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Some Comments on International Agreements in the Light of Obligation to Negotiate Access to the Pacific Ocean Case

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1. Introduction

On 1 October 2018 the International Court of Justice (ICJ) delivered its Judgment in the case concerning *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*1. The International Court found that Chile had not undertaken a legal obligation to negotiate a sovereign access to the Pacific Ocean for Bolivia. The judges were of the view that both States had not signed any international agreement which would bound Chile to negotiate access to the Pacific Ocean. In particular, the ICJ stated that "the statement by Bolivia, when signing UNCLOS, that referred to 'negotiations on the restoration to Bolivia of its own sovereign outlet to the Pacific Ocean' did not imply the allegation of the existence of any obligation for Chile in that regard" and that "acquiescence cannot

[1] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. Chile), Judgment, 1 October 2018, "I.C.J. Reports" 2018.

be considered a legal basis of an obligation to negotiate Bolivia's sovereign access to the sea".

For the purposes of the present article it may be argued that an international agreement rests on the common will of two or more contracting States or other subjects whose intentions are to create legally binding commitments (legal rights or obligations, or a legal relationship) operating within the sphere of international law[2]. The common will of States is expressed through their consent to be bound by a treaty[3]. The intentions of States must be recognized and respected. The methodology for ascertaining the existence of a legally binding agreement under international law has been consequently developed by the World Court. Today, it may be referred to as "the agreement methodology"[4].

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[2] See: V.D. Degan, *Sources of International Law*, The Hague–Boston–London, 1997, p. 357, stating that: "a treaty consists in a concordance of wills of two or more subjects of international law […], intended to achieve an effect in international law by creating a legal relationship of rights and duties for its parties" (italics omitted). A. McNair, *The Law of Treaties*, Oxford 1961, p. 4, who said that a treaty is: "a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law". The above definition was adopted by R.Y. Jennings stating that a treaty is "a written agreement by which two or more States or international organization create or intend to create a relation between themselves operating within the sphere of international law", R.Y. Jennings, *General course of public international law,* "Recueil des Cours de la Academie *de Droit International*" 1967, vol. 121, p. 530. See also: H. Lauterpacht, *Law of Treaties: Report, UN Doc. A/CN.4/63, "Yearbook of International Law Commission" (1953-II), p. 93. "Article 1 (Essential requirements of a treaty)* Treaties are agreements between States […] intended to create legal rights and obligations of the parties". On the other hand, M. Lachs was of the view that "an international treaty […] represents a consensus between two or more parties as to the object and purpose of the document they agreed upon", M. Lachs, *The Development and General Trends of International Law in Our Time*, "Recueil des Cours de la Academie de Droit International" 1980, vol. 169, p. 179.

[3] The terms "treaty", "international agreement" and "legally binding agreement" are treated in the present article as synonyms.

[4] See especially: *Jaworzina*, Advisory Opinion, 6 December 1923, "P.C.I.J. Publ.", Series B, No. 8, p. 30; *Mavrommatis Jerusalem Concessions*, Judgment, 26 March 1925, "P.C.I.J. Publ.", Series A, No. 5, p. 37; *German Interests in Polish*

The purpose of this contribution is to reflect on a certain aspect of the Judgment, to wit, the ascertainment of the existence of an international obligation on the basis of an international agreement. To this end, the article starts with the factual background of the case, while section 3 is devoted the main issue discussed in the article. A set of concluding remarks are contained in section 5.

