SEPARATE OPINION OF JUDGE ODA

1. When considering the jurisdiction of the International Court of Justice in contentious cases, I take as my point of departure the conviction that the Court's jurisdiction must rest upon the free will of sovereign States, clearly and categorically expressed, to grant to the Court the competence to settle the dispute in question. In the present case the Court may have reason to interpret the wording of Article XXXI of the Pact of Bogotá as conferring compulsory jurisdiction upon it, particularly in view of the fact that some States, like the United States and El Salvador, have also construed it in this way, whether explicitly or by implication, when evincing their respective positions in relation to the Pact. I accordingly voted in favour of the first part of the Judgment, but I did so with some reluctance. This reluctance derives from my doubts as to whether the Pact of Bogotá may not be interpreted differently, owing to the equivocal drafting of its text, and whether the American States, in adopting the Pact of Bogotá in 1948, actually might not have intended it to confer compulsory jurisdiction upon the Court. I feel that it is right for me to express my reservations, which are the following.

I

2. The Court bases its jurisdiction in the present case solely on Article XXXI of the Pact of Bogotá. It finds that

> "the commitment in Article XXXI of the Pact is independent of such declarations of acceptance of compulsory jurisdiction as may have been made under Article 36, paragraph 2, of the Statute and deposited with the United Nations Secretary-General pursuant to paragraph 4 of that same Article" (para. 41),

and that Article XXXI, which "of itself constitutes acceptance of the Court's jurisdiction" (para. 32), "relates to cases in which the Court can be seised directly" (para. 47). The Court refrains from suggesting expressly that this particular provision is one by which its jurisdiction is conferred in terms of Article 36, paragraph 1, yet denies that Article XXXI is to be regarded as a declaration of acceptance of compulsory jurisdiction under Article 36, paragraph 2, of the Statute.

Turning to Article XXXII, the Court states that it provides for a way of access to the Court that is distinct from that of Article XXXI (para. 47). While characterizing Article XXXII as a provision "refer[ring] expressly

to the jurisdiction which the Court has under Article 36, paragraph 1, of the Statute" (para. 45), it holds that under that provision "the parties have, in general terms, an entitlement to have recourse to the Court in cases where there has been an unsuccessful conciliation" *(ibid.),* and that it relates to "those [cases] in which the parties initially resort to conciliation" (para. 47). The Court concludes that "Articles XXXI and XXXII provide for two distinct ways by which access may be had to the Court" *(ibid.).* At any rate, Article XXXII is deemed, in the Judgment, to be irrelevant in the present case.

3. In both the written and the oral proceedings Honduras presented an interpretation quite contrary to that arrived at by the Court. An interpretation similar to that of Honduras, and equally different from the Court's position, is also to be found in the official or semi-official publications of the Organization of American States.

In his report on the Ninth International Conference (Bogotá) of American States that was presented to the Council of the Organization of American States in November 1948, Mr. Alberto Lleras, the Secretary-General of the Organization of American States, stated that:

> "the Treaty provides for a logical system of measures for pacific settlement from among which the States may choose; but if their application does not lead to a solution and the conciliatory stage expires without agreement by the parties to submit the matter to arbitration, any one of the parties is entitled to appeal to the International Court of Justice, which has compulsory jurisdiction under Article 36 of its Statute.
>
> . . . . . .
>
> The procedures are not given in the Treaty in any order of preference, and the parties may select the one they consider most appropriate in each case, without being under obligation to utilize all the procedures. It might occur, for example, that from the time of disruption of direct negotiations in a given case there might be agreement to submit the dispute to arbitration or to the International Court of Justice, without resorting to conciliation or good offices and mediation. All these procedures presuppose agreement between the parties having recourse to them. But should the conciliatory stage pass without producing results — either because one of the parties was opposed or because no agreement could be reached — then judicial procedure becomes compulsory if one of the parties appeals to the International Court of Justice." (*Annals of the Organization of American States,* Vol. I, No. 1, pp. 48-49.)

Dr. F. V. García-Amador, who was formerly the Director of the Department of Legal Affairs of the Organization of American States, incorporated these passages into his annotated book, *The Inter-American System,* which was published in 1983 (Vol. I, Part 2, p. 231).

