Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile): Deal or No Deal?

I. OVERVIEW

The foundation of this state border-defining case can be traced back to the war fought between Chile and Bolivia in the late 19th century.[1] Chile won the conflict and along with it, possession of Bolivia's only territory touching the Pacific Ocean.[2] Today Bolivia is a landlocked country and has been for over 100 years.[3] Throughout this time, Bolivia has pushed Chile to grant them a precise request: sovereign access to the Pacific Ocean.[4] While it may seem reasonable for Bolivia to search for access to the ocean, it seems just as reasonable for Chile to rely on the agreement the two countries entered into at the closing of the War of the Pacific.[5] The Peace Treaty of 1904 explicitly declared that Chile would possess "absolutely and in perpetuity" the territories of Tacna and Arica, which had previously belonged to Peru and Bolivia, respectively.[6] The consequent passage of this treaty resulted in a landlocked Bolivia.[7]

The Peace Treaty of 1904, despite its drastic impact, was not a death sentence for Bolivia.[8] It also granted the country the right of commercial transit to the Pacific ports and the right to customs agencies in these ports.[9]

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1. Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. Rep. 153, ¶ 21 (Oct. 1).
2. *Id.*
3. *Id.*
4. *Id.* ¶¶ 26-83.
5. *Id.* ¶ 25.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

Still, Bolivia desired to have complete sovereign access, meaning that no other entity could interfere or guide them as to how to run their commerce or presence in the ports of the Pacific.[10] Beginning in 1919 with a memorandum and carrying through the 1920s, Chile expressed its willingness to enter into negotiations regarding Bolivia's landlocked issue.[11] These attempts were not successful and were followed by additional attempts in 1950 and every decade that followed.[12] In every instance, Chile's demands for compensation were turned down by Bolivia and the talks were abandoned.[13] This suit was born out of Bolivia's assertions that Chile had refused to bend and presented before the International Court of Justice with the aim of compelling Chile to sit down to negotiations and agree that it will grant Bolivia sovereign access to the Pacific.[14] The International Court of Justice *held* that Chile did not undertake an obligation to negotiate with Bolivia because in its bilateral and unilateral agreements and statements it had never expressly nor implicitly declared its intentions to be legally bound. *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 2018 I.C.J. Rep. 153 (Oct. 1).

II. BACKGROUND

A. Obligation to Negotiate in Good Faith

The primary issue is the question of whether a party can be legally bound to negotiate with another party.[15] Fundamentally, this can happen in two ways: the party can either expressly state its intention to be bound, or it can imply such an intention with its statements or actions.[16] If an obligation to negotiate is created, it is implied within that obligation that the negotiations will be performed in good faith in accordance with international law.[17] The International Court of Justice (ICJ) has explained that to negotiate in good faith is to negotiate with the purpose of reaching an agreement as an end result.[18] It is therefore a requirement that the parties will be willing and able to alter their positions in order to negotiate

10. *Id.* ¶ 90.
11. *Id.* ¶¶ 32-34.
12. *Id.* ¶¶ 50-51, 55, 57, 60, 70, 73, 77, 83.
13. *Id.*
14. *Id.* ¶ 85.
15. *Id.* ¶¶ 84-86.
16. *Id.* ¶ 91.
17. *Id.* ¶ 97.
18. Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 132 (Dec. 5).

in good faith.[19] This is developed from the ICJ's reasoning in the North Sea Continental Shelf cases, in which it stated, that if neither party considers the position of the other and refuses to be flexible in their terms, the negotiations are essentially meaningless.[20] This is not to say that a particular agreement must be reached, but rather that some kind of conclusion will arise from the discussions.[21]

The ICJ analyzed this same question in the Advisory Opinion issued to Poland and Lithuania regarding negotiations that the two nations were attempting to hold concerning inter-state railway traffic.[22] Upon accepting a recommendation made by the Council of the League of Nations to enter into negotiations with the purpose of improving relations to ensure peace, Poland asserted that Lithuania not only bound itself to negotiate but also accepted that there would be a specific outcome as stated by the Council in the Resolution.[23] However, the court reasoned that an obligation to negotiate does not include the obligation to reach a certain agreement, otherwise the act of negotiating would be moot.[24] An exception to this rule can be seen in the ICJ's Advisory Opinion addressing the Legality of Threat or Use of Nuclear Weapons in which the court pointed to actual language in the clause calling for negotiations that outlined a specific outcome.[25] This is distinguishable from the normal rule because the outcome of nuclear disarmament was the purpose of the Treaty of the Non-Proliferation of Nuclear Weapons, with negotiations acting merely as the tool with which disarmament would be reached.[26]

B. Implied Intentions

Also relevant is the binding effect of tacit agreements when dealing with issues surrounding independent nations as parties.[27] Because there are such high stakes involved in the relations between nations, the court

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19. *Id.*

20. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 85 (Feb. 20).