2. The Factual Background

The Latin American States have a rich history of settling their disputes through international law and international courts and tribunals. The recent example thereof is a claim by Bolivia to regain access to the sea lost in 1879. The history of bitter tensions between Bolivia and Chile is long and starts with their gaining independence from Spain in 1825 and 1818 respectively. There are numerous important facts and instruments which relates to the access to the Pacific Ocean and which has been outlined and subsequently discussed in the ICJ decision[5]. They may be briefly and chronologically presented as follows:

Upper Silesia (Merits), Judgment, 25 May 1926, "P.C.I.J. Publ.", Series A, No. 7, p. 13; *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, 8 December 1927, "P.C.I.J. Publ.", Series B, No. 14, p. 34–35; *Free Zones of Upper Savoy and the District of Gex*, Judgment, 7 June 1932, "P.C.I.J. Publ.", Series A/B, No. 46, p. 169–170; *Legal Status of Eastern Greenland*, Judgment, 5 April 1933, "P.C.I.J. Publ.", Series A/B, No. 53, p. 50; *Nuclear Tests (Australia* v. *France)*, Judgment, 20 December 1974, "I.C.J. Reports" 1974, at paras. 43, 46 (see also: *Nuclear Tests (New Zealand* v. *France)*, Judgment, 20 December 1974, "I.C.J. Reports" 1974, at paras. 46, 49); *Aegean Sea Continental Shelf (Greece* v. *Turkey)*, Judgment, 19 December 1978, "I.C.J. Reports" 1978, at para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, Judgment, 1 July 1994, "I.C.J. Reports" 1994, at paras. 21–30. According to J. Klabbers, *The Concept of Treaty in International Law*, The Hague–London–Boston, 1996, p. 215, the last judgment: "establishes something of a methodology for ascertaining the true nature of an international instrument".

[5] Ibidem, paras. 16–83.

1. 1866 Treaty demarcating boundary between Chile and Bolivia and separating their Pacific coast territories;

2. War of the Pacific and Chile's occupation of Bolivia's coastal territory;
3. 1884 Truce Pact providing Chile to continue to govern coastal region;
4. 1904 Peace Treaty recognizing coastal territory as belonging "absolutely and in perpetuity" to Chile;
5. Minutes of 1920 meetings concerning question of Bolivia's access to the sea (Acta Protocolizada);
6. Follow – up exchanges concerning Bolivia's request for revision of 1904 Peace Treaty;
7. 1926 Matte Memorandum expressing Chile's position concerning question of sovereignty over provinces of Tacna and Arica;
8. 1950 exchange of Notes between Bolivia and Chile concerning Bolivia's access to the sea;
9. 1961 Memorandum handed by Chile's Ambassador in Bolivia to Minister for Foreign Affairs of Bolivia (Trucco Memorandum);
10. Joint declaration by Presidents of Bolivia and Chile in 1975 expressing agreement to initiate negotiations (Charaña Declaration);
11. Resolutions of the Organization of American States (OAS) concerning Bolivia's sovereign access to the sea;
12. New negotiations opened after 1985 Bolivian presidential elections, known as the "fresh approach";
13. 2000 Algarve Declaration on essential issues in the bilateral relationship;
14. 13-Point Agenda of 2006, including Point 6 on the "maritime issue".

Bolivia lost its 200-mile coast after humiliating defeat in the 1879–83 War of the Pacific also known as the Saltpeter War that broke out after an earthquake forced Bolivia to ordain a tax to fund the relief sought. The tax affected Chilean exporters of nitrate and saltpeter in breach of the 1874 Boundary Treaty. Bolivia lost its access to the Pacific Ocean (provinces of Tacna and Arica) and

the 1904 Peace Treaty provided that these coastal territories now belonged to Chile "*in perpetuity*". Bolivia however still contends that from both the stipulations of that Treaty and the subsequent agreements Chile has given a solemn undertaking to negotiate a sovereign access to the sea.

The crux of the dispute concerned the legal bases of an international obligation to the effect that Chile was under the duty to enter into negotiations with Bolivia with respect to its full sovereign access to the Pacific Ocean. The most important source thereof was allegedly an international agreement. This issue may be broken down into several headings.

3. The existence of an international agreement

States may act as the please on international plane unless it is contrary to their international obligations. By the same token, they are not bound to enter into negotiations with a view of reaching an agreement (*pactum de negotiando*) or enter into negotiations to reach an agreement (*pactum de contrahendo*), unless they are required to do so under international law. The fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate[6]. Moreover, *pactum de negotiando* does not imply *pactum de contrahendo*[7]. Each of these obligations must be pursued in good faith just as any other international obligation. The International Court explained that States "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification"[8].

