consideration. In taking these decisions, this Court has to exercise the utmost care to discourage attempts to resort to it in any case lacking a proper jurisdictional foundation, but at the same time not to deny States their right to benefit from its decisions where such a foundation does exist. Sometimes the mere opening of the door may bring about a solution to a dispute.

In the present case the Court has had to take decisions which — as will be clear from a mere reading of the Judgment — have not been free from complexities, placing on judges serious responsibilities, both as regards analysis of the underlying circumstances of the case, and of a juridical nature.

The Court has not prejudged the future. Thus the Parties retain their freedom of action, and full possibilities of finding solutions.

All these considerations have prompted me to give my support to this decision, voting in favour of the Judgment, as I have in 18 of the 19 Judgments in the elaboration of which I have participated.

(Signed) Manfred LACHS.

SEPARATE OPINION OF JUDGE ODA

1. When considering the jurisdiction of the International Court of Justice in contentious cases, I take as my point of departure the conviction that the Court's jurisdiction must rest upon the free will of sovereign States, clearly and categorically expressed, to grant to the Court the competence to settle the dispute in question. In the present case the Court may have reason to interpret the wording of Article XXXI of the Pact of Bogotá as conferring compulsory jurisdiction upon it, particularly in view of the fact that some States, like the United States and El Salvador, have also construed it in this way, whether explicitly or by implication, when evincing their respective positions in relation to the Pact. I accordingly voted in favour of the first part of the Judgment, but I did so with some reluctance. This reluctance derives from my doubts as to whether the Pact of Bogotá may not be interpreted differently, owing to the equivocal drafting of its text, and whether the American States, in adopting the Pact of Bogotá in 1948, actually might not have intended it to confer compulsory jurisdiction upon the Court. I feel that it is right for me to express my reservations, which are the following.

I

2. The Court bases its jurisdiction in the present case solely on Article XXXI of the Pact of Bogotá. It finds that

> "the commitment in Article XXXI of the Pact is independent of such declarations of acceptance of compulsory jurisdiction as may have been made under Article 36, paragraph 2, of the Statute and deposited with the United Nations Secretary-General pursuant to paragraph 4 of that same Article" (para. 41),

and that Article XXXI, which "of itself constitutes acceptance of the Court's jurisdiction" (para. 32), "relates to cases in which the Court can be seised directly" (para. 47). The Court refrains from suggesting expressly that this particular provision is one by which its jurisdiction is conferred in terms of Article 36, paragraph 1, yet denies that Article XXXI is to be regarded as a declaration of acceptance of compulsory jurisdiction under Article 36, paragraph 2, of the Statute.

Turning to Article XXXII, the Court states that it provides for a way of access to the Court that is distinct from that of Article XXXI (para. 47). While characterizing Article XXXII as a provision "refer[ring] expressly

to the jurisdiction which the Court has under Article 36, paragraph 1, of the Statute" (para. 45), it holds that under that provision "the parties have, in general terms, an entitlement to have recourse to the Court in cases where there has been an unsuccessful conciliation" *(ibid.),* and that it relates to "those [cases] in which the parties initially resort to conciliation" (para. 47). The Court concludes that "Articles XXXI and XXXII provide for two distinct ways by which access may be had to the Court" *(ibid.).* At any rate, Article XXXII is deemed, in the Judgment, to be irrelevant in the present case.

3. In both the written and the oral proceedings Honduras presented an interpretation quite contrary to that arrived at by the Court. An interpretation similar to that of Honduras, and equally different from the Court's position, is also to be found in the official or semi-official publications of the Organization of American States.

In his report on the Ninth International Conference (Bogotá) of American States that was presented to the Council of the Organization of American States in November 1948, Mr. Alberto Lleras, the Secretary-General of the Organization of American States, stated that:

> "the Treaty provides for a logical system of measures for pacific settlement from among which the States may choose; but if their application does not lead to a solution and the conciliatory stage expires without agreement by the parties to submit the matter to arbitration, any one of the parties is entitled to appeal to the International Court of Justice, which has compulsory jurisdiction under Article 36 of its Statute.
>
> . . . . . .
>
> The procedures are not given in the Treaty in any order of preference, and the parties may select the one they consider most appropriate in each case, without being under obligation to utilize all the procedures. It might occur, for example, that from the time of disruption of direct negotiations in a given case there might be agreement to submit the dispute to arbitration or to the International Court of Justice, without resorting to conciliation or good offices and mediation. All these procedures presuppose agreement between the parties having recourse to them. But should the conciliatory stage pass without producing results — either because one of the parties was opposed or because no agreement could be reached — then judicial procedure becomes compulsory if one of the parties appeals to the International Court of Justice." (*Annals of the Organization of American States,* Vol. I, No. 1, pp. 48-49.)

Dr. F. V. García-Amador, who was formerly the Director of the Department of Legal Affairs of the Organization of American States, incorporated these passages into his annotated book, *The Inter-American System,* which was published in 1983 (Vol. I, Part 2, p. 231).

Another book with the same title, *The Inter-American System,* was

published in 1966 by the Inter-American Institute of International Legal Studies, of which the Secretary-General was Dr. García-Amador. It contained the statement that:

> "The new system established obligatory judicial settlement as the definitive method for the solution of controversies. . . . [I]t should be pointed out, above all, that by virtue of Article XXXI the High Contracting Parties 'declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto,* without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning . . .' There follow the four categories of disputes listed in paragraph 2 of Article 36 of the Statute of the International Court of Justice. In this sense, the pact itself constitutes an unconditional declaration of the type foreseen in that article.
>
> The foregoing notwithstanding, the compulsory nature of the judicial settlement is subject, to be precise, to the fact that the conciliation procedure established in the pact or by the decision of the parties has not led to a solution and, in addition, that the said parties have not agreed on an arbitral procedure. Only in these circumstances may one of the parties exercise its right to have recourse to the Court and the other, therefore, be subject to its jurisdiction (Art. XXXII)." (Pp. 78-79.)

These authoritative interpretations of the Pact of Bogotá, which are in themselves somewhat confusing and ambiguous, strike one as contrary in certain respects to what the Court concludes in its Judgment. It may be asked whether the interpretations presented in the official or semi-official documents of the Organization of American States were ill founded or whether some reasonable explanation can be given to account for them.

4. My doubts as to whether the unqualified conferral of jurisdiction on the Court by virtue of Article XXXI, as indicated in the Judgment, is in fact well founded, also derive from two further considerations.

Firstly, I have concluded that the Court's interpretation of Articles XXXI and XXXII in the Pact of Bogotá appears much less persuasive if one looks at the meaning given to the terms of the Pact in their context, particularly if the Pact is compared with two existing multilateral treaties drawn up mainly for the purpose of the peaceful settlement of disputes and specifically providing for the compulsory jurisdiction of the International Court of Justice — the Revised General Act for the Pacific Settlement of International Disputes, adopted by the United Nations General Assembly in 1949, and the European Convention for the Peaceful Settlement of Disputes, adopted at Strasbourg in 1957. I shall examine the terms of the Pact in paragraphs 5-6 below.

Secondly, an additional argument in the Judgment to the effect that:

> "It is, moreover, quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement. This is also confirmed by the *travaux préparatoires*" (para. 46),

does not seem to reflect the history of the drafting of the Pact of Bogotá. The brief record of developments prior to the Bogotá Conference and a perusal of the *travaux préparatoires* together make it difficult to conclude with complete confidence that the American States, when drafting the Pact, intended to strengthen the jurisdiction of the Court. My interpretation of "the object and the purpose of the Pact" may, for that reason, differ from that of the Court in its Judgment *(ibid.)*. An examination of its history requires a more detailed account (paras. 8-13 below).

II

5. I shall start by examining the meaning to be given to the terms of the Pact of Bogotá in their context. In the first place, if, as suggested in the Judgment, Article XXXII is an independent clause, distinct from and additional to Article XXXI, which confers jurisdiction upon the Court under Article 36, paragraph 1, of the Court's Statute, and if both confer jurisdiction upon the Court under that Article of the Statute, it may be asked whether it is not the implicit intention of the Judgment to state that, while any legal disputes are covered by Article XXXI, other disputes — in other words, those which do not fall within the categories specified in Article XXXI — shall also be subject to the compulsory jurisdiction of the Court under Article XXXII.

Certainly, the jurisdiction of the Court comprises "all matters specially provided for . . . in treaties and conventions in force"(Art. 36, para. 1, of the Statute), and there are a number of bilateral and multilateral treaties which specify certain types of disputes as being subject to the compulsory jurisdiction of the Court. Yet is it conceivable that the States parties to the Pact of Bogotá accepted in general terms the Court's jurisdiction for *all* "international controversies" (Art. II of the Pact) of whatever nature, without specifying the types of disputes? In spite of the wording of Article 36, paragraph 1, of the Statute to the effect that "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force", has the idea of collectively giving such a *carte blanche* to the Court ever been juridically expressed on any previous occasion?

Here a distinction has to be made between the typical compromissory clause which *ex hypothesi,* if not explicitly, is confined to the subject-matter of the treaty concerned, and a clause which is part of a general dispute-settlement convention. In the latter case, if the clause provides for

judicial settlement, States (as in the case of the 1949 Revised General Act and the 1957 European Convention) take care to protect their sovereignty by specifying the types of disputes which they will consent to have adjudicated. Accordingly, when I consider the Court's construction of Article XXXII of the Pact of Bogotá, I feel bound to ask: has any other treaty or convention, comprising such a comprehensive obligation to adhere to the Court's jurisdiction, ever in fact existed? Certainly not.

This leads to an alternative interpretation of Article XXXII, namely, that this particular Article may only have any significance if the conditions found in it qualify the jurisdiction in the preceding Article, Article XXXI. In other words, the parties may have recourse to the Court in respect of the disputes specified in Article XXXI with the qualifications stated in Article XXXII.

The Spanish version of Article XXXII, second sentence, states as follows:

> "La jurisdicción de la Corte quedará obligatoriamente abierta conforme al inciso 1° del artículo 36 del mismo Estatuto",

which may be translated into English word for word as:

> "The jurisdiction of the Court will remain obligatorily available in accordance with Article 36, paragraph 1, of the said Statute."

This wording may properly be interpreted as implying that the jurisdiction of the Court, mentioned in Article XXXII, is the same as that of the previous Article, Article XXXI, and is therefore also subject to the conditions of that Article. To refer to the French version of the text (see Judgment, para. 45) to support the contrary interpretation does not seem to me to be acceptable.

6. The Court is content to interpret Article XXXII in the sense that the reference, in that provision, to the procedure of conciliation is meant simply to imply that the parties may have recourse to the Court in the event of the failure of that procedure. The Court remains silent with regard to the curious fact that, while that Article specifies the occasional failure of conciliation, it does not mention the failure of other pacific procedures established in the Pact, such as good offices, mediation, or investigation.

It may be useful to look at the comparable treaties providing a general system for the peaceful settlement of disputes, as mentioned previously. The 1949 Revised General Act clearly provides in an unequivocal manner for the obligation of judicial settlement, providing that:

> "All disputes with regard to which the parties are in conflict as to their respective rights [including in particular those mentioned in Art. 36, para. 2, of the Statute] shall . . . be submitted for decision to the International Court of Justice, unless the parties agree . . . to have resort to an arbitral tribunal." (Art. 17.) (United Nations, *Treaty Series*, Vol. 71, p. 101.)

There is also an obligation in parallel to submit to the procedure of conciliation. Any dispute of a non-legal nature which fails to reach a solution through conciliation is to be brought before an arbitral tribunal — and not the Court (Art. 21).

In the 1957 European Convention it is stated that:

> "The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes . . . including, in particular, those [mentioned in Art. 36, para. 2]." (Art. I.) (United Nations, *Treaty Series,* Vol. 320, p. 243.)

Disputes not falling within the scope of judicial settlement are to be submitted to the procedure of conciliation, and disputes considered as being other than of a legal nature and which have not been settled by conciliation are to be submitted to arbitration — not to the Court (Art. 19).

These two treaties each contain a single article providing for the compulsory submission of legal disputes to the Court, and are without any doubt conceived as "treaties and conventions in force" under Article 36, paragraph 1, of the Statute, "specially provid[ing] for" "all matters" which "[t]he jurisdiction of the Court comprises". In addition, reference to conciliation is obligatory for those cases which do not fall within the scope of the compulsory jurisdiction of the Court and, if conciliation fails, there remains an obligation of arbitration.

If there is no obligation of conciliation preceding recourse to the Court, why should the Pact of Bogotá have had to refer simply to the occasional cases in which conciliation fails? Should Article XXXII not rather be interpreted as meaning that recourse to the procedure of conciliation is a prerequisite for the compulsory referral of a dispute to the Court under the Pact of Bogotá?

