SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

Table of Contents

I. *PROLEGOMENA*

1. I have voted in favour of the adoption today, 24 September 2015, of the present Judgment on Preliminary Objection in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean*, between Bolivia and Chile, whereby the International Court of Justice (ICJ) has found that it has jurisdiction to consider the claim lodged with it under Article XXXI of the 1948 American Treaty on Pacific Settlement (Pact of Bogotá). Yet, there are certain aspects of the question decided by the Court, to which I attribute importance for its proper understanding, which are not properly reflected in the reasoning of the present Judgment. I feel thus obliged to dwell upon them, in the present Separate Opinion.

2. In particular, I find the treatment dispensed by the ICJ in the present Judgment, to the jurisdictional regime of the Pact of Bogotá, and in particular to the basis of its own jurisdiction (Article XXXI of the Pact) (paras. 37 and 54) as well as to the relevant provision (Article 79 (9)) of the Rules of Court (paras. 52-53), far too succinct. In order to rest on a more solid ground, the Court should, in my perception, have dwelt further upon those provisions, faced as it was with the contention that the respondent State's characterization of the subject-matter of the present dispute would amount to a refutation of the applicant State's case on the merits (para. 52).

3. The ICJ should, in my perception, have devoted as much attention to Article XXXI of the Pact and Article 79 (9) of the Rules of Court as it did as to Article VI of the Pact (paras. 24 and 38-50). In the present Separate Opinion, I deem it fit to stress the importance of the aforementioned provisions, in relation to the factual context of the *cas d'espèce* and the handling of the question lodged with the Court. To that effect I shall develop my considerations that follow. I shall begin by addressing the reasoning, in search of justice, as to preliminary objections and the merits.

4. I shall next consider the relation between the jurisdictional basis and the merits in the case-law of the Hague Court (PCIJ and ICJ), focusing, earlier on, on the joinder of preliminary objections to the merits, and then on the not exclusively "preliminary" character of objections to jurisdiction (and admissibility). I shall then dwell upon the relevance of general principles of international procedural law, as related to the foundations of the international legal order, and on their incidence, in contentious cases, on distinct incidental proceedings (preliminary objections, provisional measures, counter-claims and intervention), on the joinder of proceedings, as well as on advisory proceedings.

5. After an assessment of the matter, I shall proceed to consider the general principles of international law, Latin American doctrine and the significance of the 1948 Pact of Bogotá. Last but not least, the way will then be paved for the presentation of my concluding observations on the third way (*troisième voie/tercera vía*) devised by Article 79 (9) of the Rules of Court, namely, that of the determination of an objection not of an exclusively preliminary character, leading to the opening of further proceedings and moving into the merits of the case.

II. Preliminary Objections and Merits: Reasoning in Search of Justice

6. In effect, may I begin by pointing out that a clear cut separation between the procedural stages of preliminary objections and merits reflects the old voluntarist-positivist conception of international justice subjected to State consent. Yet, despite the prevalence of the positivist approach in the era of the Permanent Court of International Justice (PCIJ), soon the old Hague Court reckoned the need to join a preliminary objection to the merits (cf. *infra*). A preliminary objection to jurisdiction *ratione materiae* is more likely to appear related to the merits of a case than an objection to jurisdiction *ratione personae* or *ratione temporis*[1]. I shall seek to clarify this in my considerations that follow.

7. In effect, to start with, the search for justice transcends any straight-jacket conception of international legal procedure. In my Dissenting Opinion in the ICJ's Judgment on Preliminary

[1] Cf., to this effect, F. Ammoun, "La jonction des exceptions préliminaires au fond en Droit international public", *in Il processo internazionale — Studi in onore di G. Morelli*, 14 *Comunicazioni e Studi* (1975) pp. 34 and 38, and cf. p. 21.

Objections of 01.04.2011 in the case concerning the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation), I laid down in depth my criticisms of the voluntarist approach to the Court's jurisdiction. As I do not purport to retake here the consideration of this particular issue, I limit myself to refer to the pertinent passages of my aforementioned Dissenting Opinion (paras. 37-63, 79-87, 140, 167 and 181) in this respect.

8. Moreover, in the handling of this issue, the Hague Court (PCIJ and ICJ) has, throughout its history, been attentive to the interests of the parties and the preservation of the equilibrium between them in the course of the procedure. Hence the constant recourse by the Court to the principle of the sound administration of justice (*la bonne administration de la justice*); the acknowledgment of this principle, in the course of incidental proceedings of the ICJ, has further had repercussion in contemporary expert writing[2].

9. There are successive examples in the case-law of the Hague Court disclosing its reliance on the principle of the sound administration of justice (*la bonne administration de la justice*). Early in its life, the PCIJ, in the *Panevezys-Saldutiskis Railway* (Order of 30.06.1938), in deciding to join Lithuania's preliminary objections to the merits, expressly stated that

> "the Court may order the joinder of preliminary objections to the merits, whenever the interests of the good administration of justice require it" (p. 56).

10. This *célèbre obiter dictum* was kept in mind, along the years, by the ICJ as well (cf. *infra*). In the course of its prolonged handling of the *Barcelona Traction* case, it was repeatedly pointed out, in expert writing in the mid-sixties, that, even if the joinder to the merits appeared as an exceptional measure, there were situations in which the clear-cut separation of a preliminary objection from the merits could raise much difficulty, the solution thus being the joinder. Given the straight connection between the preliminary objection and the merits, the joinder would correspond to a necessity, in the interests of the sound administration of justice (*la bonne administration de la justice*)[3].

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

---

[2] Cf., *inter alia*, e.g., Hironobu Sakai, "*La bonne administration de la justice* in the Incidental Proceedings of the International Court of Justice", 55 *Japanese Yearbook of International Law* (2012) pp. 110-133; R. Kolb, "La maxime de la 'bonne administration de la justice' dans la jurisprudence internationale", *in*: *La bonne administration de la justice internationale*, 27 *L'Observateur des Nations Unies* (2009)-II, pp. 5-21.

[3] Cf. M. Mabrouk, *Les exceptions de procédure devant les juridictions internationales*, Paris, LGDJ, 1966, pp. 286-289; G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour Internationale*, Paris, Pédone, 1967, pp. 194-198; E. Grisel, *Les exceptions d'incompétence et d'irrecevabilité dans la procédure de la Cour Internationale de Justice*, Berne, Éd. H. Lang & Cie., 1968, pp. 175-180 and 182.

III. JURISDICTIONAL BASIS AND THE MERITS: CASE-LAW OF THE PCIJ AND ICJ

1. Joinder of Preliminary Objections to the Merits

12. Early in its history, the old PCIJ decided to join preliminary objections to the merits of the cases. It did so, for the first time, in the *Administration of the Prince von Pless* case (Order of 04.02.1933), wherein it stated that the question before it concerned the merits of the case, and thus it could not pass upon "the question of jurisdiction until the case ha[d] been argued upon the merits" (p. 15); it decided to join Poland's preliminary objection to the merits (p. 16).

13. In the same decade, the PCIJ, in the cases *Pajzs, Csáky and Esterházy* (Order of 23.05.1936), having found the questions raised in Yugoslavia's objections "too intimately" and "too closely interconnected" with Hungary's submissions on the merits, ordered likewise the joinder of those objections to the merits (p. 9). Likewise, shortly afterwards, in the *Losinger* (Order of 27.06.1936), the PCIJ again ordered the joinder, having found that the plea to the jurisdiction appeared as a "defence on the merits" (pp. 23-24). And the PCIJ, once more, ordered the joinder of preliminary objections to the merits in the aforementioned *Panevezys-Saldutiskis Railway* case (Order of 30.06.1938, pp. 55-56).

14. For its part, the ICJ, in the handling of subsequent cases, was soon also faced with circumstances which led it to determine the joinder of a preliminary objection of the merits. Thus, in the case of *Certain Norwegian Loans* (28.09.1956), the ICJ decided, on the basis of an understanding between the parties, to join the preliminary objections to the merits (p. 74). Shortly afterwards, in the case of the *Right of Passage over Indian Territory* (Judgment on Preliminary Objections, of 26.11.1957), the ICJ pointed out that any evaluation of India's fifth and sixth preliminary objections would risk prejudging the merits; accordingly, it decided to join those objections to the merits (pp. 150 and 152).

