

INTRODUCTORY NOTE TO OBLIGATION TO NEGOTIATE ACCESS TO THE  
PACIFIC OCEAN (BOLIVIA V. CHILE): PRELIMINARY OBJECTION (I.C.J.)

BY JULIAN G. KU\*

[September 24, 2015]

+Cite as 55 ILM 74 (2016)+

## Introduction

On September 24, 2015, the International Court of Justice (ICJ) released its judgment on the preliminary objection filed by Chile in *Obligation to Negotiate Access to the Pacific Ocean*.<sup>1</sup> Chile had objected to the ICJ's jurisdiction arguing that Bolivia's application raises a dispute that had already been settled by the 1904 Peace Treaty Between Bolivia and Chile. The ICJ, however, rejected this jurisdictional objection and agreed to consider the merits of Bolivia's claim that Chile has an obligation to negotiate in good faith the issue of Bolivia's sovereign access to the Pacific Ocean.

## Background

Bolivia filed an application instituting proceedings against Chile at the International Court of Justice on April 24, 2013 and claiming jurisdiction under the Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá).<sup>2</sup>

In its application, Bolivia asked the ICJ to declare that "Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean"; that Chile has breached this obligation; and that Chile must perform this obligation to negotiate in "good faith, promptly, formally, and within a reasonable time and effectively."<sup>3</sup>

The question of Bolivia's access to the Pacific had long troubled relations between the two South American nations. Although the two nations had agreed by treaty in 1874 to a boundary line that recognized Bolivian sovereignty over coastal territories, Chile later occupied these and other coastal territories during the War of the Pacific between Chile, Peru, and Bolivia. Hostilities between Bolivia and Chile finally ended in 1904 when both countries signed the Treaty on Peace and Friendship (1904 Peace Treaty). The 1904 Peace Treaty granted Chile sovereignty over all coastal territory that had previously belonged to Bolivia while guaranteeing Bolivia the right of commercial transit through Chilean ports.<sup>4</sup>

According to Bolivia's application, the subject of Bolivia's sovereign access to the Pacific remained a frequent subject of negotiations and discussion between the two nations even after the entry into force of the 1904 Treaty. Most importantly, Bolivia's application stated that Chile had promised in several "agreements, diplomatic practice and a series of declarations"<sup>5</sup> to enter into negotiations with Bolivia in order to reach an agreement granting Bolivia sovereign access to the Pacific.

In response to Bolivia's application, Chile raised a preliminary objection to the ICJ's jurisdiction on July 15, 2014.<sup>6</sup> Chile argued that Article VI of the Pact of Bogotá excludes from the ICJ's jurisdiction "matters already settled by arrangement between the parties" as well as matters "governed" by international agreement. Because Bolivia's application seeks to have the ICJ adjudicate the question of Bolivia's sovereign access to the Pacific—a matter settled by the 1904 Peace Treaty—Chile asked the ICJ to dismiss Bolivia's application for lack of jurisdiction.

Bolivia rebutted Chile's jurisdictional objection by claiming that Chile misconstrued the subject matter of the dispute before the Court. The entire dispute concerns Chile's obligation to negotiate sovereign access to the Pacific. This obligation, Bolivia argued, arose after the 1904 Treaty and could not have been settled by that treaty.<sup>7</sup>

## The Judgment

The Court divided Chile's jurisdictional objection into two parts.

First, the Court considered the different ways that the two parties characterized the "subject matter" of the dispute. While Bolivia contended that the dispute was about the existence of an obligation to negotiate sovereign access to the sea, Chile described the dispute as being about Chile's territorial sovereignty and the nature of Bolivia's access to the Pacific.<sup>8</sup>

\* Julian G. Ku is the Maurice A. Deane Distinguished Professor of Constitutional Law at Hofstra University.

On this initial question, the Court sided with Bolivia. While the Court conceded that Bolivia's ultimate goal is to gain sovereign access to the Pacific, Bolivia's application merely sought to raise the separate issue of whether Chile had an obligation to negotiate such access in good faith. Bolivia's request for ICJ adjudication was clearly limited to this distinct issue and did not extend to the ultimate question of sovereign access. Therefore, the Court concluded that the subject matter of the dispute was limited to Chile's obligation to negotiate in good faith.

Second, the Court turned to the heart of Chile's jurisdictional objection: that the question of Chile's obligation to negotiate in good faith had been "settled" by the 1904 Peace Treaty. If the Court found that the 1904 Peace Treaty had settled the issue, the ICJ would lack jurisdiction because Article VI of the Pact of Bogotá excludes matters "already settled by an arrangement between the parties" or "governed by agreement or treaties in force on the date of the conclusion of the [Pact of Bogotá]." Chile had argued while each of these prongs of Article VI had a different scope, the 1904 Peace Treaty satisfied both.<sup>9</sup>

The Court, however, rejected this view. It decided that the question of Chile's obligation to negotiate in good faith was neither expressly nor impliedly addressed by the 1904 Peace Treaty. It cited Bolivia's claim that the obligation to negotiate arose "independently of the 1904 [Peace] Treaty" as a result of subsequent communications and negotiations between the two nations. Because Bolivia alleged that the obligation to negotiate in good faith arose after the conclusion of the 1904 Peace Treaty, the Court found that neither the "settled" nor "governed" prong of Article VI applied to Bolivia's claims.<sup>10</sup>

Before concluding, the Court also addressed Bolivia's argument that Chile's jurisdictional objection lacked an exclusively preliminary character.<sup>11</sup> Under Article 79, paragraph 9 of the Rules of the Court, the Court (during a preliminary stage) is obliged to refrain from upholding or rejecting an objection that lacks an exclusively preliminary character. In those cases, the Court should reserve its decision on such matters for the merits. In examining the nature of Chile's objection, the Court had little trouble concluding that it had all the facts necessary to determine whether Bolivia's claim was "settled" or "governed" by the 1904 Peace Treaty.<sup>12</sup>

In the end, the Court (by a vote of fourteen to two) rejected Chile's preliminary objection and found it had jurisdiction under Article XXXI of the Pact of Bogotá. Only Judge Gaja and Judge ad hoc Arbour dissented from the Court's Judgment. Both dissenters, however, limited their disagreement to the question of whether the Court should have reserved Chile's objection on jurisdiction until after the merits hearing. Both believed that Bolivia's shifting characterization of its claims might later validate Chile's jurisdictional objection.