7. I do not venture to suggest that this interpretation of the Pact of Bogotá is the only correct one, because it may also not prove entirely convincing in the overall context of the Pact. This is because the requirement of conciliation prior to resort to the Court does not seem wholly compatible with the submission of legal disputes to the Court, even in the light of the two other general dispute-settlement treaties, as mentioned above. A clue to solving this paradox of the Pact may well be found through an examination of the process within which the system of the peaceful settlement of disputes — the concept of judicial settlement in parallel with the procedure of conciliation — had evolved up to 1948 in the forum of American States and the process within which the Pact was drafted at the Bogotá Conference. This will also indicate that there was not the slightest idea, in either of these processes, of enacting in general terms, in any treaty, the compulsory jurisdiction of the former or present Court for either legal or non-legal disputes — still less for both.

III

8. At the Conference of Conciliation and Arbitration convened in Washington in January 1929, two treaties were signed by 20 American States: the General Convention of Inter-American Conciliation and the General Treaty of Inter-American Arbitration. The States parties to the former treaty agreed "to submit to the procedure of conciliation ... all controversies of any kind ... which it may not have been possible to settle through diplomatic channels" (Art. 1). The latter treaty provided for compulsory arbitration for

> "all differences of an international character [arising] by virtue of a claim of right ... which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law" (Art. 1).

In neither of these treaties, however, was there any mention of a submission of disputes to the Permanent Court of International Justice which had already been in existence since 1922. (As of 1948 the former treaty was effective for 18 States and the latter for 16 States.)

The Juridical Committee of the Pan American Union proposed, in March 1944, a Draft Treaty for the Coordination of Inter-American Peace Agreements which co-ordinated the separate treaties of the past into a single instrument (Inter-American Juridical Committee, *Recommendations and Reports, Official Documents, 1942-1944,* p. 53) and further prepared the draft of an Alternative Treaty Relating to Peaceful Procedures (*ibid.,* p. 69). It was proposed that the States parties should declare that:

> "the settlement of disputes or controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of international law" (Art. I),

and bind themselves to submit to arbitration all differences, as defined in the 1929 Arbitration Treaty, which it had been impossible to adjust not only by diplomacy but also by mediation (Art. VI). The draft treaty also suggested, as an alternative to submission to arbitration, referral

> "by mutual agreement . . . to a court of international justice in accordance with the terms of a treaty to which they may both be parties, or to the procedure of investigation and conciliation set forth in the present Treaty" (Art. VII).

In parallel, the draft treaty laid down the obligation of recourse to the conciliation procedure for all disputes which it had not been possible to settle by direct negotiation, by mediation, or by the procedure of arbitration (Art. XIII). In its accompanying report the Juridical Committee stated as follows:

> "The Juridical Committee is of the opinion that the procedure of arbitration should be put in the foreground and that attention should

> be directed to it as the preferable method of settling disputes of a juridical character which it has not been possible to settle by diplomatic negotiation. An alternative to the procedure of arbitration would be the procedure of judicial settlement in case the States in controversy were parties to a treaty providing for the judicial settlement of juridical disputes and are in accord to have recourse to that procedure. At the same time, while arbitration and judicial settlement are recognized by the Committee as being in principle the proper procedures for the settlement of juridical disputes, it would seem unreasonable to deny to the parties the right to have recourse to the procedure of conciliation for the settlement of such disputes if they are in accord in preferring that more elastic procedure....
>
> Arbitration is thus obligatory for all juridical disputes which the parties do not, by mutual agreement, prefer to settle by the procedure of judicial settlement or of conciliation...." (*Recommendations and Reports, Official Documents, 1942-1944,* pp. 89-90.)

With the end of the war in sight, the American States sent representatives to Chapultepec in February/March 1945 for the Inter-American Conference on Problems of War and Peace. The Conference recommended to the Inter-American Juridical Committee the "immediate preparation of a draft of an 'Inter-American Peace System' which will coordinate the continental agreements for the prevention and pacific solution of controversies" (*The International Conferences of American States, Second Supplement, 1942-1954,* p. 101). The Juridical Committee accordingly prepared a draft of such a system (Comité Jurídico Interamericano, *Recomendaciones e Informes, Documentos Oficiales, 1945-1947,* p. 49; English text supplied by the Organization of American States), which provided that the States parties would thereby agree to have recourse at all times to peaceful procedures (Art. I). In the event that a controversy should arise which could not be settled by direct negotiations through the usual diplomatic channels, the States parties would recognize the obligation of having recourse to inter-American regional procedures such as those of mediation, investigation and conciliation, arbitration, judicial settlement, or inter-American consultation (Art. II). The States parties would further:

> "recognize the suitability of submitting either to arbitration or to judicial settlement all controversies which may arise between them which are legal in their nature by reason of being susceptible of decision by the application of principles of law" (Art. XVII).

The text was transmitted to the American Governments for their observations. Some Governments sent observations on the draft (*Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, pp. 25-35); among which were proposals by Honduras and Mexico, which advocated the additional concept of "recourse to the International Court of Justice".

9. Following the end of the Second World War, the Inter-American Conference for the Maintenance of Continental Peace and Security (Rio de Janeiro) met in August/September 1947 and recommended that at the forthcoming Ninth International Conference of American States in Bogotá:

> "there be studied with a view to approval, institutions which may give effectiveness to a pacific system of security and among them compulsory arbitration for any dispute which may endanger peace and which is not of a juridical nature" (*The International Conferences of American States, Second Supplement, 1942-1954,* p. 154).

The Inter-American Juridical Committee accordingly drafted the "Project of Inter-American Peace System" for discussion by the delegates to the Bogotá Conference (*Actas y Documentos,* Vol. IV, p. 6; English text as CB-6-E of the Documents of the Pan American Union).

That Project was thus prepared as a basis for a new treaty to be adopted at Bogotá. Articles XXXI and XXXII of the Pact of Bogotá, which are relevant in the present case and to which reference is made in the Judgment, originate from the provisions in the 1947 Project, as quoted below:

> "Part IV. *Procedure of Arbitration*
>
> Article XVII
>
> The High Contracting Parties bind themselves to submit to arbitration the controversies of any nature, juridical or non-juridical, which have arisen or may arise in the future between them and which in the opinion of one of the parties it has not been possible to settle by diplomatic means or by the procedures of mediation and investigation and conciliation.
>
> . . . . . .
>
> Article XVIII
>
> Notwithstanding the provisions of the preceding article, it is recognized that the Parties, if in agreement to do so, may submit their controversies to the International Court of Justice, when they have accepted previously its obligatory jurisdiction under the terms of article 36 of the Statute.
>
> The controversies to which this article is applicable are those referring to the following matters:
>
> *(a)* The interpretation of a treaty;
> *(b)* Any question of international law;
> *(c)* The existence of any fact which, if established, would constitute a breach of an international obligation;
> *(d)* The nature and extent of the reparation to be made for the breach of an international obligation."

The report annexed to the 1947 Project explains the ideas underlying the provisions of this draft:

> "24. Part IV of the draft, referring to arbitration procedure, particularizes:
>
> 1. Why arbitration is established for all kind of questions. Whence it is deduced that those of a juridical nature, as well as those not of that character, are subject to the said arbitration.
> 2. Why arbitration is compulsory in every dispute that has not been settled by procedures of mediation or of investigation and conciliation. Hence, if for any reason such procedures do not terminate the dispute the latter will inevitably have to be submitted to arbitration...
>
> 25. Article 18 permits the parties, if they agree, to submit to the International Court of Justice, whenever they have previously accepted its compulsory jurisdiction, the disputes enumerated in article 36 of the Statute thereof.
>
> Consequently, arbitration continues to be the general rule in regard to such disputes. But, by common consent, the parties may resort to the Court. In the absence of such consent, the arbitration procedure provided for in the Treaty shall be compulsory...." (*Actas y Documentos,* Vol. IV, p. 20; English text, p. 25.)

Dr. Charles G. Fenwick, Director of the Department of International Law and Organization of the Pan American Union, made an analytical comparison between the 1945 and the 1947 texts in a memorandum dated January 1948 (*ibid.,* Vol. IV, pp. 35-39):

> "5. In contrast to the 1945 Project, the 1947 Project submitted by the Juridical Committee establishes arbitration as the final and definitive procedure that should be followed in all cases.... The fundamental change in the 1947 Project appears in Article XVII, which refers to arbitration procedure. The High Contracting Parties commit themselves to submit to arbitration all disputes of any nature, be they juridical or not which, in the opinion of one of the Parties, it may not have been possible to resolve by any of the procedures of mediation, investigation or conciliation, established in the preceding articles. In this fashion the Juridical Committee has tried to offer a final and definitive procedure such as may assure the resolution of all controversies be they of a political or juridical character." *(Translation from the Spanish text.)*

The following three points may be seen as distinctive characteristics of the 1947 Project. Firstly, the member States agreed in general terms to make use of good offices and mediation, investigation and conciliation, and arbitration and judicial settlement; secondly, the member States bound themselves to submit to arbitration such disputes of any nature, juridical or non-juridical, as it had not been possible to settle by diplomatic means or by the procedures of mediation, investigation and

conciliation; thirdly, notwithstanding the obligation of the procedure of arbitration, it was recognized as indicated in Article XVIII, which was linked to the preceding Article, that the member States might submit to the International Court of Justice such disputes as were enumerated in Article 36, paragraph 2, of its Statute. This would be possible only if the parties were "in agreement to do so" and when they had "accepted previously its obligatory jurisdiction under the terms of Article 36 of the Statute" (Art. XVIII).

Thus the 1947 Project did not give any indication that the American States should be subject to compulsory settlement of disputes by the International Court of Justice in terms of either the first or the second paragraph of Article 36 of the Statute.

10. Both before and during the Bogotá Conference, a number of States either commented on the Committee's 1947 text or proposed amendments to it (*Actas y Documentos,* Vol. IV, pp. 39-79). As regards judicial settlement, Brazil and Mexico made proposals after the Conference had commenced. The former proposed rewording Article XVIII so as to provide that the obligation of arbitration would not prejudice the right of direct recourse to the International Court of Justice in cases in which the jurisdiction of that Court had been accepted as compulsory by both parties, and where the dispute was to be submitted by common consent to the judgment of the Court. The latter proposed that the judicial procedure should be initiated in cases in which the parties had previously accepted the compulsory jurisdiction of the International Court of Justice, and that the obligation of arbitration should be maintained, except in cases of recourse to judicial procedure, for such differences of any nature, juridical or non-juridical, as they had not been able to settle by diplomatic means or by any other pacific procedure. Honduras proposed as late as 22 April, in the last stage of the Conference, a draft resolution on the jurisdiction of the International Court of Justice, in which the Bogotá Conference would merely recommend that the American States should formulate and deposit, as soon as possible, declarations under the optional clause of the Court's Statute.

In none of those proposals presented by various Governments was there, however, any indication that the forthcoming treaty would itself become a treaty conferring compulsory jurisdiction upon the Court under Article 36, paragraph 1, of the Statute.

*

11. Having thus considered how the American States handled the matter of the judicial settlement of disputes in parallel with the procedure of arbitration and conciliation in the process leading up to the 1948 Conference of Bogotá, and having shown that there was at that time not even the slightest idea of granting compulsory jurisdiction to the previous or present Court, I now wish to look at the drafting history of those provi-

sions of the 1948 Pact of Bogotá, which — depending on their content — might allow the Court to sustain the concept of the compulsory jurisdiction of the International Court of Justice. In fact, as the Court suggests, the *travaux préparatoires*:

> "must of course be resorted to only with caution, as not all the stages of the drafting of the texts at the Bogotá Conference were the subject of detailed records" (Judgment, para. 37).

The reader may well be puzzled by the way in which certain texts used in the 1947 Project suddenly disappeared without trace, while new texts were incorporated into the 1948 Pact without substantive discussion. The picture given in the Judgment in this connection (para. 46) does not appear to be complete. I will endeavour to trace the way in which the text developed at the Bogotá Conference, as indicated in the *travaux préparatoires.*

12. In principle, the subject of the peaceful settlement of disputes was assigned to Committee III, which commenced its work on 2 April (*Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, p. 98). It in turn entrusted the work to Sub-Committee III-A, which consisted of the delegates of all the participating States. Thereafter, Committee III did not hold a meeting until 27 April, when its second meeting took place (*ibid.,* p. 106). Sub-Committee III-A, during its first three meetings from 7 to 9 April (*ibid.,* pp. 222-229), listened to a general discussion on the subject by some delegates. It then adjourned its proceedings for two weeks and, at its fourth (and final) meeting on 24 April, divided into three working groups (*ibid.,* p. 230). Sub-Committee III-A did not meet after that time. There is no record of the working groups, except for a report of the first working group appointed to study general norms of the Inter-American System of Peace (*ibid.,* p. 80), which dealt with Part I ("General Obligation to Settle Disputes by Peaceful Procedures") of the 1947 Project as well as with Chapter II ("Pacific Settlement of Disputes") of the Project of the Organic Pact.