15. Later on, in the case of *Barcelona Traction* (Judgment on Preliminary Objections, of 24.07.1964), the Hague Court, recalling its case-law (PCIJ and ICJ) on the matter (pp. 41-42), decided likewise to join Spain's third and fourth preliminary objections to the merits (p. 46). In the aftermath of its prolonged and cumbersome handling of the *Barcelona Traction* case (1964-1970), the ICJ deemed it fit to introduce, in 1972, a change in the wording of the provision at issue of the Rules of Court. The PCIJ Rules of Court (dating back to 1936) referred to the Court's deciding on the preliminary objection or joining it to the merits[4]. That provision survived in the ICJ Rules of Court of 1946, and until the amendments introduced into the Rules in 1972 (cf. *infra*). The provision then adopted in 1972 has been passed on to the Rules of Court of 1978 and 2000 (*infra*), and remains the same to date.

[4] Paragraph 5 of Article 62 of the Rules of Court (of 1936) provided that: — "After hearing the Parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings".

2. Not Exclusively "Preliminary" Character of Objections to Jurisdiction (and Admissibility)

16. The change in the Rules of Court adopted in 1972[5], and subsequently maintained in the Rules of 1978[6], and of 2000[7], was object of attention in the Court's Judgments on Jurisdiction and Admissibility (of 26.11.1984) and on the Merits (of 27.06.1986) in the *Nicaragua versus United States* case. In the 1984 Judgment the ICJ, having found that the issue before it concerned "matters of substance relating to the merits of the case", then acknowledged that "the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court" (para. 76).

17. Then, in its 1986 Judgment on the same case (merits), the ICJ explained the reason of the change introduced in the relevant provision of the Rules of Court, in the following terms:

> "The present case is the first in which the Court has had occasion to exercise the power first provided for in the 1972 Rules of Court to declare that a preliminary objection 'does not possess, in the circumstances of the case, an exclusively preliminary character'. It may therefore be appropriate to take this opportunity to comment briefly on the rationale of this provision of the Rules, in the light of the problems to which the handling of preliminary objections has given rise. In exercising its rule-making power under Article 30 of the Statute, and generally in approaching the complex issues which may be raised by the determination of appropriate procedures for the settlement of disputes, the Court has kept in view an approach defined by the [PCIJ]. That Court found that it was at liberty to adopt
>
> > 'the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law' (*Mavrommatis Palestine Concessions* [case], P.C.I.J., [Judgment of 30.08.1924,] p. 16).
>
> Under the Rules of Court dating back to 1936 (which on this point reflected still earlier practice), the Court had the power to join an objection to the merits 'whenever the interests of the good administration of justice require it' (*Panevezys-Saldutiskis Railway* [case, Order of 30.06.1938, p. 56]), and in particular where the Court, if it were to decide on the objection, 'would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution' (*ibid.*). If this power was exercised, there was always a risk, namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties fully to plead the merits, — and this did in fact occur ([in the] *Barcelona Traction* [case, Judgment of 1970, p. 3]). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure.

---

[5]Paragraph 7 of Article 69 of the Rules of Court (of 1972) provided that: — "After hearing the parties, the Court shall give its decision in the form of a judgment, but which it 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. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings".

[6]Paragraph 7 of Article 79 of the Rules of Court (of 1978) had exactly the same content and phraseology of Article 69 (7) of the previous Rules of Court (of 1972).

[7]Paragraph 9 of Article 79 of the current Rules of Court (of 2000) has likewise the same content and phraseology of Article 79 (7) of the previous Rules of Court (of 1978).

Taking into account the wide range of issues which might be presented as preliminary objections, the question which the Court faced was whether to revise the Rules so as to exclude for the future the possibility of joinder to the merits, so that every objection would have to be resolved at the preliminary stage, or to seek a solution which would be more flexible. The solution of considering all preliminary objections immediately and rejecting all possibility of a joinder to the merits had many advocates and presented many advantages. (...) However, that does not solve all questions of preliminary objections, which may, as experience has shown, be to some extent bound up with the merits. The final solution adopted in 1972, and maintained in the 1978 Rules, concerning preliminary objections is the following: the Court is to give its decision

> 'by which it 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. If the Court rejects the objection, or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings' (Art. 79, para. 7).

(...) The new rule (...) thus presents one clear advantage: that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage" (paras. 38-41).

18. In this respect, at the time of change in 1972 of the Rules of Court, a former Latin American Judge of the ICJ observed that, in face of the provision in Article 62 (5) of the 1946 Rules of Court as to the possible joinder of a preliminary objection to the merits, the ICJ was worried with procedural delays, with "duplication of work" and "repetition of arguments"[8]. Hence the amendments introduced the new provision of the Rules of Court, deleting the express reference to the joinder, so as "to provide greater flexibility" and to avoid procedural delays, in sum, to achieve a more orderly and expeditious and "a less onerous administration of international justice"[9].

19. From the Court's decision in the *Nicaragua versus United States* case (1984-1986, *supra*) onwards, the ICJ has pursued this new outlook to the point at issue in its case-law. The Court has thus moved on to further proceedings (on the merits) when the objections lodged before it do not show to have a "preliminary" character. Thus, in its two Judgments on Preliminary Objections (of 27.02.1998) in the *Lockerbie* cases, the Court saw it fit again to explain the changes effected (in 1972) in its Rules of Court (the new Article 79). Article 79 (9) of the current Rules of Court is clear, in that, if an objection seems to touch on the merits of the case, the Court may declare that it does not possess an "exclusively preliminary character", and move on to further proceedings (on the merits). This amounted to a new outlook of what was earlier referred to[10] as joining the preliminary objection to the merits. In the *Lockerbie* cases, the Court pondered that

---

[8]E. Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", 67 *American Journal of International Law* (1973) pp. 11 and 13.

[9]*Ibid*., pp. 21-22.

[10]Article 62 (5) of the previous Rules of Court.

"The solution adopted in 1972 was ultimately not to exclude the power to examine a preliminary objection in the merits phase, but to limit the exercise of that power, by laying down the conditions more strictly" (paras. 48 and 49, respectively, of the two Judgments of 27.02.1998).

20. This new outlook, — the ICJ proceeded, — presented the "clear advantage" of, once finding that the character of the objections at issue was "not exclusively preliminary", discouraging the "unnecessary prolongation of proceedings at the jurisdictional stage". The ICJ then found, in the *Lockerbie* cases, that the respective objections of the United States and the United Kingdom did not have "an exclusively preliminary character" within the meaning of Article 79 of the Rules, and could only be considered when the Court reached the merits of the case (paras. 50 and 51, respectively, of the two Judgments of 27.02.1998).

21. In the same line of thinking, shortly afterwards, in the case of the *Land and Maritime Boundary between Cameroon and Nigeria* (Judgment on Preliminary Objections, of 11.06.1998), the ICJ found that it could not give a decision on Nigeria's eighth preliminary objection "as a preliminary matter", and that it had "of necessity (...) to deal with the merits of Cameroon's request" (para. 116). The Court concluded and declared that the eighth preliminary objection did not have, in the circumstances of the case, "an exclusively preliminary character" (paras. 117-118).

22. One decade later, in its Judgment on Preliminary Objections (of 18.11.2008) in the case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), the ICJ, found that Serbia's second preliminary objection did not possess, in the circumstances of the case, "an exclusively preliminary character" (paras. 130 and 146). Very recently, in its Judgment of 03.02.2015, the ICJ at last delivered its Judgment on the merits of that case. We are here in a domain wherein general principles of law play an important role, whether they are substantive principles (such as those of *pacta sunt servanda*, or of *bona fides*), or procedural principles, to which I turn attention now.

IV. Relevance of General Principles of International Procedural Law

1. General Principles and the Foundations of the International Legal Order

23. In my perception, recourse to general principles of international procedural law is in effect ineluctable, in the realization of justice. General principles are always present and relevant, at substantive and procedural levels. Such principles orient the interpretation and application of legal norms. They rest on the foundations of any legal system, which is made to operate on the basis of fundamental principles. Ultimately, without principles there is truly no legal system. Fundamental principles form the *substratum* of the legal order itself[11].