## Conclusion

The failure of Chile to win over more than two ICJ members for its jurisdictional objection is remarkable. Chile's written submission consisted of three lengthy volumes, and its oral submissions were presented by six of the most well-known and prominent international lawyers in the world, including the former chief international legal advisers to the United States and the United Kingdom.<sup>13</sup> Moreover, Chile had a strong argument. The text of the 1904 Peace Treaty plainly settled the question of territorial boundaries and coastal access between Bolivia and Chile. Article VI of the Pact of Bogotá was plainly intended to exclude disputes that had been settled by arrangement or treaty from the ICJ's jurisdiction. The obvious purpose of Article VI is to avoid embroiling the ICJ in disputes that had already been settled by prior agreements and to enhance the durability of such "out of court" settlements.

Nonetheless, Bolivia prevailed. Why? While Chile argued that an obligation to negotiate in good faith amounted to an obligation to *agree* to grant coastal access, the Court was content to accept Bolivia's characterization of its claim as solely a demand for good faith negotiations.

Allowing Bolivia to plead its way around the 1904 Peace Treaty is logically defensible, but there is little doubt it will lead to undesirable results for the Court and international judicial practice in general. After all, as the Court itself admits, Bolivia's only goal in demanding negotiations "for sovereign access to the Pacific Ocean" is to actually gain "sovereign access to the Pacific Ocean." And, as the Court also concedes, the question of whether to grant such sovereign access was settled by the 1904 Peace Treaty. So the Court is in effect retaining jurisdiction to consider whether Chile has an obligation to negotiate, even though it already concedes Chile has no obligation to agree to Bolivia's demands.

Moreover, the source of Chile's obligation to negotiate requires the Court to wade into a century's worth of diplomatic correspondence, alleged negotiations and oral promises, and other public declarations in search of a legally binding promise to negotiate in good faith. Searching for a clear legal basis for such an obligation over a record that stretches across centuries will challenge the Court's ability to analyze and assess complex factual-historical materials.

Even worse, should it find that Chile has a binding obligation to negotiate in good faith, the Court can look forward to years (maybe decades) of subsequent Bolivian applications alleging Chile's lack of "good faith." Clear international legal standards for determining good faith in sovereign negotiations over territorial disputes are lacking, and the Court will have to resort to analogies from municipal law.

Overall, the Court's rejection of Chile's jurisdictional objection is perhaps more significant than its eventual ruling on the merits. Even if the Court eventually finds that Chile has no obligation to negotiate on the merits, the damage is done. By opening the door to applications demanding "good faith negotiations" over any subject, even those settled by clear international agreement and practice, the Court has vastly expanded its potential jurisdictional reach and will lead to more, and not fewer, state-to-state judicial disputes in the future.

---

## ENDNOTES

- |    |   |    |  |
|----|---|----|--|
| 1  | Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, Preliminary Objection (Sept. 2015), <a href="http://www.icj-cij.org/docket/files/153/18746.pdf">http://www.icj-cij.org/docket/files/153/18746.pdf</a> [hereinafter Judgment]. | 11 | <i>Id.</i> ¶¶ 54–55.   |
| 2  | Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Application (Apr. 2013), <a href="http://www.icj-cij.org/docket/files/153/17338.pdf">http://www.icj-cij.org/docket/files/153/17338.pdf</a> [hereinafter Application].                   | 12 | In a separate declaration, Judge Bennouna stated that he found this part of the judgment redundant because whenever the Court upholds or rejects an objection, it implicitly regards the objection as preliminary.   |
| 3  | <i>Id.</i>  | 13 | The following were listed as co-agents for Chile: Sir Daniel Bethlehem, Q.C., Barrister, Bar of England and Wales, 20 Essex Street Chambers; Mr. Pierre-Marie Dupuy, Professor at the Graduate Institute of International Studies and Development, Geneva, and University of Paris II (Panthéon-Assas), member of the Institut de droit international; Mr. Ben Juratowitch, Solicitor admitted in Queensland and in England and Wales, Freshfields Bruckhaus Deringer; Mr. Harold Hongju Koh, Sterling Professor of International Law, member of the Bars of New York and the District of Columbia; Ms Mónica Pinto, Professor and Dean of the Law School of the Universidad Nacional de Buenos Aires, Argentina; Mr. Samuel Wordsworth, Q.C., member of the English Bar, member of the Paris Bar, Essex Court Chambers, |
| 4  | Judgment, <i>supra</i> note 1, ¶¶ 15–17.  |    |  |
| 5  | Application, <i>supra</i> note 2, ¶ 31.   |    |  |
| 6  | Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection of the Republic of Chile (July 2014), <a href="http://www.icj-cij.org/docket/files/153/18616.pdf">http://www.icj-cij.org/docket/files/153/18616.pdf</a> .         |    |  |
| 7  | Judgment, <i>supra</i> note 1, ¶¶ 22–24.  |    |  |
| 8  | <i>Id.</i> ¶¶ 25–36   |    |  |
| 9  | <i>Id.</i> ¶¶ 18–22.  |    |  |
| 10 | <i>Id.</i> ¶¶ 37–53.  |    |  |

OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN (BOLIVIA V.  
CHILE): PRELIMINARY OBJECTION (I.C.J.)\*  
[September 24, 2015]  
+Cite as 55 ILM 77 (2016)+

24 SEPTEMBER 2015  
JUDGMENT

OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN  
(BOLIVIA v. CHILE)  
PRELIMINARY OBJECTION

---

OBLIGATION DE NÉGOCIER UN ACCÈS À L'OCÉAN PACIFIQUE  
(BOLIVIE c. CHILI)  
EXCEPTION PRÉLIMINAIRE

24 SEPTEMBRE 2015  
ARRÊT

TABLE OF CONTENTS

	<i>Paragraphs</i>
<b>CHRONOLOGY OF THE PROCEDURE</b>	
I. BACKGROUND .....	[ILM Page 83]
II. GENERAL OVERVIEW OF THE POSITIONS OF THE PARTIES .....	[ILM Page 83]
III. SUBJECT-MATTER OF THE DISPUTE .....	[ILM Page 85]
IV. WHETHER THE MATTERS IN DISPUTE BEFORE THE COURT FALL UNDER ARTICLE VI OF THE PACT OF BOGOTÁ .....	[ILM Page 87]
V. THE COURT'S CONCLUSION REGARDING THE PRELIMINARY OBJECTION .....	[ILM Page 90]
OPERATIVE CLAUSE .....	[ILM Page 90]

---

\* This text was reproduced and reformatted from the text available at the International Court of Justice website (visited January 12, 2016), <http://www.icj-cij.org/docket/files/153/18746.pdf>.

## INTERNATIONAL COURT OF JUSTICE

YEAR 2015

2015  
24 September  
General List  
No. 153

24 September 2015

OBLIGATION TO NEGOTIATE ACCESS  
TO THE PACIFIC OCEAN  
(BOLIVIA v. CHILE)  
PRELIMINARY OBJECTION

*Geography — Historical background — Bolivia's claims — Jurisdiction based on Article XXXI of Pact of Bogotá — Contention of Chile that, under Article VI of the Pact, the Court lacks jurisdiction.*

*Subject-matter of dispute to be determined by the Court — Differing characterization of the dispute by the Parties — Chile's characterization not accepted — Question whether Bolivia has a right to sovereign access to the sea not before the Court — No need for pronouncement on legal status of 1904 Peace Treaty — Subject-matter of dispute twofold — Whether Chile obligated to negotiate in good faith Bolivia's sovereign access to the sea — Whether Chile has breached any such obligation — Use in Judgment of phrases "sovereign access" and "to negotiate sovereign access" without incidence on existence, nature or content of any alleged obligation.*

*Determination whether matters in dispute were "settled" or "governed" by 1904 Peace Treaty — Jurisdictional régime of Pact of Bogotá — Article VI of the Pact — Relevant provisions of 1904 Peace Treaty — Chile's alleged obligation to negotiate not addressed in 1904 Peace Treaty — The matters in dispute are matters neither "settled" nor "governed", within meaning of Article VI of the Pact, by 1904 Peace Treaty — No need to examine, for purposes of the case, whether there exists a distinction between legal effect of terms "settled" and "governed" — No need to examine agreements, diplomatic practice and declarations invoked by Bolivia.*

*Bolivia's alternative argument that Chile's objection does not possess exclusively preliminary character — Bolivia's alternative argument moot — For the Court to determine whether an objection lacks an exclusively preliminary character — The Court not precluded from ruling on Chile's objection at this stage.*

*Chile's preliminary objection dismissed — The Court has jurisdiction to entertain Bolivia's Application.*

## JUDGMENT

*Present: 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.*

In the case concerning the obligation to negotiate access to the Pacific Ocean,  
*between*

the Plurinational State of Bolivia,  
represented by

H.E. Mr. Eduardo Rodríguez Veltzé, former President of Bolivia, former President of the Bolivian Supreme Court of Justice, former Dean of the Law School from the Catholic University of Bolivia, La Paz, Ambassador Extraordinary and Plenipotentiary of the Plurinational State of Bolivia to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. David Choquehuanca Céspedes, Minister for Foreign Affairs of the Plurinational State of Bolivia, as National Authority;

Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, Member of the International Law Commission,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma de Madrid, member of the Institut de droit international,

Ms Monique Chemillier-Gendreau, Professor Emeritus of Public Law and Political Science, University of Paris Diderot,

Mr. Payam Akhavan, LL.M. S.J.D. (Harvard), Professor of International Law, McGill University, Montreal, member of the State Bar of New York and of the Law Society of Upper Canada,

Ms Amy Sander, member of the English Bar,

as Counsel and Advocates;

Mr. Hector Arce, Attorney-General of the Plurinational State of Bolivia, Professor of Constitutional Law, Universidad Mayor de San Andrés, La Paz,

Mr. Reymi Ferreira, Minister of Defence of the Plurinational State of Bolivia,

H.E. Mr. Juan Carlos Alurralde, Vice-Minister for Foreign Affairs of the Plurinational State of Bolivia,

Mr. Emerson Calderón, Secretary General of the Strategic Maritime Vindication Office (DIREMAR), Professor of Public International Law, Universidad Mayor de San Andrés, La Paz,

H.E. Mr. Sacha Llorenty, Permanent Representative of Bolivia to the United Nations in New York,

H.E. Ms Nardy Suxo, Permanent Representative of Bolivia to the United Nations Office in Geneva,

Mr. Rubén Saavedra, Permanent Representative of Bolivia to the Union of South American Nations (UNASUR) in Quito,

as Advisers;

Mr. Carlos Mesa Gisbert, former President and Vice-President of Bolivia, as Special Envoy and Spokesman;

