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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Thursday 22 March 2018, at 10 a.m., at the Peace Palace,

President Yusuf presiding,

***in the case concerning* Obligation to Negotiate Access to the Pacific Ocean (Bolivia *v.* Chile)**

VERBATIM RECORD

ANNÉE 2018

Audience publique

tenue le jeudi 22 mars 2018, à 10 heures, au Palais de la Paix,

sous la présidence de M. Yusuf, président,

***en l'affaire relative à l'*Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili)**

COMPTE RENDU

Present:	President	Yusuf
	Vice-President	Xue
	Judges	Tomka
		Abraham
		Bennouna
		Cançado Trindade
		Donoghue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Gevorgian
		Salam
	Judges *ad hoc*	Daudet
		McRae
	Registrar	Couvreur

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Présents : M. Yusuf, président
Mme Xue, vice-présidente
MM. Tomka
Abraham
Bennouna
Cançado Trindade
Mme Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian
Salam, juges
MM. Daudet
McRae, juges *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is open. We start today with the hearing of the first round of pleadings by Chile.

I now give the floor to the Agent of the Government of Chile, Mr. Claudio Grossman. You have the floor, Sir.

Mr. GROSSMAN:

1. Mr. President, Members of the Court, it is an honour to appear before you as Agent of Chile. I would like to take this opportunity to acknowledge the presence of Chile's Minister for Foreign Affairs, Roberto Ampuero, as well as other Government officials, members of the Chilean Senate and diplomatic corps, and respectfully to greet our Bolivian counterparts, including Bolivia's Foreign Minister, Fernando Huanacuni. Just as Bolivians are carefully following these proceedings, the Chilean people, too, are glued to their television and computer screens and reading in earnest minute by minute press reports about what is happening in "La Haya".

2. Mr. President, Chile held its seventh free and fair election since the return of democracy in 1990. On 11 March, our new President, Sebastian Piñera, and our new Congress were sworn in. We are proud of Chile's deep commitment to the rule of law, the separation of powers, and an independent judiciary. Chile aspires to empower its people by respecting the rights and freedoms of, and creating opportunities for, all its citizens.

3. Chile's active engagement in the international community is marked by its respect for and dedication to international law, peace, human rights, and bilateral and multilateral co-operation. Chile is a proactive Member of the United Nations, and despite its relatively small population and geographic location, it has contributed peacekeepers to operations all over the world. Chile's vocation for peace and the peaceful resolution of international disputes is further reflected in its service in the historic Peace Accords concluded between the Government of Colombia and its main armed opposition in September 2016.

4. Chile has ratified almost every human rights treaty and actively participates in regional and global international organizations to address co-operatively matters of common concern to

humanity, taking a leading role in the protection of the oceans, the fight against climate change and the promotion of sustainable development. Chile is proud of its active membership in regional organizations dedicated to co-operation and integration, including the Organization of American States, the Union of South American Nations, the Community of Latin American and Caribbean States, and the Pacific Alliance. Only a few days ago, Chile and 11 other countries signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership in Santiago.

5. Mr. President, Members of the Court, Chile and its neighbours have lived in peace for more than a century. As you know, in 1904 Chile and Bolivia concluded a Treaty of Peace and Amity, which fully settled all outstanding territorial issues between our two States. Under this Treaty, the two States agreed on the complete boundary between them[1]. Chile also recognized in favour of Bolivia "in perpetuity the fullest and most unrestricted right of commercial transit in its territory and its Pacific ports", as well as other privileges and benefits, including the construction of railroads vital to its development at that time[2].

6. Let me be absolutely clear. The Treaty of 1904 constitutes the full agreement consented to by Chile and Bolivia. There was no "historical bargain" outside the scope of the 1904 Treaty.

7. Instead of a wall, as Bolivia would have the Court believe, the 1904 Treaty of Peace and Amity is a freely agreed bridge linking our two peoples. It is the bedrock of our bilateral relationship, and through subsequent agreements involving trade, migration and co-operation, Chile and Bolivia have built upon its solid foundation. As guaranteed by the Treaty, Bolivia enjoys unrestricted access across Chilean territory in transporting goods in both directions. The main port used by Bolivia is in Arica. In recent years, almost 80 per cent of the cargo in Arica's port was Bolivian[3]. Bolivia enjoys important storage benefits and no customs duties in Arica and

[1] Treaty of Peace and Amity between Bolivia and Chile, signed at Santiago on 20 Oct. 1904 (the *1904 Peace Treaty*); Counter-Memorial of the Republic of Chile (CMC), Ann. 106, Art. II.

[2] 1904 Peace Treaty; CMC, Ann. 106, Arts. III and VI.

[3] Memoria Puerto de Arica 2016, p. 60, at http://www.puertoarica.cl/www/descargas/Memorias/memoria_2016.pdf; (accessed on 20 Mar. 2018).

Antofagasta[4], and Chile has offered to Bolivia free transit facilities in the port of Iquique[5]. Bolivia has not taken up Chile's offer to utilize the Iquique facilities.

8. In fact, Chile has done much more than what is required by the Treaty. In recent years, Chile built three new border complexes; enlarged and improved routes connecting Bolivia with the ports of Arica, Iquique and Antofagasta; and improved the port facilities in Arica by increasing the total storage capacity four-fold, at a significant cost to Chile[6]. Bolivia is one of the few countries in the world to operate its own customs authority in another country's ports.

9. The legal régime established in the 1904 Peace Treaty, including Bolivia's access to the sea, is unaffected by any political changes in either country.

10. Yet Bolivia is not satisfied with perpetual and free access to Chile's ports. It wants to change the nature of its access to the sea, from what it freely agreed to in 1904. Bolivia wants Chile to cede Chilean coastal territory to Bolivia, undisputed territory over which Chile has exercised continuous sovereignty for over a century. Included in this territory is Arica and Parinacota, a region where 300,000 Chileans live and work.

11. Bolivia wishes to revise both the history of a nineteenth century war and the 1904 Peace Treaty. In other words, although it purports to present a case consistent with the Court's Judgment in 2015 on the Preliminary Objection, in reality, Bolivia ignores it. The Court made clear that this case is neither about the legal status of the 1904 Treaty of Peace and Amity, nor about an obligation of result[7]. Instead, the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia's sovereign access and, if so, whether Chile has breached that obligation[8]. Bolivia has made a claim to the Court in terms it knows will not succeed, and then it

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[4] Chilean Circular No. 36 on the collection of taxes on revenue relating to persons and goods in transit from or to Bolivia, 20 June 1951, Preliminary Objection of the Republic of Chile (POC), Ann. 45 (A); Empresa Portuaria de Chile, res. No. 99, 26 Dec. 1996; CMC, Ann. 313, Art. 2; Convention on Trade, signed at Santiago on 6 Aug. 1912; POC, 34, Art. I; Convention on Transit, signed at Santiago on 16 Aug. 1937; POC, Ann. 44, Art. I.

[5] Authorization of the Port of Iquique for Free Transit in favour of the Republic of Bolivia, in accordance with the Treaty of Peace, Friendship and Commerce of 1904 between Chile and Bolivia, and reference to the Establishment of a Bolivia Customs office in Iquique, by Decree No. 141, 13 May 2008, at https://www.leychile.cl/Navegar?idNorma=272761; (accessed on 20 Mar. 2018).

[6] Ministry of Foreign Affairs of Chile, "Subsecretary Riveros attends the inauguration of the Zone of Extension of the Port of Arica", 26 Apr. 2016, at https://minrel.gob.cl/subsecretario-riveros-asiste-a-inauguracion-de-zona-de-extension/minrel/2016-04-26/181952.html; (accessed on 20 Mar. 2018).

[7] *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, p. 604, para. 32.

[8] *Ibid.*, paras. 32-33.

has changed its case at every opportunity in the hope of attaining anything at all. But the fact remains that its claim is unsustainable, and it must be dismissed in its entirety.

12. Bolivia misstates and misrepresents both the facts and the law.

(a) First, as we have explained in the written pleadings, Bolivia's violation of the terms of an 1874 Treaty and its refusal to solve that dispute through arbitration were the true causes of the War of the Pacific, along with Bolivia's arbitrary collective expulsion of Chileans and seizure of their property[9]. Chile reminds Bolivia that the Court is not charged with adjudicating the history or outcomes of the War of the Pacific.

(b) Second, Chile adamantly rejects and is disappointed by Bolivia's characterization of Chile's behaviour. It is Bolivia that repeatedly broke off negotiations and terminated diplomatic relations with Chile. Chile has willingly engaged in diplomatic exchanges and bilateral discussions with Bolivia. It has at different times, and in different ways, and motivated by different considerations, sought to engage with Bolivia's aspirations and desires for improved access to the Pacific coast. But the willingness of a State to engage in a diplomatic dialogue with its neighbours does not create a legal obligation to negotiate, let alone to reach an agreement. None of the encounters between Chile and Bolivia was based on the existence of a legal obligation to negotiate.

(c) Third, and as already decided by the Court, the 1904 Peace Treaty is not and cannot be at stake in these proceedings. Chile's sovereignty over all the land territory that lies between Bolivia and the Pacific Ocean was settled fully and in perpetuity in 1904. It follows that Bolivia has no right to this territory, and the Court's preliminary objections Judgment proceeds on the basis that Bolivia is not claiming such right. As Bolivia is fully aware, Article 6 of the Pact of Bogotá excludes from the Court's jurisdiction matters already settled by arrangement, or governed by treaties in force in 1948.

13. Bolivia has framed its case as one based on an alleged obligation to negotiate sovereign access, but exactly what Bolivia means has changed materially in the course of this case, including in its presentations this week. Bolivia's latest effort to reopen the 1904 settlement is grounded in

[9] See CMC, paras. 2.21-2.23.

broad claims of historical injustice. But doing justice cannot mean asking the Court to step outside its judicial role, or ignoring this Court's 2015 Judgment, or treating Chile as an isolationist villain on the basis of entirely untested and misleading accusations.

14. Bolivia's case is neither simple, nor modest, as its counsels asserted earlier this week[10]. Bolivia has presented multiple iterations of its case, each of which suggests a considerable lack of confidence in the case as previously put. In its newest and most extreme version, on Monday, Bolivia attempted to ground an obligation to negotiate *the cession of sovereign territory* in "membership of the community of [nations]"[11]. This proposition is dazzling in its implications for international relations. It is also striking in the lack of faith that it suggests in Bolivia's case on the existence of an actual agreement, unilateral statement, or other form of conduct establishing an obligation to negotiate.

15. Bolivia's acrobatics belie its true intentions. Bolivia asks the Court to find that Chile is under a legal obligation "to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean"[12]. While in its oral pleadings on Chile's preliminary objection in 2015, Bolivia retreated from the claim of an obligation of result to one of conduct[13], in its subsequent pleadings it continues to assert that Chile has an obligation to negotiate *to reach an agreement granting Bolivia sovereign access*. Despite Bolivia's machinations to retain jurisdiction at the preliminary objections phase, it is now clear that when Bolivia says "sovereign access" it means cession of territory[14].

16. What Bolivia is seeking from the Court is a mandated negotiation to reach an agreement ceding Chilean sovereign territory to Bolivia. In Bolivia's view, this duty to negotiate is infinite in duration, never extinguished until Bolivia gets the specific result it wants. There is no sound legal or factual basis for any such duty in any document or statement that Bolivia has pointed to or in its new case founded in general international law.

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[10] CR 2018/6, p. 58, para. 2 and p. 60, para. 10 (Lowe).

[11] *Ibid.*, p. 62, para. 20 (Lowe).

[12] RB, p. 192, para. *(a)*.

[13] See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*, Hearing on the Preliminary Objection, CR 2015/21, p. 18, para. 9 (Forteau); and pp. 27-28, para. 11 (Remiro Brotóns).

[14] See, e.g. RB, paras. 185, 216, 268, 342 and 346.