Another book with the same title, *The Inter-American System,* was

published in 1966 by the Inter-American Institute of International Legal Studies, of which the Secretary-General was Dr. García-Amador. It contained the statement that:

> "The new system established obligatory judicial settlement as the definitive method for the solution of controversies. . . . [I]t should be pointed out, above all, that by virtue of Article XXXI the High Contracting Parties 'declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto,* without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning . . .' There follow the four categories of disputes listed in paragraph 2 of Article 36 of the Statute of the International Court of Justice. In this sense, the pact itself constitutes an unconditional declaration of the type foreseen in that article.
>
> The foregoing notwithstanding, the compulsory nature of the judicial settlement is subject, to be precise, to the fact that the conciliation 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 (Art. XXXII)." (Pp. 78-79.)

These authoritative interpretations of the Pact of Bogotá, which are in themselves somewhat confusing and ambiguous, strike one as contrary in certain respects to what the Court concludes in its Judgment. It may be asked whether the interpretations presented in the official or semi-official documents of the Organization of American States were ill founded or whether some reasonable explanation can be given to account for them.

4. My doubts as to whether the unqualified conferral of jurisdiction on the Court by virtue of Article XXXI, as indicated in the Judgment, is in fact well founded, also derive from two further considerations.

Firstly, I have concluded that the Court's interpretation of Articles XXXI and XXXII in the Pact of Bogotá appears much less persuasive if one looks at the meaning given to the terms of the Pact in their context, particularly if the Pact is compared with two existing multilateral treaties drawn up mainly for the purpose of the peaceful settlement of disputes and specifically providing for the compulsory jurisdiction of the International Court of Justice — the Revised General Act for the Pacific Settlement of International Disputes, adopted by the United Nations General Assembly in 1949, and the European Convention for the Peaceful Settlement of Disputes, adopted at Strasbourg in 1957. I shall examine the terms of the Pact in paragraphs 5-6 below.

Secondly, an additional argument in the Judgment to the effect that:

> "It is, moreover, quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement. This is also confirmed by the *travaux préparatoires*" (para. 46),

does not seem to reflect the history of the drafting of the Pact of Bogotá. The brief record of developments prior to the Bogotá Conference and a perusal of the *travaux préparatoires* together make it difficult to conclude with complete confidence that the American States, when drafting the Pact, intended to strengthen the jurisdiction of the Court. My interpretation of "the object and the purpose of the Pact" may, for that reason, differ from that of the Court in its Judgment *(ibid.)*. An examination of its history requires a more detailed account (paras. 8-13 below).

II

5. I shall start by examining the meaning to be given to the terms of the Pact of Bogotá in their context. In the first place, if, as suggested in the Judgment, Article XXXII is an independent clause, distinct from and additional to Article XXXI, which confers jurisdiction upon the Court under Article 36, paragraph 1, of the Court's Statute, and if both confer jurisdiction upon the Court under that Article of the Statute, it may be asked whether it is not the implicit intention of the Judgment to state that, while any legal disputes are covered by Article XXXI, other disputes — in other words, those which do not fall within the categories specified in Article XXXI — shall also be subject to the compulsory jurisdiction of the Court under Article XXXII.

Certainly, the jurisdiction of the Court comprises "all matters specially provided for . . . in treaties and conventions in force"(Art. 36, para. 1, of the Statute), and there are a number of bilateral and multilateral treaties which specify certain types of disputes as being subject to the compulsory jurisdiction of the Court. Yet is it conceivable that the States parties to the Pact of Bogotá accepted in general terms the Court's jurisdiction for *all* "international controversies" (Art. II of the Pact) of whatever nature, without specifying the types of disputes? In spite of the wording of Article 36, paragraph 1, of the Statute to the effect that "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force", has the idea of collectively giving such a *carte blanche* to the Court ever been juridically expressed on any previous occasion?

Here a distinction has to be made between the typical compromissory clause which *ex hypothesi,* if not explicitly, is confined to the subject-matter of the treaty concerned, and a clause which is part of a general dispute-settlement convention. In the latter case, if the clause provides for

judicial settlement, States (as in the case of the 1949 Revised General Act and the 1957 European Convention) take care to protect their sovereignty by specifying the types of disputes which they will consent to have adjudicated. Accordingly, when I consider the Court's construction of Article XXXII of the Pact of Bogotá, I feel bound to ask: has any other treaty or convention, comprising such a comprehensive obligation to adhere to the Court's jurisdiction, ever in fact existed? Certainly not.

This leads to an alternative interpretation of Article XXXII, namely, that this particular Article may only have any significance if the conditions found in it qualify the jurisdiction in the preceding Article, Article XXXI. In other words, the parties may have recourse to the Court in respect of the disputes specified in Article XXXI with the qualifications stated in Article XXXII.