Mr. José Villarroel, DIREMAR, La Paz,

Mr. Osvaldo Torrico, DIREMAR, La Paz,

Mr. Farit Rojas Tudela, Embassy of Bolivia in the Kingdom of the Netherlands,

Mr. Luis Rojas Martínez, Embassy of Bolivia in the Kingdom of the Netherlands,

Mr. Franz Zubieta, State Attorney's Office, La Paz,

as Technical Advisers;

Ms Gimena González,

Ms Kathleen McFarland,

as Assistant Counsel,

*and*

the Republic of Chile,

represented by

H.E. Mr. Felipe Bulnes Serrano, Former Minister of Justice and Education of the Republic of Chile, Former Ambassador of Chile to the United States of America, Professor of Civil Law, Pontificia Universidad Católica de Chile,

as Agent;

H.E. Mr. Heraldo Muñoz Valenzuela, Minister for Foreign Affairs of Chile,

as National Authority;

Mr. Claudio Grossman, Dean and R. Geraldson Professor of International Law, American University, Washington College of Law,

H.E. Ms María Teresa Infante Caffi, Ambassador of Chile to the Kingdom of the Netherlands, member of the Institut de droit international,

as Co-Agents;

Sir Daniel Bethlehem, Q.C., Barrister, Bar of England and Wales, 20 Essex Street Chambers,

Mr. Pierre-Marie Dupuy, Professor at the Graduate Institute of International Studies and Development, Geneva, and University of Paris II (Panthéon-Assas), associate member of the Institut de droit international,

Mr. Ben Juratowitch, Solicitor admitted in Queensland and in England and Wales, Freshfields Bruckhaus Deringer,

Mr. Harold Hongju Koh, Sterling Professor of International Law, Yale Law School, member of the Bars of New York and the District of Columbia,

Ms Mónica Pinto, Professor and Dean of the Law School of the Universidad de Buenos Aires, Argentina,

Mr. Samuel Wordsworth, Q.C., member of the English Bar, member of the Paris Bar, Essex Court Chambers, as Counsel and Advocates;

H.E. Mr. Alberto van Klaveren Stork, Former Vice Minister for Foreign Affairs of Chile, Professor of International Relations, Universidad de Chile,

Ms Ximena Fuentes Torrijo, Professor of Public International Law, Universidad Adolfo Ibáñez and Universidad de Chile,

Mr. Andrés Jana Linetzky, Professor, Universidad de Chile,

Ms Nienke Grossman, Professor, University of Baltimore, Maryland, member of the Bars of Virginia and the District of Columbia,

Ms Kate Parlett, Solicitor admitted in Queensland and in England and Wales,

Ms Alexandra van der Meulen, *avocat à la Cour* (Paris) and member of the Bar of the State of New York,

Ms Callista Harris, Solicitor admitted in New South Wales,

Ms Mariana Durney, Legal Officer, Ministry of Foreign Affairs of Chile,

Ms María Alicia Ríos, Ministry of Foreign Affairs of Chile,

Mr. Juan Enrique Loyer, Third Secretary, Embassy of Chile in the Kingdom of the Netherlands,

as Advisers;

Mr. Coalter G. Lathrop, Sovereign Geographic, member of the North Carolina Bar,

as Technical Adviser,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

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 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 2015 for the filing of the Counter-Memorial of Chile. Bolivia filed its Memorial within the time-limit so prescribed.

5. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of Peru and the Government of Colombia respectively asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that same provision, the President of the Court decided to grant those requests. The Registrar duly communicated these decisions to the said Governments and to the Parties.

6. On 15 July 2014, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Chile raised a preliminary objection to the jurisdiction of the Court. Consequently, by an Order of 15 July 2014, the President, noting that by virtue of Article 79, paragraph 5, of the Rules of Court the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 14 November 2014 as the time-limit for the presentation by Bolivia of a written statement of its observations and submissions on the preliminary objection raised by Chile. Bolivia filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing in respect of the preliminary objection.

7. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to the States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States (hereinafter the “OAS”) the notification provided for in Article 34, paragraph 3, of the Statute of the Court. As provided for in Article 69, paragraph 3, of the Rules of Court, the Registrar transmitted the written pleadings to the OAS and asked that organization whether or not it intended to furnish observations in writing within the meaning of that Article. The Registrar further stated that, in view of the fact that the current phase of the proceedings related to the question of jurisdiction, any written observations should be limited to the construction of the provisions of the Pact of Bogotá concerning that question. The Secretary General of the OAS informed the Court that that organization did not intend to submit any such observations.

8. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the preliminary objection and the written observations on that objection would be made accessible to the public on the opening of the oral proceedings.

9. Public hearings on the preliminary objection raised by Chile were held from Monday 4 to Friday 8 May 2015, at which the Court heard the oral arguments and replies of:

*For Chile:*  
H.E. Mr. Felipe Bulnes,  
Ms Mónica Pinto,  
Sir Daniel Bethlehem,  
Mr. Samuel Wordsworth,



Mr. Pierre-Marie Dupuy,  
 Mr. Harold Hongju Koh.  
*For Bolivia:* H.E. Mr. Eduardo Rodríguez Veltzé,  
 Mr. Mathias Forteau,  
 Ms Monique Chemillier-Gendreau,  
 Mr. Antonio Remiro Brotóns,  
 Mr. Payam Akhavan.

10. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

\*

11. In the Application, the following claim was made by Bolivia:

“For the above reasons Bolivia respectfully 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.”

12. In the Memorial, the following submissions were presented on behalf of the Government of Bolivia:

“For the reasons given in this Memorial, and reserving the right to supplement, amplify or amend the present submissions, 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; and
- (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.”

13. In the preliminary objection, the following submissions were presented on behalf of the Government of Chile:

“For the reasons explained in the preceding Chapters, Chile respectfully requests the Court to adjudge and declare that:

The claim brought by Bolivia against Chile is not within the jurisdiction of the Court.”