21. Maced. v. Greece, 2011 I.C.J. ¶ 132.

22. Railway Traffic Between Lithuania and Poland, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42, ¶ 11 (Oct. 15).

23. *Id.* ¶¶ 30-31.

24. *Id.*; *see also* Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 150 (Apr. 20).

25. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 99 (July 8).

26. *Id.*

27. Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. 659, ¶ 253 (Oct. 8).

mandates a high burden of evidence in order to prove that a tacit agreement is binding.[28] In *Nicaragua v. Honduras*, the court reasoned that because the issue at hand dealt with the establishment of a maritime boundary, a tacit agreement relating to the topic could only be binding if the evidence was compelling.[29] Otherwise, presumptions are necessary in order to establish that there was a binding agreement although silent.[30]

Conversely, exchanges made between the parties will be binding if it is clear that the parties intend to be bound by its terms.[31] While the burden to provide evidence is not as high as the burden placed on tacit agreements, there are still some requirements the court will look for when deciding if the exchange in question has a legal effect. For example, the court found in *Qatar v. Bahrain* that because the exchange included language and terms previously discussed by the parties in other exchanges leading up to the one in question, the parties were well aware of the terms and intended to be bound by them.[32] Additionally, because the exchange was signed by agents with authority on behalf of both parties, Bahrain could not declare that the document had no legal effect going forward.[33]

C. Mirroring Language & Circumstances

Similar to the requirements pertaining to exchanges, the ICJ has found that joint communiques, which are official communications or messages between parties, can be legally binding if their terms mirror previous discussions between the parties or reflect the language used in one another.[34] In *Turkey v. Greece*, the question of whether a joint communique can act as an agreement between the parties to send a dispute to arbitration or judicial proceedings was discussed.[35] The ICJ noted that nothing in international law precludes a joint communique from forming a binding legally enforceable agreement.[36] In these circumstances, however, the communiques must demonstrate that the parties are in agreement on the subject and its terms, making the identical nature of the

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28. *Id.*
29. *Id.*
30. *Id.*
31. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. Rep. 112, ¶ 25 (July 1).
32. *Id.*
33. *Id.*
34. Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. Rep. 3, ¶ 96 (Dec. 19).
35. *Id.*
36. *Id.*

communiques essential.[37] The court also looks at the circumstances surrounding the communiques as a further indication that the parties are in agreement on the communiques' content and their consequences.[38]

This is also true of unilateral acts made by a party as evidenced in the court's explanation in *Australia v. France*.[39] The case involved the disengagement of nuclear atmospheric tests in the South Pacific and the related unilateral declarations made by France that describe the process.[40] The court reasoned that France could be legally bound by their unilateral declarations if it was clearly and specifically interpretable from the terms that France had intended to be so bound.[41] Because unilateral declarations do not require a response from the other party, it is essential that this intention to be bound is readily apparent and accessible from the declaration alone.[42] The court also made it clear that in terms of form, unilateral declarations could be in writing or orally presented; it is the content of the declaration that is of the most importance.[43]

The same test was applied to the unilateral declarations made by Rwanda in *Democratic Republic of the Congo v. Rwanda* regarding human rights protections.[44] The court considered the circumstances surrounding the delivery of a statement made by the Rwandan Minister of Justice as well as the actual content of the statement itself to ascertain whether Rwanda was intending to bind itself to any obligations set forth in the statement.[45] The issue presented in this case was the lack of specificity of the terms and the indeterminate nature of the statements.[46] The terms mentioned were too general, broadly describing the rights of women, weapons of mass destruction, and the environment, as well as the timeframe in which these problems would be dealt.[47] Thus, these terms were largely inconclusive of any specific agreement.[48] Due to this

37. *Id.*
38. *Id.*
39. Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶¶ 43-44 (Dec. 20).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶ 50 (Feb. 3).
45. *Id.* ¶¶ 50-53.
46. *Id.* ¶ 50.
47. *Id.*
48. *Id.*

ambiguity, the court held that the unilateral declarations made by the Rwandan Minster of Justice did not take on any legal effect.[49]

