

**212. OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN
(BOLIVIA v. CHILE) [PRELIMINARY OBJECTION]**

Judgment of 24 September 2015

In its Judgment delivered on 24 September 2015 in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, the Court rejected the preliminary objection raised by the Republic of Chile and found that it had jurisdiction on the basis of Article XXXI of the Pact of Bogotá, to entertain the Application filed by the Plurinational State of Bolivia on 24 April 2013.

The Court was composed as follows: President Abraham; Vice-President Yusuf; Judges Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; Judges *ad hoc* Daudet, Arbour; Registrar Couvreur.

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The text of the operative paragraph (para. 56) of the Judgment reads as follows:

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THE COURT,

(1) By fourteen votes to two,

Rejects the preliminary objection raised by the Republic of Chile;

IN FAVOUR: *President* Abraham, *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Sebutinde, Bhandari, Robinson, Gevorgian; *Judge ad hoc* Daudet;

AGAINST: *Judge* Gaja; *Judge ad hoc* Arbour;

(2) By fourteen votes to two,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the Application filed by the Plurinational State of Bolivia on 24 April 2013.

IN FAVOUR: *President* Abraham, *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Sebutinde, Bhandari, Robinson, Gevorgian; *Judge ad hoc* Daudet;

AGAINST: *Judge* Gaja; *Judge ad hoc* Arbour.”

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Judge Bennouna appended a declaration to the Judgment of the Court; Judge Cançado Trindade appended a separate opinion to the Judgment of the Court; Judge Gaja appended a declaration to the Judgment of the Court; Judge *ad hoc* Arbour appended a dissenting opinion to the Judgment of the Court.

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Background (paras. 15 – 17)

The Court begins by recalling the historical background to the case. It explains that Chile and Bolivia obtained their independence from Spain in 1818 and 1825 respectively. At the time, Bolivia had a coastline along the Pacific Ocean, measuring several hundred kilometres. On 10 August 1866, the two States signed a Treaty of Territorial Limits, which established a “line of demarcation of boundaries” separating their neighbouring coastal territories. This line was confirmed as the boundary line in the Treaty of Limits between Bolivia and Chile, signed on 6 August 1874.

In 1879, Chile declared war on Peru and Bolivia, launching what became known as the War of the Pacific, in the course of which it occupied Bolivia’s coastal territories. Hostilities between Bolivia and Chile came to an end with the Truce Pact, signed in 1884 in Valparaíso. Under the terms of the Pact, Chile, *inter alia*, was to continue to govern the coastal region. As a result of these events, Bolivia lost control over its Pacific coast.

In 1895, a Treaty on the Transfer of Territory was signed between Bolivia and Chile, but never entered into force. It included provisions for Bolivia to regain access to the sea, subject to Chile acquiring sovereignty over certain territories. On 20 October 1904, the Parties signed the Treaty of Peace and Friendship (hereinafter the “1904 Peace Treaty”), which officially ended the War of the Pacific as between Bolivia and Chile. Under that Treaty, which entered into force on 10 March 1905, the entire Bolivian coastal territory became Chilean and Bolivia was granted a right of commercial transit through Chilean ports.

The Court notes that, since the conclusion of the 1904 Peace Treaty, both States have made a number of declarations and several diplomatic exchanges have taken place between them regarding the situation of Bolivia vis-à-vis the Pacific Ocean.

General overview of the positions of the Parties (paras. 18 – 24)

In its Application instituting proceedings and in its Memorial, Bolivia requests the Court to adjudge and declare that

- “(a) Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean;
- (b) Chile has breached the said obligation;

- (c) Chile must perform the said obligation in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean.”

In order to substantiate the existence of the alleged obligation to negotiate and the breach thereof, Bolivia relies on “agreements, diplomatic practice and a series of declarations attributable to [Chile’s] highest-level representatives”. According to Bolivia most of these events took place between the conclusion of the 1904 Peace Treaty and 2012.

