Traduction
Translation

CR 2015/19

Mercredi 6 mai 2015 à 10 heures

Wednesday 6 May 2015 at 10 a.m.

10 The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear Bolivia's first round of oral argument. I now give the floor to H.E. Mr. Eduardo Rodríguez Veltzé, the Agent of Bolivia.

M. RODRÍGUEZ VELTZÉ :

1. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un honneur et un privilège pour moi que de me présenter devant vous en tant qu'agent de l'Etat plurinational de Bolivie en la présente affaire. Je suis également très honoré de la présence du ministre des affaires étrangères de la Bolivie, M. David Choquehuanca, et des autres membres de mon gouvernement qui se sont rendus à La Haye pour cette occasion spéciale. Permettez-moi enfin de saluer respectueusement la délégation chilienne.

2. Pour les habitants de mon pays, cette occasion est historique. C'est la première fois que la Bolivie comparaît devant la Cour dans le cadre d'une affaire contentieuse ; une affaire, de surcroît, qui revêt la plus haute importance pour l'avenir de notre nation et du continent sud-américain. Nous nous présentons devant la Cour avec la conviction que celle-ci — qui réserve à toutes les nations un traitement égal au regard du droit international — rendra justice à notre peuple.

3. La Bolivie est une nation de dix millions d'habitants. Elle est une nation pacifique qui privilégie la culture du dialogue. De fait, l'action en faveur de la paix est inscrite dans notre Constitution, texte qui prône le bien-être des personnes et leur garantit de pouvoir exercer leurs droits fondamentaux. Si elle a parfois éprouvé des difficultés à développer son potentiel, à lutter contre la pauvreté et à accroître le niveau de vie, la Bolivie bénéficie de l'atout considérable que constituent la capacité d'adaptation et la diversité culturelle de son peuple. C'est pourquoi elle est un Etat démocratique plurinational. La plupart des non Boliviens ignorent sans doute que notre Constitution recense 36 langues officielles. Outre l'espagnol, il s'agit essentiellement de langues vernaculaires, qui témoignent de la richesse de notre histoire précoloniale. A titre d'exemple, je mentionnerai le peuple Aymara, dont les terres ancestrales s'étendaient de la côte Pacifique du désert de l'Atacama jusqu'au haut plateau. En 1825, lorsque la Bolivie est devenue indépendante de l'Espagne, elle possédait un littoral de 400 kilomètres bordant ce désert, territoire qui était appelé *Departamento del Litoral*.

4. Dans les années qui suivirent, le Chili commença à mener une politique expansionniste et militariste visant à contrôler les ressources naturelles et les très grandes richesses de ce territoire. Les côtes boliviennes furent envahies et occupées jusqu'au traité de paix de 1904. C'est ainsi que le peuple bolivien se trouva enclavé, au cœur du continent, avec de graves conséquences pour son développement économique et social et son intégration internationale. A partir de la convention

11 d'armistice de 1884, le Chili s'engagea toutefois à ce que la Bolivie récupère un accès souverain à la mer. Pour reprendre les termes de M. Domingo Santa Maria, son ministre des affaires étrangères et président de l'époque, «nous ne pouvons pas asphyxier la Bolivie … nous devons, d'une manière ou d'une autre, lui fournir son propre port, qui lui permettra d'accéder à son territoire en toute sécurité, sans devoir en demander l'autorisation». Cet engagement, réaffirmé en 1895, ne s'éteignit pas avec la signature du traité de 1904. Ainsi, dans les années qui suivirent, la promesse de négocier un accès souverain de la Bolivie à la mer prit la forme de nombreux engagements juridiques, parmi lesquels l'acte de 1920, le mémorandum Matte de 1926, l'échange de notes de 1950, le mémorandum Trucco de 1961 ou encore la déclaration de Charaña de 1975, de plusieurs déclarations de l'Organisation des Etats américains (OEA) et de multiples déclarations et propositions faites par le Chili lui-même. Celui-ci n'a donc cessé d'affirmer que, indépendamment du traité de 1904, il négocierait l'accès souverain de la Bolivie à la mer, tout en reconnaissant que le fait que cet Etat soit privé de pareil accès constituait une injustice historique et nuisait à son développement, et que cela faisait obstacle au développement de relations amicales entre les deux voisins.

5. La Bolivie ne se présente pas devant la Cour pour changer un passé lointain. Tel n'est pas l'objet de la présente affaire. La Bolivie tient à indiquer très clairement qu'elle n'a pas saisi la Cour pour rejeter le traité de 1904, ni les quatre modifications qui ont par la suite été apportées à cet instrument à l'initiative du Chili, ou rouvrir des questions déjà tranchées. Si la Bolivie se présente devant la Cour, c'est parce que le droit international lui confère des droits. Ce que demande la Bolivie est une chose simple ; comme elle l'a indiqué dans sa requête, elle demande que le Chili s'acquitte de son obligation, respecte ses promesses répétées, l'accord qu'il a donné pour négocier un accès souverain à la mer, accord qui est indépendant du traité de 1904. Ce que la Bolivie demande au Chili se résume dans le principe *pacta sunt servanda*.

6. Monsieur le président, Mesdames et Messieurs de la Cour, si nous sommes réunis ici aujourd'hui, c'est parce que le Chili a contesté la compétence de la Cour pour connaître de la demande de la Bolivie et se prononcer à cet égard. La question qui se pose à vous est donc de savoir si vous rejetterez la demande de la Bolivie sans l'examiner au fond. Or, ainsi que cela sera expliqué dans les exposés qui suivront, l'exception soulevée par le Chili porte sur une question différente de celle dont la Bolivie a saisi la Cour ; la question dont la Cour est saisie est l'accord donné par le Chili en vue de négocier un accès souverain de la Bolivie à la mer. Il s'agit d'un *pactum de contrahendo* ; il ne s'agit *pas* du traité de 1904. De surcroît, soutenir que pareil accord n'existe pas indépendamment du traité de 1904 est une réfutation de la demande de la Bolivie au fond. L'exception du Chili constitue donc un détournement de procédure, puisque celui-ci tente,

12 intentionnellement et prématurément, de présenter un moyen de défense sous couvert de contester la compétence de la Cour. Une véritable «exception préliminaire» n'implique pas de se prononcer sur le différend — ou certains de ses éléments — au fond.

7. Dire, comme le Chili l'a fait, que la Bolivie s'est présentée devant la Cour pour «tourner»[1] le traité de 1904 est tout simplement erroné. Contrairement à ce qui a été allégué lundi[2], il ne s'agit pas d'une habile «reformulation» ni d'une tentative de reviser ou d'annuler le traité de 1904. La demande que la Bolivie a présentée à la Cour ne constitue pas une violation du principe *pacta sunt servanda*. Bien au contraire, c'est le Chili qui a violé ce principe. Et c'est pour cela que la Bolivie a saisi la Cour, pour la prier de dire qu'il existe bel et bien un accord en vue de négocier un accès souverain de la Bolivie à la mer — accord indépendant du traité de 1904 —, et que le Chili doit respecter cet accord. Contrairement aux mises en garde du Chili, la Bolivie n'est pas en train de créer un dangereux précédent ; nous ne sommes pas dans l'hypothèse où une «liste de questions historiques en Amérique latine» risqueraient d'être rouvertes devant la Cour[3]. Si le Chili brandit cette menace, c'est pour susciter craintes et inquiétudes. En la présente espèce, il existe en effet un accord spécifique, une *lex specialis*, qui s'applique aux relations entre les deux Etats ; un accord réitéré, formellement reconnu par l'OEA avec le consentement du Chili, celui de négocier

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[1] CR 2015/18, p. 13, par. 3 (Bulnes).

[2] *Ibid.*, p. 14, par. 6 ; voir aussi p. 16, par. 11 (Bulnes).

[3] *Ibid.*, p. 18, par. 17 (Bulnes).

afin de parvenir à un résultat particulier permettant à la Bolivie de conserver son lien historique avec l'océan Pacifique. La présente espèce ne saurait donc créer de précédent en dehors du contexte particulier qui est le sien.

8. Monsieur le président, Mesdames et Messieurs de la Cour, le fait que des négociations sur un accès souverain sont nécessaires est l'objet d'un consensus sur le continent américain, et ce, depuis bien des années. Ainsi l'OEA a-t-elle, dans plusieurs résolutions, confirmé qu'il était dans «l'intérêt constant des pays du continent américain de trouver une solution équitable permettant à la Bolivie d'obtenir un accès souverain approprié à l'océan Pacifique[4]». Elle a en outre confirmé que pareille solution «consoliderait» — non pas menacerait, mais consoliderait — une relation stable, durable et pacifique, «favorable au progrès économique et social de la région qui subit directement les conséquences de l'enclavement de la Bolivie»[5]. C'est pourquoi l'assemblée de l'OEA a recommandé au Chili d'«ouvrir des négociations afin que la Bolivie obtienne un rattachement territorial libre et souverain à l'océan Pacifique»[6]. Autrement dit, l'OEA confirme que la demande de la Bolivie est fondée sur le multilatéralisme, l'intégration régionale et le respect du droit international.

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9. Peut-être vous demanderez-vous alors pourquoi la Bolivie se présente devant la Cour aujourd'hui, après toutes ces années. Eh bien, la réponse est simple. En 2011, après plus d'un siècle de promesses réitérées et de négociations, le Chili a ouvertement répudié son engagement, son obligation, de négocier un accès souverain à la mer, cherchant ainsi à déterminer unilatéralement les obligations auxquelles il entend se conformer, sans tenir compte du droit international. La Bolivie n'avait donc plus d'autre choix que de faire valoir ses droits devant la Cour. Elle l'a fait en se fondant sur le pacte de Bogotá, dans l'esprit de la charte de l'OEA, et dans le souci de la justice internationale. Le Chili la présente aujourd'hui comme une nation qui ne respecte pas les traités, simplement parce qu'elle demande à ce que ses droits soient mis en œuvre. Si tel était le cas, pourquoi le Chili n'a t-il cessé de faire des promesses ? Et pourquoi fait-il aujourd'hui tout ce qui est en son pouvoir pour contester la compétence de la Cour et priver les

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[4] Résolution n° 426 de l'OEA (1979) ; MB, annexe 191.

[5] *Ibid.*

[6] Résolution n° 426 de l'OEA (1979) ; MB, annexe 191 ; voir également la résolution n° 686 de 1983 ; MB, annexe 196.

Parties de ce moyen essentiel de règlement pacifique des différends ? Le Chili présente l'introduction de l'instance comme un acte d'hostilité unilatéral. La Bolivie agit-elle donc de manière illicite en s'engageant dans une voie de recours judiciaire, alors que tous les autres moyens ont échoué ? Evidemment que non. La Bolivie a foi en ses droits en vertu du droit international. Nous considérons qu'une décision impartiale rendue par l'organe judiciaire principal de l'Organisation des Nations Unies est le meilleur moyen de régler les différends internationaux lorsque les autres moyens ont échoué, et de permettre à des Etats voisins d'atteindre à la justice et de vivre harmonieusement.

10. Le président Evo Morales a récemment confirmé quelles étaient les intentions exactes de la Bolivie en introduisant la présente instance[7]. Il a indiqué clairement :

— premièrement, que la Bolivie ne demandait pas à la Cour de modifier le traité de 1904 mais demandait simplement que le Chili s'acquitte de son obligation de négocier un accès souverain à l'océan Pacifique ;

— deuxièmement, que la demande de la Bolivie était fondée sur des principes fondamentaux tels que le règlement pacifique et de bonne foi des différends ; et,

— troisièmement, que la Bolivie cherchait à refermer enfin, par le dialogue et la négociation, une blessure ouverte.

14 11. Le président Morales a par ailleurs précisé que la Bolivie plaçait une grande confiance et de grands espoirs dans le peuple chilien, qui lui a donné des signes concrets de soutien et de solidarité, et qu'elle aspirait à entretenir avec le Chili, comme avec l'ensemble de ses voisins, des relations de coopération et d'intégration sincères et constructives.

12. La présente affaire ne concerne pas des griefs passés ; elle est une promesse d'avenir. Ce différend oppose nos deux nations depuis fort longtemps, mais rien ne devrait les opposer éternellement. L'heure de la justice est venue et les souvenirs douloureux doivent, dans l'esprit de nos peuples, céder la place à un puissant élan d'espoir.

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[7] http://www.comunicacion.gob.bo/sites/default/files/media/publicaciones/Presidente%20Morales%20-%20D%C3%ADa%20de%20la%20Reivindicación%20Mar%C3%ADtima%20%2823%20de%20marzo%20de%202015%29.pdf.

13. Monsieur le président, Mesdames et Messieurs de la Cour, permettez-moi maintenant de présenter les membres de l'équipe juridique de la Bolivie qui exposeront notre argumentation visant à démontrer que la Cour a compétence en la présente espèce :

a) Le premier intervenant est M. Mathias Forteau, qui précisera le véritable objet de la demande de la Bolivie du point de vue de la compétence de la Cour.

b) Lui succédera à la barre Mme Monique Chemillier, qui démontrera que le Chili a, à maintes reprises, reconnu que le traité de 1904 n'avait pas réglé la question de l'accès souverain de la Bolivie à la mer, et que cette question serait réglée indépendamment du traité de 1904.

c) M. Antonio Remiro Brotóns s'intéressera ensuite à l'interprétation et à l'application de l'article VI du pacte de Bogotá, et expliquera pourquoi l'invocation, par le Chili, de la réserve de la Bolivie (qui a été retirée en 2013) et de la constitution bolivienne de 2009 sont tout à fait hors de propos.

d) Enfin, M. Payam Akhavan présentera les conclusions de la Bolivie sur les raisons pour lesquelles la Cour devrait rejeter l'exception soulevée par le Chili, conformément au paragraphe 9 de l'article 79 du Règlement de la Cour.

14. Je vous remercie, Monsieur le président, Mesdames et Messieurs de la Cour. Ainsi s'achève mon exposé. Je vous prierai maintenant de bien vouloir appeler à la barre M. Forteau.

The PRESIDENT: Thank you. I now give the floor to Professor Mathias Forteau.

Mr. FORTEAU: Thank you, Mr. President. Mr. President, Members of the Court, it is a renewed honour and privilege to appear before you, and it is with genuine pride that I do so today on behalf of Bolivia.

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THE SUBJECT-MATTER OF BOLIVIA'S CLAIM

1. Mr. President, in its Application instituting proceedings, Bolivia sought to found the Court's jurisdiction on the Pact of Bogotá[8]. It is thus naturally to the provisions of this Pact that we should turn in order to ascertain whether the Court has jurisdiction in the present case.