D. Acquiescence & Estoppel

There are times when a lack of a response from one party after the declaration or action of another can amount to acquiescence to an obligation.[50] If a party makes a declaration or takes action that requires a response from another party and no response is forthcoming, this inaction can imply the other party's acquiescence to the terms of the declaration or action put forth by the former, similar to acceptance of a contract by silence.[51] The court in *Malaysia/Singapore* drew similarities between acquiescence and tacit agreements by explaining that silence by one party may be interpreted as consent by the other if the terms of the conduct allow for such an understanding.[52] Like the other methods of creating obligations, the court also relied on the circumstances surrounding the conduct as a means to help interpret the intentions of the parties in taking such action.[53]

The court in *Canada/United States* also drew similarities between acquiescence and estoppel, explaining that both principles derive from the ideas of good faith and equity.[54] In the case *El Salvador/Honduras*, the ICJ set forth the requirements needed to satisfy a claim of equitable estoppel, which consisted of one party relying to its detriment on the other party's statements or representations or the party benefitting from the other's reliance.[55] The court goes further in the Arbitration Award between Mauritania, the United Kingdom of Great Britain, and Northern Ireland by stating that estoppel additionally requires that the representations made by the party must be by an agent with authority on behalf of the party and that the reliance be legitimate and reasonable.[56] It goes on to define detrimental reliance as the party missing opportunities that may have otherwise

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49. *Id.* ¶ 52.

50. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. Rep. 246, ¶ 130 (Jan. 20); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), Judgment, 2008 I.C.J. Rep. 12, ¶ 121 (May 23).

51. Malay./Sing., 2008 I.C.J. ¶ 121.

52. *Id.*

53. *Id.*

54. Can./U.S., 1984 I.C.J. ¶ 130.

55. Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Judgment, 1990 I.C.J. Rep. 92, ¶ 63 (Sept. 13).

56. Chagos Marine Protected Area (Mauritius v. U.K./N. Ir.), 2015 U.N. 359, ¶ 438 (Mar. 18).

benefitted the reliant party.[57] Estoppel exists when a formal agreement may not be solidified or official but the party making representations acts as though the agreement is final.[58]

III. THE COURT'S DECISION

In the noted case, the ICJ held that Chile did not legally bind itself to negotiations with the purpose of granting Bolivia sovereign access to the Pacific Ocean.[59] The court reasoned that no explicit or implicit intention to be so bound was present in any communications shared between the two nations.[60] It further found that there were no explicit or clearly implicit intentions stated by Chile in any of the unilateral or bilateral communications shared between itself and Bolivia that could create an obligation to negotiate.[61] Furthermore, none of the actions taken by Bolivia required a response such that Chile's silence or lack of action could be interpreted as acquiescence to a legal obligation.[62] Bolivia also failed to prove that its reliance on Chile's representations was to its detriment, as its position was virtually unchanging without having given up opportunities for change elsewhere, rendering equitable estoppel inapplicable.[63] Finally, the actions and representations given over the course of a century cannot be considered cumulatively as a promise to negotiate.[64] With this established, the court also held that even if it can compel a party to negotiate based on a legal obligation, it cannot compel the parties to reach a particular agreement as a consequence.[65] Rather, it can only mandate that the negotiations are held in good faith.[66]

The court first analyzed the argument made by Bolivia that, based on the bilateral acts formed between itself and Chile, a legal obligation to negotiate with the purpose of granting Bolivia sovereign access to the Pacific was created.[67] In the Acta Protocolizada, minutes of a meeting held in 1920 between representatives of Chile and Bolivia, Chile expressed a "willingness" and "desire" to meet with Bolivia and discuss solutions to

57. *Id.* ¶ 440.
58. *Id.* ¶ 444.
59. Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. Rep. 153, ¶ 175 (Oct. 1).
60. *Id.*
61. *Id.* ¶¶ 139, 148.
62. *Id.* ¶ 152.
63. *Id.* ¶ 159.
64. *Id.* ¶ 162.
65. *Id.* ¶ 167.
66. *Id.*
67. *Id.* ¶ 94.

their landlocked issue.[68] The court reasoned that while this language may be a significant political step, it is not binding because it did not enumerate any commitments nor did it summarize any points of agreement or disagreement.[69] When dealing with implicit intentions to be legally bound, the court looks for clear and specific indicators in order to infer something of such great consequence as negotiations.[70]