In its Application, Bolivia seeks to found the jurisdiction of the Court on Article XXXI of the Pact of Bogotá, which reads as follows:

“In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

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

Both Bolivia and Chile are parties to the Pact of Bogotá, which was adopted on 30 April 1948.

In its preliminary objection, Chile claims that the Court lacks jurisdiction under Article XXXI of the Pact of Bogotá to decide the dispute submitted by Bolivia. Citing Article VI of the Pact, it maintains that the matters at issue in the present case, namely territorial sovereignty and the character of Bolivia’s access to the Pacific Ocean, were settled by arrangement in the 1904 Peace Treaty and that they remain governed by that Treaty, which was in force on the date of the conclusion of the Pact. In effect, Article VI provides that “[t]he procedures [laid down in the Pact of Bogotá] . . . may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty”.

Bolivia responds that Chile’s preliminary objection is “manifestly unfounded”, as it “misconstrues the subject-matter of the dispute”. Bolivia maintains that the subject-matter of the dispute concerns the existence and breach of an obligation on the part of Chile to negotiate in good faith Bolivia’s sovereign access to the Pacific Ocean. It states that this obligation exists independently of the 1904 Peace Treaty.

Accordingly, Bolivia asserts that the matters in dispute in the present case are not matters settled or governed by the 1904 Peace Treaty, within the meaning of Article VI of the Pact of Bogotá, and that the Court has jurisdiction under Article XXXI thereof.

Subject-matter of the dispute (paras. 25 – 36)

The Court observes that Article 38, paragraph 2, of the Rules of Court provides that an application shall specify the facts and grounds on which the claim is based. In support of its contention that an obligation exists to negotiate sovereign access to the sea, Bolivia refers in its Application to “agreements, diplomatic practice and series of declarations attributable to [Chile’s] highest-level representatives”. It further contends that Chile — contrary to the position that it had itself adopted — later rejected and denied the existence of the alleged obligation to negotiate in 2011 and 2012, and that it has breached this obligation. On its face, therefore, the Application presents a dispute about the existence of an obligation to negotiate sovereign access to the sea, and the alleged breach thereof.

According to Chile, however, the true subject-matter of Bolivia’s claim is territorial sovereignty and the character of Bolivia’s access to the Pacific Ocean.

The Court considers that, while it may be assumed that sovereign access to the Pacific Ocean is, in the end, Bolivia’s goal, a distinction must be drawn between that goal and the related but distinct dispute presented by the Application, namely, whether Chile has an obligation to negotiate Bolivia’s sovereign access to the sea and, if such an obligation exists, whether Chile has breached it. In its Application, Bolivia does not ask the Court to adjudge and declare that it has a right to such access.

In light of the foregoing, the Court concludes that the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia’s sovereign access to the Pacific Ocean and, if so, whether Chile has breached that obligation.

Whether the matters in dispute before the Court fall under Article VI of the Pact of Bogotá (paras. 37 – 53)

The Court recalls that, pursuant to Article VI of the Pact of Bogotá, if it were to find that, given the subject-matter of the dispute as it has identified it, the matters in dispute between the Parties are matters “already settled by arrangement between the parties” or “governed by agreements or treaties in force” at the date of signature of the Pact, namely 30 April 1948, it would lack the requisite jurisdiction to decide the case on the merits. Consequently, the Court must determine whether the matters in dispute are matters “settled” or “governed” by the 1904 Peace Treaty.

As the Court has already established, the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia’s sovereign access to the Pacific Ocean, and, if such an obligation exists, whether Chile has breached it. However, the

Court notes that the relevant provisions of the 1904 Peace Treaty do not expressly or impliedly address the question of Chile's alleged obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The Court accordingly concludes that the matters in dispute are not matters "already settled by arrangement between the parties, or by arbitral award or by decision of an international court" or "governed by agreement or treaties in force on the date of conclusion of the [Pact of Bogotá]", within the meaning of Article VI of the Pact of Bogotá. This conclusion holds, according to the Court, regardless of whether, as Chile maintains, the two limbs of Article VI have a different scope. The Court does not therefore find it necessary in the circumstances of the case to determine whether or not there is a distinction between the legal effects of those two limbs.