24. May it here be recalled that, in another case, like the present one, opposing two other Latin American States (Argentina and Uruguay), the case concerning *Pulp Mills on the River Uruguay* (Judgment of 20.04.2010), I deemed it fit to call the Court's attention, in my Separate Opinion, to the fact that *both* contending parties, Argentina and Uruguay, had expressly invoked

[11] A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd. rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, pp. 58-61; and cf. A.A. Cançado Trindade, "Foundations of International Law: The Role and Importance of Its Basic Principles", *in XXX Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* —OEA (2003) pp. 359-415.

general principles of law in the course of the contentious proceedings (para. 46). In doing so, I added, they were both

> "being faithful to the long-standing tradition of Latin American international legal thinking, which has always been particularly attentive and devoted to general principles of law, in the contexts of both the formal 'sources' of international law[12] as well of codification of international law[13]" (para. 47).

---

[12]Andrés Bello, *Principios de Derecho Internacional* (1832), 3rd. ed., Paris, Libr. Garnier Hermanos, 1873, pp. 3 *et seq*.; C. Calvo, *Manuel de droit international public et privé*, 3rd. rev. ed., Paris, A. Rousseau Ed., 1892, ch. I, pp. 69-83; L.M. Drago, *La República Argentina y el Caso de Venezuela*, Buenos Aires, Impr. Coni Hermanos, 1903, pp. 1-18; L.M. Drago, *La Doctrina Drago — Colección de Documentos* (pres. S. Pérez Triana), London, Impr. Wertheimer, 1908, pp. 115-127 and 205; A.N. Vivot, *La Doctrina Drago*, Buenos Aires, Edit. Coni Hermanos, 1911, pp. 39-279; II Conférence de la Paix, *Actes et discours de M. Ruy Barbosa*, La Haye, W.P. Van Stockum, 1907, pp. 60-81, 116-126, 208-223 and 315-330; Ruy Barbosa, *Obras Completas*, vol. XXXIV (1907)-II: *A Segunda Conferência da Paz*, Rio de Janeiro, MEC, 1966, pp. 65, 163, 252, 327 and 393-395; Ruy Barbosa, *Conceptos Modernos del Derecho Internacional*, Buenos Aires, Impr. Coni Hermanos, 1916, pp. 28-29 and 47-49; Clovis Bevilaqua, *Direito Público Internacional* (A Synthese dos Princípios e a Contribuição do Brazil), vol. I, Rio de Janeiro, Livr. Francisco Alves, 1910, pp. 11-15, 21-26, 90-95, 179-180 and 239-240; Raul Fernandes, *Le principe de l´égalité juridique des États dans l´activité internationale de l´après-guerre*, Geneva, Impr. A. Kundig, 1921, pp. 18-22 and 33; J.-M. Yepes, "La contribution de l'Amérique Latine au développement du Droit international public et privé", 32 *Recueil des Cours de l'Académie de Droit International de La Haye* [*RCADI*] (1930) pp. 731-751; J.-M. Yepes, "Les problèmes fondamentaux du droit des gens en Amérique", 47 *RCADI* (1934) p. 8; Alejandro Álvarez, *Exposé de motifs et Déclaration des grands principes du Droit international moderne*, 2nd. ed., Paris, Éds. Internationales, 1938, pp. 8-9, 13-23 and 51; C. Saavedra Lamas, *Por la Paz de las Américas*, Buenos Aires, M. Gleizer Ed., 1937, pp. 69-70, 125-126 and 393; Alberto Ulloa, *Derecho Internacional Público*, vol. I, 2nd. ed., Lima, Impr. Torres Aguirre, 1939, pp. 4, 20-21, 29-30, 34, 60, 62 and 74; Alejandro Álvarez, *La Reconstrucción del Derecho de Gentes — El Nuevo Orden y la Renovación Social*, Santiago de Chile, Ed. Nascimento, 1944, pp. 19-25 and 86-87; Ph. Azevedo, *A Justiça Internacional*, Rio de Janeiro, MRE, 1949, pp. 24-26, and cf. pp. 9-10; J.-C. Puig, *Les principes du Droit international public américain*, Paris, Pédone, 1954, p. 39; H. Accioly, *Tratado de Direito Internacional Público*, 2nd. ed., vol. I, Rio de Janeiro, IBGE, 1956, pp. 32-40; Alejandro Alvarez, *El Nuevo Derecho Internacional en Sus Relaciones con la Vida Actual de los Pueblos*, Santiago, Edit. Jurídica de Chile, 1961, pp. 155-157, 304 and 356-357; A. Gómez Robledo, *Meditación sobre la Justicia*, México, Fondo de Cultura Económica, 1963, p. 9; R. Fernandes, *Nonagésimo Aniversário — Conferências e Trabalhos Esparsos*, vol. I, Rio de Janeiro, M.R.E., 1967, pp. 174-175; A.A. Conil Paz, *Historia de la Doctrina Drago*, Buenos Aires, Abeledo-Perrot, 1975, pp. 125-131; E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 *RCADI* (1978) pp. 87 and 111-113; L.A. Podestá Costa and J.M. Ruda, *Derecho Internacional Público*, 5th. rev. ed., vol. I, Buenos Aires, Tip. Ed. Argentina, 1979, pp. 17-18 and 119-139; E. Jiménez de Aréchaga, *El Derecho Internacional Contemporáneo*, Madrid, Ed. Tecnos, 1980, pp. 107-141; A.A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, Brasília, Edit. University of Brasília, 1981, pp. 1-102 and 244-248; Jorge Castañeda, *Obras Completas* — vol. I: *Naciones Unidas*, Mexico, S.R.E./El Colegio de México, 1995, pp. 63-65, 113-125, 459, 509-510, 515, 527-543 and 565-586; [Various Authors,] *Andrés Bello y el Derecho* (Colloquy of Santiago de Chile of July 1981), Santiago, Edit. Jurídica de Chile, 1982, pp. 41-49 and 63-76; D. Uribe Vargas, *La Paz es una Trégua — Solución Pacífica de Conflictos Internacionales*, 3rd. ed., Bogotá, Universidad Nacional de Colombia, 1999, p. 109; A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, pp. 91-140 and 863-889 and 1039-1071.

[13]Lafayette Rodrigues Pereira, *Princípios de Direito Internacional*, vols. I-II, Rio de Janeiro, J. Ribeiro dos Santos Ed., 1902-1903, pp. 1 *et seq*.; A.S. de Bustamante y Sirvén, *La II Conferencia de la Paz Reunida en La Haya en 1907*, vol. II, Madrid, Libr. Gen. de V. Suárez, 1908, pp. 133, 137-141, 145-147, 157-159, and cf. also vol. I, pp. 43, 80-81 and 96; Epitacio Pessôa, *Projecto de Código de Direito Internacional Público*, Rio de Janeiro, Imprensa Nacional, 1911, pp. 5-323; F.-J. Urrutia, "La codification du droit international en Amérique", 22 *RCADI* (1928) pp. 113, 116-117 and 162-163; G. Guerrero, *La codification du droit international*, Paris, Pédone, 1930, pp. 11, 13, 16, 152, 182 and 175; J.-M. Yepes, "La contribution de l'Amérique Latine au développement du Droit international public et privé", 32 *RCADI* (1930) pp. 714-730 and 753-756; Alejandro Álvarez, "Méthodes de la codification du droit international public — Rapport", in *Annuaire de l'Institut de Droit International* (1947) pp. 38, 46-47, 50-51, 54, 64 and 69; J.-M. Yepes, *Del Congreso de Panama a la Conferencia de Caracas (1826-1954)*, Caracas, M.R.E., 1955, pp. 143, 177-178, 193 and 203-208; R.J. Alfaro, "The Rights and Duties of States", 97 *RCADI* (1959) pp. 138-139, 145-154, 159 and 167-172; G.E. do Nascimento e Silva, "A Codificação do Direito Internacional", 55/60 *Boletim da Sociedade Brasileira de Direito Internacional* (1972-1974) pp. 83-84 and 103; R.P. Anand, "Sovereign Equality of States in International Law", 197 *RCADI* (1986) pp. 73-74; A.A. Cançado Trindade, "The Presence and Participation of Latin America at the II Hague Peace Conference of 1907", *in Actualité de la Conférence de La Haye de 1907, II Conférence de la Paix* (Colloque du centenaire, 2007 — ed. Yves Daudet), La Haye/Leiden, Académie de Droit International de La Haye / Nijhoff, 2008, pp. 51-84.

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

2. General Principles in Distinct Incidental Proceedings

26. Along the years, as one would expect, the principle of the sound administration of justice (*la bonne administration de la justice*) has been resorted to in respect of distinct kinds of incidental proceedings (Rules of Court, Articles 73-86), namely, *preliminary objections*, *provisional measures of protection*, *counter-claims* and *intervention*. The aforementioned principle has marked its presence, as already seen in the present Separate Opinion, in the handling of the incidental proceedings of preliminary objections (cf. *supra*). Recourse has likewise been made to that principle, in recent years, in the other incidental proceedings of provisional measures, counter-claims and intervention. May I briefly refer to its incidence, as I perceive it, in these other incidental proceedings.

