

## SEPARATE OPINION OF JUDGE SIR ROBERT JENNINGS

Whilst agreeing with the Court's decision that it has jurisdiction under the 1956 Treaty of Friendship, Commerce and Navigation, in respect of any breaches of the provisions of that Treaty, and that such claims are also admissible, I regret that I am unable to concur with the Court's decision that it has jurisdiction under Article 36, paragraph 2, of the Court's Statute. I shall explain my reasons, as briefly as may be.

First I shall consider whether the Nicaraguan Declaration of 24 September 1929 is, by operation of Article 36, paragraph 5, of the Statute of this Court, to be deemed to be an acceptance of the compulsory jurisdiction of this Court; second, I shall consider the effect of the United States letter to the Court (the "Shultz letter" of 6 April 1984); third, the effect of the United States multilateral treaty reservation; and lastly, the position under the Friendship, Commerce and Navigation Treaty.

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## I. THE NICARAGUAN DECLARATION OF 24 SEPTEMBER 1929

The question here is whether the Nicaraguan Declaration of 24 September 1929, accepting "unconditionally" the compulsory jurisdiction of the Permanent Court of International Justice is to be counted as one coming within Article 36, paragraph 5, of the present Court's Statute.

In order to be a party to the Statute of the Permanent Court of International Justice it was necessary both to sign and to ratify the Protocol of Signature of the Statute (see *P.C.I.J., Series D, No. 6*, p. 19). Nicaragua has formally admitted in its Memorial (para. 47) that, although it was a signatory of the Protocol, it "never completed ratification of the old Protocol of Signature . . .". The finding of the Court in its Judgment is to the same effect. So Nicaragua, it must be assumed, was never a party to the Statute of the Permanent Court.

To appreciate the full significance of this failure to ratify the Protocol of Signature of the Statute of the Permanent Court of International Justice, it is necessary to examine the form and content of the instrument by which that Court was established (the most convenient reference for consulting the essential portions of them is probably *P.C.I.J., Series D, No. 5*, pp. 58-62).

A resolution, of 13 December 1920, of the First Assembly of the League of Nations, approved the Statute of the Court, prepared by the Council in accordance with Article 14 of the League of Nations Covenant, and recorded that the Statute would be submitted to Members of the League "for adoption in the form of a Protocol duly ratified and declaring their recognition of this Statute". The Statute would enter into force as soon as it had been ratified by a majority of the Members of the League. The Statute of the Court was thus integral with the Protocol, the purpose of which was precisely to be the vehicle of adoption of the Statute by Members of the League. The Protocol of Signature is dated 16 December 1920. By it, the signatories recognized the Statute of the Court. The Protocol refers to the resolution of 13 December, and provides :

"The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13 December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations ; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations."

Next it is important to realize that Article 36 of the Statute, which then as now was the jurisdictional article, contained, beginning with its second (but then unnumbered) paragraph the following clause concerning "Optional Clause" jurisdiction, which is obviously the progenitor of the present Article 36, but also somewhat differently worded, not least in its reference to joinder to the Protocol.

"The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning :

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

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction,

the matter shall be settled by the decision of the Court.” (*Collection of Texts Governing the Jurisdiction of the Court, P.C.I.J., Series D, No. 5, p. 61.*)

But in addition to the second paragraph of Article 36 there was, as part of this same instrument containing the Protocol and the Statute, and set out as a separate item, a “disposition facultative”. In other words, there was an *actual* “Optional Clause”, which parties could sign if they so desired. This of course is why one still speaks of the “Optional Clause” as a loose way of referring to jurisdiction under the present Article 36, paragraph 2, even though the actual Optional Clause is now in the past.

The *disposition facultative*, or Optional Clause, provided :

“The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions : [*Here follow the declarations made by the signatories.*”

There were thus two things normally done by a State subscribing to compulsory jurisdiction : the signing of the declaration set out in standard form in the Optional Clause, and the adding of any needed declaration saying whether the undertaking was unconditional or subject to stated reservations. In a few cases the signing of the Optional Clause itself was made by the State concerned, subject to a ratification. But this was not required <sup>1</sup>. It sufficed to sign the Clause and of course to ratify signature of the Protocol, to which both Statute and Optional Clause were joined to form the one instrument. But a State which signed and ratified the Protocol, though it became thus a party to the Statute, did not subject itself to compulsory jurisdiction unless at some time it signed the Optional Clause. Nicaragua signed the Protocol on 14 September 1929 (together with the Revision Protocol), and the signing of the Optional Clause was of course 24 September. She never, however, ratified the Protocol.

The signing of the “Optional Clause” of the Protocol and Statute of the Permanent Court was something rather different, as has been seen, from the making of a declaration under Article 36 of the Statute of the International Court of Justice. The latter declaration is a quite separate instrument which is to be deposited with the Secretary-General of the United

<sup>1</sup> See Table on page 55 of the *P.C.I.J., Series D, No. 6* : note 2 to the column for ratification of a declaration, states, “La ratification n’est en effet pas exigée par le texte de la Disposition facultative”.

Nations, "who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court".

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The question, therefore, is whether Article 36, paragraph 5, of the present Court's Statute had the effect of transferring to the new Court, Nicaragua's subscription to the Optional Clause of the Protocol of Signature and the Statute of the Permanent Court, which entire instrument required ratification ; but which was never ratified, with the admitted consequence that Nicaragua never became obligated by the compulsory jurisdiction of the Permanent Court ?

The answer would seem to be placed beyond doubt according to the English text of Article 36, paragraph 5, which is :

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

Thus the declarations which are by that provision to be deemed to be acceptances of the compulsory jurisdiction of the new Court are those "which are still in force". And since the Nicaraguan Declaration was never "in force" in respect of the old Court, it would seem to follow that it cannot be held to be "still in force" for the purposes of Article 36, paragraph 5.