Committee III discussed the subject at its second, third and fourth meetings on 27 and 28 April (*ibid.,* pp. 106-220). The discussions on Part IV ("Procedure of Arbitration") commenced at the third meeting in the afternoon of 27 April. The Judgment states, in this respect, that

> "At that meeting ... the delegate of Colombia explained to the Committee the general lines of the system proposed by the Sub-Committee which had prepared the draft; the Sub-Committeee took the position 'that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice'." (Para. 46.)

In fact, the delegate of Colombia was requested by the Chairman of Com-

mittee III to speak about the work of the working groups appointed on 24 April. He, himself, was only a member of the third working group dealing with Parts IV, V and VI ("Procedure of Arbitration", "Procedure of Judicial Settlement" and "Final Provisions") (and composed of the delegates of Argentina, Brazil, Colombia, Honduras, the United States, Mexico and Uruguay), which did not produce any official documentation. The delegate of Colombia began to speak on the work of Sub-Committee III-A, though that Sub-Committee had neither prepared any draft nor taken any position, while, as stated above, there had been general debates between several delegates in its early stages (between 7 and 9 April), but had concluded its meeting by dividing the work into three working groups. It might have been possible, at least according to the statement of the Chairman of Committee III, that the working groups had prepared some articles.

The statement made by the delegate of Colombia, as quoted in the Judgment, and as mentioned above, was followed up by a remark to the effect that:

> "[the Sub-Committee] consequently established Part IV of the draft, which contains the rules concerning that procedure. At the same time, it decided that the procedure of arbitration should be a supplementary, subsidiary procedure, for cases in which the judicial procedure could not produce results." (*Actas y Documentos,* Vol. IV, p. 156.)

The delegate of Colombia referred to the proposal made a few days earlier by Honduras (as indicated above) and continued to explain the current status of "signatures" and "ratifications" of the optional clause by the American States. In spite of what he stated (and what was quoted in the Judgment), the delegate of Colombia seems to have done no more than report upon the delegates' comments during the early stages of Sub-Committee III-A. He then turned to subjects such as "reservation of domestic jurisdiction" among others, which have no direct relevance in this instance. His statement concluded with a reference to the general system of peaceful settlement of disputes. He did not intend to discuss draft Articles XVII and XVIII, and did not discuss them.

The discussion of the first Article in Part IV of the Project, that is the draft Article XVII, started much later, when Committee III decided to continue its meeting later that afternoon instead of postponing it until the following day. The text of draft Article XVII, which was thus introduced on 27 April, read:

> "In conformity with Article 36 of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto,* without the necessity of any

special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute the breach of an international obligation; or
(d) The nature or extent of the reparation to be made for the breach of an international obligation. . . ." (*Actas y Documentos,* Vol. IV, p. 161.)

The wording of this text was quite different from the text of Article XVIII of the 1947 Project. We do not know who drafted it or when it was drafted, though we can probably guess that it was one of the matters in the hands of the seven-delegate working group, as mentioned above. The purpose behind the drafting of the newly formulated text in terms so different from those of the 1947 Project is unknown.

The way in which this particular Article was dealt with by Committee III is fully explained in the Judgment (para. 37) and may not require any further explanation, except that the suggestion that the words "any other American States" should be replaced by the words "any other Member State of the Organization" was "approved" (*Actas y Documentos,* Vol. II, p. 162). The references in the Judgment to the statements made by the delegates of the United States, Mexico, Colombia, Ecuador and Peru (para. 37) are quite correct. It may be interesting to note however that, as the *travaux préparatoires* clearly indicate, the text of draft Article XVII was neither formally "approved" nor subjected to a vote, even though the inclusion of an additional article was "rejected".

With regard to draft Article XVIII (the text of which must have been distributed together with Article XVII, but which was not included in the *travaux préparatoires*), Committee III agreed that the provision would be taken up by the working group on the following day (*Actas y Documentos,* Vol. II, p. 167). On that day, 28 April, Committee III received the following proposed text reported by the working group:

> "When the conciliation procedure previously established in the present Treaty or by agreement of the parties has not led to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute." (*Ibid.,* p. 171.)

This text, which is quite different from that of 1947, seems also to have differed from the text of the previous day, as a member (delegate of Brazil) of the working group stated that draft Article XVIII had been replaced by this new text.

No delegate spoke in support of the new text, and no discussion was held. The words "has not led to a solution" were replaced by "does not lead to a solution" upon the suggestion of Colombia. The text thus amended was "approved" by the affirmative votes of 9 of the 14 representatives (13 States and the Pan American Union) who were present (*Actas y Documentos,* Vol. II, p. 171).

13. The text of the Inter-American System of Pacific Settlement (*ibid.,* p. 83), as adopted at Committee III, was then sent to the Committee on Co-ordination and to the Drafting Committee. The Committee on Co-ordination met on five occasions between 26 April and 1 May (*ibid.,* pp. 435-590) and took up the text of the Inter-American System of Pacific Settlement at its fourth meeting on 29 April (*ibid.,* p. 538). The title was changed to "American Treaty of Pacific Settlement". The draft articles were renumbered, but no substantive discussion took place concerning the texts with which we are concerned. The Drafting Committee did not leave any record, other than one very brief and general report, which tells us nothing (*ibid.,* p. 591).

The Pact of Bogotá was approved by acclamation at the plenary session on 30 April, without further discussion (*Actas y Documentos,* Vol. I, p. 234). The final text of the Pact of Bogotá was different from the text approved by Committee III in that the expressions "in conformity with Article 36 of the Statute of the International Court of Justice" and "in relation to any other Member States of the Organization" in Article XXXI (formerly draft Article XVII) were replaced by "in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice" and "in relation to any other American States".

14. I have just shown that the process whereby the provisions of Articles XXXI and XXXII (formerly Articles XVII and XVIII in the 1947 Project) were drafted at the Bogotá Conference remains a mystery. Unlike the closely linked provisions of Articles XVII and XVIII in the 1947 Project, the new texts of draft Articles XVII and XVIII placed before Committee III of the Conference (the authors and sponsors of which are unknown) seemed to be quite distinct in their nature. No delegate at the Conference at any time suggested that the provisions of the draft would constitute an acceptance of the Court's jurisdiction and relate to cases in which the Court could be seised directly. One fails to understand how the concept of Articles XVII and XVIII of the 1947 Project, that is, compulsory arbitration and the alternative of referral to the Court where the parties had given their consent, came to be replaced by the new Articles XXXI and XXXII of the Pact, respectively.

What is clear is that, as the Judgment properly records (para. 37), although some delegates drew the attention of the Conference to possible interpretations drawn from the newly drafted text of draft Article XVII (now Article XXXI), there was no further discussion among the other delegates and that another proposed version of draft Article XVIII (now Article XXXII) was not even discussed. The delegates of the American

States gathered in 1948 at Bogotá with the lofty goal of settling international disputes by peaceful means. Yet what they expected from the Court is still a mystery. This leads me to conclude that the interpretation given by the Court of "the object and the purpose" of the Pact is not sufficiently supported.

IV

15. In conclusion, I would like to add the following comments. It is certainly possible for States jointly to assume the obligation to accept the Court's jurisdiction over certain types of disputes under Article 36, paragraph 1, of the Statute, and they can also jointly declare their acceptance of the Court's jurisdiction over legal disputes, as provided for in Article 36, paragraph 2. In cases of general dispute-settlement treaties, the acceptance of jurisdiction over legal disputes in the framework of Article 36, paragraph 1, of the Statute, can be equated, in effect, with the acceptance of jurisdiction under Article 36, paragraph 2. Such an obligation must, however, be assumed in an unequivocal manner. For example, as previously stated, the 1949 Revised General Act for the Pacific Settlement of International Disputes provides that disputes "shall be submitted for decision [to the Court]" and the 1957 European Convention for the Pacific Settlement of Disputes states that the parties "shall submit [disputes] to the judgment of the . . . Court".

It cannot be denied that the parties to those two treaties accept the Court's jurisdiction within the limits of Article 36, paragraph 2, of the Statute, though it remains to be seen whether the instruments constituting a declaration of acceptance of the Court's jurisdiction should not have been deposited under Article 36, paragraph 4, of the Statute, or whether the simple registration of the treaties in question with the United Nations Secretariat, pursuant to Article 102 of the United Nations Charter, might be looked upon as a substitute for the requirement of that paragraph of the Statute.

I hesitate to assimilate the Pact of Bogotá to those two treaties for the following reasons: firstly, as I explained above, the existence of Article XXXII complicates the Pact's system of peaceful settlement because this particular Article, by its ambiguous content, casts doubt upon the intention of the parties to accept the Court's compulsory jurisdiction. Secondly, unlike the two other treaties of a general dispute-settlement nature, the Pact of Bogotá, although providing for a general obligation to settle international disputes, does not specify the use of any particular procedure, except for resort to the Court in certain cases, and thus the choice of peaceful settlement procedures is to be made jointly by the parties. Thirdly, and more significantly, it will be clearly apparent from

what has been stated above that no delegate at the Bogotá Conference ever expressed his country's readiness to confer compulsory jurisdiction on the Court by virtue of the forthcoming Treaty, although some delegates were aware of the possible implication of the text to be adopted. It is accordingly true to say that the present text of the Pact emerged without any clear indication of the parties' real intention.

16. The Permanent Court of International Justice, as quoted in the Judgment (para. 16), once mentioned

> "the fact that [the Court's] jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given . . ." (case concerning *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2,* p. 16).

It also stated:

> "When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it." (Case concerning the *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9,* p. 32.)

The present Court accepted the validity of this principle in the *Interpretation of Peace Treaties* case, in which it stated that "[t]he consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases" (*I.C.J. Reports 1950,* p. 71). The Court, in the case of the *Monetary Gold Removed from Rome in 1943* (*Preliminary Question, Judgment, I.C.J. Reports 1954,* p. 32), referred to "a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent". More recently, the fundamental principle mentioned in the 1950 case was reiterated in the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya)* (*I.C.J. Reports 1985,* p. 216).

In sum, one cannot lay too much stress upon the paramount importance of the expression of the acceptance of the Court's jurisdiction, which is invariably required for the Court to entertain a case, as the first and critical task of the Court is always to ascertain the intention of the Parties. I doubt whether this particular point has been given all the weight due to it.

(Signed) Shigeru ODA.

SEPARATE OPINION OF JUDGE SCHWEBEL

I have voted in favour of the Judgment of the Court because I am in essential, though not entire, agreement with its two principal holdings.

I believe that the Court has jurisdiction in this case accorded by Article XXXI of the Pact of Bogotá, a jurisdiction which is not qualified by the conditions found in Article XXXII. Such doubt as I have on this question is reflected in the analysis which Judge Oda's opinion in this case sets forth, particularly his quotations of the authoritative conclusions of the former Secretary-General of the Organization of American States and the former Director of the Legal Department of the OAS, Dr. F. V. García-Amador, who do appear to condition jurisdiction under Article XXXI of the Pact upon fulfilment of the prerequisites prescribed by Article XXXII. It is clear that those prerequisites — notably, conciliation — have not been fulfilled in this case. Nevertheless, I do not find in the abbreviated analyses of these authorities reasons which lead me to conclude that the Court's construction of Article XXXI as independent of Article XXXII is unfounded. These two Articles, on their face, each appear to accord the Court an independent jurisdictional title. It may of course be asked why a single treaty should provide two independent routes to the Court's compulsory jurisdiction. Perhaps the answer to that question is that Article XXXII may have been intended to embrace disputes not of a juridical nature as well as "disputes of a juridical nature".

The admissibility of Nicaragua's Application raises more substantial doubts, by reason of the operation of Articles II and IV of the Pact of Bogotá. Believing as I do that jurisdiction in this case can only be founded on the Pact of Bogotá, and that accordingly Nicaragua's Application must be considered subject to the provisions of that Pact, those Articles initially appear to render Nicaragua's Application inadmissible because the substance of that Application is clearly comprehended by the Contadora process. That process, not being a pacific procedure established by the Pact, surely is a "special procedure", agreed upon by Nicaragua and Honduras as well as other States, which, if successfully concluded, would permit them to arrive at a solution of Nicaragua's essential causes of action. Moreover, the Contadora process in any event is a "pacific procedure" (it can hardly be a warlike procedure), from which it follows that, according to Article IV of the Pact, being a pacific procedure which "has been initiated . . . by agreement between the parties" before the bringing of Nicaragua's Application, "no other procedure may be commenced until that procedure is concluded". The Court avoids confronting more than one

knotty problem of the interpretation of Articles II and IV by its holding that the Contadora process was "concluded" at the time when Nicaragua filed its Application. It so holds despite the common view of the Parties that that process "has not been abandoned or suspended at any moment". The Court maintains that it appreciates the importance of this concordance of views between the Parties; nevertheless, it decides that the Contadora process, at any rate in the phase directed towards resolution of the substance of the issues before it, had concluded by 28 July 1986. This is, for the reasons set out by the Court, one plausible interpretation of the facts; one might also arrive at another plausible interpretation as the Parties appear to do; but I do not think that the Court's interpretation is untenable.