[8]See the Application of Bolivia (AB), paras. 5-6.

2. As we all know, "the jurisdictional system of the Pact of Bogotá"[9] confers an extremely broad jurisdiction on the Court[10]. Under Article XXXI of the Pact, the Court has jurisdiction in respect of any question of international law, including those involving non-compliance with an international obligation[11]. The Pact makes a few exceptions to this jurisdiction in principle, including that in Article VI which forms the basis of Chile's objection[12].

3. In its 2007 Judgment in the *Nicaragua* v. *Colombia* case, the Court defined in very clear terms the standard applicable to determine whether the Court possesses jurisdiction based on Article XXXI, or whether it lacks jurisdiction by virtue of Article VI. According to the Court, in either case it should be determined which "questions . . . constitute the subject-matter of the dispute between the Parties on the merits"[13]. In its 2007 Judgment, the Court clarified the link in this regard between Article XXXI and Article VI of the Pact: for the exception in Article VI to be applicable, it is necessary, the Court said, for "the matters referred to it by [the Applicant] pursuant to Article XXXI of the Pact of Bogotá [to have] previously been settled by one of the methods spelled out in Article VI thereof"[14]. In other words, the reference point for the application of both Article XXXI and Article VI of the Pact are the matters referred to the Court by the Applicant State.

4. In light of the standard thus identified by the Court in 2007, there is no question that the preliminary objection raised by Chile should be rejected. In these proceedings, "the matters referred to it by [Bolivia] pursuant to Article XXXI of the Pact" consist in obtaining a finding by
16 the Court that, in parallel to the 1904 Treaty, Chile committed itself through a series of agreements and unilateral promises to negotiate sovereign access to the sea for Bolivia, and that Chile has not respected this commitment to negotiate. It is clear that these matters (the existence of a

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[9]In the words of the Court in the case of the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 852, para. 53.

[10]See CR 2015/18, p. 20, para. 2 (Pinto).

[11]See A. Zimmermann, Ch. Tomuschat and K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice*, Oxford University Press, 2006, p. 631 ("The item 'any question of international law' encompasses just about everything that can be legitimately submitted to the Court as a legal dispute"); S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, Nijhoff, Leiden, 2006, Vol. II Jurisdiction, p. 717 ("broad enough to cover virtually every international dispute").

[12]See Preliminary Objection of Chile (POCh), para. 1.2.

[13]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 849, para. 42.

[14]*Ibid.*, p. 853, para. 57.

commitment to negotiate undertaken in parallel to the 1904 Treaty and the breach of that commitment) have not been settled and are not governed by the 1904 Treaty.

5. The 1904 Treaty clearly did not prevent the Parties from binding themselves (as they have done) by other commitments to negotiate with a view to enabling Bolivia to obtain sovereign access to the sea. And it is precisely because the obligation to negotiate incumbent upon Chile results from commitments that are distinct from the 1904 Treaty that, Members of the Court, no matter how many times you read the 1904 Treaty, as Chile persists in asking you to do, you will find absolutely nothing enabling you to respond to Bolivia's claim. By definition, the Treaty concluded in 1904 makes no mention of the commitments made by Chile outside that Treaty. That is the — obvious — reason why the 1904 Treaty is quite simply irrelevant in this case and why it thus cannot preclude the Court from exercising its jurisdiction in these proceedings.

6. To escape this inevitable conclusion, Chile has endeavoured to muddy the waters and spread confusion.

7. It made its first attempt to do so by pretending that the 1904 Treaty was the only one in existence. In his "general conclusions" on Monday, Professor Dupuy summarized Chile's line of defence in respect of Bolivia's claim in the following words: in Chile's view, "[t]here is only one treaty binding the parties: and that is . . . the Treaty concluded on 20 October 1904 . . ."[15]. It is on the basis of this premise, whereby there is no other commitment binding Chile to Bolivia, that Chile concludes that everything was supposedly settled by the 1904 Treaty and that consequently the Court cannot entertain Bolivia's claim[16]. Here, Mr. President, we have a fine example of circular reasoning! Everything was settled by the 1904 Treaty because, Chile tells us, there was no other agreement than the 1904 Treaty. Such a reply of course evades the very terms of Bolivia's claim which specifically consists in seeking recognition that, independently of the 1904 Treaty,
17 there exists a commitment to negotiate with Bolivia undertaken by Chile.

8. Chile's counsel are no strangers to contradiction in this regard: on the one hand, Chile urged you on Monday not to consider Bolivia's claim "in a vacuum"[17]; yet on the other, Chile has

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[15]CR 2015/18, p. 64, para. 13 (Dupuy).

[16]*Ibid*.

[17]CR 2015/18, p. 49, para. 14 (Wordsworth).

done its utmost to create a vacuum around that claim by making absolutely no mention at all of the fact that it has declared repeatedly over several decades that sovereign access to the sea was a matter which remained pending after 1904 and which was to be settled independently of the 1904 Treaty; nor has Chile dwelt on the fact that it committed itself on a number of occasions, through bilateral agreements and unilateral promises, to negotiate a sovereign access to the sea.

9. My colleague and friend Sam Wordsworth was the only counsel for Chile to mention — very briefly — what is at the heart of the present case, that is the commitment to negotiate undertaken by Chile in parallel to the 1904 Treaty. The whole essence of its argument has consisted in claiming that these commitments or agreements to negotiate are irrelevant in the present case, because they concern a matter — sovereign access to the sea — which was allegedly settled by the 1904 Treaty[18]. Here we have a fine example of a non sequitur! If Chile did indeed make a commitment to Bolivia to negotiate sovereign access to the sea, as Bolivia argues in its claim, how can it be said that the question of sovereign access to the sea was settled by the 1904 Treaty? It is pure nonsense, a contradiction in terms. The existence of the commitment to negotiate proves on the contrary that Bolivia and Chile considered that the question of sovereign access to the sea had not been settled by the 1904 Treaty. Otherwise, once again, why make a commitment to negotiate on the subject?

10. Chile's second strategy has consisted in distorting Bolivia's claim by presenting it as an attempt to unilaterally challenge the 1904 Treaty. That was the leitmotiv of Chile's arguments on Monday: Chile's Agent denounced Bolivia's so-called unilateral attempts to challenge the 1904 Treaty[19]; Professor Pinto suggested that Bolivia was seeking to "reopen unilaterally " an issue that had already been settled[20]; Sir Daniel, for his part, spoke of the "unilateral attempt to unpick" the 1904 Treaty[21].

11. This is a gross and unacceptable distortion of Bolivia's claim, which is not at all as it is presented. Chile strives to show that a request not mentioned in Bolivia's Application falls outside

[18]CR 2015/18, pp. 66-67, paras. 18-20 (Dupuy).

[19]*Ibid*, p. 14, para. 6, p. 16, para. 12 and p. 17, para. 13 (Bulnes).

[20]CR 2015/18, p. 32, para. 36 (Pinto).

[21]*Ibid*, p. 36, para. 13 (Bethlehem).

the Court's jurisdiction. Whatever one might think of this argument, it has nothing to do with the only question that is being put to the Court: that of whether Bolivia's claim — and no other — falls within the Court's jurisdiction. And as the Agent of Bolivia recalled, the matter brought before you is not the Treaty of 1904. It is the commitment to negotiate undertaken by Chile.

12. Mr. President, to disperse the cloud of confusion artificially created by Chile, it is therefore necessary to set out once again the precise subject-matter of Bolivia's claim, and my presentation this morning will be devoted to this.

I. Bolivia's claim concerns the commitment made by Chile to negotiate sovereign access to the sea

13. Bolivia's claim is clearly set out in the Application instituting proceedings, the relevant extracts from which you will find in your judges' folder at tab 2.

[Slide of extracts from the Application]

14. In the first section of the Application, which defines the subject-matter of the dispute, Bolivia states:

> "1. The present application concerns the dispute between the Plurinational State of Bolivia ("Bolivia") and the Republic of Chile ("Chile") relating to Chile's obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean.
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> 2. The subject of the dispute lies in: *(a)* the existence of that obligation, *(b)* the non-compliance with that obligation by Chile, and *(c)* Chile's duty to comply with the said obligation."

15. In the fourth section of the Application presenting the legal grounds on which Bolivia's claim is based, Bolivia notes:

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> "The facts provided above (Section III) show that, beyond its general obligations under international law, Chile has committed itself, more specifically through agreements, diplomatic practice and a series of declarations attributable to its highest-level representatives, to negotiate a sovereign access to the sea for Bolivia. Chile has not complied with this obligation and, what is more, at the present date Chile denies the very existence of its obligation."

[End of slide of extracts from the Application]

16. In Chapter II of its Memorial, Bolivia gave a more detailed presentation of the various undertakings, declarations and acts by Chile which gave rise to that commitment to negotiate to provide Bolivia with sovereign access to the sea.

The PRESIDENT: Excuse me for interrupting you, Professor. I have the impression that the translation of your speech into English has stopped. We cannot hear it — in any case, I cannot hear it in my headphones. Can that be put right? OK, it has come back. I am sorry to have interrupted you. You may continue.

Mr. FORTEAU: Not at all, Mr. President. Bolivia noted, *inter alia*, that these commitments and declarations were made by the highest-level representatives of the Chilean State, and that they took the form of bilateral commitments and unilateral promises, in particular, to give just a few examples, through an exchange of Notes in 1950[22], the Joint Declaration of Charaña of 8 February 1975[23], the Note of 19 December 1975[24] from the Minister for Foreign Affairs of Chile, and numerous unilateral promises, confirmed in the framework of the Organization of American States in the 1970s and 1980s, and in particular in the resolution of 1983, which was negotiated and approved by Chile and Bolivia[25].

17. Bolivia's Memorial further notes that these commitments were repeated on numerous occasions, over several decades, thus creating legitimate legal expectations on the Bolivian side. To cite just one example, in a Memorandum of July 1961, the Chilean Ambassador to Bolivia confirmed that, by the exchange of letters between the two countries in 1950, Chile had expressed

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its "full consent to initiate as soon as possible, direct negotiations aimed at satisfying the fundamental national need of own sovereign access to the Pacific Ocean" (I quote Annex 24 to Bolivia's Memorial). The same commitment was repeated, among others, in the Joint Declaration of the Ministers for Foreign Affairs of the two countries adopted on 10 June 1977, which you will find at Annex 165 of Bolivia's Memorial.

18. In accordance with these commitments and promises, what the Parties referred to as the "maritime issue" remained on the official agenda of their bilateral negotiations until 2011, as can be seen in the minutes of those negotiations to be found at Annexes 116 to 124 of Bolivia's Memorial. The "maritime issue" was an item in its own right — item 6 — of the so-called Agenda

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[22]See MB, paras. 123-135.

[23]*Ibid.*, paras. 139-163.

[24]*Ibid.*, Annex 73.

[25]*Ibid.*, paras. 172-174.

of 13 points that constituted the scheme for the bilateral negotiations between the two countries until very recently, before Chile abruptly renounced its own commitments in 2011, which left Bolivia with no other choice than to have recourse to the Court.

19. Contrary to what Professor Pinto asserted on Monday, if Bolivia waited until 2013 before seising the Court, it is not because it thought that the question of sovereign access had been settled in 1904[26]; it is because until recently Chile had not repudiated its commitment to negotiate — on the contrary, it was still negotiating in the 2000s, the clearest evidence being the Agenda of 13 points that I have just mentioned.

20. In the light of the information provided in Bolivia's Application and Memorial, there can therefore be no doubt as to the subject-matter of Bolivia's claim: it requests the Court to find that Chile committed itself, through a succession of agreements, declarations and promises made independently of the 1904 Treaty, to negotiate a sovereign access to the sea for Bolivia, and that by its recent repudiation of that commitment Chile has failed to comply with it.

21. Bolivia is absolutely confident that the Court will take formal note of this formulation of Bolivia's claim, the wording of which is perfectly clear, in reaching its decision on the subject-matter of the present dispute. To determine the subject-matter of the claims referred to it,

21 the Court gives "particular attention to the formulation of the dispute chosen by the Applicant"[27]. This is the application of a general procedural principle whereby the applicant is master of its claim. In 1959 in the *Interhandel* case[28] and again in 1974 in the *Nuclear Tests* case, the Court stressed that "the Application . . . must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it"[29]. In 2010, in the *Diallo* case, the Court repeated that the subject-matter of the dispute was "delimited by the terms of the Application"[30]. And as the Court has clearly stated, though it "can construe the submissions of the

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[26]CR 2015/18, p. 28, para. 25 (Pinto).

[27]*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30.

[28]*Interhandel (Switzerland* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 21.

[29]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 260, para. 24.

[30]*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 656, para. 39.

Parties, it cannot substitute itself for them and formulate new submissions simply on the basis of the arguments and facts advanced"[31]. Moreover, the Court has always been very careful to adhere to the precise requests submitted to it[32]. And there is nothing here to justify the Court in departing from these basic principles.

22. Furthermore, should the least doubt remain as to the subject-matter of Bolivia's claim, it would suffice to consider the respective positions of the Parties regarding the present dispute[33].

23. The correspondence exchanged by the Parties prior to the seisin of the Court is unequivocal in this regard. On 8 July 2011, Bolivia informed the Court, in the context of the *Peru* v. *Chile* case, of the precise nature of its position in respect of the obligation to negotiate undertaken in its favour by Chile[34]. The claim formulated in 2011 corresponds to that brought before the Court in 2013, as Chile recognizes in its preliminary objection[35]. Bolivia recalled, with relevant supporting facts, that Chile had committed itself to negotiating sovereign access to the sea and had not abided by that commitment. By a Note Verbale to his counterpart dated

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8 November 2011, the Minister for Foreign Affairs of Chile made its position clear as to the Bolivian claim in the letter of 8 July. According to Chile, "None of the background information mentioned in the letter of 8 July 2011 support the inference of any recognition of an obligation to negotiate sovereign access to the sea, or of an alleged right of sovereign access to the sea, as the Plurinational State of Bolivia tends to suggest"[36].

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[31] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J. Series A, No. 7,* pp. 34-35.

[32] See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 321, para. 107; see also *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 37, para. 49; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, pp. 207-208, para. 87; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 18-19, para. 43.

[33] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29.

[34] POCh, Ann. 65.

[35] See POCh, p. 7, fn 28.

[36] MB, Ann. 82; see also the page dedicated to the claim submitted to the Court by Bolivia on the website of the Ministry of Foreign Affairs of Chile (consulted on 4 May 2015: http://www.mitoyrealidad.cl/what-is-at-stake/mitoyrealidad/2014-12-19/143038.html: "Bolivia's claim is without foundation. Chile is not subject to any legal obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a full sovereign access to the Pacific Ocean").

