SEPARATE OPINION OF JUDGE NAGENDRA SINGH

While I have voted for the jurisdiction of the Court on both counts, namely under the Optional Clause of Article 36, paragraphs 2 and 5, of the Statute of the Court, as well as under Article 36, paragraph 1, of the Statute on the basis of Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation of 21 January 1956, I have felt all along in those proceedings that the jurisdiction of the Court resting upon the latter, namely the Treaty, provides a clearer and a firmer ground than the jurisdiction based on the former, that is, the Optional Clause. The reasons are obvious, since the acceptance of the Court's jurisdiction by both the Applicant, Nicaragua, and the Respondent, the United States, presents several legal difficulties to be resolved and in respect of which there is room for differing views. For example, there are the problems of the "imperfect" acceptance of the jurisdiction by Nicaragua ; and of the certainly unwilling response from the United States as revealed by its Declaration of 6 April 1984 intended to bar the Court's jurisdiction in relation to any dispute with any Central American State for a period of two years. Furthermore, there is also the plea of multilateral treaty reservation of the United States, as well as the question of reciprocity in relation to six months' notice of termination stipulated in the United States Declaration of 14 August 1946. The Court's consideration of all these legal obstacles to its own jurisdiction under the Optional Clause has been both thorough and careful, and I do agree with the Court's finding, but it does represent one way of looking at the picture and of interpreting the legal situation. There could, therefore, also be the rival way of looking at it, and hence my preference for basing the Court's jurisdiction on Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation of 1956. This, for me, takes priority on an overall consideration of the case at this stage, when the Court is solely concerned about its own jurisdiction in the matter. Though there are certain objections raised by the United States to the application of Article XXIV of that Treaty, they are not of such gravity as to bar the jurisdiction of the Court on any clear or categorical basis. The Court has effectively and adequately dealt with the United States objections of basing the Court's jurisdiction on that Treaty and hence it is not necessary for me to repeat them here. I would, however, like to draw attention to the following aspects which appear to merit mention, and provide the raison d'être of this opinion.

(i) The United States has asserted that under clause 1 of Article XXIV it was necessary for Nicaragua to enter into negotiations and to make efforts to adjust the dispute by diplomacy. The Respondent maintains that no

such efforts were ever made, and even though there were negotiations with Nicaragua this dispute was never raised. It is therefore argued by the United States that the mandatory provision of clause 1 of Article XXIV has not been fulfilled and hence Nicaragua could not invoke the jurisdiction of the Court under the Treaty. However, if the wording of the compromissory clause of the Treaty is examined, it would appear that negotiations or representations affecting the operation of the present Treaty are not prescribed as a condition precedent to invoking the jurisdiction of the Court. The Treaty clearly states that if a party does choose to make representations affecting the operation of the Treaty the other party is obliged to "accord sympathetic consideration" and "afford adequate opportunity for consultation". However, it does not make it obligatory that such representations must be made and negotiations on the matter affecting the operation of the Treaty must take place before proceeding to the Court. It would appear to be the intention that due weight should be given to "sympathetic consideration" and "opportunity for consultation" if a party were to make representations on a matter affecting the operation of the Treaty. There is, however, no binding obligation to negotiate. The above conclusion would appear to be clearly justified from the wording of clause 1 of Article XXIV, which is reproduced below :

> "Each Party *shall* accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party *may* make with respect to any matter affecting the operation of the present Treaty." (Emphasis added.)

The second objection of the United States is that, in accordance with subclause 2 of Article XXI, it is essential that the dispute must not have been satisfactorily adjusted by diplomacy. In other words, resort to a diplomatic move to settle the dispute would appear to be a condition essential before submitting the case to the International Court of Justice. Similarly, parties must not have agreed to settlement by some other pacific means. Both these conditions appear to be satisfied because every effort has been made to settle the dispute by diplomacy inasmuch as Nicaragua has referred it to the Security Council. Furthermore, the dispute is before the Contadora Group, which is essentially a diplomatic process to resolve the problems of the area. In short, therefore, it could not be asserted that the dispute has not been referred to diplomatic methods for settlement. The United Nations Security Council is an organ which is essentially engaged in diplomatic methods for settling disputes. It is also true that neither the Contadora process nor the Security Council have been able to resolve the dispute by diplomacy. Again, the Parties have not resorted to any other pacific means for the settlement of the dispute. In the circumstances, the allegation made by the United States that Nicaragua in its negotiations has never raised the application or interpretation of the Treaty would appear to have no relevance to the jurisdiction of the Court

because negotiations have not been specifically prescribed as a *sine qua non* for the Parties to proceed to the Court. There are several treaties which do categorically specify negotiations as a condition precedent to resorting to the International Court of Justice. For example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973 has the following jurisdictional clause. Article 13, paragraph 1, of the Treaty is reproduced below :

> "Any dispute between two or more States Parties concerning the interpretation or application of this Convention *which is not settled by negotiation* shall, at the request of one of them, be submitted to arbitration. If within six months from the date of request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court." (Emphasis added.)