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[6] *Obligation to Negotiate*, at para. 91.

[7] *Railway Traffic between Lithuania and Poland*, Advisory Opinion, 15 October 1931, "P.C.I.J. Publ.", Series A/B No. 42, p. 116; *Pulp Mills on the River of Uruguay (Argentina* v. *Uruguay)*, Judgment, 20 April 2010, "I.C.J. Reports" 2010, at para. 150.

[8] *North Sea Continental Shelf (Federal Republic of Germany/Denmark) (Federal Republic of Germany/Netherlands)*, Judgments, 20 February 1969,

Each of them "should pay reasonable regard to the interests of the other"[9].

An international obligation is often embodied in an international agreement. It is one of the most long-standing question discussed by international lawyers when a given instrument is an international agreement of a legally binding nature that establishes rights and obligation in the sphere of international law. While the nature of certain international agreement is not disputed and enjoy the status of a treaty (for example the Charter of the United Nations, Vienna Conventions)[10], there are other international agreements which have their status questioned as binding under international law. States may conclude agreements of legal or non-legal (moral (honourable) or political) nature[11]. The question is when an international agreement becomes an international agreement of a legally binding nature. In other words, the issue remains as to what constitutes and what does not a legally binding agreement. The 1969 Vienna Convention on the Law of Treaties (VCLT) does not provide a definition of international agreement. Moreover, it excludes from its scope agreements concluded between non-State actors as well as oral agreements. Therefore, its value is very limited. As a result, one may not rely on the VCLT and has to seek the answer to the question of a true nature of international agreement outside the Convention. Reference has been made, *inter alia*, to the intention of the parties and their external expression of their conduct in order to ascertain whether a given instrument is an international agreement under international law.

International agreements are the main mode for regulating the rights and duties of States and other subjects on international

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"I.C.J. Reports" 1969, at para. 85.

[9] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece)*, Judgment, 5 December 2011, "I.C.J. Reports 2011", at para. 132. See: *Obligation to Negotiate*, at para. 86.

[10] In the present study, the terms "international agreement of legally binding nature" and "treaty" will be treated as synonyms. See: *Report on the Law of Treaties by J. L. Brierly, Special Rapporteur*, UN Doc. A/CN.4/23, "Yearbook of International Law Commission" (1950-II), p. 227, at para. 20.

[11] See: M. Virally, *Sur la notion d'accord*, in: *Festschrift für Rudolf Bindschedler*, eds. E. Diez et al., Berne 1980, p. 167.

plane. There is no particular form in which an agreement receives a legally binding nature. The formalism is alien to international law and therefore subjects may conclude treaties in a variety of forms. Most of the times, they are in a written form as various organs represent States for the purposes of expressing consent to be legally bound by an international agreement. However, not all written agreement may be considered as treaties and the issue still remains as to the ascertainment of true nature of international agreement. The question – what constitutes a treaty – is one of most perennial and intractable problems in international law[12]. It has been thoroughly discussed in scholarly writing and has been the subject of consideration by both the Permanent Court of International Justice and the International Court of Justice. As will be seen, the question of the true nature of international agreements is at times the one of utmost importance in State practice and the search for a right answer leads to the analysis of the decisions of international courts and tribunals. For example, in the *Bay of Bengal* case the International Tribunal for the Law of the Sea (ITLOS) was forced to examine the true nature of certain instruments in order to make a decision which went against an unsuccessful party[13].

In the case at hand, the International Court declared that: "In international law, the existence of an obligation to negotiate has to be ascertained in the same way as that of any other legal obligation. Negotiation is part of the usual practice of States in their bilateral and multilateral relations. However, the fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate. In particular, for there to be an obligation to negotiate on the basis of an agreement, *the terms used by the parties, the subject-matter and the conditions of the negotiations* must demonstrate *an intention of the parties to be legally bound*.

