

International Court of Justice — Jurisdiction — Consent of States Parties — Pact of Bogotá — Exception to jurisdiction for disputes settled before entry into force of Pact — Dispute between Bolivia and Chile regarding Bolivian access to the Pacific Ocean — War of the Pacific — 1904 Treaty of Peace — Whether Chile had subsequently agreed to negotiate to give Bolivia sovereign access to the sea — Whether dispute had been settled before the entry into force of the Pact — Whether objection possessing an exclusively preliminary character

Diplomatic relations — Peaceful settlement of disputes — Duty to negotiate — Whether duty of peaceful settlement giving rise to duty to negotiate to achieve a specific result — Whether expression of willingness to negotiate imposing binding obligation — Obligations of result

General principles of international law — Estoppel — Conditions for estoppel — Legitimate expectations — Whether forming part of international law

Territory — Sovereignty — Treaty of peace — 1879 War of the Pacific — Bolivia losing coastal territory to Chile — 1904 Treaty of Peace — Whether Bolivia possessing sovereign rights of access to the Pacific notwithstanding loss of coastline — Whether Chile under a duty to negotiate sovereign access for Bolivia

Treaties — Diplomatic exchanges — Whether constituting treaty — Whether giving rise to binding legal obligations — Expressions of willingness to negotiate — Whether creating legal obligation to negotiate so as to achieve specific result

War and armed conflict — Treaty of peace — Territory acquired by use of force during nineteenth century — Subsequent recognition of title of victorious State by treaty of peace

OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN
 (BOLIVIA *v.* CHILE)¹

International Court of Justice

Preliminary Objection. 24 September 2015

¹ A list of counsel participating in the proceedings appears at para. 9 of the Judgment (Preliminary Objection) of 24 September 2015 and para. 12 of the Judgment of 1 October 2018.

(Abraham, *President*; Yusuf, *Vice-President*; Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson and Gevorgian, *Judges*; Daudet² and Arbour,³ *Judges ad hoc*)

Merits. 1 October 2018

(Yusuf, *President*; Xue, *Vice-President*; Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian and Salam, *Judges*; Daudet⁴ and McRae,⁵ *Judges ad hoc*)

SUMMARY:⁶ *The facts*:—In 1879, a war (“the War of the Pacific”) took place between the Republic of Chile (“Chile”), on the one side, and the Republic of Peru and the Plurinational State of Bolivia (“Bolivia”), on the other. In the course of this war, Chile occupied Bolivia’s coastline territory running north along the Pacific Ocean from Bolivia’s frontier with Chile at the 24th parallel of latitude south. The hostilities came to an end with the 1884 Truce Pact, under which it was agreed that Chile would continue to occupy and govern Bolivia’s coastal territory. On 20 October 1904, the war was officially ended with the signing of the Treaty of Peace and Friendship (“the 1904 Peace Treaty”). Under this treaty, sovereignty over Bolivia’s coastal territory was definitively transferred to Chile, though Bolivia was granted a right of commercial transit to Chilean ports.

In subsequent years, Bolivia sought to regain sovereign access to the sea through a range of diplomatic exchanges with Chile. The two exchanged diplomatic notes, engaged in bilateral discussions and negotiations and issued joint declarations regarding Bolivia’s situation vis-à-vis the Pacific Ocean. During this time, Chile also made a number of public declarations and other unilateral representations in relation to Bolivia’s desire to regain sovereign access to the sea. It issued several memoranda and public statements and, on 19 December 1975, it sent Bolivia a Diplomatic Note indicating that it would be willing to negotiate with Bolivia regarding the possible cession of a strip of territory leading from Bolivia to the sea. Chile also participated in the drafting of, and joined, declarations to resolutions of the Organization of American States (“OAS”) General Assembly relevant to the issue of Bolivia’s sovereign access to the sea.

Bolivia claimed that the history of its bilateral exchanges with Chile, as well as the latter’s unilateral representations, taken individually or cumulatively,

² Appointed by Bolivia.

³ Appointed by Chile.

⁴ Appointed by Bolivia.

⁵ Appointed by Chile.