The Spanish version of Article XXXII, second sentence, states as follows:

> "La jurisdicción de la Corte quedará obligatoriamente abierta conforme al inciso 1° del artículo 36 del mismo Estatuto",

which may be translated into English word for word as:

> "The jurisdiction of the Court will remain obligatorily available in accordance with Article 36, paragraph 1, of the said Statute."

This wording may properly be interpreted as implying that the jurisdiction of the Court, mentioned in Article XXXII, is the same as that of the previous Article, Article XXXI, and is therefore also subject to the conditions of that Article. To refer to the French version of the text (see Judgment, para. 45) to support the contrary interpretation does not seem to me to be acceptable.

6. The Court is content to interpret Article XXXII in the sense that the reference, in that provision, to the procedure of conciliation is meant simply to imply that the parties may have recourse to the Court in the event of the failure of that procedure. The Court remains silent with regard to the curious fact that, while that Article specifies the occasional failure of conciliation, it does not mention the failure of other pacific procedures established in the Pact, such as good offices, mediation, or investigation.

It may be useful to look at the comparable treaties providing a general system for the peaceful settlement of disputes, as mentioned previously. The 1949 Revised General Act clearly provides in an unequivocal manner for the obligation of judicial settlement, providing that:

> "All disputes with regard to which the parties are in conflict as to their respective rights [including in particular those mentioned in Art. 36, para. 2, of the Statute] shall . . . be submitted for decision to the International Court of Justice, unless the parties agree . . . to have resort to an arbitral tribunal." (Art. 17.) (United Nations, *Treaty Series,* Vol. 71, p. 101.)

There is also an obligation in parallel to submit to the procedure of conciliation. Any dispute of a non-legal nature which fails to reach a solution through conciliation is to be brought before an arbitral tribunal — and not the Court (Art. 21).

In the 1957 European Convention it is stated that:

> "The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes . . . including, in particular, those [mentioned in Art. 36, para. 2]." (Art. I.) (United Nations, *Treaty Series,* Vol. 320, p. 243.)

Disputes not falling within the scope of judicial settlement are to be submitted to the procedure of conciliation, and disputes considered as being other than of a legal nature and which have not been settled by conciliation are to be submitted to arbitration — not to the Court (Art. 19).

These two treaties each contain a single article providing for the compulsory submission of legal disputes to the Court, and are without any doubt conceived as "treaties and conventions in force" under Article 36, paragraph 1, of the Statute, "specially provid[ing] for" "all matters" which "[t]he jurisdiction of the Court comprises". In addition, reference to conciliation is obligatory for those cases which do not fall within the scope of the compulsory jurisdiction of the Court and, if conciliation fails, there remains an obligation of arbitration.

If there is no obligation of conciliation preceding recourse to the Court, why should the Pact of Bogotá have had to refer simply to the occasional cases in which conciliation fails? Should Article XXXII not rather be interpreted as meaning that recourse to the procedure of conciliation is a prerequisite for the compulsory referral of a dispute to the Court under the Pact of Bogotá?

7. I do not venture to suggest that this interpretation of the Pact of Bogotá is the only correct one, because it may also not prove entirely convincing in the overall context of the Pact. This is because the requirement of conciliation prior to resort to the Court does not seem wholly compatible with the submission of legal disputes to the Court, even in the light of the two other general dispute-settlement treaties, as mentioned above. A clue to solving this paradox of the Pact may well be found through an examination of the process within which the system of the peaceful settlement of disputes — the concept of judicial settlement in parallel with the procedure of conciliation — had evolved up to 1948 in the forum of American States and the process within which the Pact was drafted at the Bogotá Conference. This will also indicate that there was not the slightest idea, in either of these processes, of enacting in general terms, in any treaty, the compulsory jurisdiction of the former or present Court for either legal or non-legal disputes — still less for both.

III

8. At the Conference of Conciliation and Arbitration convened in Washington in January 1929, two treaties were signed by 20 American States: the General Convention of Inter-American Conciliation and the General Treaty of Inter-American Arbitration. The States parties to the former treaty agreed "to submit to the procedure of conciliation ... all controversies of any kind ... which it may not have been possible to settle through diplomatic channels" (Art. 1). The latter treaty provided for compulsory arbitration for

> "all differences of an international character [arising] by virtue of a claim of right ... which it has not been possible to adjust by diplomacy and which are juridical in their nature by reason of being susceptible of decision by the application of the principles of law" (Art. 1).

In neither of these treaties, however, was there any mention of a submission of disputes to the Permanent Court of International Justice which had already been in existence since 1922. (As of 1948 the former treaty was effective for 18 States and the latter for 16 States.)