My most substantial reservations about the Court's Judgment turn upon its holdings of paragraph 54, which are in answer to the objections by Honduras to what has been termed the "serial" nature of the Applications which have been brought by Nicaragua in three inter-related cases against the United States of America in 1984 and against Costa Rica and Honduras in 1986 (see Lori Fisler Damrosch, "Multilateral Disputes", in Damrosch, ed., *The International Court of Justice at a Crossroads,* 1987, pp. 376, 379).

In its Memorial Honduras recalls that, by its Application of 9 April 1984 against the United States, Nicaragua submitted to the Court a set of facts forming part of the general conflict existing in Central America, and that, one month after the Judgment of the Court in that case, Nicaragua submitted to the Court, by its Applications against Costa Rica and Honduras, a second and a third set of facts pertaining to the same conflict. Honduras maintains that the

> "overall result of this behaviour on the part of Nicaragua constitutes . . . an artificial and arbitrary dividing up of the general conflict existing in Central America. Moreover, this result may have negative consequences for Honduras as a Defendant State before the Court, since it affects the guarantee of a sound administration of justice and undermines the principle laid down in Article 59 of the Statute of the Court.
>
> 2.07. In fact, the successive Applications lodged by Nicaragua have presented to the Court, for Nicaragua's convenience, some facts forming part of the general conflict in Central America. But it is obvious that some other facts, while appertaining to the same general conflict, are inevitably absent from the proceedings before the Court.
>
> The power granted to the Parties under Article 80 of the Rules of Court [to make counter-claims] does not totally remove this negative consequence; for it is possible for the State against which the claim is brought not to appear before the Court, as occurred in the case concerning *Military and Paramilitary Activities in and against Nicaragua*

after the Judgment of 26 November 1984. In this situation, the Court faces a great difficulty in the determination of the facts, as was acknowledged in the Judgment of 27 June 1986. But as regards subsequent disputes before the Court forming part of the same general conflict in the Region, if the facts in the previous case affect other States, the Defendant States in later proceedings will find themselves obliged to fill in previous gaps or to put other interpretations on the same facts, none of which would appear to be in conformity with the requirements of a sound administration of justice.

On the other hand, the successive Applications lodged by Nicaragua from 1984 onwards have another prejudicial effect for the Defendant States in later proceedings, as is the case of the Republic of Honduras. This negative consequence arises from the assessment of facts in previous proceedings, those facts forming part of the same general conflict existing in Central America; and it may gravely undermine the principle of relativity of international adjudications laid down in Article 59 of the Statute of the Court." (Memorial of Honduras, paras. 2.06-2.07.)

The answers which paragraph 54 of the Court's Judgment gives to these contentions of Honduras in my view are not fully adequate, in the light of the following considerations.

In the proceedings before the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua,* Nicaragua levelled grave accusations against not only the United States, but against Honduras and Costa Rica. It claimed that those two States — most particularly Honduras — were acting in concert with the United States to support its use of military force against Nicaragua and its intervention in Nicaragua's internal affairs, especially by permitting "mercenaries" to operate from their territories against Nicaragua. Despite these accusations, Nicaragua did not in 1984 bring suit against either Honduras or Costa Rica, even though both of those countries at that time adhered to the Court's compulsory jurisdiction under the Optional Clause in the most unrestricted terms. Rather, Nicaragua maintained that its Application made "no claim of illegal conduct by any State other than the United States", and that it sought "no relief . . . from any other State".

For its part, in view of these accusations against Honduras and Costa Rica — and Nicaragua's further claim that El Salvador's armed forces were acting in the service of the United States — and in view of its own contention that its actions against Nicaragua were measures taken in collective self-defence of Nicaragua's neighbours, particularly El Salvador, against armed attack by Nicaragua, the United States maintained that the Court could not adjudicate Nicaragua's allegations against the United

States without also passing upon the lawfulness of the actions of Honduras, Costa Rica and El Salvador. These three States, the United States consequently contended, were indispensable parties and, in their absence, the Court should not proceed to render judgment on the merits.

Not only did the Court reject this contention but, shortly before, when El Salvador, in a declaration of intervention which strongly supported United States claims that it was under armed attack by Nicaragua and acting in collective self-defence with the United States, sought to exercise its "right to intervene in the proceedings" — the quotation is from the terms of Article 63 of the Statute — the Court denied its intervention. Its terse Order, which is virtually devoid of reasoning, held that the declaration of intervention was "inadmissible inasmuch as it relates to the current phase of the proceedings" — i.e., jurisdiction and admissibility; a ground which has no basis in the terms or purpose of Article 63. As has been widely recognized, that denial consequently is difficult to reconcile with the Statute and, since El Salvador was not accorded a hearing, more difficult still to reconcile with the explicit provision of Article 84 of the Rules of Court that, where there is objection to the admissibility of a declaration of intervention, "the Court shall hear the State seeking to intervene and the parties before deciding". The shutting out of El Salvador's participation not only affected the subsequent content and course of the proceedings. It appears also to have affected the subsequent decision of the United States to withdraw from the proceedings, in view of the fact that one of the two principal grounds of withdrawal cited by the United States on 18 January 1985 was the Court's summary rejection of El Salvador's application "without giving reasons and without even granting El Salvador a hearing, in violation of El Salvador's right and in disregard of the Court's own rules".

While the Court in rejecting El Salvador's intervention at the stage of jurisdiction and admissibility implied that it was open to intervention by El Salvador at the stage of the merits, and elsewhere indicated that Honduras and Costa Rica as well as El Salvador had statutory possibilities of intervention open to them, it is obvious that its treatment of El Salvador could hardly have operated to encourage such interventions. Nor, for their part, did El Salvador, Honduras or Costa Rica in any event manifest any inclination to have their actions, some of which were the objects of Nicaraguan accusation, subjected to the Court's judgment, even if, in fact, the Judgment on the merits ultimately rendered by the Court on 27 June 1986 inevitably — by the nature of Nicaragua's Application and accusations and the defence of the United States — did pass upon those actions, factually and legally.

Promptly after the rendering of the Court's Judgment of 27 June 1986 against the United States, Nicaragua discovered after all (contrary to what it had pleaded in its case against the United States) that it did have legal

claims against Honduras and Costa Rica and filed its Applications of 28 July 1986 against both States. Should the instant case reach the phase of the merits, it is to be expected that Nicaragua will invoke, as it has already invoked, against Honduras the findings of fact and conclusions of law reached by the Court in the *Military and Paramilitary Activities in and against Nicaragua* case not only against the United States but, at least inferentially, against Honduras, even though Honduras was not a party to that case. As noted, it was Nicaragua's choice not to initiate suit against Honduras in 1984, despite its accusations against Honduras and Honduras's unreserved adherence to the Optional Clause which then was in force.

Nicaragua has rather preferred to pursue serial actions, however prejudicial they may be to what Honduras describes as the sound administration of justice. That such an action may indeed be prejudicial is not open to doubt. If the Court's Judgment of 27 June 1986, which rejects on factual and legal grounds the defence of the United States that it acted against Nicaragua in collective self-defence of El Salvador, Honduras and Costa Rica, were to be applied to the instant case, Honduras could be deprived of a principal defence to Nicaragua's claims even before pleadings on the merits of the case are exchanged.

When the Court denied the requests of Malta and Italy to intervene in other cases under Article 62 of the Statute — where it "shall be for the Court to decide" on intervention — the Court nevertheless gave assurances to Malta and Italy that when it came to adjudicate the merits it would ensure that their interests would not be prejudiced by their absence. It gave effect to those assurances. When El Salvador sought to intervene in the *Military and Paramilitary Activities in and against Nicaragua* case under Article 63 of the Statute — that is, to exercise its statutory "right to intervene in the proceedings" — the Court summarily denied the request, gave El Salvador no such assurances, and rendered a judgment which, on any view, must be profoundly prejudicial to the interests of El Salvador as it presented them to the Court in its denied declaration of intervention.

Now, in the instant case, when Honduras complains with apparent justification of the position in which it finds itself as a result not only of Nicaragua's litigating tactics but the Court's acceptance of them, what does the Court offer in response?

A very mixed response. On the one hand, the Court concludes that it cannot uphold the contention of Honduras that the procedural situation created by Nicaragua's splitting up of the overall conflict into separate disputes is contrary to the requirements of good faith and the

proper functioning of international justice. On the other hand, the Court holds that:

> "In any event, it is for the Parties to establish the facts in the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same parties (see Article 59 of the Statute)." (Judgment, para. 54.)

It follows from this latter holding that if, at the stage of the merits, a Party to the instant case should endeavour to rely on the findings of fact of the Judgment of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua,* the Court will not accept such reliance but will require that Party to establish the facts in the present case taking account of the usual rules of evidence. Despite the fact that that Judgment passed upon causes of action which are found in the instant case, and despite the fact that Honduras is repeatedly specified both in the pleadings of the *Military and Paramilitary Activities in and against Nicaragua* case and in the Court's Judgment, considerations of *res judicata* cannot apply since that case was another case, to which the Parties were not the same as the Parties to this case.

This says no more than what the terms of Article 59 of the Statute require. Nevertheless, in the circumstances, it is important that the Court says it, and, if the instant case reaches the stage of the merits, it will be crucial for the Court to give full effect to Article 59. In the nature of the situation with which the Parties and the Court are confronted, that will not be simple. Can the Court, which, in its Judgment of 27 June 1986, not only acquitted Nicaragua of charges of acts of unlawful intervention in the affairs of its neighbours which were tantamount to armed attack, but also acquitted Nicaragua of certain acts of unlawful intervention altogether, consider, without regard to these holdings, the facts of the instant case as the evidence may show them to be? Can the Court, which in its Judgment of 27 June 1986 considered as established the fact that certain transborder military incursions into the territory of Honduras are imputable to the Government of Nicaragua, consider, without regard to that holding, the facts of the instant case as the evidence may show them to be?

The importance of the Court giving the most rigorous effect in the current case to the import of Article 59 is, in my view, the greater for an extraordinary reason. To apply the findings of fact of the Court's Judgment of 27 June 1986 to the merits of the instant case would be the more prejudicial because certain of those findings — critical findings at that — do not in fact correspond to the facts. In Judge Oda's restrained phrase appraising the Court's finding of the facts in *Military and Paramilitary Activities in and against Nicaragua,* it is "beyond any doubt that the picture

of the present dispute painted by the Court is far from the reality". And to apply certain of the Court's conclusions of law in that case to the merits of the instant case would be no less prejudicial, because certain of those conclusions were and are in error.

(Signed) Stephen M. SCHWEBEL.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

Its general interest apart, this case is one of importance to a hitherto untested branch of the institutional structure of a major region. I agree with the Judgment of the Court but have some additional views on matters of approach, analysis and reasoning. The issues involved would also, I think, admit of more specific treatment and of some account being taken of the regional literature cited by both sides. They relate to the questions (i) whether Article XXXI of the Pact of Bogotá is an undertaking to file optional clause declarations; (ii) whether the reservations to Honduras's optional clause declaration of 1986 apply to its obligations under Article XXXI; (iii) whether conciliation is a precondition to the right to move the Court under Article XXXI; (iv) whether the negotiation requirement of Article II has been satisfied; and (v) whether the Contadora process is a bar to these proceedings under Article IV. It may be that the Judgment of the Court can be strengthened on each of these five points.

I. Whether Article XXXI of the Pact of Bogotá Is an Undertaking to File Optional Clause Declarations

I commence by stating my approach to two aspects of the Judgment of the Court as it relates to this important jurisdictional issue. These two aspects are presented in paragraph 29 of the Judgment, in which the Court notes that:

> "Honduras first draws attention to the fact that Article XXXI begins with the words, 'In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice', and that the wording of the rest of the Article is almost identical with that of Article 36, paragraph 2."

On this basis Honduras submitted that Article XXXI "obligated the parties to accept the compulsory jurisdiction of the Court 'in conformity with Article 36, paragraph 2, of the Statute' ", and that it would be "in conformity with" this provision for a party to the Pact to make a declaration from time to time and to vary or terminate it by making a subsequent declaration.

As to the opening words of Article XXXI, "In conformity with Article 36, paragraph 2, of the Statute", this phrase, being followed imme-

diately by the words "the High Contracting Parties declare . . .", clearly relates to a declaration which was thereby being actually made, operating to designate it as a declaration of the kind visualized by Article 36, paragraph 2, and not to declarations to be made in future. Hence the remark by Mr. García-Amador (cited more fully below) that "the Pact itself constitutes an unconditional declaration of the type foreseen in" Article 36, paragraph 2, of the Statute of the Court. In the result, the effect of the opening words of Article XXXI, relied on by Honduras, was exhausted at the commencement of the Pact. If the words were intended to relate to an ambulatory competence to make future declarations, simpler and less subtle ways of expressing the intention should have been available.