In the aforesaid Treaty, which was cited by the United States in the *United States Diplomatic and Consular Staff in Tehran* case *(I.C.J. Reports 1980),* it would appear that the jurisdictional clause made negotiations an essential condition before proceeding to arbitration ; and a lapse of six months from the date of the request for arbitration a condition precedent to referring the dispute to the International Court of Justice. The words "which is not settled by negotiation" have the same importance as the words "not satisfactorily adjusted by diplomacy" which occur in the 1956 Treaty of Friendship, Commerce and Navigation. There is no reference to negotiation in the Treaty under consideration. In the circumstances the conditions necessary under Article XXIV for the case to be brought to the International Court of Justice have been fulfilled.

(ii) It is of course true that the field of the jurisdiction of the Court conferred by the Treaty is restricted to and limited by the words "dispute as to the interpretation or application of the present Treaty". Thus Nicaragua would have to cite the specific articles and provisions of the Treaty of 1956 and demonstrate the point of dispute in order that the Court may exercise jurisdiction in the matter. The Court has listed in the Judgment (para. 82) the various articles of the Treaty which, according to Nicaragua, have been violated by the military and paramilitary activities of the United States. These articles need not be repeated here. However, it appears essential to point out that there is in addition a specific provision, namely Article XXI, which deals with items like the maintenance or restoration of international peace and security or measures necessary to protect the essential security interests of the Parties. The Court may well have to consider at some stage whether Article XXI of the Treaty falls within the purview of the Treaty or is excluded from it. Clause 1 of the said Article reads as follows :

"The present Treaty shall not preclude the application of measures . . .

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment ;

(d) necessary to fulfil the obligation of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

It does appear necessary to ascertain the intention of the Parties to the Treaty as to whether the application of measures under Article XXI of the Treaty are excluded from or fall within the purview of the Treaty. As far as Nicaragua is concerned, it is difficult to discern the intention because in the Memorial it has not referred to Article XXI, and in the oral hearings this Treaty has been invoked summarily in one line and not fully dealt with. However, as far as the United States is concerned, it would appear that the provisions of Article XXI, paragraph 1 *(c)* and *(d)*, are excluded from the purview of the Treaty. This would appear to be a legitimate conclusion to draw from the Counter-Memorial of the Respondent (para. 179). However, in the oral hearings this Treaty was not mentioned at all by the United States. It would appear that clause 1 of Article XXI of the Treaty is worded rather ambiguously. It states "the present Treaty shall not preclude the application of measures", which in relation to subclauses *(c)* and *(d)* would apply to obligations for the maintenance of international peace and security or protection of essential security interests. The words "shall not preclude the application of measures" would stand to mean that the present Treaty shall permit the application of "necessary measures" and therefore such measures would be within the purview of the Treaty ; at least to the extent that there may obviously be a question whether or not certain measures are, for example, truly "necessary" within the meaning of paragraph *(d)*. And what, furthermore, is intended by the qualifying term, the "application" of measures ? If the intention was to exclude these matters from the purview of the Treaty, the word "preclude" alone should have been used, and not preceded by the word "not". To say that "the present Treaty shall not preclude the application of measures" would amount to saying that the present Treaty expressly sanctions the application of measures such as those mentioned in subclauses *(c)* and *(d)*. This ambiguity in clause 1 of Article XXI of the Treaty has to be read with the Counter-Memorial of the United States to get the intention of the Party, which is that such measures as specified in subclauses *(c)* and *(d)* are altogether excluded from the purview of the Treaty. However, this inference does not appear to be borne out by the use of the words "not preclude the application of measures". The question therefore arises whether the Court has jurisdiction in relation to the interpretation and application of Article XXI, which is an integral part of the Treaty ; or whether it has no

jurisdiction because the intention of one of the Parties was to exclude from the purview of the Treaty items *(c)* and *(d)* of clause 1 of the said Article. In this context it is indeed significant that the jurisdictional clause of Article XXIV of the Treaty, does not specify the exclusion of Article XXI from the Court's jurisdiction. If the intention of both Parties was to exclude from the Court's purview that aspect of the Treaty which relates to clause 1 of Article XXI, a provision to that effect would have been helpful even if it is not regarded as strictly necessary for implementing that purpose. However, as stated before, it will be for the Court to decide on this aspect when it proceeds to the next phase of the case.

