Traduction
Translation

CR 2015/21

Vendredi 8 mai 2015 à 15 heures

Friday 8 May 2015 at 3 p.m.

10 The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of Bolivia's arguments. I now give the floor to Professor Chemillier-Gendreau.

Ms CHEMILLIER-GENDREAU:

THERE IS NO BAR TO THE COURT'S JURISDICTION IN THE LEGAL AVENUES TAKEN BY BOLIVIA

1. Mr. President, Members of the Court, the present proceedings will end in a short while and you will each have to decide on the matter that has been put to you, that of jurisdiction in this case. Bolivia considers that it has a duty to make some general clarifications. Bolivia is calling for Chile to respect its obligation to negotiate sovereign access to the sea for Bolivia in good faith. Chile shifts the focus of the dispute and repeats ad nauseam that Bolivia is seeking revision of the 1904 Treaty.

2. To untangle this knotty issue, it is necessary to understand the historical roots of this dispute. The situation arising from the military conquest of Bolivian coastal territories by Chile was confirmed in the 1904 Treaty. There is an injustice in this situation which has been recognized very widely and continuously, and not only by Bolivia. Faced with this injustice, Bolivia has turned to the law, and it is on this basis that it appears before you. Chile is caught off balance, since it must leave its comfort zone of always promising and never giving.

3. While it is quite natural for Bolivia to have tried to put right an injustice it has suffered, it is still more significant to note that the very perpetrators of this injustice have always accepted it was necessary to find the means to put an end to it. From the early days of the War of the Pacific, thus for more than a century, Chile has repeatedly expressed its willingness to meet Bolivia's persistent requests, without ever actually following up on them however. In 1919 Bello Codesido nonetheless spoke of a legitimate claim. And the Chilean President Gabriel González Videla referred to the need for "an historical reparation".

4. And today Chile would like to make Bolivia feel guilty for trying to escape that injustice. The Government of Bolivia and its people seek a remedy to the injustice they have suffered, that is true.

11 5. However, as the Court has understood from our earlier arguments, Bolivia intends to use the legal avenues open to it and nothing more. It does not put itself in the position of Antigone who appealed to natural law over positive law. No, we know that positive international law, notwithstanding the progress it has made, cannot always achieve the objective set by Vattel. In 1758, the latter wrote in his work *Droit des gens*:

> "Justice is the basis of all society . . . It is still more necessary between nations, than between individuals; because injustice produces more dreadful consequences in the quarrels of these powerful bodies politic, and it is more difficult to obtain redress . . ."[1]

6. Nonetheless, while justice is the horizon of international law, the law is always a balance between an order that must be safeguarded and societal shifts that must be followed. Hence the importance of progress in codifying international law and the possibility of having recourse to a judge. Speaking on this subject, Rosalyn Higgins, former President of the Court, summed up the terms of the debate: "In my own view, law is really to be seen not as rules but as opposing norms which must be chosen between (no use of force/self-defence). And that can only be done by articulating the values which can be promoted by one choice over the other."[2]

7. Thus, in the case that has been submitted to you, the jurist is faced with a choice of values. On the one hand there is an evolution of modern international law, in the phase ushered in by the Charter of the United Nations, which is upending that law's traditional landscape. With the emergence of the norm prohibiting the use of force, the validity of treaties no longer depends solely on agreement between the signatory States. It is determined by respect for certain values which serve to align law and justice as far as possible.

8. However, we are dealing here with a particular value which determines global equilibrium and which is expressed in the principle of stability of boundaries. That stability is so important that each time the Court has the opportunity to do so, it endorses the principle of *uti possidetis juris*

12 founded on respect for colonial boundaries. Furthermore, this is in keeping with the provisions of Article 70 of the Vienna Convention[3].

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[1]Vattel, *Droit des gens*, Book II, Chap. V, p. 306, paras. 63-64 (from the translation by J. Chitty (*ed.*), Philadelphia, 1883).

[2]Dame Rosalyn Higgins, DBE, Q.C., *Ethics and International Law*, in *Liber Amicorum* in honour of Raymond Ranjeva, A. Pedone (*ed.*), Paris, 2013, p. 509.

[3]Article 70 of the Vienna Convention on the Law of Treaties of 29 May 1969.

9. And in order to choose between those values, we have the doctrine of intertemporal law. Defined in Max Huber's celebrated Award of 1928 in the *Island of Palmas* case, this doctrine holds that a situation involving international relations should be judged by the law in force at the time the events took place. The War of the Pacific and the Treaty which ended it should thus be considered in legal terms by the norms of the time. The use of force was then an attribute of sovereignty and the peace treaties were not invalid. On most continents, the map dividing up land between States was established on those bases. And that is what General König expressed in 1900 with the utmost cynicism.

10. Bolivia therefore knows full well that it is impossible for it to challenge the 1904 Treaty, unless it were to be renegotiated with the voluntary and sovereign agreement of both States, a possibility that Chile has so far ruled out. It is because Bolivia is aware of the limitations thus imposed on it by positive law that there is no trace in Bolivia's pleadings of a request to cancel or revise the 1904 Treaty, the legal act that consolidated the established injustice. It knows that such a step would run counter to the contemporary legal situation. And that is precisely why Article VI of the Pact of Bogotá is inapplicable in this case and why the Court has full jurisdiction.

11. As for the attempt by my distinguished colleague, who concluded Chile's arguments yesterday, to widen the issue, it is not pertinent. Why cite treaties that have nothing to do with this case? Bolivia respects the treaties and the boundaries they define. If there is a dispute today between Chile and Bolivia, it is very specific because, in this particular case, Chile recognized as soon as the Treaty was concluded that it left a matter unresolved, and said that it was prepared to resolve it.

12. If Chile itself had not opened another way to remedy the injustice enshrined in that Treaty, Bolivia would have been obliged to take no further action. But Chile cannot rewrite its history. It made promise after promise and committed itself in bilateral agreements, and raised what is referred to in law as legitimate expectations. Our opponents wondered with feigned innocence as to the whereabouts of the source of law relied upon by Bolivia. But the source of that law is in Chile's own conduct. And what you are now being asked, Mr. President, Members of the Court, is to guide the two States concerned on a legal path that Chile took the responsibility of

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opening, a path that can provide a concrete solution to the problem of Bolivia's landlocked situation.

13. To uphold its claim, therefore, Bolivia first relies on respect for the given word. Not at the time of the 1904 Treaty, which nothing undermines. But in respect of the numerous commitments made by Chile to give Bolivia a sovereign maritime outlet, independently of that Treaty. Chile cannot maintain the contradiction which consists in having repeated on so many occasions that it would negotiate sovereign access to the sea with Bolivia independently of the 1904 Treaty, and in now saying, in the hope of raising an obstacle to the Court's jurisdiction, that it is the 1904 Treaty which, by its very content, prevents Chile from giving Bolivia a coast. Its good faith is at stake.

14. To assert its jurisdiction the Court will have to note that the matter submitted to it is independent of the 1904 Treaty and take into consideration the *pactum de contrahendo* to which Chile subscribed. Because this *pactum* does exist, contrary to what Mr. Wordsworth said yesterday at the podium.

15. Our opponent has made a highly selective choice of documents. It has truncated those documents to give Chile's position a guise of consistency, in which it is severely lacking. Let us take some examples and for a moment return to those words, giving them the meaning the law confers on them. Paragraph IV of the Chilean memorandum of 9 September 1919 clearly expresses Chile's willingness to make all the necessary efforts for Bolivia to acquire access to the sea, but again in paragraph V, Chile states that it "accepts to engage into new negotiations to fulfil the longing" of Bolivia[4]. Chile accepts. And to accept is to conclude.

14 16. Should the letter from the Chilean Minister for Foreign Affairs of 6 February 1923 be considered insignificant as our colleague suggests[5]? It nonetheless states that "the Government of Chile will make the greatest effort to arrange" with Bolivia "the grounds for a direct negotiation that lead to the realization" of Bolivia's maritime aspiration. The Court will make no mistake of Chile's intentions. To say that one will make the greatest effort is to make a commitment and a strong one at that.

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[4]MB, Ann. 19; CR 2015/20, p. 22, para. 19 (Wordsworth).

[5]MB, Ann. 48; CR 2015/20, p. 23, para. 22 (Wordsworth).