As to the argument that, apart from the opening words referred to above, the wording of Article XXXI of the Pact is almost identical with that of Article 36, paragraph 2, of the Statute of the Court, it was indeed the contention of Honduras that Article XXXI was a provision which "merely reproduces the terms of Article 36, paragraph 2". Although this view may claim support from remarks to be occasionally found in the literature on the subject, for the reasons given above it seems to me that Article XXXI was intended as an exercise of a faculty created by Article 36, paragraph 2, and was not conceived of as a mere reproduction of the latter. For, whereas Article 36, paragraph 2, provides that parties to the Statute "may . . . declare . . .", in Article XXXI, as has been noticed, parties to the Pact state that, "in conformity with" Article 36, paragraph 2, they "declare . . .". The idea (referred to, for example, in Roberto Córdova, "El Tratado Americano de Soluciones Pacíficas — Pacto de Bogotá", *Anuario Jurídico Interamericano,* 1948, pp. 11-12) that Article XXXI is a mere reproduction of Article 36, paragraph 2, seems traceable to a remark made by Mr. Belaúnde of Peru during the opening stages of the relevant discussions in Committee III of the Ninth International Conference of American States, held in Bogotá in 1948, when he said "that Article XVII [XXXI] does no more than transcribe Article 36 of the Statute of the International Court of Justice" *(translation by the Registry).* ["[E]l Artículo XVII [XXXI] no hace otra cosa que transcribir el Artículo 36 del Estatuto de la Corte Internacional de Justicia." *(Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, Bogotá, 1953, p. 161.)] But, overtaking that remark, the ensuing discussions went on to recognize, as Mr. Belaúnde himself did and as paragraph 32 of the Judgment of the Court seems to do, that the Article was in fact intended as an immediate general declaration of acceptance of the compulsory jurisdiction of the Court and, indeed, as a general declaration which, so far as parties to the Pact were concerned, was to be free of any reservations annexed to any separate declarations made or to be made by them under Article 36, paragraph 2, of the Statute. In effect, it is not the case that Article XXXI "obligated the parties to accept the jurisdiction of the Court 'in conformity with Article 36, paragraph 2, of the Statute'": it was intended as being in itself an accept-

ance of such jurisdiction. In the circumstances, there is need for caution in taking at face value the original remark by Mr. Belaúnde that Article XXXI of the Pact was a mere reproduction of Article 36, paragraph 2, of the Statute.

Speaking of draft Article XXXI, Mr. Soto del Corral of Colombia did say at the 1948 Conference, "This article in the draft develops the principle contained in paragraph 1 of Article 36 of the Statute of the Court." *(Translation by the Registry.)* ["Este artículo del proyecto desarrolla el principio contenido en el ordinal 1 del Artículo 36 del Estatuto de la Corte." (*Actas y Documentos,* Vol. IV, p. 157.)] Nicaragua, I believe, intended to place some reliance on that statement for its own interpretation of Article XXXI as being linked to Article 36, paragraph 1. In my opinion, however, reading his interventions as a whole, Mr. Soto del Corral was far from wishing to modify the conclusion which I draw from his earlier and main statement (*ibid.,* pp. 156-157) to the effect that Article XXXI was intended to be a declaration made by each State of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute — and it was on him that the principal responsibility fell to report on the draft provision. I interpret the above excerpt from his statement as signifying that, in serving this collective purpose, Article XXXI would be operating as a development or extension of the conventional idea incorporated in Article 36, paragraph 1, in the sense that a treaty would be made to serve as machinery for effecting a collective declaration under Article 36, paragraph 2, of the Statute, and not that Article XXXI would in fact confer a conventional jurisdiction under Article 36, paragraph 1, or that the latter would be applied as it stood. Article 36, paragraph 2, as is known, represents a compromise formula resulting from a Brazilian initiative taken during the drafting of the Statute of the Permanent Court. Latin American jurists were well acquainted with it and with the distinction between it and Article 36, paragraph 1 — a distinction explicitly observed in the contrasting wording of Articles XXXI and XXXII. They presumably meant what they seemed to be saying in Article XXXI.

However, whether the intention was to vest jurisdiction under Article 36, paragraph 1, or under Article 36, paragraph 2, of the Statute of the Court, the idea in either case was to make an operationally effective grant on a uniform basis. On either view, given the jurisdictional discrepancies which it can obviously produce *ratione temporis, ratione personae* and *ratione materiae,* the Honduran contention is inconsistent with the actual intention of the parties at Bogotá.

Some comparisons may be usefully made. In the *Novena Conferencia Internacional Americana* (*op. cit.,* pp. 6 ff.), is set out the 1947 "Proyecto de Sistema Interamericano de Paz". Article XVIII, which visualized reference

to the International Court of Justice, contemplated separate declarations having to be made under Article 36, paragraph 2, of the Statute of the Court (see also para. 25 of the Report on the draft, *Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, p. 21). Alluding to Article XVII relating to arbitration, Article XVIII stated in part:

> "Notwithstanding the provisions of the preceding Article, the parties may, if they so agree, submit their disputes to the International Court of Justice, when they have previously accepted the compulsory jurisdiction of the Court under the terms of Article 36 of its Statute . . ." *(translation by the Registry).* ["No obstante lo establecido en el artículo anterior, se reconoce a las partes, si se pusieren de acuerdo en ello, la facultad de someter sus controversias a la Corte Internacional de Justicia, cuando hubieren aceptado con anterioridad la jurisdicción obligatoria de la misma, en los términos del Artículo 36 de su Estatuto . . ." (*Ibid.,* p. 9).]

The differences between this provision and Article XXXI of the Pact are striking.

During the 1985 proceedings of the Inter-American Juridical Committee which reviewed the adequacy of the Pact, the learned Venezuelan delegate Mr. Luis Herrera Marcano, demonstrating clear understanding of the existing position, proposed that Article XXXI of the Pact be amended to read:

> "When ratifying the present Treaty or at any time thereafter, each State may declare that it recognizes, on the basis of reciprocity, with respect to any other American States . . . etc."

The suggested amendment was not adopted (see the opinion of the Committee — OEA/Ser.G, CP/doc.1603/85, 3 September 1985, pp. 14-15 — Annex 23 to the Nicaraguan Counter-Memorial). That the amendment was proposed and not accepted is however indicative of the generally received meaning of the existing provision as not being dependent on the making of separate declarations.

Some evidence, if it were needed, exists of acceptance within the international community of the essential distinction in law between recognizing, and undertaking to recognize, the compulsory jurisdiction of the Court under the optional clause. Thus, Article 3 of the Protocol for Pacific Settlement of International Disputes adopted by the General Assembly of the League of Nations on 2 October 1924 stated in part:

> "The Signatory States undertake to recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court . . ."

Likewise, Article V of the Treaty of Friendship and General Relations between Italy and the Philippines of 9 July 1947 reads:

> "[T]he Contracting Parties undertake to recognize as compulsory, *ipso facto* and without a special Convention, the jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 2, of the Statute of the Court."

Article XXXI of the Pact of Bogotá does not use language under which the signatory States "undertake to recognize . . .". Had this been the wording, the Honduran argument might have had some foundation.

The foregoing accords with the practice observed by parties to the Pact as regards the relationship between Article XXXI of the Pact and Article 36, paragraph 2, of the Statute. In addition to the matters referred to in the first half of paragraph 40 of the Judgment of the Court, it may be observed that, aside from El Salvador, which later denounced it, the Pact was ratified by thirteen States. Five of these, Costa Rica, Brazil, Peru, Paraguay and Chile did so respectively on 6 May 1949, 16 November 1965, 26 May 1967, 27 July 1967 and 15 April 1974. Costa Rica deposited a declaration under Article 36, paragraph 2, of the Statute only on 20 February 1973. Paraguay regarded itself as having no declaration in force after its 1938 termination of the declaration made by it in 1933 in favour of the Permanent Court. The last Brazilian declaration, which was made on 12 February 1948, expired five years later. Peru and Chile have never had any declaration in force at any time since ratifying the Pact. The material presented to the Court does not suggest that any of these five States was ever criticized by any other State, or by any qualified commentator, as being in breach of any undertaking given by them in Article XXXI of the Pact to make such declarations. If, as seems probable, there was no such criticism — and the general question whether any State was ever so criticized was before both sides — this would diminish the credibility of any claim that Article XXXI of the Pact was understood by the parties as such an undertaking.

As observed in paragraph 30 of the Judgment, while considering that Article XXXI of the Pact was intended to confer compulsory jurisdiction under the optional clause, Honduras submitted that the Article gave a party an option to implement that intention in one of three possible ways. I am unable to see anything in the Article which gave an option as to methods of implementation. Honduras presented no authority in support of its contention and did not succeed in reconciling it with the text of Article XXXI of the Pact or with the actual intention at Bogotá or with the evolution of Latin American interest in the subject of compulsory judicial settlement. In addition, the contention is not, in my opinion, consistent with the comparisons and considerations referred to above.

II. Applicability of the 1986 Honduran Reservations to Article XXXI of the Pact of Bogotá

A problem arises as a result of an undetermined question as to the precise character of the jurisdiction conferred by Article XXXI of the Pact of Bogotá. As the Court has pointed out in paragraph 45 of its Judgment, in the case of Article XXXII of the Pact, the jurisdiction conferred by that provision is therein described as "compulsory" even though it is expressed to be related to Article 36, paragraph 1, of the Statute of the Court. There has been no suggestion that Article XXXII of the Pact confers compulsory jurisdiction under Article 36, paragraph 2, of the Statute; no more than in the case of treaties which (possibly for reasons of drafting convenience) in fact refer to Article 36, paragraph 2, of the Statute or use elements of its language, but without purporting to be declarations made under it. See, for example, Article 1 of the Convention between Denmark and Finland for the Pacific Settlement of Disputes, 1926; Article III of the Treaty between Brazil and Venezuela for the Pacific Settlement of Disputes, 1940; Article 8 of the Treaty of Brussels, 1948; Article 17 of the Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly of the United Nations on 28 April 1949; Articles 1, 2 and 3 of the Convention concerning Judicial Settlement between Greece and Sweden, 1956; and Article 1 of the European Convention for the Peaceful Settlement of Disputes, 1957. Treaties of this kind may indeed confer a kind of compulsory jurisdiction while still falling under Article 36, paragraph 1, of the Statute of the Court. This is because of the circumstance that, although reference to "the compulsory jurisdiction" of the Court is usually understood as a reference to its jurisdiction under Article 36, paragraph 2, of its Statute, the declaratory procedure of that provision is not the only one by which the Court may be vested with compulsory jurisdiction in a generic sense. The conventional procedure of Article 36, paragraph 1, of the Statute may equally be employed to confer on the Court a compulsory jurisdiction which may be invoked unilaterally by any party to the convention. The authorities, which need not be cited, show that the greater part of the Court's compulsory jurisdiction in fact rests on such a basis.

As mentioned below, however, a historically attested current of aspiration within the region flowed in the direction of vesting the Court with true compulsory jurisdiction. Though falling short of that aim, Article 36, paragraph 2, of the Statute, as a compromise substitute, was traditionally associated with it. Possibly this explains why, in contrast with instruments of the kind referred to above and uniquely amongst compromissory clauses in treaties so far engaging the attention of the Court, Article XXXI of the Pact was cast in a form which, as has been seen and as paragraph 32 of the Judgment of the Court seems to recognize, suggests that the parties were in fact engaged in making a declaration under Article 36, para-

graph 2, of the Statute of the Court. It is possible (though countervailing arguments are also conceivable) to think of reasons why their intention could not take effect within the framework of Article 36, paragraph 2 — it may, in particular, encounter difficulties relating to the deposit and notification requirements. In that event, it may be possible to think of reasons why it should fall to be construed in law as conferring a conventional jurisdiction under Article 36, paragraph 1.

The problem which arises is that the Court has concluded that it has jurisdiction under Article XXXI of the Pact but without specifying whether such jurisdiction is exercisable under Article 36, paragraph 1, or under Article 36, paragraph 2, of the Statute. Had a determination been made as to which of these two heads of jurisdiction was applicable, the question of the effect, if any, of the 1986 Honduran reservations (assuming these to be otherwise valid) could have been dealt with exclusively in relation to the head determined. It is not my intention to suggest how the Court might have made this determination. However, as none has been made, the question of the effect, if any, of the Honduran reservations on the obligations of Honduras under Article XXXI has had to be dealt with by the Court in relation to both of the two possible heads of jurisdiction on the assumption that Article XXXI confers jurisdiction under one or the other of them. And I agree with the conclusion reached. But I also consider that this aspect of the Judgment leaves room for development.