Furthermore, this result is in conformity with what the preparatory work shows to have been the purpose and intention of the provision. The provision, as is well known, was the result of a British proposal made in, and accepted by, a subcommittee of the Committee of Jurists which met in Washington in 1945. The very expert subcommittee (Fahy, Fitzmaurice, Krylov, Novikov, Spiropoulos) reported as follows :

"The subcommittee calls attention to the fact that many nations have heretofore accepted compulsory jurisdiction under the 'Optional Clause'. The subcommittee believes that provision should be made at the San Francisco Conference for a special agreement for continuing these acceptances in force for the purpose of this Statute." (*UNCIO*, Vol. XIV, p. 289.)

The proposal, therefore, was to achieve the transfer, that is to say the continuity, of already existing obligations. It could hardly be expected to have been otherwise ; certainly not to create a new obligation where none existed before.

This purpose was faithfully pursued at San Francisco, where the present text of Article 36, paragraph 5, reproduced above, eventually emerged as a part of the Statute of the Court.

*The Language Question*

Article 36, paragraph 5, necessarily appears in the five equally authentic languages of the United Nations Charter, Chinese, English, French, Russian and Spanish (Art. 111). The Chinese, Russian and Spanish versions apparently translate the English formulation of the criterion of transfer, viz. "and which are still in force . . .". The French text was, of course, drafted alongside the English text at San Francisco. Nevertheless, the final version of Article 36, paragraph 5, both French and English, was proposed by the French delegation at the 19th meeting of the committee on 7 June, when the committee adopted what are now the French and English texts of the Article (*UNCIO*, Vol. XIII, pp. 485 and 486). In this final French proposal, the English "which are still in force" remained, but there was an alteration of the French version of that phrase. Since the Court's Judgment apparently finds this change in the language of the French version, significant, it is necessary briefly to examine this final variation of the French text. The change proposed by the French delegation, to the French text, was this: where the original French text used the phrase "encore en vigueur" to correspond to the English "still in force", the proposal was to substitute "pour une durée qui n'est pas encore expirée" for "encore en vigueur". According to the official report of the meeting:

"The French Representative stated that the changes suggested by him in paragraph 4 [as Art. 36, par. 5, then was] were not substantive ones, but were intended to improve the phraseology." (*Ibid.*, p. 284.)

The text, both in English and French, of Article 36, paragraph 5, was then unanimously adopted.

The statement of the French representative that the change was concerned with phraseology and was not substantive must of course be accepted. Moreover, the French proposal was introduced by the French delegation coupled with and alongside the English version using "still in force". If it were possible that the two texts were capable of different meanings, the rule in Article 33, paragraph 4, of the Vienna Convention on the Law of Treaties requires that: "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". It is not possible to reconcile this requirement with any solution which seeks to give a special meaning to the French text, which meaning cannot be collected from the Chinese, the English, the Russian and the Spanish.

It is interesting nevertheless to speculate on the question why the French delegation at San Francisco, in seeking the French equivalent of "still in force", eventually preferred "pour une durée qui n'est pas encore expirée" to the simple "en vigueur" which is used in the immediately following Article 37 of the Statute as equivalent to the English "in force" (in this case

of course referring not to declarations but to treaties) ; and, indeed, is also used in the first paragraph of Article 36.

The comparison of Article 36, paragraph 5, with Article 36, paragraph 1, and with Article 37, suggests a possible answer to the question. In Article 36, paragraph 1, which deals with treaties or conventions conferring jurisdiction on the International Court of Justice ; and in Article 37, concerning treaties and conventions providing for reference to any tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the only requirement of the treaty or convention is that it shall be "in force", "en vigueur", at the moment the question of jurisdiction arises. But Article 36, paragraph 5, is different. Whereas the key phrase of Article 36, paragraph 1, and Article 37, is "in force", the key phrase in Article 36, paragraph 5 (in the English version), is "still in force". To have used the phrase "still in force" in either Article 36, paragraph 1, or Article 37 would have been otiose. In Article 36, paragraph 5, on the other hand, the word "still" conveys, to my mind, the idea of something which *was* in force for the old Court, and is therefore to be *deemed* "still in force" for the new Court. There is thus an important difference between "in force" and "still in force".

The French delegation at San Francisco must have had some good reason for introducing their change to the French text. That reason, considering that they said the change was one of phraseology only, and considering that they proposed no change to the English text, could only have been that they considered the new French version to convey, more clearly than the original French text did, the meaning and purpose of the English "still in force". The new French version, therefore, seizes upon the notion of continuity as the essential criterion. What matters is not only that a declaration *is* "in force" in its terms, but that it *has been* in force for the old Court and was expressed for a period that continues and is still not expired. For the French version retains that important qualifying word, "encore".

One can do no more than speculate on the purpose of the change in the French text, for the records are sparse. So one is left with the rule that if there be, which I doubt, material difference between the meaning of the texts, the one which best reconciles the different language versions, all five of them that is to say, is to be preferred. For the present case at least there is no great difficulty in doing that. A declaration of acceptance of compulsory jurisdiction, which declaration never came into operation under the old Statute, certainly cannot be said, under the new Statute, to be "still in force", which is the language used in four of the versions of the Statute ; and is the meaning consonant with what was said to be the purpose of the provision, namely the carry over to the new Court of obligations created in respect of the old Court.

There is no difficulty in collecting the same meaning in the French formula : *pour une durée qui n'est pas encore expirée*. What is referred to by that formula is surely a declaration by which the compulsory jurisdiction of the Permanent Court was actually established. A declaration to which,

owing to failure to ratify the Protocol, no date of commencement of the obligation in respect of the Permanent Court could be assigned, cannot be said to be *pour une durée qui n'est pas encore expirée*. That which never began cannot be said to have had a duration at all.

