SEPARATE OPINION OF VICE-PRESIDENT ALFARO

The decision rendered by the Court in the present case sets forth considerations of law and fact in which I fully concur, especially for the reason that its essential basis is a principle of law to which I attribute great weight and which has been frequently applied by international tribunals, both of justice and arbitration.

This principle, as I understand it, is that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation. I have no doubt that enunciated in these broad terms, the soundness and justice of the rule is generally accepted. However, it is manifest that wide divergences exist as to its meaning, its character, its scope and even its denomination; and inasmuch as a judgment of the Court could not be expected to deal with these particulars, I have thought necessary, as a matter of conscience, to state the views by which I have been guided in the adoption of this decision. The principle, not infrequently called a doctrine, has been referred to by the terms of "estoppel", "preclusion", "forclusion", "acquiescence". I abstain from adopting any of these particular designations, as I do not believe that any of them fits exactly to the principle or doctrine as applied in international cases.

Spanish jurists, showing an objective criterium, call it "*doctrina de los actos propios*".
Judge Basdevant has given a definition of estoppel in his "*Dictionnaire de la terminologie du droit international*" which is doubtless very accurate. Here it is:

> "*Terme de procédure emprunté à la langue anglaise qui désigne l'objection péremptoire qui s'oppose à ce qu'une partie à un procès prenne une position qui contredit soit ce qu'elle a antérieurement admis expressément ou tacitement, soit ce qu'elle prétend soutenir dans la même instance.*"

However, when compared with definitions and comments contained in Anglo-American legal texts we cannot fail to recognize that while the principle, as above enunciated, underlies the Anglo-Saxon doctrine of estoppel, there is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features of the municipal system. It thus results that in some international cases the decision may have nothing in common with the Anglo-Saxon estoppel, while

at the same time notions may be found in the latter that are manifestly extraneous to international practice and jurisprudence.

Of course, I feel bound to mention these designations since they have been so generally used in international texts, but I set them aside in stating my views with regard to the principle which is the subject of this separate opinion.

Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible *(allegans contraria non audiendus est)*. Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State *(nemo potest mutare consilium suum in alterius injuriam)*. *A fortiori*, the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. *(Nullus commodum capere de sua injuria propria.)* Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right *(venire contra factum proprium non valet)*.

The acts or attitude of a State previous to and in relation with rights in dispute with another State may take the form of an express written agreement, declaration, representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation.

A State may also be bound by a passive or negative attitude in respect of rights asserted by another State, which the former State later on claims to have. Passiveness in front of given facts is the most general form of acquiescence or tacit consent. Failure of a State to assert its right when that right is openly challenged by another State can only mean abandonment to that right. Silence by a State in the presence of facts contrary or prejudicial to rights later on claimed by it before an international tribunal can only be interpreted as tacit recognition given prior to the litigation. This interpretation obtains especially in the case of a contractual relationship directly and exclusively affecting two States. Failure to protest in circumstances when protest is necessary according to the general practice of States in order to assert, to preserve or to safeguard a right does likewise signify acquiescence or tacit recognition: the State concerned must be held barred from claiming before the international tribunal the rights it failed to assert or to preserve when they were openly challenged by word or deed.

"The absence of protest"—says Lauterpacht—"may, in addition, in itself become a source of legal right inasmuch as it is related to—or forms a constituent element of—estoppel or prescription. Like these two generally recognized legal principles, the far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability—a requirement even more important in the international than in other spheres; it is a precept of fair dealing inasmuch as it prevents states from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects a State from the contigency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very States." *(Sovereignty over submarine areas* in *British Year Book 1950.)*

The reasoning used and the jurisprudence developed as regards the subject of failure to protest is also applicable in the case of failure to reserve rights of which a State is legally possessed and which it is entitled to claim or exercise in due course. Such failure may be and has been interpreted as a waiver of such rights.

The principle that condemns contradiction between previous acts and subsequent claims is not to be regarded as a mere rule of evidence or procedure. The substantive character of the rule finds support in the writtings of several authors. As stated by Sir Frederick Pollock:

"estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law."

In the *Nottebohm* case the Liechtenstein Memorial stated that:

"It may be noted in this connection that the doctrine of estoppel, which is similar both in international and municipal law, is not, notwithstanding its apparent technical connotation, a formal and artificial rule of law. It is essentially grounded in considerations of good faith and honest conduct in the relations of States and individuals alike."

