SEPARATE OPINION OF JUDGE RUDA

1. I have voted in favour of subparagraphs 1 *(a)*, 1 *(c)* and 2 of the operative provisions of the Judgment, but since I have voted against subparagraph 1 *(b)* and do not concur in some important points with the reasoning of the Court, I am bound to append this separate opinion. This opinion will refer to three subjects : the 1956 Treaty of Friendship as a basis of the jurisdiction of the Court, Proviso *c* of the 1946 United States Declaration, and the conduct of the States as a basis of the jurisdiction of the Court.

I. The 1956 Treaty as the Basis of the Jurisdiction of the Court

2. The Court finds that it has jurisdiction under the Treaty of Friendship, Commerce and Navigation of 1956 between the United States and Nicaragua to entertain the claims referred to in the Nicaraguan Application, to the extent that they constitute a dispute as to the interpretation or application of several articles of the Treaty.

The 1956 Treaty provides in Article XXIV :

> "1. Each Party shall accord sympathetic consideration to, 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.
>
> 2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means."

3. It is true, as the Court says, in paragraph 81 of the Judgment that

> "the intention of the Parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court in the absence of agreement to employ some other pacific means of settlement".

But from this point onwards, I regret to part company with the reasoning of the Court.

4. The compromissory clause of the 1956 Treaty is common to many treaties of "establishment". Its structure is simple. Two conditions must be fulfilled in order to open the way to recourse to the Court. One, that there should be a dispute between the parties as to the interpretation and

application of the Treaty and second that such a "dispute has not been adjusted by diplomacy".

5. There is no doubt that a dispute exists between Nicaragua and the United States as to the facts asserted by Nicaragua in its Application ; but even if this dispute, which is very doubtful, could be covered by the terms of the Treaty, this does not mean that Nicaragua could take action on it as a dispute over the interpretation and application of the Treaty, after the institution of the proceedings. Nicaragua has to follow the procedure laid down in the Treaty, which is simple and clear, before coming before the Court.

6. It is not sufficient to invoke the Treaty, alleging before the Court violations of its provisions, in the course of the proceedings, at the time of submitting the Memorial on jurisdiction and admissibility. These allegations must have been the subject of negotiations prior to the institution of proceedings. How can there be a dispute as to the interpretation and application of the Treaty, if no *démarche* has been presented to the other party ?

7. To invoke the 1956 Treaty as a title of jurisdiction, it is essential that diplomatic negotiations should have taken place prior to coming before the Court, because, first, that is what is set out in clear terms in Article XXIV of the Treaty and second, because it is impossible to know the existence and scope of a dispute without one party submitting a claim against the other, stating the facts and specifying the provisions of the Treaty alleged to have been violated. It is the essence and therefore the indissoluble attributes of the concept of dispute that negotiations between the interested States should precede the institution of proceedings before the Court, because negotiations or the adjustment by diplomacy fixes the points of fact and law over which the parties disagree. But, in this particular case, apart from this reasoning, the Treaty itself clearly provides that prior efforts should be made to adjust the dispute by diplomacy.

8. No evidence has been submitted by the Applicant that it had made any representation, approach, claim or *démarche* with regard to the Respondent before filing its Memorial, where the Treaty of 1956 has been invoked. No dispute has been proved to exist, prior to the institution of the proceedings, as to the interpretation and application of the Treaty.

9. For these reasons, I part company with my colleagues on the finding of the Court, that on the "basis alone" (para. 111) of the Treaty of 1956, the Court is competent. The Court states in paragraph 83 that :

> "In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty."

10. I take the opposite view from the Court. I think that a State is debarred from judicially invoking the compromissory clause of a treaty, if the procedure provided for in this clause is not followed. This procedure is not a mere formality, it has a reason from the juridical point of view : it is during the negotiations that the dispute is established and its scope defined. A procedure, incorporated in a legal instrument, must be complied with, except in circumstances when the impossibility of following the procedure could frustrate the purposes of the instrument, as was the case in the Judgment on the *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* page 3. It should be remembered that on this occasion, the Court considered, as a basis for the exercise of its jurisdiction, a similar article in the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, in regard to a claim concerning two private individuals, said to be held in the American Embassy. The Court stated :

> "As previously pointed out, when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a 'dispute ... not satisfactorily adjusted by diplomacy' within the meaning of Article XXI, paragraph 2, of the 1955 Treaty ; and this dispute comprised, *inter alia,* the matters that are the subject of the United States claims under that Treaty." (*I.C.J. Reports 1980,* p. 27, para. 51.)