17. Outside the Peace Palace, Bolivia has spoken more freely about its true motivation. It has confirmed that it is here to implement the imperative set out in its 2009 Constitution which proclaims Bolivia's "unwaivable and imprescriptible right over the territory giving access to the Pacific Ocean and its maritime space"[15]. The Constitution also required the Executive to denounce or renegotiate treaties that are contrary to the Constitution[16]. In 2013, the Bolivian Senate said that the constitutional duty to denounce and renegotiate treaties could be fulfilled by utilizing international tribunals to challenge those treaties[17]. Just two months later, Bolivia filed its Application with the Court. It is the constitutional mandate that is the real origin of this case, not any conduct by Chile.

18. If any doubt remains about Bolivia's true intentions, one need only look to the words of its own President only three days ago, who announced to the world that Antofagasta "was, is and will be Bolivian"[18]. Mr. President and Members of the Court, 700,000 Chileans reside in Antofagasta, a territory over which Chile has exercised sovereignty for 114 years.

19. In its presentation over the next two days, Chile will address what remains of Bolivia's case, a case remarkably free of analysis of either facts or law. Simply listing the dates of documents or selectively quoting and distorting language out of context cannot satisfy Bolivia's burden to prove its case.

20. Today, Sir Daniel Bethlehem will provide an overview of the elements of Chile's case. Professor Jean-Marc Thouvenin will then address the legal principles relevant to Bolivia's case. Then, Dr. Kate Parlett will demonstrate that no obligation to negotiate sovereign access arose on the basis of diplomatic events between 1920 and 1929. Finally, Mr. Samuel Wordsworth will begin a discussion of the diplomatic Notes of June 1950 and Bolivia's case that these established an international agreement to negotiate sovereign access, completing these remarks tomorrow.

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[15] Political Constitution of the Plurinational State of Bolivia, 7 Feb. 2009, RC, Ann. 447, Art. 267 (1).

[16] *Ibid.*, Ninth Transitional Provision.

[17] Bolivian Law on Normative Application – Statement of Reasons, 6 Feb. 2013, POC, Ann. 71, Art. 6.

[18] @evoespueblo, 19 Mar. 2018, "La CIJ, en el fallo sobre controversia Perú y Chile, determinó el 27/01/2014 que 'al momento de su independencia, Perú y Chile, no eran estados vecinos, porque entre los dos países se encontraba Charcas', y desde 1825 es Bolivia. Antofagasta fue, es y será territorio boliviano." https://twitter.com/evoespueblo.

21. Tomorrow, Mr. Wordsworth will also examine the Charaña process of 1975 to 1978 in more detail than Bolivia ventured, demonstrating that this did not create or confirm any legal obligation to negotiate, and that the failure of the negotiation was squarely due to Bolivia.

22. Professor Mónica Pinto will show that the political statements and resolutions of the Organization of American States (OAS) during the 1980s, and the conduct of the relevant States, created no legal obligation to negotiate. She will emphasize that the OAS General Assembly has adopted no resolutions on this topic for the past three decades.

23. Dr. Ben Juratowitch will then demonstrate that no obligation to negotiate persisted or arose following Chile's return to democracy in 1990.

24. Finally, Professor Harold Koh will conclude Chile's presentation by emphasizing that ordinary diplomatic exchanges between neighbouring States cannot be converted into sources of a legal obligation to negotiate. Such an approach would discourage the peaceful resolution of disputes by diplomatic means.

25. Mr. President, Members of the Court, Chile is proud of its record and reputation as a collaborative and thoughtful voice on the challenges that face our world. Chile wishes to reiterate, however, that it has never had any legal obligation to negotiate the cession of its territory and sovereignty to Bolivia, and has no such obligation today.

26. Thank you for your kind attention. Mr. President, I ask you to give the floor to Sir Daniel Bethlehem.

The PRESIDENT: I thank the Agent of Chile and I now give the floor to Sir Daniel Bethlehem. You have the floor, Sir.

Sir Daniel BETHLEHEM:

OPENING SUBMISSIONS

Introductory remarks

1. Good morning, Mr. President, Madam Vice-President, Members of the Court, it is an honour to appear before you today — and before the Court in its new composition — and to represent Chile in these proceedings. My submissions will be divided into four parts. I would like,

first, to make a number of points of immediate response to what we heard from Bolivia earlier in the week. Our submissions will be responsive, and I will start the process of engaging with what Bolivia has said. I will also pick up on some of the themes identified by Chile's Agent just a moment ago.

2. Following this, I will look at the bigger picture. Bolivia would like you to see some things but not others. We think a more balanced perspective is necessary and I will identify a number of elements that we think should properly inform the prism through which you look at this case.

3. Third, I will return to Bolivia's case and make some further observations about its claimed historical bargain.

4. And finally, by way of conclusion, there is a brief point that warrants comment concerning an argument that Bolivia did not make earlier this week.

Points of immediate response to Bolivia's case

5. Mr. President, Members of the Court, I start with six points of immediate response to the case we heard from Bolivia early in the week.

6. The *first point* is that it is quite striking that Bolivia is saying that every form of engagement between States creates a legal obligation to continue to engage and that, once created, that obligation to engage never ever goes away. Professor Remiro Brotóns put it most directly on Tuesday when he said that one State when it formally requests negotiations on a matter and another State responds, that latter State is bound by an obligation to negotiate that it cannot disavow[19]. This proposition was echoed in the submissions of other Bolivian counsel.

7. Mr. President, Members of the Court, this is a quite remarkable proposition and when you put it together with Professor Lowe's case on Article 2 (3) of the United Nations Charter, it would formalize and constrain diplomacy in no one's interests. And it is also wrong in law as it bypasses the very essence of what is required for a State to be subject to a legal obligation, namely, an intent to be bound, whether express or implied, whether by act or by representation.

[19] CR 2018/7, p. 19, para. 20 (Remiro Brotóns).

8. My *second point*, equally striking, goes to Professor Forteau's concluding observation on Tuesday that Chile is attempting to drown the Court in a flood of details[20]. This is quite remarkable. Bolivia is here as the claimant requesting the Court to order Chile to engage in negotiations with the outcome of ceding sovereign Chilean territory to Bolivia. To this end, Bolivia asks the Court to imply a legal obligation to negotiate and to constrain Chile, to estop Chile, from maintaining the contrary. Yet in its almost six hours of submissions at the beginning of the week, Bolivia did hardly more than give you a sound bite from one or two documents in support of its case. And, indeed, Professor Lowe suggested that you could reach a conclusion that Chile was legally bound to negotiate without regard to *any* conduct of the Parties, simply by reference to Article 2 (3) of the United Nations Charter. While Professor Remiro Brotóns and Ms Sander referred you to some documents, they did so at a very high level of abstraction. And essentially, we are left with the appreciation that Bolivia's entire claim was built on assertion and on generality, rather than on evidence and on proof.

9. Mr. President, Members of the Court, if there is a divide between the Parties on what is required to reach a reasoned and considered judgment in this case, it is on this very point. We are here before a court of law; indeed, we are here before *the* court of law in the international community. Bolivia is alleging a legal obligation to negotiate on Chile's part to secure what Professor Forteau described as a "definitive solution" of a cession to Bolivia of sovereign Chilean territory[21]. Mr. President, Members of the Court, it behoves Bolivia to come before the Court with details — to *prove* its case. But it has done nothing of the sort. It rests its case on a flawed sense of historical injustice rooted in Professor Chemillier-Gendreau's partial vision of a blood-soaked history made current[22]. This is not the law! Chile comes to the Court with a case that rests on the evidence. Bolivia has failed to engage with that evidence. This case cannot properly be decided by reference to entreaties to sentiment. It is a case about law and it is on Professor Forteau's much derided detail that a fair judgment will need to be founded.

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[20] CR 2018/7, p. 74, para. 51 (Forteau).

[21] CR 2018/7, p. 74, para. 74 (Forteau).

[22] CR 2018/6, p. 32, paras. 3-4 (Chemillier-Gendreau).

10. My *third point* of response is to draw attention to change and discordance in Bolivia's case. The change is the changing character of Bolivia's case, the fourth iteration of which we heard this week. Bolivia began its case with a claim of a right to sovereign access to the Pacific Ocean. As stated in its Memorial, Bolivia "is in a unique and unprecedented position: it has been landlocked for more than a century *while retaining a right of sovereign access to the sea* that it has not been allowed to exercise"[23]. The same point is made elsewhere in the Memorial[24].

11. Now this claimed right of sovereign access was the foundation of Bolivia's Prayer for Relief — and you should see a slide on the screen quoting the Prayer for Relief which remains unchanged; this is from the Reply. The Prayer for Relief asks the Court to adjudge and declare that Chile must perform the said obligation to negotiate "to grant Bolivia fully sovereign access to the Pacific Ocean"[25]. Now Mr. President, Members of the Court, the Prayer for Relief has been the one constant in Bolivia's case. It asserts an obligation of result; an obligation to negotiate to secure a specified outcome.

12. In its oral pleadings at the preliminary objections phase, Bolivia's case underwent a change. To defeat Chile's contention that Bolivia was trying to unsettle something that had been settled by the 1904 Treaty, Bolivia recast its case as one of an obligation of conduct; an obligation to negotiate in good faith, rather than as an obligation of result[26], as well as advancing a new theory of what was meant by sovereign access.

13. Now Mr. President, Members of the Court, the Court took Bolivia at its word and concluded, in paragraphs 32 and 33 of your preliminary objections Judgment, that Bolivia does not ask the Court to adjudge and declare that Bolivia has a right to sovereign access[27]. As determined by the Court, the subject-matter of the dispute with which you are seised concerns whether Chile is

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[23] MB, para. 20; emphasis added.

[24] MB, para. 94. See further the discussion of this issue in the RC, paras. 1.4– 1.17.

[25] MB, Submissions and Prayer for Relief, subparagraph *(c)*.

[26] See Bolivia's second round of oral submissions of 8 May 2015, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*, CR 2015/21, p. 18, para. 9. See also Bolivia's rejection in clear terms in the second round of Chile's position that Bolivia was asking the Court to order Chile to renegotiate to change Bolivia's non-sovereign access through Chilean territory into sovereign access: *ibid*., pp. 27-28, para. 11.

[27] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, pp. 604-605, paras. 32 and 33.

under an obligation to negotiate sovereign access to the Pacific Ocean[28]. This *excludes* the question of whether Bolivia has a right to sovereign access. Indeed, the Court stressed that, even assuming *arguendo* the existence of an obligation to negotiate, "it would not be for the Court to predetermine the outcome of any negotiation that would take place in consequence of that obligation"[29]. The Court determined at the preliminary objections phase that the subject-matter of the dispute of which you are seised concerns the existence of an obligation of conduct, not an obligation of result.

14. Now Bolivia's case changed focus again in its Reply. The primary focus of the Memorial, on claims of express and implied commitment by Chile to negotiate, ceded centre stage to a case that rested heavily on claims of estoppel, legitimate expectations and acquiescence[30]. The Reply also saw an attempt to bring the case back to a claim for an obligation of result, following the expedient abandonment of this claim for purposes of the preliminary objections proceedings.

15. And we then come to the case presented earlier this week and a new theory, advanced by Professor Lowe, based on Article 2 (3) of the United Nations Charter. While there is passing reference to Article 2 (3) in Bolivia's Reply (although no reference in its Memorial), the theory advanced on Monday by Professor Lowe was entirely novel. The Court, we were told, need not have regard to *any* evidence of conduct by the Parties for purposes of founding an obligation to negotiate because such a change is to be found in Article 2 (3) of the United Nations Charter. Ms Sander echoed Professor Lowe's submission by reference to Article 3 of the OAS Charter[31].

16. That is change. Turning to discordance in Bolivia's case, this was evident in the argument advanced through the voices of Bolivia's different counsel. With almost one voice, Bolivia's Agent and Professors Akhavan, Chemillier-Gendreau, Remiro Brotóns and Forteau spoke of an obligation of result. As expressed by Professor Akhavan, in opening Bolivia's case, "Chile is under a binding obligation to negotiate an end to Bolivia's landlocked situation"[32]. The outcome is predetermined, only the modalities remain to be addressed. As expressed by Professor Forteau in

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[28] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, pp. 605-610, paras. 34 and 54.

[29] *Ibid.*, p. 605, para. 33.

[30] Bolivia referred in its Memorial, paras. 332, 334, 396 and 436 to legitimate expectations, but did not make any case by reference to any relevant legal authority. See CMC, para. 63, fn 204. Cf. RB, para. 322.