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[12] M. Fitzmaurice, *The Identification and Character of Treaties and Treaty Obligations between States in International Law*, "British Yearbook of International Law" 2002, vol. 73, p. 141; J. Klabbers, *The Concept of Treaty*, p. 1.

[13] *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, case No. 16, Judgment, 14 March 2012.

This intention, in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of an objective examination of all the evidence"[14].

First of all, the ICJ indicated that there must be an intention of the parties to be legally bound. It means that the intention to be bound is not enough; the intention must be of a legal nature. Second, in case of *pactum de negotiando* an intention of the parties is ascertained by:

- the terms used by the parties;
- the subject-matter of negotiations;
- the conditions of the negotiations.

Third, if the express terms are missing or they are ambiguous, the intention may be established on the basis of an objective examination of all the evidence. The word "may" employed by the ICJ suggests that the use of indirect evidence is optional. The absence of express terms may be fulfilled by objective examination of all evidence. The terms used in an instrument seem to be of primary importance. The word "may" does not refer to objective examination. In each case a court or tribunal is obligation to apply objective criteria.

Having above in mind, it should be said that an adjudicative body may only consider the intention of States as externally declared. The external manifestations should solely determine whether the State has intended to conclude an international agreement and, consequently, expressed its consent to be bound by a treaty. In the light of the jurisprudence of the International Court and its predecessor, the Permanent Court, the indicators of external manifestations of the intentions are as follows:

- the terms and language of an instrument;
- circumstances of a given case;
- the function of a person representing a State.

Those indicators are not in a hierarchical order[15] and seem not to be exclusive, but they are the main examples of manifestations

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[14] *Obligation to Negotiate*, at para. 91.

[15] However, K. Widdows argues that: "The language used must be fundamental gauge to the parties' intention". K. Widdows, *What is an Agreement in International Law*, "British Yearbook of International Law" 1979, vol. 50, p. 137.

of the intentions to be referred to by international courts and tribunals[16]. A court or tribunal should look at the instrument's external indicators to ascertain the intention of States and the true nature of international instruments. To put it shortly, the intention must be implied from the facts in a given case. The intention should be inferred from the objective indicators of the intention of States.

Bolivia invoked mainly that the Chile's obligation to negotiate sovereign access to the Pacific Ocean was to be derived from the alleged existence of one or more bilateral international agreements. The alleged agreements raised by Bolivia occurred in different times and therefore the ICJ decided to analyse them in chronological order[17].

3.1. The diplomatic exchanges of the 1920s

First, Bolivia was of the view that the 1920 Acta Protocolizada constituted an international agreement to negotiate sovereign access to the sea[18]. The terms used confirmed Chile's intention to be bound by the instrument. Also, the specific terms of the correspondence

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[16] There are, of course, other indicators which may suggest the legal nature of an instrument. For example, J. E. S. Fawcett, *The Legal Character of International Agreements*, "British Yearbook of International Law" 1953, vol. 30, p. 387–388, states that the intentions are manifested by: (i) insertion of a provision to agreement for the settlement by compulsory judicial (and arbitral) process of disputes arising out of agreement; (2) acceptation by the parties to an agreement of the jurisdiction of the ICJ; (3) registration under Article 102 of the UN Charter; (4) the subject-matter of an agreement (whether it is governed by public international law, or by a specified system of municipal law, or by the general principles of law recognized by civilized nations). It should be underlined that the absence of the above elements may not be automatically read as expressing the intentions not to be legally bound. See also: J. Klabbers, *The Concept of Treaty*, pp. 66–89. One may also distinguish a number of negative indicators which will suggest that the parties to an instrument did not intend to conclude a legally binding agreement. A classic example is a clause on non-eligibility for registration of an instrument under Article 102 of the UN Charter, e.g. the Helsinki Final Act of 1 September 1975. See: A. Aust. *The Modern Treaty Law and Practice*, Cambridge 2004, p. 14–46, 404.

[17] *Obligation to Negotiate*, at para. 94.