11. The Court invoked paragraph 2 as a basis of its jurisdiction because there was an impossibility to negotiate under the Treaty.

12. The circumstances in the present case are just the opposite ; both countries have Embassies in their respective capitals, the Secretary of State has visited Managua and negotiations are going on between the Parties. In this case, it is possible to apply the provisions of Article XXIV, paragraph 2. Therefore, there is no factual impediment to the application of the compromissory clause of the Treaty of 1956, and the way seems open to negotiations under this instrument, but negotiations have not taken place until today.

II. Proviso C of the United States Declaration of 1946

13. The United States Declaration of 14 August 1946 accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute excludes, *inter alia,* from such jurisdiction :

> "*(c)* disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case

before the Court, or (2) the United States of America specially agrees to that jurisdiction".

14. Much doctrinal controversy arose in the 1940s as to the meaning of this proviso, but this is the first time that it has been invoked by the United States to bar the jurisdiction of the Court.

15. The textual interpretation of the proviso is not easy. I agreed with those who consider that the phrase "affected by the decision" qualifies "parties" and not "treaty" and therefore it is not necessary for all the parties to a multilateral treaty to be present before the Court for it to declare itself competent, in a case when the United States is party to a dispute, under the treaty.

16. The problem of interpretation of this proviso arises from the meaning to be attached to the phrase "parties ... affected by the decision".

17. The history of the proviso is well known and it is not of much help to find the intention of its authors, but that is the only source of interpretation available. My reading of this legislative history leads me to the conclusion that the objective was to ensure that the United States would not be forced, because of its acceptance of the Optional Clause, to be involved in a case before the Court when not all the parties to the dispute are before it : the United States does not wish, because of its acceptance of the Optional Clause, to be bound by a judgment of the Court vis-à-vis States that have accepted the Clause, when other States which have not accepted the Optional Clause, would not be bound by the same judgment.

18. This interpretation derives from the following part of Mr. Dulles' Memorandum submitted to a subcommittee of the Committee on Foreign Relations of the United States Senate :

> "Since the Court uses the singular 'any other State', it might be desirable to make clear that there is no compulsory obligation to submit to the Court merely because one of several parties to such dispute is similarly bound, the others not having bound themselves to become parties before the Court and, consequently, not being subject to the Charter provision (Art. 94) requiring Members to comply with decisions of the Court in cases to which they are a party." (*Hearings before a Subcommittee of the Committee on Foreign Relations on S. Res. 196, 79th Cong., 2nd sess,* p. 44.)

19. And from the following part of the report of the Committee on Foreign Relations :

> "If the United States would prefer to deny jurisdiction without special agreement, in disputes among several States, some of which

have not declared to be bound, Article 36 (3) permits it to make its declaration conditional as to the reciprocity of several or certain States.

Mr. Dulles' objection might possibly be provided by another subsection, in the first proviso . . ." (*S. Rept. 1835, 79th Cong., 2nd sess,* pp. 6, 7.)

20. On the floor of the Senate the following exchange took place between Mr. Vandenberg from Michigan and Mr. Thomas from Utah :

"*Mr. Vandenberg.* Mr. Dulles . . . has raised the question whether the language of the resolution might not involve us in accepting jurisdiction in a multilateral dispute in which some one or more nations had not accepted jurisdiction. It is my understanding that it is the opinion of the Senator from Utah that if we confronted such a situation we would not be bound to submit to compulsory jurisdiction in a multilateral case if all of the other nations involved in the multilateral situation had not themselves accepted compulsory jurisdiction. Is that so ?

Mr. Thomas. That is surely my understanding. I think reciprocity is complete. All parties to the case must stand on exactly the same foundation except that we have waived a right." (*Congressional Record,* 1 August 1946, p. 10618.)

21. Therefore, the phrase "parties . . . affected by the decision" seems to mean, in the context of proviso *c*, that, I repeat, the United States will accept the jurisdiction of the Court in a dispute arising under a multilateral treaty, when all other parties to the treaty involved in the dispute have previously accepted the jurisdiction of the Court. In other words, the United States wishes to avoid a situation under a multilateral treaty, in which it would be obliged to apply the treaty in a certain way because of the Court's decision and the other parties to the treaty would remain juridically free to apply it in another form, because of the effects of Article 59 of the Statute.