The Juridical Committee of the Pan American Union proposed, in March 1944, a Draft Treaty for the Coordination of Inter-American Peace Agreements which co-ordinated the separate treaties of the past into a single instrument (Inter-American Juridical Committee, *Recommendations and Reports, Official Documents, 1942-1944,* p. 53) and further prepared the draft of an Alternative Treaty Relating to Peaceful Procedures (*ibid.,* p. 69). It was proposed that the States parties should declare that:

> "the settlement of disputes or controversies of any kind that may arise among them shall be effected only by the pacific means which have the sanction of international law" (Art. I),

and bind themselves to submit to arbitration all differences, as defined in the 1929 Arbitration Treaty, which it had been impossible to adjust not only by diplomacy but also by mediation (Art. VI). The draft treaty also suggested, as an alternative to submission to arbitration, referral

> "by mutual agreement . . . to a court of international justice in accordance with the terms of a treaty to which they may both be parties, or to the procedure of investigation and conciliation set forth in the present Treaty" (Art. VII).

In parallel, the draft treaty laid down the obligation of recourse to the conciliation procedure for all disputes which it had not been possible to settle by direct negotiation, by mediation, or by the procedure of arbitration (Art. XIII). In its accompanying report the Juridical Committee stated as follows:

> "The Juridical Committee is of the opinion that the procedure of arbitration should be put in the foreground and that attention should

> be directed to it as the preferable method of settling disputes of a juridical character which it has not been possible to settle by diplomatic negotiation. An alternative to the procedure of arbitration would be the procedure of judicial settlement in case the States in controversy were parties to a treaty providing for the judicial settlement of juridical disputes and are in accord to have recourse to that procedure. At the same time, while arbitration and judicial settlement are recognized by the Committee as being in principle the proper procedures for the settlement of juridical disputes, it would seem unreasonable to deny to the parties the right to have recourse to the procedure of conciliation for the settlement of such disputes if they are in accord in preferring that more elastic procedure....
>
> Arbitration is thus obligatory for all juridical disputes which the parties do not, by mutual agreement, prefer to settle by the procedure of judicial settlement or of conciliation...." (*Recommendations and Reports, Official Documents, 1942-1944,* pp. 89-90.)

With the end of the war in sight, the American States sent representatives to Chapultepec in February/March 1945 for the Inter-American Conference on Problems of War and Peace. The Conference recommended to the Inter-American Juridical Committee the "immediate preparation of a draft of an 'Inter-American Peace System' which will coordinate the continental agreements for the prevention and pacific solution of controversies" (*The International Conferences of American States, Second Supplement, 1942-1954,* p. 101). The Juridical Committee accordingly prepared a draft of such a system (Comité Jurídico Interamericano, *Recomendaciones e Informes, Documentos Oficiales, 1945-1947,* p. 49; English text supplied by the Organization of American States), which provided that the States parties would thereby agree to have recourse at all times to peaceful procedures (Art. I). In the event that a controversy should arise which could not be settled by direct negotiations through the usual diplomatic channels, the States parties would recognize the obligation of having recourse to inter-American regional procedures such as those of mediation, investigation and conciliation, arbitration, judicial settlement, or inter-American consultation (Art. II). The States parties would further:

> "recognize the suitability of submitting either to arbitration or to judicial settlement all controversies which may arise between them which are legal in their nature by reason of being susceptible of decision by the application of principles of law" (Art. XVII).

The text was transmitted to the American Governments for their observations. Some Governments sent observations on the draft (*Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, pp. 25-35); among which were proposals by Honduras and Mexico, which advocated the additional concept of "recourse to the International Court of Justice".

9. Following the end of the Second World War, the Inter-American Conference for the Maintenance of Continental Peace and Security (Rio de Janeiro) met in August/September 1947 and recommended that at the forthcoming Ninth International Conference of American States in Bogotá:

> "there be studied with a view to approval, institutions which may give effectiveness to a pacific system of security and among them compulsory arbitration for any dispute which may endanger peace and which is not of a juridical nature" (*The International Conferences of American States, Second Supplement, 1942-1954,* p. 154).

The Inter-American Juridical Committee accordingly drafted the "Project of Inter-American Peace System" for discussion by the delegates to the Bogotá Conference (*Actas y Documentos,* Vol. IV, p. 6; English text as CB-6-E of the Documents of the Pan American Union).