In the written statement of its observations and submissions on the preliminary objection, the following submissions were presented on behalf of the Government of Bolivia:

“Accordingly, Bolivia respectfully asks the Court:

- (a) To reject the objection to its jurisdiction submitted by Chile;
- (b) To adjudge and declare that the claim brought by Bolivia enters within its jurisdiction.”

14. At the oral proceedings on the preliminary objection, the following submissions were presented by the Parties:  
*On behalf of the Government of Chile,*

at the hearing of 7 May 2015:

“The Republic of Chile respectfully requests the Court to adjudge and declare that the claim brought by Bolivia against Chile is not within the jurisdiction of the Court.”

*On behalf of the Government of Bolivia,*

at the hearing of 8 May 2015:

“[T]he Plurinational State of Bolivia respectfully requests the Court:

- (a) to reject the objection to its jurisdiction submitted by Chile;
- (b) to adjudge and declare that the claim brought by Bolivia enters within its jurisdiction.”

\*

\* \*

## I. BACKGROUND

15. Bolivia is situated in South America, bordering Chile to the south-west, Peru to the west, Brazil to the north and east, Paraguay to the south-east and Argentina to the south. Bolivia has no sea-coast. Chile, for its part, shares a land boundary with Peru to the north, with Bolivia to the north-east and with Argentina to the east. Its mainland coast faces the Pacific Ocean to the west.

16. Chile and Bolivia gained their independence from Spain in 1818 and 1825 respectively. At the time of its independence, Bolivia had a coastline along the Pacific Ocean, measuring several hundred kilometres. On 10 August 1866, Chile and Bolivia signed a Treaty of Territorial Limits, which established a “line of demarcation of boundaries” between the two States, separating their neighbouring Pacific coast 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, known as the War of the Pacific. In the course of this war, Chile occupied Bolivia’s coastal territory. The hostilities came to an end as between Bolivia and Chile with the Truce Pact signed in 1884 in Valparaíso. Under the terms of the Truce 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. This Treaty included provisions for Bolivia to regain access to the sea, subject to Chile acquiring sovereignty over certain specific 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 this 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 to Chilean ports. Certain provisions of the 1904 Peace Treaty are set forth below<sup>1</sup> (see paragraph 40).

17. Following the 1904 Peace Treaty, both States made a number of declarations and several diplomatic exchanges took place between them regarding the situation of Bolivia vis-à-vis the Pacific Ocean (see paragraphs 19 and 22 below).

## II. GENERAL OVERVIEW OF THE POSITIONS OF THE PARTIES

18. 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” (see paragraphs 11 and 12 above).

19. 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.

20. Bolivia, in its Application, 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.”

21. Both Bolivia and Chile are parties to the Pact of Bogotá, which was adopted on 30 April 1948. Chile ratified the Pact of Bogotá on 21 August 1967 and deposited its instrument of ratification on 15 April 1974. Bolivia ratified the Pact of Bogotá on 14 April 2011 and deposited its instrument of ratification on 9 June 2011.

When Bolivia signed the Pact of Bogotá in 1948, and again when it ratified it in 2011, it entered a reservation to Article VI. That Article provides:

“The . . . 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’s reservation read as follows:

“The Delegation of Bolivia makes a reservation with regard to Article VI, inasmuch as it considers that pacific procedures may also be applied to controversies arising from matters settled by arrangement between the Parties, when the said arrangement affects the vital interests of a State.”

Chile objected to Bolivia’s reservation. On 10 April 2013, this reservation was withdrawn. Bolivia therefore states that, as of the date the proceedings were initiated, on 24 April 2013, neither Party had any reservation in force precluding the jurisdiction of the Court. Chile, which does not contradict this point, states that the withdrawal of Bolivia’s reservation brought the Pact of Bogotá into force between the Parties.

22. In its preliminary objection, Chile claims that, pursuant to Article VI of the Pact of Bogotá, the Court lacks jurisdiction under Article XXXI of the Pact of Bogotá to decide the dispute submitted by Bolivia. Chile maintains that the matters at issue in the present case are territorial sovereignty and the character of Bolivia’s access to the Pacific Ocean. Referring to Article VI of the Pact of Bogotá, it contends that these matters 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 of Bogotá. According to Chile, the various “agreements, diplomatic practice and . . . declarations” invoked by Bolivia (see paragraph 19 above) concern “in substance the same matter settled in and governed by [the 1904 Peace] Treaty”.

23. Bolivia’s response is that Chile’s preliminary objection is “manifestly unfounded” as it “misconstrues the subject matter of the dispute” between the Parties. 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 are not matters settled or governed by that Treaty, within the meaning of Article VI of the Pact of Bogotá, and that the Court has jurisdiction under Article XXXI thereof.

\*

\*   \*

24. The essence of Chile's preliminary objection is that the subject-matter of Bolivia's claim falls within Article VI of the Pact of Bogotá. The Court notes, however, that the matter that Chile considers to be excluded from the Court's jurisdiction by virtue of Article VI (see paragraph 22 above) does not correspond to the subject-matter of the dispute as described by Bolivia (see paragraph 23 above). Accordingly, it is necessary for the Court first to state its own views about the subject-matter of the dispute and to reach its own conclusions thereon. The Court will then turn to the question whether the matters in dispute are matters "settled" or "governed" by the 1904 Peace Treaty.

### III. SUBJECT-MATTER OF THE DISPUTE

25. Article 40, paragraph 1, of the Statute of the Court, and Article 38, paragraph 1, of the Rules of Court require an applicant to indicate the "subject of the dispute" in the application. The application shall also specify the "precise nature of the claim" (Art. 38, para. 2, of the Rules of Court; *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1998, p. 448, para. 29).