The Court recalls that the Parties have presented their respective views on the "agreements, diplomatic practice and . . . declarations" invoked by Bolivia to substantiate its claim on the merits. It is of the view that, for purposes of determining the question of its jurisdiction, it is neither necessary nor appropriate to examine those elements.

The Court further recalls that it is for the Court itself to decide whether, in the circumstances of the case, an objection lacks an exclusively preliminary character within the meaning of Article 79, paragraph 9, of the Rules. If so, the Court must refrain from upholding or rejecting the objection at the preliminary stage, and reserve its decision on this issue for further proceedings. In the present case, however, the Court considers that it has all the facts necessary to rule on Chile's objection, and that the question whether the matters in dispute are matters "settled" or "governed" by the 1904 Peace Treaty can be answered without determining the dispute, or elements thereof, on the merits. Consequently, the Court finds that it is not precluded from ruling on Chile's objection at this stage.

The Court's conclusion regarding the preliminary objection (paras 54 – 55)

Bearing in mind the subject-matter of the dispute, as earlier identified, the Court concludes that the matters in dispute are not matters "already settled by arrangement between the parties, or by arbitral award or by decision of an international court" or "governed by agreements or treaties in force on the date of the conclusion of the [Pact of Bogotá]". Consequently, Article VI does not bar the Court's jurisdiction under Article XXXI of the Pact of Bogotá. Chile's preliminary objection must therefore be dismissed.

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Declaration of Judge Bennouna

In his declaration, Judge Bennouna has felt it necessary to clarify the approach and role which the Court should adopt when it examines a preliminary objection.

Judge Bennouna notes that there are three options available under Article 79, paragraph 9, of the Rules: to uphold the objection, to dismiss it, or to declare that it does not possess an exclusively preliminary character; this last option involves deferring the decision to the merits stage.

Judge Bennouna recalls that the current Article 79, paragraph 9, of the Rules was amended in 1972 in order to curb abuse of the preliminary objection procedure. It is thus only in exceptional circumstances that the Court may find that an objection does not have an exclusively preliminary character, where it does not have all the elements required to make a decision, or where such a decision would prejudice the dispute, or some aspects thereof, on the merits.

Judge Bennouna notes that where the Court upholds or rejects an objection, it implicitly regards the objection as preliminary. The Court is not bound by Article 79, paragraph 9, to begin by characterizing it as preliminary. Judge Bennouna finds that this approach accords with the sound administration of justice.

According to Judge Bennouna, paragraphs 52 and 53 of the Judgment are redundant and misconceived, because the Court revisits an argument that Bolivia had simply put forward on a subsidiary basis, namely that, in the event that the Court were to accept the definition of the subject matter of the dispute as proposed by Chile, the latter's objection would no longer possess an exclusively preliminary character. However, Judge Bennouna points out that the Court had previously rejected the definition proposed by Chile and dismissed its objection based on Article VI of the Pact of Bogotá. The argument of Bolivia had thus become moot. Judge Bennouna finds that it is therefore not necessary to enter into discussions on this issue, just before setting out the Judgment's final conclusion.

Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of seven parts, Judge Cançado Trindade presents the foundations of his personal position on the matter decided by the International Court of Justice (ICJ) in the present Judgment on Preliminary Objection in the case concerning the Obligation to Negotiate Access to the Pacific Ocean, between Bolivia and Chile, whereby the ICJ has found that it has jurisdiction to consider the claim lodged with it under Article XXXI of the 1948 American Treaty on Pacific Settlement (Pact of Bogotá). Although he upholds likewise the Court's jurisdiction, there are certain aspects of the question decided by the Court to which he attributes importance for its proper understanding, which are not properly reflected in the Judgment, and he feels thus obliged to dwell upon them in his Separate Opinion.