The court adopted a similar outlook to Bolivia's claim that the Exchange Notes of the 1950s bound Chile to past agreements the two had made, as well as the agreement set forth in the Exchange Notes themselves.[71] The Exchange Notes were not an intention to be bound, but rather a statement of Chile's willingness to open negotiations—the response by Chile had not even agreed to the terms stipulated in Bolivia's note.[72] This statement stands in contrast to the rule established in *Greece v. Turkey* where agreements should mirror each other and reflect the same language before the court can infer that the parties intend to be bound by the instruments.[73]

The court found parallel issues with Bolivia's argument that the 1975 Charaña Declaration, a tool used to normalize relations between the two nations after diplomatic ties had been severed following the last failed negotiation attempt, legally bound the parties to negotiations.[74] In this document, several issues surrounding Bolivia, Chile, and the region were outlined, including the landlocked problem facing Bolivia.[75] The court found, however, that because the specific idea of granting Bolivia sovereign access to the Pacific Ocean as a remedy to such a problem was not mentioned, it could not be inferred that Chile intended to bind itself to an obligation to negotiate for that purpose.[76] In the court's opinion, the Charaña Declaration was another example of a political stance being put forth by Chile, not an instrument of legal force.[77]

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68. *Id.* ¶¶ 98-100.

69. *Id.* ¶ 106; *see* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. Rep. 112, ¶ 25 (July 1) (finding that reaffirmation of obligations previously entered into makes an exchange binding).

70. Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 132 (Dec. 5).

71. *Id.*; Bol. v. Chile, 2018 I.C.J. ¶¶ 116-117.

72. Bol. v. Chile, 2018 I.C.J. ¶¶ 116-117.

73. Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. Rep. 3, ¶ 96 (Dec. 19).

74. Bol. v. Chile, 2018 I.C.J. ¶¶ 62, 126.

75. *Id.* ¶ 120.

76. *Id.* ¶ 126.

77. *Id.*

Next, the court turned to Bolivia's argument that the communiques made between the parties of 1986 constitute an agreement to be bound because they had referenced the matters discussed in the 1975 Joint Declaration of Charaña.[78] In denying this argument, the court cited *Greece v. Turkey*, which had established that, although joint communiques may constitute an international agreement, the nature and content of the communiques did not reach the burden needed.[79] Here too, because the language in the joint communiques did not mirror one another, they cannot confirm a meeting of the minds and are therefore two separate instruments.[80] There was also no direct mention of Bolivia's desire to have sovereign access to the sea so it could not be inferred that Chile bound itself to negotiate such a term.[81] This same issue was also the downfall in Bolivia's argument for the Algarve Declaration of 2000 acting as a binding agreement as well as the 13 Point Agenda of 2006, both of which used broad language like the "maritime issue," which does not necessarily link to Bolivia's sovereign access to the sea.[82] The court therefore found that none of the bilateral acts entered into by Bolivia and Chile established an obligation for Chile to negotiate Bolivia's sovereign access to the Pacific.[83]

The court then considered whether the unilateral acts and declarations made by Chile established a legal obligation to negotiate with Bolivia. Bolivia asserts that because the declarations were made by officials of Chile, such as the President and the Minister of Foreign Affairs, who have the authority to bind Chile to legal obligations, an obligation to negotiate was created.[84] The court rejected this argument because the content of the declarations did not include a clear intention that Chile be bound to negotiate.[85] The language in the declarations included phrases like "willingness to give an ear," an expression the court deemed clearly did not form a promise but rather simply an eagerness to proceed.[86] The court also reiterated its holdings in *Australia v. France* and *Democratic Republic of the Congo v. Rwanda* by stating that because such a heavy obligation is being inferred in these circumstances, the intention must be

78. *Id.* ¶¶ 128-129.
79. *Id.* ¶¶ 131-132; Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. Rep. 3, ¶ 96 (Dec. 19).
80. Bol. v. Chile, 2018 I.C.J. ¶ 132.
81. *Id.*
82. *Id.* ¶¶ 135, 137.
83. *Id.* ¶ 139.
84. *Id.* ¶ 140.
85. *Id.* ¶ 148.
86. *Id.* ¶ 143.