[18] See: ibidem, at paras. 26–41, 98–104.

preceding the Acta and the follow-up correspondence confirmed the intention of the Parties. On its side, Chile underlined the penultimate clause of the Acta, according to which Bolivia's Minister for Foreign Affairs stated that no rights or obligation could be created for States whose representatives made the declaration. Moreover, the language of the correspondence preceding and following the Acta did not indicate its legally binding force.

The Court noted, among others, that in the 1920 Chile had expressed willingness "to seek that Bolivia acquire its own access to the sea ceding to it an important part of that zone in the north of Arica and of the railway line. In the Court's view, these remarks are of political significance only and they do not indicate Chile's acceptance of a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. Such acceptance was not expressed in the Acta either"[19].

At this point, the Court recalled its famous statement in the *Qatar* v. *Bahrain* case, where it found that signed minutes of a discussion could constitute an agreement if they "enumerate[d] the commitments to which the Parties ha[d] consented" and did not "merely give an account of discussions and summarize points of agreement and disagreement"[20]. Applying this statement as a test, the ICJ observed that: "the 'Acta Protocolizada' does not enumerate any commitments and does not even summarize points of agreement and disagreement. Moreover, the penultimate clause of these minutes records that the Foreign Minister of Bolivia stated that 'the present declarations do not contain provisions that create rights, or obligations for the States whose representatives make them'. The Chilean Minister Plenipotentiary did not contest this point. Thus, even if a statement concerning an obligation to resort to negotiations had been made by Chile, this would not have been part of an agreement between the Parties"[21].

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[19] Ibidem, at para. 105.

[20] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain) (Jurisdiction and Admissibility)*, Judgment, 1 July 1994, "I.C.J. Reports 1994", at para. 25.

[21] *Obligation to Negotiate*, p. 106.

The Qatar v. Bahrain test thus implies that, in case of a doubt, for an agreement to be legally binding an instrument must enumerate any commitments undertaken by the parties thereto or at least summarize points of agreement or disagreement. The language employed by that instrument must be strict and precise enough to extract words embodying a legal obligation. Otherwise, the text would not be indicative of Parties assuming any legal obligation.

3.2. The 1950 Exchange of Notes

Second, Bolivia claimed that the 1950 exchange of Notes constituted an international agreement[22]. The terms of the Notes were clear and precise. Slight textual differences between the Notes did not demonstrate a disagreement between the Parties. The Notes were to be seen as an "Exchange of mutual commitments demonstrating a clear intention to be bound". With regard to subsequent exchanges, Bolivia reminded that the Trucco Memorandum quoted a part of the 1950 Chilean Note and referred to Chile's "full consent to initiate as soon as possible, direct negotiations aimed at satisfying the fundamental need [of Bolivia – M. K.] of own sovereign access to the sea. Therefore, it was an international act reflecting the agreement between Bolivia and Chile.

Chile contended that the 1950 Notes did not show objective intention to be bound. The Parties did not conclude an international agreement. The language used only denoted its political willingness to enter into negotiations. In the same vein, the language employed in the Trucco Memorandum did not reflect any sense of legal obligation.

The International Court recalled that the existence of States' consent to be bound by a treaty may be constituted by instruments exchanged between them and requires either that: "The instruments provide that their exchange shall have that effect" or that "It is otherwise established that those States were agreed that

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[22] Ibidem, at para. 50–58, 108–115.

the exchange of instruments should have that effect" (Article 13 of VCLT). The first condition was not met as the Notes did not specify anything about their effect. The second condition was not proved either as Bolivia did not present any adequate evidence in this regard. Moreover, the ICJ underlined certain inconsistencies and the departure from the settled practice with respect to international agreements concluded through an exchange of related documents: "According to that practice, a State proposes in a note to another State that an agreement be concluded following a certain text and the latter State answers with a note that reproduces an identical text and indicates its acceptance of that text. Other forms of exchange of instruments may also be used to conclude an international agreement. However, the Notes exchanged between Bolivia and Chile in June 1950 do not contain the same wording nor do they reflect an identical position, in particular with regard to the crucial issue of negotiations concerning Bolivia's sovereign access to the Pacific Ocean"[23].