(iii) A noteworthy feature of the jurisdiction based on the 1956 Treaty, established under Article 36, paragraph 1, of the Statute, is that it is not subject to the multilateral treaty reservation of the United States which is applicable to the Court's jurisdiction under the Optional Clause of Article 36, paragraph 2, of the Statute. Thus under the Treaty basis the Court would be free to apply for purposes of interpretation and application of the Treaty the whole sphere of international law, as defined in Article 38 of the Statute, namely both customary and conventional law as well as the general principles of international law (*vide* Art. 38, paras. *(a)*, *(b)* and *(c)* of the Statute). On the other hand, the multilateral treaty reservation operating in relation to the Court's jurisdiction based on the Optional Clause under Article 36, paragraph 2, of the Statute would confine the applicable law for purposes of adjudication of the dispute to customary law as well as the general principles of international law (Art. 38, para. 1 *(b)* and *(c)*) and not to conventional treaty law (Art. 38, para. 1 *(a)*), unless State Parties affected by the decision of the Court were also present in the proceedings.

However, I do fully endorse the conclusion reached by the Court that the multilateral treaty reservation of the Respondent does not possess "an exclusively preliminary character" and remains inapplicable at this jurisdictional stage of the case, and hence under Article 79, paragraph 7, of the Rules, the Court has affirmed its own jurisdiction under Article 36, paragraph 2, of the Statute and proceeded to fix time-limits for the further proceedings on the merits of the case. In short, the Court has held that the multilateral treaty reservation of the United States has not barred its jurisdiction for the simple reason that at this stage it is not possible to name with any precision or firmness the States whose presence is necessary to enable the Court to proceed further with the case. In this connection it is worth pointing out that there are several States which have made reservations of the "Vandenberg" type which is described by the Court as the multilateral treaty reservation of the United States added to its Declaration of 1946 under Article 36, paragraph 2, of the Statute. Proviso "*(c)*" of the United States Declaration which embodies the multilateral treaty reservation provides that the United States acceptance of the Court's compulsory jurisdiction shall not extend to :

"disputes arising under a multilateral treaty, unless (1) all parties to

the treaty *affected by the decision* are also parties to the case before the Court, or (2) the United States of America specially agreed to jurisdiction . . ." (emphasis added).

The key words of the aforesaid reservation are "affected by the decision", which deprive the reservation of its preliminary character because at the present jurisdictional stage it is not possible to come to any conclusion as to which, if any, of the States parties to a multilateral treaty would be affected by the decision of the Court. It is indeed significant to observe here that the same observation could not be made in relation to the other Vandenberg-type reservations such as those made by India and the Philippines. The reservation made by India on 18 September 1974 is to the effect that the Government of India accepts the jurisdiction of the Court over all disputes other than :

"(7) disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction".

The reservation of the Philippines, made on 18 January 1972, is similarly worded, stating that the Court's jurisdiction would not extend to any legal dispute

"*(d)* arising under a multilateral treaty, unless (1) all parties to the treaty are also parties to the case before the Court, or (2) the Republic of the Philippines specially agrees to jurisdiction".

It will appear from the wording of the reservations of India and the Philippines that they both clearly maintain their essentially preliminary character and would therefore unambiguously act as a bar to the jurisdiction of the Court at the very start. This would be so because their meaning is clear and the application is simple and straightforward, as opposed to the Vandenberg reservation of the United States type which poses several problems concerning the determination of "States affected by the decision of the Court". The first question that arises relates to who is to judge which States are affected by the decision of the Court ? Is it to be the decision of the Respondent – the United States – which made the reservation, in which event if would appear to take the objections of the Connally reservation, or is it to be left to the States concerned who regard themselves as affected by the decision of the Court, or is it for the Court itself to decide ? The reservations of India and the Philippines do not pose such problems and cannot be described as "not exclusively preliminary" so as to be caught by the provisions of Article 79, paragraph 7, of the Rules of Court, which are found applicable here in relation to the United States reservation to render it ineffective.