[31] CR 2018/6, p. 30, para. 32 (Akhavan).

[32] CR 2018/6, p. 30, para. 32 (Akhavan). See also CR 2018/6, p. 23, para. 1 (Akhavan).

closing, Bolivia asks the Court to order a definitive solution, that Chile must negotiate to secure Bolivian sovereign access to the Pacific Ocean[33]. And concordant submissions were made by Bolivia's Agent and by Professors Chemillier-Gendreau and Remiro Brotóns[34].

17. Professor Lowe, however, was singing from a different hymn sheet, with the support of Ms Sander. Professor Lowe's submissions were all about an obligation of conduct, not an obligation of result[35]. He spoke about a duty to receive communications, a duty to consider proposals, etc. And he expressed surprise that Chile was reluctant to entertain such a modest proposal[36].

18. What are we to make of this change and discordance in Bolivia's case? In the first instance, it is important simply to recognize the mercurial character of Bolivia's case and draw pause for thought from this. Professor Akhavan began Bolivia's submissions on Monday by extolling the simplicity of Bolivia's case[37]. Professor Forteau concluded Bolivia's case on Tuesday by echoing this intonation[38]. But Bolivia's case is not quite so simple. And it is not that Bolivia is struggling to articulate its case. Our friends on the other side of the room are very articulate. It is not that Bolivia's case rests on complex evidential detail. They have carefully shied away from such detail. *Rather, it is that Bolivia is simply making up its case as it goes along.* Its case changes shape at every attempt to grasp it. We still do not know when the claimed obligation to negotiate came into being. We still do not know whether Bolivia is seeking an obligation of result, or whether Professor Lowe has more modest aims, even if dressed up in very big clothes.

19. In Chile's submission, this undefined quality to Bolivia's case should cause the Court to hesitate long when it comes to assessing Bolivia's claims. A case that claims a legal obligation on the part of another, however it is packaged, concerns the cession of territory, must be held to a high standard of proof. This is not lightly to be presumed. Nor can weight without more properly be

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[33] CR 2018/7, p.74, para. 52 (Forteau).

[34] See CR 2018/6, p.18, paras. 5-6 (Agent); CR 2018/6, p. 34, para.10 (Chemillier-Gendreau); CR 2018/6, p. 35, para. 15 (Chemillier-Gendreau); CR 2018/6, p. 39, para. 28 (Chemillier-Gendreau); CR 2018/6, p. 45, para. 50 (Chemillier-Gendreau); CR 2018/6, pp. 56-57, paras. 41-42 (Remiro Brotóns).

[35] See, e.g. CR 2018/6, p. 61, para. 14 (Lowe).

[36] CR 2018/6, p. 58, para. 4 (Lowe).

[37] CR 2018/6, p. 18, para. 5 (Akhavan).

[38] CR 2018/7, p. 74, para. 51 (Forteau).

given to Bolivia's assertion of *bona fide* reliance on what Bolivia says Chile has committed itself to, but which Bolivia struggles to define and fails to prove.

20. So what exactly is Bolivia's case? Does Bolivia claim an obligation of conduct or does it claim an obligation of result? If it claims an obligation of result, following the Court's preliminary objections Judgment, this is simply outside the jurisdiction of the Court. If it claims an obligation of conduct, Bolivia must present a case on the facts by reference to the legal character of such an obligation.

21. But Mr. President, Members of the Court, on Monday Professor Lowe referred you to the commentary on the United Nations Charter edited by Bruno Simma, and cited extracts which were included at tab 16 of Bolivia's hearing bundle, to support his contention that Article 2 (3) of the Charter had legally binding effect and gave rise to an obligation to deploy active efforts for a settlement of an international dispute. But he fails to take you to the following paragraph on his extract of tab 16, and that says the following:

> "It should be noted that Art. 2 (3) obligates States to strive for the resolution of a dispute existing between themselves only to the best of their abilities . . . the obligation enshrined in Art. 2 (3) must not be mistaken for an obligation to reach a specific substantive result."[39]

22. Now obligations of conduct are not obligations to reach a specified substantive result. Bolivia has no right of sovereign access. This issue is not before the Court. There is no proper basis on which Bolivia can sustain a claim for a declaration by the Court that Chile is required to negotiate "effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean". And, as to the claimed obligation of conduct, there is no case on the facts before you to sustain the existence of such an obligation.

23. Mr. President, Members of the Court, my *fourth point* concerns the substance of Professor Lowe's argument on Article 2 (3) of the United Nations Charter. In setting out his case, Professor Lowe spoke about the modesty of Bolivia's case. Now there was indeed modesty, but this is to be found in the economy of Professor Lowe's characterization of the issues, an economy that, like a magician's distraction, masked a sleight of hand.

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[39] B. Simma et al., *The Charter of the United Nations. A Commentary*, 3rd ed., 2012, Vol. I, p. 190.

24. Professor Lowe spoke about the Court remedying injustice *extra legem*, a nineteenth-century historic injustice that Bolivia now claims for purposes of founding its case. In his appeal to the Court to provide the tools to facilitate a settlement of disputes, he painted a tantalizing picture of how much better the world would be if only the Court would seize the opportunity presented by Bolivia's case[40].

25. Chile would like a new world order as well, rooted in good neighbourliness. And Chile has on more than one occasion in the past engaged with Bolivia in a spirit of good neighbourliness only to find that spirit dashed on the rocks of Bolivia's intransigence. The modesty of the Bolivian case that we heard about this week was not quite so modest. Bolivia is not saying: "We should make efforts to resolve our dispute; please, Chile, come to the table and let's talk without preconditions." Bolivia is not saying: "All we are asking for is for Chile to come and talk and look for ways of overcoming our lingering dispute." Bolivia is saying something quite different.

26. On the screen, you should see again Bolivia's Prayer for Relief. As will be plain from this, Bolivia imposes a precondition for the negotiations that it wants with Chile. Bolivia is not simply seeking good-faith negotiations. Bolivia rather, is demanding a precommitment from Chile to an outcome of sovereign access.

27. There is also an additional consideration concerning Professor's Lowe's new theory. From his submissions, it appears that the dispute that Professor Lowe has in contemplation when he invokes Article 2 (3) is Bolivia's claimed nineteenth-century injustice that it "has been cut off from the sea by the forceful seizure of part of its territory"[41]. There is however a fundamental problem with this. That "dispute", the dispute to which Professor Lowe refers, was without doubt settled by the 1904 Treaty. The 1904 Treaty drew a line under the War of the Pacific and gave effect to the injunction of the Truce Pact of 1884 that a definitive treaty of peace and amity would be concluded. The dispute that Professor Lowe invoked to sustain his Article 2 (3) submission is thus a dispute that is undoubtedly beyond the Court's jurisdiction under the Bogotá Pact.

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[40] CR 2018/6, p. 59, para. 6 (Lowe).

[41] CR 2018/6, p. 66, para. 40 (Lowe).

28. My *fifth point* of response goes to the refrain that we heard from more than one of Bolivia's counsel. If Chile did not think that it was under an obligation to negotiate, Bolivia asks, why did it do so?

29. This is a curious question, but perhaps it fits with Professor Remiro Brotóns' proposition that you only respond to a request to negotiate from your neighbour, if you intend to assume a legal obligation to continue to negotiate thereafter.

30. Chile and Bolivia are neighbours. Chile would like to have good relations with Bolivia. Good neighbours talk — they find ways to talk even when there are difficulties. So, at various points, Chile engaged with Bolivia, including on the issue of Bolivia's aspiration to sovereign access.

31. *But,* Mr. President, Members of the Court, *agreeing to talk is not the same as agreeing to be bound to talk.* And, importantly, Chile's motivation to engage with Bolivia was influenced by the factual circumstances and Chilean policy imperatives of each individual engagement. So, for example, as regards the June 1950s Notes, Chile's engagement at that time was motivated by the possibility of reaching an agreement with Bolivia in which Bolivia would obtain sovereign access to the sea, but in return for allowing the waters of Lake Titicaca and other Bolivian lakes to be channelled for use in irrigation and hydroelectric power in Chile[42]. In the same vein, within the Charaña process in 1975-1978, while Chile was willing to negotiate, this was solely on the basis of an exchange of sovereign territory between the two States. Mr. Wordsworth will address both of these issues in greater detail.

32. The bottom line is that Bolivia's question of why Chile engaged, if it did not consider itself bound to do so, does not have a one-size-fits-all response, save only that Chile *never* engaged with Bolivia out of a sense that it was legally bound to do so. Chile's engagement was motivated by good neighbourliness. It was also motivated by its own policy imperatives that were circumstance and time specific. Now Mr President, Members of the Court, as you will well

[42] This was pursuant to a major engineering scheme financed by the United States of America and discussed between Chilean President González Videla and United States President Truman in May 1950. See, for example, Communiqué of the Ministry of Foreign Affairs of Bolivia regarding the statement made by the President of Chile, 30 March 1951, RB, Ann. 279.

appreciate, there is nothing unusual or nefarious about this. This is what States do the world over, for good and proper reasons and often to good and proper ends.

33. Now, there is one other point to add on this, which goes to the unreality of Bolivia's appreciation of the negotiating dynamic that its conduct has engendered over the years. Not to put too fine a point on it, whenever Chile has engaged on Bolivia's sovereign access agenda, and things have not unfolded as Bolivia would have liked, Bolivia has been adept at walking away. Bolivia has been adept at severing diplomatic relations. Bolivia has been adept at setting preconditions.

34. This is hardly the context in which Chile would have assumed or affirmed an obligation to negotiate. This is hardly the context in which Chile would have made representations to lead Bolivia on. Professor Forteau, in his closing remarks, referred to the 13-Point Agenda of 2006, and he said that both States knew exactly what they were doing[43]. Well, he is exactly right. Both States knew what they were doing and, indeed, had a common understanding. That common understanding was a search for a new accommodation to their relations. To this end, the two States adopted a pragmatic approach that side-lined and downplayed the issue of Bolivia's sovereign access aspirations. There was a shared recognition by the two States that headlining an issue about which there was no immediate prospect of agreement could derail engagement on other issues. Dr. Juratowitch will address this in greater detail tomorrow. The bottom line is that, after 1990, the engagement between Chile and Bolivia focused on practical initiatives. Bolivia may have retained its aspirations, but there was no engagement between the Parties on the issue of a cession of sovereign territory and no suggestion that Chile was bound by an obligation to negotiate. The focus was on other things.

35. Now, my *final point* of response goes to Bolivia's invocation of history, and I will address Bolivia's claimed historical bargain more fully a little later, but would like to make two headline points at this stage. The first is that there was no historical bargain, in two parts, as Bolivia claims. The 1904 Treaty drew a decisive line under the events of the late nineteenth century. It was by design, by name, by content, a definitive Treaty of Peace and Amity, negotiated and agreed, willingly and without let or hindrance, on both sides, as the anticipated outcome of the Truce Pact

[43] CR 2018/7, pp. 72-73, para. 48 (Forteau).

of 1884 that brought the Pacific War to an end. There was no second component of the 1904 settlement, waiting in the wings, aimed at according to Bolivia sovereign access to the Pacific Ocean. The claimed existence of a two-part historical bargain is an *ex post facto* mitigation construct by Bolivia that has no evidential foundation.

36. Bolivia roots its historical bargain claim in a treaty — the 1895 Transfer Treaty — that never entered into force and was overtaken nine years later by the 1904 Treaty. The record shows that the then-President of Bolivia considered the 1904 Treaty to be a good deal[44]. He campaigned for the presidency of Bolivia on that basis and was elected. It is of course the case that a number of his successors, including the current incumbent, have endeavoured to revisit the issue. But to claim a two-part historical bargain is insupportable by reference to any informed appreciation of the evidential record.