"clear and specific," leaving little to no room for doubt as to what the parties intended.[87] Thus, there was no obligation to negotiate born out of Chile's unilateral acts, but merely a willingness to participate in such negotiations.[88]

The court then addresses Bolivia's contention that Chile acquiesced to an obligation to negotiate sovereign access to the sea because of Chile's silence in response to Bolivia's call to negotiations as well as the subsequent engagement in negotiations with Bolivia.[89] The court noted that these calls to action made by Bolivia were delivered in an international forum and did not require a response from Chile.[90] When a response to a statement or act is not required, silence cannot be interpreted as tacit consent.[91] In reference to its holding in *Malaysia/Singapore*, the court determined that proving silence can reasonably be interpreted as consent was burdensome due to the leap the court must make in its conclusion.[92] In this case, Bolivia failed to demonstrate that a response was required to its statements regarding negotiations for access to the sea such that Chile's silence represented acquiescence to be obligated.[93]

The next argument put forth by Bolivia that the court ultimately rejected was that of equitable estoppel.[94] The court conceded that Bolivia had satisfied two components of the test established in *El Salvador/Honduras* by Chile having made clear representations that it was willing to negotiate with Bolivia and by these representations being made by authorities of the state.[95] However, the court explained that Bolivia failed to satisfy the final two elements of the test.[96] Bolivia failed to demonstrate how its reliance on Chile's representations was detrimental to

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87. *Id.* ¶ 145; Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶¶ 43-44 (Dec. 20); Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶ 50 (Feb. 3).

88. Bol. v. Chile, 2018 I.C.J. ¶ 148.

89. *Id.* ¶ 149.

90. *Id.* ¶ 152.

91. *Id.*; *see* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. Rep. 246, ¶ 130 (Jan. 20) (finding that legal consequences cannot be attributed to silence even when it is an imprudent response, if a response is not required).

92. Bol. v. Chile, 2018 I.C.J. ¶ 152; *see* Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), Judgment, 2008 I.C.J. Rep. 12, ¶ 121 (May 23) (holding that "silence may also speak, but only if the conduct of the other State calls for a response").

93. Bol. v. Chile, 2018 I.C.J. ¶ 152.

94. *Id.* ¶ 153.

95. *Id.* ¶ 159; Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Judgment, 1990 I.C.J. Rep. 92, ¶ 63 (Sept. 13).

96. Bol. v. Chile, 2018 I.C.J. ¶ 159.

its progress on the issue, not having forgone other opportunities or showing that Chile benefitted from Bolivia's detriment.[97] Bolivia also failed to demonstrate that its reliance was legitimate owing to the fact that Chile's representations consisted of an eagerness to participate in negotiations but no promises to do so.[98]

If estoppel failed, Bolivia asked the court to consider the doctrine of legitimate expectations, which entitles States who have relied on representations made by others to do so with protection.[99] The court quickly disagreed, stating that it is simply not a rule of international law and unenforceable.[100] Along the same line, Bolivia contended that international disputes must be settled by peaceful means with the aim of sustaining peace, security, and justice in accordance with the U.N. Charter and the Charter of the Organization of American States.[101] The court distinguished a general duty to settle disputes in such a manner from an obligation imposed on the States to utilize negotiations as the tool with which to achieve this goal.[102] There is no indication in the Charter that the parties are required to resort to a specific method of conflict resolution but rather imposes a general duty to settle disputes peacefully.[103] Finally, Bolivia argued that although none of the representations, acts, or declarations made by Chile regarding the issue of sovereign access to the sea created an obligation to negotiate, taken all together over a period of time, an obligation had been formed.[104] The court rejected this argument by reasoning that the sum of a whole cannot be greater than its parts when Chile had not been presented with any individual basis for negotiating Bolivia's sovereign access to the Pacific Ocean.[105] In other words, if none of the representations or actions individually amount to an obligation, they cannot together create enough force to form an obligation either.[106]

IV. ANALYSIS

The noted case stands as an example of judicial caution. By keeping with the past precedent set in cases dealing with the same issue of the legal

97. *Id.*; *see* El Sal./Hond., 1990 I.C.J. ¶ 63.
98. Bol. v. Chile, 2018 I.C.J. ¶ 159.
99. *Id.* ¶ 160.
100. *Id.* ¶ 162.
101. *Id.* ¶ 163.
102. *Id.* ¶ 165.
103. *Id.*
104. *Id.* ¶ 172.
105. *Id.* ¶ 174.
106. *Id.*

obligations to negotiate, the ICJ refused to interfere in independent States' affairs.[107] To do so otherwise would run the risk of opening the floodgates to other claims in which the court need not meddle but does, thereby giving itself more power than a judiciary should bear. The ICJ has consistently held that a party is not legally bound to negotiate unless it is clear, expressly or implicitly, that the party intends to be so bound.[108] The governments of nations are often viewed as sources of high power and authority, independent of others and free to act as they wish within the boundaries of justice and human rights. If a higher power than these governments is so easily capable of interfering with their affairs, the independence and flexibility of global communities would be threatened.

