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DEVELOPMENTS AT THE INTERNATIONAL COURT OF JUSTICE: PROVISIONAL MEASURES AND JURISDICTION IN THE NICARAGUA CASE*

MICHAEL P. MALLOY**

INTRODUCTION

The International Court of Justice, principal judicial organ of the United Nations Organization,¹ has been subjected to frequent and intense scrutiny throughout the nearly forty years of its existence.² In some instances criticism has stemmed from particular decisions.³ Much of the criticism, however, has been of an institutional or programmatic orientation.⁴ In particular, there has in the past existed a degree of distrust or skepticism in the Third World as to the effectiveness of the Court as an institution responsive to the sensitivities and emerging le-

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gal concerns of developing states.5

Even more threatening to the institutional credibility of the Court is its relatively sparse practice in the thirty-seven years since it received its first application initiating a contentious case.6 As of July 1983, the Court had had a total of forty-eight contentious cases submitted to it.7 Two additional cases were added during 1983-1984,8 raising to fifty the total number of contentious cases over the entire tenure of the Court to date.

Aside from the obvious disinclination of states to avail themselves of the Court in contentious situations that is reflected in the above statistics, other indications from the Court’s experience raise doubts as to its credibility or effectiveness in the view of many states. It is a continuing source of concern that a significant number of states have repudiated the Court’s jurisdiction and authority with respect to disputes to which they stood as apparent respondents.9 Further, in the forty-four contentious cases that are no longer pending matters, only sixteen resulted in judgments on the merits.10 Finally, in absolute terms, until quite recently, states have evidenced a decreased willing-

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7. 1982-1983 I.C.J.Y.B. 3-5 (1983). The total includes separate listings for related cases which were decided in separate but materially identical judgments (e.g., Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (Merits Judgment of July 25); Fisheries Jurisdiction (W. Ger. v. Ice.), 1974 I.C.J. 175 (Merits Judgment of July 25)). Other situations of possible double counting would further reduce the real number. See, e.g., J. Sweeney, C. Oliver & N. Leech, The International Legal System 68 (2d ed. 1981), suggesting that, for the period 1947-1978, the then total of 44 cases might be counted as only 38.
9. See generally Malloy, supra note 3. Such was the case most recently in United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24). The case was later discontinued, pursuant to an extra-judicial settlement between the parties. See United States Diplomatic and Consular Staff in Tehran, 1981 I.C.J. 45 (Order of May 12).
10. See International Legal System, supra note 7, at 68. The remaining 28 cases included judgments of the Court upholding objections to adjudication on the grounds of, inter alia, lack of jurisdiction of the Court, failure to exhaust local remedies or considerations of “judicial propriety.” See generally Malloy, supra note 3.
ness to initiate or participate in contentious proceedings before the Court at all.\textsuperscript{11}

Against this empirical background, serious students of the Court's jurisprudence must consider the range of current issues before it. The commentary that follows suggests that there is some basis for optimism with respect to the Court's current stature and future credibility. There is evidence in the recent experience of the Court and in the current issues pending before it that the Court may be regaining a degree of influence over the development of international law and credibility as an institutional device for dispute settlement.

Unfortunately, even as the words of the preceding paragraph were being written, circumstances were beginning to gather into a new crisis of credibility for the Court. In January 1985, the United States Government, respondent in a contentious proceeding initiated by the Nicaraguan Government,\textsuperscript{12} brashly repudiated the Court's assertion of jurisdiction over it.\textsuperscript{13} It is the view of the present writer that this action, representing as well a repudiation of the United States duties under the Charter and the Statute of Court,\textsuperscript{14} raises anew the longstanding doubts about the efficacy of the Court's institutional role.

\textsuperscript{11} Cf. \textit{International Legal System}, supra note 7, at 70: "There were only six cases brought before the court between 1972 and 1980 . . . [In] five of them . . . [the respondent] states . . . refused to appear. The unwillingness of states to resolve their disputes by referring them to the court has caused concern about its future."

This situation may be changing. In the more recent period (1981-1984) the Court has received four new disputes. Of these four, only one involved a jurisdictional objection by the respondent. Further, of the four applicants and four respondents in these recently filed cases, three applicants and two respondents are developing countries. Finally, of the four disputes, three involve maritime or territorial boundary disputes, an area of the law in which the Court has been relatively active and particularly effective and influential. \textit{Id.} See generally Malloy, \textit{An Analysis of the Jurisprudence of the International Court of Justice in Cases Concerning Boundaries}, 14 \textit{Thesaurus AcroAslum} 276 (1985) (subtitled \textit{National and International Boundaries}, 10th Sess. (Sept. 1983), Thessaloniki Institute Int'l Pub. L. & Int'l Rel.). The four cases are: (1) Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12) (filed in 1981 and decided in October 1984 by a chamber of the Court. See I.C.J. Stat., arts. 26-27). \textit{See generally} Urquhart, \textit{World Court's Award to Canada of a Sixth of Georges Bank Upsets New Englanders}, Wall St. J., Oct. 15, 1984, at 7, col. 1; (2) Continental Shelf (Libya v. Malta), 1983 I.C.J. 3 (Order of Apr. 26) (filed in 1982); (3) Frontier Dispute (filed in 1983); (4) Nicaragua Application.

\textsuperscript{12} See Nicaragua Application, supra note 8.


\textsuperscript{14} \textit{See I.C.J. Stat.}, art. 36, para. 6, & art. 59. \textit{See also infra} text accompanying notes 215-16.
MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

Certainly one of the major issues before the Court at this writing is the dispute that is the subject of Nicaragua’s application instituting proceedings in the Military and Paramilitary Activities case.15 The factual background of the case itself reflects a critical state of affairs, involving charges by Nicaragua that the United States has been using military force against Nicaragua and is intervening in Nicaragua’s internal affairs through sponsorship of insurgent and mercenary attacks in and against Nicaragua.16 The Court’s finding of responsibility on the part of the respondent for such attacks would have obvious and potentially grave consequences for the acceptability and effectiveness of United States foreign policy with respect to Central America.

At the present stage, however, attention has been focused on two preliminary problems: (1) the appropriateness of the applicant’s request for the indication of provisional measures,17 in effect, preliminary injunctive relief;18 and (2) the existence of a jurisdictional basis for the Court’s consideration of the application. The first issue was decided in May 1984;19 the second issue was decided in November 1984.20 In light of the United States repudiation of the Court’s jurisdiction, the manner in which these two issues have been handled may have a significant effect upon the Court’s future standing and credibility in the international community.

15. See Nicaragua Application, supra note 8.

16. For the detailed allegations of Nicaragua concerning United States intervention and continued sponsorship of attacks against the current Nicaraguan regime, see Covert Activities In and Against Nicaragua, Nicaragua Application, supra note 8, Annex A. The truth of the factual allegations has not yet been determined by the Court. See Military and Paramilitary Activities In and Against Nicaragua, 1984 I.C.J. 169, 182 (Provisional Measures Order of May 10) [hereinafter cited as Nicaragua Order of May 10]. For an alternative analysis of the facts, with some emphasis upon allegations of Nicaragua’s aggression, see id. at 190-93 (Schwebel, J., dissenting).


18. To the extent that article 41 of its statute allows the Court only to “indicate” provisional measures, it may be argued that such “indications” are merely advisory. See S. ROSENNE, PROCEDURES, supra note 2, at 149-50. Cf. United States Diplomatic and Consular Staff in Tehran, 1979 I.C.J. 7, 16 (Provisional Measures Order of Dec. 15). To the extent that they are merely hortatory, “indications” clearly are not analogous to preliminary injunctive relief.


20. Military and Paramilitary Activities In and Against Nicaragua, 1984 I.C.J. 392 (Jurisdiction Judgment of Nov. 26) [hereinafter cited as Judgment of Nov. 26].
A. Request for Provisional Measures

1. Merits of the Request

On April 9, 1984, Nicaragua filed its application instituting proceedings against the United States; at the same time it filed a request that the Court indicate provisional measures to remain in effect "while the Court is seised of the case." Specifically, the applicant requested an indication from the Court that the respondent "should immediately cease and desist from providing, directly or indirectly, any support . . . to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary activities in or against Nicaragua . . . ." In addition, the Court was asked to indicate that the respondent should cease and desist from any such activities by any of its own officials, agents or forces. Finally, the Court was requested to indicate, more broadly, that respondent should refrain from "any other use or threat of force in its relations with Nicaragua." This last request, if granted, might appear to be little more than a declaration of well accepted principles of contemporary international law governing the conduct of relations between states. Yet an indication would lend credibility to Nicaraguan charges that the United States was in fact conducting a widespread campaign of insurgence, sabotage and terrorism against the Nicaraguan state and people.

Requests for indication of provisional measures are clearly contemplated by the Court's Statute and Rules. Given the procedural context, it has often been the case in the past that the request might well be granted prior to a decision of the Court on the question of its jurisdiction vel non. Since provisional measures might be imposed with effect for the pendency of the Court's consideration of the case,

21. Id. at 171. On the concept of "seisen" in contentious cases before the Court, see I. Shihata, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION 87-89 (1965).


23. See id. at 172.

24. Id.


26. See supra note 17. See generally S. Rosenne, PROCEDURE, supra note 2, at 149-57.

27. Such was the situation, for example, in the following cases: Anglo-Iranian Oil Co. (U.K. v. Iran), 1951 I.C.J. 89, 100 (Interim Protection Order of July 5); Fisheries Jurisdiction (U.K. v. Ice.; W. Ger. v. Ice), 1972 I.C.J. 12, 35, 184, 191 (Interim Protection Order of Aug. 17); Nuclear Tests (Austl. v. Fr.), 1973 I.C.J. 99, 135 (Interim Protection Order of June 22); United States Diplomatic and Consular Staff in Tehran, 1979 I.C.J. 7; Cf Trial of Pakistani Prisoners of War (Pak. v. India), 1973 I.C.J. 328, 348 (Interim Protection Order of July 13) (jurisdiction to indicate provisional measures found); Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 3, 42 (Jurisdiction Judgment of Dec. 19).
however, as was contemplated in the instant case, the Court's sensitivity to jurisdictional issues counsels restraint in imposing such measures. In any situation in which interim relief is sought, a court will be particularly concerned about the implications of the request before it.\textsuperscript{28}

Before this Court, the ramifications are heightened by the fact that it exercises jurisdiction over parties in a contentious case only by virtue of the consent of those parties in the first place. Not surprisingly, then, the United States response to the applicant's initiation of proceedings and request for provisional measures was essentially a challenge to jurisdiction. While the Court might have withdrawn itself from this dispute by seizing upon jurisdictional or standing considerations,\textsuperscript{29} the Court held these jurisdictional arguments over until a later time.\textsuperscript{30} It appears to have preferred an approach to the problem of provisional measures that was more sympathetic to factual allegations and less fearful of the possible consequences of uncertain jurisdiction over the parties.

