

DECLARATION OF JUDGE *AD HOC* BROWER

*Colombia's first preliminary objection — The Pact of Bogotá — Interpretation of Article LVI of the Pact of Bogotá — Guidance from travaux préparatoires — The principle of effet utile — Articles LVIII and LIX of the Pact of Bogotá.*

1. While I am one of the seven Members of the Court who have issued a joint dissenting opinion vigorously opposing the Judgment's conclusion, reached only with the casting vote of the President due to the even, eight to eight, split of the Court on the issue, to reject Colombia's third preliminary objection (*res judicata*), I have joined all of the other Members of the Court in concluding that, on balance, the Court does have jurisdiction over Nicaragua's Application under the Pact of Bogotá. I think it important, however, to explain the difficulties the Court necessarily has had in accepting Colombia's interpretation of the second paragraph of Article LVI of the Pact, particularly given the astronomical "black hole" of the virtually complete absence of useful guidance from any *travaux préparatoires* in respect of that paragraph.

2. The context for the Court's consideration of that paragraph was graphically given by Nicaragua itself when its counsel conceded, more than once, in the oral proceedings that that second paragraph is "superfluous, but . . . not ineffective", or, as Colombia characterized it succinctly, "superfluous but not useless". In other words, the only alternative to acceptance of Colombia's interpretation of that paragraph is that it has no meaning whatsoever other than, as the Court has agreed, to make clear out of an abundance of caution what in any event would be true. Of course just as nature abhors a vacuum, so, too, is the Court generally driven to attribute a meaning to each and every provision of a treaty, as required by the principle of *effet utile*.

3. The Court fortunately notes and discusses, though neither Nicaragua nor Colombia did, neither in their written submissions nor in the oral proceedings, Articles LVIII and LIX of the Pact, the first of which terminates eight earlier treaties as the Pact enters into force for parties to the Pact and any of those earlier instruments, and the second of which echoes the second paragraph of Article LVI: "The provisions of the foregoing Article [LVIII] shall not apply to procedures already initiated or agreed upon in accordance with any of the above-mentioned international instruments."

4. It could be argued from these two Articles, put alongside the entirety of Article LVI, that collectively they reflect an intention of the parties to the Pact that once the Pact would be denounced by a party, then, just as with Article LVIII's termination of the eight previous treaties, no new proceedings could be commenced. Further, since *Nottebohm* (*Liechtenstein v. Guatemala*), *Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111) confirmed definitively only in 1953, or five years after the conclusion of the Pact in 1948, that the Court's jurisdiction attaches upon the submission of an application and endures thereafter irrespective of the subsequent termination of the instrument on which such jurisdiction was based, it could be argued that the second paragraph of Article LVI had, when drafted in 1938 and when the Pact was adopted ten years later, the *effet utile* of making clear what had not yet been definitively established by *Nottebohm*, though this, too, perhaps could be regarded as being done out of an abundance of caution. In any event, the Court has not found any of this persuasive, fundamentally because of the complete absence of any indication in the very limited *travaux préparatoires* as to why that second paragraph was included.

5. All the Court could derive from those records was quite meagre fare. In 1937, the Director General of the Pan-American Union invited the Under Secretary of State of the United States to "consider the possibility of taking the initiative at the forthcoming Conference at Lima in recommending additions to the existing treaties of peace with the view of increasing their usefulness". On 15 November 1938, the United States responded positively, submitting a Draft Treaty for discussion at the conference in Lima to be held shortly thereafter. That draft did not include what is the second paragraph of Article LVI of the Pact. During the ensuing Lima conference itself, however, just one month after submission of that first draft, the United States submitted an amended second draft, which did include within the draft's denunciation provision this language: "Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given."

6. Essentially the same language was retained throughout the various relevant conferences and versions of the Pact as it progressed to its conclusion ten years after first being introduced. At the last minute, at the 1948 conference that concluded the Pact of Bogotá, its Drafting Committee "decided that the best drafting possible would consist on [sic] replicating Article 16 of the 1929 Treaty [i.e., the General Convention of Inter-American Conciliation]", which it then did, adding, however, now for the first time as a separate second paragraph: "The denunciation will not have any effect on proceedings pending and initiated prior to the transmission of the respective notice."

7. Unfortunately, nowhere in the ten years between the United States' 1938 introduction of that language, which consistently was included, with

minor variations not affecting the substance, in each successive version of what became the Pact of Bogotá, and the Pact's conclusion in 1948 is there any record indicating why what became the second paragraph of the Pact's Article LVI was introduced and repeatedly accepted during the ten following years by all concerned. It clearly is due to the absence of any such guidance that the Court has felt constrained to prefer the interpretation of the paragraph in question as having the, albeit superfluous, *effet utile* of an abundance of caution to the rather more difficult *a contrario* inference for which Colombia has argued. This is all the more understandable considering Article 44 (1) of the Vienna Convention on the Law of Treaties, which provides that "[a] right of a party, provided for in a treaty . . . , to denounce . . . may be exercised only with respect to the whole treaty unless the treaty otherwise provides", a default rule which inherently has posed a further, and undeniably difficult, interpretive obstacle. In my view, though not arrived at without some hesitation, the Court's conclusion, everything considered, is not unreasonable, hence I have not found myself able to dissent from it.

(Signed) Charles N. BROWER.

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