24. The subject-matter of the dispute is thus clearly identified: Bolivia considers that the commitments and conduct of Chile gave rise to an obligation to negotiate, which has not been respected. Chile, for its part, denies that its conduct gave rise to such an obligation. That is the subject-matter of the dispute on which you are asked to adjudicate.

II. Chile is unjustifiably distorting Bolivia's claim

25. Chile asserts, however, that Bolivia's claim is not about the commitment to negotiate and should be treated as a claim for the revision or nullification of the 1904 Treaty[37]. According to Chile, this is why Bolivia's claim falls outside the Court's jurisdiction by virtue of Article VI of the Pact of Bogotá.

26. Such an assertion is erroneous in several respects.

27. Firstly, Chile's argument that Bolivia's claim is in fact aimed at unilaterally securing the nullification or revision of the 1904 Treaty does not take account of the perfectly clear terms of that claim, which, as I have just recalled, concerns commitments which are separate from the 1904 Treaty, unilateral and bilateral commitments by which Chile undertook to negotiate a sovereign access to the sea for Bolivia.

28. Equally, Bolivia's contention that sovereign access to the sea must be the result, not of a unilateral revision of the 1904 Treaty, but of negotiations in which Chile has agreed to participate,

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is not in any way new, as has been insinuated by Chile[38], which on Monday accused Bolivia of only very recently "repackaging" an old claim as a new commitment to negotiate[39]. More than 30 years ago, in 1979, Bolivia made a statement before the General Assembly of the Organization of American States recalling the numerous promises made to Bolivia by Chile to negotiate sovereign access to the sea[40].

29. Similarly, the declaration made in 1984 by Bolivia on signing the United Nations Convention on the Law of the Sea is free of any ambiguity: according to Bolivia, its sovereign

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[37]POCh, para. 2.1; CR 2015/18, p. 52, para. 23, and pp. 58-59, para. 50 (Wordsworth).

[38]See POCh, para. 2.1: "Although Bolivia has *now* sought to portray its claim as one concerning an obligation to negotiate"; emphasis added.

[39]CR 2015/18, p. 14, para. 6 (Bulnes); p. 59, para. 51 *(c)* (Wordsworth).

[40]See MB, Vol. II, Part II, Ann. 203. See also Ann. 213.

access to the sea must be the product of negotiations — which was accepted by Chile — and not of a unilateral denunciation of the 1904 Treaty. In that declaration, Bolivia officially placed on record in that connection that "it will assert all the rights of coastal States under the Convention once it recovers the legal status in question *as a consequence of negotiations* on the restoration to Bolivia of its own sovereign outlet to the Pacific Ocean"[41].

30. Chile persists, however, in asserting that the true, hidden motive behind Bolivia's seisin of the Court is to mount a unilateral challenge to the 1904 Treaty[42]. But none of the documents it cites to that effect supports this allegation:

— first of all, Bolivia may have described the 1904 Treaty as an "unfair" treaty, imposed upon it by armed force[43], but that clearly does not mean that it in any way considers itself to have the right to nullify it unilaterally, or that it is asking the Court to do so on its behalf;

— as for Chile's allegation that the Bolivian Constitution imposes a duty upon Bolivia to denounce the 1904 Treaty[44], this is nothing short of pure speculation, as Professor Remiro Brotóns will demonstrate shortly.

The fact is, Members of the Court, that Bolivia has not denounced the 1904 Treaty; nor has it asked the Court to do so on its behalf. Once again, Bolivia's claim is clear: what it is asking is for the Court to find that, through other commitments, which exist independently of the 1904 Treaty, Chile has agreed to negotiate sovereign access to the sea for Bolivia.

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31. This, moreover, was understood perfectly by the Chilean authorities when they read first the Application and then the Memorial of Bolivia, as can be seen from several statements made to the press, which are freely available on the Internet:

— on 25 April 2013, the day after the filing of the Application, Chile's Minister for Foreign Affairs, Alfredo Moreno, told newspaper *El Mercurio* that "the first thing to point out is that Bolivia is not challenging the 1904 Treaty in its Application"[45];

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[41] See https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=%20mtdsg3&lang=en&clang=_en; emphasis added.

[42] See POCh, Chap. II.

[43] *Ibid*., para. 2.1, and fn. 18.

[44] *Ibid*., para. 2.3.

— one year later, on 13 March 2014, the new Minister for Foreign Affairs of Chile, Heraldo Muñoz, told newspaper *La Tercera* that Bolivia's claim "is not about challenging treaties; what is at issue is a claim by Bolivia that Chile has an obligation to negotiate a sovereign access to the Pacific Ocean"[46];

— the same Minister for Foreign Affairs stated in the same newspaper on 19 April 2014, having read Bolivia's Memorial, that "it is not a question of a boundary dispute, but of a claim relating to alleged legitimate legal expectations"[47].

32. It is difficult to understand why, under these circumstances, Chile's legal team is now trying to convince the Court that Bolivia's claim actually concerns the 1904 Treaty and not the commitment to negotiate sovereign access to the sea.

25 33. Nevertheless, Chile persisted in arguing on Monday that Bolivia's "real goal" is to "unsettle"[48] or "reopen"[49] something which has already been settled by means of an agreement between the Parties. Once again, this is erroneous: Bolivia does not dispute what has been agreed upon by the Parties in the past; what it is seeking is respect for the commitments made by them.

34. To put it another way, Bolivia is not asking the Court to modify the legal order, contest the international law in force between the Parties, or reopen questions that have already been settled; nor does Bolivia wish to challenge Chile's right of free will. What Bolivia wants is for Chile to respect the commitments it has made, respect the willingness it has shown to negotiate. By asking the Court to find that Chile has committed itself to negotiating sovereign access to the sea for Bolivia, Bolivia is seeking from the Court a judgment that will simply constitute a record reflecting the commitments made freely by Chile in the full exercise of its sovereignty. The

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[45]See *El Mercurio*, 25 Apr. 2013, p. C4: "Lo primero que hay que señalar es que Bolivia en su documento no cuestiona el Tratado de 1904", available at: http://impresa.elmercurio.com/Pages/NewsDetail.aspx?dt=2013-04-25&dtB=18-04-2015%200:00:00&PaginaId=4&bodyid=3.

[46]See *La Tercera*, 13 Mar. 2014: "aquí no está en juego el desconocimiento de tratados, aquí lo que está en juego es una demanda que plantea la obligación que pretendería Bolivia de que Chile negocie una salida soberana de Bolivia al Océano Pacífico", available at: http://www.latercera.com/noticia/politica/2014/03/674-569319-9-canciller-y-demanda-de-bolivia-en-la-haya-no-esta-en-juego-el-desconocimiento-de.shtml.

[47]See *La Tercera*, 19 Apr. 2014: "Aquí no se trata de un diferendo limítofe, sino de una demanda por lo que se ha venido en denominar supuestos 'derechos expectaticios'", available at: http://diario.latercera.com/2014/04/19/01/contenido/reportajes/25-162559-9-heraldo-munoz-tenemos-que-agregar-la-dimension-politica-a-los-argumentos.shtml.

[48]See, for example, CR 2015/18, p. 17, Part IV (Bulnes).

[49]*Ibid*., p. 15, para. 7 (Bulnes).

principle whereby "the right of entering into international engagements is an attribute of State sovereignty"[50] applies equally to the 1904 Treaty and to the commitments to negotiate made by Chile, and it would be unacceptable for those commitments to be reduced to nothing more than scraps of paper on the sole ground that Chile today disputes their existence.

35. To conclude, Mr. President, the subject-matter of the dispute between the Parties is very clearly defined: Chile is today of the view that the law in force between the two States is limited to the 1904 Treaty; Bolivia contends, for its part, that the law in force between the two States includes *both* the 1904 Treaty and the commitment made by Chile to negotiate with a view to granting Bolivia sovereign access to the sea. Thus, the dispute between the two States before the Court does not concern the 1904 Treaty, since both Parties agree that it is in force between them; what the Parties disagree about is the existence, independently of the 1904 Treaty, of a commitment to negotiate sovereign access to the sea freely entered into by Chile. That is the true subject-matter of the dispute.

26 36. Mr. President, in its 1996 Advisory Opinion, the Court emphasized that a commitment to negotiate "includes its fulfilment in accordance with the basic principle of good faith"[51]. It is this "fulfilment" of the obligation to negotiate undertaken by Chile in respect of Bolivia which is the subject-matter of the claim introduced in April 2013, and this claim indisputably falls within the basis of jurisdiction relied upon by Bolivia.

37. Mr. President, Members of the Court, this brings my presentation to an end. Thank you so much for listening. Mr. President, I would be grateful if you could now give the floor to my esteemed colleague Professor Chemillier-Gendreau, who will continue with the presentation of Bolivia's first round of oral argument. Thank you.

The PRESIDENT: Thank you, Professor. I now give the floor to Professor Chemillier-Gendreau.

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[50] *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25.

[51] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 102.

Ms CHEMILLIER-GENGREAU:

CHILE'S ACTIONS AND CONDUCT CONFIRM THAT THE COURT HAS JURISDICTION

1. Mr. President, Members of the Court, you have just heard Professor Forteau explain to you the true content of Bolivia's request as submitted to your Court. This initial point was necessary, given the way in which Chile has misrepresented the subject of this dispute in order artificially to construct a preliminary objection.

2. Bolivia, which I am honoured to represent before you on this occasion, is simply inviting you to return to the real subject of the dispute. It does indeed relate to the obligations of one State to another. However, Chile is seeking grossly to misrepresent the obligations at stake in this case. Those deriving from the Treaty of 1904 are recognized by both States and are not in issue here. On the other hand, Chile is seeking to ignore other obligations into which it has entered on a great many occasions in the form of unilateral promises or exchanges of letters. They are the source of its obligation to negotiate in good faith in order to provide Bolivia with sovereign access to the sea.

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That is the question of international law in respect of which the Pact of Bogotá gives you jurisdiction. You are being asked to safeguard "the integrity of the *pacta sunt servanda* rule", a rule whose importance you have always stressed, for example, in your 1997 Judgment in the case between Hungary and Slovakia[52].

3. These obligations of Chile derive from well-established facts. It is also clear that Chile has reversed its position by recently claiming that everything had been settled between itself and Bolivia since the 1904 Treaty. In making this volte-face, Chile has committed a breach of an international obligation previously entered into by it.

4. Chile has attempted to divert the course of the proceedings instituted by Bolivia by filing a preliminary objection. But its representatives have only been able to do so by succumbing to a strange collective amnesia, whose symptoms we must now examine. They have in fact had to

[52] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 68, para. 114.

rewrite their own past, ignoring the many declarations or unilateral or bilateral acts carried out over several decades by the successive authorities in their country[53].

5. Sheltering behind this massive loss of memory, Chile bases its objection on two points, both equally misconceived:

— First, Chile claims that since 1904 there has been no issue pending between the two States regarding Bolivian sovereign access to the sea. That claim is to be found in paragraph 3.21 of Chile's Preliminary Objection.

— The second point, as misconceived as the first, may be understood as follows: the only way for Bolivia to regain sovereign access to the sea is to undo what the 1904 Treaty did; thus its request is an attempt to have the Treaty revised, in violation of an obligation already entered into by it. That argument can be found in paragraph 2.1 of Chile's Preliminary Objection. This then enables Chile to claim that, since this case involves a treaty concluded prior to the Pact of Bogotá, Article VI of the latter acts as a bar to your jurisdiction.

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6. It is my task to demonstrate to the Court the inconsistency of this two-pronged argument. Its weakness derives in the first place from its recent emergence in the history of relations between the two countries. For more than a century, the various representatives of the Chilean State promised to enter into negotiations in order to put an end to Bolivia's landlocked situation, without affecting the 1904 Treaty. The reversal in Chile's position only began to develop once it had understood that Bolivia was seeking to re-launch century-long negotiations that had become deadlocked. Finding it impossible to do so, Bolivia clearly announced its intention to have recourse to the legal routes available to it. It was in this context, in contrast with the infinite patience shown by Bolivia until then that, from 2011, the Chilean attitude very clearly hardened.

7. Mr. President, Members of the Court, although I am appearing here before you on behalf of Bolivia, it is Chile's words which have echoed down the decades. I am going to quote them to you at length, at the same time as they will appear on your screens. We are obliged to do this, because Chile has confined itself to a few lines, paragraphs 4.9, 4.10 and 4.11, in its pleadings on the core issue , and just a few minutes in oral argument. It is thus seeking to minimize the

[53]MB, paras. 34 to 219, and paras 58 to 69 of the Written Statement of the Government of the Plurinational State of Bolivia (WSB), filed on 7 Nov. 2014 in reply to the Preliminary Objection of Chile.

importance of its long series of prior statements. But once we have remedied this, the Court will be able to see clearly how, in order to object to your jurisdiction, Chile is obliged to contradict its own past statements.

8. As you will see, there is indeed an issue pending between the two States. And it is Chile itself which has placed the 1904 Treaty outside the scope of the present proceedings, for it is Chile which has laid down the principle that the solution to Bolivia's landlocked situation cannot call into question the provisions of that Treaty. Once we have re-established the truth, that will dispose of the arguments based on Article VI of the Pact of Bogotá, which would have acted as a bar to your jurisdiction.

9. The Pact of Bogotá was signed on 30 April 1948. In order for the Court to be able to exercise the jurisdiction conferred on it by that instrument, the question submitted to it must not have been settled at that date by an agreement between the Parties, or by a treaty in force in 1948. We must therefore look at the situation on that date. The need to settle Bolivia's access to the Pacific was recognized by Chile long before, immediately following the conquest of Bolivia's coastal territory in 1879, and has constantly recurred in relations between the two States since that date, both before and after the 1904 Treaty. This permanent state of affairs is indeed proof that, at

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the date of entry into force of the Pact of Bogotá, the matter had not been settled. As regards the stages in the negotiations which continued after the entry into force of the Pact, we can well understand why Chile seeks to exclude them from the argument. Do they not represent evidence confirming that, at the date of the Pact, the matter had not been settled? Chile's efforts thus demonstrate the impasse in which it finds itself as a result of the fact that the arguments on which its Preliminary Objection is founded are persistently contradicted by its own actions over a long period of time.