In reaching the substance of the request, however, the Court did endorse a prima facie standard on the question of jurisdiction. While it need not answer the jurisdictional question prior to the request, the Court was of the view that "it ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded."\textsuperscript{31} Nicaragua relied upon its declaration accepting the compulsory jurisdiction of the Court to establish the consent of the two

\textsuperscript{28} Thus, in United States federal practice, the enunciated standards for interim injunctive relief seek to minimize the possibility that granting the relief before the issues are developed will markedly prejudice the rights of a party who might later be vindicated. \textit{Cf.}, \textit{e.g.}, \textit{Mason County Medical Ass'n v. Knebel}, 563 F.2d 256, 261 (6th Cir. 1977); \textit{Mobil Corp. v. Marathon Oil Co.}, 669 F.2d 366, 369 (6th Cir. 1981).

\textsuperscript{29} The Court has frequently resorted to withdrawal in troublesome cases. \textit{See, e.g.}, \textit{Nuclear Tests (N.Z. v. Fr.; Austl. v. Fr.)}, 1974 I.C.J. 253, 457 (Judgment of Dec. 20) (mootness or "judicial propriety"); \textit{South West Africa, Second Phase}, 1966 I.C.J. 6 (jus \textit{standi} of applicants, despite previous ruling that jurisdiction of court had been established).

\textsuperscript{30} Nicaragua Order of May 10, \textit{supra} note 16, at 187. The memorial and counter-memorial on the issue of jurisdiction were due June 30, 1984 and August 17, 1984, respectively. \textit{Id.} at 209. Oral proceedings on the issue began in early October 1984. \textit{See} Moore, \textit{Nicaraguan Injustice at the World Court}, Wall St. J., Oct. 8, 1984, at 30, col. 3. The decision on jurisdiction was not reached until November, more than six months after the indication of provisional measures.

\textsuperscript{31} Nicaragua Order of May 10, \textit{supra} note 16, at 179. Nevertheless, the Court determined whether there was a prima facie showing of jurisdiction by a weighted method, considering the question only so far as "compatible with the requirements of urgency imposed by a request for the indication of provisional measures." \textit{Id.}
parties, but it appears that the Court shifted the burden of persuasion to respondent to demonstrate that Nicaragua's declaration did not confer jurisdiction. In any event, at this stage the issue was not joined by respondent on the factual allegations made by Nicaragua in support of its request. If accepted as true, there can be little doubt that these factual allegations suggested "the urgent need for the requested measures."

In response to the request for provisional measures, the Court unanimously indicated, pending its final decision, that the United States should cease and refrain from any action "restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines." It also unanimously directed that neither Nicaragua nor the United States should take any action which might "aggravate or extend the dispute submitted to the Court," or "which might prejudice the rights of the other party in . . . carrying out" the Court's ultimate decision.

By a vote of fourteen to one (the United States judge, Judge Schwebel, voting against), the Court also indicated that Nicaragua's right "to sovereignty and political independence . . . should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by international law." In his dissenting opinion, Judge Schwebel argued that the emphasis in this provision "upon the rights of Nicaragua . . . is unwarranted." He claimed that the United States had charged Nicaragua as well with violations of international law, particularly against neighbor-

32. Id. See I.C.J. Stat., art. 36, para. 2. Cf. infra notes 53-59 and accompanying text.
33. See Nicaragua Order of May 10, supra note 16, at 180 (citing Aerial Incident of July 27, 1955 (Isr. v. Bulgaria), 1959 I.C.J. 127, 142 (Preliminary Objections Judgment of May 26); Temple of Preah Vihear (Cambodia v. Thailand), 1961 I.C.J. 17 (Preliminary Objections Judgment of May 26)): "[H]owever, the Court is not convinced, by the arguments so far addressed to it," that the declaration of Nicaragua, absent a formal instrument of ratification, did not implicate the present Court's jurisdiction.
34. See Nicaragua Order of May 10, supra note 16, at 181-82. But cf. id. at 191 (Schwebel, J., dissenting) (United States had nevertheless advanced countering factual allegations).
35. Id. at 182.
36. Id. at 187.
37. Id.
38. Id.
39. Id.
40. Id. at 190 (Schwebel, J., dissenting). Judge Schwebel emphasized that Nicaragua should also be viewed as subject to an obligation to refrain from intervening in the affairs of neighboring states. Id. See also id. at 189 (Mosler, J., and Jennings, J., concurring).
ing Central American states.\textsuperscript{41}

A noteworthy aspect of Judge Schwebel's dissenting opinion is his argument that "the obligations of a State to the international community as a whole"\textsuperscript{44} to refrain from insurgency may require the conclusion that "[t]he United States has . . . 'a legal interest' in the performance by Nicaragua of [such] fundamental international obligations."\textsuperscript{43} Unfortunately, it is not entirely clear from Judge Schwebel's opinion where such a conclusion leads. Could it affirmatively justify the direct or indirect use of unilateral force to vindicate this "legal interest"? Surely, this would be an extreme view, one which is not directly addressed by the dissenting opinion.\textsuperscript{44} The dissenting opinion clearly asserts, however, that the conclusion finding such a "legal interest" would justify the United States in invoking Nicaragua's responsibility:

for the internationally wrongful acts which are at issue in this case. The United States should be considered justified in doing so before this Court not because it can speak for Costa Rica, Honduras and El Salvador but because the alleged violation by Nicaragua of their security is a violation of the security of the United States.\textsuperscript{45}

The relationship between this argument and the United States arguments in opposition to the applicant's request is unclear. The dissent suggests that the United States has standing before the Court to press the interests of other Central American states, since those interests are consonant with the United States interests. Yet this was surely not the position of the United States at this stage of the proceedings, since it sought to defeat the request by arguing that the absence of those states would dictate that the request be denied.\textsuperscript{46} To suggest that the United States could vindicate, if not directly represent, the interests of these states undercuts the United States argument in this regard.

Despite the Court's ruling on the request for provisional measures, the critical moment in this case had not yet arrived for the United

\textsuperscript{41} See id. at 191-93 (Schwebel, J., dissenting).
\textsuperscript{42} Id. at 197 (quoting Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain) Second Phase, 1970 I.C.J. 3, 32 (Judgment of Feb. 5)).
\textsuperscript{43} Nicaragua Order of May 10, supra note 16, at 198 (Schwebel, J., dissenting).
\textsuperscript{44} In fact, however, Judge Schwebel does suggest elsewhere in his dissenting opinion that, if the United States does appear to be acting as a "guardian" of states in the Central American region, this is due to its treaty obligations with respect to collective security in the region. See id. at 196. See also Moore, supra note 30.
\textsuperscript{45} Nicaragua Order of May 10, supra note 16, at 198 (Schwebel, J., dissenting).
\textsuperscript{46} See id. at 184. See also infra text accompanying notes 92-93.
States. The State Department took the position that the Court's ruling was "acceptable," since "nothing contained in the measures indicated by the Court is inconsistent with current United States policy or activities."\textsuperscript{47} In the view of the United States, the indicated measure concerning the mining of Nicaraguan harbors was moot, even accepting the allegations of the application, because the alleged activities had ceased by March 1984.\textsuperscript{48}

2. Jurisdictional Implications of the Request

The argument suggested by Judge Schwebel\textsuperscript{49} could resurface when the Court reaches the merits of the case. However, the Court would first be required to decide whether it had jurisdiction. At the provisional measures stage, the Court unanimously rejected the United States argument that the case be summarily terminated on jurisdictional grounds,\textsuperscript{50} but it did schedule written proceedings to be directed to the jurisdiction issue.\textsuperscript{51} The United States arguments against provisional measures therefore afforded a preview of the argumentation on that issue.

The jurisdiction of the Court in contentious cases remains essentially a matter of consent of the parties.\textsuperscript{52} Nicaragua sought to establish the consent of the two parties to the case by reference to declarations made by them accepting the Court's compulsory jurisdiction without special agreement from case to case.\textsuperscript{53} Nicaragua's declaration,\textsuperscript{54} in summary fashion, accepted unconditionally the compulsory jurisdiction of the predecessor Permanent Court of International Justice (P.C.I.J.). If still in force upon the establishment of the present

\textsuperscript{47} Court's Ruling Acceptable State Department Declares, N.Y. Times, May 11, 1984, at A8, col. 1.

\textsuperscript{48} Id.

\textsuperscript{49} See supra text accompanying notes 42-45.

\textsuperscript{50} See Nicaragua Order of May 10, supra note 16, at 186.

\textsuperscript{51} See supra note 30.

\textsuperscript{52} See supra note 3, at 341-42.

\textsuperscript{53} I.C.J. Stat., art. 36, para. 2, states: "The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes . . . ." Later in its memorial on jurisdiction, Nicaragua argued that the Court had jurisdiction under the United States-Nicaragua Treaty of Friendship, Commerce and Navigation, art. XXIV, para. 2, 9 U.S.T. 449, T.I.A.S. No. 4024 [hereinafter cited as FCN Treaty]. See Judgment of Nov. 26, supra note 20, at 396 para. 8. See also infra notes 165-75 and accompanying text.

Court, it is deemed an acceptance of the jurisdiction of that court.\(^5\)
The original declaration of the United States\(^6\) accepted the jurisdict-
ion of the present Court, but was subject to three conditions.\(^5\) By its
own terms, the declaration requires a minimum six-month notice pe-
riod before any United States notice of termination of the declaration

55. *See I.C.J. Stat., art. 36, para. 5, which states:

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.

*Id.*


57. The conditions exclude from the applicability of the declaration the following three categories:

(a) disputes the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes in regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States of America; or

(c) disputes arising under a multilateral treaty, unless (1) all Parties to the treaty affected by the decision are also Parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction.