2. He begins by pointing out (Part I) that the treatment dispensed by the ICJ in the present Judgment, to the jurisdictional regime of the 1948 American Treaty on Pacific Settlement (Pact of Bogotá), and in particular to the basis of its own jurisdiction

(Article XXXI of the Pact) as well as to the relevant provision (Article 79 (9)) of the Rules of Court, is far too succinct. In order to rest on a more solid ground, the Court should, in his perception, have dwelt further upon those provisions, faced as it was with the contention that the respondent State's characterization of the subject matter of the present dispute would amount to a refutation of the applicant State's case on the merits. The ICJ should, in his view, have devoted as much attention to Article XXXI of the Pact and Article 79 (9) of the Rules of Court as it did as to Article VI of the Pact, in relation to the factual context of the *cas d'espèce*.

3. In his Separate Opinion, Judge Cançado Trindade addresses, at first, the relation between the jurisdictional basis and the merits in the case law of the Hague Court (PCIJ and ICJ), focusing, earlier on, on the joinder of preliminary objections to the merits, and then on the not exclusively "preliminary" character of objections to jurisdiction (and admissibility) (Part II). Judge Cançado Trindade promptly warns that, in effect,

"a clear cut separation between the procedural stages of preliminary objections and merits reflects the old voluntarist positivist conception of international justice subjected to State consent. Yet, despite the prevalence of the positivist approach in the era of the Permanent Court of International Justice (PCIJ), soon the old Hague Court reckoned the need to join a preliminary objection to the merits (cf. *infra*). A preliminary objection to jurisdiction *ratione materiae* is more likely to appear related to the merits of a case than an objection to jurisdiction *ratione personae* or *ratione temporis*" (para. 6).

4. To him, "the search for justice transcends any straight jacket conception of international legal procedure" (para. 7). He recalls that, throughout its history, the Hague Court (PCIJ and ICJ) has been attentive to the interests of the parties and the preservation of the equilibrium between them in the course of the procedure; hence the constant recourse by the Court to the principle of the sound administration of justice (*la bonne administration de la justice*) (para. 8). He recalls successive examples in the case law of the Hague Court disclosing its reliance on the principle of the sound administration of justice (*la bonne administration de la justice*), as from a célèbre obiter dictum of the PCIJ, in the *Panevezys Saldutiskis Railway* (Order of 30 June 1938), in deciding to join Lithuania's preliminary objections to the merits.

5. That célèbre obiter dictum, he proceeds, was kept in mind, along the years, by the ICJ as well, e.g., in the course of its prolonged handling of the *Barcelona Traction* case. By then it was reckoned, he added, that, even if the joinder to the merits appeared as an exceptional measure, "there were situations in which the clear cut separation of a preliminary objection from the merits could raise much difficulty, the solution thus being the joinder. Given the straight connection between the preliminary objection and the merits, the joinder would correspond to a necessity, in the interests of the sound administration of justice (*la bonne administration de la justice*)" (para. 10). Judge Cançado Trindade then adds that,

“In all its historical trajectory, the PCIJ, and later on the ICJ from the very beginning of its operation, made it clear that the Court is master of its procedure. It does not and cannot accept straight jacket conceptions of its own procedure; reasoning is essential to its mission of realization of justice. The path followed has been a long one: for decades the idea of a ‘joinder’ of a preliminary objection to the merits found expression in the then Rules of Court; from the early seventies onwards, the Rules of Court began to provide for further proceedings in the cases, given the fact that the objections at issue did not disclose an exclusively ‘preliminary’ character” (para. 11).

6. Judge Cançado Trindade then proceeds to an examination of the case law of the PCIJ and ICJ on the matter (Part III), and the corresponding changes in the pertinent provisions of the Rules of Court (as from the Rules of 1936 and 1946), in particular the amendments introduced into the Rules of Court in 1972: the changes in the Rules of Court of 1972 passed on to the Rules of Court of 1978 and 2000, and remained the same to date. They did away with joinder of preliminary objections to the merits, and focused, from then onwards, on the “not exclusively preliminary character” of objections to jurisdiction (and admissibility).