Therefore, in the ICJ's view, the exchange of Notes could not be considered an international agreement. Also the terms used indicated conveyed only Chile's willingness to enter into negotiation and not the acceptance of an obligation to negotiate Bolivia's access to the Pacific Ocean.

3.3. The 1975 Charaña Declaration

Third, Bolivia maintained that the 1975 Joint Declaration constituted an international agreement. In that Declaration, the Heads of State of Bolivia and Chile undertook to "continue the dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia, taking into account the mutual interests and aspirations of the Bolivian and Chilean peoples"[24]. Its terms were precise and unequivocal. It affirmed the Parties' intention to negoti-

[23] Ibidem, at para. 117.

[24] Ibidem, at paras. 60–70, 120–125.

ate Bolivia's access to the Pacific Ocean. Moreover, this commitment was confirmed in a number of subsequent instances. By way of the Declaration the Parties "normalized" their diplomatic ties and this "act" was conditioned on Chile's acceptance to undertake negotiations on sovereign access to the sea. Chile opposed to Bolivian contention and argued that the terms used in the Declaration did not create or confirm a legal obligation. The resumption of diplomatic relations did not depend on the creation of the said obligation.

The Court did not ascertain the existence of an international agreement. Again, the terms used did not express Parties' intention to be legally bound. In this regard, the Court stated that: "the overall language of the Declaration rather indicates that it has the nature of a political document which stresses the 'atmosphere of fraternity and cordiality' and 'the spirit of solidarity' between the two States, who in the final clause decide to 'normalize' their diplomatic relations. The wording of the Declaration does not convey the existence or the confirmation of an obligation [...] The engagement 'to continue the dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia', cannot constitute a legal commitment to negotiate Bolivia's sovereign access to the sea, which is not even specifically mentioned"[25].

Having above in mind, the Court was of the view that the obligation sought by Bolivia could not be inferred from the Declaration.

3.4. The Communiqués of 1986

Fourth, Bolivia argued that another set of instruments accounted for an international agreement. The Bolivian Minister for Foreign Affairs issued a communiqué on 13 November 1986 and on the same date his Chilean counterpart also issued a communiqué in which he stated as follows: "We have agreed with the Minister of Foreign Affairs of Bolivia that, without prejudice to the important

[25] Ibidem, at para. 126.

and fruitful talks and tasks that the Rapprochement Binational Commission will continue to carry out, both Foreign Ministers will meet in Montevideo at the end of April, in order to discuss matters of substance that are of interest to both Governments"[26].

The Court observed that both instruments were separate and their wording was not the same. What is more important, neither of these documents referred to Bolivia's access to the sea. Therefore, the ICJ could not declare that such instruments form a legally binding agreement.

3.5. The 2000 Algrave Declaration and the 2006 13-Point Agenda

Fifth, Bolivia invoked a joint declaration of 22 February 2000 and a Joint Communiqé of 1 September 2000 in which the Parties had agreed to discuss, without any exception, the essential issues in the bilateral relationship and had confirmed their willingness to engage in a dialogue with no exclusions[27]. The Court could not find anything in these instruments which would suggest an existence of a binding agreement[28]. Similarly, Bolivia insisted that the 2006 minutes of a meeting of the Bolivia-Chile Working Group on Bilateral Affairs formed an international agreement having a binding nature. It included the maritime issue and therefore Chile was under an obligation to negotiate. However, the minutes state that "Both delegations gave succinct reports on the discussions that they had on this issue in the past few days and agreed to leave this issue for consideration by the Vice-Ministers at their meeting". As was remarked by the Head of the Bolivian delegation to the General Assembly of the OAS, "The Agenda was conceived as an expression of the political will of both countries to include the maritime issue"[29]. Thus, the Court obviously observed that the mere

[26] Ibidem, at para. 128. See also: ibidem, at paras. 76–77.
[27] Ibidem, at paras. 78–83, 133–134.
[28] Ibidem, at para. 135.
[29] Ibidem, at para. 136.

mention of the "maritime issue" did not give rise to an obligation to negotiate access to the sea.