*Id.* See generally *Interhandel (Switz. v. U.S.),* 1959 I.C.J. 6, 24-26 (Preliminary Objections Judgment of Mar. 21) (discussion of self-judging “domestic jurisdiction” exclusion in United States Declaration). *See also id.* at 54 et seq. (Spender, J., concurring); *id.* at 75-76 (Klaestad, J., dissenting); *id.* at 96-97, 103-06 (Lauterpacht, J., dissenting). Cf. Judgment of Nov. 26, supra note 20, at 601-03, paras. 64-67 (Schwebel, J., dissenting) (consideration of possible invalidity of 1946 declaration because of reservation (b)). See generally Crawford, *The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court*, 50 B.R.T. Y.B. INT’L L. 63 (1979). The United States would eventually rely on the third condition as one argument against jurisdiction. *See infra* notes 156-64 and accompanying text.
could become effective.\textsuperscript{58}

This state of affairs presents a clear prima facie showing of jurisdiction, at least sufficient to justify the Court's initial consideration of applicant's request for indication of provisional measures.\textsuperscript{60} The United States, however, raised three basic arguments in opposition that sought to introduce circumstantial ambiguities contrary to the prima facie showing.\textsuperscript{60}

The first argument challenged the effectiveness of the Nicaraguan declaration accepting the jurisdiction of the P.C.I.J. and, \textit{a fortiori}, that of the present Court.\textsuperscript{61} On September 24, 1929, Nicaragua made its declaration, but no instrument of ratification of the Protocol of Signature of the P.C.I.J. Statute was deposited with the Secretary-General of the League of Nations.\textsuperscript{62} There was some evidence that internal procedures for ratification occurred in Nicaragua,\textsuperscript{62} but no such instrument was ever received by the Secretariat of the League.\textsuperscript{62}

In the absence of ratification of the P.C.I.J. Statute, the question of the effectiveness of the Nicaraguan declaration accepting compulsory jurisdiction under the Statute remained unsettled. If, as a formal matter, the declaration had not become effective, then there would have been no Nicaraguan declaration accepting P.C.I.J. jurisdiction that was "still in force" to be deemed an acceptance of the jurisdiction of the present Court.\textsuperscript{63} Accordingly, Nicaragua would not be a state "accepting the same obligation" of compulsory jurisdiction of the Court as the United States and, by its own terms, the United States declaration would not establish consent to jurisdiction as between the

\textsuperscript{58} United States Declaration, \textit{supra} note 56, at 89.
\textsuperscript{59} Cf. \textit{supra} note 31 and accompanying text.
\textsuperscript{60} These arguments would, if accepted, also dictate that the case itself be removed from the Court's list. \textit{See} Nicaragua Order of May 10 at 172, 175.
\textsuperscript{61} Cf., \textit{supra} note 55.

\textsuperscript{63} \textit{See} P.C.I.J. ANN. R., ser. E, No. 16, at 331.
\textsuperscript{64} Nicaragua Order of May 10, \textit{supra} note 16, at 176.
\textsuperscript{65} Cf. \textit{supra} note 55. Judge Schwebel noted, however, that the French text of article 36, paragraph 5, speaks not in terms of pre-1946 declarations being "still in force," but rather, of declarations "for a period which has not yet expired" ("pour une durée qui n'est pas encore expirée"). \textit{See} Nicaragua Order of May 10, \textit{supra} note 16, at 203 (Schwebel, J., dissenting). Of course, if the P.C.I.J. Statute, because of the absence of a formality of ratification, did not come into force with respect to Nicaragua, then the Nicaraguan declaration accepting compulsory jurisdiction was not "still in force" in 1946, but neither had it "expired" at that time.
two states. On the other hand, opposing these formal considerations was the fact that Nicaragua had been included in both United States and United Nations publications as a state accepting the compulsory jurisdiction of the Court. Further, in a previous case decided by the Court in 1960, the applicant Honduras relied, inter alia, on the Nicaraguan declaration to establish jurisdiction before the Court.

Although the Court acknowledged its power to remove a case from the general list when the applicant concedes that there is clearly no present mutual consent of the parties, it was not inclined to dismiss a case summarily on the basis of this formal argument. The Court characterized the effect of the argument as raising a "dispute as to whether the Court has jurisdiction," more suitable for treatment at the preliminary objections stage of the proceedings. Thus, going to the substance of this argument, the Court observed:

the question is thus not whether a jurisdictional instrument exists, but whether Nicaragua, having deposited a declaration of acceptance of the jurisdiction of the Permanent Court of International Justice, can claim to be a "State accepting the same obligation" within the meaning of Article 36, paragraph 2, of the Statute, so as to invoke the United States declaration notwithstanding the fact that, as it appears, no instrument of ratification by Nicaragua was received by the League of Nations. [W]here the contentions of the parties disclose a "dispute as to whether the Court has jurisdiction", [the matter should be settled] by a judicial decision. rendered

66. United States Declaration, supra note 56, at 88.
67. See United States Dept. of State, Treaties in Force: A List of Treaties and Other Agreements of the United States in Force on January 1, 1984, at 125.
68. See United Nations Dept. of Public Information, The International Court of Justice 8 (9th ed.); 1982-1983 I.C.J.Y.B. 79 (1983). But see id. at n.1 ("It does not appear, however, that the instrument of ratification was ever received by the League of Nations"). See also Nicaragua Order of May 10, supra note 16, at 176-77.
69. See Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192 (Judgment of Nov. 18).
70. See id. at 196-97. It should be noted, however, that Honduras and Nicaragua, the two parties to the boundary dispute involved in the case, had concluded an agreement in July 1957 to submit the case to the Court. Id. at 203. See generally Malloy, supra note 11.
73. See I.C.J. Rules of Court, supra note 71, art. 79, para. 1. See generally, S. Rosenne, Procedure, supra note 2, at 156-68.
after fully hearing the parties . . . . [T]herefore the Court is unable to accede to the request of the United States of America summarily to remove the case from the list . . . . 74

The second argument concerned a new United States declaration, dated April 6, 1984, which purported to suspend or modify the effect of the original 1946 declaration.75 The 1946 declaration would “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.”76

Furthermore, by its own terms, this declaration was to take effect immediately, “notwithstanding the terms of the [1946] Declaration,” and was to remain in effect for two years.77 In light of this 1984 declaration, the United States argued that the instant dispute “falls squarely within the terms of the exclusion [and] for that reason the 1946 declaration is ineffective to confer jurisdiction on the Court to entertain the present case.”78

In response, Nicaragua emphasized the six-month notice requirement in the original 1946 declaration,79 and argued that the United States attempt “to modify or suspend”80 the earlier declaration was invalid for several interrelated reasons. This rationale attempts to equate such a declaration with a treaty, subject to the same principles of interpretation. If these principles do apply to modification and termination of such declarations, then neither can occur “except on those conditions [expressed in the declaration] or on some other ground recognized in the law of treaties.”81 Furthermore, any such conditions “must also be compatible with the Statute of the Court.”82 Hence, either the “modification” is invalid (and the 1946 declaration is still in force), or the 1984 declaration is, in effect, an attempt to terminate the

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75. See id. at 178-79.
77. Id. Presumably, the “notwithstanding” phrase is intended to refer to the six-month notice requirement for termination that appears in the 1946 declaration. See supra note 58 and accompanying text.
79. See supra note 58 and accompanying text.
82. Nicaragua Order of May 10, supra note 16, at 179. For a discussion of “compatibility” with the Statute of the Court, see Right of Passage Over Indian Territory (Port. v. India), 1957 I.C.J. 125, 141-44 (Preliminary Objections Judgment of Nov. 26); id. at 168 (Chagla, J., dissenting).
former (and, therefore, is not effective for six months).

There are two basic problems of characterization that the Court would be required to confront in reviewing these arguments. First, is a declaration like a treaty, at least insofar as applying principles of treaty interpretation with respect to modification and termination? 

Certainly, no particular formality need be observed in order to create a treaty-like obligation. Indeed, binding legal obligations may be imposed upon a state as a result of its unilateral public statements. In light of the Court's own jurisprudence, it is not even certain that Nicaragua would be required to demonstrate reliance on the unilateral declaration before the declaration could be said to impose such a binding obligation on the United States.

A second characterization problem concerns the nature of the 1984 declaration itself. Is it in effect a "termination" of the earlier declaration (and thus subject to the six-month notice requirement of the latter), or is it "merely" a modification of the earlier declaration (and not subject to any specific regime of notice)? The Court has tended to resist decisions on jurisdiction vel non based on formalistic or linguistic arguments. Nevertheless, the United States for its part argued that the 1984 declaration was not a "termination," but only a "modification" or "suspension," which it was entitled to make with respect to its

83. In this regard, consider the Court's remark in Anglo-Iranian Oil Co., 1952 I.C.J. 93, 105 (Preliminary Objections Judgment of July 22), concerning the nature of Iran's declaration accepting compulsory jurisdiction: "[T]he text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States." But cf. id. at 125 (Alvarez, J., dissenting): "[T]he Declaration is a multilateral act of a special character; it is the basis of a treaty made by Iran with the States which had already adhered and with those which would subsequently adhere to the provisions of Article 36, paragraph 2, of the Statute of the Court."


85. Cf. Nuclear Tests, 1974 I.C.J. at 267: "When it is the intention of the State making [a unilateral] declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration."

86. See id.: [N]othing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

Id. Cf. Malloy, supra note 3, at 335 n.386.

earlier declaration at any time before Nicaragua filed its application. In the jurisdictional phase of the proceedings, the Court would determine whether the United States characterization of the 1984 declaration was credible or simply disingenuous. The United States raised a third argument in opposition to the request, an argument implicating certain institutional considerations. The United States asserted that granting the request for provisional measures would, ironically enough, prejudice regional diplomatic negotiations for a resolution of the tensions in the Central American region:

[T]he allegations of the Government of Nicaragua comprise but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region. Those matters are the subject of a regional diplomatic effort, known as the "Contadora Process," which has been en-

88. See Nicaragua Order of May 10, supra note 16, at 179. In addition, the United States suggested that, on the basis of the principle of reciprocity, it ought to be permitted to rely upon the absence of any notice requirement in the Nicaraguan declaration, in order to render its own declaration "immediately terminable." Id. See also id. at 206 (Schwebel, J., dissenting). Nicaragua's response to this argument was, in effect, that termination of its declaration would be subject in any event to any applicable notice requirements derived from the principles of the law of treaties. See id. The Court refused to make a determination on the merits of the United States argument at this stage in the proceedings. See Nicaragua Order of May 10, supra note 16, at 179. It may be significant, by way of analogy, that the United States made a similar argument in opposition to jurisdiction in an earlier case before the Court. See Interhandel, 1959 I.C.J. at 23. There the reciprocity argument concerned an attempt by the United States to read into the Swiss declaration a clause from the United States declaration limiting its application to disputes arising after its effective date. The Court summarily rejected this argument, stating that the principle of reciprocity could not justify the United States "in relying upon a restriction which the other Party . . . has not included in its own declaration." Id.