37. The second headline point goes to Bolivia's claim of historical injustice. Mr. President, Members of the Court, interpretations of history are for historians. Chile addressed Bolivia's misleading account of history in Chile's Counter-Memorial[45]. Professor Chemillier-Gendreau, Professor Lowe, may want to press the Court to right Bolivia's contemporary perception of its nineteenth century wrongs. The point, however, is that these proceedings are not a trial of duelling visions of the nineteenth century. Courts, of course, frequently assess and address history, and properly do so. But this is not that case, both for reasons of substance and for reasons of jurisdiction. This is not that case for the substantive reason that Bolivia's invocation of its claimed nineteenth century historic injustice is an appeal to sentiment. It is not an appeal to law, and it is flawed on the merits. This is not that case for the jurisdictional reason that matters settled by arrangement or governed by treaties in force at the point at which the Bogotá Pact was concluded are outside the Court's jurisdiction[46]. Whatever view one might take of nineteenth century history, the 1904 Treaty of Peace and Amity drew a line under prior claims. These issues are not properly before the Court.

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[44] Bolivia, 13th Closing Session of the Honourable National Congress, 2 February 1905 (La Paz, 1905), POC, Ann. 30, p. 123.

[45] CMC, pp. 21-32.

[46] Pursuant to Art. VI of the Bogotá Pact.

Realigning the prism

38. Mr. President, Members of the Court, I turn to my second topic, the broader picture, to give you a sense of what you are not seeing in the vision painted for you by Bolivia's counsel. For purposes of doing so, I will identify a number of elements that we think should properly inform the prism through which you should look at this case.

39. Mr. President, Members of the Court, as you look at the exchanges of the Parties over the years, it will be important that you see them not through the hindsight of judges and lawyers looking at the issues decades later but rather through the contemporary lens of the politicians and diplomats who were engaged in the exchanges you are asked to assess. I do not mean by this to suggest that you should suspend your judicial role or character. Quite to the contrary. It is an exacting and forensic judicial enquiry that is required of this case. I mean, rather, that you should not check real-world diplomatic rationality and experience at the door when you engage in this exercise as if somehow that experience is irrelevant. The diplomatic context is all important. Whether as a senior diplomat and representative of a State, as a foreign ministry legal adviser, as a politician, a key question running through the last decades of Chile–Bolivia relations is the following. When, on occasion, a representative of Bolivia comes knocking on your door and says, "We would like to talk about sovereign access", what do you say? What do you do?

40. You might readily say, in the spirit of good neighbourliness, or in the hope that good neighbourliness and something more concrete will emerge from such an engagement, you may readily say, "Sure, we would be happy to talk to you. You should have no expectations, as our territorial arrangements are governed by the 1904 Treaty, but we would be happy to talk to you."

41. Now, this happens the world over — in the great halls and margins of the United Nations or the OAS General Assemblies; when a non-paper is drafted and exchanged with a view to making more visible the contours of areas of potential agreement and disagreement; when political leaders agree to talk, even on the basis of an agreed agenda, but all the while with an honest understanding that *dialogue is not obligation but rather an important step in seeing whether a problem can be resolved.*

42. This is the case here, with the exchanges between Chile and Bolivia over the years. Chile does not disavow those exchanges. But it wants them to be seen for what they were. Political

outreach, genuine and open; attempts to explore the possibilities for addressing relations between the Parties. But not a commitment on Chile's part that Bolivia's aspirations would be met, and that the discussions to be had were simply about the modalities of achieving Bolivia's aims. This is legal repackaging that neither reflects nor serves the reality of diplomatic intercourse.

Diplomatic realities

43. Mr. President, Members of the Court, as you reflect on the objective intention of Chilean politicians and diplomats when engaging with their Bolivian counterparts, there are two practical, diplomatic realities to bear in mind. The *first* is simply the very fact of the 1904 Treaty and its long-arm controlling character on issues of territorial sovereignty between the two States. Treaties can be revised, and new arrangements adopted, if the parties so agree. But, if you have a treaty, such as the 1904 Treaty, which settles issues of territorial sovereignty between the two States, the representative of one State may properly take comfort from the appreciation that the arrangements agreed in that treaty cannot simply be upset or revised by anything other than a subsequent express, binding, treaty-based commitment to adopt a different dispensation. In other words, the 1904 Treaty is a backstop that secures your position and properly makes you more amenable to non-binding dialogue.

44. The *second* diplomatic reality is an understanding, both diplomatic and legal, that diplomatic dialogue does not without more create binding legal obligations. This is what every diplomat knows in his or her bones. This is what the lawyers would have advised. This is what the politicians would have understood. The refrain "nothing is agreed until everything is agreed" is the most significant controlling phrase in any negotiation. There is no rational world in which any representative of a State enters into a dialogue with a counterpart from another State and says, "I am happy to talk. Nothing is agreed until everything is agreed. But, by way of an exception to this, I am happy to give you a cast-iron legally binding commitment up front that I will negotiate until you achieve your objective."

45. But this is exactly what Bolivia is asking you to accept. Bolivia is asking you to accept that Chile, through its engagement and its conduct, manifested an open-ended, unconstrained, legally binding commitment to negotiate away a portion of its sovereign territory with the only

issue remaining to be addressed being the form of that gift of sovereign territory. Now this is simply not credible.

A more complete perspective

46. Mr. President, Members of the Court, alongside these diplomatic realities, there are also other considerations that will inform the prism through which you ought properly to look at the case presented by Bolivia.

47. The *first* of these is the settled legal framework of Chile–Bolivian relations regarding territorial sovereignty over more than a century preceding Bolivia's institution of these proceedings. I refer, of course, to the 1904 Treaty.

48. Now I have already addressed the backstop quality of the 1904 Treaty, but the Treaty also has continuing relevance for wider purposes. And as the preliminary objections phase is three years away and the composition of the Court has changed, I propose just very briefly to address one or two aspects of the 1904 Treaty.

49. The 1904 Treaty was a definitive settlement of all issues of sovereignty. By Article II — and you see the slide on the screen — the territories occupied by Chile by virtue of the Truce Pact of 1884, which brought the Pacific War to an end, "are recognized as belonging absolutely and in perpetuity to Chile". There follows this brief extract on the screen — from Article II — a further two and a half pages of dense text delimiting, comprehensively, the boundary between Chile and Bolivia. You can see, on the slide on the screen, this delimitation which makes clear that the entire boundary was delimited. There was no undelimited space leaving room for what Bolivia now claims was a second stage concerning Bolivian sovereign access to the Pacific Ocean. This second stage is a Bolivian construct that finds no reflection in the 1904 Treaty.

50. Complementing the territorial settlement in Article II was the provision in Article VI of the 1904 Treaty — which you now see side-by-side with Article II on the screen — granting to Bolivia "in perpetuity, the fullest and most unrestricted right of commercial transit through [Chilean] territory and ports on the Pacific". And this provision Article VI was supplemented by others in the Treaty which together established what was intended to be a comprehensive framework governing Chile-Bolivia relations going forward.

51. And as will be evident as you look at Articles II and VI on the screens side-by-side, the 1904 Treaty settled the issue of Bolivia's access to the Pacific Ocean. And as I will come on to address more fully, as part of the 1904 Treaty settlement, Bolivia abandoned any claim that it had sovereign access in favour of a treaty-based right of free transit in perpetuity. Bolivia, through its historical bargain argument, attempts to unpick the 1904 settlement, but it has no basis for doing so.

52. Mr. President, Members of the Court, together with a backstop quality of the 1904 Treaty, the continuing relevance of the 1904 Treaty for purposes of this merits hearing, is that it affected a comprehensive territorial settlement between Chile and Bolivia and addressed definitively the issue of Bolivian access to the Pacific Ocean.

53. The *second* consideration relevant to a more complete perspective is the evolving relationship between the Parties on the ground, based on the 1904 Treaty. The 1904 Treaty is the settled legal framework of Chile–Bolivian relations regarding territorial sovereignty but it did not put in place a static régime. The Parties have over the years undertaken and continue to this day to take, active steps to enhance and secure the Article VI–based right of free transit to the Pacific granted to Bolivia. And these are addressed in some detail in Chile's Counter-Memorial[47].

54. We appreciate, of course, that Bolivia will seek to downplay these developments. But they are relevant, nonetheless, as they point to what the Parties actually did over the course of decades, and what can be deduced from this about Chile's intentions as regards any claimed commitment to negotiate sovereign access.

55. Mr. President, Members of the Court, the *third* consideration, relevant to a more complete perspective, is that for 53 of the past 56 years, Chile and Bolivia have not had diplomatic relations. Bolivia broke diplomatic relations with Chile in 1962, with relations remaining ruptured until 1975. Bolivia again broke diplomatic relations with Chile in 1978, and they remain ruptured to this day.

56. Now relations between Chile and Bolivia remain good at the people-to-people level, and Chile and Bolivia also continue to engage co-operatively on a wide range of matters, including on

[47] CMC, pp. 43-54.

the enhancements to which I have just alluded concerning Bolivia's 1904 Treaty-based right of free transit. But the absence of diplomatic relations is telling because it is the clearest indicator that relations between Chile and Bolivia have not, for many decades, been conducive to commitments, however expressed, going to a binding obligation to negotiate to grant Bolivia sovereign access to the Pacific Ocean.

57. Mr. President, Members of the Court, Bolivia has painted a partial picture for you which attempts to draw substance from the accretion of conduct between the Parties over more than a century of engagement. The picture it tries to paint is of consistent conduct over this period. This is very far from reality. Dr. Juratowitch will address this further in his submissions tomorrow. For the moment, I would like to leave you with a sense that it is important that you look both at the broader picture and at the details of the engagements between the Parties. My colleagues will take you to the details. We believe that your clarity of vision will also be aided if you see this conduct through the broader lens that I have just proposed.

Bolivia's claimed historical bargain

58. Mr. President, Members of the Court, let me turn to address the third of my topics, and that is Bolivia's claimed historical narrative.

59. We heard a great deal from Bolivia on this earlier in the week about its claimed historical bargain and its two pillars, the first pillar being Bolivia's cession to Chile of the territories lost in the Pacific War and Bolivia's second claimed pillar, a cession of territory to Bolivia to afford it sovereign access to the ocean. Now the difficulty with Bolivia's case is that it is pure fiction. It bears no resemblance to the well-documented historical record. There was no second part to the claimed bargain. It is historical revisionism in the face of the evidential record.

60. Now Bolivia raised the issue of a nineteenth-century historical bargain in its Reply. Chile addressed this argument in some detail in Chapter 3 of its Rejoinder. But counsel for Bolivia seem not to have read this chapter at all as they made no attempt whatever to engage with the evidential record there set out therein. I will, in my few remarks to come, identify the main points, but in view of the weight that is placed on the historical bargain argument by Bolivia, I would invite you,

Members of the Court, to undertake an early review of this chapter of Bolivia's rejoinder, as it will leave you in no doubt whatever that there is no foundation to Bolivia's historical bargain claim.

61. Now the genesis of its historical bargain argument is to be found in Bolivia's failed attempt to invoke the 1895 Transfer Treaty as a basis for an express obligation to negotiate. As set out in its Memorial, Bolivia founded its claimed obligation to negotiate on the 1895 Transfer Treaty. And as stated in Bolivia's Memorial, the 1895 Transfer Treaty, according to Bolivia, "created an international obligation for Chile 'to transfer' a pre-defined area of territory, materialising a sovereign access to the sea for Bolivia"[48].

62. Now the only difficulty with this assertion is that the 1895 Transfer Treaty never entered into force and was left wholly without effect, but a matter discretely overlooked by Bolivia in its Memorial. But the unconsummated status of the 1895 Transfer Treaty was acknowledged by the Court in your preliminary objections Judgment, that is at paragraph sixteen[49].

63. But faced with the loss of the 1895 Treaty as an instrument giving rise to a binding legal obligation, Bolivia had to invent. And its invention was its historical bargain argument, that the 1895 Transfer Treaty, though wholly without effect, somehow nonetheless reflected a commitment by Chile to cede territory to grant Bolivia sovereign access to the ocean.

64. The record of the negotiations leading to the conclusion of the 1904 Treaty, however, and informed contemporaneous commentary, leave no doubt whatever that Bolivia abandoned any aspiration to a port on the Pacific in favour of the arrangements that were ultimately agreed in the 1904 Treaty.

65. And we have good visibility into the negotiations that ultimately culminated in the conclusion of the 1904 Treaty from Bolivia's own foreign ministry records, which Chile annexed to our Rejoinder. So, for example, in a circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, dated 25 January 1901[50], we find the following comment:

> "If Bolivia were to renounce its port, necessary as an indispensable condition for its progress and commercial development, it was required that Bolivia be provided with other means capable of making up the absence of a port, to be compensated, as

[48] MB, para. 340.