10. Let us summarize the matter in broad outline. We know that Chile's military attack on the port of Antofagasta, which was then part of Bolivia, took place on 14 February 1879[54]. From then on, Chile's intentions were very clear: to take possession, definitively, of a coastline famous for its wealth of saltpetre and various ores and metals[55]. But as happens, both in human relations

[54]MB, para. 55.

[55]See MB, Anns. 15 and 16.

and in relations between States, Chile, having achieved this conquest, was aware that it had produced an injustice, which could not be left as it was. Domingo Santa Maria, initially Chile's Minister for Foreign Affairs and quoted just now by Bolivia's Agent, wrote as follows, in November 1879: "Let us not forget, even for a moment, that we cannot suffocate Bolivia . . . [*W]e must* somehow provide it with its own port . . ."[56] Having become President of Chile, he reiterated four years later: "Bolivia cannot remain as it is . . . No people can live and develop in such conditions . . . [*W]e must* grant it an access of its own to the Pacific."[57] It is the verb "must" that he uses. Thus Domingo Santa Maria, addressing a Chilean audience, laid the basis for an obligation incumbent upon the country which he led. That obligation, which was recognized as such at the time, has to this day not been complied with.

11. However, the Chilean State then set about devising a solution enabling it to reconcile its possession of the Bolivian littoral, which it was firmly determined to keep, because of the powerful economic benefits that it offered, with the feeling that it could not leave Bolivia landlocked in this way. That approach found concrete expression in the treaties of 1895. Those instruments
30 constitute a mutually-coherent whole. One ratifies the Chilean gains on the territory of Bolivia. The other provides for the latter to be given its own access to the Pacific by granting it part of the territory conquered by Chile from Peru[58].

12. Those 1895 treaties would never be effectively implemented and, contrary to what Chile insinuates, Bolivia has never sought to deny this. But that phase throws light on the intentions on Chile's part that are now so vehemently denied: it represented the outline for a settlement of the issue still pending before us today. The duality of the Chilean position: confirming its seizure of the Bolivian coast, while giving Bolivia access to the sea, would be the dominant motif in Chile's diplomacy in this area. The first limb of the Chilean position became effective in law through the 1904 Treaty, which is recognized by both States as being in force between them. As regards the second limb of the Chilean position: not to leave Bolivia landlocked, Chile has committed itself

[56]MB, Ann. 34; emphasis added.

[57]*Ibid.*, Ann. 36; emphasis added.

[58]*Ibid.*, Anns. 98 and 99, and POC, Ann. 3.

over decades to negotiating this question independently of the *de jure* consolidation of its territorial conquests.

13. On the strength of these promises, Daniel Sanchez Bustamante, Bolivia's Foreign Minister, summarized the Bolivian position in 1910: "Bolivia cannot live isolated from the sea."[59] Echoing the statement, Emilio Bello Codesido, Chile's Foreign Minister, who had himself signed the 1904 Treaty on behalf of Chile, wrote in September 1919 that Chile wished to make every effort to enable Bolivia to acquire its own access to the sea, adding that this would be independently of the provisions of the 1904 Treaty[60]. The same approach can be seen in the Act of 10 January 1920. Chile states itself ready to settle the problem of Bolivia's landlocked situation "independently of the final situation created by the provisions of the Treaty of Peace and Friendship of 20 October 1904"[61]. Many years have gone by since the conclusion of that Treaty, but Chile has left the issue open, and its settlement must be achieved independently of that Treaty.

31 14. In a Note of 6 February 1923, the Chilean Minister for Foreign Affairs stated that Chile was ready to conclude a new Pact, "which responds to the situation of Bolivia, without modifying the Treaty of Peace"[62]. And this was not written lightly, for the same Minister returned to the matter in a Note of 22 February of the same year[63].

15. Since the future of the territories conquered from Peru had not been settled, the Government of the United States offered to serve as mediator. In a memorandum of 23 June 1926, Chile then proposed that part of the territory of Arica should be transferred to Bolivia[64]. The American Secretary of State, Frank Kellogg, went further and, on 30 November 1926, he proposed that Chile and Peru should cede in perpetuity to Bolivia the provinces of Tacna and Arica[65]. In his Memorandum in reply, the same Chilean Foreign Minister, Jorge Matte, pointed out that he had never dismissed the idea of granting Bolivia a strip of territory and a port. However, he observed:

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[59]MB, Ann. 18.

[60]*Ibid.*, Ann. 19.

[61]*Ibid.*, Ann. 101.

[62]*Ibid.*, Ann. 48.

[63]*Ibid.*, Ann. 50.

[64]*Ibid.*, Ann. 20.

[65]*Ibid.*, Ann. 21.

"the question has remained pending until the present moment"[66]. The 1904 Treaty thus did not settle all outstanding issues, and the solution proposed by the mediator left the provisions of that Treaty untouched.

16. The War of the Pacific had affected not only relations between Chile and Bolivia, but also those between Chile and Peru, and peace was concluded between the two latter States by the Treaty of Ancon of 20 October 1883. But the fate of the territories of Tacna and Arica was not settled, provision having been made for a plebiscite to decide whether those provinces should remain Chilean or return to Peru[67]. Ultimately, it proved impossible to organize that plebiscite, and the two States agreed in the Treaty of Lima of 3 June 1929 to share the territories between them, with Tacna returning to Peru and Arica remaining with Chile.

17. The fact that the problem of Bolivia's sovereign access to the ocean was still a pending issue between that country and Chile was obliquely apparent in the Protocol to that Treaty[68]. The first Article states that the signatory Governments, namely Chile and Peru, shall not, without a prior
32 agreement between them, cede to a third Power the whole or a part of the territories which, in accordance with the Treaty, come under their respective sovereignties. That is an unusual clause. Although it is applicable only as between the two signatory States, it should be noted that it is justified by the negotiations already opened by Bolivia and Chile on the transfer to Bolivia of any or all of the territory passing to Chile under the Treaty. It confirms the existence of a pending issue, as well as the need to settle it outside the framework of the 1904 Treaty. It was, moreover, along those lines that the Charaña process would be launched in 1975; I shall come back to this later.

18. When the Pact of Bogotá came into force in 1948, negotiations between the two States on the question of Bolivia's sovereign access to the ocean had already been reopened for some months. By some curious logic, my learned friend Mr. Wordsworth argues that, if the two States were then negotiating, it proves that the matter was already settled[69]. Bolivia confesses that it is

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[66]MB, Ann. 22.

[67]POCh, Ann. 1.

[68]MB, Ann. 107; POCh, Ann. 11.

[69]CR 2015/18, pp. 46-61, paras. 1-60 (Wordsworth).

unable to follow him, and it respectfully requests the Court kindly to consult Annexes 58 to 68 of Bolivia's Memorial. There it will find confirmation that, in those negotiations, it was not a question of reopening a matter which already been settled, but in fact of settling a pending issue, and doing so independently of what had been settled by the 1904 Treaty.

19. That phase of the negotiations resulted in the Note of 20 June 1950, in which the Chilean Minister for Foreign Affairs replied to the Bolivian Ambassador in Santiago, who, on 1 June, had proposed negotiations to settle the matter[70]. Chile's representative stated that his Government had always been willing, while "safeguarding the legal situation established by the Treaty of Peace of 1904, . . . to study in direct negotiations . . ., the possibility of satisfying [Bolivia's] aspirations". That exchange of letters, a bilateral act, is a key element among the many Chilean acts underpinning its obligation to Bolivia. It clearly contradicts the twofold claim put forward by Chile today.

20. The two core notions in that 1950 Exchange of Letters were taken up again in a document known as the Trucco Memorandum, after its author, the Chilean Ambassador to Bolivia. "Chile", he wrote on 10 July 1961, "has always been willing, along with preserving the legal
33 situation established by the Treaty of Peace of 1904, to examine directly with Bolivia the possibility of satisfying the aspirations of the latter and the interests of Chile"[71]. Here, clearly formulated by a senior Chilean diplomat, we see what that State seeks to deny today before this Court. Chile stresses that this text also states its refusal to allow any recourse to organs which are not competent. But it is for the Court to tell us, in light of Chile's obligations, whether it regards itself as an organ competent to settle the dispute which we have submitted to it.

21. These exchanges failed to produce any positive result, and a crisis between the two States ensued. However, a new phase began in 1975 after the two Heads of State met at Charaña. They agreed, in a Joint Declaration of 8 February, 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 . . ."[72]

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[70]MB, Ann. 109.

[71]MB, Ann. 24, and POCh, Ann. 48.

[72]Joint Declaration of Bolivia and Chile, Charaña, 8 Feb. 1975, Ann. 111.

22. I ask the Court kindly to note the language used in this Joint Declaration. The Heads of State use the word "solve". What is to be solved is clearly an issue to which no solution has yet been found. Moreover, both countries recognize that these are issues that they "face". Which clearly means that they have not been settled. And the declaration gives as an example of these vital issues: Bolivia's landlocked situation. Thus the Chilean President is not telling us that there is no longer anything to solve because everything had been settled in 1904. Can Chile explain the reasons for this silence?

23. Can Chile explain to us why, in a Note of 19 December of that year, the Chilean Minister states that, once arrived at, the final agreement will represent solemn testimony that the territorial cession permitting sovereign access to the sea will represent the full and final solution to the landlocked situation of Bolivia[73]? If, for 70 years, there had been nothing more to discuss, why then say that Bolivia should be granted a maritime coast, but without prejudice to the provisions of the 1904 Treaty? There you have it, Mr. President, Members of the Court, proof that the issue of Bolivia's sovereign access to the sea had not been settled at the time when the Pact of Bogotá was concluded, and was still not settled almost 30 years later.

34 24. The need to consult Peru, and the latter's counter-proposal, were responsible for the lack of progress in the negotiations. However, the Foreign Ministers of Chile and Bolivia were still able, on 10 June 1977, to produce a joint declaration stating that they would deepen and activate dialogue aimed at allowing Bolivia sovereign access to the Pacific Ocean[74]. Finally, following the failure of this phase, when the Presidents of the two States launched what became known as the "13 Points", it was recognized that the issues settled by the 1904 Treaty were separate and distinct from those covered by Bolivia's "maritime issue"[75].

25. How can Chile explain that, almost 50 years after the Treaty entered into force, it was prepared to show so much willingness to enter into negotiations to settle an issue then described as pending, which today is claimed to have been settled since 1904? Were these simply, both in 1950 and in 1975, insincere gestures? Are we dealing here with deliberate breaches of the principle of

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[73]MB, Ann. 73, and POCh, Ann. 52.

[74]MB, Ann. 165.

[75]MB, paras. 205-214, and Ann. 118.

good faith in international relations? That is an issue which will be debated in due course before this Court. At this, the preliminary objections stage, all you have to do is to note the positions adopted by Chile.

26. And, moreover, you already did so in the recent *Maritime Delimitation* case between Chile and Peru. In its written pleadings, Chile had referred expressly to the negotiations in which, at different times, it had recognized the need to cede to Bolivia an access corridor to the sea. On that basis you were able to state, in your decision of 27 January 2014, that in 1975 to 1976, "Chile entered into negotiations with Bolivia regarding a proposed exchange of territory that would provide Bolivia with a 'corridor to the sea' and an adjacent maritime zone"[76]. Thus you yourselves noted the fact that the question of Bolivia's sovereign access to the sea remained an open issue between Bolivia and Chile.

27. It is true that that was in a different case. But the consistency that the Court is always concerned to establish means that it follows what it has said previously when there is no new element justifying a change in its position. Thus, in the *Oil Platforms* case, the Court recalled that it had decided in 1980 that the Treaty of 1955 was in force at that time, adding that "none of these circumstances brought to its knowledge in the present would cause it now to depart from that view"[77]. You will agree that there has been no new circumstance since your Judgment of 27 January 2014.

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28. Chile's own commentators agree. Thus, in an article published in the French Yearbook of International Law in 1977, a trio of eminent Chilean jurists explained to their readers that the documents exchanged between the two countries during that process "sought to satisfy Bolivia's aspiration for sovereign access to the Pacific Ocean"[78]. They took the view that the response of the Chilean Government could in fact be regarded as a unilateral promise, given that it constitutes the acceptance of conduct whose aim is the commencement of negotiations. And they explained that

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[76]See paras. 36 and 37 of Bolivia's Written Statement on Chile's preliminary objection.

[77]*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 809, para. 15.

[78]"Les négociations entre le Chili et la Bolivie relatives à un accès souverain à la mer", Rodrigo Diaz Albonico, Maria Teresa Infante Caffi and Francisco Orrego Vicuna, French Yearbook of International Law, 1977, p. 352.

"such negotiations were intended to achieve an agreement independent of any other prior treaty practice between the two countries". They continued:

> "That means that the Treaty of Peace of 1904, which consolidated territorial arrangements between the two countries, will in no way be interpreted, amended or revised by the new agreement under negotiation. In that sense, Bolivia's sovereign access to the sea would be legally independent of historical claims concerning the loss of the maritime coastline"[79].

There could be no better interpretation of the position which Bolivia is defending before the Court. Those Chilean jurists thus confirmed that Chile's promises opened the way to the settlement of a pending issue, and that they did so quite independently of the 1904 Treaty. And when Chile's counsel argued last Monday at this Bar that Bolivia was trying to make the 1904 Treaty disappear as if by magic, the article from which I have just quoted here provides overwhelming evidence of the fact that the initiative for that "disappearance" came from Chile itself.

29. Finally, I am bound to draw the Court's attention to the fact that Chile recognized that this was a pending issue in the Assembly of the Organization of American States. Thus Chile
36 voted in favour of the General Assembly's resolution of 18 November 1983, in which the need for a solution giving Bolivia sovereign access to the Pacific Ocean was mentioned[80]. There is also the declaration by the Chilean delegate to the General Assembly on 12 November 1986, where he refers both to the intangibility of the 1904 Treaty and to Chile's intention to grant Bolivia sovereign access to the ocean[81].

30. Everything I have cited here relates to facts. Facts reflecting Chile's conduct[82]. These are proven facts, as is confirmed in the annexes submitted by Bolivia, but also, as regards certain of these facts, by the annexes filed by Chile itself. If I have discussed them in detail, it is because of their consequence for the decision which the Court will take on its jurisdiction. For these are legal facts, capable as such of producing effects in law. They reflect the will of a subject, in this case the Chilean State. As their originating source, Chile cannot subsequently deny their truth, in order to construct a different truth.

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[79]"Les négociations entre le Chili et la Bolivie relatives à un accès souverain à la mer", Rodrigo Diaz Albonico, Maria Teresa Infante Caffi and Francisco Orrego Vicuna, French Yearbook of International Law, 1977, p. 353.