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### *The Aerial Incident Case*

The meaning of Article 36, paragraph 5, is clarified by the Judgment of this Court in the *Aerial Incident* case (*I.C.J. Reports 1959*, p. 127). In that case Israel, the Applicant State, relied upon the alleged operation of Article 36, paragraph 5, in respect of Bulgaria's Declaration of 29 July 1921, which has been made unconditionally, and which had certainly come into effect in respect of the Permanent Court of International Justice because Bulgaria had indeed ratified the Protocol of Signature of the Statute of that Court. The International Court of Justice found, nevertheless, that it did not have compulsory jurisdiction under Article 36, paragraph 5, of its Statute because, by the time Bulgaria, which was not present at San Francisco, had become a member of the United Nations in 1955, the Permanent Court of International Justice had ceased to exist. Accordingly, Bulgaria's Declaration, even though stated in its terms to be unconditional and therefore without a time-limit, had, it was held, lapsed with the demise of the Court. Thus, the question asked by the Court was whether the declaration could properly be said to be "still in force" in respect to the old Court at the time when Bulgaria became subject to the Statute of the new Court, and in particular to Article 36, paragraph 5? Any notion that, for the effect of Article 36, paragraph 5, one was entitled to look merely to the terms of the declaration itself, abstracted from its status with respect to the Permanent Court, was rejected. If a declaration which had come into effect for the Permanent Court, and in its own terms was still running, was not caught by Article 36, paragraph 5, because the obligation to the old Court must have ceased when the Court itself ceased to exist, then one would suppose that, *a fortiori*, a declaration which never at any time actually created an obligation in respect of the old Court, cannot be carried over to the new Court by Article 36, paragraph 5.

There is one passage of the Judgment that is most apposite to the present case. The Court is considering the case of those States, like Bulgaria, which did not become parties to the Charter and to the Statute of the new Court, until after the dissolution of the Permanent Court.

"Accordingly, the question of the transformation of an existing obligation could no longer arise so far as they were concerned : all that could be envisaged in their case was the creation of a new obligation

binding upon them. To extend Article 36, paragraph 5, to those States would be to allow that provision to do in their case something quite different from what it did in the case of signatory States.” (*I.C.J. Reports 1959*, p. 138.)

In this passage the Court denied that there could be any possibility of Article 36, paragraph 5, creating a *new* obligation, not existing under the old Court – which is precisely what the present Judgment does in respect of Nicaragua.

For all these reasons it seems to me that to say that the effect of Article 36, paragraph 5, was to create for Nicaragua an obligation in respect of the new Court, which never in fact existed in respect of the Permanent Court, is straining the language of that Article beyond what it can bear.

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#### *The Yearbooks of the Court*

Considerable weight has been attached by Nicaragua to the fact that in all the *Yearbooks* of the present Court it has been listed among the States bound by Optional-Clause jurisdiction. The Judgment of the Court also regards the *Yearbooks* and other publications as a factor confirming its interpretation of the effect of Article 36, paragraph 5 ; if not an independent source of jurisdiction for the Court. In my view, thus to allow considerable, and even decisive, effect, to statements in the Court’s *Yearbook* is mistaken in general principle ; and is in any event not sufficiently supported by the facts in the present case.

It is to my mind wrong in principle because the Court should always distinguish between its administrative functions – including the compilation of the *Yearbook* by the Registrar on the Court’s instructions – and its judicial functions. When there is a dispute between States as to the Court’s jurisdiction, that dispute may be, as in the present case, submitted to the Court for determination in its judicial capacity. To hold, after the exchange of voluminous written pleadings and after two rounds of oral proceedings, that the matter was, before all this, virtually settled as a result of the action of the Registrar acting on behalf of the Court in its administrative capacity, and without benefit of judicial argument and procedure, is not free from an element of absurdity. For the Court’s administrative organization to make some necessary assessment of a legal question for purposes of an annually published reference book ; and for the full Court in its judicial capacity, after its full judicial procedure, including hearing arguments of both parties, to make a decision on the same matter ; are two entirely different things which should never be confused.

It is of course to prevent any such confusion that every *Yearbook* is



prefaced by the following warning and disclaimer in the general "Preface" to the volume. In the first *Yearbook* (1946-1947) it read :

"It is to be understood that the *Yearbook* of the International Court of Justice is prepared and published by the Registrar and in no way involves the responsibility of the Court."

Later *Yearbooks* somewhat expanded the disclaimer typically as follows :

"The *Yearbook* is prepared by the Registry and in no way involves the responsibility of the Court ; in particular, the summaries of judgments, advisory opinions and orders contained in Chapter VI cannot be quoted against the actual texts of those judgments, advisory opinions and orders and do not constitute an interpretation of them."

For the Court, nevertheless, to attach important legal consequences to entries in the *Yearbook* is to destroy the clear effect of the disclaimer ; as well as, in my view, being wrong in principle.

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But even apart from the objections of principle, the *Yearbooks* do not at all yield any certain message on the status of the Nicaraguan declaration ; on the contrary they consistently – each one of them – alert the attentive reader to the existence of doubts.

The first *Yearbook* is that for 1946-1947. There are two entries concerning Nicaragua. First, there is a part giving the actual text of "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) <sup>1</sup>. In this section, on page 210 (p. 206 of the French edition) the actual text of the Nicaraguan Declaration of 24 September 1929 is set out verbatim, and with a reference to a footnote which reads :

"According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. Notification concerning the deposit of the said instrument has not, however, been received by the Registry."

This then was the *Yearbook* in which the actual text of the Nicaraguan

<sup>1</sup> The use in this heading of the phrase "still bound" ("encore liés" in the French version), far from lending support to Nicaragua's reliance on the *Yearbooks*, shows why successive Registrars had doubts whether Nicaragua should have been listed or not.

Declaration was to be found, the practice of the following *Yearbooks* being to give a reference back for those who wished to consult the text.

The second entry for Nicaragua in this same *Yearbook 1946-1947* is in the complete list (which also features in subsequent *Yearbooks*), of Optional-Clause States. In this list the date and conditions of the State's acceptance are set out, but not the actual text of the communication. In the *Yearbook 1946-1947* list, Nicaragua appears, in its alphabetical order, on page 226, as having made an "unconditional" declaration on "24 IX 29". There is, however, a footnote giving a reference back to page 210 for the actual text of the declaration. The whole of this list appears under the bold-letter heading :

"List of States which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by the 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)."

Thus, one certain message that can be collected from these *Yearbooks* (for the same heading continues through several subsequent volumes) is that the Registrars at least understood the "still in force" of Article 36, paragraph 5, as being equivalent to "still bound".