⁶ Prepared by Ms R. Elphick.

demonstrated that Chile had undertaken an obligation to negotiate with Bolivia for Bolivia's sovereign access to the sea. Bolivia also claimed that Chile's obligation to negotiate such a settlement arose from acquiescence, estoppel, Bolivia's legitimate expectations, a general international law obligation to negotiate for the peaceful settlement of international disputes, or resolutions relevant to Bolivia's situation adopted by the OAS General Assembly. Bolivia contended that, by refusing to engage in negotiations, Chile had acted in breach of its obligation. Accordingly, Bolivia commenced proceedings against Chile before the International Court of Justice ("the Court") on the basis of Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948 ("the Pact of Bogotá").⁷

Chile denied that it had, by any act or acquiescence, undertaken an obligation to negotiate with Bolivia for Bolivia's sovereign access to the sea. According to Chile, the record of its unilateral representations and diplomatic exchanges with Bolivia was proof only of a historic willingness to negotiate. The evidence raised by Bolivia did not demonstrate an intention on behalf of either State to create a legal obligation to negotiate, proof of which Chile argued was a requirement for establishing Bolivia's case. Moreover, Chile denied that an obligation to negotiate for the peaceful settlement of disputes existed under general international law.

Chile raised a preliminary objection to the jurisdiction of the Court on the ground that the matters truly at issue—territorial sovereignty and the character of Bolivia's access to the Pacific Ocean—were settled in, and governed by, the 1904 Peace Treaty. As such, the subject-matter of the dispute fell within the terms of Article VI of the Pact of Bogotá,⁸ which excluded the Court's jurisdiction under Article XXXI thereof. Bolivia maintained that Article VI was not applicable because its claim related not to the Treaty of Peace but to developments since the entry into force of the Pact of Bogotá.

Preliminary Objection

Held (by fourteen votes to two, Judge Gaja and Judge ad hoc Arbour dissenting):—The preliminary objection was dismissed. The Court had jurisdiction to entertain Bolivia's Application on the basis of Article XXXI of the Pact of Bogotá (para. 56(2)).

(1) It was for the Court itself to determine on an objective basis the subject-matter of the dispute. The Application did not invoke the 1904 Peace Treaty as a source of rights or require the Court to make a determination as to the status of that Treaty. Nor did it request a finding as to whether or not Bolivia had a right of sovereign access to the sea. Moreover, at the merits phase, Bolivia's claim would place before the Court the Parties' respective contentions about the existence, nature and content of the alleged obligation to

⁷ The text of this provision appears at para. 20 of the Preliminary Objection.

⁸ The text of this provision appears at para. 21 of the Preliminary Objection.

negotiate sovereign access. The subject-matter of the dispute was therefore whether Chile was obligated to negotiate in good faith regarding Bolivia's sovereign access to the Pacific Ocean, and, if such an obligation existed, whether Chile had breached it (paras. 25-34).

(2) The Court's use of the phrases "sovereign access" and "to negotiate sovereign access" did not express any view by the Court about the existence, nature or content of any alleged obligation to negotiate on the part of Chile (paras. 35-6).

(3) The matters in dispute were matters neither "settled" nor "governed" by the 1904 Peace Treaty, which did not expressly or impliedly address the question of Chile's alleged obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The subject-matter of the dispute therefore did not fall under Article VI of the Pact of Bogotá (paras. 37-51).

(4) All of the facts necessary to rule on Chile's preliminary objection could be answered without determining the dispute, or elements thereof, on the merits. Consequently, the Court was not precluded from ruling on Chile's objection (paras. 52-3).

Declaration of Judge Bennouna: The decision of the Court was redundant in so far as it addressed the Bolivian argument that the Chilean objection would not have an exclusively preliminary character if the Court accepted Chile's definition of the subject-matter of the dispute. Given that the Court had previously rejected Chile's proposed subject-matter of the dispute and dismissed its objection based on Article VI of the Pact of Bogotá, the argument that Bolivia put forward had become moot (para. 9).

Separate Opinion of Judge Cançado Trindade: Whereas the Court was correct to find that it had jurisdiction to consider Bolivia's claim, certain aspects of its reasoning were insufficient. In particular, greater attention should have been paid to Article XXXI of the Pact of Bogotá and Article 79(9) of the Rules of Court.