89. See infra note 146 and accompanying text.
90. On the results to date of the so-called Contadora Process, see generally The Contadora Process for Peace in Central America, 24 I.L.M. 182 (1985) (selected United Nations and Contadora Group documents); Kinzer, Nicaraguans Say They Would Sign Proposed Treaty, N.Y. Times, Sept. 23, 1984, at A1, col. 4. Contrary to the attitude it expressed in its arguments to the Court, the United States has seemed somewhat resistant to the recent results of the Contadora Process. See, e.g., U.S. Voices Skepticism on Nicaraguan Move, id. at A21, col. 1; Kinzer, Nicaragua Says U.S. No Longer Backs Peace Plan, id., Sept. 25, 1984, at A12, col. 3. The setbacks in the process of peaceful resolution of the differences between the two states by resort to regional negotiations raise the possibility of exacerbated tensions between them. See, e.g., Taubman, Treaty Impasse Viewed as Omen of New U.S.-Nicaragua Tensions, id. Oct. 2, 1984, at A1, col. 1; Howe, Nicaraguan, at U.N., Asserts U.S. Plans to Invade His Nation Soon, id. Oct. 3, 1984, at A4, col. 1. In this regard, at the provisional measures stage, the Court noted in passing the United States assertion that Nicaragua was under an obligation to negotiate in good faith within the Contadora Process. See Nicaragua Order of May 10, supra note
endorsed by the Organization of American States, and in which
the Government of Nicaragua participates. This process is
strongly supported by the United States as the most appropri-
ate means of resolving this complex of issues, consistent with
the United Nations Charter and the Charter of the Organiza-
tion of American States, in order to achieve a durable peace in
the region. The concern of the United States is that bilateral
judicial proceedings initiated by Nicaragua would impede this
ongoing multilateral diplomatic process.91

In addition, the United States suggested that the other Central
American states whose security was allegedly threatened by Nicara-
guan actions were, in effect, indispensable parties in the present con-
text. Their rights and interests could be affected by any decision of the
Court in the case.92 The dispute was more properly committed to reso-
lution by regional institutions sanctioned by article 52 of the United
Nations Charter.93

At this stage of the proceedings, the Court refused to credit this
argument. This result is hardly surprising when one considers that a
similar argument, made by Iran in opposition to an application of the
United States itself in an earlier case,94 was strongly rejected by the
Court. There Iran had asserted, in a letter to the Court, that it should
not exercise jurisdiction because the particular dispute brought before
the Court by the United States was merely "a marginal and secondary
aspect of an overall problem, one such that it cannot be studied sepa-
rately."95 The Court rejected this argument, explaining: "no provision
of the Statute or the Rules contemplates that the Court should decline
to take cognizance of one aspect of a dispute merely because that dis-
pute has other aspects, however important."96

16, at 185; see also id. at 189 (Mosler, J. & Jennings, J., concurring), emphasizing that
both parties were under such an obligation. Nevertheless, the United States has since
given indications that it is not pursuing the Contadora process as a means of resolution
of the present dispute. See Taubman, U.S. Says It Has Halted Talks With Nicaragua,
91. Nicaragua Order of May 10, supra note 16, at 183 (quoting Letter of United
States Ambassador, Apr. 13, 1984).
92. Id. at 184. On October 4, 1984, the Court rejected a petition by El Salvador to
intervene on behalf of the respondent in the jurisdictional phase of the proceedings. 1984
also World Court Dismisses Petition by El Salvador, N.Y. Times, Oct. 6, 1984, at A3,
col. 4.
93. See Nicaragua Order of May 10, supra note 16, at 184-85.
95. Id. at 8.
96. Id. at 19. The United States has since argued that, contrary to the Court's lan-
In addition, the notion that resolution of the present dispute should be left to "regional agencies and arrangements for the pacific settlement of local disputes" runs counter to the Court's recent jurisprudence on the pacific settlement of international disputes. Again, the Iran case raises an interesting parallel. There the Court considered whether it might be preempted by the active interest and efforts of the United Nations Security Council, as well as the Secretary-General and the General Assembly, in resolving the crisis between the United States and Iran. The Court took the very emphatic view that, not only was it not the intention of the other United Nations principal organs to preclude it from acting, but that it was peculiarly the institutional role of the Court to resolve any legal issues before it, whatever the role undertaken by those other organs in the context of the crisis. Thus, the Court has stated:

It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.

It is with this background in mind that we may appreciate the Court's recital of Nicaragua's response to the United States argument, echoing the Court's language in the Iran case: "the Court is not required to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, and . . . the Court should not decline an essentially judicial task merely because the question before the Court is intertwined with political questions."

B. The Decision on Jurisdiction

The Court's decision on the question of jurisdiction should greatly advance our understanding of the way the Court views the limits of
this judicial task. On balance, although the jurisdictional issues were in
certain respects novel and uncertain, the case for respondent was by no
means a clearly compelling one. 102 The decision also gives some indica-
tion of the extent to which the Court intends to strengthen its institu-
tional credibility as a potentially "important, and sometimes decisive,
factor" in the pacific settlement of international disputes. It is particu-
larly unfortunate, therefore, that the response of the United States to
this decision has been a stark repudiation of the Court's institutional
role in this regard. 103

1. Optional Clause Basis for Jurisdiction

At the jurisdictional phase of the proceedings, the principal argu-
ment of Nicaragua was that both it and the United States had ac-
cepted the Court's jurisdiction under the "Optional Clause" of the
Court's Statute. 104 In order for this argument to stand, it was necessary
for Nicaragua to demonstrate that its 1929 P.C.I.J. declaration could
be deemed an acceptance of the present Court's jurisdiction. 105 For this
to be so, the declaration must have been "still in force" or "not yet
expired" (qui n'est pas encore expirée). 106

As was clear at the earlier stage of the case, 107 the problem for
Nicaragua was that its 1929 declaration was not supported by a formal
instrument of ratification of the Protocol of Signature of the P.C.I.J.
Statute itself. 108 The consequence of this fact is that the declaration
itself did not constitute, at the time, a binding acceptance of the com-
pulsory jurisdiction of the P.C.I.J. 109 Nicaragua argued that, while the
declaration was not an effective acceptance of P.C.I.J. jurisdiction, it
had not "expired." In its view the language of the present Court's Stat-
ute, requiring that a P.C.I.J. declaration still be "in force" or "not yet
expired," was intended only to exclude declarations that had already

102. Id. at 206 (Schwebel J., dissenting):
   In my provisional view . . . [the "modification" and the "reciprocity"] juris-
dictional arguments advanced by the United States . . . are so substantial as to
require the most searching analysis of the Court.

   Nevertheless, I have not found it possible to conclude that, . . . the jurisdic-
tional provisions invoked by Nicaragua do not, prima facie, afford a basis on
which the jurisdiction of the Court might be found.

103. Cf. infra notes 201-13 and accompanying text.


105. See I.C.J. Stat., art. 36, para. 5.

106. Cf. supra note 65.

107. See supra notes 62-66 and accompanying text.

108. See Judgment of Nov. 26, supra note 20, at 499-500, para. 16.

109. See id. at 400-01, para. 18. See also id. at 514, 518 (Ago, J., sep. op.) (declaration
   signed, but without protocol ratification, creates no binding obligation).
expired before the moment of transition occurred between the P.C.I.J. and its successor.\textsuperscript{110} In this regard, it stressed in particular the long-standing practice of publications of the Court and the United Nations Secretariat to treat its declaration as effective in binding Nicaragua to the present Court's compulsory jurisdiction.\textsuperscript{111}

In resolving this novel issue, based on the peculiar facts surrounding Nicaragua's attempt to ratify the P.C.I.J. Statute, the Court accepted the import of the Nicaraguan position, though not the specific terms of its argumentation. Since a declaration under the P.C.I.J. Statute could have been made upon either signing or ratifying the Statute itself,\textsuperscript{112} the Court distinguished between the corresponding validity and effectiveness of such a declaration. The declaration in question was, in the Court's view, "undoubtedly valid"\textsuperscript{113} at the moment it was deposited with the League Secretariat.\textsuperscript{114} It was not binding (i.e., effective), since Nicaragua, having failed as a formal matter to ratify the P.C.I.J. Statute, was not a party to it.\textsuperscript{115} Hence, the Court summarized the legal characteristics of the declaration as follows: "Nicaragua's 1929 Declaration was valid at the moment when Nicaragua became a party

\textsuperscript{110}. \textit{id.}
\textsuperscript{111}. \textit{id.} at 401-03, paras. 19-22. The United States took the position that such publications were not authoritative on the legal question of the effect of article 36, para. 5, of the Court's statute on Nicaragua's declaration. \textit{See id.} at 403, para. 23. The Court viewed this question as argumentatively significant, but not determinative. \textit{See id.} at 409, para. 37:

\begin{quote}
The Court has no intention of assigning these publications any role that would be contrary to their nature but will content itself with noting that they attest a certain interpretation of Article 36, paragraph 5 (whereby that provision would cover the declaration of Nicaragua), and the rejection of an opposite interpretation (which would refuse to classify Nicaragua among the States covered by that Article). Admittedly, this testimony concerns only the result and not the legal reasoning that leads to it.
\end{quote}

For a thorough review of the treatment of the status of Nicaragua and its 1929 Declaration in the Court's publications, see \textit{id.} at 483-89 (Oda, J., sep. op.); \textit{see also id.} at 527 (Ago, J., sep. op.); \textit{id.} at 532-545 (Jennings, J., sep. op.); \textit{id.} at 588-94, paras. 41-52 (Schwebel J., dissenting).

\textsuperscript{112}. \textit{See P.C.I.J. Stat.,} art. 36, para. 2, which states:

\begin{quote}
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 \textit{ipso facto} and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court. . .
\end{quote}

(emphasis added).