[49] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 599, para.16.

[50] RC, Ann. 375, p. 33.

far as possible, for the absence of a port, which Chile stated it could not grant to Bolivia."

66. And then the following year in a letter from the Legation of Bolivia in Chile to the President of Bolivia, dated 10 April 1902, the core elements of what was to become the 1904 Treaty were set out. And there is no reference anywhere to any claim by Bolivia to sovereign access and no suggestion of a parallel initiative — what Bolivia now claims as the second part of its historical bargain — to secure such access[51].

67. In his book addressing the history of diplomatic negotiations with Peru and Bolivia, Emilio Bello Codesido, the Chilean Foreign Minister who signed the 1904 Treaty, and who Bolivia invoked earlier this week, he records "that the idea of offering [to Bolivia] an area with access to the sea was disregarded because it was impracticable, although it was a logical and legitimate aspiration"[52]. And importantly he goes on to record that one of the items of negotiation that received particular treatment was "Bolivia's abandonment of any aspiration to a port on the Pacific"[53]. And I emphasize this: *"Bolivia's abandonment of any aspiration to a port on the Pacific"*. The accommodation for the abandonment of Bolivia's sovereign access claim was the arrangements agreed in the 1904 Treaty.

68. Mr. President, Members of the Court, there is no basis to Bolivia's historical bargain claim. Bolivia's claim to a port was abandoned in favour of the arrangements that were ultimately agreed in the 1904 Treaty. The 1904 Treaty occupies the space. There was no second part waiting to be agreed. But Bolivia today may lament what their forebears did a century ago, but the history shows, in the words of Bolivia's Foreign Minister, Federico Diez de Medina, in 1901, "that sensible men from both countries [were engaged] so that *peace* could be secured". Counsel for Bolivia may wish to conjure some hidden compact, but there was none. If Bolivia is to found its case for an obligation to negotiate, it must do so by reference to binding, contemporary commitments, not to fictitious claims of a nineteenth century bargain.

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[51] RC, Ann. 376.

[52] RC, Ann. 383, p. 87.

[53] RC, Ann. 383, p. 91.

Concluding remarks

69. Mr. President, Members of the Court, I turn to some very, very brief concluding remarks on an argument that Bolivia did not make earlier in the week, but hinted at. More than once, Bolivia's counsel, referring to the exchanges between Chile and Bolivia, said that this conduct, *whether taken separately or together* gave rise to a binding commitment to negotiate on Chile's part.

70. Now we heard very little from Bolivia on the detail of the legal basis for deducing a binding commitment from any individual exchanges. But we heard nothing at all whatsoever from Bolivia on any theory of accumulation. And we presume from its silence that the *whether taken separately or together* refrain from Bolivia is simply that, that it is simply a refrain, and that Bolivia does not advance an accumulation theory of arguments. Certainly, no such argument has been developed with any particularity in Bolivia's written pleadings. Of course, we still have Bolivia's second round submissions to come, so we may yet be treated to a further iteration of Bolivia's case.

71. Lest this issue be in the minds of the Court, however, there are two very brief points that I would like to make. The first is that 0 + 0 + 0 = 0. When it comes to founding a legal obligation, the whole is not greater than the sum of the parts. Bolivia cannot found a legal obligation to negotiate on conduct that invokes a series of engagements that, when individually assessed, are unable to sustain the claim that is advanced.

72. *Second*, for there to be an "overall pattern" of conduct there must *in fact* be a thread of consistent and continuous conduct that runs between *all* of the claimed exchanges, joining them together in cumulative effect. But there is *no such thread* in the exchanges that Bolivia seeks to stitch together. Now, I say no more about this, other than to leave you with the proposition just stated, as Dr. Juratowitch will address this aspect more fully in his submissions tomorrow.

73. Mr. President, Members of the Court, that concludes my submissions. I thank you for your close attention. Mr. President, may I ask you to call Professor Jean-Marc Thouvenin to continue Chile's submissions.

Le PRESIDENT : I thank you. Je donne à présent la parole à M. le professeur Thouvenin. Vous avez la parole.

M. THOUVENIN :

LE CADRE JURIDIQUE

I. Introduction

1. Merci beaucoup, Monsieur le président. Monsieur le président, Mesdames et Messieurs de la Cour, c'est un grand honneur de paraître devant vous, pour présenter certains des arguments du Chili, que je remercie vivement pour la confiance qu'il a bien voulu m'accorder.

2. Il m'échoit de présenter la position du Chili

a) sur les sources du droit international invoquées par la Bolivie comme fondement de la prétendue obligation qu'elle fait valoir,

ainsi que

b) sur le contenu d'une obligation de négocier, lorsqu'elle existe, et sur son extinction.

Auparavant, je ferai trois brèves observations sur la thèse bolivienne.

A. La demande bolivienne

3. La première, qui s'inscrit dans le prolongement des observations que sir Daniel vient de faire, concerne l'obligation de négocier que la Bolivie prétend opposer au Chili dans la présente instance.

4. Poupée russe, ou cheval de Troie ? Le fait demeure : ouvrez l'obligation de négocier, c'est une autre qui surgit, l'obligation pour le Chili de concéder un accès souverain à la mer. Donc un droit, pour la Bolivie, de se voir concéder ledit accès.

5. Or, Monsieur le président, la Bolivie ne peut pas faire valoir une telle prétention devant vous. Votre Cour a soigneusement procédé à une interprétation de la demande bolivienne, et a jugé que : [onglet n° 10] «[d]ans sa requête, la Bolivie ne demande pas à la Cour de dire et juger qu'elle a droit à [un] accès [souverain à la mer]»[54]. Cette conclusion, qui est à l'écran, est *essentielle* à

[54] *Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili), exception préliminaire, arrêt, C.I.J. Recueil 2015 (II)*, p. 604-605, par. 32 et 33 ; voir aussi CMC, par. 1.19-1.21.

l'arrêt fixant les limites de la compétence que vous exercez dans la présente affaire, arrêt qui a expressément été rendu «au vu de l'objet du différend» tel que la Cour l'a défini[55].

6. Dès lors, en droit, tout ce qui, dans les plaidoiries de la Bolivie, revient à réclamer que vous jugiez qu'elle a un droit à se voir concéder un accès à la mer, tout ce qui vous appelle à «prédéterminer le résultat de toute négociation qui se tiendrait en conséquence»[56] d'une obligation de négocier, tout ce que vous avez expressément indiqué ne pas relever de votre compétence, se qualifie comme une *demande nouvelle*, «a new claim», qui modifie l'objet du différend à l'égard duquel la Cour s'est jugée compétente[57]. Cet aspect de la demande, et les arguments qui l'accompagnent, devraient donc être simplement ignorés par la Cour car ils sont manifestement irrecevables.

B. La tonalité d'ensemble de l'argumentation bolivienne

7. Ma deuxième observation porte sur la tonalité d'ensemble de l'argumentation bolivienne. Elle vise à créer de toutes pièces l'introuvable «chaînon manquant» de son dossier, à savoir une *obligation juridique* du Chili de négocier pour satisfaire l'aspiration bolivienne.

8. Pour en donner l'illusion, la Bolivie a recours à diverses «techniques» de prétoire. Il y a évidemment la rhétorique, que nos amis de l'autre côté de la barre manient avec un talent consommé. La Cour y est habituée et sait parfaitement faire la part du droit. Je dirai en revanche un mot de la technique favorite de nos contradicteurs, qui est celle de l'accumulation, la Bolivie essayant de «faire masse» de tout ce qu'elle trouve, d'inonder la Cour d'éléments de toutes natures, pour donner une impression de densité à une thèse qui n'en a strictement aucune.

9. Je m'arrêterai à cet égard sur cette idée, développée pour la toute première fois devant vous lundi, que l'obligation de négocier dont vous êtes saisis découlerait non seulement d'accords,

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[55] *Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili), exception préliminaire, arrêt, C.I.J. Recueil 2015 (II)*, p. 610, par. 54.

[56] *Ibid.*, pp. 604-605, par. 33.

[57] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 695, par. 108 ; *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), arrêt, C.I.J. Recueil 2010 (II)*, p. 656, par. 39.

d'actes unilatéraux, etc., — j'y reviendrai tout à l'heure — mais aussi, de l'article 2, paragraphe 3, de la Charte des Nations Unies.

10. Pour la Bolivie, la notion de «différend» contenue dans cet article viserait, notamment, toute situation : «where a problem is raised with a neighbouring State, [and when] the State declines to offer any reaction and refuses absolutely to address the matter at all»[58].

11. Il en découlerait, si l'on a bien suivi les explications du professeur Lowe, que :

a) puisque la Bolivie a fait connaître au Chili qu'elle a un besoin vital d'accès à la mer, et que

b) le Chili ne veut pas en discuter,

c) alors il existe un différend au sens de l'article 2, paragraphe 3,

d) lequel génère l'obligation, pour le Chili, de négocier ledit besoin vital d'accès à la mer.

12. Quatre observations s'imposent.

13. Premièrement, si cette formule était correcte, tout Etat pourrait, quand bon lui semblerait, obliger en droit ses voisins à négocier à propos de ses aspirations, en faisant valoir qu'elles relèvent de ses besoins vitaux.

14. Deuxièmement, le mot «négocier» n'apparaît nullement dans le texte de l'article 2, paragraphe 3, de la Charte, dont on nous dit pourtant qu'il génère une obligation de négocier.

15. Troisièmement, la Cour aura peut-être été frustrée d'entendre lundi que sa jurisprudence à propos de la notion de «différend» est «irrelevant»[59]. Car, tout au contraire, elle est généralement, et à très juste titre, considérée comme «ample», comme couvrant les différends *en général*, sans se limiter aux différends «de nature juridique». Au demeurant : «le caractère politique ou juridique d'un différend n'est pas une distinction matérielle, mais une distinction renvoyant au type d'arguments et au champ lexical choisis par les parties»[60].

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[58] CR 2018/6, p. 69, par. 52 (Lowe).

[59] CR 2018/6, p. 67, par. 44 et p. 69, par. 52 (Lowe).

[60] H. Ascensio, «Art. 33», *in* J.-P. Cot, A. Pellet (sous la dir. de), *La Charte des Nations Unies, Commentaire article par article*, t. 1, troisième édition, Economica, 2005, p. 1049.

16. Un «différend», au sens de l'article 2, paragraphe 3, n'est rien d'autre qu'«un désaccord sur un point de droit ou de fait», une «contradiction, une opposition de thèses juridiques ou d'intérêts» entre des parties[61], conformément à la jurisprudence *Mavrommatis*.

17. Le «commentaire Simma» évoqué par mon éminent contradicteur — dont la contribution pertinente est signée de Christian Tomuschat — ne dit pas autre chose : «A dispute arises when a State addresses specific claims to another State, which the latter State rejects.»[62]

18. Le même auteur explique d'ailleurs :

> «Realistically, the Charter refrains from demanding of States that they should maintain with all of their neighbours relations of friendship and good neighbourliness, although this is a desirable state of affairs ; it confines itself to requiring all States not to let their disputes with other countries degenerate into a peace-threatening configuration.»[63]

19. Lorsqu'un Etat fait connaître à un autre ses aspirations, ses problèmes et que ce dernier ne souhaite pas en discuter, il n'y a pas «désaccord», «contradiction», ou «opposition», susceptible de faire naître une obligation. Mais il y a, sans doute, une frustration.

20. Monsieur le président, Mesdames et Messieurs les juges, il n'existe pas, en droit international, d'obligation pour les Etats de négocier avec leurs voisins à propos de leurs aspirations. Ils *peuvent* le faire ; ils le font bien souvent ; mais ils n'y sont nullement *obligés* par la Charte des Nations Unies. La frustration de l'un ne fait pas naître l'obligation de l'autre.

21. Quatrièmement, et, en tout état de cause, contrairement à ce que suggère la Bolivie, le Chili n'a pas tourné le dos aux problèmes de son voisin. Depuis plus d'un siècle, le Chili a fait de

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[61] *Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 11.