17. Let us return again for a moment to the exchange of Notes of 1950[6]. In an attempt to play down the significance of this exchange, which nonetheless has contractual value, our friends on the other side of the Bar feign ignorance of the fact that in that Note Chile refers to various quotations contained in Bolivia's Note of 1 June 1950; the latter Note included an introductory paragraph noting that Chile had, on a number of occasions, from 1895 to 1949, agreed to discuss the means for Bolivia to acquire sovereign access to the sea. And it is on the basis of these acknowledged references that Chile declared in its Note of 1950 that its "Government [would] act consistently with this position", a position it had taken for a number of years, namely to formally enter into negotiations with Bolivia in order to find a formula that would make it possible to give Bolivia sovereign access to the sea.

18. Our opponents pay scant attention to the 1961 Trucco Memorandum[7]. No doubt because it recalls that in 1950 Chile consented to holding negotiations, as soon as possible, aimed at satisfying Bolivia's fundamental national need for sovereign access of its own to the sea[8]. The commitment to negotiate is fully confirmed.

19. I could cite many other documents. Without encroaching on the merits of this case and for the sole purpose of demonstrating that the Court has jurisdiction on the basis of commitments made independently of the 1904 Treaty, we could refer to the President of Chile's Note of 30 September 1975. In it he mentions the "repeated declarations" he made concerning the sincere and unchanging purpose of his Government to examine with Bolivia a lasting solution to Bolivia's landlocked condition[9]. In a further Note of 8 February 1977, the President of Chile recalled that his

15 Government had entered into negotiations with Bolivia to satisfy the latter's aspiration to have sovereign access to the sea, and stated that his Government would maintain its "decision" to reach a satisfactory solution[10]. He was to confirm this on 23 November 1977[11].

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[6]MB, Ann. 109 A and Annex 109 B.

[7]CR 2015/20, p. 28, para. 38 (Wordsworth).

[8]MB, Ann. 24.

[9]*Ibid.*, Ann. 70.

[10]*Ibid.*, Ann. 74.

[11]*Ibid.*, Ann. 76.

20. And this *pactum de contrahendo* found another more recent expression on 17 June 2008. On that day, the Vice-Ministers for Foreign Affairs of the two countries agreed to continue discussions on the maritime issue, point 6 on the Agenda of 13 Points adopted in 2006[12]. The same word "agreed", with all its legal significance, is to be found in the minutes of the 2010 negotiations, regarding the continuation of discussions on the maritime issue[13].

21. Mr. President, Members of the Court, these are only examples, as the place for a complete analysis is during the debate on the merits and not here. However, they serve to show that Bolivia relies on international law and on the obligation to negotiate as it results therefrom when a State — Chile — has committed itself to doing so. Which is what it did in respect of Bolivia's sovereign access to the sea.

22. Bolivia therefore asks the Court to force Chile to respect the obligation it is under and thus to resume negotiations, but with the obligation to achieve an outcome based on the commitments previously made by that country. This request is independent of any attempt to return to the provisions of the 1904 Treaty. By no means does it pave the way for the application of Article VI of the Pact of Bogotá, which would impede the exercise of the Court's jurisdiction. It falls within the scope of Article XXXI of the Pact of Bogotá and no objection can block it. Upon rigorous consideration, the Court will reject Chile's preliminary objection and declare that it has jurisdiction to judge this case.

Mr. President, I thank the Court for its attention and ask you to call Professor Forteau.

16 The PRESIDENT: I now give the floor to Professor Forteau.

Mr. FORTEAU:

THE SUBJECT-MATTER OF THE DISPUTE AND THE QUESTION OF THE SO-CALLED CRITICAL DATE

1. Thank you, Mr. President. Mr. President, Members of the Court, I will not try to conceal our surprise at Chile's oral arguments yesterday. It was our understanding that Chile had raised a preliminary objection on 15 July 2014, as a result of which, by an Order of the Court made on the

[12]MB, Ann. 120.

[13]*Ibid.*, Ann. 124.

same day, the proceedings on the merits had been suspended. And yet, despite requesting that suspension[14], Chile devoted the majority of its oral argument yesterday to pleading the merits of the case. Mr. President, let us be clear, our opponent cannot, especially in such an expeditious and piecemeal manner, during a second round of oral argument on jurisdiction, and having itself requested the suspension of the proceedings on the merits, ask the Court to rule on the merits of the case, as it did yesterday in the guise of pleading on jurisdiction.

2. If it were able to do so, Chile would undoubtedly claim in its defence that it had to examine the merits, because, in order to establish the Court's jurisdiction, it is necessary to sort the pre-1948 sources of the obligation to negotiate from the post-1948 sources — that was the whole point of the presentations made by Mr. Wordsworth and Professor Dupuy, who hid behind the idea that 1948 is the critical date for the purposes of ascertaining the Court's jurisdiction. Mr. President, this issue of the critical date is actually a false problem, and I will return to it in a moment.

I. Bolivia's claim

3. Before that, allow me first to say a few words on the subject-matter of the dispute. Mr. Wordsworth asked the Court to requalify this dispute in order, he said, to give it its correct characterization[15].

17 4. He began by indicating that the Applicant was not the master of the meaning of its claim, suggesting that the Court's task in this case was not only to interpret but also to reformulate Bolivia's claim[16]. According to Mr. Wordsworth, the jurisprudence in this respect is well established — but he remained very elusive on this point. I will simply say in response to him that, in a recent Judgment rendered in 2012, the Court noted that:

> "[t]he present case was brought before the Court by the Application of Nicaragua, not by special agreement between the Parties, and there has been no counter−claim by Colombia. It is, therefore, to the Nicaraguan Application and Nicaragua's submissions that it is necessary to turn in order to determine what the Court is called upon to decide."[17]

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[14]POCh, pp. 3-4, para. 1.7.

[15]CR 2015/20, p. 18, Part II (Wordsworth).

[16]*Ibid.*, pp. 21-22, paras. 11-13 (Wordsworth).

[17]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 670, para. 133.

5. Mr. Wordsworth then endeavoured to show that Bolivia's claim is equivalent to a request for the revision of the 1904 Treaty, concentrating his efforts on the third part of Bolivia's claim calling for the implementation of the obligation to negotiate. However, in order to arrive at that conclusion, Chile is forced to reformulate Bolivia's request — reformulate it, and not simply interpret it, which only the Court has the authority to do. Let us hear what Mr. Wordsworth had to say: "if the words referring to the alleged obligation to negotiate were removed from Bolivia's prayer for relief, the Court would lack jurisdiction by virtue of Article VI of the Pact of Bogotá"[18].

6. Two points, Mr. President: the first is to point out that, if the claim does concern the obligation to negotiate (and it does), there is no issue of jurisdiction; the second, why on earth and on what basis would it be necessary to remove the words "obligation to negotiate" from Bolivia's claim? Those words form the very essence of its claim. According to Bolivia, an obligation to negotiate has arisen alongside the 1904 Treaty. Members of the Court, we could debate the existence of this obligation and its exact content. But this is the very question on the merits that has been submitted to the Court, and it cannot be decided at the jurisdiction stage. And so we keep coming back to the same point: Chile's preliminary objection postulates that there is no obligation to negotiate; Chile is confusing jurisdiction and merits.

18 7. Moreover, Chile asserted again yesterday that Bolivia's claim is the product of "repackaging" carried out "suddenly" by Bolivia in 2013[19]. However, I recalled on Wednesday — referring to the relevant supporting documents — that in 1979, that is to say over 30 years ago, Bolivia officially reminded Chile that it was under an obligation to negotiate sovereign access to the Pacific Ocean[20]; furthermore, at that time, Chile did not refute having made such a commitment (which, by the way, can be regarded as a form of acquiescence, which constitutes a valid source of obligations under international law). Bolivia did not seise the Court until 30 years later — and it did so in 2011 for a specific reason: it was then that Chile began to renege on the commitment it had made to negotiate.

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[18]CR 2015/20, p. 18, para. 5 (Wordsworth).

[19]*Ibid.*, pp. 20-21, para. 12 (Wordsworth).

[20]CR 2015/19, pp. 22-23, para. 28 (Forteau); MB, Ann. 203.

