

DECLARATION OF JUDGE GAJA

1. In its Application (para. 32) and in the submissions included in its Memorial Bolivia requested the Court to adjudge and 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 this obligation has been breached and that it must be complied with. Thus, although the request put the stress on negotiations, 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.

Even if the term “sovereign access to the sea” may be ambiguous, it is uncontested that the 1904 Treaty of Peace and Amity between Bolivia and Chile, which addressed questions of sovereignty, does not contain any reference to such a sovereign access by Bolivia. Article II of the 1904 Treaty concerned the acquisition by Chile of the entire stretch of coastal land which had been under Bolivia’s sovereignty before the Pacific war. Moreover, the Treaty comprehensively defined the land boundary between Bolivia and Chile, including with regard to the provinces of Tacna and Arica, the sovereignty over which was still undetermined between Chile and Peru (see Article 3 of the Treaty of Ancón of 20 October 1883 between Chile and Peru) and which, although occupied by Chile at that time, had been defined as “Peruvian provinces” in the Treaty of 23 September 1902 between Bolivia and Peru on Demarcation of Frontiers. Since the political debates in Chile and Peru in the previous years had shown that an agreement on the transfer of the two provinces or even only of Arica to Bolivia was unrealistic, it is understandable that Bolivia and Chile sought, and the 1904 Treaty provided, what could be considered an alternative to the sovereign access to a port. This consisted in granting Bolivia the right of commercial transit, the establishment of customs agencies of Bolivia in the harbours of Arica and Antofagasta, the construction at Chile’s expense of a railway line between Arica and La Paz and the attribution of a financial compensation to Bolivia. The content of the Treaty, in particular the costly concessions made by Chile, suggests that the 1904 Treaty was meant to provide a comprehensive settlement, which included the issue of the access to a port. The comprehensive character of the settlement as concerns this latter issue was acknowledged in a pamphlet in 1905 by the Bolivian negotiator, Alberto Gutiérrez (*El Tratado de paz con Chile*, La Paz: Imprenta y Litografía Artística, 1905, pp. 21, 22, 36 and 53).

Chile’s current sovereignty over the relevant coastline is not contested by Bolivia, nor has Bolivia challenged in the present proceedings the validity of the 1904 Treaty or the fact that this Treaty is still in force (CR 2015/21, p. 12, paras. 9-10 and 12 (Chemillier-Gendreau)). Bolivia’s aim is to acquire through negotiations a sovereign access to the Pacific Ocean. Bolivia’s counsel suggested that “an agreed solution may or may not impact the Treaty” (CR 2015/21, p. 32, para. 7 (Akhavan)) and the Bolivian response to Judge Owada’s question concerning the meaning of the term “sovereign access” spoke of “[t]he hypothetical modification of the 1904 Treaty at some point in the future”. However, Chile rightly argued that the acquisition by Bolivia of a sovereign access would inevitably affect in part the 1904 Treaty. “Sovereign” access would have to be through a territory which was agreed in the 1904 Treaty as not being under Bolivian sovereignty.

2. The Court’s jurisdiction has been invoked by Bolivia on the basis of Article XXXI of the Pact of Bogotá, which gives the Court jurisdiction over a wide range of disputes. Chile does not contest the scope of Article XXXI but objects that the Court’s jurisdiction is barred by Article VI of the same Pact, which excludes “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”. According to Chile, the question of Bolivia’s sovereign access to the sea was settled by the 1904 Treaty.

What is required under the first limb of Article VI for excluding the application of the procedures provided for in the Pact is that the dispute concerns a certain matter or question that was “already settled” either by an arrangement or a judicial or arbitral decision before the date of

conclusion of the Pact of Bogotá. As Mr. Belaúnde, the delegate of Peru who proposed the text that became Article VI, explained at the Bogotá Conference, “[t]he danger is that the matter could be re-opened, or that there could be an attempt to re-open it” (Preliminary Objection of Chile, Vol. I, Ann. 12, p. 199; “El peligro está en que se reabra, en que se quiera reabrir”). The Court noted in the *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Preliminary Objections, Judgment, I.C.J. Reports 2007 (II))*, p. 858, para. 77) that “the clear purpose of this provision was to preclude the possibility of using those procedures, and in particular judicial remedies, in order to reopen such matters as were settled between the parties to the Pact”.