[80]MB, Ann. 206, and WOCh, Ann. 55.

[81]MB, Ann. 208.

[82]See *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1976*, p. 9, para. 16.

31. In its argument before the Court last Monday, Chile invited the Court to interpret Bolivia's request. But at the same time, citing a number of your previous decisions, it recalled that, in order to identify the true dispute, the Court must base itself not only on the Application and on the Applicant's submissions, but also on diplomatic exchanges, public statements and other relevant evidence. However, in focusing on material emanating from Bolivia that is not relevant to the case, Chile omits to mention all those actions attributable to Chile itself. The Court cannot ignore them.

32. Those actions are in striking contrast with the recent categorical denial by Chile of the very existence of the issue, obstinately claiming that Bolivia's Application is a cover for a desire to revise the 1904 Treaty. What is at stake here is the principle of good faith. In his reference work on good faith Robert Kolb has written: "Everyone is entitled . . . to count on a certain constancy and continuity in the conduct of others, wherever its own sphere of interest is affected"[83].

37 33. You recalled this key principle in international relations in your 1974 Judgment in the *Nuclear Tests* case[84]. Similarly, you have made it clear a great many times that international law focuses on the intention of the Parties, in particular in the *Malaysia/Singapore* case, decided in 2008[85]. And in the case before you today, the joint intention of the Parties has for over a century been to reach a settlement of this issue. The fact that the Parties have not managed to do so and that Chile today denies that this unsettled question continues to exist, that in itself constitutes a dispute and justifies its being submitted to you on the basis of your jurisdiction under Article XXXI of the Pact of Bogotá. By denying an intention expressed over such a long period, Chile will not succeed in convincing this Court that its jurisdiction is barred by the existence of exceptions covered by Article VI of that same Pact. It would have to show that the issue before you has been settled since 1904. Yet Chile has clearly and publicly stated the contrary.

34. Mr. President, Members of the Court, the Bolivian people has been deprived of its coastline by the consequences of a war. But it continues to seek to escape the land-locked situation

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[83]Robert Kolb, "La bonne foi en droit international public", *Revue belge de droit international public*, 1998/2, p. 685.

[84]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46.

[85]*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 42, para. 120.

in which it has been unjustly enclosed. However, it seeks to do so by legal means. Respecting its word, it does not challenge the 1904 Treaty. But it has trusted the statements by Chile, which, ever since the end of the war, has assured it of its desire to give it sovereign access to the Pacific otherwise than by reopening the 1904 Treaty. In these circumstances, and since both Parties agree that the Treaty is external to the dispute, the impediment constructed by Chile in order to justify its preliminary objection can be seen to be unfounded.

35. Thus Chile seeks to draw the Court into the hallucination from which it is suffering. Doubtless blinded by the sun, and by the aridity of the Atacama Desert, which formerly belonged to Bolivia and became Chilean as a result of the 1904 Treaty, Chile sees, as if in a mirage, two impediments to your jurisdiction. But this is what happens with mirages: they disappear as soon as the observer attempts to check if they are real. And the impediments invented by Chile are no more real than the *Roses of Atacama* dreamed up by Luís Sepúlveda. They flower once a year, and
38 that same day the midday sun burns them up. That may be a comfort to students of great literature, but it is no basis for a just solution to a problem of international law. In this quite specific area, once the mirage has disappeared, Chile's preliminary objection loses all substance. And there is nothing left to prevent the application of the Pact of Bogotá, whose Article XXXI applies here without being barred from doing so by any exception allegedly derived from Article VI of the same Pact. That issue will now be addressed by Professor Antonio Remiro Brotóns. Thank you very much.

The PRESIDENT: Thank you, Professor. The Court will now rise for a break. The hearing will continue in 15 minutes for Bolivia's further argument. The sitting is adjourned.

The Court adjourned from 11.25 a.m. to 11.45 a.m.

The PRESIDENT: Please be seated. The hearing is resumed. I should have mentioned earlier at the opening of the hearing — and I do so now — that Judge Robinson is unable to sit with us this morning for reasons duly communicated to me. I now give the floor to Professor Remiro Brotóns for the continuation of Bolivia's argument. Yes, Professor.

Mr. REMIRO BROTONS:

ARTICLE VI OF THE PACT OF BOGOTÁ DOES NOT EXCLUDE BOLIVIA'S CLAIM FROM THE COURT'S JURISDICTION

1. Mr. President, Members of the Court, Chile recognizes that the Pact of Bogotá applies in its relations with Bolivia. Chile therefore accepts that the procedures established by the Pact are, in principle, applicable, given that Bolivia invoked Article XXXI to found the jurisdiction of the Court, pursuant to Article 36, paragraph 1, of the Court's Statute. But, alas, Chile seeks to circumvent that jurisdiction by relying on Article VI of the Pact, this provision being the only basis for its objection. I appreciate the trust placed in me by Bolivia, and am doubly honoured to appear before you today and argue in favour of the Court's jurisdiction in these proceedings.

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I. Article VI of the Pact of Bogotá

2. Mr. President, Members of the Court, if I may, I won't repeat the terms of Article VI of the Pact, now showing on the screen in the Court's official languages and in the shared language of the Parties, which is also the language in which the Pact was negotiated[86]. [Slide 1: French, English and Spanish texts of Article VI on the screen]

Chile interprets this provision as consisting of two limbs, each of which independently excludes the Court's jurisdiction: *the first* concerns the inapplicability of procedures provided for in the Pact "to matters already settled by arrangement between the parties"; the aim of *the second* is to exclude matters "which are governed by agreements or treaties" in force on the date of the conclusion of the Pact, 30 April 1948. Chile maintains that the relevant "matters" in the case before us have been settled and are governed by the 1904 Treaty of Peace and Amity, which was in force on the date the Pact was concluded[87].

3. However, Chile fails to draw any practical conclusion from the distinction it posits. Moreover, there is nothing in the *travaux préparatoires* of Article VI to suggest that the two limbs thus distinguished should be interpreted separately. Thus the twofold concept of exclusion put

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[86]English text: "The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty."

[87]POCh, paras. 1.6, 2.4, 3.3, 3.4; CR 2005/18, pp. 25−28, 52−61.

forward by Chile could very well be narrowed down to just one, namely: any agreement in force between the Parties concerning a contentious matter that preceded the conclusion of the Pact of Bogotá blocks the jurisdiction of the Court. The words "agreements or treaties" are the written and formal expression of the "arrangements" referred to in Article VI, included to underline that agreements can in fact take very diverse forms and titles[88].

4. Similarly, the phrases "matters already settled" and matters "governed by" do not lead to distinct legal consequences. That was the finding of the Court in its Judgment of 13 December 2007 in the *Territorial and Maritime Dispute*[89]. The Court observed that: "in the specific circumstances of the present case, there is no difference in legal effect, for the purpose of applying Article VI of the Pact, between a given matter being 'settled' by the 1928 Treaty and being 'governed' by that Treaty"[90].

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5. Bolivia believes that, even if the contention that there are two limbs were to be upheld, thus extending the scope of the objection to the Court's jurisdiction, Chile's claim would still fail. The 1904 Treaty could not have settled a dispute that did not exist in 1904 and, moreover, cannot govern matters such as that put forward by Bolivia, which, as my colleagues have already shown, did not fall within the terms of that Treaty. [End of slide 1]

II. Chile's misreading of Article VI of the Pact

6. Mr. President, the purpose of Article VI of the Pact is to exclude challenges, without the consent of the Parties, to treaties or legal and arbitral decisions from the range of disputes that may be subject to the procedures provided for in the Pact. This is simply a matter of respecting the principles of *pacta sunt servanda* and *res judicata*. As the Court quite rightly noted in the case I have just cited, "the clear purpose" of Article VI of the Pact was to preclude the possibility of using the procedures provided for in the Pact, and in particular judicial means, "in order to reopen such matters as were settled between the parties to the Pact, because they had been the object of an

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[88] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994,* p. 120, para. 23.

[89] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*.

[90] *Ibid.*, p. 848, para. 39; emphasis added.

international judicial decision or a treaty"[91]. Equally, we do not dispute the fact that the 1904 Treaty was in force on 30 April 1948, as it still is today, on 6 May 2015, at around midday. The source of the disagreement with Chile thus clearly does not concern the purpose of Article VI, but its interpretation as pleaded by our opponents in order to provide a totally artificial basis for their so-called preliminary objection.

7. Our opponents propose a misconceived and misleading interpretation of the area of exclusion provided for in Article VI of the Pact. Chile claims that territorial sovereignty and the nature of Bolivia's access to the Pacific Ocean are the relevant "matters" in the case before us, and argues that these matters have already been settled "by arrangement" and are, at the same time, "governed by agreements and treaties", in this instance the 1904 Treaty. In the unlikely event that

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this interpretation were to be accepted by the Court, the end-result would be to extend it not only to matters settled in the 1904 Treaty, but also to the whole field of issues potentially associated with territorial sovereignty.

8. Chile is trying to block the Court's jurisdiction in the belief that it suffices for there to be some connection with this *matter*. In Chile's view, it is the subject-matter covered by the 1904 Treaty that supposedly determines whether the Court's jurisdiction is excluded. If that were so — *quod non* —, the result would be to make Article VI a sort of black hole, whose gravitational pull would draw in any "agreement", including obligations assumed entirely independently of and subsequent to the 1904 Treaty.

9. This reading of Article VI of the Pact is not only absurd, but is also contradicted by the way this Court has interpreted it in the past. In the *Territorial and Maritime Dispute*, Colombia attempted to escape the Court's jurisdiction by arguing that all the issues forming the subject-matter of Nicaragua's Application had been settled by the 1928 Treaty and the 1930 Protocol and that, consequently, they were covered by the exclusion provided for in Article VI of the Pact. And what did the Court do? Far from accepting that argument at face value — the same argument that Chile is now pleading — the Court examined those issues, one by one, in the light of the Treaty and the Protocol. It found that the Treaty had settled the matter of

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[91] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 858, para. 77.

Colombian sovereignty over the named islands of the San Andrés Archipelago, but had not dealt with the question of the scope and composition of the rest of the Archipelago or with the other questions under discussion. The Court consequently upheld the objection to its jurisdiction in so far as it concerned sovereignty over the islands of San Andrés, Providencia and Santa Catalina, and rejected the said objection in respect of the other questions, finding that it had jurisdiction to adjudicate on those disputes on the basis of Article XXXI of the Pact[92].

10. Mr. President, in the case before us, the Court's task is equally specific, though simpler. Chile, both before and after the conclusion of the 1904 Treaty, demonstrated its willingness to negotiate with Bolivia sovereign access to the Pacific Ocean, a matter which the 1904 Treaty did not settle — as demonstrated, moreover, by its recurrent appearance on the agenda of relations between the two countries.

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11. Furthermore, Chile manipulates the subject-matter of the dispute submitted by Bolivia in such arbitrary fashion that its drafters no longer recognize the result. When the subject-matter of the claim is presented as it should be, it can readily be seen that the 1904 Treaty cannot provide a reasonable basis for Chile's invocation of Article VI as a bar to the Court's jurisdiction.

12. Bolivia firmly rejects the idea that the dispute we are discussing today can be presented by Chile as a dispute aimed at revising the 1904 Treaty. The documents produced by Bolivia to the Court are unequivocal in this regard. Bolivia has made it perfectly clear, in writing in its Statement of 7 November 2014 and in the oral presentations of my colleagues, Professors Mathias Forteau and Monique Chemillier-Gendreau, what the precise subject-matter of the claim is. The "matter", the only matter, in respect of which Bolivia is appearing before you, the subject-matter of its Application, concerns *the existence of Chile's obligation to negotiate with Bolivia its sovereign access to the Pacific Ocean*. We cannot accept that the 1904 Treaty has some kind of corrosive effect, capable of destroying the Court's jurisdiction even in the case of obligations assumed by Chile independently thereof.

13. Furthermore, Chile itself recognized that the 1904 Treaty was not at issue in the present case. Suffice it to recall in this connection the series of instruments in which Chile showed itself to

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[92] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II),* pp. 829−876.

be aware of the fact that consideration of the matter of Bolivia's sovereign access to the Pacific Ocean was independent of compliance with the 1904 Treaty. Chile's claims that the subject-matter of the dispute *masks* an intention to revise the 1904 Treaty are completely absurd and unfounded, as is its attempt to ensnare the dispute in the catch-all net of Article VI of the Pact. Bolivia's institution of proceedings before the Court is not a political act. It is an independent judicial action whose aim is in no sense to challenge the 1904 Treaty.

14. Chile is welcome to continue vaunting the perceived merits of that Treaty[93]. But Bolivia will not participate in the debate sought by Chile in order to bolster its objection to the Court's
43 jurisdiction. Members of the Court, Chile would need a magic wand to enable it to invoke the terms of the 1904 Treaty in order to make Article VI of the Pact applicable to the issue of the obligation to negotiate sovereign access to the Pacific Ocean. [Slide 2: paragraph 34 of the Application]

As our opponent is well aware, there are specific procedures in place for settling claims concerning the interpretation and application of the 1904 Treaty, which Bolivia expressly underlined in the last paragraph of its Application, now showing on the screen. [End of slide 2]

III. Chile's attempts to "compel" the application of Article VI of the Pact

15. Mr. President, Chile refers time and again to Bolivia's so-called "reformulation" of its claim, in order, it argues, to *escape* the effects of Article VI of the Pact[94]. Chile has tried every trick in the book to convince the Court that *there is more than meets the eye* to Bolivia's Application. But these attempts do nothing other than muddy the waters and distort the subject-matter of the dispute. Bolivia does not need to *escape* anything. Rather it is Chile that has to face up to the commitments it has made, as well as to the terms of the Pact and, more fundamentally, to the consequences resulting from Article XXXI, given that every avenue explored by it seems to take us back to where we started: the unavoidable fact of the Court's jurisdiction. It is perhaps worth taking a few minutes to shed light on the diversionary tactics employed by Chile.

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[93]POCh, paras. 3.20−3.39; CR 2015/18, pp. 33−46 (Bethlehem).

[94]POCh, para. 2.1.

16. First of all, there is the emphasis it places on the 1895 Treaty. Our opponent refers to this instrument as one of the "tricks" used by Bolivia to try to circumvent the 1904 regulations. Chile argues that Bolivia invokes this Treaty as the basis for its claim to a right of sovereign access to the Pacific Ocean, before accusing it of omitting to mention that this Treaty never entered into force between the Parties[95]. However, one need only look at the corresponding paragraphs of

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Bolivia's Memorial to see that Chile's contention lacks rigour[96]. The 1895 Treaty is mentioned by Bolivia only as a *precedent*, and not as the source of Chile's obligation to negotiate sovereign access. In citing that instrument, Bolivia is merely attempting to show, as Professor Chemillier-Gendreau has already explained, that, even prior to 1904, the Parties were already distinguishing between Bolivia's cession of the *Litoral* province to Chile and Bolivia's sovereign access to the sea through other territories.