8. It is interesting also to note that both Sir Daniel and Mr. Wordsworth seemed to suggest yesterday that Chile had no particular problem in terms of jurisdiction with the first or second parts of Bolivia's claim; it is only the third part of the claim which, they argue, raises the issue of jurisdiction, since requesting the implementation of the obligation to negotiate would, in their eyes, be a clear infringement of the 1904 Treaty[21]. I have two comments to make in that connection.

9. Firstly, the implementation of the obligation to negotiate, which is the subject-matter of the third part of Bolivia's claim, will not have a direct effect on the 1904 Treaty: it is not a self-enforcing obligation which would in itself bring about sovereign access to the sea. As is very clearly explained in Bolivia's Memorial, it is an obligation to enter into negotiations and to maintain a certain level of conduct during those negotiations, with the aim of reaching an agreement on sovereign access to the sea — in that regard I refer the Court most respectfully to paragraphs 238 to 290 of Bolivia's Memorial, which very clearly set out what Bolivia means by the obligation to negotiate sovereign access to the sea.

10. Bolivia also fails to see why the request for implementation of the obligation to negotiate would pose a particular problem in terms of jurisdiction under Article VI of the Pact. If the Court
19 finds that an obligation to negotiate exists (the object of the first part of the claim), then Chile has an obligation under international law. In that event, it will thus simply be a matter of giving effect to an obligation assumed by Chile — it being understood, as I have just said, that the obligation in question is an obligation to negotiate. Whatever constraints that obligation places upon Chile, it is a principle upheld by this Court that the fact that a right or an obligation "may give rise to delicate questions of application . . . is not, in the view of the Court, sufficient ground for holding that the right is not susceptible of judicial determination with reference to . . . the Statute"[22].

11. Thus, we keep coming back to the same point: does an obligation exist in this case? It is strictly a question on the merits. If that obligation does not exist, Chile will not be required to do anything; if that obligation does exist, Chile is, quite simply, bound by international law, of which this Court is an instrument.

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[21]CR 2015/20, p. 10, para. 1 (Bethlehem); p. 17, para. 2 (Wordsworth).

[22]*Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 37.

II. The so-called critical date of 1948

12. Mr. President, I now come to the point I raised earlier: the critical date for the purposes of the application of Article VI of the Pact of Bogotá.

13. Professor Dupuy spoke yesterday about a question that was "critical in terms of verifying whether or not the Court has jurisdiction in this case"[23]. This critical question was as follows:

> "The simple question before the Court at this preliminary stage is whether the matter referred to it by Bolivia's Application was or was not *already settled* by the 1904 Peace Treaty, in force when the Pact of Bogotá was signed in 1948."[24]

14. Almost all of Chile's counsel echoed this idea that, in order for Article VI of the Pact to apply, not one but two temporal conditions must be met: the matter in question must be one which *was governed in 1948* by a treaty *in force in 1948*. Thus, Mr. Wordsworth used the expression "as of 1948" six times in his presentation yesterday[25]. And as far as Chile is concerned, this double temporal condition is vital, because it has very definite consequences.

20 15. Both Ms Pinto and Mr. Wordsworth told the Court on Monday that if a matter is governed or settled by a treaty within the meaning of Article VI, then "that matter is outside the Court's subject-matter jurisdiction under the Pact *even if the arrangement or treaty concerning the matter was altered after 1948*"[26]. Professor Dupuy also claimed that the obligation to negotiate needed to have arisen before 1948 in order to block the application of Article VI of the Pact[27]. That is why, according to Professor Dupuy, it is essential for Bolivia to state "the point at which" the obligation to negotiate arose: "Before or after 1948"[28]?

16. With all due respect to my esteemed opponents, Mr. President, their interpretation of Article VI is not correct: this critical date is a condition that has been cobbled together by Chile in order to sidestep the agreements concluded by Chile after 1948, starting with the 1950 exchange of notes. It is clear that our opponents are not at ease with the post-1948 period, and that they would rather it simply disappeared from the landscape.

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[23]CR 2015/20, p. 37, para. 23 (Dupuy).

[24]*Ibid*., p. 33, para. 6 (Dupuy).

[25]See also CR 2015/18, p. 58, para. 49 (Wordsworth).

[26]CR 2015/18, p. 26, para. 16 (Pinto); pp. 57-58, para. 46 (Wordsworth).

[27]CR 2015/20, p. 35, para. 14 (Dupuy).

[28]*Ibid*., p. 32, para. 4 (Dupuy).

17. The first thing to say is that Chile's critical date is impossible to apply on a practical level. Take the following example, which is essentially fictitious: in 1928, a treaty concluded between Nicaragua and Colombia awards three islands to Colombia. A new treaty is concluded in 1950, which transfers sovereignty over those islands to Nicaragua. A dispute then arises between the two countries concerning both sovereignty over the islands and maritime delimitation, and that dispute is brought before the Court on the basis of the Pact of Bogotá. This is what Chile is arguing:

— the Court does not have jurisdiction to entertain the question of sovereignty over the islands because, *in 1948*, it *was* settled by a treaty — the 1928 Treaty;

— of course, sovereignty changed hands in 1950, but, according to Chile, what counts is that in 1948 the matter was settled by a treaty in force on that date — the 1928 Treaty;

— this means that, for the purposes of maritime delimitation, the Court should take account of how sovereignty over the islands was dealt with in the 1928 Treaty, since that is the agreement reputed to have settled or governed the matter by virtue of the Pact of Bogotá;

21 — but how, then, is the Court going to carry out the maritime delimitation, which depends on who has sovereignty over the islands? If it takes account of the 1928 Treaty, it is not respecting the new treaty of 1950. And if it takes account of the 1950 Treaty, it is not respecting Chile's interpretation of Article VI of the Pact of Bogotá. This is the sort of impasse to which Chile's reasoning leads.

18. It is true that Ms Pinto referred on Monday to the authority of the Court's jurisprudence. You will find at tab 2.1 in the judges' folder the document which was shown to that end during her presentation. And that document was subsequently relied upon by all of Chile's counsel. It reproduces paragraph 82 of the Court's 2007 Judgment in the *Nicaragua* v. *Colombia* case, in which the Court states:

> "the question whether the Treaty was terminated in 1969 is not relevant to the question of its jurisdiction since what is determinative, under Article VI of the Pact of Bogotá, is whether the 1928 Treaty was in force on the date of the conclusion of the Pact, i.e. in 1948, and not in 1969".

19. Chile deduces from the foregoing that any commitment to negotiate made post 1948 is without effect on the Court's jurisdiction, irrespective of whether it would modify the 1904 Treaty in one sense or another, because the critical date is the situation as it existed in 1948.

20. This does not seem to me to be the reasoning followed by the Court. First, it will not have escaped you that, at the end of paragraph 82 of the 2007 Judgment, "see paragraph 89 below" appears in brackets. This would seem to suggest that what the Court says in paragraph 82 is not sufficient in itself. In fact, paragraph 82 falls within section 4.4.3 of the Judgment, which focuses *solely* on the question of whether the 1928 Treaty invoked in this case was in force in 1948. It is clear that, in order to answer this question (whether the 1928 Treaty was in force in 1948), one must look at the situation in 1948.

21. Now let's turn the pages of the *Report* to paragraph 83 of the Judgment, and the start of a new section in which the Court examines the preliminary objection in relation to different elements of the dispute, that is to say that it considers whether each of those elements is settled by the treaty in force in 1948. Here, the Court does not state that it will verify whether each of the elements of the dispute *were governed in 1948* by the 1928 Treaty. It says in paragraph 85: "[t]he Court finds it appropriate to examine in turn whether each matter listed above *has been* settled by the

22 1928 Treaty" — "whether each matter . . . *has been* settled" and not "whether each matter *had been*" settled in 1948 by the 1928 Treaty.

22. This explains why, later on in its Judgment, the Court takes account of the possibility that the law might have evolved after 1948[29], and shows that the Court must ensure that the treaty still governs, *at the time of its ruling*, the question submitted to it. At the time of its ruling, and not in 1948.

23. There is absolutely nothing unusual about this, for three reasons:

(1) it is a general principle upheld by the Court that the critical date for the purposes of ascertaining jurisdiction is the date of the filing of the application;

[29] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 861, para. 89, and p. 869, para. 120.