When Article VI in its second limb refers to “matters governed by agreements or treaties in force”, it is unlikely that the provision intends to draw a distinction according to the source, between informal arrangements and judicial or arbitral decisions, on the one hand, and formal treaties, on the other. The distinction could rather lie between matters settled once and for all and matters regulated by treaty provisions that have a continuous application, such as those in the 1904 Treaty concerning the determination of the boundary or commercial transit. A concern about the reopening of issues would seem to apply also with regard to matters governed by treaties.

Whichever interpretation is given to Article VI, it would be difficult to conclude that the matter of Bolivian access to the sea was not settled by the 1904 Treaty.

3. A matter that was settled may subsequently become unsettled. Should the matter concerned by the dispute be regarded as having been reopened before 30 April 1948, the date of the adoption of the Pact of Bogotá, the Court would have jurisdiction over the dispute.

The settlement of a dispute necessarily depends, directly or indirectly, on the consent of the Parties. Also the reopening of a settled matter must be understood as requiring such consent. A new dispute could arise because of the unilateral action of one State, but both States need to be involved in unsettling what had previously been settled between them. For that purpose, it is not necessary to find that an obligation to negotiate has arisen. Negotiations freely entered into by the Parties could conceivably cause a settled matter to become again unsettled.

The hypothesis that the issue of Bolivia’s sovereign access to the sea was reopened before 30 April 1948 mainly appears to rest (1) on a memorandum dated 9 September 1919 which stated that “[i]ndependently of the stipulations of the 1904 Treaty of Peace, Chile accepts to engage into new negotiations to fulfil the longing of the friendly country, subordinated to the victory of Chile in the plebiscite”; (2) on a declaration made by Chile on 10 January 1920 that “Chile is willing to make all efforts for Bolivia to acquire an access to the sea of its own, by ceding a significant part of the area to the north of Arica . . .” (“Chile está dispuesto a procurar que Bolivia adquiera una salida propia al mar, cediéndole una parte importante de esa zona al norte de Arica”); and (3) on the memorandum by the Chilean Government of 4 December 1926 in reply to the proposal to hand over Tacna and Arica to Bolivia, made by the United States Secretary of State Kellogg. The latter memorandum says that “the Chilean Government agrees to consider, in principle, the proposal” (“el Gobierno de Chile accede a considerar en principio la proposición”).

4. Given that, according to the above analysis, it would be necessary to ascertain whether matters were unsettled subsequent to the 1904 Treaty, Chile’s preliminary objection would raise questions which relate to the negotiations between the Parties. One would have to consider whether, and to what extent, the Court may examine these questions at the stage of a decision on the preliminary objection.

According to Article 79, paragraph 9, of the Rules, the Court “shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character”. In the *Territorial and Maritime Dispute (Nicaragua v. Colombia) (I.C.J. Reports 2007 (II))*, p. 852, para. 51), where an objection had also been lodged on the basis of Article VI of the Pact of Bogotá, the Court said that:

“a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits”.

When Article VI of the Pact of Bogotá is invoked, the issue of whether a matter was settled will often affect both the jurisdiction and the merits. However, the Court did not refrain in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* from considering that its judgment on preliminary objections could “touch upon certain aspects of the merits of the case” (*I.C.J. Reports 2007 (II)*, p. 852, para. 51). The Court found in its judgment on preliminary objections that certain questions, concerning the sovereignty over three named islands, were to be regarded as settled by a bilateral treaty between the Parties (*ibid.*, pp. 860-861, paras. 86 to 90). The Court’s jurisdiction was upheld with regard to other questions relating to territorial sovereignty. These matters were considered as not “settled” by the bilateral treaty and were therefore considered as falling within the Court’s jurisdiction (*ibid.*, p. 863, para. 97, and p. 865, para. 104).

In the present case the Court could have considered in its Judgment on the preliminary objection whether certain matters had been settled by the 1904 Treaty. However, the Court could not have come to a decision on jurisdiction without also examining whether a matter settled by that Treaty had been subsequently unsettled. For this purpose, the Court would have had to consider some questions relating to negotiations which are also part of the merits of the case. 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 the objection does not have an exclusively preliminary character.

(Signed) Giorgio GAJA.