26. It is for the Court itself, however, to determine on an objective basis the subject-matter of the dispute between the parties, that is, to "isolate the real issue in the case and to identify the object of the claim" (*Nuclear Tests (Australia v. France)*, *Judgment*, I.C.J. Reports 1974, p. 262, para. 29; *Nuclear Tests (New Zealand v. France)*, *Judgment*, I.C.J. Reports 1974, p. 466, para. 30). In doing so, the Court examines the positions of both parties, "while giving particular attention to the formulation of the dispute chosen by the [a]pplicant" (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1998, p. 448, para. 30; see also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2007 (II), p. 848, para. 38). The Court recalls that the Rules of Court require that the application specify the "facts and grounds on which the claim is based" and that a memorial include a statement of the "relevant facts" (Art. 38, para. 2, and Art. 49, para. 1, respectively). To identify the subject-matter of the dispute, the Court bases itself on the application, as well as the written and oral pleadings of the parties. In particular, it takes account of the facts that the applicant identifies as the basis for its claim (see *Nuclear Tests (Australia v. France)*, *Judgment*, I.C.J. Reports 1974, p. 263, para. 30; *Nuclear Tests (New Zealand v. France)*, *Judgment*, I.C.J. Reports 1974, p. 467, para. 31; *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1998, p. 449, para. 31; pp. 449–450, para. 33).

\*   \*

27. Bolivia's Application states that the dispute between Bolivia and Chile relates 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".

It further indicates that

"[t]he subject of the dispute lies in: (a) the existence of that obligation, (b) the non-compliance with that obligation by Chile, and (c) Chile's duty to comply with the said obligation".

Bolivia's Memorial is to the same effect (see paragraph 18 above).

28. Chile contends that the subject-matter of Bolivia's claim is territorial sovereignty and the character of Bolivia's access to the Pacific Ocean. It does not dispute that the Application portrays Bolivia's claim as one concerning an obligation to negotiate. However, according to Chile, this alleged obligation is in fact an obligation to conduct negotiations the outcome of which is predetermined, namely, the grant to Bolivia of sovereign access to the Pacific Ocean. Only the details of that sovereign access — such as how much territory is involved and its location — would be subject to negotiation. Thus, in Chile's view, Bolivia is not seeking an open negotiation comprised of good faith

exchanges, but rather negotiations with a judicially predetermined outcome. Chile states that the alleged obligation to negotiate should be seen as an “artificial means” to implement Bolivia’s alleged right to sovereign access to the Pacific Ocean.

29. Chile also maintains that Bolivia could be granted sovereign access to the sea only through revision or nullification of the 1904 Peace Treaty. Any negotiation resulting in sovereign access to the sea would modify the allocation of sovereignty over territory and the character of Bolivia’s access to the sea, upon which the Parties agreed in that Treaty. Accordingly, Chile claims that Bolivia’s Application seeks “revision of the settlement reached in 1904 concerning territorial sovereignty and the character of Bolivia’s access to the sea”.

30. Bolivia responds that Chile misrepresents the dispute that is the subject of the Application. It emphasizes that the Application asks the Court to find that Chile has an obligation to negotiate sovereign access to the sea. Bolivia maintains that the result of those negotiations and the specific modalities of sovereign access are not matters for the Court but, rather, are matters for future agreement to be negotiated by the Parties in good faith. It also states that there is no dispute regarding the validity of the 1904 Peace Treaty and that it does not seek the revision or nullification of that Treaty in these proceedings. Instead, according to Bolivia, the alleged obligation to negotiate exists independently of, and in parallel to, the 1904 Peace Treaty.

\* \* \*

31. The Court observes that, consistent with Article 38, paragraph 2, of the Rules of Court, the Application specifies the facts and grounds on which the claim is based. In support of the claim that there is an obligation to negotiate sovereign access to the sea, the Application cites “agreements, diplomatic practice and a series of declarations attributable to [Chile’s] highest-level representatives”. It also states that Chile’s contrary to the position that Chile had itself adopted later rejected and denied the existence of the alleged obligation to negotiate in 2011 and 2012, and that Chile has breached this obligation. The Application does not invoke the 1904 Peace Treaty as a source of rights or obligations for either Party, nor does it ask the Court to make any pronouncement regarding the legal status of that Treaty. 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.

32. Chile would have the Court set aside the dispute as presented in the Application because, in its view, the Application obfuscates the true subject-matter of Bolivia’s claim — territorial sovereignty and the character of Bolivia’s access to the Pacific Ocean. As the Court has observed in the past, applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 85–86, para. 32; see also *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 91–92, para. 54; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, pp. 19–20, paras. 36–37). 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. The Application does not ask the Court to adjudicate and declare that Bolivia has a right to sovereign access.

33. As to Chile’s assertion that the Application presents an artificial framing of the subject-matter in dispute, because the relief sought by Bolivia would lead to negotiations with a judicially predetermined outcome and to modification of the 1904 Peace Treaty, the Court recalls that Bolivia does not ask the Court to declare that it has a right to sovereign access to the sea nor to pronounce on the legal status of the 1904 Peace Treaty. Moreover, should this case proceed to the merits, Bolivia’s claim would place before the Court the Parties’ respective contentions about the existence, nature and content of the alleged obligation to negotiate sovereign access. Even assuming *arguendo* that the Court were to find the existence of such an obligation, it would not be for the Court to predetermine the outcome of any negotiation that would take place in consequence of that obligation.

34. In view of the foregoing analysis, 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 such an obligation exists, whether Chile has breached it.

\*

35. The Court recalls that the submissions in Bolivia's Application and Memorial refer to an "obligation to negotiate . . . in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean". Bolivia has repeatedly stated that Chile has an "obligation to negotiate sovereign access to the sea". Chile has also used in its written and oral pleadings the phrase "sovereign access to the sea".