(2) as Sir Daniel rightly stated, this Court is an instrument "of judicial settlement"[30]; its role is to settle disputes in the present and, in order to do this, it must apply the law in force at the time of its settlement;

(3) Article XXXIV of the Pact provides that, if the Court declares itself to be without jurisdiction to hear the dispute submitted to it on the basis of Article VI, that dispute "shall be declared ended". Contrary to Sir Daniel's arguments, Article XXXIV is not simply a jurisdictional provision[31]; Article VI has the effect of putting an end to the dispute and of putting an end to it not in 1948 but now. Article VI actually precludes the applicant from turning to another means of dispute settlement because, by virtue of Article VI, there is no longer a dispute.

24. In its 2007 Judgment, the Court thus noted that it "could not have concluded that it lacked jurisdiction over that matter under the Pact of Bogotá had there still been an extant dispute with regard thereto", and found that it lacked jurisdiction on the basis of Article 36 of its Statute because, in its own words, the application of Article VI necessarily leads to the conclusion that "there is no extant legal dispute between the Parties"[32]. This confirms, on the one hand, that Article VI must be exercised with caution, given its effects, and, on the other, that the application
23 of Article VI of the Pact means determining whether, on the date on which the Court was seised, the date on which it settles the dispute, that dispute is governed or ruled by the treaty invoked.

25. Under these conditions, there is no need to discriminate, as Chile does, between the pre- and post-1948 agreements. If, for example, as Bolivia claims, the 1950 exchange of letters is indeed an agreement whereby Chile undertook to negotiate sovereign access to the sea, it cannot be opposed by Article VI of the Pact on the ground that it would be necessary to consider the situation in 1948 in order to determine whether the question was settled on that date. It is necessary to look at the situation on the date on which the Court was seised of the dispute it is being asked to resolve — in this instance, 2013. Therefore, in order to found the obligation to negotiate, it is only necessary to find that that obligation existed at the time of the seisin of the Court and at the

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[30]CR 2015/20, pp. 13-14, para. 15 (Bethlehem).

[31]*Ibid*., p. 16, para. 25 (Bethlehem).

[32]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 874, para. 138.

moment at which Bolivia claims Chile stopped respecting it; there is no need to ascertain whether the obligation existed before or after 1948.

26. I come now to my conclusion, Mr. President. Bolivia believes that, in this case, neither the dispute relating to the existence of the obligation to negotiate, nor the dispute relating to the violation of that obligation, was settled or governed by the 1904 Treaty when Chile renounced its obligation to negotiate, and it does so for a very simple reason: the obligation to negotiate does not derive from the 1904 Treaty, but from sources of law separate from that Treaty.

Mr. President, Members of the Court, this concludes my presentation. Thank you very much for listening. I would be grateful, Mr. President, if you would give the floor to my esteemed colleague Antonio Remiro Brotóns.

The PRESIDENT: Thank you, Professor. I now give the floor to Professor Remiro Brotóns.

Mr. REMIRO BROTONS:

ON THE 1904 TREATY, FORMALISM IN THE FORMATION OF INTERNATIONAL OBLIGATIONS AND SCARE TACTICS

1. Mr. President, Members of the Court, today I propose to address certain aspects of the second round of Chile's arguments, which seem to me particularly revealing: firstly, the absolute consecration of the 1904 Treaty as the beginning and end of all things; secondly, scepticism as to the formation of international obligations outside of treaties, understood as solemn and formal written agreements; and thirdly, scare tactics.

I. On the 1904 Treaty

2. First, I shall address the 1904 Treaty. Listening to Chile's counsel yesterday, I wondered if perhaps Moses had come down from Mount Sinai with the tablets of the ten commandments in one hand and a copy of the 1904 Treaty certified by God in the other. The 1904 Treaty has permanent value, of course, it merits sanctity, but it is not eternal. No doubt this assertion, which is based on the logic of history, puts me on the list of suspects of those bent on its revision. The mere mention of the fact that the 1904 Treaty might be renegotiated, amended or complemented

immediately triggered the accusation of revisionism[33]. Our opponent has accused us time and again of not paying heed to the 1904 Treaty in our pleadings, but as soon as we do, we are immediately accused of wanting to revise it.

3. Revising treaties no doubt has a bad reputation in the civilized world, since those who seek to do so are stereotyped as destabilizing agents of the *established* order by those who, beforehand, succeeded in destabilizing the *pre-established* order. But, truth be told, there is no normative principle prohibiting the renegotiation of treaties by peaceful means and on the basis of consent. The texts of the Vienna Conventions on the Law of Treaties provide — since it could not have been otherwise — for the amendment[34] and succession[35] of treaties as available options.

4. Bolivia seems doomed to a sorry fate. If it refers to the 1904 Treaty, in any way whatsoever, it is revisionist. According to Chile's diagnosis, it is a form of genetic determinism

25 that must lead to the sudden death of any initiative to regain sovereign access to the sea within the framework of compliance with the said Treaty.

5. It is true that Bolivia went before the League of Nations in 1920 to request the revision of the 1904 Treaty — which it considered unjust —, inspired by the hopes raised by Article 20 of the "Covenant" and by a misinterpretation of the powers of the Council and the latter's desire to implement them. To the same end, in 1948, Bolivia supported proposals — which were eventually discarded — to widen the scope of the settlement procedures in the Pact, and then, when the Pact was signed and ratified, it made a declaration in the same spirit[36]. However, this account leads us to a completely different issue, which, contrary to what Chile claims in its attempt to sow confusion, has nothing to do with the matter we are actually dealing with here.

6. Now, in the second round of argument, Chile has returned to what it believes is evidence of the scheme to cover up (or camouflage) revision of the 1904 Treaty initiated by the subtle forces of Bolivia in order to dupe the Court. I already addressed the withdrawal of Bolivia's reservation

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[33]CR 2015/20, p. 13 (Bethlehem).

[34]Arts. 39 and 40 of the Vienna Convention on the Law of Treaties, 1969, United Nations, *Treaty Series (UNTS)*, Vol. 1155, p. 331).

[35]Arts. 30.3 and 59 of the Vienna Convention on the Law of Treaties, 1969, *(UNTS)*, Vol. 1155, p. 331.

[36]"[T]he Delegation of Bolivia makes a reservation with regard to Article VI, inasmuch as it considers that pacific procedures may also be applied to controversies arising from matters settled by arrangement between the Parties, when the said arrangement affects the vital interests of a State."

to Article VI of the Pact in my first speech, and I am obliged to return to it again[37]. In fact, Bolivia's reservation was not a genuine one according to the definition of Article 2 *(d)* of the Vienna Convention on the Law of Treaties, due to the fact that its purpose was not to exclude or modify the legal effects of the Pact's provisions, but to widen them. Bolivia withdrew its reservation, as it had every right to, but it does not see any problem in stating that it did so in order that Chile should not continue to use it to oppose the Pact's entry into force in their mutual relations. To attempt to infer that the purpose of Bolivia's claim, two weeks later, was to revise the 1904 Treaty, smacks of childishness considering the *petitum* of Bolivia's claim. If Chile wished to escape the jurisdiction of the Court in respect of a matter such as the one submitted by Bolivia, it should have denounced the Pact and then let a year pass for the denunciation to become effective, pursuant to its Article LVI. However, our opponent did not choose this approach. It decided to

26 shelter behind Article VI and distort the subject-matter of Bolivia's Application.

7. And, quite naturally, we spoke again of the Bolivian Constitution of 2009, a Constitution which is in fact a progressive model of respect for international human rights law and treaty law. Chile maintains that the purpose of Bolivia's claim before the Court is to revise the 1904 Treaty, because it is assumed that that Treaty is incompatible with the Constitution and the interpretation of the ninth transitional provision which provides for the submission of claims to international tribunals as an alternative to denunciation. However, as already noted in the first round, the 1904 Treaty was never included in the list drawn up by Bolivia's Foreign Minister of treaties contrary to the Constitution which were then denounced or renegotiated. Chile's counsel questioned the existence of proof in this connection[38]. The proof exists. I don't know whether it is in the judges' folder after all, since I understand there were some regulatory problems given that there was a copy in Spanish, but, materially, the proof exists: if the Chilean delegation would like to have a copy, I will have it sent to them straight away.

8. Moreover, Article 267 of the Constitution formulates a legitimate objective that is entirely compatible with respect for the 1904 Treaty, taking account in particular of the fact that the obligation to negotiate Bolivia's access to the Pacific Ocean is considered outside the Treaty

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[37]CR 2015/20, p. 35 (Dupuy).