27. In so far as *provisional measures of protection* are concerned, in my Dissenting Opinion in the case of *Questions Relating to the Obligation to Prosecute or to Extradite* (Belgium *versus* Senegal, Order of 28.05.2009), I deemed it fit to recall that, in its case-law, the ICJ has ordered provisional measures so as to contribute "to secure *la bonne administration de la justice*" (para. 28). I pondered that "in the case-law itself of the ICJ there are already elements disclosing the concern of the Court, when issuing Orders of provisional measures, *to strive towards achieving a good administration of justice*" (para. 29). I further warned that, in the consideration of the *cas d'espèce*, the Court should keep in mind that "the *right to the realization of justice* assumes a central place, and a paramount importance, and becomes thus deserving of particular attention" (para. 29).

28. As to *counter-claims*, in my Dissenting Opinion in the case of *Jurisdictional Immunities of the State* (Germany *versus* Italy, Order of 06.07.2010), I felt obliged to stress that

> "(...) Without Italy's counter claim of reparations for damages arising of war crimes, the Court will now have a much narrower horizon to pronounce on Germany's (original) claim of State immunity. The present decision of the Court made *tabula rasa* of its own previous reasonings, and of 70 years of the more enlightened legal doctrine on the matter, to the effect that counter-claims do assist in achieving the sound administration of justice (*la bonne administration de la justice*) and in securing the needed equilibrium between the procedural rights of the contending parties.
>
> In any case, as the Court's majority decided summarily to discard the counter-claim as 'inadmissible as such', — with my firm dissent, — it should at least have instructed itself properly by holding, first, public hearings to obtain further clarifications from the contending parties. It should not have taken the present decision without first having heard the contending parties in a public sitting, for five reasons, namely: a) first, as a basic requirement ensuing from the principle of international procedural law of the sound administration of justice (*la bonne administration de la justice*); b) secondly, because counter-claims are ontologically endowed with *autonomy*, and ought to be treated on the same footing as the original claims, that they intend to neutralize (*supra*); c) thirdly, claims and counter-claims, 'directly connected' as they ought to be, require a strict observance of the *principe du*

> *contradictoire* in their handling altogether; d) fourthly, only with the faithful observance of the *principe du contradictoire* can the *procedural equality* of the parties (applicant and respondent, rendered respondent and applicant by the counter-claim) be secured; and e) fifthly, last but not least, the issues raised by the original claim and the counter-claim before the Court are far too important — for the settlement of the case as well as for the present and the future of International Law, — to have been dealt with by the Court in the way it did, summarily rejecting the counter-claim" (paras. 29-30).

29. And in so far as *intervention* is concerned, again in the case in the case of *Jurisdictional Immunities of the State* (Germany *versus* Italy, intervention of Greece, Order of 04.07.2011), I developed my reflections on the importance of sound reasoning in that respect (paras. 1-61). More recently, in the *Whaling in the Antarctic* case (Australia *versus* Japan, intervention of New Zealand, Order of 06.02.2013), I pondered, in my Separate Opinion, that

> "The *resurgere* of intervention is thus most welcome, propitiating the sound administration of justice (*la bonne administration de la justice*), attentive to the needs not only of all States concerned but of the international community as a whole, in the conceptual universe of the *jus gentium* of our times" (para. 68).

30. In sum, the principle of the sound administration of justice (*la bonne administration de la justice*) permeates the considerations of all the aforementioned incidental proceedings before the Court, namely, preliminary objections, provisional measures of protection, counter-claims and intervention. As expected, general principles mark their presence, and guide, all Court proceedings. The factual contexts of the cases vary, but the incidence of those principles always takes place. Other illustrations, which abound, can be here referred to.

31. A very recent example, of less than three months ago, can be found in the Court's Order of 01.07.2015, in the case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda) wherein the Court took account of "the requirements of the sound administration of justice" (para. 7) in order to resume the proceedings in the case as to reparations (para. 8). In my Declaration appended to that Order, I have stressed the relevance of the application of the principle of the sound administration of justice (*la bonne administration de la justice*) for the proper exercise of the international judicial function (para. 6). Yet another illustration in the case-law of the ICJ is provided by the incidence — as I perceive it — of the principle of the sound administration of justice (*la bonne administration de la justice*) in the Court's handling of joinder of proceedings in two recent (joined) cases, to which I now briefly turn.

3. General Principles in the Joinder of Proceedings

32. The joinder of proceedings (regulated by Article 47 of the Rules of Court) has found application by the Court in the recent cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *versus* Costa Rica) (two Court's Orders of 17.04.2013). In both Orders of joinder, the ICJ stated that the joinders previously effected by it, and before it by its predecessor, were "consonant" with "the principle of the sound administration of justice" and also with "the need for judicial economy"[14]. Likewise, in those two cases, the Court deemed it appropriate to join

[14] Paras. 18 and 12, respectively.

their proceedings, "in conformity with the principle of the sound administration of justice and with the need for judicial economy"[15].

33. In my Separate Opinions in each of the Orders in the two cases, I devoted special attention to the incidence of the principle of the sound administration of justice in respect of joinders of proceedings[16]. I pointed out that, even if *la bonne administration de la justice* flourished initially as a maxim, it later gave expression to a principle. In my perception, the proper exercise of the international judicial function "requires the blend of logic and experience (*la sagesse et l'expérience*), deeply-rooted in legal thinking (of comparative domestic law and of international law)", so as to endeavour "to secure the sound administration of justice". And I added:

> "Positivists try in vain to subsume this latter under the *interna corporis* of the international tribunal at issue, in their well-known incapacity to explain anything that transcends the regulatory texts. (...)
>
> The sound administration of justice enables the international tribunal at issue to tackle questions of procedure even if these latter have 'escaped' the regulations of its *interna corporis*. It is, in my perception, the idea of an objective justice that, ultimately, guides the sound administration of justice (*la bonne administration de la justice*), in the line of jusnaturalist thinking. The proper pursuit of justice is in conformity with the general principles of law. With the reassuring evolution and expansion of judicial settlement in recent decades, there has been, not surprisingly, an increasing recourse to the maxim *la bonne administration de la justice*, — which gives expression to a general principle of law, captured by human conscience[17]," (paras. 13 and 15).

34. Hence the relevance of the proper handling of international procedure, for the sake of the realization of justice (para. 17). In this connection, already in the late thirties, Maurice Bourquin deemed it fit to single out the relevance of the "qualité des procédures". To him,

> "Une bonne procédure facilite la solution des difficultés. Une mauvaise procédure fait, en revanche, plus de mal que de bien. Mais ce n'est pas un mécanisme, même admirablement agencé, qui pourrait régler à lui seul une pareille matière. Ce qu'il faut ici, par-dessus tout, c'est un certain état d'esprit, (...) le calme de la raison; c'est cette chose si simple et pourtant si rare qu'on appelle le bon sens"[18].

35. Common sense is indeed the least common of all senses, it cannot simply be assumed. Hence the need to keep always in mind the principle of *la bonne administration de la justice*. It is not the only principle of the kind. The maxim *audiatur et altera pars* (or *audi alteram partem*) gave expression to the general principle of law providing for *procedural equality* between the contending parties in the course of judicial proceedings[19]. Another principle of international

---

[15]Paras. 24 and 18.

[16]Paras. 10-23 and 25-27.

[17]On human conscience — the universal juridical conscience — as the ultimate material source of international law, cf. A.A. Cançado Trindade, *International Law for Humankind..., op. cit supra* n. (11), ch. VI, pp. 139-161.

[18]M. Bourquin, "Stabilité et mouvement dans l´ordre juridique international", 64 *Recueil des Cours de l'Académie de Droit International de La Haye* (1938) p. 472.

[19]Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens, 1953, p. 291.

procedural law, that of *jura novit curia* (going back to Roman law), acknowledges the freedom and autonomy of the judge in searching for and determining the law applicable to a given dispute, without being restrained by the arguments of the parties[20].