The *Yearbooks* from 1947-1948 to 1954-1955, in accord with the normal *Yearbook* practice, simply reproduced this Nicaraguan entry in the list in exactly the same form as in the *Yearbook 1946-1947*. Nicaragua seemed to attach some importance to the absence in these subsequent volumes of the footnote about the non-receipt in Geneva of any Nicaraguan instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice. But as mentioned above that note did not appear either, in the *Yearbook 1946-1947* in its list and summary of declarations ; it appeared where the actual text of the Nicaraguan declaration was reproduced. Furthermore there is also in all these *Yearbooks* between 1947-1948 and 1954-1955, at the beginning of the "instruments" section, a list of States having made declarations. Nicaragua is included in that list, always with a reference back to page 210 (p. 206 of the French version) of the *Yearbook 1946-1947* for the text of the declaration where of course the warning footnote is to be found. So it is not the position that in this series of seven *Yearbooks* there is nothing to suggest any doubt about the Nicaraguan declaration : on the contrary, the careful reader is always guided back to the text of the declaration in the *Yearbook 1947-1948*, and there he finds the cautionary footnote.

From the *Yearbook* of 1955-1956 onwards there is a change. There is again the same list of States which refers the reader back to page 210 of the

*Yearbook 1946-1947* and its footnote. The change is in the summary list of States "which are still bound by their declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice". There Nicaragua now appears with a new footnote, which however reproduces the 1946-1947 footnote with a change in the second sentence making it rather stronger. The whole note reads :

"According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations."

Thus from 1955-1956 onwards, the reader was warned in two places about the doubts : first by the usual reference back, in the introductory list of Optional-Clause States, to the text of the declaration in the 1946-1947 volume, with its cautionary footnote, and second by a new note for the Nicaraguan entry in the summary of declarations of States "which are still bound by their declarations accepting the compulsory jurisdiction of the Permanent Court of International Justice", which note reinforces the original note.

There is also another caution to the careful reader. Thus, for example, on page 207 of *Yearbook 1956-1957* we find the following very important note :

"The texts of declarations set out in this Chapter are reproduced for convenience of reference only. The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry or, *a fortiori*, by the Court, regarding the nature, scope or validity of the instrument in question."

This twofold reference to cautionary notes could have been prompted by the Registrar, as we know from the Pleadings of the Parties, having had letters of inquiry from Professor Manley Hudson, who was then advising Honduras about the issue which later came before this Court in the *Arbitral Award Made by the King of Spain* case (*I.C.J. Reports 1960*, p. 192 ; Professor Hudson, who died in 1960, did not survive to take part as counsel in the case, however). But the new note might also have been in anticipation of the new format of the *Yearbook* entries from 1956-1957 onwards, by which there were no longer two lists of these States, one for Article 36, paragraph 2, declarations and one for Article 36, paragraph 5 ; but only one general section in which the texts of the instruments are reproduced. There is thus, after 1956-1957 up to and including the latest *Yearbook*, no need for a list referring back to the *Yearbook* in which the text of a declaration is reproduced, because in the new format the text is to be found

set out *each* year in this section ; it was, therefore, essential that the note warning of the doubts about the status of Nicaragua's declaration should appear against its entry in this, now, single list ; as, indeed, it invariably does.

The point needs to be made with emphasis that the successive Registrars who compiled the *Yearbook*, which as the Preface says in every *Yearbook*, "in no way involves the responsibility of the Court"<sup>1</sup>, acted in the only correct way in simply stating the facts and making no attempt to purport to decide Nicaragua's status one way or the other ; this would have been for the Registrar to act *ultra vires*. Thus in every *Yearbook* the more than casual reader is led to the fact that a Nicaraguan ratification of the Protocol of Signature of the Statute of the Permanent Court appeared not to have been received at the League of Nations. The Registrar could not have done more or less without exceeding his authority. He had simply to inform the reader that there was indeed a Nicaraguan declaration of acceptance of compulsory jurisdiction and to add notice of the fact that the necessary ratification of the Protocol had not been received. The disclaimer note cited above warns that the *Yearbook* entry is not to be regarded as involving even the Registrar's own views. For the Court now to give such weight to these entries is indeed startling. It is contrary to principle. It is at odds with the notices of disclaimer in each *Yearbook*, usually in more than one place. It is in any event not supported by any more than a superficial reading of the *Yearbook* entries.

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Other publications, mainly governmental collections of treaties, were mentioned by Nicaragua ; but these almost certainly use the *Yearbook* as their source and usually say so. The ancillary notion that the Court is in some way bound by the inclusion of Nicaragua in the list of States accepting compulsory jurisdiction in the Court's *Annual Reports* to the General Assembly, can be dealt with shortly. It is an astonishing proposition that the result of a full adjudication of a difficult legal question, can be in some way foreclosed by a list in routine reports made by the Court in its administrative capacity. The purpose of that part of the *Reports* is to give the General Assembly a more or less accurate idea of the state of the Optional-Clause jurisdiction from time to time ; it is certainly not to prejudice, much less to decide, a dispute between Nicaragua and the

<sup>1</sup> These introductory remarks signed personally by the Registrar ceased to have the heading "Preface" with the 1961-1962 volume. They are always, however, printed on a separate page immediately following the title-page.

United States. The whole list is in two short paragraphs, pointing out that a number of States have made reservations, but with no indication which, or the nature of any reservations. For those who wish to know more, it gives a reference to the *Yearbook*. Nobody should be able to fall into the error of supposing the list definitive. Nobody concerned with the law involved in the present case would regard it as other than difficult ; it would be extraordinary to allow its decision to be prejudiced by a side-wind from a routine, administrative report.

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## II. THE LETTER OF 6 APRIL 1984 FROM SECRETARY OF STATE SHULTZ

Since in my opinion Article 36, paragraph 5, of the Court's Statute is not applicable to Nicaragua's 1929 Declaration, and since, accordingly, Nicaragua does not in my view have standing to prosecute this case before the Court without the special agreement of the United States, there is strictly no need to consider any of the other matters in contention between the Parties. As, however, the Court has decided that it has jurisdiction under Article 36, paragraph 2, it may be convenient briefly to indicate my own view upon the effect of the Shultz letter, as well as of the effect of the United States multilateral treaties reservation. The text of the letter of 6 April 1984 from Secretary of State Shultz is as follows :

"I have the honor on behalf of the Government of the United States of America to refer to the Declaration of my Government of August 26, 1946, concerning the acceptance by the United States of America of the compulsory jurisdiction of the International Court of Justice, and to state that the aforesaid declaration shall not apply to disputes with any Central American state or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."