17. Chile's second attempt to distort the subject-matter of the dispute concerns its treatment of Bolivia's reservation to Article VI of the Pact[97]. As we know, Chile sought to rely on this reservation in order to prevent the Pact from entering into force in respect of its relations with Bolivia[98]. Bolivia's response came in the form of a clarification (an *aclaración*, to be precise), explaining that the sole purpose of its "reservation" was to enlarge — and not to exclude or limit — the Pact's obligations and that Chile's objection could not therefore produce its desired effect[99]. Nevertheless, in view of Chile's continuing objection to that reservation and to the Pact's entry into force[100], Bolivia decided to withdraw it[101], and thus to dispel any doubts regarding the applicability of the Pact to its relations with Chile. While maintaining the reservation might have resulted in fruitful doctrinal debates, it would also have impacted negatively on the course of the judicial proceedings, given the subject-matter of the Application. As a result, Article VI became the only

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[95]POCh, paras. 4.1-4.8; see also, paras. 1.5, 3.22 *(b)*; CR 2015/18, pp. 43-45 (Bethlehem), p. 54 (Wordsworth) and p. 64 (Dupuy).

[96]MB, Vol. I, pp. 136-138, paras. 338-345.

[97]POCh, paras. 3.13-3.19; CR 2015/18, pp. 28-30 (Pinto), p. 55 (Wordsworth).

[98]See POCh, Vol. III, Ann. 64.

[99]See OEA-MP-225-11: "la objeción de la República de Chile es intrínsecamente incapaz de producir los efectos en ella mencionados dada, en particular, la naturaleza de la reserva boliviana que, lejos de restringir o suprimir las obligaciones del Pacto, no pretende sino ampliarlas, razón por la cual no implica compromiso alguno para las Partes en el Pacto que no la acepten expresamente".

[100]Letter from the Minister for Foreign Affairs of Chile dated 12 December 2011, POCh (Ann. 68).

[101]See OEA MPB-OEA-ND-039-13, 10 April 2013.

means by which Chile could try to circumvent the Court's jurisdiction; hence its need to distort the subject-matter of the dispute.

18. Mr. President, for its third attempt, Chile became a specialist in interpreting the 2009 Bolivian Constitution[102]. Article 267, paragraph 1, of the Constitution stipulates that Bolivia

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has an "unwaivable and imprescriptible right over the territory giving access to the Pacific Ocean and its maritime space". Paragraph 2 of the same Article adds that "the effective resolution of the maritime dispute by pacific means and the full exercise of sovereignty over the above-mentioned territory are permanent and inalienable objectives of the Bolivian State". This is a policy statement which promotes action to achieve those objectives — action which is entirely compatible with and separable from the validity and observance of the 1904 Treaty. Article 267 of the Constitution does not call for the return of the *Litoral* province — which was ceded by Article II of the 1904 Treaty — but for sovereign access to the sea as a permanent and inalienable objective to be achieved by peaceful means.

19. This provision has its own bearing on the interpretation of the ninth transitional provision, pursuant to which, within four years of its appointment, the Executive Branch "will denounce and, if necessary, renegotiate those international treaties that are contrary to the Constitution".

20. Article 6 of the so-called Law on Normative Application stipulated that, as an alternative to denunciation, treaties contrary to the Constitution could be challenged before international tribunals "with the purpose of protecting the high interests of the State", without any reference to the 1904 Treaty. The same can be said of the declaration made by the Constitutional Court on 25 April, which merely states, in equally general terms, that it is for the Executive Branch to identify the treaties contrary to the Constitution.

21. The ninth transitional provision has been applied to a string of treaties — in particular to around 20 treaties for the protection of investments — according to a list drawn up by the Ministry of Foreign Affairs, a list on which the 1904 Treaty has never featured. Moreover, denunciation

[102]POCh, para. 2.3; CR 2015/18, pp. 50-52 (Wordsworth).

must be carried out in accordance with the relevant clauses of the treaties concerned, and with the general rules of international law, as provided in Article 260, paragraph 2, of the Constitution.

22. In fact, the 1904 Treaty has never been considered as being contrary to the Constitution, nor has the Executive Branch ever denounced it or challenged it before an international tribunal. On the contrary, the 1904 Treaty is still in force and is protected by constitutional provisions which

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guarantee that, in domestic law, it ranks above other legislation, pursuant to Article 410, paragraph 2, of the Basic Law.

23. Mr. President, it is the negotiations themselves which will determine, by means of an agreement between the Parties, the terms of Bolivia's sovereign access to the Pacific Ocean, once Chile's obligation to negotiate has been declared by the Court. To date, Bolivia has carefully avoided commenting on this subject in the context of the present proceedings. That said, Chile has tried to pre-empt the question in its preliminary objection, first by asserting that Bolivia means to force access to the sea through the province of Arica, and then by including arguments relating to the 1929 Treaty between Chile and Peru in that preliminary objection[103].

24. On Monday, during its first round of oral argument, Chile virtually ignored this point. Nevertheless, it should be noted that the 1929 Treaty is not relevant to the present dispute, and to mention it at this stage of the proceedings in order to challenge the Court's jurisdiction would be nothing but an arbitrary attempt to mislead. What is more, Chile's claims are untrue. Bolivia has not submitted a territorial dispute to the Court, nor has it come before it brandishing titles to sovereignty.

IV. Chile's failure to mention key points

25. Mr. President, Chile argues that Bolivia's reference to diplomatic exchanges which took place after the conclusion of the 1904 Treaty is another attempt to sidestep the 1904 settlement[104]. Chile skates over those exchanges in an effort to convince us that they cannot establish consent to jurisdiction over questions that have been excluded from the Court's jurisdiction by Article VI of the Pact of Bogotá, having been settled by the 1904 Treaty. What we have here, in terms of the

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[103]POCh, paras. 4.1 and 4.14-4.16.

[104]POCh, paras. 4.1 and 4.9-4.13; CR 2015/18, pp. 57-60 (Wordsworth).

legal reasoning, is a good example of what is known as a doubly fallacious argument. There is nothing intrinsic to the Treaty preventing the renegotiation of its terms, nothing precluding those terms from being modified by a subsequent agreement negotiated on the basis of a freely made commitment, and indeed nothing excluding the possibility of the adoption of a second complementary agreement to the 1904 Treaty. But irrespective of these logical shortcomings, and

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of the lack of any basis for Chile's assertion, the way in which our opponent tries to sweep aside an issue that is, in fact, at the heart of its objection, is telling — even more so if compared to the large amounts of time given over to some of its digressions on points which, as we have shown, are without relevance.

26. Mr. President, Members of the Court, the crucial point — the point that should be underlined — is the fact that before, and especially after, the signing of the Pact, Chile expressed a willingness to negotiate sovereign access to the Pacific Ocean for Bolivia, without in any way challenging the terms of the 1904 Treaty. Bolivia has carefully documented and submitted to the Court the instruments which illustrate and substantiate that willingness. It is clear that Chile is at a loss. Our opponent has no response to the diplomatic notes exchanged in 1950 or to the 1975 Act of Charaña, except to treat them as aspects of Bolivia's claim for revision or annulment of the 1904 Treaty[105]. A thoroughly dogmatic approach, based on the premise that the 1904 Treaty is the sole arbiter in relation to Bolivia's territorial sovereignty and landlocked situation.

27. The legal significance and scope of these instruments will be discussed at the merits stage, but right now they provide incontestable proof of: (1) *one*, the existence of an unresolved issue that has not been settled by, and is not governed by, a treaty or agreement concluded prior to the signing of the Pact of Bogotá; and (2) *two*, the clear separation between the obligation to negotiate, on the one hand, and the status of the 1904 Treaty, on the other. An existence and a separation which have been confirmed by the highest representatives of the Chilean State at every opportunity. Chile will have plenty of opportunities — at the merits stage — to discuss the nature of the commitment made and its violation. However, it is no longer able seriously to contend that there is a compatibility issue between compliance with the 1904 Treaty and negotiating sovereign

[105]POCh, paras. 4.10-4.11.

access to the Pacific Ocean for Bolivia as a result of commitments it has made over the years. It cannot invoke the *pacta sunt servanda* principle as a way of safeguarding the 1904 Treaty, and then disregard it when it is a matter of showing due respect for the agreements produced in evidence by
48 Bolivia. The *pacta* principle applies to all commitments without discrimination, and Chile cannot go back on its own undertakings.

V. The Court must reject Chile's so-called preliminary objection

28. Mr. President, it is true that the drafters of Article VI of the Pact set out as a procedural objection what is in essence more in the nature of a substantive defence. As you yourself pointed out in your separate opinion appended to the Court's Judgment of 13 December 2007 in the *Territorial and Maritime Dispute*: "the confusion which is to some extent unavoidable between the merits and jurisdiction is created by the Pact of Bogotá itself"[106]. The reality is that, if the Court were to uphold Chile's claim, its decision will inevitably involve a substantive judgment in Chile's favour. And indeed, Chile's efforts to compel the Court to this conclusion simply reflect an ill-concealed aim of securing a dismissal of the substantive claim by systematically distorting its content.

29. On the other hand, the Court can, and must, give a ruling now, and for the following reasons, rejecting Chile's objection: (1) firstly, there is no connection between the subject-matter of Bolivia's claim and the 1904 Treaty; (2) secondly, the obligation to negotiate sovereign access to the Pacific Ocean for Bolivia arose and crystallized independently of that Treaty; (3) thirdly, Chile has acknowledged this fact on numerous occasions; and (4) finally, the Court has enough information at its disposal at this stage to verify all of this without infringing the right of the Parties to develop their arguments on the merits. Thus, it is not a question of determining whether or not Chile's objection is of an exclusively preliminary character; it is simply a question of finding that the said objection has absolutely nothing to do with the subject-matter of Bolivia's claim; in other words, that it is not an objection to jurisdiction — unless one accepts, entirely erroneously, that our opponent can claim an exceptional right to modify — and even disregard — the subject-matter of the Application in order to rely on Article VI of the Pact.

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[106] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 915, para. 39.

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VI. Conclusion: the Court has jurisdiction on the basis of Article XXXI of the Pact

30. Mr. President, Members of the Court, can an Application such as this constitute a hostile move that threatens the stability of borders and regional order? Simply formulating the question in these terms is to offend the fundamental principle of the peaceful settlement of disputes, as well as the basic principles of the United Nations Charter, the Charter of the Organization of American States and, more especially, the Pact of Bogotá. As noted by the Court in its Judgment of 20 December 1988: "[i]t is . . . quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement"[107].

31. A dispute does exist regarding the obligation to negotiate sovereign access to the Pacific Ocean for Bolivia on the basis of instruments drawn up following, and independently of, the conclusion of the 1904 Treaty. It is thus clearly established that Article VI — the sole basis for exclusion relied upon by Chile — cannot apply here; consequently, Bolivia awaits a response from the Court on the basis of the Parties' consent in accordance with Article XXXI of the Pact.

32. Regional stability, frequently cited by the Chilean authorities to stoke unfounded fears, would be better served by a Chile prepared to fulfil in good faith an obligation it had a role in creating, and not by a Chile hell-bent on blocking proceedings aimed solely at finding a solution founded on law and on the spirit of dialogue and negotiation.

33. Mr. President, Members of the Court, thank you for your attention. Mr. President, I would be grateful if you would give the floor to Professor Payam Akhavan, who is going to examine Article 79 of the Rules of Court.

The PRESIDENT: Thank you, Professor. I now give the floor to Professor Payam Akhavan.

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[107] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 89, para. 46.

50 M. AKHAVAN :

CONCLUSIONS DE LA BOLIVIE : L'EXCEPTION DU CHILI DOIT ÊTRE REJETÉE EN VERTU DU PARAGRAPHE 9 DE L'ARTICLE 79 DU RÈGLEMENT DE LA COUR

1. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un honneur pour moi que de me présenter devant vous au nom de la Bolivie. Vous avez entendu les plaidoiries de mes collègues. C'est à moi qu'il appartient maintenant d'exposer les conclusions de la Bolivie sur les raisons pour lesquelles la Cour devrait rejeter l'exception soulevée par le Chili et se déclarer compétente, en vertu du paragraphe 9 de l'article 79 de la Cour.

2. Ce que le Chili vous demande de faire, c'est de rejeter la demande présentée par la Bolivie sans l'examiner au fond. Lors de l'audience de lundi, les conseils du Chili ont longuement développé l'exception d'incompétence. D'après ce que comprend la Bolivie, c'est sur la base de plusieurs postulats erronés que le Chili en arrive à la conclusion que la Cour n'est pas compétente. Premièrement, il suppose que l'accord de 1904 n'est pas conciliable avec un accord ultérieur distinct prévoyant de négocier un accès souverain à la mer. Deuxièmement, il part du principe que l'obligation de négocier un accord de bonne foi revient au même que de conclure réellement pareil accord. Troisièmement, il présume que l'accès souverain à la mer ne peut être obtenu qu'en redessinant les frontières établies dans l'accord de 1904. Quatrièmement, il suppose que tout futur accord éventuel de revision des frontières équivaut à la répudiation, par la Bolivie, de l'accord de 1904. Cinquièmement, il considère qu'il peut se contenter d'ignorer le comportement des Parties entre 1904 et l'adoption du pacte de Bogotá en 1948 pour conclure que la question de l'accès souverain a été réglée. Et, sixièmement, il part du principe que le comportement suivi par les Parties après 1948 ne saurait être pris en compte par la Cour pour déterminer si la question a effectivement été réglée ou non. Voilà, en résumé, ce que le Chili a fait valoir devant la Cour lundi. Il s'agit d'un syllogisme assez complexe en six volets ou, pour le dire plus simplement, d'un château de cartes.

3. Mais le problème que pose l'exception soulevée par le Chili ne s'arrête pas là ; sa lacune fondamentale, et même, j'ose le dire, irréparable, tient à ce qu'il s'agit d'une exception fallacieuse, puisqu'elle repose sur une présentation erronée de l'argumentation de la Bolivie. Comme l'a expliqué M. Forteau, la Bolivie ne demande ni la revision ni l'invalidation de l'accord de 1904.