That Project was thus prepared as a basis for a new treaty to be adopted at Bogotá. Articles XXXI and XXXII of the Pact of Bogotá, which are relevant in the present case and to which reference is made in the Judgment, originate from the provisions in the 1947 Project, as quoted below:

> "Part IV. *Procedure of Arbitration*
>
> Article XVII
>
> The High Contracting Parties bind themselves to submit to arbitration the controversies of any nature, juridical or non-juridical, which have arisen or may arise in the future between them and which in the opinion of one of the parties it has not been possible to settle by diplomatic means or by the procedures of mediation and investigation and conciliation.
>
> . . . . . .
>
> Article XVIII
>
> Notwithstanding the provisions of the preceding article, it is recognized that the Parties, if in agreement to do so, may submit their controversies to the International Court of Justice, when they have accepted previously its obligatory jurisdiction under the terms of article 36 of the Statute.
>
> The controversies to which this article is applicable are those referring to the following matters:
>
> *(a)* The interpretation of a 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 and extent of the reparation to be made for the breach of an international obligation."

The report annexed to the 1947 Project explains the ideas underlying the provisions of this draft:

> "24. Part IV of the draft, referring to arbitration procedure, particularizes:
>
> 1. Why arbitration is established for all kind of questions. Whence it is deduced that those of a juridical nature, as well as those not of that character, are subject to the said arbitration.
> 2. Why arbitration is compulsory in every dispute that has not been settled by procedures of mediation or of investigation and conciliation. Hence, if for any reason such procedures do not terminate the dispute the latter will inevitably have to be submitted to arbitration...
>
> 25. Article 18 permits the parties, if they agree, to submit to the International Court of Justice, whenever they have previously accepted its compulsory jurisdiction, the disputes enumerated in article 36 of the Statute thereof.
>
> Consequently, arbitration continues to be the general rule in regard to such disputes. But, by common consent, the parties may resort to the Court. In the absence of such consent, the arbitration procedure provided for in the Treaty shall be compulsory...." (*Actas y Documentos,* Vol. IV, p. 20; English text, p. 25.)

Dr. Charles G. Fenwick, Director of the Department of International Law and Organization of the Pan American Union, made an analytical comparison between the 1945 and the 1947 texts in a memorandum dated January 1948 (*ibid.,* Vol. IV, pp. 35-39):

> "5. In contrast to the 1945 Project, the 1947 Project submitted by the Juridical Committee establishes arbitration as the final and definitive procedure that should be followed in all cases.... The fundamental change in the 1947 Project appears in Article XVII, which refers to arbitration procedure. The High Contracting Parties commit themselves to submit to arbitration all disputes of any nature, be they juridical or not which, in the opinion of one of the Parties, it may not have been possible to resolve by any of the procedures of mediation, investigation or conciliation, established in the preceding articles. In this fashion the Juridical Committee has tried to offer a final and definitive procedure such as may assure the resolution of all controversies be they of a political or juridical character." *(Translation from the Spanish text.)*

The following three points may be seen as distinctive characteristics of the 1947 Project. Firstly, the member States agreed in general terms to make use of good offices and mediation, investigation and conciliation, and arbitration and judicial settlement; secondly, the member States bound themselves to submit to arbitration such disputes of any nature, juridical or non-juridical, as it had not been possible to settle by diplomatic means or by the procedures of mediation, investigation and

conciliation; thirdly, notwithstanding the obligation of the procedure of arbitration, it was recognized as indicated in Article XVIII, which was linked to the preceding Article, that the member States might submit to the International Court of Justice such disputes as were enumerated in Article 36, paragraph 2, of its Statute. This would be possible only if the parties were "in agreement to do so" and when they had "accepted previously its obligatory jurisdiction under the terms of Article 36 of the Statute" (Art. XVIII).

Thus the 1947 Project did not give any indication that the American States should be subject to compulsory settlement of disputes by the International Court of Justice in terms of either the first or the second paragraph of Article 36 of the Statute.

10. Both before and during the Bogotá Conference, a number of States either commented on the Committee's 1947 text or proposed amendments to it (*Actas y Documentos,* Vol. IV, pp. 39-79). As regards judicial settlement, Brazil and Mexico made proposals after the Conference had commenced. The former proposed rewording Article XVIII so as to provide that the obligation of arbitration would not prejudice the right of direct recourse to the International Court of Justice in cases in which the jurisdiction of that Court had been accepted as compulsory by both parties, and where the dispute was to be submitted by common consent to the judgment of the Court. The latter proposed that the judicial procedure should be initiated in cases in which the parties had previously accepted the compulsory jurisdiction of the International Court of Justice, and that the obligation of arbitration should be maintained, except in cases of recourse to judicial procedure, for such differences of any nature, juridical or non-juridical, as they had not been able to settle by diplomatic means or by any other pacific procedure. Honduras proposed as late as 22 April, in the last stage of the Conference, a draft resolution on the jurisdiction of the International Court of Justice, in which the Bogotá Conference would merely recommend that the American States should formulate and deposit, as soon as possible, declarations under the optional clause of the Court's Statute.