This raises many questions, but perhaps the most important one — certainly from the point of view of the general law governing Optional-

Clause acceptances — is the effect in law of the manifest contradiction between the 1946 United States Declaration of acceptance of compulsory jurisdiction for “five years and thereafter subject to six months’ notice”, and the Shultz letter, which is expressed to take effect immediately and to remain in force for two years, notwithstanding the terms of the 1946 Declaration.

Before attempting to answer this question, it may be useful to make two preliminary observations. First, the discussion in the oral proceedings of whether or not the legal position of declarations under the Optional Clause is, or is not, governed by the law of treaties, I found not entirely helpful and in any event inconclusive. The fact of the matter must surely be that the Optional-Clause régime is *sui generis*. Doubtless some parts of the law of treaties may be applied by useful analogy ; but so may the law governing unilateral declarations ; and so, most certainly, may the law deriving from the practice of States in respect of such declarations.

The second preliminary observation is that I do not think one need spend much time on the somewhat theoretical question whether the Shultz letter amounts to a modification or a substitution of the 1946 Declaration. The major problems of principle would apply to either. (See also *Right of Passage over Indian Territory, Preliminary Objections, I.C.J. Reports 1957*, pp. 143-144.) It looks on the face of it like a modification since the original declaration is untouched for most States and disputes and there seems to be neither reason nor profit in attempting to go behind the United States own assertion that it was not intended as a withdrawal, but as a temporary modification or partial suspension.

Coming now to the question of the contradiction between the terms *ratione temporis* of the 1946 Declaration, and the terms of the Shultz letter, it is of course established law — the so-called rule in the *Nottebohm* case (*I.C.J. Reports 1953*, p. 123) — that the critical moment for the determination whether or not there is jurisdiction in respect of a particular case, is the moment when the Court becomes seised of that case, which is the moment of seisin. In consequence of this rule it is not possible in law for a government effectively to change its declaration, after seisin, in any way that might purport to deprive the Court of jurisdiction. Thus, in the *Right of Passage over Indian Territory* case (*I.C.J. Reports 1957*, p. 142) the Court said :

“It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration, in whole or in part, cannot divest the Court of jurisdiction.”

But the problem in the present case is quite different : it is whether a

government can lawfully and effectively change the terms of its declaration before seisin ; in the present case, indeed, only hours before seisin and in direct contemplation of the particular case of which the Court is seised. This question seems to be, for the Court, a matter *prima impressionis* ; though it is naturally one that has attracted the attention of commentators.

Obviously, the making of a declaration under the Optional Clause establishes some sort of relationship with other States that have made declarations ; although it is not easy to say what kind of legal relationship it is. It is a relationship created by a great variety of unilateral declarations, all having, however, the common element of being made within the framework of Article 36, paragraph 2, of the Court's Statute. The declarations are statements of intention ; and statements of intention made in a quite formal way. Obviously, however, they do not amount to treaties or contracts ; or, at least, if one says they are treaties, or contracts, one immediately has to go on to say they are a special kind of treaty, or contract, partaking only of some of the rules normally applicable to such matters. Thus, however one starts, one ends by treating them as more or less *sui generis*. In short, it seems to me that, interesting as it might be to speculate about the juridical taxonomy of Optional-Clause declarations, it is better to begin the inquiry not from a label but from the actual practice and expectation of States today.

Law develops by precedent, and it is that which gives it consistency and predictability. But legal precedents like any other must be seen in the light of history and of changing times. In the period of the Permanent Court and even in 1946 when the United States Declaration was made, an important proportion of States had subscribed to the Optional-Clause system. Today that is no longer the case. The Optional-Clause States are distinctly in the minority and very many of the most important and powerful States have not accepted compulsory jurisdiction and show little indication of any ambition to do so. Any assessment of the position in contemporary practice must take into account the position of this majority of States which do not subscribe to the Optional-Clause system. It is well described by Waldock in his well-known article :

“A State which is a party to the Statute of the Court but does not make a declaration under the Optional Clause is in a highly favoured position. Acceptance of the Statute by itself carries no liability to appear in front of the Court in a contentious case at the suit of another State. Before it can come under any liability to appear as defendant in a case, a State must specifically have accepted the Court's contentious jurisdiction either by treaty or by unilateral declaration under the Optional Clause. On the other hand, the mere fact that a State is a party to the Statute gives it the power, under the Optional Clause, at any moment to put itself into the position of being able instantly to

bring before the Court any States which have already subscribed to the Optional Clause in any case covered by the terms of their declarations. Being a party to the Statute, it has the right under the Optional Clause at any time and without reference to any other State to make a declaration recognizing the compulsory jurisdiction of the Court in relation to States which also subscribe to the Optional Clause . . .

There is, in consequence, a glaring inequality in the position of a State which does and a State which does not make a declaration under the Optional Clause. The former State, for practical purposes, is continuously liable to be brought before the Court compulsorily at the suit of the latter, whereas the latter is not liable to be brought before the Court at the suit of the former unless and until it chooses to initiate proceedings before the Court as plaintiff and makes a declaration under the Optional Clause *ad hoc* expressly for that purpose.” (*BYBIL*, 1955-1956, pp. 244 ff., at p. 280.)

It is, therefore, at least in part in the light of what Waldock goes on to call “this fundamental lack of reciprocity between the positions of States which do and States which do not make declarations”, that the answer to the question of the legal effect of declarations should be given. It is this position of inequality and lack of reciprocity that has inevitably produced reservations by which the declarant State can withdraw or alter a declaration with immediate effect. Even so there remains inequality with those States which have chosen not to make any declaration at all. In this climate it would in my view be as impracticable as it would be inequitable to hold that a State whose declaration, like that of the United States, is expressed as subject to six months’ notice, is bound by that statement of intention in respect of all comers, including those very many States which have declined to risk even a potential liability to jurisdiction ; though it is of course bound once an application has been made.