In my judgment, the principle is substantive in character. It constitutes a presumption *juris et de jure* in virtue of which a State is held to have abandoned its right if it ever had it, or else that such a State never felt that it had a clear legal title on which it could base opposition to the right asserted or claimed by another State. In short, the legal effects of the principle are so fundamental that they decide by themselves alone the matter in dispute and its

infraction cannot be looked upon as a mere incident of the proceedings.

The primary foundation of this principle is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith. Again, I submit that such inconsistency is especially inadmissible when the dispute arises from bilateral treaty relations.

A secondary basis of the principle is the necessity for security in contractual relationships. A State bound by a certain treaty to another State must rest in the security that a harmonious and undisturbed exercise of the rights of each party and a faithful discharge of reciprocal obligations denote a mutually satisfactory state of things which is permanent in character and is bound to last as long as the treaty is in force. A State cannot enjoy such a situation and at the same time live in fear that some day the other State may change its mind or its conduct and jeopardize or deny rights that for a long time it has never challenged. A continuous and uncontroverted fulfilment of a treaty is tantamount to a pledge, a security renewed day by day that the treaty is valid and effective as signed, intended and understood by the parties. Such a security must needs be upheld as an indispensable element of fruitful harmony in all treaty relationships.

It may thus be seen that the rule *pacta sunt servanda* cannot be conciliated with the notion of inconsistency in the interpretation and observance of public treaties. Of course, this notion does not conflict with the entirely different question of *rebus sic stantibus*. Inconsistency condemns two contradictory positions with regard to the same situation existing at the time the binding acts occurred. The clause *rebus sic stantibus* contemplates two different situations: the one existing when the treaty was signed and the new one created by conditions and circumstances posterior to the treaty. But even in the case of ordinary, non-contractual relations between States the rule of consistency must be observed and a State cannot challenge or injure the rights of another in a manner which is contrary to its previous acts, conduct or opinions during the maintenance of its international relationships.

Finally, it may be averred that, as in the case of prescription, the principle is also rooted in the necessity of avoiding controversies as a matter of public policy (*interest rei publicae ut sit finis litium*). By condemning inconsistency a great deal of litigation is liable to be avoided and the element of friendship and co-operation is strengthened in the international community.

While refraining from discussing the question whether the principle of the binding effect of a State's own acts with regard to rights in dispute with another State is or is not part of customary

international law, I have no hesitation in asserting that this principle, known to the world since the days of the Romans, is one of the "general principles of law recognized by civilized nations" applicable and in fact frequently applied by the International Court of Justice in conformity with Article 38, para. 1 *(c)*, of its Statute.

Cases in which the International Court of Justice, the Permanent Court of International Justice or arbitration tribunals have applied or recognized the principle above discussed.

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1. *Express agreement or recognition*

In the case of the *Award of the King of Spain*, Honduras *v.* Nicaragua (1960), this Court said:

> "No question was at any time raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction as such. Before him, the Parties followed the procedure that had been agreed upon for submitting their respective cases. Indeed, the very first occasion when the validity of the designation of the King of Spain as arbitrator was challenged was in the Note of the Foreign Minister of Nicaragua of 19 March 1912. In these circumstances the Court is unable to hold that the designation of the King of Spain as arbitrator to decide the boundary dispute between the two Parties was invalid."

And further on the Court declared:

> "In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award." (*I.C.J. Reports*, pp. 207, 213.)

In his Separate Opinion in the same case Judge Sir Percy Spender said:

> "I do not find it necessary to determine whether the King's appointment involved any non-compliance with the provisions of the Treaty. Although I incline strongly to the view that the appointment was irregular, this contention of Nicaragua fails because that State is precluded by its conduct prior to and during the course of the arbitration from relying upon any irregularity in the appointment of the King as a ground to invalidate the Award." (*Ibid.*, p. 219.)

In the course of its Advisory Opinion concerning the *Jurisdiction of the European Commission of the Danube* the Permanent Court of International Justice stated that:

"as all the Governments concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute, they cannot, as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Commission under Article 349 of the Treaty of Versailles". (P.C.I.J., Series B, No. 14, p. 23.)

In the *Eastern Greenland* case (1933), the Permanent Court of International Justice declared:

"Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland".

The Court accordingly decided that the "Ihlen declaration" was binding on Norway and barred a subsequent Norwegian attitude contrary to its notified intent. (P.C.I.J., Series A/B, No. 53, pp. 70-71.)