[62] C. Tomuschat, «Art. 2(3)», *in* B. Simma *et al.*, *The Charter of the United Nations : A Commentary*, vol. 1, troisième édition, par. 27.

[63] C. Tomuschat, «Art. 2, par. 3», *in* A. Zimmermann, C. Tomuschat, K Oellers-Frahm, C. Tams, *The Statute of the International Court of Justice, A commentary*, deuxième édition, Oxford, 2012, p. 85.

constants efforts pour améliorer l'accès de la Bolivie à la mer, dans le cadre du droit de transit concédé par le traité de 1904, et même au-delà de ses prescriptions[64].

C. Le cœur de la thèse bolivienne

22. J'en viens à ma troisième observation, qui porte sur la prétention qui se trouve au cœur de la thèse bolivienne, qui est qu'un Etat serait soumis à une *obligation* de négocier dès lors qu'il se dirait *disposé* à entamer une négociation.

23. Cette thèse est à vrai dire intenable après l'accueil réservé par les Etats à l'article 15, alinéa *a)*, du projet que la Commission du droit international a transmis en 1968 à la conférence diplomatique de Vienne qui devait adopter ce qui devint la convention de Vienne sur le droit des traités.

24. Il se lit ainsi [onglet n° 11]:

> «Un Etat est obligé de s'abstenir d'actes tendant à réduire à néant l'objet d'un traité envisagé :
>
> *a)* Lorsqu'il a *accepté d'entrer en négociations* en vue de la conclusion du traité, tant que ces négociations se poursuivent»[65].

[64] Voir, par exemple : Convention on Trade between Chile and Bolivia, signed at Santiago on 6 August 1912, voir l'exception préliminaire de la République du Chili (ci-après «EPC») (annexe 34) ; Protocol Regarding the Transfer of the Bolivian Section of the Railroad from Arica to La Paz between Bolivia and Chile, signed at Santiago on 2 February 1928, EPC (annexe 42) ; Act of Transfer of the Railroad from Arica to the Plateau of La Paz — Bolivian Section between Bolivia and Chile, signed at Viacha on 13 May 1928, EPC (annexe 43) ; Protocol on the Management of the Chilean and Bolivian Sections of the Railway from Arica to La Paz, signed at La Paz on 29 August 1928, CMC (annexe 132) ; Convention on Transit between Bolivia and Chile, signed at Santiago on 16 August 1937, EPC (annexe 44) ; Chilean Circular No. 36 on the collection of taxes on revenue relating to persons and goods in transit from or to Bolivia, 20 June 1951, EPC (annexe 45 A) ; Chilean Circular No. 36 on the collection of taxes on revenue relating to persons and goods in transit from or to Bolivia, 20 June 1951, EPC (annexe 45 A) ; Declaration of Arica by the Ministers of Foreign Affairs of Bolivia and Chile, signed at Arica on 25 January 1953, CMC (annexe 150) ; Chile-Bolivia Treaty of Economic Complementation, signed at Arica on 31 January 1955, CMC (annexe 151) ; Supplementary Protocol to the Treaty of Economic Complementation on Facilities for the Construction of the Oil Pipeline, signed at La Paz on 14 October 1955, CMC (annexe 153) ; Agreement Modifying Article Two of the Protocol on the Exploitation of the Bolivian Section of the Arica-La Paz Railway of 29 August 1928, agreed by exchange of notes on 10 November 1955, CMC (annexe 154) ; Agreement on the Sica Sica — Arica Oil Pipeline of Yacimientos Petrolíferos Fiscales Bolivianos, Transiting through Chilean Territory between Bolivia and Chile, signed at Santiago on 24 April 1957, CMC (annexe 155) ; Chilean Ministry of National Defence, Undersecretary of the Navy, Decree No. 009, 29 February 2000, CMC (annexe 319) ; Convention between Chile and Bolivia on Integrated Border Controls, signed at Santiago on 17 February 2004, CMC (annexe 331) ; Agreement on Customs Cooperation and Information Exchange between Bolivia and Chile, signed at Santiago on 17 February 2004, CMC (annexe 330) ; Letter from the Chilean Internal Tax Administration to the Chilean Ambassador Deputy Secretary of the Ministry of Foreign Affairs, No. 1270, 29 July 2010, EPC (annexe 45 E)).

[65] *Annuaire de la Commission du droit international*, 1966, vol. II, p. 220 ; les italiques sont de nous.

25. Ce texte a été rejeté par la conférence diplomatique[66], notamment, et c'est ce qui importe ici, parce que la plupart des participants se sont dits convaincus que, contrairement à ce que ce texte pouvait laisser penser, *un Etat ne se lie aucunement lorsqu'il accepte d'entrer en négociations*[67]. L'opinion générale était, pour reprendre une formule de Paul Reuter, qu':

> «ouvrir une négociation n'engage à rien, car négocier répond à une action entièrement discrétionnaire : jusqu'à la conclusion d'une négociation, le négociateur garde sa liberté totale : accepter, refuser, suspendre, rompre, en appeler à l'opinion, tout est permis»[68].

L'idée de modifier cet état des choses comme le suggérait le projet de texte fut rejetée comme contraire à la pratique et à l'*opinio juris*, et jugée par ailleurs totalement inopportune car l'adopter aurait eu pour effet, selon les Etats, de les dissuader d'entrer en négociations, minant le socle même des relations diplomatiques[69]. Les visions «catastrophiques» dont le Chili est censé «raffoler», selon le mot du professeur Remiro Brotóns, sont donc loin d'être les hallucinations qu'il suggère[70].

26. A vrai dire, la Commission du droit international était elle-même convaincue qu'un Etat qui accepte d'entrer en négociations avec un autre n'est soumis à aucune obligation de négocier. Elle souhaitait seulement que fût indiqué que le principe de bonne foi impose une certaine conduite tant que des négociations sont en cours. Mais même cette précision, aussi peu engageante fût-elle, fut considérée par les Etats comme incompatible avec leur liberté à l'endroit de négociations auxquelles ils ne sauraient être obligés, pour la seule raison qu'ils auraient *accepté* de les entamer.

II. La théorie des sources des obligations sur laquelle repose la thèse bolivienne

27. Si vous me le permettez, Monsieur le président, je vais maintenant vous entretenir des sources des obligations sur lesquelles la demande bolivienne repose. Les professeurs Remiro Brotóns et Akhavan me pardonneront de ne pas réfuter leurs caricatures de la position

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[66] *Documents officiels de la Conférence des Nations Unies sur le droit des traités*, Première et deuxième sessions, Vienne, 26 mars-24 mai 1968 et 9 avril-22 mai 1969, Nations Unies, doc. A/CONF.39/11.Add.2, rapports de la Commission plénière, p. 141-142.

[67] Voir conférence des Nations Unies sur le droit des traités, première session, 26 mars-24 mai 1968, Nations Unies, doc. A/CONF.39/C.1/SR.19, les déclarations des représentants du Venezuela, p. 106, par. 4 ; de la Suisse, par. 5 ; de l'Inde, p. 107, par. 18 ; de l'Autriche, p. 110, par. 50 ; de l'Allemagne, p. 110, par. 53 ; de l'Uruguay, A/CONF.39/C.1/SR.20, p. 112, par. 3 ; du Mali, p. 112, par. 9.

[68] P. Reuter, «De l'obligation de négocier», *in Mélanges Morelli*, Paris, 1975, p. 711-733, en particulier p. 714.

[69] Conférence des Nations Unies sur le droit des traités, première session, 26 mars-24 mai 1968, Nations Unies, doc. A/CONF.39/C.1/SR.19, les déclarations des représentants du Venezuela, p. 106, par. 4 ; de la Suisse, p. 106, par. 5 ; du Liban, p. 110, par. 51 ; de la Grèce, p. 107, par. 16.

[70] CR 2018/6, p. 52, par. 27 (Remiro Brotóns).

chilienne à ce sujet, qui relèvent d'une technique de prétoire bien connue, consistant à travestir les positions de la partie adverse pour mieux en dénoncer la prétendue inanité[71]. Non sans quelques regrets, je ne disserterai pas non plus sur la notion d'«atmosphère conventionnelle» si poétiquement évoquée par le professeur Remiro Brotóns[72]. Mais le temps m'est compté, et je vais donc me concentrer sur le droit. C'est une gageure de le faire en quelques minutes, mais je vais m'y employer, car le demandeur convoque, alternativement aussi bien que cumulativement, quantité de figures du droit international. On échappe à la coutume locale, mais pas au principe général du droit international, puisque la Bolivie invoque l'obligation générale de négocier de la Charte des Nations Unies, que j'ai déjà écartée comme sans pertinence à l'instant. Voyons donc le reste.

A. Accord

28. A commencer par l'accord. Qu'il soit explicite ou tacite, l'accord ne vaut que s'il reflète à la fois une «rencontre de volontés identiques et réciproques entre les contractants»[73], et l'intention des Etats concernés de se lier juridiquement[74]. Sans ces *deux* éléments, il n'y a pas d'obligation juridique. Le juge Ranjeva l'a très bien exprimé :

> «La rencontre de volontés, en soi, ne suffit … pas pour la création d'obligations juridiques. Il en est ainsi lorsque les parties à un accord n'ont pas voulu établir entre elles un rapport juridique et qu'elles ont entendu écarter leur volonté commune de l'espace couvert par le droit.»[75]

i) Accord explicite

29. Cette exigence des deux éléments, rencontre de volontés et intentions de se lier juridiquement, vaut bien entendu pour un échange de correspondances diplomatiques constitutif d'un traité. Ce type de traité suppose en principe que les parties se soient accordées sur les termes de leur engagement, afin d'exprimer leur «volonté commune», avec la précision qui sied à un traité. Le *Glossaire des termes se rapportant aux traités*, établi par les Nations Unies, rend compte de cette pratique bien connue du monde diplomatique de la manière suivante :

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[71] CR 2018/6, p. 49-50, par. 16-19 (Remiro Brotóns) ; CR 2018/7, p. 51, par. 28 (Akhavan).

[72] CR 2018/6, p. 52, par. 24 (Remiro Brotóns).

[73] F. Capotorti, «Cours général de droit international public», *RCADI*, t. 248, 1994-IV, p. 148.

[74] DC, par. 2.8.

[75] *Compétence en matière de pêcheries (Espagne c. Canada),compétence de la Cour, arrêt*, opinion dissidente du juge Ranjeva, *C.I.J. Recueil 1998*, p. 569, par. 41.

> «Le consentement des Etats à être liés par un traité peut être constitué par un «échange de lettres» ou un «échange de notes» … Dans la pratique, la deuxième lettre ou note, en général celle qui est envoyée en réponse, *reproduira le texte de la première*.»[76].

30. Dans ce contexte, une succession de notes dont la seconde ne reproduit pas le texte de la première rend généralement douteux qu'elle puisse être un traité. Mais à supposer même que, bien que différents, les termes des deux notes soient considérés comme reflétant fidèlement une identité de vues, ce qui suppose à tout le moins qu'elles parlent de la même chose, encore faudrait-il, pour que leur échange soit porteur d'obligations internationales, qu'elles expriment une intention des parties de se lier juridiquement. On ne saurait le présumer car bon nombre d'accords formels n'ont pas cette ambition. Tout dépend de l'intention exprimée par les parties, telle qu'elle ressort des mots qu'elles ont choisi d'employer : si ces mots ne sont pas évocateurs d'obligations juridiques, alors ils caractériseront une posture purement politique. Lorsque tel est le cas, l'accord relève de la catégorie bien connue des «actes concertés non conventionnels», ou, en anglais, des «non-legally binding agreements»[77].

Monsieur le président, ma langue a fourché ; peut-être que cela veut dire que c'est le moment de la pause.

Le PRÉSIDENT : Je vous remercie, Monsieur le professeur, la Cour va à présent marquer une pause de quinze minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 30 à 11 h 50.

Le PRESIDENT : Veuillez vous asseoir. L'audience reprend. J'invite M. le professeur Thouvenin à poursuivre son discours.

M. THOUVENIN :

31. Merci beaucoup. Monsieur le président, Mesdames et Messieurs de la Cour, je parlais avant la pause de la rigueur avec laquelle il sied de vérifier l'existence d'un engagement conventionnel. C'est avec cette rigueur qu'il convient d'évaluer la portée juridique des «accords

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[76] https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_fr.xml#exchange ; les italiques sont de nous.

