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.