(1) A clear-cut separation between the preliminary objection and merits phases of dispute settlement was outdated. The search for justice transcended any strict conception of international legal procedure (paras. 6-11).

(2) An examination of the Court's case law and the corresponding changes in the Rules of Court (as from the Rules of 1936 and 1946) demonstrated that the Court had moved away from joinder of the preliminary objection to the merits (paras. 12-22).

(3) Recourse to general principles of international procedural law, such as the sound administration of justice, was central to the realization of justice in incidental proceedings (paras. 23-40).

(4) The Pact of Bogotá manifested the enduring posture of Latin American States in support of the peaceful settlement of disputes by enhancing the jurisdiction of the Court. Article XXXI amounted to a compromissory clause

accepting the compulsory jurisdiction of the Court over disputes of a juridical nature (paras. 41-58).

(5) The preliminary objection raised by Chile was inextricably interwoven with the merits of Bolivia's claim. It would therefore have been more in line with the good administration of justice for the Court to allow the case to proceed to the merits stage by declaring that the preliminary objection did not have an exclusively preliminary character in accordance with Article 79(9) of the Rules of Court. Indeed, Article XXXI of the Pact of Bogotá could not be unduly limited by the preliminary objection not possessing an exclusively preliminary character (paras. 59-67).

Declaration of Judge Gaja: Given that the matter of Bolivian access to the sea was settled by the 1904 Peace Treaty, the acquisition by Bolivia of sovereign access would inevitably affect a matter governed by that agreement. The jurisdiction of the Court was therefore excluded by Article VI of the Pact of Bogotá unless the matter concerned by the dispute could be regarded as having been reopened before 30 April 1948, the date of the adoption of the Pact of Bogotá. An enquiry in this regard, however, was also a part of the merits of the case. Under these circumstances, the Court should have found that the objection did not have an exclusively preliminary character within the meaning of Article 79(9) of the Rules of Court (paras. 1-4).

Dissenting Opinion of Judge ad hoc Arbour: The preliminary objection did not have an exclusively preliminary character within the meaning of Article 79(9) of the Rules of the Court and therefore the question of jurisdiction should have been left to the merits stage.

(1) Bolivia had articulated the subject-matter of its claim in several different ways, leading to ambiguity as to whether it maintained the position that the alleged obligation to negotiate was an obligation of result (paras. 2-15).

(2) Until the hearing on the merits, the Court was not in a position to identify the true nature, content and scope of the alleged obligation to negotiate, and whether it amounted to an obligation of result or an obligation of means. Only once this obligation had been defined could the Court determine whether it was a matter "settled" or "governed" by the 1904 Peace Treaty for the purposes of Article VI, and therefore whether it had jurisdiction (paras. 16-29).

Merits

Held:—(1) (a) (by twelve votes to three, Judges Robinson and Salam and Judge ad hoc Daudet dissenting) Chile had not undertaken a legal obligation to negotiate to give Bolivia sovereign access to the Pacific Ocean (para. 177(1)).

(b) (by twelve votes to three, Judges Robinson and Salam and Judge ad hoc Daudet dissenting) Bolivia's other final submissions consequently stood to be rejected (para. 177(2)).

(2) The obligation to negotiate was not an obligation of result—it did not imply a commitment to reach an agreement on the subject-matter of the dispute (paras. 84-9).

(3) The term “sovereign access” as used in Bolivia's submissions could lead to different interpretations (para. 90).

(4) The existence of an obligation to negotiate had to be ascertained in the same way as that of any other legal obligation. The evidence had to be assessed for proof of an intention to be bound. Tacit agreement could be inferred from the evidence assessed objectively, though only if it was found to be compelling (paras. 91-7).