A solution which has the attraction of compromise is a novel application to relations even before seisin of the principle of reciprocity. This is the solution which was espoused by the United States in its argument before the Court. It has the merit of involving a principle – the idea of States “accepting the same obligation” – which is written into the express terms of Article 36, paragraph 2, itself, and which all previous practice and doctrine has regarded as the very basis and justification of the Optional-Clause system.

This reciprocity test applied before seisin would presumably mean that if one took, for example, the relationship of a State A with a declaration subject to 12 months’ notice of cesser, and a State B with a declaration subject to 6 months’ notice of cesser, State A would be entitled to give 6 months’ notice of cesser as against State B ; though it is not easy to imagine



circumstances in which State A would be much benefited by indulging this right. There would, however, be obvious practical benefits where State B has reserved the right to withdraw or alter at any time ; for then State A would be able to justify, in relation to State B, a withdrawal with immediate effect, presumably even when made in face of an anticipated application by State B. This is the way in which the United States thought it should be applied in the present case ; though their argument needs the further proposition that Nicaragua's "unconditional" declaration is one which could itself be withdrawn or altered at any time with immediate effect.

Leaving on one side for the moment whether or not it would in the present case have the particular result for which the United States contends, it may be accepted that some such application of a doctrine of pre-seisin reciprocity is a possible and practicable solution of the problem, that has considerable attraction.

The idea of applying reciprocity before seisin rather than after – or rather *at* seisin – is, however, not free from difficulty and would be something of an innovation. At seisin there are three factors, not two, which enter into the calculation whether or not the Court has jurisdiction ; there are the terms of the declarations of the two States concerned, but there is also the terms of the application in the case. It is the latter which makes practicable the search for a coincidence between the two declarations ; and makes it practicable because the necessary coincidence is limited to coincidence in respect of the subject-matter of the application. As the Court said in the *Right of Passage over Indian Territory* case :

“When a case is submitted to the Court, it is always possible to ascertain what are, at the moment, the reciprocal obligations of the Parties in accordance with their respective Declaration.” (*I.C.J. Reports 1957*, p. 143.)

It is almost an implication of this dictum that it is not possible to make that ascertainment other than at the moment when a case is submitted to the Court ; at any rate not in quite the same way. Moreover, in that case, the Court apparently saw no objection to the existence of a degree of uncertainty in the reciprocal rights and obligations before an application has been made (*ibid.*, p. 143).

Nevertheless, what is sought to be “ascertained” at seisin – namely jurisdiction in respect of the subject-matter of the application – is quite different from what is in issue here : namely whether, or to what extent, a State can withdraw or alter its declaration, contrary to the terms of the declaration, before seisin. The situation is materially different in respect of the very question at issue, for whereas after seisin even the most flexible declaration may not be altered in its impact on the case, there are, even on

the strictest view, at least *some* possibilities of changing a declaration before seisin ; for example, in accordance with the declaration's own terms.

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The conclusion I have come to, however, is that, attractive as the device of reciprocity might be for solving this problem, the fact is that the practice of States – certainly the recent practice of States – has already gone beyond it. I believe there is ample evidence that States belonging to the Optional-Clause system have now generally the expectation that they can lawfully withdraw or alter their declarations of acceptance at will, provided only that this is done before seisin. Certainly there is no lack of precedents where this has been done without effective protest, and, in recent cases, without any protest whatsoever. It is necessary, however, briefly to mention certain aspects of this modern practice.

The instances of changes to declarations made by certain States before the Second World War (Colombia, 1936 ; Paraguay, 1938 ; and Australia, Canada, France, India, New Zealand, South Africa ; and the United Kingdom in 1939) are only remotely relevant to the issue before the Court. At that time the international community of States was relatively very small, and a very important majority of those States were parties to the Optional-Clause system so that there was not the present inequality and lack of reciprocity with a large body of States who are not parties. Perhaps the only important point to notice about these early instances is that such relatively few protests as were made were entirely ineffectual and the altered declarations were left intact.

Of the very considerable body of practice in more recent times, in many ways the most significant aspect is the number (in relation, that is, to the number of States with Optional-Clause declarations) of States that now have declarations which expressly reserve a right to withdraw or modify with immediate effect. The existence of this right was recognized by the Court in the *Right of Passage over Indian Territory* case, when it speaks of

“the right claimed by many Signatories of the Optional Clause, including India, to terminate their Declarations of Acceptance by simple notification without any obligatory period of notice” (*I.C.J. Reports 1957*, p. 143).

It appears that no less than 15 declarations now reserve the right to modify with immediate effect : Australia, Botswana, Canada, El Salvador, Kenya, Malawi, Malta, Mauritius, New Zealand, Norway, Portugal, Somalia, Swaziland, Togo and the United Kingdom. This is almost a third of the declarations now existing. It might perhaps be argued that this only shows that a right of immediate change may be expressly reserved ; for, ob-

viously, since a State need not accept compulsory jurisdiction at all, it may accept compulsory jurisdiction subject to conditions, including even a power of instant denunciation. But it is equally arguable that, given now so many express reservations of a right of immediate denunciation or modification, the express stipulation made in a unilateral and voluntary declaration is inserted to make the position clear, or in order to recite modalities of withdrawal or alteration ; and that this body of practice supports the proposition that the right is now, whatever may have been the position at an earlier period, one generally available.