Elle ne remet pas en cause la validité de cet accord, ni en 1948 ni aujourd'hui. La Bolivie ne demande pas à la Cour de régler un différend territorial. Elle ne sollicite pas de délimitation frontalière. Elle ne demande pas même à la Cour de définir les modalités spécifiques de son accès
51 souverain à la mer. Cet accès pourrait prendre diverses formes, celle d'un couloir, d'une enclave côtière, d'une zone spéciale, ou de toute autre solution concrète. La manière dont cela se traduira concrètement n'est pas en question en l'espèce. C'est l'accord à venir, qu'accepteront librement les Parties, en négociant de bonne foi, qui définira cette formule novatrice. La Bolivie se contente de demander à la Cour de prescrire au Chili d'honorer l'engagement qu'il a pris à maintes reprises de négocier cette solution.

4. La Cour reconnaît de longue date les *pacta de contrahendo* comme un type d'accord international. Dans l'affaire *Gabčíkovo-Nagymaros (Hongrie/Slovaquie)*, elle a ainsi observé ce qui suit : «Il n'appartient pas à la Cour de déterminer quel sera le résultat final des négociations à mener par les Parties. Ce sont les Parties elles-mêmes qui doivent trouver d'un commun accord une solution qui tienne compte des objectifs du traité»[108]. De la même manière, l'affaire dont la Cour est saisie aujourd'hui a trait à l'accord entre les Parties en vue de négocier un accès souverain à la mer, et *non* au résultat final des négociations. Mon éminent confrère, M. Wordsworth, a insisté sur le fait que cette obligation «se heurt[ait] immanquablement»[109], à l'accord de 1904 ; que les deux accords ne pouvaient en aucun cas être conciliables. En réalité, l'accord de 1904 et le *pactum de contrahendo* sont tous deux valides ; ils étaient tous deux en vigueur en 1948 et le sont restés ; ils ont créé des obligations bien distinctes ; ils ne se heurteront pas car ils coexistent parallèlement. J'ai grandi à Téhéran et je sais que la circulation peut prendre plusieurs directions à la fois, sans qu'il y ait forcément carambolage !

5. En assimilant l'obligation de négocier à une répudiation de l'accord de 1904, le Chili crée un «homme de paille» — une exception fallacieuse — qu'il peut ensuite détruire. La demande de la Bolivie est clairement énoncée dans les conclusions et la décision sollicitée figurant au paragraphe 500 du mémoire. La Bolivie prie la Cour de conclure, premièrement, que le Chili a l'obligation de négocier un accès souverain à la mer ; deuxièmement, que celui-ci a manqué à cette

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[108] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)*, *arrêt, C.I.J. Recueil 1997*, p. 7, par. 141.

[109] CR 2015/18, p. 60, par. 53 (Wordsworth).

obligation ; et troisièmement, que ladite obligation doit être exécutée «de bonne foi». Tel est «l'objet» du différend qui oppose les Parties. Il n'y a aucune «reformulation», aucune arrière-pensée, aucun cheval de Troie. La demande de la Bolivie est parfaitement claire. La Bolivie se présente devant la Cour parce que, en 2011, le Chili est explicitement revenu sur l'engagement qu'il avait pris de longue date de négocier un accès souverain à la mer. Pour le dire simplement, l'argumentation de la Bolivie ne repose sur rien d'autre que le principe *pacta sunt servanda*. Le fait que le Chili accuse la Bolivie de ne pas respecter ce même principe revient à renverser la situation.

52 6. L'«homme de paille» du Chili, c'est-à-dire le fait de considérer, à tort, la demande de la Bolivie comme une répudiation de l'accord de 1904, est un argument alarmiste. Il vise à décourager la Cour d'exercer sa compétence. Mon éminent confrère sir Daniel a évoqué le spectre de la «tent[ative] unilatéral[e] de réécrire l'histoire du continent [américain] en saisissant la Cour»[110]. Un simple *pactum de contrahendo* est présenté, à tort, comme une boîte de Pandore qui, une fois ouverte, remettra en cause la stabilité de l'ensemble des traités de limites. Cette interprétation apocalyptique est très éloignée de la vérité. La demande de la Bolivie s'inscrit dans un contexte unique et particulier ; elle ne vise pas à créer un précédent d'application générale en droit international. Par rapport à l'accord de 1904, le consentement ultérieur du Chili à négocier constitue à la fois une *lex posteriori* et une *lex specialis*. Les obligations contractées par le Chili découlent des engagements qu'il a pris lui-même, les affirmant et les confirmant pendant plus d'un siècle dans des accords bilatéraux, des déclarations unilatérales, des résolutions unanimes de l'OEA et dans le cadre d'autres actes similaires, ultérieurs au traité de 1904.

7. Pourquoi le Chili a-t-il donc si peur que la Cour connaisse de l'affaire au fond ? Si la Bolivie a tort sur le fond, alors le blocage des négociations perdurera. Rien ne changera. En revanche, si la Bolivie a raison sur le fond, cela signifie seulement que les Parties devront reprendre les négociations, de bonne foi, parce qu'elles *sont convenues* que la Bolivie devait se voir accorder, d'une manière ou d'autre, un accès souverain à la mer.

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[110] CR 2015/18, p. 36, par. 13 (Bethlehem).

8. En résumé, en soulevant cette exception fallacieuse, le Chili pose la mauvaise question. La question qu'il faut se poser n'est pas celle de savoir si l'accord de 1904 était valide en 1948, mais si les Parties sont convenues ultérieurement de négocier un accès souverain. C'est là l'objet de l'instance portée devant la Cour : le *pactum de contrahendo*, et non l'accord de 1904. L'exception du Chili se rapporte à une question autre que celle que la Bolivie a soumise à la Cour ; pour cette seule raison, elle doit être rejetée en vertu du paragraphe 9 de l'article 79 du Règlement de la Cour.

9. Supposons néanmoins, pour les besoins de la démonstration, que l'exception fallacieuse du Chili se rapporte à l'objet du différend (ce qui n'est pas le cas). Quelles seraient les conséquences ? La Cour devrait conclure qu'il s'agit non pas d'une exception préliminaire, mais d'une réfutation de l'argumentation de la Bolivie sur le fond. C'est ce qu'a clairement avoué mon éminent confrère M. Dupuy alors qu'il essayait de faire valoir exactement le contraire, à savoir que l'exception soulevée par le Chili avait un caractère exclusivement préliminaire, pour reprendre les termes du paragraphe 9 de l'article 79 du Règlement de la Cour. Dans ses conclusions, il a exposé
53 la position de la Bolivie de la manière suivante : «la Bolivie ne prétend qu'une chose ; à savoir qu'elle a un droit d'accès souverain au Pacifique dont le Chili aurait l'obligation de négocier les modalités»[111]. Il a ensuite exposé la position contraire du Chili comme suit : «le Chili ne réfute qu'une chose, en disant que vous n'avez pas compétence pour en connaître parce que toute remise en cause des frontières entre les deux pays remettrait inéluctablement en discussion une question réglée … par le traité conclu en 1904»[112].

10. Ces deux déclarations ne laissent *aucun doute* sur ce que le Chili demande à la Cour. En assimilant le *pactum de contrahendo* à une répudiation de l'accord de 1904, le Chili prie manifestement la Cour de conclure qu'il n'est pas dans l'obligation de négocier un accès souverain. Il sollicite donc une décision sur le fond. M. Dupuy a invoqué le paragraphe 51 de l'arrêt sur les exceptions préliminaires rendu en l'affaire du *Différend territorial et maritime (Nicaragua c. Colombie)* pour faire valoir que l'exception soulevée par le Chili avait un caractère préliminaire et que la Cour devait se déclarer incompétente. Or celle-ci a clairement indiqué, dans ce même

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[111] CR 2015/18, p. 65, par. 16 (Dupuy).

[112] *Ibid.*

paragraphe, qu'elle ne pouvait se prononcer sur une exception au stade préliminaire si «le fait de répondre à l'exception préliminaire équiva[lait] à trancher le différend, ou certains de ses éléments, au fond»[113].

11. Mais oublions le caractère fallacieux de l'exception soulevée par le Chili et le fait que, même si elle n'était pas fallacieuse, elle n'a pas de caractère préliminaire. Dans quelle hypothèse la Cour pourrait-elle se prononcer sur la compétence sans statuer au fond ? Autrement dit, comment la Cour pourrait-elle déterminer, à ce stade préliminaire, si la question de l'accès souverain a été ou non réglée sans déterminer s'il existe une obligation de négocier un accès souverain ? Il n'y a, semble-t-il, qu'une seule possibilité : il lui faudrait conclure que, qu'elles aient ou non constitué un *pactum de contrahendo*, les négociations prouvent que la question n'était en réalité pas réglée. Dans son exposé, Mme Chemillier a passé en revue le long historique des accords et du comportement des Parties ultérieurs au traité de 1904, établissant que, de fait, la question de l'accès souverain n'était pas réglée, ni en 1948, ni par la suite. Le seul point d'accord portait sur la nécessité de négocier un nouvel accord. Tout ce qui avait été réglé, c'est que la question devait encore être réglée. A l'évidence, une question qui fait l'objet de négociations ne saurait avoir été tranchée.

54 12. Il est assez curieux que, compte tenu de l'importance cruciale de ces négociations pour l'exception qu'il soulève, le Chili ne consacre, dans son exposé écrit, que deux pages à ce qu'il qualifie prudemment d'«échanges postérieurs à 1904». Encore est-ce généreux par rapport à sa plaidoirie de lundi, dans laquelle ces échanges n'ont été mentionnés qu'en passant, pour faire valoir que tout accord postérieur à 1948 était dénué de pertinence. Quant aux accords pertinents antérieurs à 1948, ils ont été complètement ignorés. Si l'accord de 1904 clôturait définitivement la question de l'accès souverain, quel était le but de ces négociations ? Rien ne peut expliquer qu'une question soit à la fois réglée et en cours de négociation. C'est cet argument que je développerai à présent. Je traiterai d'abord le droit applicable permettant de déterminer la compétence au titre de l'article VI, puis me pencherai sur la question de savoir si le problème de l'accès souverain était ou non réglé au vu des éléments de preuve présentés à la Cour.

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[113] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007* (II), p. 852, par. 51.

Le droit applicable aux fins de déterminer si la Cour est compétente au titre de l'article VI du pacte de Bogotá

13. M. Remiro a exposé tout à l'heure l'objet et le but de l'article VI du pacte de Bogotá. Ainsi qu'il l'a rappelé, la Cour a expliqué que cette disposition «visait clairement à empêcher que … les voies de recours de nature judiciaire … pussent être utilisées afin de rouvrir des questions déjà réglées entre les parties au pacte …»[114]. Elle n'a pas dit qu'il s'agissait d'exclure les procédures judiciaires chaque fois qu'un traité antérieur à 1948 était susceptible de s'appliquer à l'égard d'un différend. L'article VI n'est pas une baguette magique qui ferait obstacle à la compétence de la Cour dès lors qu'une partie invoque un traité conclu avant 1948. C'est ce que la Cour a précisé en l'affaire relative à des *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)*, qui concernait des violations alléguées de la Charte des Nations Unies et de la charte de l'OEA. Le Chili ne peut certainement pas soutenir que, dans cette affaire, où les deux instruments en question étaient antérieurs à 1948, la Cour n'était pas compétente du fait de l'article VI. Un traité peut être pertinent à l'égard d'un différend sans pour autant le régler.

14. Selon quels critères doit-on déterminer si une question a été réglée ou est régie par un traité ? Le Chili propose une lecture extrêmement large de l'article VI, qui en méconnaît l'objet et le but, et va à l'encontre de la jurisprudence de la Cour. En l'affaire du *Différend territorial et maritime (Nicaragua c. Colombie)*, la Cour a en effet relevé que le pacte avait été conclu «conformément à» l'article 27 de la charte de l'OEA, qui dispose qu'«un traité spécial établira les
55 moyens propres à résoudre les différends … de façon à ce qu'*aucun différend* surgissant entre les Etats américains ne reste sans *solution définitive*»[115]. Conformément à cette disposition, la Cour a confirmé que, pour être «réglée», une question devait avoir été «définitivement résolue»[116]. Cet impératif de règlement final découle de l'article XXXIV du pacte, qui dispose que, si la Cour «se déclarait incompétente pour juger le différend» en application de l'article VI, «celui-ci sera déclaré terminé». Le caractère totalement définitif d'une telle situation, où les parties se trouvent privées de voies de recours judiciaires et le différend est déclaré définitivement terminé, illustre les conséquences importantes de toute décision d'incompétence de la Cour en application du pacte de

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[114] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 858, par. 77.

[115] *Ibid.*, par. 54, les italiques sont de nous.

[116] *Ibid.*, par. 78.

Bogotá. Pareille décision se démarque nettement d'autres situations dans lesquelles la Cour peut se déclarer incompétente sans toutefois juger qu'il n'existe, de fait, aucun différend entre les parties. Il convient donc d'appliquer l'article VI avec une grande prudence.

15. En ce sens, l'article XXXI du pacte de Bogotá n'est pas simplement une clause compromissoire contenue dans un traité ; il ne saurait pas même être assimilé à une déclaration unilatérale en vertu du paragraphe 2 de l'article 36 du Statut de la Cour. Selon la Cour, le pacte constitue un «engagement autonome» en vue du règlement final des différends[117]. Son objet et son but, intrinsèquement contenus dans la charte de l'OEA, sont précisément de permettre le règlement complet et définitif, par des moyens pacifiques, de tous les différends entre les Etats d'Amérique. L'interprétation de l'article VI à la lumière de ce principe ne peut conduire qu'à une seule conclusion, à savoir que, s'il existe le moindre doute quant au fait de savoir si une question est … [puissant coup de tonnerre].

Le PRESIDENT : Ne vous laissez pas impressionner. Continuez.

M. AKHAVAN : J'espère, Monsieur le président, que ce n'était pas la manifestation de la colère des dieux à mon endroit ... S'il existe le moindre doute, disais-je, quant au fait de savoir si une question est «définitivement résolue», la Cour doit exercer sa compétence.

16. Or, de toute évidence, une question ne peut *à la fois* être «réglée» et faire l'objet d'un différend. Si les parties négocient en vue de trouver une solution, c'est bien qu'il existe un problème à résoudre. A cet égard, la Cour a souligné que les négociations «démontre[nt] l'existence d['un] différend et … en ciconscri[vent] l'objet»[118]. Que démontrent donc, en la présente espèce, les négociations conduites après 1904 ?

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La question de l'accès souverain à la mer a-t-elle été définitivement réglée en 1948 ?