The position under Article 36, paragraph 1, of the Statute is disposed of easily enough. Nicaragua's conception of Article XXXI of the Pact as conferring a conventional jurisdiction on the Court under that provision would, if sound, support its further position that the jurisdiction so conferred could not be affected by any reservation annexed to any declaration made by Honduras under Article 36, paragraph 2, of the Statute (see the *Nuclear Tests* cases *(I.C.J. Reports 1974),* discussed in Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century", *Collected Courses of the Hague Academy of International Law,* Vol. 159 (1978-I), p. 155). Since the jurisdiction would be conferred by treaty, treaty law *stricto sensu* would apply to prohibit any reservations from being made except at the time of signature or ratification of the Pact or adhesion to it.

The position is less straightforward if Article XXXI of the Pact falls to be treated as a declaration collectively made under Article 36, paragraph 2, of the Statute. On the question whether Honduras's 1986 reservations could limit its obligations under Article XXXI, counsel for Nicaragua did indeed take the position that for

> "Honduras to prevail on that issue, it must show that Article XXXI of the Pact is essentially identical to a declaration under the optional

clause. Then and only then would the reservation of 6 June 1986 also limit its obligations under Article XXXI."

I do not see the way ahead as clearly as that. The attempt by Nicaragua to place Article XXXI of the Pact under Article 36, paragraph 1, of the Statute is not, I think, the only mode of insulating the former from such a reservation. In my view (which, I believe, is consistent with paragraph 33 of the Judgment of the Court), Article XXXI may be equally immune from such a reservation even if it falls to be treated as a declaration collectively made under Article 36, paragraph 2. The matter is one of some difficulty but may, I think, be approached in the following way.

It is the case that, historically, Article 36, paragraph 2, of the Statute of the Court was constructed only with unilateral declarations in view. Whether this is sufficient to operate as a permanent brake on development in the direction of permitting States to do together what they may do separately is a question into which I do not myself enter. It is enough for present purposes to observe that if, indeed, as must be assumed in this branch of the case, Article XXXI of the Pact does constitute a valid collective declaration under the optional clause (a possibility not so far falling to be assessed by the Court), this would represent a materially new legal phenomenon. The consistency with which the Court and its predecessor have affirmed the concept of unilaterality in cases of individual declarations would not be a self-evident justification for visiting the full implications of the concept on such a phenomenon. For, if Article 36, paragraph 2, of the Statute of the Court is permissive of a collective declaration being made by treaty, it would seem to follow that that provision equally lets in the application of treaty law to the question whether the jurisdiction conferred by such a declaration can be unilaterally terminated or varied. In the absence of an appropriate enabling reservation made to the treaty itself at the time of signature, ratification or adhesion, a negative answer would seem to suggest itself to that question. Consequently, Honduras's obligations under Article XXXI of the Pact could not be terminated or modified by the reservations to its 1986 optional clause declaration.

What, however, is the position if, though collectively made by treaty, a declaration is regarded as retaining an indestructibly unilateral character in so far as each party is concerned? In my view, this should not materially affect the position. Apart from defining relations *inter partes,* the treaty would fall to be read as a statement by each party of the nature and terms of the declaration so made by it, and of its intention in making it. Where a State has more than one declaration in force under Article 36, paragraph 2, of the Statute (a possibility which, I believe, both sides accepted)

the operation of one is not automatically affected by changes in the other. This is because of the "rule of international law that a State cannot unilaterally release itself from international engagements except in accordance with their terms" (H. W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", *Collected Courses of the Hague Academy of International Law,* Vol. 93 (1958-I), p. 278), or, as it has been put more specifically, of the rule that "termination of a declaration of acceptance is only permissible within the limits set by the declaration itself" (J. H. W. Verzijl, "The System of the Optional Clause", *International Relations,* Vol. 1, No. 12, October 1959, p. 607). Again, although an optional clause declaration is in some respects different from the kind of unilateral declaration considered in the *Nuclear Tests (Australia* v. *France)* case *(I.C.J. Reports 1974),* the observation therein (p. 267, para. 43), which commended itself to the Court in the *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility* case (*I.C.J. Reports 1984,* p. 418, para. 59), may well be cited as follows:

> "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration."

It is true that in the case last mentioned, speaking of the United States declaration of 1946, the Court held that a right to modify or terminate is "a power which is inherent in any unilateral act of a State" (*ibid.,* p. 419, para. 61; see also pp. 466-467 per Judge Mosler, and p. 552 per Judge Sir Robert Jennings). This, it may be thought, would apply to Article XXXI of the Pact if, though collectively made, it is viewed as amounting quintessentially to a unilateral declaration by each party to the Pact of acceptance of compulsory jurisdiction under the optional clause. But each case is to be understood within its own factual and legal framework. The cited dictum, which stands to be qualified by the observation earlier quoted from the *Nuclear Tests (Australia* v. *France)* case, was not addressed to conditions and circumstances such as those governing Article XXXI as a pledge to the creation of a durable regional régime of compulsory judicial settlement. Even if considered as unilaterally given, that pledge, as reinforced by good faith, clearly excluded a right of termination or modification as long as the State concerned continued as a party to the Pact.

Honduras relied on the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* (*I.C.J. Reports 1960,* p. 192), in conjunction with the Nicaraguan reservation to the Pact and the compromis of 1957, in support of a contention that the procedures therein employed

evidenced a certain unity of jurisdictional base between Article XXXI of the Pact and Article 36, paragraph 2, of the Statute such that reservations properly made by a State to the former automatically applied to a declaration made by it under the latter, and vice versa. The material before the Court did not clearly disclose Nicaragua's reason for entering the reservation, the relevant part of which reads thus:

> "The Nicaraguan Delegation, on giving its approval to the American Treaty on Pacific Settlement (Pact of Bogotá) wishes to record expressly that no provisions contained in the said Treaty may prejudice any position assumed by the Government of Nicaragua with respect to arbitral decisions the validity of which it has contested on the basis of the principles of international law, which clearly permit arbitral decisions to be attacked when they are adjudged to be null or invalidated. Consequently, the signature of the Nicaraguan Delegation to the Treaty in question cannot be alleged as an acceptance of any arbitral decisions that Nicaragua has contested and the validity of which is not certain . . ."

On the face of the reservation, it seems that Nicaragua considered that it had an existing right to challenge the validity of the award but apprehended that something in the Pact might be construed as an acceptance of the award by it. The reservation was accordingly directed to preserving Nicaragua's right to challenge the award *simpliciter,* as distinguished from limiting or prescribing the fora in which such a challenge might be brought. In particular, the reservation did not appear to have been directed to the question whether or not such a challenge might be brought under Article XXXI of the Pact. Indeed, being interested in challenging the award, it is not easy to see why Nicaragua should have wished to exclude the case from the jurisdiction conferred on the Court under Article XXXI of the Pact, if it would have been otherwise cognizable thereunder. In this latter respect, however, it seemed arguable that, Nicaragua having challenged the award since 1912, the question of the validity of the award constituted a pre-existing dispute which would in any event be excluded from litigation under Article XXXI of the Pact by reason of the terms of both that Article and Article II. (Compare Article XXXVIII, and see Galo Leoro F., "La Reforma del Tratado Americano de Soluciones Pacíficas o Pacto de Bogotá", *Anuario Jurídico Americano,* 1981, pp. 48 ff.; *Opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement (Pact of Bogotá),* OEA/Ser.G, CP/doc.1603/85, 3 September 1985, pp. 8-9, and "Analysis of the American Treaty on Pacific Settlement . . .", by the Rapporteur of the Committee, contained in this document, pp. 49-50 — Annex 23 to the Nicaraguan Counter-Memorial; and the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* (*I.C.J. Reports 1960,* p. 203).) It followed that, if the Nicaraguan reservation itself did not need to and did not in fact have an independent exclusionary effect in relation to Article XXXI, no question

could arise of the reservation automatically operating to exclude the case from Nicaragua's declaration under Article 36, paragraph 2, of the Statute of the Court, even supposing the correctness of the Honduran thesis of a common jurisdictional base.

Argument in favour of a different interpretation of the purpose of the reservation may be made on the basis of clause 6 of the 1957 compromis which stated that in

> "accepting . . . the pertinent application of the Pact of Bogotá to the case here considered, the High Contracting Party [1] that made a reservation to the aforesaid international agreement declares that the aforesaid reservation shall not take effect".

A possible response to such an argument is that the first part of the clause (which did not refer to the reservation) was intended to reflect a contractual extension of the Pact, as between the two parties, to a case which, considered as relating to a pre-existing dispute, would otherwise have been excluded by the Pact itself from judicial settlement under it, while the second part (which did refer to the reservation and should therefore be construed reactively to it) would have operated to enable Honduras to argue, if it wished and thought it could, that the Pact did constitute acceptance by Nicaragua of the award. On this reading, the compromis did not necessarily imply that the reservation had been intended to exclude the case from Article XXXI of the Pact. It is nevertheless proper to recognize that the interpretation of the compromis on this point is a matter of some difficulty.

However, even if the above interpretation of the reservation is wrong with the consequence that the reservation should be viewed as intended to exclude the particular case from Article XXXI of the Pact, the evidence does not satisfactorily establish that a reservation made by a State to Article XXXI of the Pact was regarded as automatically applying to a declaration made by it under Article 36, paragraph 2, of the Statute or that it was the purpose of the compromis to remove any such automatic effect of the Nicaraguan reservation from the declaration made by Nicaragua under Article 36, paragraph 2. Relying on supporting material presented by him in the *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility* case *(I.C.J. Reports 1984),* counsel for Nicaragua contended that the compromis was due to a belief by Honduras

> "that if it made an application under the optional clause declarations

[1] The Spanish text likewise spoke of "la Alta Parte Contractante" but the French translation in the published pleadings reads, "les Hautes Parties contractantes déclarent que toute réserve qu'elles auraient faite audit pacte ne produira aucun effet". See and compare the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906, I.C.J. Pleadings,* Vol. 1, pp. 32, 207, 209, and Annex 1 to the original Nicaraguan Counter-Memorial in that case, p. 14.

> it would be putting in issue the validity of the Arbitral Award, which it did not want to do because it regarded the Award as unquestionably valid",

a contention to which Honduras does not appear to have made any, or any substantial, response. In all the circumstances, even if the Nicaraguan reservation was intended to exclude jurisdiction under Article XXXI of the Pact, I cannot draw from the 1957 compromis any reliable inference of the particular kind proposed by Honduras.

As remarked above and as is noticed in paragraphs 37 and 38 of the Judgment of the Court, it is clear that the 1948 Conference concluded by taking the view that, as among members of the Pact, Article XXXI imposed an obligation which, in the absence of an appropriate reservation to the Pact itself, would not be subject to any reservations annexed to any separate declarations made or to be made under Article 36, paragraph 2 (see the interventions of Mr. Soto del Corral, Mr. Enríquez and Mr. Belaúnde in *Novena Conferencia Internacional Americana,* Vol. IV, pp. 161-167 and 171-172). It offends logic, strains credulity and conflicts with the *travaux préparatoires* of the 1948 Conference (used with due caution) to suppose that reservations attached to any of the separate declarations later made by Honduras under Article 36, paragraph 2, of the Statute could affect the obligations assumed by it under Article XXXI of the Pact.

III. Applicability of Conciliation to Article XXXI of the Pact of Bogotá

I agree with the Judgment of the Court that conciliation is not a precondition to the right to litigate under Article XXXI of the Pact. I agree in particular that Articles XXXI and XXXII separately and autonomously confer jurisdiction on the Court to determine disputes. I wish, however, to explain my approach to three aspects. The first concerns the substantive relationship between the two Articles. The second concerns the textual relationship between them. And the third concerns the views of the publicists on the relationship.

As to the first aspect, in paragraph 47 of its Judgment the Court holds that it is "not pertinent . . . what interpretation is given to Article XXXII . . . as regards the nature and the subject-matter of the disputes to which that text applies". It seems to me, however, that, if that approach is relaxed, the way will be made clear for further analysis confirmatory of the decision reached.

The Inter-American Juridical Committee, which prepared the 1947 draft, was itself aware of contemporary debate on the subject of justiciability of disputes, its report reading:

> "The Committee realizes that there is a respectable body of legal opinion which considers that no distinction can be made between

disputes which are juridical in character and those which are not. It did not, however, consider it necessary to opt for one or the other in this respect, since the draft envisages arbitration for all disputes." *(Translation by the Registry.)*["El Comité se da cuenta de la existencia de una respetable corriente doctrinaria, en el sentido de que no puede distinguirse entre las controversias de carácter jurídico y las que no lo son. Pero no se ha considerado necesario tomar partido a este respecto, ya que el proyecto contempla el arbitraje para todas las controversias." (*Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, p. 21, para. 28).]