7. The 1972 revision became the object of attention in the ICJ’s Judgments on Jurisdiction and Admissibility (of 26 November 1984) and on the Merits (of 27 June 1986) in the Nicaragua versus United States case; it was clarified that the amendments introduced into the new provision of the Rules of Court, deleting the express reference to the joinder, were meant to provide more flexibility and to avoid procedural delays, in the interests of the sound administration of justice. From the Court’s decision in the Nicaragua versus United States case onwards, he adds, the ICJ has pursued this new outlook to the point at issue in its case law (e.g., the *Lockerbie* cases, 1998; the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, 1998; the case of the *Application of the Convention against Genocide, Croatia versus Serbia, Preliminary Objections*, 2008).

8. Judge Cançado Trindade ponders that “[w]e are here in a domain wherein general principles of law play an important role, whether they are substantive principles (such as those of *pacta sunt servanda*, or of *bona fides*), or procedural principles” (para. 22). He then dwells upon the relevance of general principles of international procedural law, as related to the foundations of the international legal order, and on their incidence, in contentious cases, on distinct incidental proceedings (preliminary objections, provisional measures, counter claims and intervention), on the joinder of proceedings, as well as on advisory proceedings (Part IV). In his perception,

“recourse to general principles of international procedural law is in effect ineluctable, in the realization of justice. General principles are always present and relevant, at substantive and procedural levels. Such principles orient the interpretation and application of legal norms. They rest on the foundations of any legal system, which is made to operate on the basis of fundamental principles.

Ultimately, without principles there is truly no legal system. Fundamental principles form the substratum of the legal order itself” (para. 23).

9. He recalls that, in another case, like the present one, opposing two other Latin American States (Argentina and Uruguay), the case concerning *Pulp Mills on the River Uruguay* (Judgment of 20 April 2010), he deemed it fit to call the Court’s attention, in his Separate Opinion, to the fact that both contending parties, Argentina and Uruguay, had expressly invoked general principles of law in the course of the contentious proceedings. In doing so, he added, they were both “being faithful to the long standing tradition of Latin American international legal thinking, which has always been particularly attentive and devoted to general principles of law” (para. 24).

10. He then observes that the ICJ has remained attentive to general principles in the exercise of the international judicial function, and adds:

“As master of its procedure, as well as of its jurisdiction, the Court is fully entitled to determine freely the order in which it will resolve the issues raised by the contending parties. And, in doing so, it is not limited by the arguments raised by the contending parties, as indicated by the principle *jura novit curia*. The Court knows the Law, and, in settling disputes, attentive to the equality of parties, it also says what the Law is (*juris dictio, jus dicere*)” (para. 25).

11. He next reviews the case law of the ICJ on general principles in distinct incidental proceedings (paras. 26-31), keeping in mind the principle of the sound administration of justice (*la bonne administration de la justice*), as well as in the joinder of proceedings (paras. 32-35), and in advisory proceedings (paras. 36-38). Judge Cançado Trindade then sums up that

“the principle of the sound administration of justice (*la bonne administration de la justice*) permeates the considerations of all the aforementioned incidental proceedings before the Court, namely, preliminary objections, provisional measures of protection, counter claims and intervention. As expected, general principles mark their presence, and guide, all Court proceedings. The factual contexts of the cases vary, but the incidence of those principles always takes place” (para. 30).

12. He recalls that, in his Separate Opinions appended to the two Orders of the ICJ (of 17 April 2013) of joinder of the proceedings in two other Latin American cases, concerning *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, he deemed it fit to state:

“In my perception, the presence of the idea of justice, guiding the sound administration of justice, is ineluctable. Not seldom the text of the Court’s interna corporis does not suffice; in order to impart justice, in circumstances of this kind, an international tribunal such as the ICJ is guided by the *prima principia*. To attempt to offer a definition of the sound administration of justice that would

encompass all possible situations that could arise would be far too pretentious, and fruitless. (...)