[38]*Ibid.*, p. 21 (Wordsworth).

though in full observance thereof. Given Chile's refusal to comply with that obligation, it is reasonable to argue that, in order to achieve this constitutional objective, Bolivia seised the Court by invoking Article XXXI of the Pact, and that the source of legitimacy for the appointment of Bolivia's Agent lies in Article 267 of the Basic Law.

9. Furthermore, it seems that Chile has found in an offering of bonds definitive proof that Bolivia seeks revision of the 1904 Treaty before this Court. However, if we examine the paragraph that Chile highlighted in the offering memorandum, there is nothing to support this claim. The first sentence merely notes the substance of Article 267 of the Constitution. The second sentence establishes the undeniable fact that, since the 1904 Treaty, Bolivia has not had sovereign access to
27 the Pacific Ocean. The third sentence recalls Bolivia's persistent claim to regain access to that Ocean, not to be confused with the territories ceded by the 1904 Treaty. Finally, it is mentioned that in order to find a peaceful solution to the maritime dispute — a dispute whose object is not the revision of the 1904 Treaty — Bolivia seised the International Court of Justice. In the end, the most interesting aspect of this ten-year US$500 million bond offering is its interest rate — 5.95 per cent.

10. The facts, when all is said and done, give the lie to the judgments of intention cast by Chile. 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 guarantee that, in domestic law, it ranks above other legislation, pursuant to Article 410, paragraph 2, of the Bolivian Constitution[39].

11. Treaties that are respected are not always loved. Chile's attachment to the 1904 Treaty is understandable, in the same way that Bolivia's profound disappointment is understandable. At the end of the day, the former gained a 120,000 sq km of the coastal Department of Litoral that belonged to the latter; as the ever-present Minister Plenipotentiary Abraham König once said "our

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[39]Text in Spanish:

"La aplicación de las normas jurídicas se regirá por la siguiente jerarquía, de acuerdo a las competencias de las entidades territoriales: 1. Constitución Política del Estado. 2. Los tratados internacionales. 3. Las leyes nacionales, los estatutos autonómicos, las cartas orgánicas y el resto de legislación departamental, municipal e indígena 4. Los decretos, reglamentos y demás resoluciones emanadas de los órganos ejecutivos correspondientes."

rights are rooted in victory, the supreme law of Nations"[40]. In these circumstances, it is hard to understand how the victor that succeeded in translating its conquest into a legal title of ownership can hold itself up as an example of magnanimity towards the one that had the "good fortune" to be beaten by it. Since Chile has used this platform to display, once again, its virtue towards Bolivia[41], which enjoys — so say — the most ample freedom of transit in the world, note should be taken, just for the record, of the many restrictions to the right of free transit from which Bolivia in fact suffers on Chilean territory; it is the source of recurrent disputes that have to be resolved in different fora, such as the Latin American Integration Association (ALADI)[42]. The last of Chile's counsel to arrive in The Hague asserted that Bolivia is asking the Court to *order* Chile to renegotiate to change Bolivia's non-sovereign access through Chilean territory into sovereign access[43]. This assertion is wrong. Bolivia has no intention of waiving the right of free transit afforded to it in the 1904 Treaty, nor is it demanding its revision or seeking to change Chilean ports into Bolivian ones.

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II. A formalist approach to the formation of international obligations

12. I noted that the second feature of Chile's second round of oral argument was a complete, though entirely recent, scepticism towards the formation of obligations outside of treaties understood as formal written agreements. I get the impression that Chile began to lose faith in its belief that international obligations can arise out of declarations and unilateral acts of acquiescence the day it realized that its conduct could result in obligations not only for its neighbours but also for itself. Since Chile's conversion to strict formalism, its lawyers have rejected the legal value of the exchanges of notes, joint declarations and unilateral acts submitted to the Court by Bolivia in its Memorial of 17 April 2014. But it has taken its iconoclastic fury too far. Pursuant to Article 79, paragraph 7, of the Rules of Court, the pleadings must be confined to those matters that are relevant to the objection.

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[40]See MB, Vol. II, Part I, Ann. 39.

[41]CR 2015/20, p. 16 (Bethlehem).

[42]Estado Plurinacional de Bolivia, "Limitaciones al derecho de libre tránsito de Bolivia por territorio chileno", Ministry of Foreign Affairs, Diremar, 2015.

[43]CR 2015/20, p. 39 (Koh).

13. Establishing whether the obligation to negotiate sovereign access to the Pacific Ocean for Bolivia can be inferred from those documents is a question which goes to the merits. It is something that we might have been discussing here today had Chile filed its Counter-Memorial in accordance with the terms of the Court's Order of 18 June 2013, instead of raising a preliminary objection to the Court's jurisdiction. However, Chile chose to contest the Court's jurisdiction under Article 79, paragraph 5, of the Rules of Court, and, as a result, the proceedings on the merits have been suspended. Our opponent cannot now use the one-and-a-half hours in the second round — as it did — to dispose of the merits in a decision on the Court's jurisdiction. Chile invoked Article VI of the Pact of Bogotá and that is the provision we have debated. Bolivia has highlighted the illogicality of Chile's objection to the Court's jurisdiction. If the Court confirms that it has jurisdiction, as Bolivia expects it to do, Chile will have several months in which to develop first its written and then its oral arguments on the nature and content of the obligation to negotiate which Bolivia infers from the agreements and unilateral acts submitted to the Court. Attempting to do so at this stage of the proceedings is, procedurally speaking, both improper and inappropriate, and the Court must not tolerate such conduct.

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III. The scare tactics

14. The third and final feature of Chile's second round was its scare tactics[44]. It is fascinating that Mr. Koh came all the way to The Hague to spend Chile's final ten minutes preaching a terrible message of the territorial instability awaiting Latin America were the Members of this Court to find that they have jurisdiction to entertain Bolivia's modest, reasoned and civilized Application. Every single treaty of limits would be in danger; the Pact of Bogotá would collapse; Bolivia would end up asking the Court to review its borders with all its neighbours; others would follow its bad example; good neighbourliness and regional co-operation would be at risk; the Court would find itself caught up in sensitive diplomatic affairs. Members of the Court, if you must be subjected to scare tactics, I truly believe you deserve something more sophisticated than the speech made by our opponent. Mr. Koh casually asserts that a legal declaration confirming the existence of the obligation to negotiate would result in States refusing to contemplate negotiations

[44]CR 2015/20, p. 38 (Koh).

for fear of the consequences. And yet, Bolivia has seised the Court precisely because of that: a refusal to negotiate.

15. Allow me to finish with a parable — the story of the Sephardic Jews, expelled from Castille in 1492, who abandoned their homes but took the keys with them in the hope that they would one day return. This symbolic return took place more than 500 years later with the legal recognition that they had an automatic right to Spanish nationality. It is not surprising that, in circumstances as complicated as those surrounding Bolivia's traumatic expulsion from the sea, the

30 latter tried to keep hold of its sovereign right to the ocean, in the same way that the Sephardic Jews held onto the keys to their homes, in the hope of one day returning. It did so with the longing of a Sephardic Jew. And, like the former, without seeking anything more than that which once belonged to it.

Mr. President, Members of the Court, thank you for listening. Mr. President, I would be grateful if you would give the floor to my colleague Professor Payam Akhavan.

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

M. AKHAVAN :

L'EXCEPTION SOULEVÉE PAR LE CHILI AU REGARD DU PARAGRAPHE 9 DE L'ARTICLE 79 DU RÈGLEMENT DE LA COUR

1. Monsieur le président, Mesdames et Messieurs de la Cour, hier, le Chili n'a laissé aucune place au doute quant à son souhait d'obtenir une décision au fond. M. Dupuy l'a dit aussi clairement que succinctement :

> «The only test to verify the jurisdiction of the Court is whether the [1904] [T]reaty . . . was in force or not in 1948. And Bolivia itself acknowledges that such was indeed the case, while at the same time trying to have that real treaty prevailed over by an improbable *pactum*.»[45]

Voilà qui est formulé on ne peut plus clairement. Le Chili demande donc à la Cour de dire qu'il existe un «traité réel» et un «*pactum* improbable»[46], qu'il n'a *pas* l'obligation de négocier un accès souverain à la mer, et qu'il n'existe aucun *pactum de contrahendo* mais uniquement

[45] CR 2015/20, p. 37, par. 22.