It may be observed that the words used by a State in making a reservation under Article 36, paragraph 2, of the Statute must be such as clearly and unequivocally to spell out the application of the reservation in a straight and simple manner and not raise questions which are ambiguous and therefore create confusion as to the intention of the State making the reservation. The Vandenberg reservation of the United States, by the use of the words "States parties to a treaty affected by the decision", has introduced an element which spells ambiguity in the application of the reservation inasmuch as the Court is left with no option but to conclude that the said reservation cannot act as a bar to the jurisdiction of the Court at this stage of the case. It is quite clear that the decision of the Court at the present stage is not even in sight. The merits of the case have to be argued first by the Parties and at this stage it is not even known which multilateral treaties will have to be invoked by the Court's decision, and hence the inherent difficulty in applying the said United States reservation at the present phase of the case. The Court has therefore been indeed correct in coming to the conclusion that the Vandenberg reservation of the Respondent is "not exclusively preliminary" and hence cannot debar the Court today as it proceeds to pronounce its jurisdiction in the case.

(iv) Another helpful feature of the 1956 Treaty-based jurisdiction of the Court under Article 36, paragraph 1, of the Statute is that it compels the Parties to come to the Court, invoking legal principles and adopting legal procedures which would helpfully place legal limits to the presentation of this sprawling dispute, which could otherwise easily take a non-legal character by including political issues and thus raising the problem of sorting out what is justiciable as opposed to non-justiciable matters being brought before the Court. Invoking the Treaty base would indeed help to specify and legally channelize the issues of the dispute. For example, the Applicant will have to present specific violations of the provisions of the Treaty, thus involving their interpretation and application in the adjudication of the dispute. Thus, while the Treaty would help the judicial process to run on the right legal lines, the jurisdiction of the Court under the Optional Clause could possibly open the door to limitless considerations, presenting problems in adjudication.

(v) There is also the objection raised by the United States which relates to the pleadings of Nicaragua inasmuch as the oral hearings before the Court do not bring out the jurisdiction of the Court based on the Treaty of 1956, except by way of a single line in which Nicaragua's Agent mentions this Treaty in very bald terms. The result has been that the United States, too, in the oral hearings has totally ignored the Treaty because it had not been gone into by Nicaragua. Furthermore, Nicaragua has not mentioned the Treaty of 1956 in its Application but has inserted a clause reserving the right to supplement the Application of 9 April 1984 or to amend it at a later stage. Nicaragua has relied on this clause, and in its written Memorial dated 30 June 1984 has stated that it "respectfully requests the Court to

consider that Nicaragua is exercising the right to invoke the Treaty of Friendship, Commerce and Navigation of 1956 between Nicaragua and the United States" (Nicaragua's Memorial, para. 164, note 3). On that basis Nicaragua has in its Memorial devoted Chapter III, paragraphs 163-175, to the aforesaid Treaty, attempting to establish the jurisdiction of the Court under Article 36, paragraph 1, of the Statute. As a result the United States Counter-Memorial deals with this Treaty at length and answers the points that have been raised by Nicaragua (Chap. II, paras. 167-183, of the United States Counter-Memorial). In short, while the oral hearings have almost totally neglected the Treaty as a base of jurisdiction, the Parties have properly dealt with this aspect in the Memorial and the Counter-Memorial. It is felt that Nicaragua, having reserved the right in its Application to supplement or amend it, was in a legal position to invoke the Treaty in its Memorial. Again, as both the Applicant and the Respondent have dealt with the jurisdiction of the Court as based on the Treaty in the written pleadings, it was not possible for the Court to ignore that base in its calculations in search of its own jurisdiction. No tribunal can afford to ignore the written pleadings and to pay sole attention to the oral hearings. In fact, both the written pleadings and the oral hearings constitute the right and left foot in the presentation of the case and the Court would therefore be justified in relying on the Treaty-basis of the jurisdiction since it has been pleaded by both the Parties at length in the written proceedings. It could perhaps be argued that the neglect of the Treaty in the oral hearings should have provoked a question from the Court so that the Parties were not taken by surprise as to the Court's reliance on the legal validity of the base of its jurisdiction provided by the Treaty. However, these can hardly be said to be valid reasons preventing the Court from relying on the Treaty, which, as stated earlier, has been fully discussed by both the Parties in their written pleadings.

It is in view of the aforesaid reasons that I have come to the conclusion that the jurisdiction of the Court as based on the Treaty of 1956 is clear, convincing and reliable.

(Signed) NAGENDRA SINGH.