General principles of law have always marked presence in the pursuit of the realization of justice. In my understanding, they comprise not only those principles acknowledged in national legal systems, but likewise the general principles of international law. They have been repeatedly reaffirmed, time and time again, and, even if regrettably neglected by segments of contemporary legal doctrine, they retain their full validity in our days. An international tribunal like the ICJ has consistently had recourse to them in its jurisprudence constante. Despite the characteristic attitude of legal positivism to attempt, in vain, to minimize their role, the truth remains that, without principles, there is no legal system at all, at either national or international level.

General principles of law inform and conform the norms and rules of legal systems. In my understanding, sedimented along the years, general principles of law form the substratum of the national and international legal orders, they are indispensable (forming the *jus necessarium*, going well beyond the mere *jus voluntarium*), and they give expression to the idea of an objective justice (proper of *jusnaturalist* thinking), of universal scope” (cit. in para. 40).

13. Judge Cançado Trindade then proceeds to consider the general principles of international law, Latin American doctrine and the significance of the 1948 Pact of Bogotá (Part V), Article XXXI of which provides the jurisdictional basis for the Court’s present Judgment in the case concerning the Obligation to Negotiate Access to the Pacific Ocean. He then recalls that, as the Pact of Bogotá was adopted in 1948, it was reckoned that stress needed to be laid by the Pact in particular upon the importance of judicial settlement. Article XXXI of the Pact, in providing for the compulsory jurisdiction of the ICJ for the settlement of “all disputes of a juridical nature”, was regarded as being in line with Latin American doctrine as to the primacy of law and justice over recourse to force.

14. Already in 1948, Judge Cançado Trindade proceeds, the Pact of Bogotá was promptly regarded as a work of codification of peaceful settlement in international law, moving beyond the arbitral solution (deeply rooted in Latin American experience) into judicial settlement itself, “without the need of a special agreement to that effect. Without imposing any specific means of peaceful settlement, the Pact of Bogotá took a step forward in rendering obligatory peaceful settlement itself, and enhanced recourse to the ICJ” (paras. 41 42).

15. The advance achieved with the adoption of the Pact of Bogotá was the culminating point of the evolution, starting in the XIXth century, of the commitment of Latin American countries with peaceful settlement of international disputes, moving towards compulsory jurisdiction of the Hague Court. This feature of Latin American international legal thinking, - he adds, - arose out of the concertation of the countries of the region in two series of Conferences, namely: (a) the Latin American

Conferences (1826-1889); and (b) the Pan American Conferences (1889-1948), leading to the adoption, in 1948, of the OAS Charter and the Pact of Bogotá. The gradual outcome of this concertation echoed at the Second Hague Peace Conference (1907), and in the drafting process of the Statute of the PCIJ in 1920 and the ICJ in 1945 (para. 43).

16. The adoption of the Pact of Bogotá in 1948 was the culmination of the sustained and enduring posture of Latin American States in support of peaceful settlement of disputes, and of the compulsory jurisdiction of the Hague Court over disputes of a “juridical nature”. In effect, three years after the adoption of the Charter of the United Nations in 1945, Judge Cançado Trindade adds, Latin American States significantly did in Bogotá in 1948 what they had announced in San Francisco as a goal: the recourse, under Article XXXI of the Pact of Bogotá, to the compulsory jurisdiction of the ICJ, for the settlement of disputes of a “juridical nature”, irrespective of the position that States Parties to the Pact might have taken under the optional clause (Article 36 (2)) of the ICJ Statute (para. 44). There was, in the Pact of Bogotá, in the words of Judge Cançado Trindade,

“a combination of the obligation to submit disputes of a juridical nature (i.e., those based on claims of legal rights) to judicial or arbitral settlement, with the free choice of means of peaceful settlement as to other types of controversies; in this way, the 1948 Pact innovated in providing for peaceful settlement of all disputes. In adopting the 1948 Pact of Bogotá, Latin American States made a point of expressing their ‘spirit of confidence’, added to their ‘feeling of common interest’, in judicial settlement (more perfected than arbitral settlement), in particular the compulsory jurisdiction of the ICJ. Hence the relevance of Article XXXI of the Pact, also in relation to Article VI” (para. 46).