17. Dans les deux pages que le Chili consacre à l'examen de ce qu'il appelle les «échanges postérieurs à 1904», il n'explique pas comment il pourrait concilier un siècle de négociations avec

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[117] *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 85, par. 36.

[118] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 84, par. 30.

l'affirmation selon laquelle la question de l'accès souverain à la mer aurait été définitivement réglée. Si aucune question n'était pendante entre les Parties, si la question avait été réglée, alors pourquoi les Parties ont-elles négocié pendant plus d'un siècle après avoir signé le traité de 1904 ? C'est une question simple, et la réponse à cette question ne l'est pas moins.

18. Même si la fin de l'Histoire avait été décrétée en 1904, comme l'affirme le Chili, et même si tous les échanges postérieurs à 1948 étaient jugés sans intérêt, comme l'avance M. Wordsworth, nul ne saurait soutenir de façon crédible que la question était réglée en 1948. Le Chili indique dans ses propres écritures que, si la question de l'accès souverain à la mer était réglée «[c]ela ne résult[ait] pas seulement du traité de paix de 1904 …, mais également du règlement auquel [le Chili] et le Pérou [étaient] parvenus dans le traité de Lima qu'ils [avaient] conclu en 1929 concernant la souveraineté sur la province d'Arica»[119]. Or ce traité est manifestement *res inter alios acta* à l'égard de la Bolivie. Mais ce qui est remarquable, c'est que le Chili ne tente même pas d'expliquer pourquoi, en 1929, il a simultanément conclu un protocole complémentaire avec le Pérou concernant des accords à venir avec la Bolivie relativement à ce même territoire. La réponse est simple : le Chili reconnaissait que la question n'avait, en réalité, pas été réglée avec la Bolivie. Il a d'ailleurs lui-même invoqué ce protocole de 1929 au sujet de l'accès souverain de celle-ci à la mer. Dans sa propre note diplomatique n° 685 en date du 19 décembre 1975 (qui figure à l'annexe 73 du mémoire de la Bolivie), le Chili a ainsi demandé au Pérou, à la suite du processus de Charaña[120], s'il acceptait la proposition concernant l'accès souverain de la Bolivie à la mer. Cela indique clairement que le protocole de 1929 avait bien trait à cette même question. Si celle-ci avait été réglée en 1904, pourquoi le Chili aurait-il jugé nécessaire de conclure pareil protocole avec le Pérou en 1929 concernant précisément cette question ?

19. Il est tout aussi remarquable que, tant dans ses écritures que dans ses plaidoiries, le Chili se soit totalement désintéressé du protocole d'accord de 1920. Nul ne conteste que, en 1919,
57 M. Bello Codesido, le même ministre chilien des affaires étrangères qui avait conclu le traité de 1904, a formulé une proposition officielle concernant l'accès souverain de la Bolivie à la mer.

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[119] Exception préliminaire du Chili, vol. I, chap. IV, sect. III, p. 42, par. 4.16.

[120] Note n° 686 du ministre des affaires étrangères du Chili en date du 19 décembre 1975, MB, vol. II, partie I, annexe 73.

A cette occasion, le Chili a déclaré de sa propre initiative qu'il *«entend[ait] veiller»*, «entend[ait] veiller à ce que [la Bolivie] dispos[ât] d'un accès à la mer, en cédant une partie importante de la zone située au nord d'Arica … devant faire l'objet du plébiscite visé par le traité d'Ancón [avec le Pérou]». Le Chili ne fait par ailleurs aucun cas des engagements contenus dans le mémorandum Matte de 1926 et il en va de même des autres échanges bilatéraux qui ont jalonné les années 1920. Ces échanges démontrent-ils que les Parties considéraient que la question avait été réglée par le traité de 1904 ? Evidemment que non.

20. Et si quelque chose avait changé entre les années 1920 et l'adoption du pacte de Bogotá le 30 avril 1948 ? La question a-t-elle été réglée d'une manière ou d'une autre pendant cette période ? Les échanges de cette même année — 1948 — entre le président chilien, M. Gonzalez Videla, et l'ambassadeur bolivien à Santiago, M. Alberto Ostria Gutiérrez, permettent de répondre facilement à cette question. En 1948, le président chilien «a déclaré qu'il pouvait accepter de céder [à la Bolivie] une bande de … territoire semi-désert au nord de [la] ville» d'Arica et «manifesté le désir légitime d'associer son nom à une solution historique … compte tenu de l'importance considérable qu'elle revêtait pour l'Amérique»[121].

21. En 1949, il a répété que la propre solution du Chili était «presque signé[e]». Le Chili voudrait vous faire accroire que les négociations avaient une date de péremption fixée au 30 avril 1948, que lorsque la cloche sonna minuit ce jour-là, tout comportement postérieur des Parties se trouvait dépourvu de pertinence aux termes de l'article VI. Or, ce qui a suivi permet de déterminer si, en 1948, les Parties considéraient que la question était réglée. Les négociations menées entre 1948 et 1949 se sont achevées avec l'échange de notes de 1950, qui a confirmé que le Chili était «disposé à entamer officiellement les négociations directes en vue de trouver la formule qui permettrait à la Bolivie de se voir accorder un accès souverain à l'océan Pacifique». Les Parties n'étaient clairement pas en train de rouvrir une question réglée avant 1948. Bien au contraire, elles s'efforçaient de clore une question qui demeurait ouverte.

22. La mention «sans préjudice de la situation juridique créée par le traité de paix de 1904» contenue dans cette note ne donne nullement à penser que le fait de négocier pareil accès souverain

[121] Note n° 515/375 de l'ambassadeur de Bolivie en date du 28 juin 1948, MB, vol. II, partie I, annexe 62.

à la mer constitue une répudiation du traité de 1904, comme le Chili le prétend aujourd'hui. A la
58 suite de l'échange de notes de 1950, le ministre chilien des affaires étrangères a au contraire affirmé que la recherche d'un accord était la «politique» du Chili et «s'inscri[vait] dans le droit fil des antécédents diplomatiques», comme l'accord de cession territoriale de 1895 et le protocole d'accord de 1920. C'est ce que le Chili a dit, et cela est en contradiction totale avec son argumentation actuelle. De même, le 19 juillet 1950, le président chilien, M. González Videla, a confirmé, dans une déclaration, que s'il était «d'accord pour engager des négociations» sur l'accès souverain de la Bolivie à la mer, c'était parce qu'il l'avait «prom[is]» au président bolivien.

23. Face à ces éléments de preuve clairs et convaincants, le Chili écarte avec désinvolture l'échange de notes de 1950, auquel il ne consacre qu'un seul paragraphe de ses écritures. Il soutient, sans explication d'aucune sorte, que la référence au traité de 1904 aboutit, sans que l'on sache trop pourquoi, à la conclusion inverse, à savoir que la question même au sujet de laquelle les Parties étaient convenues de négocier était déjà réglée, affirmant à présent que la voie vers tout autre accord a été fermée pour toujours le 30 avril 1948. Et pourtant, les éléments de preuve ne peuvent conduire qu'à une simple conclusion : le Chili lui-même proposait une solution à ce qu'il admettait être le problème non résolu de l'accès souverain à la mer ; il souscrivait expressément aux vues de la Bolivie pour qui la question n'était pas réglée.

24. De même, avant de présenter lundi son nouvel argument, selon lequel tous les échanges postérieurs à 1948 sont dépourvus de pertinence, le Chili a soutenu dans ses écritures que, contrairement aux termes sans équivoque de la déclaration de Charaña de 1975, l'accord des présidents de la Bolivie et du Chili visant à «résoudre … l'enclavement de la Bolivie» avait, sans que l'on sache, là encore, pourquoi, confirmé exactement l'inverse, à savoir que le traité de 1904 avait déjà réglé la question de l'accès souverain à la mer. Or, dans la déclaration commune qu'ils ont faite le 10 juin 1977, les ministres bolivien et chilien des affaires étrangères ont précisé qu'ils mettraient «*tout ... en œuvre*», «tout … en œuvre» pour trouver «une solution efficace qui permette à la Bolivie d'obtenir un accès libre et souverain à l'océan Pacifique». Encore une fois, pourquoi les Parties chercheraient-elles une solution si la question avait déjà été réglée ? Le Chili ne tient aucun compte de ces faits pourtant évidents.

25. Pour déterminer quelle est l'interprétation du Chili quant à ce qu'avait ou non réglé le traité de 1904, il est utile d'examiner la proposition qu'il a faite à la Bolivie dans une note en date du 19 décembre 1975 ; on la trouve à l'annexe 73 du mémoire de la Bolivie. Dans cette proposition, le Chili a précisé d'emblée, à l'alinéa *b)*, que l'accord n'entraînait «aucune modification» des dispositions du traité de 1904. Autrement dit, il considérait que, si elle était acceptée, sa propre proposition ne constituerait pas une modification matérielle des dispositions du traité de 1904. Et quelle était cette proposition ? Eh bien, l'alinéa *c)* de la note du Chili prévoyait

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«la cession à la Bolivie d'une côte maritime souveraine, reliée au territoire bolivien par une bande de territoire également souveraine». Il était en outre précisé, à l'alinéa *d)*, que «[l]e Chili serait disposé à négocier avec la Bolivie au sujet de la cession d'une bande de territoire au nord d'Arica». Du propre aveu du Chili — aveu exprès —, le fait d'accorder un accès souverain à la mer à la Bolivie, même en lui cédant une bande de territoire, ne revenait pas à «revis[er] ou [à]annul[er]» le traité de 1904.

26. Mais encore une fois, le Chili tente de renverser la situation factuelle. De sa propre affirmation selon laquelle aucune «modification» du traité de 1904 n'était nécessaire pour assurer à la Bolivie un accès souverain à la mer, il conclut, de manière tout à fait improbable, que cela prouve exactement l'inverse, à savoir que cet instrument avait déjà réglé la question. Il s'agit là manifestement d'un argument spécialement conçu pour essayer de faire échec à la compétence de la Cour en l'espèce.

27. Enfin, s'il subsistait un quelconque doute quant à savoir si la question avait été réglée par le traité de 1904, les diverses résolutions adoptées à l'unanimité par l'OEA — dont certaines ont été proposées par le Chili lui-même — appelant au règlement de la question de l'accès souverain de la Bolivie à la mer, démontrent que le continent américain tout entier reconnaît qu'il existe bel et bien un problème qui n'a pas encore été réglé. Pour ne donner qu'un exemple, dans sa déclaration du 6 août 1975, l'OEA a expressément indiqué que «[l]'enclavement de la Bolivie [était] un problème pour tout le continent», et appelé «l'ensemble des Etats américains … à coopérer pour trouver une solution qui, conformément aux principes du droit international … permette … de

remédier aux difficultés … que cet enclavement a[vait] causées»[122]. Rappelons que le pacte de Bogotá n'est autre que l'instrument de la Charte de l'OEA pour le règlement pacifique des différends. Dès lors, le fait que l'OEA elle-même ait reconnu à l'unanimité et à plusieurs reprises que cette question n'était pas encore réglée ne saurait être ignoré ; cette reconnaissance ne saurait par ailleurs être conciliée avec l'argument selon lequel l'article VI exclut la compétence de la Cour.

28. Monsieur le président, Mesdames et Messieurs de la Cour, l'exception soulevée par le Chili est une fausse exception. Quand bien même tel ne serait pas le cas, il ne s'agirait pas d'une exception préliminaire. Même si le Chili persiste à la présenter comme telle, il convient de la rejeter car elle ne tient absolument pas compte des éléments de preuve qui ont été soumis à la Cour. C'est qu'en effet, pour faire droit à l'exception soulevée par le Chili, la Cour devrait conclure que,

60 pendant plus d'un siècle, la Bolivie et le Chili ont négocié sur une question qui avait été définitivement réglée. Avec tout le respect que je vous dois, cette conclusion ne saurait être juste.

29. En conséquence, comme elle l'a indiqué au paragraphe 81 de son exposé écrit, la Bolivie prie respectueusement la Cour de rejeter, conformément au paragraphe 9 de l'article 79 de son Règlement, l'exception d'incompétence soulevée par le Chili et de dire et juger que la demande présentée par la Bolivie relève de sa compétence.

30. Monsieur le président, Mesdames et Messieurs de la Cour, dans la tradition spirituelle du peuple Aymara, des habitants autochtones du désert de l'Atacama, on emploie les mots «kamasa» et «ajayu» pour qualifier la force de la vie, la force de l'espoir qui permet d'avancer vers des lendemains meilleurs. Cela fait bien trop longtemps que les injustices du passé perturbent des relations de bon voisinage entre la Bolivie et le Chili. Le règlement de cette controverse est une étape indispensable à un avenir meilleur, plus prospère pour les deux nations. Et c'est vers la Cour que la Bolivie se tourne pour régler définitivement, conformément aux principes du droit international et du règlement pacifique des différends, cette source de conflit déjà ancienne.

31. Monsieur le président, ainsi s'achève le premier tour de plaidoiries de la Bolivie. Je vous remercie de votre aimable attention.

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[122] Résolution CP/RES 157 en date du 6 août 1975, MB, vol. II, partie II, annexe 190.

The PRESIDENT: Thank you, Professor. A Member of the Court wishes to put a question to Bolivia, and I shall now give him the floor. Judge Greenwood.

Juge GREENWOOD : Merci beaucoup, Monsieur le président. J'aimerais poser une question à la Bolivie.

> «A quelle date la Bolivie considère-t-elle que les Parties ont conclu un accord aux fins de négocier un accès souverain à la mer ?»

Je vous remercie.

The PRESIDENT: Thank you, Judge Greenwood. The text of that question will be sent to the Parties in writing as soon as possible. Bolivia will have an opportunity to reply to it, and is invited to do so during its second round of oral argument.

That brings today's sitting to an end and concludes the first round of oral argument. The Court will meet again tomorrow, Thursday 7 May, at 4.30 p.m., to hear Chile's second round of oral argument. At the end of the sitting, Chile will present its final submissions.

61 Bolivia will take the floor on Friday 8 May, at 3 p.m., for its second round of oral argument. At the end of that sitting, Bolivia will present its final submissions.

I would point out that, in accordance with Article 60, paragraph 1, of the Rules of Court, the oral statements are to be as succinct as possible. I would add that the purpose of the second round of oral argument is to enable each of the Parties to reply to the arguments put forward orally by the opposing Party or to the questions put by Members of the Court. The second round must therefore not be a repetition of the arguments already set forth by the Parties, which are not obliged to use all the time allotted to them. Thank you.

The Court is adjourned.

The Court rose at 12.55 p.m.