In addition to the explanation given by the Committee, the judicial settlement provisions of its draft, besides not being of a compulsory character, did not involve the problems of categorization of disputes later precipitated by the contrasting language of Articles XXXI and XXXII of the 1948 Pact. Speaking of Article XXXII, Mr. Eduardo Jiménez de Aréchaga ("Tentativas de Reforma del Pacto de Bogotá", *Anuario Jurídico Interamericano,* 1986, pp. 5-6), considered that purely political disputes were not justiciable but nevertheless seemed to accept that "by means of this provision it becomes possible to submit to the Court questions which are purely political, in which one party asserts a concern and not a right" *(translation by the Registry).* ["se procure, mediante este precepto, someter a la Corte cuestiones puramente politicas en que una parte alegue un interés y no un derecho".] Other publicists support this latter view as corresponding to the actual intention of the framers of the Pact. It would also seem consistent with the circumstance that Article XXXII follows up the conciliation procedures of Articles XV to XXX which extend to all disputes. This view of the actually intended scope of Article XXXII may assist in appraising the relationship between that Article and Article XXXI, the latter being expressly limited to juridical disputes.

However, even if it is not necessary to determine whether non-legal disputes were intended to be comprehended by Article XXXII, the analysis is distinctly aided by considering whether legal disputes are covered. And it would seem to me that they are.

The position defined in paragraph 52 of the Judgment of the Court is to the effect, as I understand it, that the Court is only concerned with cases involving a "legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law". This seems to accord with recent thinking as expressed, for example, in Eduardo Jiménez de Aréchaga (*loc. cit.,* p. 6); Galo Leoro F., "La Reforma del Tratado Americano de Soluciones Pacíficas o Pacto de Bogotá" (*loc. cit.,* pp. 58-59); Sir Robert Jennings, "International Force and the International Court of Justice" (in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force,* 1986, pp. 326-327); and Hermann Mos-

ler, "Political and Justiciable Legal Disputes: Revival of an Old Controversy?" (in Bin Cheng and E. D. Brown (eds.), *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his Eightieth Birthday,* 1986, p. 224). (Cf. André Beirlaen, "La distinction entre les différends juridiques et les différends politiques dans la pratique des organisations internationales", *Belgian Review of International Law,* Vol. XI, 1975-I, pp. 405 ff.) Coupling the position so taken by the Court with the difficulty of imagining a legal dispute which is not comprehended by the optional clause categories adopted in Article XXXI (see S. Rosenne, *The Law and Practice of the International Court of Justice,* 1965, Vol. 1, p. 376), it is not easy to see what purpose is served in relation to the Court by Article XXXII unless this does in fact embrace legal disputes as enumerated in Article XXXI. Whatever else Article XXXII may in fact have been intended by its framers to cover, there seems to be a clear balance of opinion amongst the commentators that it does apply to such disputes.

However, if Article XXXII does embrace legal disputes, then, unless Article XXXI was intended to give a right to sue without a need for complying with the preconditions referred to in the former, it is difficult to see the need for Article XXXI, since Article XXXII would cover the same disputes subject to compliance with the same preconditions. Apart from colliding with the cautionary principles of treaty interpretation relating to a reading productive of redundancy (see Charles Rousseau, *Droit international public,* 1970, Vol. 1, pp. 271-272), so hollow a consequence would be surprising in the light of the general object and purpose of the Pact, which, as indicated in paragraph 46 of the Judgment of the Court, was intended to enhance the level of regional commitment to compulsory judicial settlement of inter-American disputes. True, Article XXXI appears to have been the result of on-the-spot drafting and decision-making at Bogotá; but, viewed over a larger time-scale, it seems to have been the natural product of a longer process of gestation. Under the General Treaty of Inter-American Arbitration, 1929, participating States committed themselves to accept compulsory arbitration of disputes relating to the four categories of matters specified in the second paragraph of Article 36 of the Statute of the Permanent Court (corresponding to Article 36, paragraph 2, of the Statute of the present Court). Thereafter, a long quest by some American States after true compulsory judicial settlement failed to find a place within the structure of the present Court when it was established in 1946, as it had failed when the Permanent Court was earlier established. On the disappointment of those more general hopes, it might have been thought that an attempt would sooner or later be made to provide for some proximate form of compulsory judicial settlement as among Latin American States (see J. M. Yepes, "La Conférence panaméricaine de Bogotá et le droit international américain", *Revue générale de droit international public,* 1949, Vol. 53, p. 65). For the reasons mentioned earlier, this they accordingly proceeded to do, however abruptly and unheralded, in Article XXXI of the Pact, by way of a collective declaration of accept-

ance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court. In the absence of clear language compelling to the contrary, it would not be right to construe Article XXXI as representing a level of commitment to the idea of compulsory judicial settlement so markedly below that derivable from the development of regional aspirations on the subject as to be practically illusory, if not regressive when compared with the level of obligations already undertaken by many American States in the ordinary way under the optional clause.

As to the second aspect, there is no textual or logical connection between Articles XXXI and XXXII. Article III provides for freedom of choice of means of settlement, but, by a seemingly partial exception to that general principle, Articles XXXII to XXXV prescribe a certain progression of steps where conciliation (which can apply to any dispute) has been unsuccessfully tried. Those subsequent steps involve voluntary arbitration or, where there has been failure to agree on arbitration, settlement by the Court at the instance of either party (each being entitled to apply), and, finally, where the Court declines jurisdiction (save in certain cases) obligatory reference by the parties to arbitration. In this sense conciliation is the key to what has been called the "automatic machinery" of the Pact (see William Sanders, "The Organization of American States, A Summary of the Conclusions of the Ninth International Conference of American States", *International Conciliation,* 1948, p. 404; and Raúl Luis Cardón, *La Solución Pacífica de Controversias Internacionales en el Sistema Americano,* Buenos Aires, 1954, p. 75).

It is within this framework that may be sought an explanation of an apparent hiatus existing between Articles XXXI and XXXII in the sense that, whereas the former is silent on the subject of conciliation, the ensuing provisions of the latter begin somewhat disjointedly with the words, "When the conciliation procedure previously established in the present Treaty or by agreement of the parties does not lead to a solution . . .". The linkage backwards established by these words is with Articles XV to XXX, which deal with conciliation, and not with Article XXXI, which does not. The connective strand of the phrase seems to be simply carrying forward the reading of those earlier provisions, no reference to Article XXXI being germane to the narrative thus continued. Though, in the result, a party does stand precluded from litigating under Article XXXII unless conciliation has been unsuccessfully tried and there has been failure to agree on arbitration, the concern in that Article is not with the institution of those steps as preconditions to the right to litigate, but rather with the conferment of a right to litigate where those steps have in fact been taken. Article XXXI does not have any place in that self-contained sequence. Nor can it; for once it is accepted that the object of Article XXXII was not to prescribe a procedure for the exercise of a juris-

diction but rather to confer a jurisdiction where certain procedures otherwise prescribed have in fact been followed, it becomes impossible to sustain the Honduran contention that Article XXXII was intended to prescribe a procedure for the exercise of the jurisdiction conferred by Article XXXI.

Latin American jurists, it may be noted, had had some experience in dealing with conciliation in relation to other forms of settlement. Under Article I of the General Treaty of Inter-American Arbitration, 1929, conciliation was laid down as an optional preliminary to, and not a mandatory precondition of, arbitration of legal disputes corresponding to the categories prescribed by the optional clause. By contrast, under Article 3 of the Treaty between Brazil and Venezuela for the Pacific Settlement of Disputes, 1940, conciliation was explicitly established as a precondition to settlement of such disputes by the International Court of Justice. With such precedents before them, clearer language might have been expected had it been the intention of the framers of the Pact of Bogotá to prescribe conciliation as a precondition to the exercise of the right to move the Court under Article XXXI.

As to the third aspect, the commentators are divided on the subject. In view of their association with the system in its early years, it would be right to give weight to the views of Mr. Alberto Lleras Camargo and Mr. F. V. García-Amador. The former, though reporting somewhat summarily on the particular point, considered that conciliation was a precondition to recourse to the Court under both Articles XXXI and XXXII of the Pact (see Alberto Lleras, "Report of the Ninth International Conference of American States", *Annals of the Organization of American States,* 1949, Vol. 1, No. 1, pp. 48-49). Both sides agreed that Mr. García-Amador also subscribed to that view; but his position does not seem to me to be altogether clear. A contrast suggests itself between *The Inter-American System, Its Development and Strengthening* (Inter-American Institute of International Legal Studies, 1966, pp. 78-79) (thought to have been prepared under his general academic supervision) and his personal views as expressed in Heidelberg in 1972 (see, by him, "To which Extent and for which Subject-Matters is it Advisable to Create and Develop Special Judicial Bodies with a Jurisdiction Limited to Certain Regions and to Certain Subject-Matters?", in *Judicial Settlement of International Disputes,* Max-Planck Institute for Comparative Public Law and International Law, 1974, p. 92). Referring to Article XXXI of the Pact, both works state that "the Pact itself constitutes an unconditional declaration of the type foreseen in" Article 36, paragraph 2, of the Statute of the Court. This is then followed in the 1966 work by a paragraph stressed by Honduras and reading:

> "The foregoing notwithstanding, the compulsory nature of the judicial settlement is subject, to be precise, to the fact that the Con-

> ciliation Procedure established in the Pact or by the decision of the parties has not led to a solution and, in addition, that the said parties have not agreed on an Arbitral Procedure. Only in these circumstances may one of the parties exercise its right to have recourse to the Court and the other, therefore, be subject to its jurisdiction (Article XXXII)."

The corresponding paragraph in the 1972 statement reads, more guardedly, it seems to me, as follows:

> "However, two conditions are to be met before a party to the dispute is entitled to have recourse to the ICJ in the manner prescribed in Art. 40 of its Statute and before the Court has jurisdiction in accordance with Art. 36 (1) of the said Statute: namely, when the conciliation procedure previously established in the Pact or by agreement of the parties does not lead to a solution, and the said parties have not agreed upon an arbitral procedure."

The internal structure of each of the two paragraphs and their consequential relationship to the preceding common remark concerning Article XXXI of the Pact seem somewhat different. The later paragraph appears in substance to be addressed only to proceedings instituted (in the manner prescribed in Article 40 of the Statute) under Article 36, paragraph 1, of the Statute and presumably, therefore, in pursuance of Article XXXII of the Pact. The passages in question are not, of course, to be construed as if they were provisions of a statute, and too fine a point need not be put on slight differences. Yet, assuming that Mr. García-Amador was a party to the 1966 statement, it is possible, I believe, to discern some movement in this important area on the part of a thoughtful mind.

Whatever may be the position of Mr. García-Amador (and I recognize that it is debatable), the view taken by Mr. Alberto Lleras does appear to be held by Charles G. Fenwick, *The Organization of American States, the Inter-American Regional System* (1963, p. 188); Hans van Mangoldt, "Arbitration and Conciliation" (in *Judicial Settlement of International Disputes,* Max-Planck Institute for Comparative Public Law and International Law, 1974, p. 466); and R. P. Anand, *International Courts and Contemporary Conflicts* (1974, p. 301). But it does not, in my opinion, prevail over what I consider to be the ordinary and natural meaning of the scheme of the Pact to be ascertained in accordance with the leading principle enunciated in Article 31 of the Vienna Convention on the Law of Treaties, 1969, or over the views of other commentators who speak differently.

One of the earliest among these is William Sanders, an alternate delegate of the United States at the Bogotá Conference. His authority was in fact put forward by Honduras in support of the opposite view advanced by it, the particular passage cited reading as follows:

> "Consultations among the members of the Organization would have no place in this scheme since in theory no dispute could escape settlement, either by acceptance by the parties of the results of good offices, mediation, investigation or conciliation, or failing such acceptance, by a binding award reached through judicial or arbitral settlement of all disputes, whether legal or non-legal in character." (Sanders, *loc. cit.*, p. 401.)

Honduras submitted that by this passage Mr. Sanders "indicates, by comparison with" the 1945 draft, "the system which was finally to be definitively adopted". However, the judicial settlement provisions of the 1947 draft, to which the passage related, were not compulsory in character and, more particularly, did not correspond in their essential features to Articles XXXI and XXXII of the 1948 Pact. With regard to these Articles, a different position is suggested by a close reading of Sanders (pp. 403-404). And this different position is, I think, sustained by others, including Raúl Luis Cardón (*op. cit.*, pp. 75-76); F. G. Fernández-Shaw, *La Organización de los Estados Americanos (OEA) — Una Nueva Visión de América* (Madrid, 1959, pp. 369, 377 and 378); J. M. Ruda, "Relaciones de la OEA y la UN en cuanto al Mantenimiento de la Paz y la Seguridad Internacionales" (*Revista Jurídica de Buenos Aires,* 1961, Vol. 1, Part II, pp. 47-48); J. J. Caicedo Castilla, *El Derecho Internacional en el Sistema Interamericano* (Madrid, 1970, p. 374, para. 417); Alberto Herrarte, "Solución Pacífica de las Controversias en el Sistema Interamericano" (in *Sexto Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano,* July-August 1979, Washington, 1980, pp. 220 and 225); Félix Lavina and Horacio Baldomir, *Instrumentos Jurídicos para el Mantenimiento de la Paz en América* (Montevideo, 1979, pp. 29-30); Galo Leoro F., "La Reforma del Tratado" (*loc. cit.*, pp. 46 and 53); *idem,* "El Proyecto de Reformas del Comité Jurídico Interamericano al Tratado Americano de Soluciones Pacíficas (Pacto de Bogotá)" (*Anuario Jurídico Interamericano,* 1986, p. 22); and, although the reading is not free from difficulty, P. J. I. M. de Waart, *The Element of Negotiation in the Pacific Settlement of Disputes between States* (The Hague, 1973, pp. 95-96).