\textsuperscript{113}. \textit{Judgment of Nov. 26, supra} note 20, at 403-04, para. 25.
\textsuperscript{114}. \textit{Cf.} Right of Passage over Indian Territory, 1957 I.C.J. at 146.
\textsuperscript{115}. \textit{See Judgment of Nov. 26, supra} note 20, at 404, para. 26.
to the Statute of the new Court; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly refrained from doing so."116

How, then, does such a declaration relate to article 36, paragraph 5, of the present Statute?117 As the Court correctly notes,118 the present case raises almost precisely the reverse situation of that found in the case of Aerial Incident of July 27, 1955.119 There the question was whether article 36, paragraph 5, had any effect on a binding declaration made by Bulgaria under the P.C.I.J. Statute, since Bulgaria was not an original signatory of the I.C.J. Statute.120 The Court concluded that the period of time between dissolution of the P.C.I.J. and Bulgaria's eventual acceptance of the new judicial regime caused a lapse which destroyed the effectiveness of the declaration.121

In the present case, the Court insisted that Aerial Incident "featured quite a different issue"122 and provided no "pointers to precise conclusions on the limited point now in issue."123 Surely, this view is disingenuous.124 It is true that the dissenters in Aerial Incident criticized the judgment at the time as resting on too narrow an interpretation of article 36, paragraph 5.125 It was the dissenters' view that the provision should have been interpreted and applied in such a way as to foster continuity between the preceding and current judicial regimes.126 To the contrary, the judgment in Aerial Incident stressed the importance of continuity of consent by states to these judicial regimes.127

116. Id. at 404, para. 27.
117. Cf. supra note 55.
118. Judgment of Nov. 26, supra note 20, at 405-406, para. 29.
120. Aerial Incident, 1959 I.C.J. at 136.
121. Id. at 138.
123. Id.
124. The Court cites and quotes Aerial Incident decisively in support of the proposition that I.C.J. Stat., art. 36, para. 5, was intended to maintain, as much as possible, the continuity of the judicial regimes represented by the P.C.I.J. and I.C.J. statutes. See id. at 18-19, paras. 32-34, (quoting Aerial Incident, 1959 I.C.J. at 145). See also Judgment of Nov. 26, supra note 20, at 20, para. 28 (Schwebel, J., dissenting): "the Aerial Incident case strikingly and decisively cuts against Nicaragua's thesis." Id.
125. See Aerial Incident 159 I.C.J. at 175 (Lauterpacht, J., Koo, J., & Spender, J., joint dissenting op.).
126. See, e.g., id. at 158, in which the dissenters wrote, "[a]lthough the establishment of the International Court of Justice and the dissolution of the Permanent Court were two separate acts, they were closely linked by the common intention to ensure, as far as possible, the continuity of administration of international justice."
127. See, e.g., Aerial Incident, 1959 I.C.J. at 142:

[When, as in the present case, a State has for many years remained a stranger to the I.C.J. Statute, to hold that that State has consented to the transfer,
One might therefore reasonably argue that the significance of *Aerial Incident* for the present dispute is its insistence that the transitional provision of article 36, paragraph 5, can be invoked only if there exists actual consent to jurisdiction at all relevant times during the transition from one judicial regime to the other. If this is true, then Nicaragua's 1929 declaration might not have survived that moment of transition.

Nevertheless, in the present case the Court chose to emphasize its distinction between "valid" and "binding" declarations under P.C.I.J. practice. The Court did not explain how a valid but non-binding or non-effective declaration could be "still in force," in the words of the English language version of its Statute. It did, however, see signifi-

by the fact of its admission to the United Nations, would be to regard its request for admission as equivalent to an express declaration by that State as provided for by Article 36, paragraph 2, of the Statute. It would be to disregard both the latter provision and the principle according to which the jurisdiction of the Court is conditional upon the consent of the respondent, and to regard as sufficient a consent which is merely presumed. See also id. at 148 (Badawi, J., concurring); Judgment of Nov. 26, supra note 20, at 540 (Jennings, J., concurring): In *Aerial Incident* "the Court denied that there could be any possibility of Article 36, paragraph 5, creating a new obligation, not existing under the old Court . . . ." (emphasis in original). Id. Cf. Malloy, supra note 3, at 311 (footnote omitted): "The decision in *Aerial Incident* emphasizes the extreme importance of the principle of consent underlying the Court's jurisdiction, including the Court's 'compulsory' jurisdiction." Id.

128. See generally Judgment of Nov. 26, supra note 20, at 481-83 (Oda, J., sep. op.).

129. Cf. id. at 406-07, para. 31:

It can only be said . . . that the English version does not require (any more than does the French version) that the declarations concerned should have been made by States parties to the Statute of the Permanent Court and does not mention the necessity of declarations having any binding character for the [Statute's transitional] provision to be applicable to them. It is therefore the Court's opinion that the English version in no way expressly excludes a valid declaration of unexpired duration . . . and therefore not of a binding character.

This argument seems somewhat questionable. For a treaty to be "in force," for example, one would expect that it had a binding character as to the parties thereto. See, e.g., id. at 536 (Jennings, J., sep. op.):

[T]he declarations which are by [the transitional] 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.

See also id. at 570, para. 16 (Schwebel, J., dissenting) ("'in force' means, and equates with, 'bound'"). Cf. Vienna Convention on the Law of Treaties, supra note 81, art. 24, para. 2 (failing any such provision or agreement, a treaty enters into force as soon as consent to be bound has been established for all the negotiating states). See generally I. Brownlie, Principles of Public International Law 608-09 (3rd ed. 1979). Surely then, a more attractive interpretation of the two versions of the transitional provision is that
In view of the excellent equivalence of the expressions "encore en vigueur" and "still in force," the deliberate choice [of the French delegation to the San Francisco Conference] of the expression "pour une durée qui n’est pas encore expirée" seems to denote an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations which have not acquired binding force.\textsuperscript{130}

The Court did acknowledge the need for continuity expressed in \textit{Aerial Incident} as a motivation behind article 36, paragraph 5, but it interpreted this motivation more broadly than had the previous case. Imputing to the transitional provision a progressive character rather than the static one endorsed by \textit{Aerial Incident}, the Court stated: "No doubt [the] main aim [of the Statute's draftsmen] was to safeguard [existing, binding] declarations, but the intention to wipe out the progress evidenced by a declaration such as that of Nicaragua would certainly not square well with their general concern [with progress towards compulsory jurisdiction]."\textsuperscript{131}

While this normative approach may seem to advance "the cause of compulsory jurisdiction,"\textsuperscript{132} it does so by detaching that cause from the principle of actual consent as the basis for jurisdiction before the Court, "compulsory" or otherwise.\textsuperscript{133} It cannot be denied that the sta-

\textsuperscript{130} "still in force" means "binding," and that a declaration that is not binding cannot have a remaining "unexpired period" (\textit{la durée non expirée}) if its period of effectiveness has never in fact begun.

\textsuperscript{131} For a thorough review of the drafting history of article 36, para. 5, see Judgment of Nov. 26, supra note 20, at 478-81 (Oda, J., sep. op.). See also id. at 537-39 (Jennings, J., sep. op.) and 571-76, paras. 18-24 (Schwebel, J., dissenting).

\textsuperscript{132} Judgment of Nov. 26, supra note 20, at 406-07, para. 31. The Court went on to acknowledge, however, that “[o]ther interpretations of [the French delegation’s] proposal are not excluded.” \textit{Id. See supra} note 129. \textit{See also} Judgment of Nov. 26, supra note 20, at 522-24 (Ago, J., sep. op.).

\textsuperscript{133} Judgment of Nov. 26, supra note 20, at 407-08, para. 34. \textit{But see id.} at 481 (Oda, J., sep. op.):

There is no denying that the founders of the International Court of Justice in 1945 wanted to carry over to its declarations accepting the jurisdiction of the Permanent Court of International Justice as compulsory. This is no license, however, for interpreting Article 36, paragraph 5, as attempting to refer to any declaration which, without being effective, was simply on record at that time as a historical statement.

\textit{See also id.} at 524-25 (Ago, J., sep. op.).

\textsuperscript{132} \textit{Id.} at 408, para. 35. \textit{See also id.} at 524-25 (Ago, J., sep. op.).

\textsuperscript{133} \textit{See id.} at 42 (Oda, J., sep. op.). The Court should not close its eyes to the practice and experience over the last forty years in the international community, which has given a new meaning to the Optional Clause. The basic principle that the jurisdiction of
tus of Nicaragua's "valid" but non-binding declaration is ambiguous and that the prior conduct of states in relation to the question is at best equally uncertain.¹³⁴

Ultimately, the Court's conclusion with respect to the status of Nicaragua's declaration is convincing only if one accepts the significance it gives to the distinction between "validity" and "effectiveness" of pre-1946 declarations. The fact that Nicaragua's "acceptance" of the present Court's compulsory jurisdiction is formally irregular³ was not compelling to the Court. To require a new declaration would have been, in the Court's view, unreasonable under the circumstances of the case.¹³⁵ The attitude of the Court in this case towards the requisite formalities of acceptance of jurisdiction appears to be consistent with

any judicial institution in the international community is based upon consent of sovereign states has never changed, and the role of the Optional Clause can never override that principle.

¹³⁴. See, e.g., id. at 410, para. 39. For a discussion of the Arbitral Award case, see supra note 69; id. at 411-12 paras. 43-44 (discussion of inferences from Nicaragua's past conduct). But see id. at 459, para. 29 (Ruda, J., sep. op.) (conduct not determinative); id. at 464-65 (Mosler, J., sep. op.) (arguing that Arbitral Award was decided, as Nicaragua insisted, on the compromis and not on the Optional Clause declarations). See also id. at 489 (Oda, J., sep. op.): "The Court thus appears to take Nicaragua's assertion at face value and evades considering whether Nicaragua's conduct in [the Arbitral Award] case would really constitute acquiescence in the compulsory jurisdiction of the Court."

For a useful analysis of the Arbitral Award case in the present context, see id. at 528-31 (Ago, J., sep. op.).

¹³⁵. Cf. Judgment of Nov. 26, supra note 20, at 411, para. 44 (explaining United States argument as to lack of requisite formalities).

¹³⁶. See id. at 412-13, paras. 46-47:

[I]f the Court were to object that Nicaragua ought to have a declaration under Article 36, paragraph 2, it would be penalizing Nicaragua for having attached undue weight to the information given on that point by the Court and the Secretary General of the United Nations and, in sum, having . . . regarded them as more reliable than they really were.

The Court . . . recognizes that, so far as the accomplishment of the formality of depositing an optional declaration is concerned, Nicaragua was placed in an exceptional position, since the international organs empowered to handle such declarations declared that the formality in question had been accomplished by Nicaragua.

Cf. supra note 111. But see Judgment of Nov. 26, supra note 20, at 462 (Mosler, J., sep. op.):

The Declaration of 1929 was a legal instrument, the effect of which depended on a condition precedent, namely the deposit of the instrument of ratification of the Protocol of 1920. So long as this act had not been performed the Declaration remained without legal effect. To qualify it as certainly valid, but not binding, seems to me a misconstruction of a legal act which was subject to a suspensive condition.