[46] *Ibid.*

l'incontournable traité de 1904. Il s'agit là purement et simplement d'une réfutation catégorique de la demande de la Bolivie au fond.

2. Comme si la lune était jalouse des étoiles, sir Daniel, incapable de tolérer d'autres accords au firmament des obligations, a qualifié le traité de 1904 de «toxique»[47] pour la demande bolivienne. Il a parlé de lever le voile sur celle-ci[48], et il en aura tout le loisir, Monsieur le président, mais il lui faudra attendre la nuit de noces, c'est-à-dire le stade de l'examen au fond de la présente instance.

31 3. M. Wordsworth, quant à lui, a qualifié les négociations portant sur un accès souverain de déclarations exprimant une «intention ... et non [un] *pactum de contrahendo*»[49] ; il a évoqué un *pactum* «tiré[] par les cheveux»[50] et «imaginaire»[51], ainsi que des «termes ne pouvant guère créer d'obligation[] juridique[]»[52], estimant que ces éléments étaient tout sauf un *pactum de contrahendo*[53]. Pour faire bonne mesure, il a poliment ajouté que, s'il s'attaquait ainsi frontalement à la demande de la Bolivie au fond, c'était uniquement dans le cadre de l'«examen de la question de la compétence»[54].

4. Monsieur le président, avec tout le respect que je porte à la Cour, il serait *inconcevable* qu'elle dise que cette exception a un caractère exclusivement préliminaire, au sens du paragraphe 9 de l'article 79 de son Règlement. Certes, il est clair que le fait de «[r]echercher si elle a compétence pourrait amener la Cour à effleurer certains aspects du fond de l'affaire»[55], mais «une décision sur la compétence ne peut *jamais* régler directement un point de fond»[56]. Or, la décision sollicitée par le Chili, selon laquelle il n'existerait pas de *pactum de contrahendo*, signifie

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[47] CR 2015/20, p. 13, par. 14.

[48] *Ibid.*

[49] *Ibid.*, p. 22, par. 19.

[50] *Ibid*., p. 23, par. 21.

[51] *Ibid*., p. 31, par. 51.

[52] *Ibid*., p. 25, par. 27.

[53] *Ibid*., p. 29, par. 45.

[54] *Ibid*., p. 31, par. 51.

[55] *Certains intérêts allemands en Haute-Silésie polonaise, compétence, arrêt n° 6, 1925, C.P.J.I. série A n° 6*, p. 15.

[56] *Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972*, p. 56 ; les italiques sont de moi.

nécessairement que «le fait de répondre à l'exception préliminaire» équivaudrait, pour la Cour, à «trancher le différend ... au fond»[57]. C'est tout à fait évident et élémentaire. La Cour ne saurait statuer sur cette question au stade préliminaire sans connaître du fond.

5. Monsieur le président, votre prédécesseur, M. le juge Aréchaga, a précisé que, en 1972, les mots «exclusivement préliminaire» avaient été ajoutés au paragraphe 9 de l'article 79 du Règlement de la Cour pour «dissuader les parties de soulever certaines questions sous la forme d'exceptions préliminaires»[58] et les «encourager à mettre ces exceptions de côté, en tant que moyens de défense au fond ne devant être introduits, intacts et préservés, qu'à ce stade». Telle est exactement la situation en la présente espèce ; nous avons affaire à des exceptions d'incompétence constituant à l'évidence des moyens de défense au fond qui n'auraient dû être introduits, «intacts et préservés», qu'au stade de l'examen au fond, et non pas à ce stade préliminaire.

32 6. Il va de soi que la Bolivie a toute confiance en son argumentation au fond. Bien qu'il ait tourné cette argumentation en ridicule, le Chili n'a en effet expliqué à aucun moment ce qu'était un *pactum de contrahendo*. Tout ce qu'il a trouvé à dire, c'est que la présente affaire porterait sur le caractère «sans préjudice» des négociations[59], et que la reconnaissance de l'existence d'un accord de négocier aurait, pour reprendre les termes de M. Koh, un «effet pervers» qui «paralyserait» la diplomatie[60]. En revanche, le Chili est resté muet sur les principes bien établis relatifs aux obligations qui découlent d'accords et d'autres éléments du comportement des Etats, parmi lesquels le *pacta de contrahendo* mais aussi le *pacta de negocio* et l'estoppel, qui constituent autant de motifs reconnus attestant l'existence d'obligations internationales, ainsi que cela est exposé au chapitre II, paragraphes 291 à 334, du mémoire. L'un d'entre eux est le principe fondamental selon lequel les «Etats sont en droit d'attendre et d'exiger que pareils engagements, une fois pris, soient respectés», principe qui «trouve son expression dans diverses notions juridiques, telles que l'estoppel, la forclusion et les attentes légitimes» (mémoire, par. 332). La Bolivie connaît fort bien la différence entre les déclarations politiques et les engagements juridiques, et elle a hâte de

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

[58] Eduardo Jiménez de Aréchaga, «The Amendments to the Rules of Procedure of the International Court of Justice», *American Journal of International Law*, vol. 61, p. 16.

[59] CR 2015/20, p. 16, par. 27 ; p. 39, par. 3 ; et p. 40, par. 6.

[60] *Ibid.*, p. 41, par. 9.

pouvoir contester la description erronée que le Chili a faite de sa demande, dépeinte comme étant le fruit d'une série de négociations qui n'ont pas abouti. Mais il lui faudra patienter jusqu'au stade de l'examen au fond.

7. En répétant sans cesse que l'accord en vue de négocier se heurterait immanquablement au traité de 1904, le Chili a fait l'impasse sur le renvoi, au cours du premier tour de plaidoiries de la Bolivie, à l'affaire *Gabčíkovo-Nagymaros*. Les chauffards qui circulent à Téhéran ou ailleurs seraient bien avisés de lire attentivement ce qui est dit dans cet arrêt : «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 [de l'accord].»[61] Les conséquences sont évidentes : les obligations découlant du traité de 1904 et de l'accord de négocier existent parallèlement ; une solution trouvée d'un commun accord peut donc avoir ou non une incidence sur le traité. Dans la pratique, pareille solution pourrait tout à fait ne pas exiger de revision du traité de 1904 mais, même si cela devait se révéler nécessaire, pourquoi faudrait-il s'en alarmer ? Ce qui importe, c'est qu'il s'agirait d'une solution trouvée d'un commun accord, et non d'une solution imposée. C'est là toute la futilité de l'argument du Chili concernant les heurts entre ces deux éléments. Sir Daniel a parlé, non sans dédain, d'«obligations parallèles», séparées par des «portes coulissantes», qui «coexistent sans jamais se recouper»[62], et

33 M. Koh a poursuivi en mettant la Cour en garde contre le fait de «prescrire *judiciairement* une obligation de négocier en vue d'atteindre un résultat précis»[63] et les dangers d'une négociation «déséquilibrée»[64]. Mais la véritable question, Monsieur le président, ne consisterait-elle pas simplement à déterminer précisément ce dont les Parties sont convenues, en examinant l'affaire au fond ?

8. Le Chili ne ménage pas ses efforts pour faire du traité de 1904 un tabou. Sir Daniel a ainsi fait grand cas de ma déclaration selon laquelle «[u]n traité [pouvait] être pertinent à l'égard d'un différend sans pour autant le régler»[65]. En l'occurrence, il semblerait que ce traité soit intouchable,

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

[62] CR 2015/20, p. 10, par. 1.

[63] *Ibid.*, p. 40, par. 6.

[64] *Ibid.*

[65] CR 2015/19, p. 54, par. 13.

que même un accord prévoyant de négocier qui pourrait aboutir à une entente susceptible ne serait-ce que d'effleurer le traité de 1904 reviendrait automatiquement à répudier cet instrument ; et que cela justifierait que la Cour se déclare incompétente en application de l'article VI au motif qu'elle rouvrirait une question déjà réglée, et ce, alors même que l'accord prévoyant de négocier revient à dire qu'une question demeure en suspens. Monsieur le président, tel ne saurait être le cas.