The *Serbian Loans* case is thus reported by Bowett (*"Estoppel before International Tribunals", British Year Book of International Law*, 1957):

"In the *Serbian Loans* case the question arose whether in accepting payment of interest upon the loans in French francs, as opposed to 'gold francs', the French bondholders had represented that they were prepared to accept payment in French francs. If they had, despite the derogation from the terms of the loan, it was arguable that they were henceforth estopped from claiming payment according to the strict terms of the loans."

On this point the Permanent Court said:

"... when the requirements of the principle of estoppel to establish a loss of right are considered, it is clear that no sufficient basis has been shown for applying the principle in this case. There was no clear and unequivocal representation of the bondholders upon which the debtor State was entitled to rely and has relied." (P.C.I.J., Series A, Nos. 20-21, p. 39.)

In the *Shufeldt* case (1930), the United States contended that Guatemala, having for six years recognized the validity of the claimant's contract, and received all the benefits to which she was entitled thereunder, and having allowed Shufeldt to continue to spend money on the concession, was precluded from denying its validity, even if the contract had not received the necessary approval of the Guatemalan legislature. The Arbitrator held the contention to be "sound and in keeping with the principles of international law". (Cheng, *General Principles of Law*, Ch. 5, C, p. 143.)

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2. *Recognition by conduct and express agreement*

In *The Pious Fund of California* (1902) it was contended by the United States that Mexico was estopped by its conduct from denying

the right of the Mixed Commission of 1868 to settle the entire question of the California Fund. They urged that throughout the whole dispute, both before and after the decision of the umpire, Mexico impliedly and by a uniform conduct conceded to that commission full powers of decision. This conduct consisted in the ratification, in 1872 and 1874, of the conventions providing for the extension of time within which the joint Commission should settle the claims brought before it, and also in other acts of the agents of Mexico. (Lauterpacht, *Private Law Sources and Analogies of International Law*, p. 248.)

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3. *Passiveness before adverse acts. Abandonment of rights*

The binding effect of passiveness or inaction before acts contrary to what a State believes or pretends to believe to be its right is vividly set out in the *Grisbadarna* case (1909) between Norway and Sweden, in which the tribunal made the following considerations for adjudicating to Sweden the disputed territory:

> "The 'circumstance that Sweden has performed various acts in the Grisbadarna region, especially of late, owing to her conviction that these regions were Swedish as, for instance, the placing of beacons, the measurement of the sea, and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought she was exercising her right but even more that she was performing her duty; whereas Norway, according to her own admission, showed much less solicitude in this region in these various regards'. After adverting to the maxim *quieta non movere*, the tribunal laid further stress on the co-existence of expenditure and acquiescence, in the following words: 'The stationing of a light-boat, which is necessary to the safety of navigation in the regions of Grisbadarna, was done by Sweden without meeting any protest and even at the initiative of Norway, and likewise a large number of beacons were established there without giving rise to any protests.' " (Scott, *Hague Court Reports*, 1916, p. 121.)

Circumstances very similar to those of the *Grisbadarna* case occurred in the controversy over the islands of *Minquiers and Ecrehos* (1953). At a later stage of the oral proceedings Sir Gerald Fitzmaurice advanced the proposition in these terms:

> "[Title to territory is abandoned] by letting another country assume and carry out for many years all the responsibilities and expenses in connection with the territory concerned. Could anything be imagined more obviously amounting to acquiescence, that is in effect abandonment? Such a course of action, or rather inaction, disqualifies the country concerned from asserting the continued existence of the title." (J. C. McGibbon, "*Estoppel in International Law*", in *Int. and Comp. Law Quarterly*, 1958, p. 509.)

In the *Yukon Lumber* case a claim was put forward by Great Britain for the value of some timber cut in trespass upon Canadian territory, sold subsequently to the Government of the United States, and used by it in the construction of certain military bridges in Alaska. The United States contended in reply that Great Britain, by the course taken by her officials, was estopped from denying that a full and complete title to the timber had legally vested in the United States, that the Canadian land and timber agent stood by silently and watched the American Government acquire this timber *bona fide* and continue for six months to pay the instalments due in respect of it, and that, accordingly, Great Britain could not now be heard in a demand that the United States should pay for the timber which it was permitted to acquire under false representations. This plea in support of which a vast number of English and American cases on estoppel was cited, was fully adopted by the tribunal. (Lauterpacht, *opus cit.*, para. 132, p. 280.)