4. General Principles in Advisory Proceedings

36. The principle of the sound administration of justice (*la bonne administration de la justice*) has been resorted to not only in the proceedings of contentious cases, but in the Court's advisory proceedings as well. May I turn briefly to these latter now. On successive occasions the Court, by resorting to *la bonne administration de la justice*, has endeavoured to secure the observance of the principle of *procedural equality* of the parties. Already in the mid-fifties, the ICJ expressed its attention to general principles of international procedural law.

37. Thus, in its Advisory Opinion (of 23.10.1956) on the *Judgments of the ILO Administrative Tribunal upon Complaints Made against UNESCO*, the ICJ, after having noted the "absence of equality" (in its advisory proceedings) ensuing from the Statute of the Court itself, pondered that "[t]he principle of equality of the parties follows from the requirements of good administration of justice" (p. 86). The Court would better have stated, more precisely, that the principle of equality of the parties *orients* or *guides* the requirements of good administration of justice. In my understanding, principles (*prima principia*) stand higher than rules or requirements, and orient them.

38. Two and a half decades later, the ICJ again stressed the relevance of "the principle of equality of the parties" in its Advisory Opinion of 20.07.1982, concerning an *Application for Review of a Judgment of the U.N. Administrative Tribunal* (paras. 29-32 and 79). In its most recent Advisory Opinion (of 01.02.2012), on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against IFAD*, the ICJ insisted on "the right to equality in the proceedings" (para. 30), on "the principle of equality before the Court" as "a central aspect of the good administration of justice" (paras. 35 and 44), and on "the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice" (para. 47)[21]. In my Separate Opinion (paras. 28-51 and 82-118) appended to this recent Advisory Opinion of the ICJ of 2012, I have dwelt in depth (paras. 20-56 and 82-118) upon the imperative of securing the equality of parties in the international legal process.

5. General Assessment

39. As seen in the preceding paragraphs, fundamental principles, forming the *substratum* of the legal order itself, are always present, at substantive and procedural levels. They orient the interpretation and application of legal norms, and recourse to them is ineluctable in the realization of justice. I have reviewed their incidence in distinct incidental proceedings of contentious cases (of preliminary objections, provisional measures, counter-claims and intervention), in addition to the joinder of proceedings, as well as in advisory proceedings (cf. *supra*).

---

[20]Cf. my Separate Opinions in the two Orders of joinder of the ICJ in the aforementioned cases of *Certain Activities* and *Construction of a Road*, para. 19.

[21]It further insisted on "equality of access" to justice (paras. 37, 39, 43 and 48), on "the concept of equality before courts and tribunals" (paras. 38 and 40), and on the guarantee of "equal access and equality of arms" (para. 39).

40. The ICJ, explaining the reasons to decide the way it did, for example, in its two aforementioned Orders (of 17.04.2013) of joinder of the proceedings in the cases concerning *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *versus* Costa Rica), pondered that its decision to join the proceedings would allow it "to address simultaneously the totality of the various interrelated and contested issues raised by the Parties" (para. 23). In my Separate Opinions appended to those two Orders, I deemed it fit to state:

> "In my perception, the presence of the idea of justice, guiding the sound administration of justice, is ineluctable. Not seldom the text of the Court's *interna corporis* does not suffice; in order to impart justice, in circumstances of this kind, an international tribunal such as the ICJ is guided by the *prima principia*. To attempt to offer a definition of the sound administration of justice that would encompass all possible situations that could arise would be far too pretentious, and fruitless. An endless diversity of situations may be faced by the ICJ, leading it — in its pursuit of the realization of justice — to deem it fit to have recourse to the principle of the sound administration of justice (*la bonne administration de la justice*); this general principle, in sum, finds application in the most diverse circumstances. (...)
>
> (...) The idea of justice guides the sound administration of justice (*la bonne administration de la justice*), as manifested, e.g., in decisions aiming at securing the *procedural equality* of the contending parties.
>
> General principles of law have always marked presence in the pursuit of the realization of justice. In my understanding, they comprise not only those principles acknowledged in national legal systems, but likewise the general principles of international law. They have been repeatedly reaffirmed, time and time again, and, — even if regrettably neglected by segments of contemporary legal doctrine, — they retain their full validity in our days. An international tribunal like the ICJ has consistently had recourse to them in its *jurisprudence constante*. Despite the characteristic attitude of legal positivism to attempt, in vain, to minimize their role, the truth remains that, without principles, there is no legal system at all, at either national or international level.
>
> General principles of law inform and conform the norms and rules of legal systems. In my understanding, sedimented along the years, general principles of law form the *substratum* of the national and international legal orders, they are indispensable (forming the *jus necessarium*, going well beyond the mere *jus voluntarium*), and they give expression to the idea of an *objective* justice (proper of jusnaturalist thinking), of universal scope. Last but not least, it is the general principles of law that inspire the interpretation and application of legal norms, and also the law making process itself[22]"(paras. 20 and 25-27).

V. General Principles of International Law, Latin American International Legal Doctrine, and the Significance of the Pact of Bogotá

41. In this connection, may I now turn to the Pact of Bogotá, Article XXXI of which provides the jurisdictional basis for the Court's present Judgment in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean*. May I briefly recall how the Pact of Bogotá

[22] A.A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium, op. cit. supra* n. (11), ch. III, pp. 85-121, esp. pp. 90-92.

was envisaged in the epoch it came to see the light of the day. As soon as the Pact of Bogotá was adopted in 1948, it was reckoned that, among the solutions in the domain of peaceful settlement of international disputes, stress needed to be laid by the Pact in particular upon the importance of judicial settlement. Article XXXI of the Pact, in providing for the compulsory jurisdiction of the ICJ for the settlement of "all disputes of a juridical nature", was regarded as being in line with Latin American doctrine as to the primacy of law and justice over recourse to force[23]. Already in 1948, it was pointed out that

> "La finalidad evidente de todo el sistema creado en [el Pacto de] Bogotá es la de asegurar que ningún conflicto ni ninguna controversia susceptible de poner en peligro la paz de América, quede sin solución pacífica. Para ésto, el Pacto generalizó, en un compromiso colectivo, la jurisdicción obligatoria de la Corte Internacional de Justicia"[24].

42. This brings us closer to the object and purpose of the Pact itself, taken as a whole. In effect, the 1948 Pact of Bogotá was promptly regarded as a work of codification of peaceful settlement in international law, moving beyond the arbitral solution (deeply-rooted in Latin American experience) into judicial settlement itself, without the need of a special agreement to that effect[25]. Without imposing any specific means of peaceful settlement, the Pact of Bogotá took a step forward in rendering obligatory peaceful settlement itself, and enhanced recourse to the ICJ[26].

43. The adoption of the Pact of Bogotá, with this advance in dispute-settlement, was the culminating point of the evolution, starting in the XIXth century, of the commitment of Latin American countries with peaceful settlement of international disputes, moving towards compulsory jurisdiction of the Hague Court. This feature of Latin American international legal thinking arose out of the concertation of the countries of the region in two series of Conferences, namely: a) the Latin American Conferences (1826-1889)[27]; and b) the Pan American Conferences (1889-1948)[28], leading to the adoption, in 1948, of the OAS Charter and the Pact of Bogotá. The

---

[23]Cf. R. Cordova, "El Tratado Americano de Soluciones Pacíficas — Pacto de Bogotá", 1 *Anuario Jurídico Interamericano* — Pan American Union (1948) pp. 11-15 and 17.

[24]*Ibid*., p. 11 — "The clear aim of the whole system created in [the Pact of] Bogotá is that of securing that no conflict nor any controversy susceptible of putting in risk the peace of America, is to remain without peaceful settlement. To that end, the Pact generalized, in a collective engagement, the compulsory jurisdiction of the International Court of Justice". [My own translation].

[25]J.M. Yepes, "El Tratado Americano de Soluciones Pacíficas (Pacto de Bogotá)", 9 *Universitas* — Pontificia Universidad Católica Javeniana (1955) pp. 23-25 and 40.

[26]*Ibid*., pp. 34 and 36.

[27]Starting with the Conference (*Congreso Anfictiónico*) of Panama of 1826, followed by the Conferences (with small groups of States) of Lima (1847-1848), Santiago de Chile (1856), Lima (1864-1865 and 1877-1880) and Montevideo (1888-1889).