17. This may explain subsequent initiatives of its revision (in the mid fifties, in the early seventies, in the mid eighties), which, however, did not prosper, and left the Pact unchanged (paras. 47-53). The following point examined in the present Separate Opinion was the reliance on the Pact of Bogotá for judicial settlement by the ICJ (Part VI), intensified from the late eighties onwards (as disclosed by the cases, e.g., of *Border and Transborder Armed Actions* (Nicaragua versus Honduras, 1988), *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (2007), *Dispute regarding Navigational and Related Rights* (Costa Rica versus Nicaragua, 2009), *Pulp Mills on the River Uruguay* (Argentina versus Uruguay, 2010), *Territorial and Maritime Dispute* (Nicaragua versus Colombia, 2013), *Maritime Dispute* (Peru versus Chile, 2014), in addition to five other cases, currently pending before the Court . Yet, Judge Cançado Trindade adds,

“despite this recent revival of the Pact of Bogotá, I suppose no one would dare to predict, or to hazard a guess, as to further developments in its application in the future. After all, despite advances made, experience shows, within a larger

context, that the parcours towards compulsory jurisdiction is a particularly long one, there still remaining a long path to follow...” (para. 55).

18. In sum, Judge Cançado Trindade proceeds, Article XXXI of the Pact of Bogotá was intended to enhance the jurisdiction of the Court, *ratione materiae* and *ratione temporis* (not admitting subsequent restrictions, while the Pact remains in force), as well as *ratione personae* (concerning all States Parties to the Pact). In his perception, “the traditional voluntarist conception (a derivative of anachronical legal positivism) yielded to the reassuring conception of the jus necessarium, to the benefit of the realization of international justice” (para. 57). It is nowadays generally acknowledged that which sets forth the engagement, by the States Parties to the Pact, as to the conventional basis of the jurisdiction of the ICJ, to settle all “disputes of a juridical nature”, by means of Article XXXI, which amounts to a compromissory clause, the Pact of Bogotá has enhanced (independently of the optional clause Article 36 (2) of the ICJ Statute) the procedure of judicial settlement by the ICJ (para. 58).

19. Judge Cançado Trindade then moves into the remaining line of considerations in his Separate Opinion, namely, the third way (*troisième voie/tercera vía*) under Article 79 (9) of the Rules of Court objection not of an exclusively preliminary character (Part VII). Despite the fact that the present Judgment of the ICJ has very briefly referred to Article XXXI of the Pact of Bogotá and to Article 79 (9) of the Rules of Court (in comparison with the attention it devoted to Article VI of the Pact), he notes, on other occasions the ICJ has elaborated on Article 79 (9) (cases of *Nicaragua versus United States* (merits, 1986), of *Lockerbie* (preliminary objections, 1998) of *Territorial and Maritime Dispute between Nicaragua and Colombia* (preliminary objections, 2007) (paras. 59-60).

20. Judge Cançado Trindade recalls that Article 79 (9) of the Rules of Court is not limited to the ICJ deciding in one way or another (upholding or rejecting) the objection raised before it in the course of the proceedings. Article 79 (9) in effect contemplates a third way (*troisième voie/tercera vía*) (para. 61), namely, in its terms:

“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”.

21. This being so, the ICJ, moving into the merits, asserts its jurisdiction; this happens because the character of the objection contains aspects relating to the merits, and thus requires an examination of the merits. This is so in the present case concerning the Obligation to Negotiate Access to the Pacific Ocean, as to the dispute arisen between Bolivia and Chile, as to whether their practice subsequent to the 1904 Peace Treaty substantiates an obligation to negotiate on the part of the respondent State. He adds that Chile’s objection “does not have an exclusively preliminary character, appearing rather as a defence as to the merits of Bolivia’s claim” (para. 62).