Accord id. at 475-77 (Oda, J., sep. op.).
its longstanding jurisprudence of elevating substance over form.\textsuperscript{137} The Court accordingly found that the continuing "validity" of the Nicaraguan declaration was sufficient to constitute a binding "intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute."\textsuperscript{138}

Having resolved the difficult issue of the status of Nicaragua's declaration, the Court was still faced with the question of whether there existed the mutual consent necessary to give it jurisdiction. This question required the Court to determine the extent to which the United States declaration accepting the Court's jurisdiction was coextensive with the Nicaragua declaration.\textsuperscript{139} The Court, therefore, turned to an analysis of the United States declaration.

For the most part, the arguments of the United States replicated its earlier arguments at the provisional measures stage of the proceedings.\textsuperscript{140} The Court's analysis offers answers to the characterization problems raised by the 1984 declaration. Nicaragua argued that, if the 1984 declaration was a modification, it was invalid (under treaty law principles), since no right of unilateral modification had been expressly

\textsuperscript{137} Cf., e.g., Corfu Channel 1947-48 I.C.J. at 28-29 (no formal limits on mutual consent); Aegean Sea Continental Shelf, 1978 I.C.J. at 39 ("no rule of international law . . . might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement"); Nuclear Tests, 1974 I.C.J. 253 (form not controlling on question of binding character of unilateral declaration); Temple of Preah Vihear, 1961 I.C.J. at 31 (formal irregularities in proceedings not determinative).\textsuperscript{138} But see Judgment of Nov. 26, supra note 20, at 4 (Oda, J., sep. op.):

[Even supposing that Nicaragua's intention was constant and demonstrable beyond all doubt, I cannot accept the proposition that intention outweighed the defect because of the formal character of the latter . . . . ]

[R]atification of the Protocol was a stringent requirement without whose fulfillment the Permanent Court could have no jurisdiction over Nicaragua.

\textit{Id.}

\textsuperscript{138} See also id. at 519 (Ago, J., sep. op.) (ratification note mere formality).

\textsuperscript{139} Judgment of Nov. 26, supra note 20, at 412-13, para. 47. The Court rejected United States arguments to the effect that Nicaragua was stopped from relying on the Optional Clause because of its behavior vis-à-vis the United States which, it was contended, suggested an intent not to be bound by the compulsory jurisdiction of the Court. See, e.g., id. at 413-14, paras. 48-50. The Court has consistently tended to disfavor estoppel arguments, see e.g., North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3, 26 (Judgment of Feb. 20), and in the present case it rejected the argument on factual grounds. See Judgment of Nov. 26, supra note 20, at 414-15, para. 51.

\textsuperscript{140} See I.C.J. Stat., art. 36, para. 2. Cf., e.g., Interhandel, 1959 I.C.J. at 23 (jurisdiction only to extent that two declarations coincide in conferring it); Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 23 (Judgment of July 6); Anglo-Iranian Oil Co., 1952 I.C.J. at 103. See generally I. SHIHATA, supra note 21, at 147-50.

\textsuperscript{140} See supra notes 75-89 and accompanying text.
reserved in the 1946 declaration. In the alternative, if the 1984 declaration was a partial termination of the 1946 declaration, then it was ineffective until the expiration of the six-month notice period of the original declaration.

The United States responded that the 1984 declaration was a "modification." Further, since Optional Clause declarations were sui generis and unlike treaties, it would be inappropriate to extend rules of treaty law to these declarations in deciding whether a unilateral modification would be effective. The United States rejected the characterization of the 1984 declaration as a "termination" subject to the six-month notice period.

The Court proceeded to resolve both characterization problems which had been raised at the provisional measures stage. It first dissolved the "modification"/"termination" dispute as irrelevant to the underlying issues raised by the case:

The argument between the Parties as to whether the 1984 notification should be characterized as a modification or as a termination of the 1946 Declaration appears in fact to be without consequence for the purpose of this Judgment. The truth is that it is intended to secure a partial and temporary termina-

141. Judgment of Nov. 26, supra note 20, at 404, para. 52. Cf. Vienna Convention on the Law of Treaties, supra note 81, art. 39: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

142. See Judgment of Nov. 26, supra note 20, at 416, para. 54.

143. See id. at 415-16, para. 53. Cf. id. at 546, (Jennings, J., concurring):

[T]he 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 regime 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.

144. Id. at 416, para. 55. The United States also argued that, even assuming the six-month notice period was generally applicable to the "modification," the 1984 declaration was still immediately applicable vis-à-vis Nicaragua by operation of reciprocity, since the Nicaraguan declaration was immediately terminable without notice. Id. at 416-17, para. 55. Nicaragua took the view that its own declaration was not immediately terminable, being governed by treaty law principles which would require notice of termination in the absence of express provisions to the contrary. Id. at 417, para. 56. Cf. Vienna Convention on the Law of Treaties, supra note 81, art. 54. The Court cut through this subsidiary line of argument by reaffirming a principle enunciated in an earlier case, in which it had rejected a similar argument made by the United States. See Interhandel, 1959 I.C.J. at 23.

145. See supra notes 83-88 and accompanying text.
Counsel for the United States during the hearings claimed that the notification was equally valid against Nicaragua whether it was regarded as a "modification" or as a "termination" of the [1946] Declaration.\textsuperscript{146}

To the contrary, the key issue at this stage involved the other characterization problem, whether Optional Clause declarations should be treated like treaties in analyzing the effectiveness of any purported modification or termination. The Court's judgment in the Nuclear Tests cases\textsuperscript{147} had already suggested that unilateral "declarations" created legal (i.e., treaty-like) obligations,\textsuperscript{148} though the "declaration" there had not been one made under the Optional Clause. Despite some contrary authority directly on this issue,\textsuperscript{149} the Court chose to extend the reasoning of the Nuclear Tests cases in this regard to the present case:

Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations . . . . However, the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and contents of its solemn commitments as it pleases. In the Nuclear Tests cases the Court expressed its position on this point very clearly . . . .\textsuperscript{150}

Indeed, the Court goes so far as to conclude that Optional Clause declarations "establish a series of bilateral engagements with other States accepting the same obligation . . . in which the conditions, reservations and time-limit clauses are taken into consideration."\textsuperscript{151} The

\begin{itemize}
\item \textsuperscript{146} Judgment of Nov. 26, supra note 20, at 417, para. 58. See id. at 617, para. 92 (Schwebel, J., dissenting) (accord with Court's disposition of characterization problem). See also id. at 546 (Jennings, J., sep. op.): "I do not think one need spend much time on the somewhat theoretical question whether the [1984 declaration] amounts to a modification or a substitution of the 1946 Declaration. The major problems of principle would apply to either." Id.
\item \textsuperscript{147} See supra note 27.
\item \textsuperscript{148} See supra notes 85-86 and accompanying text.
\item \textsuperscript{149} See supra note 83.
\item \textsuperscript{150} Judgment of Nov. 26, supra note 20, at 418, para. 59. Cf. id. at 549 (Jennings, J., sep. op.): "[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 . . . . Obviously, . . . they do not amount to treaties or contracts . . . ."
\item \textsuperscript{151} Judgment of Nov. 26, supra note 20, at 418, para. 60.
\end{itemize}
notice period in the 1946 declaration is such an engagement, representing a “positive undertaking” that is binding on the United States. In general, Optional Clause declarations should be treated “by analogy, according to the law of treaties.” Such declarations, therefore, are at least “treaty-like,” and, in the absence of express provisions to the contrary, their modification or termination would be required to comply with legal principles governing treaties, including, inter alia, good faith notice of termination or modification.

The Court then considered whether, despite the continuing applicability of the United States 1946 declaration, the third express reservation of that declaration might negate jurisdiction in the present case. Since the United States had not specifically agreed to jurisdiction, was the present dispute one in which “all parties to [a multilateral] treaty affected by the decision” were not parties to the case? The United States noted that four multilateral conventions were implicated by the dispute, and that other interested states that were parties to the conventions (i.e., Honduras, Costa Rica and El Salvador) were not parties to the case. Accordingly, the dispute was excluded from the application of the 1946 declaration by the “multilateral treaties reservation.”

This argument raised considerable ambiguities in the Court’s view. First, Nicaragua’s claims were not limited to violations of these con-

152. Id. at 419, para. 62.
153. Id. at 421, para. 65.
154. Id. at 419-20, para. 63.
155. This conclusion made it unnecessary for the Court to consider Nicaragua’s subsidiary argument that the 1984 declaration was ineffective because it was an unconstitutional exercise of the treaty power, and hence a violation of internal law which was “manifest and concerned a rule of United States internal law of fundamental importance.” Vienna Convention on the Law of Treaties, supra note 81, art. 46, para. 1. See Judgment of Nov. 26, supra note 20, at 421, para. 66. The invalidity of treaties on the basis of provisions of internal (municipal) law is a matter of continuing controversy, (see I. Brownlie, supra note 129, at 610-11), and one may therefore question whether the Vienna Convention in fact reflects any customary principle of international law in this regard. Indeed, even as a matter of United States constitutional law, the question of the validity vel non of unilateral executive action modifying or abrogating previously contracted treaty commitments is far from settled, let alone “manifest.” See, e.g., Panel Discussion, China: Constitutional Implications of Recognition and Derecognition, 1979 Proc. Am. Soc. Int’l L. 137.

156. See supra note 57 for text of reservation (c).

157. These multilateral treaties were: (i) the United Nations Charter; (ii) the O.A.S. Charter; (iii) the Montevideo Charter on Rights and Duties of States, Dec. 26, 1933; and (iv) the Havana Convention on the Rights and Duties of States in the Event of Civil Strife, Feb. 20, 1928. Judgment of Nov. 26, supra note 20, at 421.

158. See id. at 422, para. 68. See also id. at 604, para. 70 (Schwebel, J., dissenting).
Second, the wording of the multilateral treaty reservation was by no means clear in its meaning or implications. Finally, a determination of which states would be "affected by the decision" in this case necessarily looked to the decision of the Court on the merits. Hence, invocation by the United States of the multilateral treaty reservation, given its terms, raised "a question concerning matters of sub-

159. Id. at 418, para. 60. The United States nevertheless argued that all the Nicaraguan claims were merely restatements or paraphrases of the claims based upon the multilateral treaties in question. See id. Nicaragua rejected this argument, asserting specifically that customary international law, particularly that related to the use of force, did not depend solely upon such conventions. See id. at 423-24, para. 71. The Court decisively endorsed the underlying premise of the Nicaraguan argument:

Nicaragua . . . does not confine those claims only to violations of the four multilateral conventions . . . . On the contrary, Nicaragua invokes a number of principles of customary and international law . . . . The Court cannot dismiss the claims of Nicaragua under [such] principles . . . simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua . . . . Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.