[77] F. Münch, «Non-Binding Agreements», *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 29, 1969, p. 1.

informels, déclarations ou communiqués», lesquels ont en principe vocation, comme l'indiquait le professeur Jacqué dans son cours donné à l'Académie de droit international de La Haye, à «[ne donner] naissance qu'à un modèle de comportement de nature politique»[78]. Ce n'est que «dans des cas exceptionnels», écrit-il encore, que ces instruments pourront créer des obligations réciproques, de sorte qu'il faut être «prudent lorsque l'on se livr[e] à l'analyse d'un engagement pris dans un tel document, car il pourrait s'agir d'un engagement purement politique»[79].

32. Un bel exemple d'engagement sans portée juridique obligatoire exprimé dans un communiqué a été donné dans l'affaire du *Plateau continental de la mer Egée*, dont la Bolivie fait curieusement grand cas[80].

33. Dans cette affaire, la Cour a considéré que la question de savoir si le communiqué conjoint de Bruxelles du 31 mai 1975 était un accord autorisant la saisine unilatérale de la Cour dépendait «essentiellement de la nature de l'acte ou de la transaction dont il [était] fait état», et qu'il fallait «tenir compte avant tout des termes employés et des circonstances dans lesquelles le communiqué a[vait] été élaboré»[81].

34. Dans cette affaire, la Cour a conclu à l'absence d'accord juridique après avoir exploré les circonstances et les termes du communiqué, dans le texte duquel les premiers ministres concernés avaient pourtant utilisé le terme «décidé»[82].

35. On le voit, et c'est bien normal, Monsieur le président, car les souverainetés ne sauraient se lier par inadvertance, pour qu'un communiqué conjoint puisse être considéré comme un accord juridiquement contraignant, ce sont à la fois ses termes *et* les circonstances dans lesquelles il a été rédigé qui doivent y concourir. Si les termes n'y sont pas, les circonstances n'y suffiront jamais. Si les termes y sont, mais pas les circonstances, aucun accord ne sera caractérisé.

36. J'en viens alors au cas d'espèce.

37. Monsieur le président, permettez-moi d'ouvrir une parenthèse purement linguistique. La phrase en anglais «is open formally to enter into a direct negotiation aimed at searching for a

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[78] J.-P. Jacqué, «Acte et norme en droit international public», *RCADI*, t. 227, 1991-II, p. 394-395.

[79] *Ibid*., p. 391-392.

[80] MB, par. 296.

[81] *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 39, par. 96.

[82] *Ibid.*, p. 39-40, par. 97-98 ; les italiques sont de nous.

formula» ne signifie pas, comme le soutient la Bolivie[83], «disposé à entamer *officiellement des* négociations directes en vue de *trouver la* formule», mais signifie, ce qui est tout à fait différent, «est disposé à entamer *formellement une* négociation directe destinée à *chercher une* formule».

38. Ceci précisé, j'observe que les textes dont la Bolivie prétend, à tort, qu'ils sont des accords explicites, indiquent du Chili qu'il est en anglais «open to enter into a negotiation» — selon la Bolivie, «willing to enter into a negotiation» — ou «resolved to continue the dialogue» avec son voisin. Ces mots reflètent-ils ordinairement un engagement juridique ? La réponse est négative. Permettez-moi, Monsieur le président, de l'illustrer brièvement en évoquant trois cas typiques récents dans lesquels les mêmes mots que ceux que la Bolivie met dans la bouche du Chili ont été utilisés par des Etats, sans aucunement signifier une intention de s'obliger juridiquement [onglet n° 12] :

a) En septembre 2013, alors que l'Iran était mis en cause à raison de son attitude à l'égard de l'arme nucléaire, le président des Etats-Unis Barrack Obama fit savoir par ses services de presse que : «it had «long been the position of President Obama» that he'd be willing to enter bilateral negotiations [with Iran] … The extended hand has been there from the moment the president was sworn into office.»[84]

b) L'année dernière, l'ambassadeur de Chine au Mexique a rendu public que : «China is willing to negotiate a free-trade agreement with Mexico»[85].

39. A l'évidence, Mesdames et Messieurs de la Cour, aucune de ces déclarations unilatérales n'a eu pour objet ou pour effet de créer une obligation juridique. Derrière ces mots s'expriment des postures politiques, importantes sans doute sur le plan politique et diplomatique, mais pas des engagements juridiques.

40. Quant aux déclarations conjointes par lesquelles les Etats se disent «resolved to»/«résolus à» telle ou telle action, là encore la pratique démontre sans appel qu'elles n'ont pas

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[83] MB, annexe 109 B.

[84] «White House : Obama «willing» to meet with Iran's Rouhani», *The Hill*, 19 septembre 2013, http://thehill.com/homenews/administration/323419-white-house-obama-willing-to-meet-rouhani-at-un.

[85] «China willing to negotiate FTA with Mexico, says ambassador», *China Daily*, 29 juin 2017, http://www.chinadaily.com.cn/business/2017-06/29/content_29929713.htm.

vocation à créer des obligations juridiques. Parmi bien d'autres[86], le communiqué conjoint des ministres des affaires étrangères du Japon, des Etats-Unis et de l'Australie du 25 juillet 2016 en est un bon exemple. Il indique, entre autres, que : «The Ministers resolved to further strengthen cooperation in the following fields : … Effective implementation of the Paris Agreement, striving for entry into force in 2016.»[87]

41. C'est peut-être dommage pour l'accord de Paris, mais il n'y a évidemment, derrière ces mots, aucune obligation juridique.

42. Je conclus ce point, Monsieur le président : les mots dont la Bolivie assène qu'ils sont porteurs d'obligations juridiques, n'ont pas cette vocation.

ii) Accord tacite et acquiescement

43. Au titre de son bouquet de thèses alternatives, la Bolivie en appelle aussi à l'accord *tacite* et à l'acquiescement comme si les théories de l'accord tacite et de l'acquiescement étaient des prix de consolation pour celui qui échoue à prouver un accord explicite.

44. A l'évidence, la théorie des accords tacites ne peut se manier qu'avec d'extrêmes précautions. Ce n'est que lorsque la preuve de l'existence d'un tel accord est solide comme le roc qu'elle trouve à s'appliquer[88].

45. Or, et par un contraste assez saisissant, le propos de la Bolivie sur l'accord tacite et sur l'acquiescement d'ailleurs est singulièrement peu articulé.

46. Dans ses écritures, la Bolivie en appelle à une déclaration politique faite dans le cadre de l'Organisation des Etats américains le 26 octobre 1979[89], à laquelle le Chili aurait opposé un silence que la Bolivie prétend approbateur. Mais, Monsieur le président, les diplomates savent bien qu'ils n'ont aucune obligation de répondre à tout ce que disent leurs homologues devant les

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[86] Voir, comme autre exemple, communiqué de presse conjoint Japon/Australie, 18 janvier 2018, http://www.mofa.go.jp/files/000326262.pdf ; communiqué conjoint Pakistan/Etats-Unis, 1er mars 2016, https://pk.usembassy.gov/u-s-pakistan-strategic-dialogue-joint-statement/.

[87] Déclaration conjointe des ministres des affaires étrangères du Japon, des Etats-Unis et de l'Australie, 25 juillet 2016, https://foreignminister.gov.au/releases/Pages/2016/jb_mr_160725.aspx.

[88] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 735, par. 253 ; *Délimitation de la frontière maritime dans le golfe du Bengale (Bangladesh/Myanmar), arrêt, TIDM Recueil 2012*, p. 44, par. 117.

[89] Procès-verbal de la 2e réunion de la commission générale de l'Assemblée générale de l'Organisation des Etats américains, 26 octobre 1979, CMC, annexe 248.

organes politiques des organisations internationales. La Bolivie s'est également référée, y compris cette semaine[90], à sa déclaration de novembre 1984 faite à l'occasion de sa signature de la convention des Nations Unies sur le droit de la mer. Mais il suffit de la lire pour comprendre qu'elle n'appelait aucune réponse du Chili puisqu'elle se bornait à faire valoir l'aspiration bolivienne, sans aucunement prétendre que le Chili serait juridiquement tenu de négocier afin de la satisfaire.

47. Pour le reste, mardi dernier, le professeur Akhavan s'est borné d'abord à tenter — en vain, je crois — de vous convaincre de ne pas aborder la question des accords tacites avec la rigueur et l'exigence qui vous caractérisent et sont reflétées dans votre jurisprudence[91], ensuite à arguer que le fait que le Chili ait clairement et distinctement fait valoir, à plusieurs reprises, que rien dans sa conduite ne saurait être vu comme l'engageant juridiquement, *confirme le contraire*, parce que l'exception confirmerait la règle[92]. La Cour appréciera.

B. Acte unilatéral

48. J'en viens à l'acte unilatéral, sans redire l'évidence sur laquelle, d'ailleurs, les Parties s'accordent, qu'un tel acte ne peut créer d'obligations juridiques que si telle est l'intention clairement affirmée de son auteur[93], et si une telle intention résulte incontestablement des termes de l'acte comme des circonstances de son adoption. Je n'insiste pas non plus sur la rareté des actes unilatéraux créateurs d'obligations juridiques, laquelle rareté «s'explique facilement étant donné qu'aucun Etat ne se prête de bon gré à faire des concessions spontanées et gratuites»[94].

49. Les Parties s'opposent ici sur au moins trois points.

50. Premièrement, contrairement à ce que suggère la Bolivie, ce n'est pas à la légère qu'un Etat peut prétendre qu'un autre a unilatéralement tenu des propos qui l'engagent juridiquement. L'exigence probatoire est très élevée[95]. A cet égard, les réactions qu'une déclaration a suscitées

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[90] CR 2018/7, p. 50, par. 24-25 (Akhavan).

[91] CR 2018/7, p. 48-49, par. 18-20 (Akhavan).

[92] CR 2018/7, p. 49, par. 21 (Akhavan).

[93] MB, par. 304 ; CMC, par. 4 .17.

[94] E. Suy, *Les actes juridiques unilatéraux en droit international public*, Paris, L.G.D.J., 1962, p. 111.

[95] Commission du droit international, «Principes directeurs applicables aux déclarations unilatérales des Etats susceptibles de créer des obligations juridiques et commentaires y relatifs», *Annuaire de la Commission du droit international*, 2006, vol. II, deuxième partie.

lorsqu'elle a été faite sont d'une particulière pertinence afin de déterminer ses éventuels effets juridiques[96]. Si le prétendu destinataire d'une promesse ne voit dans la déclaration rien qui vaille engagement juridique, prétendre le contraire, *a posteriori*, revient à rien moins qu'à une réécriture de l'histoire diplomatique.

51. Deuxièmement, la Bolivie prétend pouvoir s'appuyer sur des documents rédigés unilatéralement par ses services, des documents purement internes, rapportant des phrases non vérifiées, non validées par les responsables chiliens à qui ces documents les attribuent[97]. La Bolivie en fait grand cas, comme si elle pouvait s'appuyer sur ses propres documents internes pour asseoir sa démonstration de l'existence d'actes unilatéraux par lesquels le Chili aurait promis de concéder un accès souverain à la mer. Mais, Monsieur le président, les phrases rapportées ont-elles été correctement retranscrites ? Même à supposer que ce soit le cas, ont-elles été sorties de leur contexte ? Le Chili ne saurait le dire car les acteurs que ces textes mettent en scène ne sont pas là pour témoigner. La plus grande prudence s'impose donc. La Cour se rappellera d'ailleurs que lorsque la Cour permanente de Justice internationale a donné foi à la célèbre déclaration Ihlen, elle s'est dûment assurée que cette déclaration correspondait aux «mots qui figurent dans la minute rédigée de la main de M. Ihlen»[98].

52. Pour ce qui concerne les actes indubitablement attribuables au Chili, mes collègues reviendront sur chacun d'entre eux et démontreront qu'ils ne manifestent aucune intention de se lier juridiquement.