In many ways the most striking of the examples of States claiming such a right are the withdrawals or modifications by those States, which, often without having expressly reserved such a right, have made the change with immediate effect and with the obvious intention – as in the present case – or frustrating an anticipated case, or a class of cases. There are no less than 11 instances of modifications made in the absence of any expressly reserved right to do so ; three examples have been provided by the United Kingdom (2 June 1955 ; 31 October 1955 ; 18 April 1957) ; France has produced two examples (10 July 1959 ; 20 May 1966) ; other States that have resorted to this device, once, are Australia, on 6 February 1954 ; South Africa, 13 September 1955 ; Canada, 7 April 1970 ; Philippines, 18 January 1972 ; India, 18 April 1974. Six of these were certainly in order to avoid applications on subjects which the State concerned wished to avoid litigating. The Australian modification of 1954, for example, was made to frustrate a possible Japanese application regarding pearl fisheries in the seas between Australia and Japan. The United Kingdom twice narrowed the scope of its declaration ; once specifically to avoid an application over its dispute with Saudi Arabia over the Buraimi Oasis (after the breakdown of the attempted arbitration). Canada's new reservation to its declaration in 1970 was specifically to avoid any application questioning the lawfulness of Canada's 1970 legislation establishing an anti-pollution zone of claimed Canadian jurisdiction extending 100 miles off its northern coast into Arctic waters. The Prime Minister of Canada stated to the press that,

“it was important to make the reservation the moment we introduced the law for fear that at any moment there may be some litigation begun which we would be too late to withdraw from” (*ILM*, 9-600).

In none of these cases was there a formal protest which questioned the right of an exclusory modification with immediate effect and in the absence of an expressly reserved right to modify. In the Canadian case, the United States vigorously protested the lawfulness of the Canadian legislation. Yet far from denying Canada's right to modify its Optional-Clause acceptance, the United States accepted its effect. A Press Release of 15 April 1970 (No.

121), setting out a "Department of State Statement on Government of Canada's Bills on Limits of the Territorial Sea", contains the following passage:

"If, however, the Canadian Government is unwilling to await international agreement, we have urged that in the interest of avoiding a continuing dispute and undermining our efforts to achieve international agreement, that we submit our differences regarding pollution and exclusive fisheries jurisdiction beyond 12 miles to the International Court of Justice, the forum where disputes of this nature should rightfully be settled. *Canada's action last week excluded such disputes from its acceptance of the International Court's compulsory jurisdiction. However, such action only prevents Canada from being forced into the Court.* It does not preclude Canada voluntarily joining with us in submitting these disputes to the Court or an appropriate chamber of the Court." (*ILM*, 9-606 ; emphasis supplied.)

There are other well-known instances of modifications such as El Salvador's 1973 change in its 1921 Declaration, which was protested by Honduras but by no other State ; and Israel's 1984 modification of its declaration, which declaration provided for denunciation but not for modification. This is an impressive body of practice, considering the present total "constituency" of the Optional Clause is but 47.

Another relevant consideration is certainly the labours of the International Law Commission in its work on the law of treaties, and its view reached, after careful investigation, that treaties of arbitration, conciliation or judicial settlement are amongst those which, even in the absence of a denunciation clause, are by reason of the nature of the treaty, terminable by notice. Such treaties are of course quite different in their legal nature from the Optional-Clause system. But the significant point is that Sir Humphrey Waldock, the distinguished Special Rapporteur on the law of treaties, in examining the position of such treaties, argued *from* the analogy of the Optional-Clause system. He said :

"Taken as a whole, State practice under the Optional Clause, and especially the modern trend toward declarations terminable upon notice, seem only to reinforce the clear conclusion to be drawn from treaties of arbitration, conciliation and judicial settlement, that these treaties are regarded as essentially of a terminable character." (*ILC Yearbook*, 1963, Vol. 2, p. 68.)

In face of the unmistakable trend of recent developments, I feel bound to conclude that States now – though the position was probably different during the earlier, more promising period of the Optional Clause jurisdiction – have the right, before seisin of the Court, to withdraw or alter their declarations of acceptance, with immediate effect, and, moreover, even in anticipation of a particular case or class of cases. If this is so, then it follows that the Shultz letter was effective to deprive the Court of jurisdiction under Article 36, paragraph 2, of the Court's Statute.

It remains to add that, if the above view of State practice and expectation is correct, it must also follow that Nicaragua's "unconditional" declaration could also be withdrawn or altered at any time before seisin. Indeed I should be constrained to this view even applying the terms of the Nicaraguan declaration itself : for it is impossible to believe that an unconditional declaration is made in perpetuity. A declaration that is made for an indefinite period, without other condition, is surely one that can at any time be made definite. And although a need to give notice of withdrawal or alteration is implied, it is impossible in the light of modern practice in these matters to deny that the notice may be expressed to have immediate effect. The practice of the States that have accepted Optional-Clause jurisdiction suggests strongly that notice with immediate effect is reasonable notice. Accordingly if, contrary to my own inclination, some sort of rule of reciprocity, in the matter of notice of change or withdrawal, were to be applied to relations between Optional-Clause States before seisin, my answer to the case of Nicaragua would be the same.

It is necessary to add one further and final point about the effect of the letter of 6 April 1984. Any doubt in a case of this kind should in principle be resolved in favour of a respondent State denying jurisdiction. As this Court has pronounced on a former occasion :

“Finally, if any doubt remained, the Court, in order to interpret Article 36, paragraph 5, should consider it in its context and bearing in mind the general scheme of the Charter and the Statute which founds the jurisdiction of the Court on the consent of States. It should, as it said in the case of the *Monetary Gold Removed from Rome in 1943*, be careful not to ‘run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent’ (*I.C.J. Reports 1954*, p. 32).” (*Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Judgment, *I.C.J. Reports 1959*, p. 142.)

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### III. THE UNITED STATES MULTILATERAL TREATIES RESERVATION

The United States has pleaded the third of the reservations made to its Declaration of 26 August 1946, sometimes called the multilateral treaties reservation and sometimes the Vandenberg Reservation. It reserves from jurisdiction :

“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 jurisdiction”.

The reservation is important in more than the context of the present case, for it served as the paradigm for reservations later made by other countries ; some of them, however, simpler in that they are less qualified, but by the same token wider in their effect.

I am unable to accept the argument, nor indeed does the Court appear to accept, that this reservation is “mere surplusage”, and that it does no more than protect the interests of absent States already protected by Article 59 of the Statute. No doubt both that Article and the reservation are concerned with States not parties to the case ; but I am unable to see how an instrument which protects those States from being bound by the decision can be said to cover the same ground as one which reserves jurisdiction unless those States *are* parties.