22. The proviso could only be invoked if the United States is defendant in a case, because as Applicant it would not, logically, submit the Application until it was sure that all the other parties to the dispute were in a condition to be bound by the decision of the Court. Moreover, I do not interpret the proviso as meaning that it includes the defence of the interests of third parties ; from the debates in the Senate it is clear that the intention was to preserve the interests of the United States, i.e., to ensure that third States would also be bound by the decision of the Court. On the other hand, it does not seem logical that a State submitting a declaration accepting the compulsory jurisdiction of the Court, but excluding certain matters affecting its own interests from that jurisdiction, should act on behalf of third States. The other States also have the same opportunity as the United States, and they are the sole sovereign judges of their own

interests ; furthermore, it is open to these States to apply to intervene under Articles 62 and 63 of the Statute, if they think their interests are affected.

23. In the present proceedings, there is a dispute under several multilateral treaties and the United States is defendant against the claims submitted by Nicaragua. But the United States alleges that there is a situation where the decision of the Court will affect El Salvador, Honduras and Costa Rica, and that, consequently, proviso *c* is applicable here.

24. However, that is not my understanding of the case. It is true that there is a complex and generalized conflict among Central American countries, but not the whole conflict, with all its economic, social, political and security aspects, is submitted to the Court, only the claims of Nicaragua against the United States. Nicaragua has not presented any claims against Honduras, El Salvador and Costa Rica.

25. In my analysis there are two disputes : the first, Nicaragua *v.* United States, and the second, involving the grievances of El Salvador, Honduras and Costa Rica [1] against Nicaragua. A decision of the Court in the first

[1] As for the grievances of El Salvador against Nicaragua I would refer, for instance, to the statement made by President Magana to the *ABC*, Madrid, on 22 December 1983, when, replying to a question on how and where the guerrillas obtained their supplies, he said :

> "Be sure of this, from Nicaragua and only from Nicaragua. In the past two weeks we have detected 62 incursions by aircraft which parachuted equipment, weapons and ammunitions into the Morazan area . . ."

and he added :

> "While Nicaragua draws the world's attention by claiming for the past two years that it is about to be invaded, they have not ceased for one moment to invade our country. There is only one point of departure for the armed subversion : Nicaragua." (United States Counter-Memorial, Ann. 51.)

See also the statements of a similar tenor by President Duarte on 4 June 1984 and 27 July 1984 (United States Counter-Memorial, Anns. 52 and 53). See also the Declaration of Intervention filed on 15 August 1984.

As for the grievances of Costa Rica, I would refer to the notes presented to Nicaragua, reproduced in documents of the Organization of American States where it is said, for example, on 10 September 1983 :

> "The Government of Costa Rica condemns and repudiates with profound indignation the attack on Costa Rican territory, on Members of the armed forces of Costa Rica and the country installations . . ." (United States Counter-Memorial, Anns. 63 and 64.)

With reference to the grievances of Honduras I would refer to the diplomatic notes, reproduced in documents of the Organization of American States, where it is said, for example, on 1 July 1983 :

> "It has been confirmed that they were caused [the deaths of two US journalists, injuries to a Honduran citizen and damages to a truck] by the explosion of antitank and antipersonnel mines placed by the Sandinista forces on the Honduran highway . . ." (United States Counter-Memorial, Anns. 59, 60, 61 and 62.)

dispute will not affect the reciprocal rights, duties and obligations of these Central American countries. Whatever conduct, if any, that the Court would impose on the United States, such a decision would not debar the rights of these three countries vis-à-vis Nicaragua.

26. For this reason, I think that the present situation is not the one provided for in proviso *c*, where a situation is foreseen, in which the United States, as a defendant, would be obliged to follow a certain course of action and the other parties to the dispute would be free. Here, if the Court imposes, in a decision, a certain conduct on the United States vis-à-vis Nicaragua for alleged violations of several multilateral treaties, there is no possibility of other States being affected, because there are no other parties to this dispute. Honduras, El Salvador and Costa Rica ask, on the contrary, that Nicaragua should stop illegal actions of a similar character against them. Nicaragua is placed in a defensive position, but the rights of Honduras, El Salvador and Costa Rica cannot be affected by the Court's decision. Although I recognize that both disputes are part of a generalized conflict, they are clearly distinguished from the juridical point of view, because in one Nicaragua is in the position of Applicant and in the other the claims are made against it.