In none of those proposals presented by various Governments was there, however, any indication that the forthcoming treaty would itself become a treaty conferring compulsory jurisdiction upon the Court under Article 36, paragraph 1, of the Statute.

*

11. Having thus considered how the American States handled the matter of the judicial settlement of disputes in parallel with the procedure of arbitration and conciliation in the process leading up to the 1948 Conference of Bogotá, and having shown that there was at that time not even the slightest idea of granting compulsory jurisdiction to the previous or present Court, I now wish to look at the drafting history of those provi-

sions of the 1948 Pact of Bogotá, which — depending on their content — might allow the Court to sustain the concept of the compulsory jurisdiction of the International Court of Justice. In fact, as the Court suggests, the *travaux préparatoires*:

> "must of course be resorted to only with caution, as not all the stages of the drafting of the texts at the Bogotá Conference were the subject of detailed records" (Judgment, para. 37).

The reader may well be puzzled by the way in which certain texts used in the 1947 Project suddenly disappeared without trace, while new texts were incorporated into the 1948 Pact without substantive discussion. The picture given in the Judgment in this connection (para. 46) does not appear to be complete. I will endeavour to trace the way in which the text developed at the Bogotá Conference, as indicated in the *travaux préparatoires.*

12. In principle, the subject of the peaceful settlement of disputes was assigned to Committee III, which commenced its work on 2 April (*Novena Conferencia Internacional Americana, Actas y Documentos,* Vol. IV, p. 98). It in turn entrusted the work to Sub-Committee III-A, which consisted of the delegates of all the participating States. Thereafter, Committee III did not hold a meeting until 27 April, when its second meeting took place (*ibid.,* p. 106). Sub-Committee III-A, during its first three meetings from 7 to 9 April (*ibid.,* pp. 222-229), listened to a general discussion on the subject by some delegates. It then adjourned its proceedings for two weeks and, at its fourth (and final) meeting on 24 April, divided into three working groups (*ibid.,* p. 230). Sub-Committee III-A did not meet after that time. There is no record of the working groups, except for a report of the first working group appointed to study general norms of the Inter-American System of Peace (*ibid.,* p. 80), which dealt with Part I ("General Obligation to Settle Disputes by Peaceful Procedures") of the 1947 Project as well as with Chapter II ("Pacific Settlement of Disputes") of the Project of the Organic Pact.

Committee III discussed the subject at its second, third and fourth meetings on 27 and 28 April (*ibid.,* pp. 106-220). The discussions on Part IV ("Procedure of Arbitration") commenced at the third meeting in the afternoon of 27 April. The Judgment states, in this respect, that

> "At that meeting ... the delegate of Colombia explained to the Committee the general lines of the system proposed by the Sub-Committee which had prepared the draft; the Sub-Committeee took the position 'that the principal procedure for the peaceful settlement of conflicts between the American States had to be judicial procedure before the International Court of Justice'." (Para. 46.)

In fact, the delegate of Colombia was requested by the Chairman of Com-

mittee III to speak about the work of the working groups appointed on 24 April. He, himself, was only a member of the third working group dealing with Parts IV, V and VI ("Procedure of Arbitration", "Procedure of Judicial Settlement" and "Final Provisions") (and composed of the delegates of Argentina, Brazil, Colombia, Honduras, the United States, Mexico and Uruguay), which did not produce any official documentation. The delegate of Colombia began to speak on the work of Sub-Committee III-A, though that Sub-Committee had neither prepared any draft nor taken any position, while, as stated above, there had been general debates between several delegates in its early stages (between 7 and 9 April), but had concluded its meeting by dividing the work into three working groups. It might have been possible, at least according to the statement of the Chairman of Committee III, that the working groups had prepared some articles.

The statement made by the delegate of Colombia, as quoted in the Judgment, and as mentioned above, was followed up by a remark to the effect that:

> "[the Sub-Committee] consequently established Part IV of the draft, which contains the rules concerning that procedure. At the same time, it decided that the procedure of arbitration should be a supplementary, subsidiary procedure, for cases in which the judicial procedure could not produce results." (*Actas y Documentos,* Vol. IV, p. 156.)