[28]Starting with the Conference of Washington (1889), followed by the International Conferences of American States of Mexico (1901-1902), Rio de Janeiro (1906), Buenos Aires (1910), Santiago de Chile (1923), Havana (1928), Montevideo (1933), Lima (1938), and Bogotá (1948, wherein the OAS Charter and the Pact of Bogotá were adopted, initiating the era of the OAS).

gradual outcome of this concertation echoed at the II Hague Peace Conference (1907), and in the drafting process of the Statute of the PCIJ (1920) and the ICJ (1945)[29].

44. The adoption of the Pact of Bogotá in 1948 was the culmination of the sustained and enduring posture of Latin American States in support of peaceful settlement of disputes, and of the compulsory jurisdiction of the Hague Court over disputes of a "juridical nature". In effect, three years after the adoption of the U.N. Charter in 1945, Latin American States did in Bogotá in 1948 what they had announced in San Francisco as a goal: the recourse, under Article XXXI of the Pact of Bogotá, to the compulsory jurisdiction of the ICJ, for the settlement of disputes of a "juridical nature", irrespective of the position that States Parties to the Pact might have taken under the optional clause (Article 36 (2)) of the ICJ Statute. That was a significant step ahead.

45. As it was adopted, the Pact of Bogotá was promptly regarded by its contemporaries as a landmark in the development of this chapter of international law:

> "Hasta la reunión de la IX Conferencia [Internacional Americana (Bogotá, 1948)] no existía en América lo que podríamos llamar el estatuto de la *pax americana*. Había habido sólo una multitud de convenciones que reglamentaban fragmentariamente los distintos medios de solución pacífica. (...) De ahí la necesidad (...) de elaborar un instrumento único que (...) coordinase el conjunto para que constituyesen un cuerpo armónico, tanto en la parte substantiva como en la procedimental. Puede decirse que el Pacto de Bogotá ha alcanzado ese objetivo. Un sólo tratado, bien estructurado, como éste, que prevea todos los casos posibles de conflictos entre los Estados americanos y que estipule de una manera ineludible la solución pacífica obligatoria de todas las controversias, implica sin duda un progreso real del Derecho internacional americano. (...)
>
> (...) Nos referimos especialmente (...) a la disposición que confiere, *ipso facto* y sin necesidad de ningún convenio especial, jurisdicción obligatoria a la Corte Internacional de Justicia para todas las diferencias de carácter jurídico entre los Estados signatarios"[30].

---

[29] For an account and examination of those historical antecedents, cf. F.V. García-Amador (coord.), *Sistema Interamericano a través de Tratados, Convenciones y Otros Documentos*, vol. I: Asuntos Jurídico-Políticos, Washington D.C., OAS General Secretariat, 1981, pp. 1-67; A.A. Cançado Trindade, "The Presence and Participation of Latin America at the II Hague Peace Conference of 1907", *in Actualité de la Conférence de La Haye de 1907, II Conférence de la Paix (Colloque de 2007) (*ed. Y. Daudet), The Hague/Leiden, The Hague Academy of International Law/Nijhoff, 2008, pp. 51-84; H. Gros Espiell, "La doctrine du Droit international en Amérique Latine avant la Première Conférence Panaméricaine (Washington, 1889)", 3 *Journal of the History of International Law/Revue d´histoire du droit international* (2001) pp. 1-17.

[30] *Ibid*., pp. 24-25 — "Until the meeting of the IX [International American] Conference [(Bogotá, 1948)] there did not exist in America what we could call the statute of the *pax americana*. There was only a multitude of conventions which regulated in a fragmented way the distinct means of peaceful settlement (...) Hence the necessity (...) to elaborate one sole instrument which (...) would coordinate the whole matter so as to render it a harmonious *corpus*, as substantive as well as procedural level. One may say that the Pact of Bogotá has achieved that aim. One sole treaty, well structured, like this one, which foresees all possible cases of conflicts among the American States and which stipulates in an ineluctable way the compulsory peaceful settlement of all controversies, implies undoubtedly a real progress of the American International Law. (...)

> (...) We refer especially (...) to the provision which confers, *ipso facto* and without the need of any special agreement, compulsory jurisdiction to the International Court of Justice for all disputes of a juridical nature among the signatory States" [My own translation].

46. There was, in the Pact of Bogotá, a combination of the obligation to submit disputes of a juridical nature (i.e., those based on claims of legal rights) to judicial or arbitral settlement, — with the free choice of means of peaceful settlement as to other types of controversies; in this way, the 1948 Pact innovated in providing for peaceful settlement of all disputes[31]. In adopting the 1948 Pact of Bogotá, Latin American States made a point of expressing their "spirit of confidence", added to their "feeling of common interest", in judicial settlement (more perfected than arbitral settlement), in particular the compulsory jurisdiction of the ICJ[32]. Hence the relevance of Article XXXI of the Pact, also in relation to Article VI.

47. Moreover, the 1948 Charter of the Organization of American States (OAS) relied upon the adoption of a "special treaty" for the peaceful settlement of international disputes among States of the region, and the Pact of Bogotá was intended to be that "special treaty". Yet, despite the achievement, in historical perspective[33], of the adoption of the 1948 American Treaty on Pacific Settlement (Pact of Bogotá), and the fact that it had been elaborated in a conceptual framework which best reflected Latin American international law doctrine, — as time went on, not so many States became Parties to it. For those which did not ratify it, earlier treaties continue to operate, providing a diversity of bases for the peaceful settlement of international disputes, which the Pact of Bogotá sought to overcome and systematize.

48. This may explain why, already in the mid-fifties, the possibility of its future revision was already admitted[34]. The 1948 Pact of Bogotá, as just seen, has already a long history, during which the question of its reform was more than once envisaged. From the early seventies onwards, the idea of its reassessment or revision was in effect contemplated, though without effects. Thus, in an Opinion of 16.09.1971, the OAS Inter-American Juridical Committee, having examined the matter, was of the view that its key provisions (such as Articles XXXI and VI) could not be modified or suppressed[35]. The Committee concluded that the Pact of Bogotá rightly regulates all procedures (including compulsory judicial or arbitral ones) of peaceful settlement, and should not be opened to modifications[36]; it finally urged OAS member States to ratify the Pact of Bogotá[37].

49. In the mid-eighties the idea of its revision was again brought to the fore, — in the 1984 OAS General Assembly, held in Brasília, — in the wider context of the OAS reforms as a whole (1985 Protocol of Cartagena de Indias); concern was expressed in the Committee with the relatively small number of ratifications (13 at that time) and the fact that it had been rarely resorted

---

[31]W. Sanders, "The Organization of American States — Summary of the Conclusions of the Ninth International Conference of American States (Bogotá, Colombia, March 30-May 2, 1948)", 442 *International Conciliation* (June 1948) p. 400.

[32]Ch.G. Fenwick, "The Pact of Bogotá and Other Juridical Decisions of the Ninth Conference", 82 *Bulletin of the Pan American Union* (August 1948) n. 8, pp. 424-425.

[33]Cf., for a general study, J.M. Yepes, *Del Congreso de Panamá a la Conferencia de Caracas (1826-1954)*, Caracas, [Ed. Concurso M.R.E. de Venezuela], 1955, pp. 29-208.

[34]Cf. Ch.G. Fenwick, "The Revision of the Pact of Bogotá", 48 *American Journal of International Law* (1954) pp. 123-126. It was pointed out, *inter alia*, that, e.g., Bolivia and Ecuador had both made reservations to Article VI of the Pact (excluding its application to matters already settled by treaty), bearing in mind "treaties which they believe were entered into under compulsion"; *ibid*., p. 124.

[35]Cf. Comité Jurídico Interamericano, "Dictamen", *in*: 10 *Recomendaciones e Informes* (1967-1973) pp. 402-403.

[36]*Ibid*., pp. 402-403.

[37]*Ibid*., p. 406 — Subsequently, in the mid-seventies, the OAS Permanent Council took note that no recommendations had been presented of reforms of the Pact of Bogotá; cf. OEA/Consejo Permanente, doc. OEA/Ser.G-CP/CG-628/75, of 21.11.1975, p. XI.

to in practice until then[38]. The OAS Inter-American Juridical Committee issued a new Opinion on 29.08.1985, and, once again, the idea of reforming the Pact of Bogotá did not prosper. The Committee pondered, in its Opinion of 1985, that the Pact, — the special treaty foreseen under Article 26 of the OAS Charter, — amounted to a codification of the existing treaties on peaceful settlement of disputes in the inter-American system[39].