(5) The bilateral instruments invoked by Bolivia did not establish an obligation on Chile to negotiate. The terms of the 1920 “Acta Protocolizada” did not enumerate any commitments and expressly stated that it did not create rights or obligations for the Parties. The exchanges which followed, including the Matte Memorandum, did not contain any wording to show that Chile accepted or confirmed an obligation to negotiate. The Exchange of Notes of 1 and 20 June 1950 did not contain the same wording or reflect a shared position regarding the issue of negotiations. The Trucco Memorandum merely repeated statements made in the Chilean Note of 20 June 1950. The wording of the 1975 Charaña Declaration did not convey the existence or the confirmation of an obligation to negotiate. The two communiqués issued by both States in 1986 were separate instruments, with different wording, and contained no reference to Bolivia's sovereign access to the sea. The 2000 Algarve Declaration, and the Joint Communiqué which followed, only indicated the Parties' willingness to initiate a dialogue and contained no reference to the issue of Bolivia's sovereign access to the sea. The 13-Point Agenda was conceived as an expression of the political will, which did not constitute the acceptance of an obligation (paras. 98-139).

(6) Chile's declarations and other unilateral acts did not establish a legal obligation to negotiate. The wording used by Chile in the statements relied on by Bolivia expressed a willingness to enter into negotiations, but not an intention to undertake a legal obligation to do so. The circumstances of Chile's declarations and statements also provided no evidence of an intention to assume an obligation to negotiate (paras. 140-8).

(7) An obligation to negotiate was not established through acquiescence, as Bolivia had failed to identify any declaration which required a response or reaction on the part of Chile in order to prevent an obligation from arising (paras. 149-52).

(8) An obligation to negotiate was not established by estoppel. Chile's expressions of willingness to negotiate did not imply an obligation to do so. Moreover, Bolivia was not able to demonstrate that, in reliance on Chile's

representations, it had changed its position to its own detriment or to Chile's advantage. The essential elements of estoppel were therefore not proven (paras. 153-9).

(9) References to legitimate expectations in investor-State arbitral awards were insufficient to establish the existence of the doctrine under general international law. Bolivia's argument based on legitimate expectations could not be sustained (paras. 160-2).

(10) The obligation to settle disputes via peaceful means, articulated in Article 2(3) of the United Nations Charter and Article 3(i) of the Charter of the OAS, did not constitute a legal basis for a general international law obligation to negotiate. There was no indication in these provisions that the parties to a dispute were required to resort to a specific method of settlement, such as negotiation (paras. 163-7).

(11) It was not possible to infer from the content of the resolutions of the General Assembly of the OAS referred to by Bolivia, nor from Chile's position with respect to their adoption, that Chile had accepted an obligation to negotiate. Resolutions of the General Assembly of the OAS which were not per se binding could not create international obligations. Moreover, the relevant resolutions contained mere recommendations to the Parties (paras. 168-71).

(12) Given that no individual basis for a legal obligation to negotiate could be found in Chile's conduct, a cumulative view of that conduct could not create such an obligation (paras. 172-4).

(13) The Court's finding should not be understood as precluding the Parties from continuing their dialogue and exchanges to address the issues relating to Bolivia's landlocked situation (paras. 175-6).

Declaration of President Yusuf: Although the Court had found against Bolivia in the exercise of its function to settle disputes through law, it was cognizant of the fact that the law could not apprehend all aspects of the dispute or the reality of the relations between the Parties. The Court's decision had not put an end to the issues which divided the Parties or removed all the uncertainties affecting their relations. It was therefore not inappropriate for the Court to recall the possibility of exploring or continuing to explore other avenues for the settlement of the dispute in the interest of peace and harmony between the Parties (paras. 1-11).

Dissenting Opinion of Judge Robinson: (1) Chile had a legal obligation to negotiate directly with Bolivia to find a formula or solution that would enable Bolivia to have sovereign access to the Pacific Ocean.

(a) "Sovereign access" referred to the cession by Chile to Bolivia of a part of its territory over which Bolivia would have sovereignty and which would give it access to the Pacific (paras. 7-9).

(b) The use of traditional language of diplomatic discourse—such as the words “willing” or “agree”—should not automatically be taken to signify a non-binding political aspiration. These words should be given meaning in light of the “particular circumstances” or context in which they were drafted (paras. 10-19).