9. J'en viens à présent à la question posée à la Bolivie par M. le juge Greenwood, à savoir «[à] quelle *date* [celle-ci] considère-t-elle que les Parties ont conclu un accord aux fins de négocier un accès souverain à la mer ?»[66]. La Bolivie se fera un plaisir de répondre à cette question, et commencera par relever que le Chili s'est en saisi avec enthousiasme lors de son second tour de plaidoiries. M. Dupuy a ainsi parlé d'un *continuum* historique aux origines mystérieuses et de la nécessité que se produisent une «sédimentation»[67], une «cristallisation»[68], une «métamorphose»[69], ou d'autres instants magiques donnant soudainement naissance à des obligations. Il a laissé entendre que, si un accord particulier n'avait pas été conclu à une date précise, un comportement ou une pratique constante ne pouvaient générer d'obligation. Or, ce n'est pas là ce que la Cour a dit à maintes reprises. Pour ne citer qu'un seul exemple récent, dans l'affaire du *Différend maritime (Pérou c. Chili)*, elle a considéré que l'«accord tacite» intervenu entre les Parties «[laissait] supposer que la manière dont [elles] envisageaient leur frontière maritime avait évolué»[70]. Aucun principe de droit international n'exige en effet qu'il y ait un unique instant magique où des accords ou ententes apparaissent comme par enchantement, à l'instar de la création du monde. Cela étant, la Bolivie n'estime pas moins qu'il existe plusieurs exemples d'accords conclus avec le Chili. Au

34 paragraphe 337 de son mémoire, elle a d'ailleurs clairement indiqué que «[l]es événements exposés ... satisf[aisaient] [tous] aux critères d'un engagement juridique contraignant. Alors même qu'un seul engagement aurait suffi à donner naissance à l'obligation invoquée, c'[était] en l'espèce toute une série d'actes successifs du Chili qui [venait] étayer la thèse de la Bolivie.»

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[66] CR 2015/19, p. 60.

[67] CR 2015/20, p. 32, par. 4 (Dupuy).

[68] *Ibid.*

[69] *Ibid.*

[70] *Différend maritime (Pérou c. Chili), arrêt, C.I.J. Recueil 2014*, p. 38, par. 91.

10. Les faits sont tous là. Ils démontrent que, en de nombreuses occasions, le Chili a promis de négocier un accès souverain à la mer. «Si vous escomptez avoir du succès dans le monde, promettez tout, ne donnez rien !», a dit un jour Napoléon. En droit, une promesse reste toutefois une promesse, qu'elle ait été formulée une seule ou plusieurs fois. C'est aussi simple que cela.

11. M. Wordsworth n'a pas ménagé ses efforts pour ne retenir dans ces échanges que ce qui lui convenait, Mme Chemillier ayant brièvement démontré que les documents en question avaient ainsi été présentés sous un faux jour. Il n'en demeure pas moins que ces questions portent toutes sur le fond, et que la Bolivie se fera un plaisir, le moment venu, d'examiner en détail l'ensemble de ces échanges, à la lumière des principes applicables du droit international. En tout état de cause, ces questions ne relèvent pas de la procédure sur la compétence. Le comportement constant dont a fait preuve le Chili a bel et bien donné naissance à des obligations, tant avant qu'après 1948, et ce, que l'on considère les faits pertinents isolément ou conjointement. Pour en revenir à la question du juge Greenwood, la Bolivie estime qu'elle ne pourrait se révéler pertinente aux fins de la compétence que si l'on considérait qu'il existe une différence entre les périodes antérieure et postérieure à 1948, comme si l'article VI signifiait que les parties contractantes ne pouvaient plus conclure de nouveaux accords après l'instant magique où avaient sonné les douze coups de minuit, le 30 avril 1948. Or, les faits énoncés dans le mémoire de la Bolivie couvrent toutes les éventualités ; ils établissent l'existence d'obligations avant, en, et après 1948, mais il s'agit là, encore une fois, d'une question de fond.

12. Ce qui est évident, c'est que les auteurs du pacte de Bogotá, «pour satisfaire» à l'article 27 de la charte de l'OEA, avaient prévu de donner à l'article XXXI la portée la plus large possible, afin de «régler définitivement» tous les différends dans les Amériques. Sir Daniel a certes tenté de minimiser l'effet de l'article XXXIV du pacte, qu'il a qualifié de «disposition concernant [exclusivement] la compétence de la Cour» et signifiant que les «mécanismes de règlement des différends prévus dans cet instrument [étaient] épuisés»[71]. Cependant, ainsi que M. Forteau l'a précisé tout à l'heure, cette disposition met un terme à un différend si la Cour se

[71] CR 2015/20, p. 16, par. 25 (Bethlehem).

déclare incompétente en application de l'article VI ; elle ne peut donc s'appliquer que s'il ne fait aucun doute qu'une question a bien été réglée définitivement.

35 13. Monsieur le président, le Chili a fait grand cas de l'article 6 du traité de 1904, qui accorde à la Bolivie un «droit perpétuel et absolu de ... transit»[72]. Nous ne sommes pas tout à fait sûrs du but qu'il poursuit en invoquant sans cesse ce droit. Cherche-t-il, ce faisant, à insinuer que, puisqu'elle jouit de ce droit de transit moins important, la Bolivie devrait tout simplement oublier la promesse qu'il lui a faite de négocier un accès souverain ? Toujours est-il qu'il suffit, là encore, pour répondre à cette question, de déterminer précisément ce dont les Parties sont convenues — c'est-à-dire la teneur du *pactum de contrahendo* —, point qui relève du fond. Pour éviter que la Cour ne soit induite en erreur par cette prétendue «liberté de transit», la Bolivie tient toutefois à préciser qu'elle a récemment saisi l'Association latino-américaine d'intégration (ALADI), basée en Uruguay, de réclamations contre le Chili portant sur des restrictions que celui-ci a imposées en matière de transport. Ces restrictions prennent notamment la forme de longue files de camions auxquels il faut parfois trois jours pour franchir la frontière, ce qui nuit clairement au commerce extérieur bolivien. En dépit des droits que la Bolivie tient de l'accord en vue de négocier, les coûts entraînés par le refus de lui assurer un accès souverain à la mer ont eu des conséquences catastrophiques sur son développement ; en témoigne le fait que tous les pays de l'OEA reconnaissent que cette question reste en suspens et doit être résolue par voie de négociation entre les Parties.

14. Le ton que le Chili a adopté dans la présente instance ne saurait passer inaperçu. Tantôt celui-ci traite avec dédain les préoccupations bien réelles de la Bolivie, en prédisant le pire chaos et de graves bouleversements si la présente affaire devait être entendue au fond et en assimilant une procédure judiciaire à une attaque unilatérale, tantôt il déclare, comme dans l'exposé liminaire de son agent, qu'il «ne consent [tout simplement] pas»[73] à reconnaître la compétence de la Cour. M. Koh a, quant à lui, parlé de «tentatives unilatérales visant à remettre en cause, par voie

[72] CR 2015/20, p. 43, par. 1 (Bulnes).

[73] CR 2015/18, p. 19, par. 20 (Bulnes).

judiciaire, [les] frontières»[74] du continent, de les «ébranler et [de les] déstabiliser»[75], un peu comme si, en affirmant qu'il existe un accord en vue de négocier, la Bolivie avait commis un acte d'agression à l'encontre de ses voisins. M. Koh a également brandi la menace que la présente affaire donne à la Bolivie la possibilité de renégocier l'ensemble de ses traités frontaliers, ce qui est tout simplement faux. La Bolivie se fonde exclusivement sur son accord spécifique avec le Chili portant sur la négociation d'un accès souverain à l'océan Pacifique. Il s'agit d'une *lex specialis*, propre à des circonstances tout à fait particulières, aux relations historiques entre les deux Etats et aux ententes qu'ils ont conclues.