The delegate of Colombia referred to the proposal made a few days earlier by Honduras (as indicated above) and continued to explain the current status of "signatures" and "ratifications" of the optional clause by the American States. In spite of what he stated (and what was quoted in the Judgment), the delegate of Colombia seems to have done no more than report upon the delegates' comments during the early stages of Sub-Committee III-A. He then turned to subjects such as "reservation of domestic jurisdiction" among others, which have no direct relevance in this instance. His statement concluded with a reference to the general system of peaceful settlement of disputes. He did not intend to discuss draft Articles XVII and XVIII, and did not discuss them.

The discussion of the first Article in Part IV of the Project, that is the draft Article XVII, started much later, when Committee III decided to continue its meeting later that afternoon instead of postponing it until the following day. The text of draft Article XVII, which was thus introduced on 27 April, read:

> "In conformity with Article 36 of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto,* without the necessity of any

special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute the breach of an international obligation; or
(d) The nature or extent of the reparation to be made for the breach of an international obligation. . . ." (*Actas y Documentos,* Vol. IV, p. 161.)

The wording of this text was quite different from the text of Article XVIII of the 1947 Project. We do not know who drafted it or when it was drafted, though we can probably guess that it was one of the matters in the hands of the seven-delegate working group, as mentioned above. The purpose behind the drafting of the newly formulated text in terms so different from those of the 1947 Project is unknown.

The way in which this particular Article was dealt with by Committee III is fully explained in the Judgment (para. 37) and may not require any further explanation, except that the suggestion that the words "any other American States" should be replaced by the words "any other Member State of the Organization" was "approved" (*Actas y Documentos,* Vol. II, p. 162). The references in the Judgment to the statements made by the delegates of the United States, Mexico, Colombia, Ecuador and Peru (para. 37) are quite correct. It may be interesting to note however that, as the *travaux préparatoires* clearly indicate, the text of draft Article XVII was neither formally "approved" nor subjected to a vote, even though the inclusion of an additional article was "rejected".

With regard to draft Article XVIII (the text of which must have been distributed together with Article XVII, but which was not included in the *travaux préparatoires*), Committee III agreed that the provision would be taken up by the working group on the following day (*Actas y Documentos,* Vol. II, p. 167). On that day, 28 April, Committee III received the following proposed text reported by the working group:

> "When the conciliation procedure previously established in the present Treaty or by agreement of the parties has not led to a solution, and the said parties have not agreed upon an arbitral procedure, either of them shall be entitled to have recourse to the International Court of Justice in the manner prescribed in Article 40 of the Statute thereof. The Court shall have compulsory jurisdiction in accordance with Article 36, paragraph 1, of the said Statute." (*Ibid.,* p. 171.)

This text, which is quite different from that of 1947, seems also to have differed from the text of the previous day, as a member (delegate of Brazil) of the working group stated that draft Article XVIII had been replaced by this new text.

No delegate spoke in support of the new text, and no discussion was held. The words "has not led to a solution" were replaced by "does not lead to a solution" upon the suggestion of Colombia. The text thus amended was "approved" by the affirmative votes of 9 of the 14 representatives (13 States and the Pan American Union) who were present (*Actas y Documentos,* Vol. II, p. 171).

13. The text of the Inter-American System of Pacific Settlement (*ibid.,* p. 83), as adopted at Committee III, was then sent to the Committee on Co-ordination and to the Drafting Committee. The Committee on Co-ordination met on five occasions between 26 April and 1 May (*ibid.,* pp. 435-590) and took up the text of the Inter-American System of Pacific Settlement at its fourth meeting on 29 April (*ibid.,* p. 538). The title was changed to "American Treaty of Pacific Settlement". The draft articles were renumbered, but no substantive discussion took place concerning the texts with which we are concerned. The Drafting Committee did not leave any record, other than one very brief and general report, which tells us nothing (*ibid.,* p. 591).

The Pact of Bogotá was approved by acclamation at the plenary session on 30 April, without further discussion (*Actas y Documentos,* Vol. I, p. 234). The final text of the Pact of Bogotá was different from the text approved by Committee III in that the expressions "in conformity with Article 36 of the Statute of the International Court of Justice" and "in relation to any other Member States of the Organization" in Article XXXI (formerly draft Article XVII) were replaced by "in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice" and "in relation to any other American States".