Id. at 424, para. 73. But see id. at 614-16, para. 88 (Schwebel, J., dissenting) (Nicaraguan claims under treaties and customary principles substantially equivalent).

160. See, e.g., id. at 424, para. 72:

The multilateral treaty reservation in the United States Declaration has some obscure aspects, which have been the subject of comment since its making in 1946. There are two interpretations of the need for the presence of the parties to the multilateral treaties concerned in the proceedings before the Court as a condition for the validity of the acceptance of the compulsory jurisdiction by the United States. It is not clear whether what are "affected," according to the terms of the proviso, are the treaties themselves or the parties to them.

For a useful analysis of the interpretive controversy surrounding this reservation, see id. at 454-57, 467-69 (Ruda, J., & Mosler, J., sep. op.). See also Briggs, Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice, 93 HAGUE ACAD. REC. DES COURS 307 (1958), Waldock, The Decline of the Optional Clause, 32 BRIT. Y.B. INT'L L. 244, 275 (1955-56).

In any event, the three non-party states involved had themselves accepted the compulsory jurisdiction of the Court and could therefore join the dispute on the merits. See Judgment of Nov. 26, supra note 20, at 425, para. 74.

161. See Judgment of Nov. 26, supra note 20, at 425, para. 75. See also id. at 449 (Singh, J., sep. op.):

The key words of the [multilateral treaty] reservation are "affected by the decision," which deprive the reservation of its preliminary character because at the present jurisdictional stage it is not possible to come to any conclusion as to which, if any, of the States parties to a multilateral treaty would be affected by the decision of the Court.

Id. But see id. at 557 (Jennings, J., sep. op.) (difficulty one of interpretation only); id. at 604-05, paras. 71-72 (Schwebel, J., dissenting).
stance relating to the merits of the case,” not simply the question of jurisdiction _vel non_. Consequently, under its revised rules, the Court did not treat this objection as possessing “an exclusively preliminary character” and did not respond to it definitively at this stage of the proceedings.

2. FCN Treaty Basis for Jurisdiction

Given the Court’s reluctance to resolve this last objection concerning the Optional Clause basis for jurisdiction, it became more important for the Court to make a determination on the applicant’s narrower, alternative basis for jurisdiction, the provisions of a 1956 Treaty of Friendship, Commerce and Navigation (FCN Treaty) between the parties. Article 24, paragraph 2, of the FCN Treaty provides: “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.”

A preliminary procedural issue arose, however, because Nicaragua’s application had not invoked the FCN Treaty as a basis for jurisdiction, contrary to the Court’s rules. Nicaragua had attempted in its

162. _Id._ at 425, para. 76. _Cf._ _id._ at 555 (Jennings, J., sep. op.):
Nicaragua has . . . made the very important . . . counter-argument that its case . . . 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.

163. _See_ I.C.J. Rules of Court, _supra_ note 17, art. 79, para. 7:
7. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

164. Judgment of Nov. 26, _supra_ note 20, at 425, para. 76. _See also id._ at 448 (Singh, J., sep. op.) (multilateral treaty reservation is not “exclusively preliminary”). _Cf._ _id._ at 611-12, paras. 79-81 (Schwebel, J., dissenting).

165. FCN Treaty, _supra_ note 53. Judge Ago would go so far as to say that the FCN Treaty basis of jurisdiction was “an independent and not . . . a merely ‘complementary’ title of jurisdiction.” Judgment of Nov. 26, _supra_ note 20, at 514 (Ago, J., sep. op.).

166. _See_ I.C.J. Rules of Court, _supra_ note 17, art. 38, para. 2:
The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.
application to reserve the right to amend it,\textsuperscript{167} and invoked that right to justify the introduction of this alternative basis for jurisdiction at the jurisdictional stage of the proceedings.\textsuperscript{168} The Court did not view this variance from its rules to be "a bar to reliance"\textsuperscript{169} on the FCN Treaty at this stage, so long as reliance thereon was clearly indicated by the applicant and the result of such reliance did not transform the character of the dispute before it.\textsuperscript{170}

In addressing the FCN Treaty basis of jurisdiction on its own terms, the United States first argued that there was no showing of a "reasonable connection between the Treaty and the claims submitted to the Court."\textsuperscript{171} After reviewing several substantive provisions of the FCN Treaty,\textsuperscript{172} however, the Court concluded that there was under the circumstances at least a dispute between the parties over the "interpretation or application" of those provisions sufficient to trigger the jurisdictional provision of the FCN Treaty.\textsuperscript{173}

The United States also argued that, contrary to the requirements of that jurisdictional provision, there had been no attempt to adjust the dispute by diplomacy.\textsuperscript{174} The Court rejected this argument, pointedly relying upon its disposition of similar arguments in the Iran hos-
tages case in which the United States had been applicant.175

3. Admissibility of the Claims

The establishment of these two alternative bases of jurisdiction did not end the preliminary stage of proceedings in the present case. The Court then considered arguments by the United States that the claims raised by Nicaragua were inadmissible before it, despite its jurisdiction over the parties. The status and timing of objections to the admissibility of claims, as opposed to jurisdictional objections, have been a subject of considerable uncertainty and controversy.176 Though it may be argued that questions of admissibility are concerned with the "merits" of the substantive claim itself,177 they are of a sufficiently preliminary character that their resolution at an early stage of the proceedings seems preferable.

For the most part, the five objections of the United States on admissibility of the claims replicate its previous argumentation at the provisional measures stage.178 The first objection, a variation on the theme of its multilateral treaty reservation argument,179 was that the case did not include certain states whose interests would be affected by any decision adjudicating Nicaragua's claim.180 These states were, in effect, "indispensable parties" whom Nicaragua had failed to bring into

175. See, e.g., id. at 428, para. 83:

[The] dispute is also clearly one which is not "satisfactorily adjusted by diplomacy" within the meaning of Article XXVI of the [FCN] Treaty (cf. United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, pp. 26-28, paras. 50-54). In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty.
Id. See also id. at 427, para. 81, id. at 515-16 (Ago, J., sep. op.); cf. id. at 445 (Singh, J., sep. op.) (requirement of prior diplomatic efforts satisfied). But see id. at 453, paras. 5-8 (Ruda, J., sep. op.) (no evidence of requisite invocation of treaty in negotiations). See also id. at 473 (Oda, J., sep. op.) (reasons why the Iranian hostage case presented distinguishable jurisdictional justifications); id. at 629-30, para. 119 (Schwebel, J., dissenting) (distinguishing the Iranian hostage case). But see id. at 556 (Jennings, J., sep. op.) (indicated that identical treaty provisions were at issue in the two cases). Accord id. at 516 (Ago, J., sep. op.).

176. Nowhere has this controversy over the status of admissibility objections been more intense than in South West Africa, Second Phase, 1966 I.C.J. 6.

177. Cf., e.g., Nottebohm (Liecht. v. Guat.) Second Phase, 1955 I.C.J. 4, 12 (Judgment of Apr. 6); id. at 28 (Klaestad, J., dissenting); id. at 34 (Read, J., dissenting); South West Africa, Second Phase, 1966 I.C.J. at 55 (Declaration of Spender).

178. Cf. supra notes 90-101 and accompanying text.

179. Cf. supra notes 156-158 and accompanying text.

180. See Judgment of Nov. 26, supra note 20, at 430, para. 86.
the case.

This objection had been specifically raised at the provisional measures stage. While the three states involved had informally communicated their agreement with the assertion that their interests were implicated, none had indicated in those communications any intention to intervene.

The Court has taken a narrow view of the applicability of any concept of "indispensable parties" whose absence would require dismissal of a case before it. Unlike the formulation of the United States multilateral treaty reservation, which focuses on a state "affected" by the decision, the indispensable party objection has been recognized by the Court only "where the legal interests of a State not a party would not only be affected by a decision, but would form the very subject-matter of the decision." In the absence of something like a decision in rem, non-party states whose legal interests were factually implicated by a decision would, in no technical sense at least, be bound by the Court's decision.

The four remaining admissibility objections present different, though related, aspects of the same institutional concern; namely, that the Court was not the appropriate dispute settlement mechanism in light of the broader controversy underlying the case. Thus, the second objection asserted that the fundamental issue in the case was a charge of illicit use of force or aggression, a charge which presented a matter committed to the cognizance of the Security Council. Similarly, the third objection argued that the court should not exercise subject matter jurisdiction in a case involving assertions of the "inherent right of individual or collective self-defence" as permitted member states under the United Nations Charter.

The Court noted the essential terms of these two arguments as

181. See Order of May 10, supra note 16, at 185.
182. See Judgment of Nov. 26, supra note 20, at 430-31, para. 87.
183. See id. But see supra note 92.
187. See Judgment of Nov. 26, supra note 20, at 431. Cf. U.N. CHARTER art. 24, para. 1 (Security Council charged with "primary responsibility for the maintenance of international peace and security").
188. See Judgment of Nov. 26, supra note 20, at 432. Cf. U.N. CHARTER art. 51. As a factual matter, however, there was a serious question whether there had been an "armed attack" by Nicaragua to trigger the provisions of article 51. See Judgment of Nov. 26, supra note 20, at 433.
follows: "The United States is thus arguing that the matter was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force." In the face of these arguments, it went on to confirm the view it had expressed in the Iran hostages case and at the provisional measures stage of the present case. The institutional role of the Court in resolving the legal disputes raised by such charges of aggression and countercharges of collective self-defense is primary and not subordinated in any sense to political or diplomatic processes. Under the Charter, the Security Council does not have an exclusive institutional role to play in this regard, despite its exclusive authority under chapter 7 of the Charter.

Similarly, the Court rejected the fourth objection that, as an institutional matter, the Court was unable to deal with an ongoing political conflict such as the present case. This objection is the merest rhetorical flourish. What dispute between states reaching this Court is not fraught with political implications? What cases would have remained on its general list if this argument were cogent? In fact, this objection is no more than a recasting of the two previous arguments in a more impressionistic tone. The fact that armed conflict is or may be involved does little to distinguish this case from previous ones involving issues of the use of force, in which the Court had nevertheless exercised its jurisdiction over the subject matter.