The Arbitrator in the *Island of Palmas* arbitration declared without taking into consideration the recognition by the Treaty of Utrecht of the position in 1714:

> "the acquiescence of Spain in the situation created after 1677 [the establishment of the Dutch position in Sangi] would deprive her and her successors of the possibility of still invoking conventional rights at the present". (J. C. McGibbon, *opus cit.*, p. 506.)

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4. *Failure to protest*

"The duty to protest", says Lauterpacht, "and the relevance of the failure to protest, are especially conspicuous in the international sphere where the normal avenues for ascertaining disputed rights through the compulsory jurisdiction of tribunals are not always available."

In this connection he refers to the *Venezuelan Preferential Claims* (1902) in the following terms:

> "The Award, in addition to the effect which it attributed to the Venezuelan recognition in principle of the justice of the claims of the Blockading Powers, was largely based upon the effect of acquiescence as an estoppel, as the following reasons prefacing the operative part of the Award indicate: 'Whereas the Government of Venezuela until the end of January, 1903, in no way protested against the pretension of the Blockading Powers to insist on special securities for the settlement of their claims... Whereas the neutral Powers ... did not protest against the pretensions of the Blockading Powers to a preferential treatment... Whereas it appears from the negotiations ... that the German and British Governments constantly insisted on their being given guarantees... Whereas the Plenipotentiary of the Government of Venezuela accepted this reservation on

the part of the allied Powers without the least protest... For these reasons *[inter alia]* the Tribunal of Arbitration decides and pronounces unanimously.' "

In the *Anglo-Norwegian Fisheries* case (1951), the International Court of Justice considered that the "prolonged abstention" of the United Kingdom from protesting against the Norwegian system of straight base lines in delimiting territorial waters was one of the factors which, together with "the notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norways' enforcement of her system against the United Kingdom".

In the case of *The Lotus*, the Court referred to the several instances, quoted in argument, of criminal proceedings in respect of collisions before the courts of a country other than that of the flag of the vessel concerned, and stressed the fact that in these cases the States affected did not object and refrained from protesting. The Court said:

> "This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown... It seems hardly probable, and it would not have been in accordance with international practice, that the French Government in the *Ortigia-Oncle-Joseph* case and the same Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law." (P.C.I.J., Series A, No. 10, p. 29.)

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5. *Failure to reserve rights*

In the *Russian Indemnity* case (1912) Russia claimed interest for the delayed payment of certain indemnity sums provided for in the Treaty of Constantinople of 1879. The Ottoman Government maintained, and the accuracy of this assertion appeared clearly from the correspondence produced before the Court, that although the Russian Government demanded in 1891 the payment of both interest and principal, it did not subsequently reserve its rights to interest on the receipts given by the Embassy or in the notes granting extension of payment, and that the Embassy did not regard the received sums as interest. The award said in this connection:

"When the tribunal recognized that, according to the general principles and the custom of public international law, there was a similarity between the condition of a State and that of an individual, which are debtors for a clear and exigible conventional sum, it is equitable and juridical also to apply by analogy the principles of private law common to cases where the demand for payment must be considered as removed and the benefit to be derived therefrom as eliminated. In private law, the effects of demand for payment are eliminated when the creditor, after having made legal demand upon the debtor, grants one or more extensions for the payment of the principal obligation, without reserving the rights acquired by the legal demand."

The Tribunal held accordingly that the Ottoman Government was not liable to pay interest-damages as demanded by Russia. (Lauterpacht, *opus cit.*, pp. 255-260.)

The case of the *Pious Fund of California*, already mentioned, affords another example of the damage a State may suffer from failure to reserve whatever rights may be liable to be affected in connection with an international agreement. In this case the United States pointed out that Mexico, embarking, in 1868 and in the subsequent conventions, upon the litigation, took the risk of success or failure, and that she could not now, after having lost, question the jurisdiction of the tribunal. They disclaimed the intention of relying upon a mere technicality, but urged that if one party to the dispute contemplates the withdrawing of certain claims from arbitration, it is under the obligation to announce such intention in the beginning in order to enable the opposing party to make such claims the foundation of a separate convention. (Lauterpacht, *opus cit.*, p. 248.)

The *Landreau* case arbitration (1922) was one in which the rule relative to the necessity of reserving rights was discussed before the tribunal but in this case it was found that there was no cause for applying it to the claimant.

In 1892 Théophile Landreau granted a release to the Peruvian Government cancelling his rights, and the Commission found that the Peruvian Government had been notified of the assignment to his brother Célestin of 30 per cent. of the claim. The Commission stated:

"Of course if there was anything to show that Célestin knew of this release at the time of its execution and abstained from putting forward his claim, he and his representatives would be estopped from making any claim against the Peruvian Government, but there is nothing to show that there was any such acquiescence in this transaction by Célestin."