36 15. Il est évident que, en avançant de tels arguments politiques, le Chili s'est largement écarté du droit applicable en vertu du pacte de Bogotá. Plutôt que de rester dans ce cadre, il s'est servi de la présente instance pour présenter la demande de la Bolivie comme un précédent dépourvu de fondement, artificiel, vexatoire, dangereux et «tout à fait inacceptable pour [lui]»[76], afin de susciter la crainte au sein de la Cour et de la dissuader d'examiner l'affaire au fond, en invoquant des motifs sans rapport aucun avec le droit international. Mais peut-être le recours à pareils arguments dénote-t-il un manque de confiance en sa propre exception d'incompétence. M. Koh a, pour sa part, exhorté la Cour à ne pas se mêler de «questions diplomatiques épineuses»[77], comme si son rôle consistait à se tenir à l'écart de tout différend problématique. L'organe judiciaire principal de l'Organisation des Nations Unies n'aurait-il donc été créé que pour connaître de différends dont les enjeux sont minimes et ne portent guère à conséquence ? La réponse à cette question est claire : c'est un «non» retentissant ! Bien au contraire, c'est précisément dans le cadre de différends délicats comme celui qui oppose les deux Parties, lorsque tous les autres moyens de règlement ont été épuisés, que la Cour doit se montrer à la hauteur de la situation et proposer une solution permettant de sortir de l'impasse. La tentative du Chili de la dissuader d'exercer sa compétence en introduisant des considérations politiques étrangères à

[74] CR 2015/20, p. 41, par. 10 (Koh).

[75] *Ibid.*, p. 42, par. 14 (Koh).

[76] CR 2015/18, p. 17, par. 13 (Bulnes).

[77] CR 2015/20, p. 42, par. 15 (Koh).

l'affaire n'est pas de mise, mais le peuple bolivien est convaincu que la Cour fera la sourde oreille à pareils arguments, qui n'ont rien à voir avec le droit.

16. En résumé, Monsieur le président, Mesdames et Messieurs de la Cour, l'exception d'incompétence soulevée par le Chili consiste à dire qu'il n'existe aucune obligation de négocier un accès souverain de la Bolivie à la mer. Elle porte donc sur le cœur même de la demande de la Bolivie, ce qu'atteste le paragraphe 500 du mémoire que celle-ci a présenté. Le Chili vous demande tout simplement de statuer sur le fond, ce qui montre que son exception n'a manifestement pas le caractère exclusivement préliminaire requis par le paragraphe 9 de l'article 79 du Règlement de la Cour.

17. Ainsi s'achève ma plaidoirie. Je vous remercie, Monsieur le président, Mesdames et Messieurs de la Cour, de votre aimable attention tout au long des présentes audiences et vous prie de bien vouloir appeler à la barre M. l'ambassadeur Rodríguez Veltzé, agent de la Bolivie, qui présentera nos conclusions finales.

The PRESIDENT: Thank you, Professor. I now give the floor to H.E. Mr. Eduardo Rodríguez Veltzé, Agent of Bolivia.

37 M. RODRÍGUEZ VELTZÉ :

CONCLUSIONS FINALES DE L'AGENT DE L'ETAT PLURINATIONAL DE BOLIVIE

1. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un honneur pour moi que de m'adresser de nouveau à vous pour présenter, en son nom, les conclusions finales de l'Etat plurinational de Bolivie.

2. Ainsi que je l'ai indiqué mercredi dernier dans ma déclaration liminaire, la Bolivie a saisi la Cour parce qu'elle est attachée au droit international et croit au règlement pacifique des différends. Comme l'ont exposé nos éminents conseils, la Bolivie demande uniquement que le Chili respecte son obligation de négocier un accès souverain à l'océan Pacifique. Cette obligation est tout à fait distincte du traité de 1904 et résulte d'une série d'engagements, de déclarations et d'échanges intervenus au fil des années. Ce comportement prolongé n'est pas anodin ; il se voit au

contraire conférer, par le droit international, valeur d'obligation devant être respectée, conformément aux principes bien établis par la jurisprudence de la Cour.

3. L'existence de cette obligation est la question soumise à la Cour ; il s'agit d'une question de fond, qui ne peut être traitée à ce stade préliminaire sans la présentation, en bonne et due forme, d'exposés écrits et oraux. Le Chili a bloqué l'accès souverain de la Bolivie à l'océan Pacifique, il a bloqué la poursuite des négociations et il tente à présent, par son exception, de bloquer l'accès de la Bolivie à la Cour. Monsieur le président, Mesdames et Messieurs de la Cour, il serait injuste de priver la Bolivie de la possibilité de présenter son argumentation au fond.

4. En dépit des efforts déployés par le Chili pour faire échec à la compétence de la Cour en la présente espèce, le différend ne va pas disparaître pour autant ; il doit être réglé. Et le peuple bolivien appelle de ses vœux ce règlement. Le Chili ne devrait pas considérer cette affaire comme une menace mais comme une opportunité, une occasion s'offrant à lui et à la région tout entière de régler ce différend conformément au droit international et de renforcer encore les relations amicales entre les Etats.

5. De fait, le pacte de Bogotá visait précisément à régler pareils différends, de sorte qu'aucun différend sur le continent américain ne reste sans règlement définitif, ainsi que cela est exposé à l'article 27 de la charte de l'OEA.

6. La présente affaire revêt une importance capitale pour le peuple bolivien, qui compte sur votre institution pour régler définitivement la question. En 2013, le bâtiment même dans lequel nous nous trouvons, le «Palais de la Paix», a célébré son centenaire, et il avait été rappelé à cette occasion la contribution considérable qu'il avait apportée à la paix et à la justice. Il est devenu le «Palais de tous les Peuples», lesquels aspirent à ce que justice soit rendue dans un monde en
38 constante évolution. Les décisions prises dans ce palais prouvent que le droit prévaut et que les différends ne sauraient se prolonger indéfiniment.

7. Avant de donner lecture des conclusions finales, je tiens à exprimer, au nom de la délégation de l'Etat plurinational de Bolivie, notre sincère gratitude à la Cour pour l'attention et la patience dont elle a fait preuve tout au long des présentes audiences.

8. Je voudrais également remercier le greffier, M. Philippe Couvreur, et l'ensemble de son personnel, y compris les interprètes, pour leur courtoisie et leur efficacité.

9. Je saisis également cette occasion pour remercier tous les membres de la délégation bolivienne, qui n'ont pas ménagé leur peine pour élaborer et présenter l'argumentation de la Bolivie. Enfin, je tiens à remercier nos amis et collègues de la délégation chilienne pour leur courtoisie et l'esprit de respect mutuel qui a prévalu au cours des présentes audiences.

Conclusions finales de la Bolivie

10. Monsieur le président, Mesdames et Messieurs de la Cour, je vais à présent donner lecture des conclusions finales de la Bolivie.

11. La Bolivie prie respectueusement la Cour de :

a) rejeter l'exception d'incompétence soulevée par le Chili ;

b) dire et juger que la demande présentée par la Bolivie relève de sa compétence.

12. Monsieur le président, Mesdames et Messieurs de la Cour, je vous remercie de votre attention. Ainsi s'achèvent les conclusions de la Bolivie en la présente audience.

The PRESIDENT: Thank you, Excellency. A Member of the Court wishes to put a question to the Parties, and I shall now give him the floor. Judge Owada, please.

Juge OWADA : Je vous remercie, Monsieur le président. Je souhaiterais poser une question simple au demandeur et au défendeur afin d'éclaircir un point. La voici :

Au cours des présentes audiences, comme dans leurs écritures, les deux Parties ont employé l'expression «accès souverain à la mer». Bien qu'elles l'aient fait l'une et l'autre aux fins d'exposer leur propre position ou de décrire celle de la Partie adverse, il ne s'agit pas d'une formule consacrée en droit international général. Je saurais donc gré aux deux Parties de bien

39

vouloir indiquer quel est, selon elles, le sens de cette expression, et préciser quels sont les différents éléments que celle-ci recouvre lorsqu'elles l'emploient pour définir leur position concernant la compétence de la Cour.

Merci, Monsieur le président.

The PRESIDENT: Thank you. The text of the question will be sent to the Parties in writing as soon as possible. The Parties are invited to provide their written replies to this question no later than 1 p.m. on 13 May. Any comments a Party may wish to make, in accordance with Article 72 of

the Rules of Court, on the reply by the other Party must be submitted no later than 1 p.m. on 15 May.

The Court takes note of the final submissions which the Agent of Bolivia has just read out on behalf of Bolivia, as it took note yesterday of the final submissions of Chile.

That brings us to the end of the hearings on the preliminary objection raised by Chile in this case. I should like to thank the Agents, counsel and advocates of the two Parties for their presentations. In accordance with the usual practice, I shall ask the Agents to remain at the Court's disposal to provide any additional information the Court may require.

With that proviso, I declare closed the oral proceedings in the case concerning *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*. The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its Judgment. As the Court has no other business before it today, the sitting is now closed.

The Court rose at 4.30 p.m.

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