It is helpful to consider what the implications of a holding by the court compelling Chile to negotiate with Bolivia would look like. When parties commit to holding negotiations, it is implied that the discussions will be held in good faith, or as described by the International Court of Justice in prior cases, that the parties will be flexible and willing to alter their positions in order to reach an agreement.[109] It is hard to imagine that a party, after having been forced to the table by a court judgment, will truly be able to proceed with negotiations in good faith. After all, free will is somewhat implicit in the idea of a good faith effort.[110] Of course it is not a redline rule that the court will not compel negotiations, but the standard that needs to be met to reach such a judgment is very high.[111] An exception can be seen in the court's Legality of the Use of Nuclear Weapons Advisory Opinion in which the court found that the parties did indeed intend to be bound to an agreement to negotiate because such intentions were clearly manifest in their statements and actions.[112] However it is questionable how effective the negotiations could possibly be if one party does not want to be at the table.

Perhaps it is difficult to draw this line between compelling a party to negotiate where there is an intent to be bound and compelling a party where there is no such intent, because without some kind of enforcement

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107. *Id.* ¶¶ 175-176.

108. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. Rep. 112, ¶ 25 (July 1).

109. Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 132 (Dec. 5); North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 85 (Feb. 20).

110. Maced. v. Greece, 2011 I.C.J. ¶ 132.

111. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 99 (July 8).

112. *Id.*

mechanism, parties will be prone to back out of agreements more frequently. An agreement to negotiate can be likened to a contract between the two parties with the object being that negotiations take place.[113] However, in the case of a breach of contract, common-law courts, such as the United States, generally will not award specific performance to the nonbreaching party because they are unwilling to force a party to do something against its will, even if it had previously agreed to do it.[114] Internationally speaking, States who have adopted a civil law system generally take a different, more favorable view of specific performance.[115] It seems almost strange to consider court-compelled specific performance for negotiations: what if the party simply does not intend to agree on the position of the other and will not concede?

In the noted case, Bolivia's request that the court not only compel negotiations, but also require that a specific outcome be reached falls squarely under this idea of requiring specific performance of a party that does not wish to perform.[116] The court denied this request, but if it had agreed with Bolivia and demanded that the result of sovereign access to the sea for Bolivia be granted, it would have essentially performed the negotiations for the parties itself.[117] Perhaps the terms of the agreement would still be on the table for the parties to decide themselves but Bolivia was essentially asking the court to compel Chile to grant Bolivia its sovereign access.[118] The court therefore correctly decided to deny Bolivia's request and in so doing allowed sovereign authority to remain intact. When nations ask the International Court of Justice to intervene it can sometimes open the door to judicial interference on a global scale that could set a dangerous precedent.

V. CONCLUSION

The noted case presents a difficult challenge not necessarily because of the issue at hand, but rather because of the methods that must be utilized by the ICJ to reach a conclusion. In other words, the notion of a legally

113. Maced. v. Greece, 2011 I.C.J. ¶ 132.

114. John Y. Gotanda, Damages in Lieu of Performance Because of Breach of Contract 13, 25 (Villanova Univ. Sch. of Law, Working Paper Series, No. 53, 2006), https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1053&context=wps (taking notice of civil law jurisdictions' preference for specific performance).

115. *Id.* at 13.

116. Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. Rep. 153, ¶ 1 (Oct. 1).

117. *Id.* ¶¶ 175-176.

118. *See id.* ¶ 1.

binding obligation to negotiate can be explained in relatively simple terms. The true difficulty for the court is the task of interpreting the intentions of each party in their representations and dealings with one another. Intentions are rather subjective and require a great deal of analysis of evidence. The remarkable thing about the noted case is the ICJ's ability to remain neutral and in step with their past decisions regarding similar issues. If the ICJ changed its course even slightly when dealing with negotiation obligation cases, the precedent could transition to a slippery slope of increasing court involvement in sovereign state issues. Instead, there is recognition of this possibility by the ICJ in the noted case. Chile and Bolivia will have to continue on in their arduous, but undisturbed, process of coming to a compromise on this century-long issue on their own.

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 J.D. candidate 2020, Tulane University Law School; B.A. 2015, Tulane University. I would like to thank my boyfriend James for cheering me on through the long hours and late nights of writing this Case Note. I would also like to thank the members of the *Tulane Journal of International and Comparative Law* for their help in preparing and polishing this piece. Finally, I would like to thank my family for supporting me, no matter how far the distance.