When a Member of the Court asked each Party to define what it meant by the phrase "sovereign access to the sea", Bolivia responded that the "existence and specific content" of the alleged obligation to negotiate sovereign access to the sea was not a matter to be determined at the preliminary stage of the proceedings but, rather was to be determined at the merits stage of the proceedings. Chile, for its part, answered that Bolivia used the expression "sovereign access to the sea" in its Application and Memorial to refer to the transfer or cession to Bolivia of Chilean territory, and that this phrase had the same meaning in Chile's preliminary objection.

36. Bearing in mind these observations by the Parties, the Court emphasizes that the use in this Judgment of the phrases "sovereign access" and "to negotiate sovereign access" should not be understood as expressing any view by the Court about the existence, nature or content of any alleged obligation to negotiate on the part of Chile.

#### IV. WHETHER THE MATTERS IN DISPUTE BEFORE THE COURT FALL UNDER ARTICLE VI OF THE PACT OF BOGOTÁ

37. The Court will now consider the jurisdictional régime of the Pact of Bogotá. The Court recalls that the Pact contains a number of provisions relating to the judicial settlement of disputes. Article XXXI of the Pact provides that the Parties recognize the compulsory jurisdiction of the Court in all disputes of a juridical nature arising among them concerning matters listed therein (see paragraph 20 above).

38. The other relevant provisions of the Pact of Bogotá are Articles VI and XXXIII. As already noted, Article VI states that:

"The . . . 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."

Article XXXIII of the Pact of Bogotá provides that: "If the parties fail to agree as to whether the Court has jurisdiction over the controversy, the Court itself shall first decide that question."

39. Under Article VI of the Pact of Bogotá, if the Court were to find that, given the subject-matter of the dispute as identified by the Court in paragraph 34 above, the matters in dispute between the Parties were matters "already settled by arrangement between the parties" or "governed by agreements or treaties in force" on 30 April 1948, it would lack the requisite jurisdiction under the Pact of Bogotá to decide the case on the merits. Consequently, the Court will proceed to determine whether the matters in dispute are matters "settled" or "governed" by the 1904 Peace Treaty.

40. The Court recalls the following provisions of the 1904 Peace Treaty, in force on 30 April 1948. Article I re-established the relations of peace and friendship between Bolivia and Chile and terminated the régime established by the 1884 Truce Pact of Valparaíso.

Article II of the 1904 Peace Treaty provides:

"By the present Treaty, the territories occupied by Chile by virtue of article 2 of the Truce Pact of April 4, 1884, are recognized as belonging absolutely and in perpetuity to Chile."

Article II continues by delimiting the boundary between Bolivia and Chile and setting out the procedure for demarcation.

In Article III, the Parties agreed on the construction of a railway between the port of Arica and the Plateau of La Paz, at the expense of Chile.

Article VI provides:

“The Republic of Chile recognizes in favour of Bolivia in perpetuity the fullest and most unrestricted right of commercial transit in its territory and its Pacific ports.

Both Governments will agree, in special acts, upon the method suitable for securing, without prejudice to their respective fiscal interests, the object indicated above.”

Article VII provides:

“The Republic of Bolivia shall have the right to establish customs agencies in the ports which it may designate for its commerce. For the present it indicates as such ports for its commerce those of Antofagasta and Arica.

The agencies shall take care that the goods in transit shall go directly from the pier to the railroad station and shall be loaded and transported to the Bolivian Custom-houses in wagons closed and sealed and with freight schedules which shall indicate the number of packages, their weight and mark, number and content, which shall be exchanged for receipts.”

Articles VIII, IX, X and XI regulate aspects of commercial interchange between the Parties, customs and the transit of goods. Chile also made other financial commitments in favour of Bolivia (Arts. IV and V).

\* \*

41. In Chile’s view, Article VI of the Pact of Bogotá undoubtedly excludes the present dispute between the Parties from the Court’s jurisdiction. Chile submits that the purpose of Article VI of the Pact of Bogotá was to preclude the possibility of using the dispute settlement procedures of the Pact and, in particular, judicial remedies, “in order to reopen such matters as were settled between the parties to the Pact, because they had been the object of an international judicial decision or a treaty” (citing *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 858, para. 77).

42. Chile submits that there is a distinction to be drawn between the two limbs of Article VI and argues that a matter is “settled” by arrangement if it is resolved by that arrangement, while a matter is “governed” by a treaty if the treaty regulates the relationship between the parties concerning that subject-matter. In the present case, Chile concludes that territorial sovereignty and the character of Bolivia’s access to the Pacific Ocean are matters both “settled” and “governed” by the 1904 Peace Treaty.

43. In this respect, Chile argues, first, that Article II of the 1904 Peace Treaty is a comprehensive territorial settlement between the two States and that the question of territorial sovereignty is therefore a matter settled and governed by that provision. Chile also maintains that Article II of the 1904 Peace Treaty has the following material components:

“First, it addresses Chilean sovereignty over what had, until the Pacific War of 1879, been the Bolivian Littoral Department. Second, it delimited the boundary between Chile and Bolivia from south to north in the area of the Chilean provinces of Antofagasta and Tarapacá. Third, it agreed and delimited the frontier line between Chile and Bolivia in the area of Tacna and Arica. Fourth, it provided for the demarcation of the entire boundary.”

44. Secondly, Chile contends that the character of Bolivia’s access to the sea is a matter settled and governed by Articles VI and VII of the 1904 Peace Treaty, which relate to Bolivia’s perpetual right of commercial transit and its right to establish customs agencies in Chilean ports, respectively.