14. I have just shown that the process whereby the provisions of Articles XXXI and XXXII (formerly Articles XVII and XVIII in the 1947 Project) were drafted at the Bogotá Conference remains a mystery. Unlike the closely linked provisions of Articles XVII and XVIII in the 1947 Project, the new texts of draft Articles XVII and XVIII placed before Committee III of the Conference (the authors and sponsors of which are unknown) seemed to be quite distinct in their nature. No delegate at the Conference at any time suggested that the provisions of the draft would constitute an acceptance of the Court's jurisdiction and relate to cases in which the Court could be seised directly. One fails to understand how the concept of Articles XVII and XVIII of the 1947 Project, that is, compulsory arbitration and the alternative of referral to the Court where the parties had given their consent, came to be replaced by the new Articles XXXI and XXXII of the Pact, respectively.

What is clear is that, as the Judgment properly records (para. 37), although some delegates drew the attention of the Conference to possible interpretations drawn from the newly drafted text of draft Article XVII (now Article XXXI), there was no further discussion among the other delegates and that another proposed version of draft Article XVIII (now Article XXXII) was not even discussed. The delegates of the American

States gathered in 1948 at Bogotá with the lofty goal of settling international disputes by peaceful means. Yet what they expected from the Court is still a mystery. This leads me to conclude that the interpretation given by the Court of "the object and the purpose" of the Pact is not sufficiently supported.

IV

15. In conclusion, I would like to add the following comments. It is certainly possible for States jointly to assume the obligation to accept the Court's jurisdiction over certain types of disputes under Article 36, paragraph 1, of the Statute, and they can also jointly declare their acceptance of the Court's jurisdiction over legal disputes, as provided for in Article 36, paragraph 2. In cases of general dispute-settlement treaties, the acceptance of jurisdiction over legal disputes in the framework of Article 36, paragraph 1, of the Statute, can be equated, in effect, with the acceptance of jurisdiction under Article 36, paragraph 2. Such an obligation must, however, be assumed in an unequivocal manner. For example, as previously stated, the 1949 Revised General Act for the Pacific Settlement of International Disputes provides that disputes "shall be submitted for decision [to the Court]" and the 1957 European Convention for the Pacific Settlement of Disputes states that the parties "shall submit [disputes] to the judgment of the . . . Court".

It cannot be denied that the parties to those two treaties accept the Court's jurisdiction within the limits of Article 36, paragraph 2, of the Statute, though it remains to be seen whether the instruments constituting a declaration of acceptance of the Court's jurisdiction should not have been deposited under Article 36, paragraph 4, of the Statute, or whether the simple registration of the treaties in question with the United Nations Secretariat, pursuant to Article 102 of the United Nations Charter, might be looked upon as a substitute for the requirement of that paragraph of the Statute.

I hesitate to assimilate the Pact of Bogotá to those two treaties for the following reasons: firstly, as I explained above, the existence of Article XXXII complicates the Pact's system of peaceful settlement because this particular Article, by its ambiguous content, casts doubt upon the intention of the parties to accept the Court's compulsory jurisdiction. Secondly, unlike the two other treaties of a general dispute-settlement nature, the Pact of Bogotá, although providing for a general obligation to settle international disputes, does not specify the use of any particular procedure, except for resort to the Court in certain cases, and thus the choice of peaceful settlement procedures is to be made jointly by the parties. Thirdly, and more significantly, it will be clearly apparent from

what has been stated above that no delegate at the Bogotá Conference ever expressed his country's readiness to confer compulsory jurisdiction on the Court by virtue of the forthcoming Treaty, although some delegates were aware of the possible implication of the text to be adopted. It is accordingly true to say that the present text of the Pact emerged without any clear indication of the parties' real intention.

16. The Permanent Court of International Justice, as quoted in the Judgment (para. 16), once mentioned

> "the fact that [the Court's] jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given . . ." (case concerning *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2,* p. 16).

It also stated:

> "When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it." (Case concerning the *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9,* p. 32.)

The present Court accepted the validity of this principle in the *Interpretation of Peace Treaties* case, in which it stated that "[t]he consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases" (*I.C.J. Reports 1950,* p. 71). The Court, in the case of the *Monetary Gold Removed from Rome in 1943* (*Preliminary Question, Judgment, I.C.J. Reports 1954,* p. 32), referred 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". More recently, the fundamental principle mentioned in the 1950 case was reiterated in the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya)* (*I.C.J. Reports 1985,* p. 216).

In sum, one cannot lay too much stress upon the paramount importance of the expression of the acceptance of the Court's jurisdiction, which is invariably required for the Court to entertain a case, as the first and critical task of the Court is always to ascertain the intention of the Parties. I doubt whether this particular point has been given all the weight due to it.

(Signed) Shigeru ODA.