The meaning of the words, “unless all parties to the treaty . . . are also parties to the case before the Court”, could hardly be plainer. The prospect of perhaps some scores of parties to a case may be bizarre ; but a State is clearly entitled to make such a reservation, and the practical result is, no jurisdiction in the absence of special agreement. There can be no doubt, for example, that a State may, if it so desires, reserve against any case whatsoever involving a treaty to which it is party.

The principal, though certainly not the only, difficulty with the United States multilateral treaty reservation, is the qualifying words, “affected by the decision”. But the difficulty is one of interpretation ; and it is one not very different from the one faced in applications to intervene under Article 62 of the Statute. In any event, if the reservation may be made without such a qualification, it may surely be made subject to a qualification which on any view of its meaning must be a considerable qualification. As to the possible suggestion that the difficulty of establishing the right meaning of those words makes the whole reservation so vague that it can be discarded : this immediately runs into the difficulty that it would then have to be considered whether, since the reservation might not be severable, it might render the entire United States acceptance void ; in which case there would clearly be no jurisdiction under Article 36, paragraph 2, and the other aspects of this question need hardly have been considered at all (see the

individual opinion of Judge Sir Hersch Lauterpacht in *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, pp. 9 ff., at p. 34, and especially, pp. 55 ff.).

It is, however, possible to exaggerate the difficulties of the phrase, "affected by the decision". The United States has indicated which States it believes are affected ; and, having regard to the United States argument based upon the proposition of collective self-defence, it cannot be said that this interpretation of the reservation is manifestly an impossible one.

But Nicaragua has in turn made the very important, and very interesting, counter-argument that its case as stated in the Application is based upon customary law as well as, perhaps as much as, upon multilateral treaty law. This raises some fundamental questions about the nature of international law, and its sources ; which is to say that it is a matter of substance. I fail to see how this question could be fully considered at the present stage of proceedings. I am, therefore, in agreement with the Court that the argument based on the multilateral treaties reservation is one which at this stage should, in the words of Article 79, paragraph 7, of the Court's Rules, be neither upheld nor rejected, but declared to be an objection which "does not possess, in the circumstances of the case, an exclusively preliminary character" ; and should be dealt with accordingly in the "further proceedings" for which the Court will presumably now proceed to "fix time-limits" in accordance with that paragraph of Rule 79.

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#### IV. THE FRIENDSHIP, COMMERCE AND NAVIGATION TREATY OF 21 JANUARY 1956

Nicaragua, in its Memorial, has alleged breach by the United States of several articles of this treaty, which is in force : Articles I ; XIV (2) ; XVII (3) ; XX ; XIX (1) and (3) ; and XXI (2). Nicaragua adds that : "The proof of these violations must await the proceedings on the merits." There is a jurisdiction clause in Article XXIV (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."

This jurisdiction clause is, as a matter of fact, the same, word for word, as Article XXI (2) of the Treaty of Amity, Economic Relations, and Consular

Rights of 1955 between the United States and Iran, on which this Court relied in the *United States Diplomatic and Consular Staff in Tehran* case (*I.C.J. Reports 1980*, p. 26, para. 50). There the Iranian Government had refused "to enter into any discussion of the matter". In consequence, said the Court, there existed

"not only a dispute but, beyond any doubt, a 'dispute . . . not satisfactorily adjusted by diplomacy' within the meaning of Article XXI (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" (*ibid.*, p. 27, para. 51).

In the present case, the United States claims that Nicaragua has made no attempt to settle the matters, the subject of the application, by diplomacy. But the qualifying clause in question merely requires that the dispute be one "not satisfactorily adjusted by diplomacy". Expressed thus, in a purely negative form, it is not an exigent requirement. It seems indeed to be cogently arguable that all that is required is, as the clause precisely states, that the claims have not in fact already been "adjusted" by diplomacy. In short it appears to be intended to do no more than to ensure that disputes that have already been adequately dealt with by diplomacy, should not be reopened before the Court. However that may be, the facts in the present case disclose that Nicaragua brought the subject of the application before the Security Council, where they were met with the United States exercising its veto. The United Nations Organization, not least the Security Council, must now surely be an orthodox forum for diplomacy. It would seem, therefore, that the requirements of Article XXIV are most fully met in this matter.

A crucial aspect for present purposes of the Judgment in the *United States Diplomatic and Consular Staff in Tehran* case, however, is the decision that, whilst the jurisdictional article did not provide in express terms that either party might bring a case to the Court by unilateral application, "it is evident, as the United States contended in its Memorial, that this is what the parties intended" (*ibid.*). Since the jurisdictional clauses in the two treaties, the one with Iran and the one with Nicaragua, are identical, the same conclusion must apply in the present case.

As to making good these allegations, and demonstrating that they cover some, certainly not all, of the content of the Application: this, as Nicaragua itself has said, "must await the proceedings on the merits".

Accordingly, although I must dissent on the question of jurisdiction under Article 36, paragraph 2 and paragraph 5, of the Court's Statute, I am in agreement with the Court that it does have jurisdiction over the Application in so far as it may involve the question of alleged breaches of the



Treaty of Friendship, Commerce and Navigation of 1956. Moreover, since the Treaty is bilateral, this jurisdiction would not involve any effect of the United States multilateral treaties reservation. It may be a question how far Nicaragua would be able to bring the series of allegations which form the gravamen of its Application within the framework of what is essentially the normal form of commercial treaty ; more particularly because of the possible effect of the "preclusion" provisions of Article XXI, which, *inter alia*, provides that the Treaty "shall not preclude" the application of measures :

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

On the other hand, Nicaragua has itself made clear that it believes that important aspects of the Application can be brought within the scope of the Treaty ; so jurisdiction under Article XXIV of the Treaty is not unimportant.

For the exercise of jurisdiction over allegations of breaches of specific provisions of the Treaty, no questions of admissibility appear to arise. And since in my view the Court does not have jurisdiction in any respect other than under the Treaty, there is no need to consider the difficult questions of admissibility further, at this stage.

(Signed) Robert Y. JENNINGS.

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