45. Thirdly, Chile submits that Articles III to XI — with Articles VI and VII featuring predominantly — established treaty-based arrangements and commitments governing core aspects of the Parties’ relations going forward.

46. Chile thus concludes that the terms of the 1904 Peace Treaty leave no room for doubt that “territorial sovereignty” and “the character of Bolivia’s access to the Pacific Ocean” are matters settled and governed by that Treaty.

\*

47. For its part, Bolivia argues that the basis of its claim is that:

*“independently of the 1904 Treaty Chile agreed to negotiate to grant Bolivia a sovereign access to the Pacific Ocean. It is because this issue was not ‘settled’ by the 1904 Treaty that both Parties agreed afterwards on negotiations to grant Bolivia such a sovereign access to the Ocean.”* (Emphasis in the original.)

It maintains that the Parties were negotiating this pending issue until 2011 when Chile allegedly reneged on its obligation to negotiate. It further argues that Chile should comply with its obligation to negotiate Bolivia’s sovereign access to the Pacific Ocean and that the 1904 Peace Treaty cannot provide a reasonable basis for Chile’s invocation of Article VI of the Pact of Bogotá as a bar to the Court’s jurisdiction.

48. While Bolivia agrees that Chile has provided an accurate depiction of the purpose of Article VI (see paragraph 41 above), it finds Chile’s interpretation of Article VI overly expansive. Moreover, it argues that Chile fails to draw any practical conclusion from the distinction between the two limbs of that Article. In this respect, it refers to the case of the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, where the Court concluded that:

*“in the specific circumstances of the present case, there is no difference in legal effect, for the purpose of applying Article VI of the Pact, between a given matter being ‘settled’ by the 1928 Treaty and being ‘governed’ by that Treaty. In light of the foregoing, the Court will hereafter use the word ‘settled’.”* (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 39.)

Bolivia maintains that in the present case too, there is no substantive difference between the application of the terms “settled” and “governed” for the purposes of Article VI of the Pact.

49. Bolivia submits that, even if Chile’s interpretation of the two limbs of Article VI were to be upheld, Chile’s objection would still fail because the 1904 Peace Treaty could not have settled a dispute that did not exist in 1904 and because it cannot govern matters such as those put forward by Bolivia, which did not fall within the terms of that Treaty. Bolivia maintains that, by mischaracterizing its claim as one regarding “territorial sovereignty and the character of Bolivia’s access to the sea” rather than the one described in its Application and Memorial, namely, “the existence and violation of the obligation to negotiate a sovereign access to the Pacific Ocean agreed upon by Chile”, Chile erroneously draws the conclusion that the matters in dispute are matters “settled and governed by the 1904 Peace Treaty” and that Bolivia is merely seeking to “revise or nullify” that Treaty.

\* \*

50. As the Court concluded above, 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 (see paragraph 34 above). The provisions of the 1904 Peace Treaty set forth at paragraph 40 do not expressly or impliedly address the question of Chile’s alleged obligation to negotiate Bolivia’s sovereign access to the Pacific Ocean. In the Court’s view, therefore, the matters in dispute are matters neither “settled by arrangement between the parties, or by arbitral award or by decision of an international court” nor “governed by agreements or treaties in force on the date of the conclusion of the [Pact of Bogotá]” within the meaning of Article VI of the Pact of Bogotá. This conclusion holds regardless of whether, as Chile maintains, the two limbs of Article VI have a different scope (see paragraph 42 above). The Court does not, therefore, find it necessary in the circumstances of the present case to determine whether or not there is a distinction between the legal effect of those two limbs.

51. The Court recalls that the Parties have presented their respective views on “agreements, diplomatic practice and . . . declarations” invoked by Bolivia to substantiate its claim on the merits (see paragraphs 19 and 22 above). The Court is of the view that, for the purposes of determining the question of its jurisdiction, it is neither necessary nor appropriate to examine those elements.

\*

\* \*



52. As noted above, Chile's submission is that the Court should declare that it lacks jurisdiction (see paragraph 14 above). Bolivia's submission is that the Court should reject Chile's objection to jurisdiction (*ibid.*). In the alternative, Bolivia argues that if the Court addressed Chile's objection on the basis of Chile's characterization of the subject-matter of the dispute, the objection would amount to a refutation of Bolivia's case on the merits, and thus would not possess an exclusively preliminary character. As indicated above, the Court does not accept Chile's characterization of the subject-matter of the dispute (see paragraph 34). Bolivia's alternative argument is therefore moot.

53. The Court recalls however that it is for it to decide, under Article 79, paragraph 9, of the Rules of Court, whether in the circumstances of the case, an objection lacks an exclusively preliminary character. 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, 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 (*Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51). Consequently, the Court finds that it is not precluded from ruling on Chile's objection at this stage.

#### V. THE COURT'S CONCLUSION REGARDING THE PRELIMINARY OBJECTION

54. Bearing in mind the subject-matter of the dispute, as earlier identified (see paragraph 34 above), 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 to the jurisdiction of the Court must be dismissed.

55. In accordance with Article 79, paragraph 9, of the Rules of Court, the time-limits for the further proceedings shall be fixed by order of the Court.

\*

\*   \*

56. For these reasons,  
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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of September, two thousand and fifteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Plurinational State of Bolivia and the Government of the Republic of Chile, respectively.

(Signed) Ronny ABRAHAM,  
President.

(Signed) Philippe COUVREUR,  
Registrar.

Judge BENNOUNA appends a declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge GAJA appends a declaration to the Judgment of the Court; Judge *ad hoc* ARBOUR appends a dissenting opinion to the Judgment of the Court.

(Initialled) R. A.

(Initialled) Ph. C.

---

#### ENDNOTES

- 1 The original language of the 1904 Peace Treaty is Spanish. All provisions from the Treaty that are quoted in this Judgment have been translated into English by the Registry.