50. The Committee decided, in the same Opinion, that Article XXXI of the Pact was to remain unaltered, as it constituted one of its key features, in setting forth the recourse to the ICJ, by means of the recognition of its jurisdiction as "compulsory *ipso facto*, without the necessity of any special agreement", so long as the treaty remains in force for the settlement of "disputes of a juridical nature" specified in the Pact itself[40]. The Committee thus dismissed any amendments that purported to put an end to the automatism of recourse to the compulsory jurisdiction of the ICJ under the Pact of Bogotá (Article XXXI)[41]. The Committee's Opinion of 1985 was followed by a project presented by Colombia to the OAS in 1986-1987[42], which sought an adjustment of the Pact with the provisions of the OAS Charter as amended by the Protocol of Cartagena de Indias[43].

51. In this respect, in 1987, the OAS Committee on Juridical and Political Affairs (subsidiary organ of the OAS Permanent Council) found the existence of differences of opinion within the OAS as to an eventual revision of the Pact of Bogotá. In the lack of any consensus to amend the Pact, this latter, accordingly, subsisted as it stood, and as it stands today. The OAS General Secretariat, for its part, likewise studied the matter in 1985-1987[44], and concluded that the Pact of Bogotá is the "special treaty" adopted in compliance with Article 26 of the OAS Charter, and could only be changed if all States Parties to it so decided[45], — which was not the case. The Pact remained unchanged.

52. Throughout these exercises, from 1971 to the late eighties, although an argument was made in favour of a reform of the Pact of Bogotá[46], this latter remained unchanged, and the main trend of expert writing leaned in support of the preservation of its provisions, stressing, in particular, the historical relevance of Article XXXI of the Pact, for ascribing the utmost importance to judicial settlement of "disputes of a juridical nature", by means of automatic acceptance of the

---

[38]Cf. Comité Jurídico Interamericano, 16 *Informes y Recomendaciones* (1984) p. 59; Comité Jurídico Interamericano, 17 *Informes y Recomendaciones* (1985) pp. 62-63.

[39]Listed in Article LVIII of the Pact itself; cf. "Dictamen", *in*: Comité Jurídico Interamericano, 17 *Informes y Recomendaciones* (1985), pp. 65 and 95.

[40]*In ibid*., pp. 66, 74-75 and 81.

[41]Cf. *ibid*., p. 75.

[42]Cf. OAS, doc. AG/doc.2030/86, pp. 1-19; OAS/Permanent Council, doc. OEA/Ser.G-CP/CAJP-662/87, of 03.05.1987, pp. 1-5; OAS/Permanent Council, doc. OEA/Ser.G-CP/CAJP-666/87, of 11.05.1987, pp. 1-6.

[43]Cf. doc. OEA/Ser.G-CP/CAJP-666/87, *cit. supra* n. (42), of 11.05.1987, p. 3.

[44]Cf. OEA/Consejo Permanente, doc. OEA/Ser.G-CP/doc.1560/85-part II, of 09.04.1985, pp. 13-23.

[45]Cf. OEA/Consejo Permanente, doc. OEA/Ser.G-CP/CAJP-676/87, of 02.06.1987, pp. 13-15, and cf. pp. 1-12.

[46]Cf. G. Leoro F., "La Reforma del Tratado Americano de Soluciones Pacíficas o Pacto de Bogotá, *in*: OEA, *Anuario Jurídico Interamericano* (1981) pp. 43 and 77-79.

compulsory jurisdiction of the ICJ, thus overriding obligations ensuing from optional clause declarations[47].

53. This was a significant contribution of Latin American international legal thinking to the matter, enhancing compulsory judicial settlement. Article XXXI of the Pact of Bogotá had the legal effect of transforming the "loose relationship" ensuing from optional clause declarations under Article 36 (2) of the ICJ Statute into a "treaty relationship", endowed with

> "the binding force and the stability which is characteristic of a conventional link, and not of the regime of the optional clause. In this way, the Latin American States which have accepted the Pact of Bogotá have established, in their mutual relations, and in view of the close historical and cultural ties between them, the compulsory jurisdiction of the Court on much stronger terms than those resulting from the network of declarations made under Article 36 (2) of the Statute"[48].

VI. THE PACT OF BOGOTÁ AND JUDICIAL SETTLEMENT BY THE ICJ

54. The Pact of Bogotá served as basis of the ICJ's jurisdiction in the case of the 1906 Arbitral Award by the King of Spain (Honduras *versus* Nicaragua, 1960), — but ever since, until the mid-eighties, the Pact laid dormant, in so far as the ICJ jurisdiction is concerned. Furthermore, the Pact of Bogotá, despite its few ratifications (only [fourteen])[49], was to be considered in the context of regional arrangements for conflict resolution in Latin America, given the importance ascribed by Latin American States to the general principle of peaceful settlement of international disputes[50].

55. After the aforementioned dismissed initiatives as to its eventual amendment (*supra*), there occurred, from the late eighties onwards, a gradual revival of the Pact of Bogotá, as basis of the ICJ's jurisdiction, in disputes — like the one in the present case — opposing Latin American States. Reference can be made to the Court's Judgments in the cases, e.g., of *Border and Transborder Armed Actions* (Nicaragua *versus* Honduras, 1988), *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (2007), *Dispute regarding Navigational and Related Rights* (Costa Rica *versus* Nicaragua, 2009), *Pulp Mills on the River Uruguay* (Argentina *versus* Uruguay, 2010), *Territorial and Maritime Dispute* (Nicaragua *versus* Colombia, 2013), *Maritime Dispute* (Peru *versus* Chile, 2014). To these, one may add five other cases,

---

[47]Cf. A. Herrarte, "Solución Pacífica de las Controversias en el Sistema Interamericano", *in*: OEA, *VI Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (1979) pp. 220 and 225; E. Valencia-Ospina, "The Role of the International Court of Justice in the Pact of Bogotá", *in Liber Amicorum In Memoriam of Judge J.M. Ruda* (eds. C.A. Armas Barea, J. Barberis *et alii*), The Hague, Kluwer, 2000, pp. 296-297, 301 and 305-306; A. Bazán Jiménez, "Tratado Americano de Soluciones Pacíficas — Pacto de Bogotá", 57 *Revista Peruana de Derecho Internacional* (2007) pp. 21, 36 and 47-48.

[48]E. Jiménez de Aréchaga, "The Compulsory Jurisdiction of the International Court of Justice under the Pact of Bogotá and the Optional Clause", *in International Law at a Time of Perplexity — Essays in Honour of S. Rosenne* (eds. Y. Dinstein and M. Tabory), Dordrecht, Nijhoff, 1989, pp. 356-357.

[49]Currently (September 2015): Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay. (Denunciations: Colombia, El Salvador).

[50]Cf. A.A. Cançado Trindade, "Regional Arrangements and Conflict Resolution in Latin America", *in Conflict Resolution: New Approaches and Methods*, Paris, UNESCO, 2000, pp. 141-162; A.A. Cançado Trindade, "Mécanismes de règlement pacifique des différends en Amérique Centrale: de Contadora à Esquipulas-II", 33 *Annuaire français de Droit international* (1987) pp. 798-822.

currently pending before the Court[51]. Yet, despite this recent revival of the Pact of Bogotá, I suppose no one would dare to predict, or to hazard a guess, as to further developments in its application in the future. After all, despite advances made, experience shows, within a larger context, that the *parcours* towards compulsory jurisdiction is a particularly long one, there still remains a long path to follow[52]...

56. It should not pass unnoticed that, significantly, the legacy of Latin American doctrine (*supra*) as to the enhancement of judicial settlement of international disputes was well captured and sustained by the ICJ, e.g., in its Judgment of 20.12.1988 in the case concerning *Border and Transborder Armed Actions* (Nicaragua *versus* Honduras). The ICJ held therein that Article XXXI of the Pact of Bogotá enshrines an engagement which can in no way be amended by a subsequent unilateral declaration. In the words of the Court itself, whenever such declaration is made, "it has no effect on the commitment" resulting from Article XXXI of the Pact (para. 36). The States Parties to the Pact have not linked together Article XXXI and such declarations (para. 40); that commitment "is independent of such declarations" (para. 41).

57. In sum, the Court's jurisdiction is grounded on the provision of a treaty (the Pact of Bogotá), and not on a unilateral declaration, as under the optional clause of Article 36 (2) of the ICJ Statute. Article XXXI was intended to enhance the jurisdiction of the Court, *ratione materiae* and *ratione temporis* (not admitting subsequent restrictions, while the Pact remains in force), as well as *ratione personae* (concerning all States Parties to the Pact). In my own perception, the traditional voluntarist conception (a derivative of anachronical legal positivism) yielded to the reassuring conception of the *jus necessarium*, to the benefit of the realization of international justice.