The Commission concluded that there was "no sufficient foundation for inferring that Célestin's representatives are estopped by any conduct on his part from not asserting the right to their 30 per cent. share". (McGibbon, *opus cit.*, p. 505.)

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7. *Inconsistency*

Apart from specific cases of recognition, failure to protest or to reserve rights, passiveness or any form of express or tacit acquiescence, other disputes have been decided against litigant States on the general basis of inconsistency between the claims of States and their previous acts. Inconsistency is (and has been for many years) a practice at which the combined efforts of justice and international harmony must be directed.

Thus, in the case of *The Mechanic* (C. 1862), it was held:

> "Ecuador ... having fully recognized and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honour and good faith deny the principle when it imposed an obligation." (Cheng, *opus cit.*, p. 142.)

In the case of *The Lisman* (1937), concerning an American vessel which was seized in London in June, 1915, the claimant's original contention before the British Prize Court:

> "was not that there was not reasonable cause for seizure, or for requiring the goods to be discharged, but that there was undue delay on the part of the Crown in taking the steps they were entitled to take as belligerents. In a subsequent arbitration in 1937, which took the place of diplomatic claims by the United States against Great Britain, the sole Arbitrator held that:
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> 'By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, *claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on*, that these acts were unlawful, and constitute the basis of his claim.'" (*Ibid.*, pp. 142-147.)

In the *Salvador Commercial Co.* case (1902), the Arbitral Tribunal, in dealing with the Salvadorian Government contention that the Company did not comply with the terms of the concession, held that:

> "It is of course obvious that the Salvador Government should be estopped from going behind those reports of its own officers on the subject and from attacking their correctness without supplementary evidence tending to show that such reports were induced by mistake or were procured by fraud or undue influence. No evidence of this kind is introduced." (Cheng, *ibid.*, p. 147.)

It was held in the *Chorzów Factory* case (1927) that one of the parties was estopped from pleading the Court's lack of jurisdiction on the ground that:

> "it is ... a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail itself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him".

The Representative of the United Kingdom, referring to the passage from the *Chorzów Factory* case and applying it to the question before the Court, said:

> "What is involved is really an application of the principle known in English law as estoppel (or to use what I believe is the equivalent French term *préclusion*)—to which effect has frequently been given by international tribunals." (McGibbon, *opus cit.*, pp. 480-481.)

Likewise, in the *Meuse* case (1937), it was held that, where two States were bound by the same treaty obligations, State A could not complain of an act by State B of which itself it had set an example in the past. Nor indeed may a State, while denying that a certain treaty is applicable to the case, contend at the same time that the other party in regard to the matter in dispute has not complied with certain provisions of that treaty. (P.C.I.J., Series A/B, No. 70, p. 25.)

In the *Behring Sea* arbitration of 1893 between the United States and Great Britain, the Arbitrators expressly found against the United States contention that Great Britain had conceded the Russian claim to exercise exclusive jurisdiction over the fur-seals fisheries in the Behring Sea outside territorial waters; and they were fortified in this conclusion by the fact that the United States,

as well as Great Britain, had protested against the Russian Ukase of 1821 in which this claim was asserted. The proceedings, as Lord McNair stated:

> "demonstrated that some advantage is to be gained by one State, party to a dispute, by convicting the other State of inconsistency with an attitude previously adopted". (McGibbon, *opus cit.*, p. 469.)

In its Judgment in the case concerning the *Diversion of Water from the Meuse* (1937), the Permanent Court of International Justice found it:

> "difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past". (P.C.I.J., Series A/B, No. 70, p. 25.)

The anti-inconsistency rule was also applied by the German-United States Mixed Claims Commission in the *Life-Insurance Claims* case (1924), when it decided that a State was debarred from asserting claims which, on general principles of law, its own courts would not admit, for instance, claims involving damages which its own municipal courts, in similar cases, would consider too remote. (Cheng, *opus cit.*, p. 143.)

There exist many other cases of international jurisprudence which might be cited as examples of the application of the principle which rejects allegations that are contrary to a State's own acts. Space prevents me from citing any more. I have accordingly limited myself to selecting a few cases which I consider can usefully demonstrate, in the main aspects, the force and flexibility of this principle.

(Signed) R. J. ALFARO.