(c) The 1950 Diplomatic Notes did not constitute a treaty, not because they did not meet the requirements for a traditional Exchange of Notes, but because Bolivia’s non-acceptance of Chile’s counterproposal left the Notes without a mutuality of commitment between the Parties as to the content of their obligation (paras. 21-51).

(d) A proper analysis of the Parties’ exchanges revealed that the Trucco Memorandum, together with Bolivia’s response thereto, and the 1975 and 1977 Charaña Declarations, created a mutuality of commitment sufficient to establish a binding legal obligation to negotiate Bolivia’s sovereign access to the Pacific (paras. 52-72).

(e) The obligation incurred by Chile was to negotiate directly with Bolivia to achieve the precise result of finding a formula or solution that would enable Bolivia to have sovereign access to the Pacific (paras. 73-80).

(2) In the circumstances, Chile had not discharged its obligation to negotiate and the Court should have found for Bolivia (paras. 81-90).

Dissenting Opinion of Judge Salam: The Notes exchanged in 1950 established between the Parties an obligation to negotiate.

(1) The words used, the fact that the persons who drew them up had the capacity to commit their respective States, and the historical context of the exchange indicated that, by their 1950 Notes, the Parties had crystallized an obligation to negotiate (paras. 1-14).

(2) The events which had followed, in particular the Trucco Memorandum, the Charaña Declaration, the letter of 18 January 1978 from the Chilean President to the Bolivian President, and Chile’s participation in further rounds of negotiations, constituted a set of actions from which it might reasonably be inferred that Chile and Bolivia were bound by a consistent obligation to negotiate on granting the latter sovereign access to the Pacific Ocean (paras. 15-23).

(3) The scope of the obligation to negotiate was limited. The obligation to negotiate incumbent on Chile could not be an obligation of result (paras. 24-32).

Dissenting Opinion of Judge ad hoc Daudet: (1) The obligation to negotiate existed.

(a) The obligation to negotiate did not arise out of estoppel or Bolivia’s legitimate expectations (paras. 1-6).

(b) In the 1920 “Acta Protocolizada”, the language used by official authorities vested with the power to bind their States reflected a commitment

by Chile to enter into negotiations with a view to granting Bolivia sovereign access to the sea (paras. 10-16).

(c) In so far as the texts in the 1950 Exchange of Notes both mentioned an agreement to enter into direct negotiations and referred to the same object of the negotiation as sovereign access for Bolivia to the Pacific Ocean, the exchange created a legal obligation for Chile to negotiate sovereign access to the Pacific Ocean for Bolivia. The subsequent practice of the Parties, in particular the 1961 Trucco Memorandum, confirmed this (paras. 17-26).

(d) The Charaña Declaration expressed a common will to negotiate on a clearly identified subject. The practice of the Parties which followed, consisting of negotiations including the successive statements and representations made from 1975 to 1978, justified the recognition of an obligation to negotiate incumbent on Chile (paras. 27-35).

(e) The majority's reasoning, in reaching the opposite conclusion, was based on a particularly strict form of positivism that failed to take into account the cumulative effect of the successive elements relied on by Bolivia, and drew an overly rigid distinction between legal obligations and moral or political and diplomatic ones (paras. 36-55).

(2) The question of Bolivia's sovereign access to the sea was not closed by the majority's decision. If the Parties wished, it remained open to them to return to negotiations (paras. 56-8).

The text of the judgments of the Court and the declarations, separate opinion and dissenting opinions is set out as follows:

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The following is the text of the Judgment on Preliminary Objection:

JUDGMENT ON PRELIMINARY OBJECTION

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...
 [596] 1. On 24 April 2013, the Government of the Plurinational State of Bolivia (hereinafter “Bolivia”) filed in the Registry of the Court an Application instituting proceedings against the Republic of Chile (hereinafter “Chile”) with regard to a dispute “relating to Chile’s obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean”.

In its Application, Bolivia seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the “Pact of Bogotá” (and hereinafter referred to as such).

2. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Chile; and, under paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred upon [597] it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Bolivia chose Mr Yves Daudet and Chile Ms Louise Arbour.

4. By an Order of 18 June 2013, the Court fixed 17 April 2014 as the time-limit for the filing of the Memorial of Bolivia and 18 February