22. Judge Cançado Trindade recalls that there have been negotiations, extending well after the adoption of the 1948 Pact of Bogotá, in which both contending parties were actively engaged: although in the present Judgment there is no express reference to any of such negotiations specifically, the ICJ takes note (in para. 19) of arguments made in the course of the proceedings of the *cas d'espèce* to the effect that negotiations took place subsequently to the 1904 Peace Treaty on unsettled issues, well beyond the date of the adoption of the Pact of Bogotá (on 30 April 1948), until 2012 (para. 63). Having stated that, he adds that

“To assert the duty to negotiate is not the same as to assert the duty to negotiate an agreement, or a given result. The former does not imply the latter. This is a matter for consideration at the merits stage. The Court is here concerned only with the former, the claimed duty to negotiate. The objection raised by the respondent State does not appear as one of an exclusively preliminary character. The substance of it can only be properly addressed in the course of the consideration of the merits of the *cas d'espèce*, not as a ‘preliminary objection’” (para. 64).

23. The Court should thus have gone into the merits on the understanding of the third way of Article 79 (9) (*supra*); this would have been, in his perception, “the proper and more prudent way for the Court” to dispose of the preliminary objection at issue (para. 66). Judge Cançado Trindade then concludes that “the objection raised by Chile appears as a defence to Bolivia’s claim as to the merits, inextricably interwoven with this latter”. And the Court, anyway, he adds, does not count on all the necessary information to render a decision on it as a “preliminary” issue. It is, in his view, more in line with the good administration of justice (*la bonne administration de la justice*) that the Court should keep the issue to be resolved at the merits stage, when the contending parties will have had the opportunity to plead their case in full. This would entail no delays at all for the forthcoming proceedings as to the merits. Last but not least, Article VI of the Pact of Bogotá, in Judge Cançado Trindade’s understanding, does not exclude the Court’s jurisdiction in respect of disputes arisen after 1948: “to hold otherwise would deprive the Pact of its *effet utile*. The Pact of Bogotá, in line with the mainstream of Latin American international legal doctrine, ascribes great importance to the judicial settlement of disputes, its main or central achievement, on the basis of its Article XXXI, a milestone in the conceptual development of this domain of international law” (para. 67).

Declaration of Judge Gaja

Bolivia’s request put the stress on negotiations, but these are only a means for enabling Bolivia to acquire a sovereign access to the sea. This fact should have been given more weight by the majority when defining the dispute.

“Sovereign” access would have to be through a territory which was agreed in the 1904 Peace Treaty as not being under Bolivian sovereignty. The matter of Bolivian access to the sea was thus settled in 1904 and this would affect the Court’s jurisdiction under the Pact of Bogotá. However, a matter that had been settled can become unsettled again if the parties so agree.

Given the connection between the role that negotiations may have had in unsettling a matter previously settled, on the one hand, and the possibility to infer from negotiations an obligation to negotiate, on the other, the Court should have found that under these circumstances Chile’s objection to jurisdiction does not have an exclusively preliminary character.

Dissenting opinion of Judge *ad hoc* Arbour

Judge *ad hoc* Arbour disagreed with the decision of the Court that Chile’s preliminary objection had an exclusively preliminary character within the meaning of Article 79 (9) of the Rules of Court, and can thus be disposed of at the preliminary stage. She stated it should have been postponed until after a full hearing on the merits.

She noted that the way Bolivia pleaded the subject matter of its claim changed between its Application, Memorial and the First and Second Round of Oral Hearings. As a result, it was difficult to determine the scope and content of the alleged obligation of Chile to negotiate sovereign access for Bolivia to the Pacific Ocean and, in particular, whether this alleged obligation was one of result.

Judge *ad hoc* Arbour noted that if Bolivia was alleging that Chile had an obligation to cede a sovereign part of its territory to Bolivia in order to grant it access to the Pacific, on terms to be negotiated, the Court would have no jurisdiction under Article VI of the Pact of Bogotá, since the question of sovereign access to the Pacific Ocean was a matter settled or governed by the 1904 Peace Treaty. The uncertainty about the nature, content and scope of the alleged obligation to negotiate makes it premature to decide on the subject matter. Thus Judge *ad hoc* Arbour concluded that the preliminary objection should not have been disposed of at this stage, but should have been postponed until after a full hearing on the merits.