4. Concluding observations

The Vienna Convention on the Law of Treaties has a very limited value for the ascertainment of binding or non-binding character of international agreements. The International Court indirectly confirmed it as it simply did not refer to art. 2 (1) (a) of the VCLT in its considerations. There is strong force in the view, as it is sometimes asserted, that defining what is a treaty only according to the Vienna Convention is a daunting task[30]. Thus, it may be fairly said that the VCLT does not explain how to ascertain whether a given agreement has a legally binding nature.

The notion of a legally binding agreement is not an academic endeavor and it has vital importance for international practice[31]. The ascertainment of whether a given agreement is or is not a treaty may have – and often has – serious legal consequences for parties to a dispute as it determines the jurisdiction of an international court or decide on the issue of rights and duties of parties in the merits phase.

The most import observation stemming from the ICJ decision is that an intention of States as externally manifested is crucial for the ascertainment of the true nature of international agreements. The intention must be established on the basis of an objective examination of all the evidence. This evidence consists of the language and the terms of a documents as well as surrounding circumstances.

The judgment in the *Obligation to Negotiate* case may be regarded as another step in the creation of the methodology for the ascer-

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[30] M. Fitzmaurice, *The Identification and Character*, note 12, p. 185.

[31] As J. de Arechaga observed: "the definition of an international treaty seems at first sight to be a purely academic question, judicial experience shows that the determination of whether a certain instrument constitutes a treaty has important practical consequences". J. de Arechaga, *International Law in the Past Third Century*, "Recueil des Cours de la Academie *de Droit International*" 1978, vol. 159, p. 35.

tainment of a true nature of international agreements. The International Court once again put an emphasis on objective elements with underlining the terms of instrument as a basic indicator of an intention of parties thereto. The ICJ decision also shows that proving the existence of international agreement is not an easy task. The evidence must be compelling and the rebuttable presumption is that no legally bound agreement has been made.

STRESZCZENIE

Kilka uwag o porozumieniach międzynarodowych
w kontekście sprawy zobowiązania do negocjacji
dostępu do Pacyfiku

1 października Międzynarodowy Trybunał Sprawidliwości (MTS) wydał wyrok w sprawie dotyczącej *zobowiązania do negocacji dostępu do Pacifiku (Boliwia* v. *Chile*). Trybunał rozważał m.in. kwestię obowiązywania porozumienia międzynarodowego między Boliwią i Chile. Ustalenie, czy pewien dokument stanowi prawnie wiążące porozumienie, może mieć istotne konsekwencje praktyczne. Artykuł zawiera refleksje nad rzeczywistym charakterem porozumień międzynarodowych w świetle komentowanego wyroku. Autor analizuje metodologię zastosowaną przez MTS dla ustalenia obowiązywania prawnie wiążącego porozumienia i bada, czy i w jakim zakresie MTS inspirował się dotychczasowym orzecznictwem międzynarodowych sądów i trybunałów międzynarodowych.

Słowa kluczowe: traktat; porozumienie międzynarodowe; Międzynarodowy Trybunał Sprawiedliwości; zobowiązanie do negocjacji; zobowiązanie do zawarcia umowy

SUMMARY

Some Comments on International Agreements
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On 1 October 2018 the International Court of Justice (ICJ) delivered its Judgment in the case concerning *Obligation to Negotiate Access to the Pa-*

cific Ocean (Bolivia v. Chile). The Court considered, inter alia, the question of the existence of an international agreement between Bolivia and Chile. The determination of whether a certain instrument constitutes a legally binding agreement may have serious practical conseqences. This article discusses the true nature of international agreements in the light of the present Judgment. The contribution analyses the methodology applied by the ICJ for ascertaining the existence of a legally binding agreement and explores whether and to what extent the ICJ was influenced by the case law of the international courts and tribunals.

Keywords: treaty; international agreement; International Court of Justice; obligation to negotiate; obligation to conclude an agreement

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