27. I am, therefore, of the opinion that proviso *c* is not applicable in the case before the Court and, consequently, it should be rejected. Since my understanding of the juridical situation is different from that of the Court, and I reach a different conclusion, I part company from the Judgment where the Court finds that the bar raised by the United States does not possess, in the circumstances of the case, an exclusive preliminary character.

III. The Conduct of States as a Basis of the Jurisdiction of the Court

28. I fully agree with the finding of the Court, in paragraph 42 of the Judgment, "that the interpretation whereby the provisions of Article 36, paragraph 5, cover the case of Nicaragua has been confirmed by the subsequent conduct of the parties to the treaty in question, the Statute of the Court" ; and this is precisely the reason why I have voted in favour of the decision that the Court has jurisdiction to entertain the Application filed by Nicaragua on 9 April 1984. But I disagree with the reasoning of the Court and the corresponding finding in paragraphs 42 and 47 :

> "... It should therefore be observed that the conduct of Nicaragua in relation to the publications in question also supports a finding of jurisdiction under Article 36, paragraph 2, of the Statute independently of the interpretation and effect of paragraph 5 of that Article." (Para. 42.)

> "... [The Court] considers therefore that, having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of that State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and that accordingly Nicaragua is, vis-à-vis the United States, a State accepting 'the same obligation' under that Article." (Para. 47.)

29. My disagreement is based on my reading of the Statute of the Court, where it is provided that the only condition necessary to make operative a declaration accepting the jurisdiction of the Court under Article 36, paragraph 2, of the Statute, is, in accordance with paragraph 4 of the same Article, the deposit of the declaration with the Secretary-General of the United Nations. The consent of a State to be bound by the international obligations assumed under a treaty, should be given in accordance with the procedure laid down in the treaty. The conduct of a State is an important element in the interpretation of a convention, including the Statute, which the Court has taken into account in previous paragraphs, but it is a totally different matter to regard this conduct as constituting acceptance of the international obligations set out in a treaty, without following the procedure laid down precisely for the entry into force of these obligations.

30. I agree with the Court that the situation of Nicaragua is wholly unique, among the States bound by the Optional Clause, but this uniqueness does not justify taking the conduct of this State as a basis for considering Nicaragua as accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the present Statute, independently of Article 36, paragraph 5, for the reasons I have just explained.

31. Moreover, I disagree with the Court's affirmation that the reports of the Secretary-General, as depositary of the declarations, and that the International Court of Justice *Yearbooks* have affirmed that Nicaragua had accomplished the formality of deposit, if I have correctly interpreted the Court's statement in paragraph 46.

32. In the publication of the Secretary-General concerning *Multilateral Treaties Deposited with the Secretary-General,* Nicaragua's acceptance is included under subtitle *(b)* :

> "Declarations made under Article 36, paragraph 2, of the Statute of the *Permanent Court of International Justice,* which are deemed to be acceptances of the compulsory jurisdiction of the International Court of Justice." (Emphasis added ; *Multilateral Treaties deposited with the Secretary-General. Status as at 31 December 1982,* p. 24.)

33. In the International Court of Justice *Yearbook 1946-1947,* Nicaragua's declaration is included among "Communications and declarations of States which are still bound by their adherence to the Optional Clause of the Statute of the Permanent Court of International Justice" (p. 207) and the country is included in the

> "List of States which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice (Article 36 of the Statute of the International Court of Justice)." (P. 221.)

34. The same title is reproduced in the *Yearbook 1947-1948* (p. 133). The parenthesis is deleted in the *Yearbook 1955-1956* (p. 188). The last *Yearbook 1982-1983* includes Nicaragua in a list of "Declarations recognizing as compulsory the jurisdiction of the Court" ; it is stated, before the texts of the Declarations :

> "In view of the provisions of Article 36, paragraph 5, of the Statute of the International Court of Justice, the present section also contains the texts of Declarations made under the Statute of the *Permanent Court of International Justice* which have not lapsed or been withdrawn. There are now eight such declarations." (Emphasis added in the original text, p. 56.)

35. In my reading of these official publications, what Nicaragua has acquiesced in is to be considered bound by the Optional Clause, in accordance with the interpretation and application given by these organs of the United Nations to Article 36, paragraph 5, of the Statute of the Court, and not to be bound directly under Article 36, paragraph 2, as has been found by the Court.

(Signed) J. M. RUDA.