189. Judgment of Nov. 26, supra note 20, at 433, para. 93.
191. See supra notes 97-101 and accompanying text.
193. See id. at 434, paras. 94-95:

It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principle judicial organ of the Organization for peaceful settlement.

It is necessary to emphasize that Article 24 of the Charter of the United Nations does not confer exclusive responsibility upon the Security Council for the purpose [of maintaining international peace and security].

Id. (emphasis in original).

Cf. U.N. CHARTER art. 12, para. 1, which expressly limits the role of the General Assembly where the Security Council is exercising its functions with respect to any dispute or situation. No such provision expresses any similar demarcation of functions between the Court and the Council.

194. See Judgment of Nov. 26, supra note 20, at 436, para. 99.
195. The United States itself emphasized that this conclusion of its fourth objection was "merely that in this respect the application of international legal principles is the responsibility of the organs set up under the Charter." Id.
196. See, e.g., Corfu Channel 1949 I.C.J. 4, 31 (Merits Judgment of Apr. 9); Aerial
The fifth and final objection to admissibility argued that the applicant should be required to exhaust "established [diplomatic] processes for the resolution of the conflicts occurring in Central America." In light of the United States disinclination to engage in the so-called Contadora Process, this argument may seem particularly disingenuous. In any event, this objection, like the previous three, seeks to subordinate the institutional role of the Court to that of other, political institutions and processes. Further, as had already been noted at the provisional measures stage, the Court could not find:

any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan Application and judicial determination in due course of the submissions of the Parties in the case.

The Court concluded, therefore, by a unanimous vote, that the claims of Nicaragua were admissible.

CONCLUSION

The decisions of the Court on provisional measures and, most particularly, on jurisdiction and admissibility, represent a significant manifestation of the Court's credibility and attentiveness to its institutional role in the process of pacific settlement of international disputes. On their abstract merits, the decisions have much to offer students of international adjudication on such diverse issues as the precise place of


The United States argued that cases such as those just cited are distinguishable from the present case, since any use of force had been completed at the time of the Court's proceedings. See Judgment of Nov. 26, supra note 20, at 435, para. 97. This counter-argument cannot explain, however, the Court's exercise of jurisdiction in the case of United States Diplomatic and Consular Staff in Tehran, where, embarrassingly enough, the United States initiated the use of armed forces in Iran while the case was sub judice.

198. See id. at 438, para. 103; cf. supra note 90.
199. Judgment of Nov. 26, supra note 20, at 440-41, para. 108. On the findings at the provisional measures stage, see supra notes 94-95 and accompanying text.
200. Judgment of Nov. 26, supra note 20, at 442, para. 113(1). While dissenting from the two jurisdictional decisions in the judgment, Judge Schwebel joined the Court's decision rejecting the admissibility objections at this stage of the proceedings. See id. at 1-2, para. 2. (Schwebel, J., dissenting).
the Court in this process, the legal character and significance of Optional Clause declarations, and the applicability of the transitional provisions of article 36, paragraph 5, of the Court’s Statute. Unfortunately, these abstract considerations have now been overshadowed by a crisis of institutional credibility triggered by the United States response to the Court’s jurisdictional decision in this case.

On January 18, 1985, almost two months after the decision, the United States announced its intention to withdraw from any further proceedings in the case. The Court nevertheless scheduled time limits for the submission of memorials by applicant and respondent on the merits, April 30 and May 31, 1985, respectively. In a statement by the United States Department of State accompanying the announcement of United States withdrawal from the case, the Department argued that the proceedings were a “misuse of the Court for political purposes,” an ingenuous utterance by a client in need of counselling. It repeated the United States contention (already rejected) that the Court lacked jurisdiction and it insisted upon the legally irrelevant fact that “the scope of the problem [between Nicaragua and the United States] is far broader” than a legal dispute.

Among other things, the statement took the position that the Court’s jurisdictional decision based on the Optional Clause declarations was erroneous. It argued as follows:

The Court chose to ignore the irrefutable evidence that Nicaragua itself never accepted the Court’s compulsory jurisdiction. Allowing Nicaragua to sue where it could not be sued was a violation of the Court’s basic principle of reciprocity, which necessarily underlies our own consent to the Court’s compulsory jurisdiction. On this pivotal issue in the Nov. 26 decision—decided by a vote of 11-5—dissenting judges called the Court’s judgment “untenable” and “astonishing” and described

204. U.S. Withdrawal, supra note 13, at 246. This is a particularly infelicitous remark. Would the United States therefore discredit its own motives in instituting proceedings against the U.S.S.R. in the case of the Aerial Incident of 7 Nov. 1954 (see supra note 196), where it was conceded by the then applicant United States that the U.S.S.R. had not made a declaration accepting the compulsory jurisdiction of the Court? When the U.S.S.R. declined to accept the United States “invitation” to enter the case already initiated by the United States, the case was removed from the list. Id.
205. Id.
the United States position as "beyond doubt." We agree.\textsuperscript{206}

This argument is far from compelling. The arguments before the Court as to Nicaraguan acceptance of compulsory jurisdiction were less a factual matter of adducing evidence—"irrefutable" or otherwise—than a subtle legal question concerning the effect of article 36, paragraph 5, of the Court's Statute on the Nicaraguan declaration. Further, the significance of the eleven to five vote on the issue is not clear, particularly where one of those "dissenting" was the United States judge, Judge Schwebel.\textsuperscript{207} Shall an observer infer that all non-unanimous decisions of the Court are inherently suspect? Does this include the Iran hostages decision, in favor of the then-applicant United States,\textsuperscript{208} or the 1962 and 1966 decisions in the South West Africa cases, each decided by one-vote margins and each contradicting the other?\textsuperscript{209} Such an interpretation does not bespeak the rule of law.

In any event, the focus of the statement on the eleven to five vote as "this pivotal issue"\textsuperscript{210} is inherently and shamelessly misleading for two reasons. First, from the moment the FCN Treaty basis of jurisdiction entered the case, the Optional Clause basis was no longer "pivotal."\textsuperscript{211} Second, the vote on jurisdiction \textit{vel non} was not eleven to five,

\textsuperscript{206} Id. at 247. The statement went on to criticize "[t]he haste with which the Court proceeded to a judgment on these issues ...." Id. at 248. To the contrary, see Judge Nagendra Singh's separate opinion: "The Court's consideration of all these legal obstacles to its own jurisdiction under the Optional Clause has been both thorough and careful, and I do agree with the Court's finding, but it does represent one way of looking at the picture and interpreting the legal situation." Judgment of Nov. 26, supra note 20, at 444 (Singh, J., sep. op.). \textit{But see id. at 472} (Oda, J., sep. op.) ("unduly short time allowed to Judges in the present case for expounding their separate or dissenting opinions").

\textsuperscript{207} See Judgment of Nov. 26, supra note 20, at 442, para. 113(1)(a).

\textsuperscript{208} The vote in that case varied from question to question. On the question of whether Iran had violated international law and whether its responsibility had been engaged, the vote was 13-2 on each (affirmative). On whether Iran must take immediate measures to address the situation causing the violations, the vote was unanimous (affirmative). On whether Iran was under an obligation to the United States for reparations, the vote was 12-3 (affirmative). On whether reparations should be arranged between the parties and, failing agreement, by the Court, the vote was 14-1 (affirmative). United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. at 44-45, para. 95. The United States judge participated in the decision, but no \textit{ad hoc} judge had been appointed by Iran under I.C.J. Stat. art. 31, para. 2. \textit{See id.}

\textsuperscript{209} See South West Africa, 1962 I.C.J. 319 (8-7 vote); see also id. 1966 I.C.J. at 6 (Second Phase) (8-7 vote, with the president of the Court casting a tie-breaking vote under I.C.J. Stat. art. 55, para. 2).

\textsuperscript{210} \textit{U.S. Withdrawal}, supra note 13.

\textsuperscript{211} \textit{See, e.g., Judgment of Nov. 26, supra note 20, at 444} (Singh, J., sep. op.). "[T]he jurisdiction of the Court resting upon the [FCN Treaty] provides a clearer and a firmer ground than the jurisdiction based on .... the Optional Clause." \textit{Id. See also id. at 461-62} (Mosler, J., sep. op.) (FCN Treaty sole basis for jurisdiction).
but fifteen to one, the lone vote against was cast by the United States judge.\(^\text{212}\) Fourteen judges voted for the FCN Treaty basis of jurisdiction,\(^\text{213}\) and fully fifteen for one or the other of the alternative bases.

In a passage worthy of Lewis Carroll, the United States Statement concludes: "because of our commitment to the rule of law, we must declare our firm conviction that the course on which the Court may now be embarked could do enormous harm to it as an institution and to the cause of international law."\(^\text{214}\)

Can the rule of law and the institutional credibility of the Court possibly be served by an action of a major power announcing its intention to repudiate fundamental duties imposed upon it by the United Nations Charter and the Court's Statute?\(^\text{215}\) The precise issue raised by the United States repudiation of the Court's decision is neither the correctness of that decision in the abstract, nor the sensibilities of five judges who voted against one of two independent bases for that decision. Clearly, the Court's decision on the Optional Clause basis for jurisdiction is a conceptual leap, dependent upon the cogency of the distinction between the "validity" and the "effectiveness" of P.C.I.J. Optional Clause declarations.

The question now is whether the rule of law can have any meaning when the United States so cavalierly and cynically disregards the Charter obligation "to comply with the decision of the International Court of Justice in any case to which it is a party."\(^\text{216}\) This repudiation overshadows any honest dispute that reasonable persons might have over the proper disposition of the jurisdictional arguments of the parties to this case.

The dissolution of the rule of law into the inertial force of political power is particularly distressing when it is set in motion by a state that has in the past publicly encouraged the enhancement of the Court's institutional credibility through General Assembly resolution\(^\text{217}\) and through municipal legislative resolutions and study.\(^\text{218}\) One can only echo Shakespeare and cry, "O, it is excellent to have a giant's strength; but it is tyrannous to use it like a giant."\(^\text{219}\)

\(^{212}\) See id. at 442, para. 113(1)(c). See also U.S. Observations, supra note 96, at 249.

\(^{213}\) See Judgment of Nov. 26, supra note 20, at 442, para. 113(1)(b).

\(^{214}\) U.S. Withdrawal, supra note 13.

\(^{215}\) See supra note 14.

\(^{216}\) U.N. Charter art. 94, para. 1.


\(^{219}\) W. SHAKESPEARE, MEASURE FOR MEASURE, act II, Scene 2, lines 107-09.