Without going through these views seriatim or suggesting that they are all equally considered or clear on the point, I have gained the impression that their general tenor is reconcilable with the position taken by the Inter-American Juridical Committee on the American Treaty on Pacific Settlement, which, in my understanding, made it reasonably clear at page 6 of its 1985 Opinion that the right to move the Court under Article XXXI of the Pact is not subject to the preconditions referred to in Article XXXII, the view of the Rapporteur, Dr. Galo Leoro F., being to the same effect (see "Analysis of the American Treaty on Pacific Settlement . . .", *loc. cit.*, pp. 48, 56-57 and 61 — Annex 23 to the Nicaraguan Counter-Memorial). I share this opinion.

IV. Whether the Negotiation Requirement of Article II of the Pact of Bogotá Has Been Satisfied

I agree with the view expressed in paragraphs 75 and 92 of the Judgment of the Court to the effect that, when the Nicaraguan Application was filed, there were no negotiations in being or in prospect which could ground an opinion by Honduras in good faith that the controversy between it and Nicaragua could be settled by negotiations. I, however, consider that that view is strengthened by giving some prominence to the circumstance that, as it seems to me, Honduras effectively refused to embark on direct bilateral negotiations.

On the record, it is clear that Nicaragua did endeavour to hold direct bilateral negotiations with Honduras but that its efforts to do so failed because (as appears more particularly from the substance of the Honduran Foreign Minister's Note of 23 April 1982 referred to in paragraph 68 of the Judgment) Honduras for all practical purposes insisted on a regional approach. Where States in fact negotiate with each other within a multilateral framework (and they can only do so with the consent of each side) the negotiations may well be regarded as direct bilateral negotiations even though they take place within a multilateral framework. But there is no principle which entitles a party to claim that it is offering to enter into "direct bilateral negotiations through the usual diplomatic channels" where it is in fact insisting on a multilateral framework as the only acceptable basis for negotiating. Though an admissible method, bilateral negotiations conducted within such a framework can scarcely constitute the norm of "direct negotiations through the usual diplomatic channels". I do not accept that where, for example, a party is subject to a requirement to enter into such negotiations, it is entitled unilaterally to impose a multilateral framework as an indispensable condition for complying with the requirement. Drawing on this approach, it seems to me that, in the circumstances referred to, Honduras effectively refused to enter into such negotiations and so could not have been of the opinion that the controversy between itself and Nicaragua could be settled in that manner.

Unable to rest on any negotiations occurring prior to the commencement of the Contadora process, Honduras was obliged to rely on such negotiations as were conducted within the Contadora process itself as constituting both negotiations within the meaning of the preliminary requirement relating to negotiations and as part of a special procedure adopted consequent on the Parties being of opinion that a settlement could not be produced by "direct negotiations through the usual diplomatic channels". In the light of the procedural sequence prescribed by Article II of the Pact as referred to below, I find no answer to the observation made by counsel for Nicaragua when, speaking of the Contadora process in this connection, he said, "Il ne peut pas à la fois être et précéder!"

I would add that a certain internal contradiction in the position of Honduras excludes the possibility of an opinion being held by it to the effect that the controversy which is the subject-matter of the Nicaraguan Application could be settled by negotiations. Under Article II of the Pact the consent of both parties is required for the adoption of a procedure as a special procedure. But, under the scheme of that provision, the question of both parties agreeing to treat a procedure as a special procedure can only arise where the requirement relating to the opinion of the parties as to the incapacity of negotiations to produce a settlement has been satisfied. Since Honduras insists that the concurring opinions of both parties were necessary to satisfy that requirement, it could not, on its own presentation, deny a concurrence of opinions in respect of that requirement while needing to affirm a concurrence of opinions in respect of the Contadora process.

V. Whether the Contadora Process Is a Bar to These Proceedings

On this part of the case I propose, first, to notice what may be regarded as a preliminary question relating to Article IV of the Pact, and, second, to consider another approach to the decision reached.

As to the first point, it was the argument of Nicaragua that the subject-matter of the Contadora process did not embrace the subject-matter of the case at bar. If the argument is sound, it suffices to dispose of this branch of the case in favour of Nicaragua, even making every other assumption in favour of Honduras, including an assumption that the Contadora process continued without material change after the filing of the Nicaraguan Application. This is because the principle of Article IV naturally presupposes that both of the procedures involved relate to the same "controversy". Indeed, that presupposition lies at the threshold of any attempt to invoke the principle[1]. Not surprisingly, the Nicaraguan argument was strenuously opposed by Honduras, chiefly on the ground that both the Contadora process and the reliefs sought in the case were directed to achieving the common purpose of bringing about a cessation of the transborder activities alleged by Nicaragua. The difficult issue presented is whether any such common physical result is a sufficient answer to what I understand to be Nicaragua's contention, that is to say, that what it is essentially seeking from the Court is an authoritative declaration on the question whether Honduras has violated its international legal obligations

[1] Referred to in the Nicaraguan arguments as the *una via electa* principle, and in Fernández-Shaw (*op. cit.*, p. 370), as the *exceptio de litispendentia*. For the distinction, see Dan Ciobanu, "Litispendence between the International Court of Justice and the Political Organs of the United Nations", in Leo Gross (ed.), *The Future of the International Court of Justice*, 1976, Vol. 1, pp. 209 ff.

to Nicaragua, and that nothing corresponding to any such declaration is being sought on any basis or at any level through the Contadora process which, though it might prevent similar questions from arising in future, was not designed to determine that particular question.

A problem for Nicaragua would seem to be presented by the *Nuclear Tests (Australia* v. *France)* case, in which it was held that the Australian request for a declaration that "the carrying out of further atmospheric nuclear weapon tests [by France] in the South Pacific Ocean [was] not consistent with applicable rules of international law" (*I.C.J. Reports 1974,* p. 260, para. 25) was not a prayer for separate relief but merely a statement of reason in support of the other reliefs sought, and could not therefore be granted once it was judged no longer possible to grant the latter. But, without entering into the discussion of that interesting decision, there could be an argument as to whether it is distinguishable, regard being had to the fact that, unlike the position as found by the Court in that case, in the instant case there is a prayer for reparation, the asserted transgressions are not non-recurrent but are allegedly continuing, and there is no undertaking by Honduras to discontinue them (see the observations of Judge Sir Gerald Fitzmaurice in the *Northern Cameroons* case (*I.C.J. Reports 1963,* p. 98, note 2), and those of Judge Morelli (*ibid.,* p. 141), in reference to the *Corfu Channel* case *(I.C.J. Reports 1949)*). Such a distinction might take strength from the authorities cited and the remarks made by the joint minority in the *Nuclear Tests* case to the effect that

> "to decide and declare that certain conduct of a State is or is not consistent with international law is of the essence of international adjudication, the heart of the Court's judicial function" (*I.C.J. Reports 1974,* p. 314).

Whatever was the position in the *Nuclear Tests* case, it would seem that questions are open in this case as to whether it could be held that the Nicaraguan "request for a declaration is the essential submission" or the "basic submission", to adopt the description given by the joint minority of the Australian request for a declaration (*I.C.J. Reports 1974,* pp. 313 and 315 respectively); if so, whether the issues raised by such a declaration fell for determination within the Contadora process; and, if not, whether there was identity of subject-matter as between that process and the instant case. The Judgment of the Court leaves these issues unresolved, paragraph 93 stating that "it is unnecessary for the Court to determine whether the Contadora process ... had the same object as that now in progress before the Court". However, although the Court has not determined that question, which therefore remains open, its Judgment logically assumes an answer in favour of Honduras. Such an assumption could, of course, be made for the purpose of determining the particular point on

which the Court's Judgment turned. I would note, however, that the assumption so made is juridically one of some magnitude relating to a major preliminary issue in deep contention between the Parties.

As to the second point, whatever may have led to the concordance of views of the Parties on the matter, they both took the position that the Contadora process continued (as in a sense it did) even after the filing of the Nicaraguan Application (see paragraph 90 of the Judgment of the Court). More particularly, however, and contrary to the finding of the Court (with which I agree), neither side made any recognition of any substantial difference between the process as it existed before and as it existed after that event. Yet, in my opinion, even if it is thought that the agreed views of the Parties should be deferred to, and even if (which is far from clear) the subject-matter of the Contadora process embraced that of the Nicaraguan Application, the result reached by the Court stands undisturbed.

This is so for the reason that, even on the assumptions made, the question remains whether the Contadora process is a procedure of a kind which serves to ground the prohibition in Article IV against simultaneous recourse to another procedure. Honduras sought to answer this in the affirmative by contending that the process is a "special procedure" within the meaning of Article II. However, the prohibition in Article IV hinges on the adoption of "any pacific procedure". As is made clearer in the Spanish text, which speaks of "uno de los procedimientos pacíficos" (in the Portuguese text "um dos processos pacíficos", and in the French text "l'une des procédures pacifiques"), the reference in the English text of Article IV to "any pacific procedure" relates to the reference in Article III to "the pacific procedures established in the present Treaty". This in turn relates to the reference in Article II to "the procedures established in the present Treaty". But Article II draws a distinction between "the procedures established in the present Treaty" and "such special procedures as, in their opinion, will permit them to arrive at a solution", with the result that the prohibition in Article IV hinges not on "special procedures" but only on "pacific procedures" in the sense of "procedures established in the present Treaty". Hence, if, as argued by Honduras, the Contadora process is a special procedure, it does not serve to ground the prohibition.

It is, in my opinion, equally clear that the Contadora process, though generically a pacific procedure, is not a "pacific procedure" within the meaning of Article IV. The process appears to comprehend a protean amalgam of elements of negotiation, good offices, mediation and possibly conciliation, the proportionate weight of each element varying from phase to phase. Though referred to in the Pact, negotiation is not a procedure established by it. The others are so established, but the prescribed steps relating to mediation and conciliation — no particular ones were prescribed in relation to good offices — were not observed and

were not intended to be observed, with the suggested inference that the procedures followed were not those established by the Pact. Further, as distinguished from what may be possible in the case of a special procedure, no pacific procedure established by the Pact consists of a combination of others or permits of their simultaneous use; the principle of Article IV, appealed to by Honduras, is itself against that. The Contadora process is generally and rightly regarded as unique. Neither the process as a whole nor any procedure forming part of it can fairly be seen as answering to the description of any pacific procedure established by the Pact.

In so far as concerns Esquipulas II, this, to the extent that it is accepted as an unfolding of the Contadora process, is covered by the foregoing. If it represents a materially new process, it is not relevant to the question of admissibility since it came into being after the case was brought. However, the matter may bear reference to a statement by the Honduran Foreign Minister published in *La Tribuna* of 3 June 1988, in which he asserted "the incompatibility between 'the Guatemala Procedure' and judicial recourse" and said:

> "Once the issue of the Court's jurisdiction is decided, Honduras will be free of undue pressure from Nicaragua. It will be able to continue contributing to the normalization of Central America by complying with the commitments undertaken in good faith in the special Esquipulas II procedure."

The implication that Honduras would not be complying with the commitments undertaken by it in the special Esquipulas II procedure whilst this case was pending led the Agent for Nicaragua to submit to the Court that

> "on the other side of the Atlantic Honduras tells its Latin American counterparts that it cannot comply with Esquipulas because of these proceedings. On the other hand, on this side of the Atlantic and before the Court, Honduras says these proceedings should not go ahead because there is another process that is ongoing and more appropriate, something which stops the Court from continuing this case."

It seems difficult to fault that statement to the extent that it is based on the proposition that Honduras cannot have it both ways.

The relative lack of utilization of the Pact combines with the recourse which has instead been made over the years to other inter-American procedures to give some significance to the fact that, prior to the institution of the case, neither of the two Parties, nor, indeed, any interested third party, had ever suggested that the Contadora process was a procedure within the framework of the Pact. Accepting that a specific commitment to that view was not legally necessary, the silence is still noteworthy. Had a

statement in the sense referred to been made, El Salvador, a participant in the Contadora process but not a member of the Pact, might have offered a comment. I agree with the Court that, valuable as it is, the Contadora process is not a bar to these proceedings.

(Signed) Mohamed SHAHABUDDEEN.