58. It was made clear by the ICJ, already in the case of *Border and Transborder Armed Actions*, that Article XXXI amounts to a compromissory clause which sets forth the engagement, by the States Parties to the Pact, as to the conventional basis of the jurisdiction of the ICJ, to settle all "disputes of a juridical nature", independently of the optional clause (Article 36 (2) of the ICJ Statute). The Court stressed that it was "quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to the judicial settlement. This is also confirmed by the *travaux préparatoires*" of the Pact, during which the judicial procedure before the ICJ was regarded as "the principal procedure for the peaceful settlement of conflicts between the American States" (para. 46). Furthermore, expert writing has likewise acknowledged that Article XXXI of the Pact of Bogotá enhanced the procedure of judicial settlement by the ICJ[53].

---

[51]Such as the (merged) cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua), and of *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *versus* Costa Rica), — as well as the cases of *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (Costa Rica *versus* Nicaragua), *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua *versus* Colombia), *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua *versus* Colombia).

[52]For a recent study, cf. A.A. Cançado Trindade, "Towards Compulsory Jurisdiction: Contemporary International Tribunals and Developments in the International Rule of Law — Part I", *in* XXXVII *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2010*, Washington D.C., OAS General Secretariat, 2011, pp. 233-259; A.A. Cançado Trindade, "Towards Compulsory Jurisdiction: Contemporary International Tribunals and Developments in the International Rule of Law — Part II", *in* XXXVIII *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2011*, Washington D.C., OAS General Secretariat, 2012, pp. 285-366.

[53]Cf., e.g., R. Casado Raigón, "La Sentencia de la CIJ de 20 de Diciembre de 1988 (Competencia y Admisibilidad de la Demanda) en el Asunto Relativo a Acciones Armadas Fronterizas y Transfronterizas (Nicarágua c. Honduras)", 41 *Revista Española de Derecho Internacional* (1989) pp. 402-405 and 407; E. Orihuela Calatayud, "El Pacto de Bogotá y la Corte Internacional de Justicia", 42 *Revista Española de Derecho Internacional* (1990) pp. 430-431, 433, 436 and 438.

VII. Concluding Observations: The Third Way (*Troisième Voie*/*Tercera Vía*) under Article 79 (9) of the Rules of Court — Objection Not of an Exclusively Preliminary Character

59. May I come to the remaining aspect that I purport to address in the present Separate Opinion. In its Judgment of today, 24.09.2015, in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean*, the Court — as I have already pointed out (cf. paras. 2-3, supra) — has very briefly referred to Article XXXI of the Pact of Bogotá and to Article 79 (9) of the Rules of Court, in comparison with the attention it devoted to Article VI of the Pact. May it here be recalled that, in the case of *Nicaragua versus United States* (merits, Judgment of 27.06.1986), the ICJ elaborated on the scope of Article 79 of the Rules of Court, to the effect that the provision

> "presents one clear advantage: that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage" (para. 41).

60. This point was later reiterated by the ICJ in the *Lockerbie* cases (preliminary objections, Libya *versus* United Kingdom and United States, Judgments of 27.02.1998, paras. 49 and 48, respectively). Moreover, in the aforementioned case of *Territorial and Maritime Dispute* (Nicaragua *versus* Colombia, preliminary objections, Judgment of 13.12.2007), it was also clarified by the Court that, in principle, a party raising a preliminary objection (to jurisdiction or admissibility) is entitled to have that objection answered at the preliminary stage of the proceedings unless the Court "does not have before it all facts necessary" to decide the question raised, or else the Court, in answering that objection, would prejudge the dispute, or some elements thereof, on the merits (para. 51).

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

> "declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings".

62. This being so, the ICJ, moving into the merits, asserts its jurisdiction; this happens because the character of the objection contains aspects relating to the merits, and thus requires an examination of the merits. This is so in the present case concerning the *Obligation to Negotiate Access to the Pacific Ocean*, as to the dispute arisen between Bolivia and Chile, as to whether their practice subsequent to the 1904 Peace Treaty substantiates an obligation to negotiate on the part of the respondent State. Such negotiations have given rise to a dispute, not settled by the 1904 Peace Treaty. Chile's objection cannot be properly decided without deciding the merits of the dispute, as it does not have an exclusively preliminary character, appearing rather as a defence as to the merits of Bolivia's claim.

63. There have been negotiations, extending well after the adoption of the 1948 Pact of Bogotá, in which both contending parties were actively engaged; although in the present Judgment there is no express reference to any of such negotiations specifically, the ICJ takes note of arguments made in the course of the proceedings of the *cas d'espèce* to the effect that negotiations took place subsequently to the 1904 Peace Treaty (para. 19)[54] on unsettled issues, well beyond the date of the adoption of the Pact of Bogotá (on 30.04.1948), until 2012. The present case relating to the *Obligation to Negotiate Access to the Pacific Ocean* concerns such process of negotiations, and the issue whether there is a duty to pursue them further.

64. To assert the duty to negotiate is not the same as to assert the duty to negotiate an agreement, or a given result. The former does not imply the latter. This is a matter for consideration at the merits stage. The Court is here concerned only with the former, the claimed duty to negotiate. The objection raised by the respondent State does not appear as one of an exclusively preliminary character. The substance of it can only be properly addressed in the course of the consideration of the merits of the *cas d'espèce*, not as a "preliminary objection". The Court is thus right in proceeding — for this particular reason — to fix time-limits for further proceedings (Article 79 (9) *in fine*), moving into the merits phase. The contending parties' post-1904 exchanges and declarations appear to substantiate an obligation to negotiate, beyond and irrespective of the 1904 Peace Treaty. The Court has thus to move into the merits, in order to examine, and pronounce upon, the *punctum pruriens* of the *cas d'espèce*.

65. May it here be further pointed out that, in the case of the *Territorial and Maritime Dispute* (Nicaragua *versus* Colombia, preliminary objections, Judgment of 13.12.2007), the ICJ, after recalling the *rationale* of Article VI of the Pact of Bogotá, found that the dispute had not been settled by the treaty at issue (of 1938, and Protocol of 1930), nor by a judicial decision, and thus found it had jurisdiction under Article XXXI of the Pact (paras. 77 and 120). The ICJ deemed it fit further to recall that Article 79 (9) of its Rules of Court establishes three ways in which it may dispose of a preliminary objection: either to uphold or to reject it, or else to declare that it does not possess an exclusively preliminary character (para. 48).

66. This would have been, in my perception, the proper and more prudent way for the Court to dispose of the preliminary objection raised by Chile in the present case opposing it to Bolivia. In any case, the ICJ would move into the merits. The first and third ways foreseen by Article 79 (9) of the Rules of Court lead, on the basis of distinct reasonings, to a consideration of the merits of the case. In the previous case of the *Territorial and Maritime Dispute*, opposing Nicaragua to Colombia (*supra*), the ICJ further stressed that the commitment under Article XXXI of the Pact of Bogotá is an "autonomous one" (independent from an optional clause declaration), which enhances the access to the Court (paras. 134-135) and the judicial settlement of "disputes of a juridical nature" under the Pact of Bogotá. Article XXXI cannot be unduly limited by optional clause declarations, nor by preliminary objections which do not possess an exclusively preliminary character.

67. May I conclude that the objection raised by Chile appears as a defence to Bolivia's claim as to the merits, inextricably interwoven with this latter. And the Court, anyway, does not count on all the necessary information to render a decision on it as a "preliminary" issue. It is, in my view, more in line with the good administration of justice (*la bonne administration de la justice*) that the Court should keep the issue to be resolved at the merits stage, when the contending parties will have had the opportunity to plead their case in full. This would entail no delays at all for the

[54] And cf. paras. 49-50.

forthcoming proceedings as to the merits. Last but not least, Article VI of the Pact of Bogotá does not exclude the Court's jurisdiction in respect of disputes arisen after 1948: to hold otherwise would deprive the Pact of its *effet utile*. The Pact of Bogotá, in line with the mainstream of Latin American international legal doctrine, ascribes great importance to the judicial settlement of disputes, — its main or central achievement, — on the basis of its Article XXXI, a milestone in the conceptual development of this domain of international law.

(Signed) Antônio Augusto CANÇADO TRINDADE.

_____