53. Il me reste seulement à dire un mot — c'est le troisième point *au moins* sur lequel les Parties divergent — des circonstances qu'il convient de prendre en considération pour déterminer la portée d'un acte. La plus déterminante est le contexte dans lequel l'acte intervient. Dans l'affaire *Burkina Faso/République du Mali*, la Cour a analysé la portée d'une déclaration unilatérale du chef de l'Etat malien, qui affirmait publiquement que «si la Commission de l'Organisation de l'unité africaine décide objectivement que la ligne de frontière passe par Bamako, le gouvernement que je

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[96] Commission du droit international, «Principes directeurs applicables aux déclarations unilatérales des Etats susceptibles de créer des obligations juridiques et commentaires y relatifs», *Annuaire de la Commission du droit international*, 2006, vol. II, deuxième partie, principe directeur n° 3 et les commentaires y attenant.

[97] CR 2018/7, p. 43, par. 4 (Akhavan) ; voir, par exemple, MB, annexe 56, REB, annexe 325, *ibid.*, annexe 334 et MB, annexe 66.

[98] *Statut juridique du Groënland oriental, arrêt, 1933, C.P.J.I. série A/B n° 53*, p. 58.

préside s'inclinera devant la décision»[99]. La Cour a constaté qu'il ne s'agissait pas d'un engagement juridique non pas, comme le voudrait le professeur Akhavan, parce que cette déclaration «hyperbolic» manquait de sérieux[100], mais parce que — il suffit de lire ce que dit la Cour [onglet n° 13] :

> «Rien ne s'opposait en l'espèce à ce que les Parties manifestent leur intention de reconnaître le caractère obligatoire des conclusions de la Commission de médiation de l'Organisation de l'unité africaine par la voie normale : celle d'un accord formel fondé sur une condition de réciprocité.»[101]

54. Ce sont *très exactement* les mêmes circonstances qui prévalent en la présente espèce.

C. *Estoppel*

55. La Bolivie en appelle aussi à la règle de l'*estoppel*. Monsieur le président, voilà encore une règle qui ne saurait être invoquée à la légère, à raison, pour reprendre les termes de la Cour dans l'affaire du *Golfe du Maine*, «des problèmes que peut poser en général l'application de cette notion en droit international»[102]. Ses conditions d'application sont par suite strictes et cumulatives.

56. L'*estoppel* ne saurait jouer que dans les cas où il existe un doute sur la position de l'Etat à qui il est opposé, en ce sens qu'il y a une incertitude sur le point de savoir s'il a entendu se lier — c'est ce que le Tribunal arbitral dans l'affaire des *Chagos* appelle la «zone grise»[103]. En l'espèce, il n'existe aucun doute sur l'intention du Chili, qui n'a jamais été de se lier juridiquement, comme le Chili l'a clairement fait savoir à de nombreuses reprises.

57. Pour le reste, les conditions de l'*estoppel* ont été résumées par votre Cour. Selon votre jurisprudence, l'*estoppel* suppose que l'Etat à qui il est opposé [onglet n° 14] :

> «ait adopté un comportement ou fait des déclarations qui auraient attesté d'une manière claire et constante qu'il avait accepté [une obligation]. Elle impliquerait en outre que [l'Etat qui invoque l'*estoppel*], se fondant sur cette attitude, ait modifié sa position à son détriment ou ait subi un préjudice quelconque *(Plateau continental de la mer du Nord, arrêt, C.I.J. Recueil 1969*, p. 26, par. 30 ; *Différend frontalier,*

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[99] *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 571, par. 36.

[100] CR 2018/7, p. 46, par. 13 (Akhavan).

[101] *Différend frontalier (Burkina Faso/République du Mali), arrêt, C.I.J. Recueil 1986*, p. 574, par. 40.

[102] *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 310, par. 148.

[103] *Aire marine protégée des Chagos* (*Maurice c. Royaume-Uni*) (2015), CPA n° 2011-3, p. 178, par. 447, mentionné avec approbation par la Bolivie dans sa réplique, par. 325.

terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I.J. Recueil 1990, p. 118, par. 63).»[104]

58. Pour qu'il y ait *estoppel*, il faut donc d'abord que le comportement ou les déclarations de l'Etat en cause ait attesté de manière claire et constante qu'il se tenait pour juridiquement lié[105]. Ladite représentation ne saurait avoir un «caractère incertain»[106].

59. En l'espèce, aucune représentation claire, constante et non équivoque, n'a attesté que le Chili se tenait pour lié par l'obligation alléguée par la Bolivie. Les termes de certaines déclarations chiliennes ont reflété une ouverture à une négociation, qui ne saurait être *légitimement* comprise comme autre chose que comme une fort classique posture diplomatique.

60. L'*estoppel* supposerait aussi que la Bolivie apporte la preuve documentaire qu'elle s'est fondée «en toute bonne foi» sur la conduite chilienne pour croire à un engagement juridique de sa part. Il ne suffit pas évidemment pour la Bolivie de le dire à la barre ; il faut qu'elle le prouve. Or, non seulement la Bolivie n'apporte aucune preuve documentaire à cet égard car il n'y a strictement rien dans son dossier qui aille en ce sens, mais, surtout, elle ne le peut pas puisqu'elle était parfaitement au courant de la position chilienne, à la fois du fait des termes soigneusement choisis par le Chili dans ses différentes communications officielles, qui ne laissent aucun doute sur ses intentions, mais aussi à la suite des dénégations chiliennes, par exemple celles de 1963[107], 1967[108],

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[104] *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 303, par. 57.

[105] *Emprunts serbes, arrêt n° 14, 1929, C.P.J.I. série A n° 20*, p. 39 («représentation claire et non équivoque») ; affaire du *Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, opinion dissidente de sir Percy Spender, p. 143 («représentation claire et sans équivoque») ; *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark) (République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 26, par. 30 (représentation «claire et constante») ; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 303, par. 57 («que le Cameroun ait adopté un comportement ou fait des déclarations qui auraient attesté d'une manière claire et constante qu'il avait accepté») ; *Aire marine protégée des Chagos* (*Maurice c. Royaume-Uni*) (affaire CPA n° 2011-03), sentence du 18 mars 2015, p. 174, par. 438 «clear and consistent representations».

[106] *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 309, par. 145.

[107] DC, par. 5.31-5.32

[108] DC, par. 5.33.

1987[109] et 1988[110]. La Cour mondiale a toujours rejeté la thèse de l'*estoppel* dans de telles circonstances[111].

61. L'*estoppel* supposerait encore que la Bolivie apporte la preuve qu'alors qu'elle se serait fondée de bonne foi sur une apparence créée par la conduite du Chili, le prétendu changement de position de ce dernier lui aurait fait subir un dommage.

62. Mais là encore, le dossier bolivien est vide.

III. Le contenu d'une obligation de négocier

63. J'en viens alors, Monsieur le président, au contenu d'une obligation de négocier, lorsqu'elle existe. Permettez-moi deux remarques d'ordre général avant d'évoquer le cas d'espèce.

64. Premièrement, la Bolivie fait fausse route en postulant que ce contenu répondrait à des standards généraux qui seraient toujours pertinents[112]. Comme l'observait Paul Reuter : «il n'y a pas une obligation uniforme de négocier»[113]. Il faut donc, et ceci relève en réalité du bon sens, distinguer selon chaque cas.

65. Deuxièmement, la Bolivie se fourvoie également en prétendant, dans sa réplique, qu'une obligation de négocier, lorsqu'elle existe, se définirait au regard de sa prétendue «cause». En réalité, à l'image de toute obligation internationale, une obligation de négocier, lorsqu'elle existe, s'interprète au regard des termes de l'engagement pris, ainsi que de son objet, tel qu'il est révélé par ses termes.

66. J'en viens alors au fait, c'est-à-dire à l'objet de l'obligation de négocier dont la Bolivie se prévaut devant votre Cour.

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[109] DC, par. 5.20 *a)*.

[110] DC, par. 5.20 *b)*.

[111] *Emprunts serbes, arrêt n° 14, 1929, C.P.J.I. série A n° 20*, p. 39 ; *Barcelona Traction, Light and Power Company, Limited (nouvelle requête : 1962) (Belgique c. Espagne), exceptions préliminaires, arrêt, C.I.J. Recueil 1964*, p. 24-25 ; *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I.J. Recueil 1990*, p. 118, par. 63 ; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 304, par. 58 ; *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008*, p. 81, par. 228.

[112] CR 2018/6, p. 59-61, par. 7-17 (Lowe) ; voir notamment MB, chap. II, sect. II ; voir aussi REB, par. 167-175.

[113] P. Reuter, «De l'obligation de négocier», *op. cit.*, p. 715.

67. Cet objet n'est pas, contrairement à ce que le professeur Forteau a soutenu mardi, en s'appuyant sur un document de 1975, «de parvenir à une solution définitive à l'enclavement de la Bolivie»[114].

68. L'objet de la négociation serait, si, comme on le doit, l'on s'en tient aux termes contenus dans les textes attribuables au Chili, desquels la Bolivie prétend tirer cette obligation, de chercher s'il existe une solution à l'aspiration bolivienne, qui soit en même temps acceptable par le Chili au regard de ses propres intérêts. Elle serait de : «reaching a mutually convenient solution», selon les termes du document de 1975 que mon contradicteur vous a présenté de manière biaisée.

69. Il s'agirait de négocier «*ex nihilo* : sur la matière qui est l'objet des négociations»[115], sans autre contrainte que celle de *rechercher* s'il est possible pour chaque partie de satisfaire ses propres intérêts, tout en satisfaisant les intérêts de l'autre.

70. Autrement dit,

a) l'objet de cette négociation ne serait *pas* de concilier des droits concurrents revendiqués par le Chili et la Bolivie, car la Bolivie ne revendique aucun droit d'accès à la mer, comme vous l'avez jugé dans votre arrêt sur les exceptions préliminaires ;

b) son objet ne serait pas davantage de mettre en œuvre un droit que la Bolivie et le Chili se seraient mutuellement concédés, car ils ne se sont rien concédé de tel[116] ;

c) il ne s'agirait pas non plus de mettre en œuvre une obligation de régler pacifiquement un différend. Comme je l'ai montré, il n'y a aucun différend dont la Bolivie puisse se prévaloir, au titre de l'obligation de régler pacifiquement des différends, qui ait fait naître une obligation de négocier.

71. Dès lors, la jurisprudence relative à ces types de négociations, la seule qui soit invoquée par la Bolivie dans ses écritures et dans ses plaidoiries[117], ne lui est d'aucune aide, et c'est un pur contresens que de l'invoquer.

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[114] CR 2018/7, p. 64, par. 29 (Forteau), se référant au CMC, annexe 180.

[115] P. Reuter, «De l'obligation de négocier», *op. cit.*, p. 720.

[116] DC, par. 2.42-2.47.

[117] CR 2018/7, p. 65, par. 31 (Forteau).

72. Si l'obligation existait, il s'agirait donc, j'y insiste, d'une obligation de comportement, qui consisterait pour le Chili et la Bolivie à confronter librement leurs points de vue afin de rechercher s'ils peuvent trouver un accord mutuellement acceptable, tant qu'ils ont la conviction qu'une telle solution est envisageable.

73. Le point important à souligner ici est qu'une telle obligation, lorsqu'elle existe, ne saurait survivre au constat de l'une ou l'autre des Parties, ou des deux, qu'aucune solution mutuellement satisfaisante ne saurait être trouvée.

74. Le professeur Forteau prétend l'inverse, soutenant qu'en droit international général «[l]'obligation de négocier est une obligation *continue*»[118], en se référant de manière énigmatique, dans la présente instance, à l'article 33 de la Charte des Nations Unies[119], et ce, apparemment, sans s'être entendu avec le professeur Lowe[120]. Mais peu importe. En toute hypothèse, le droit international général ne saurait être une source de l'obligation de négocier en cause dans la présente espèce.

75. La Cour aura également pris note de la formule du professeur Forteau, indiquant que l'obligation de négocier ne saurait s'éteindre à raison du fait qu'elle aurait été pleinement exécutée, quand bien même les Parties auraient fait des efforts de bonne foi pour chercher un compromis qu'elles n'ont pas trouvé, puisque cette hypothèse n'a pas été prévue par les engagements et déclarations du Chili[121]. C'est une position très mystérieuse. Mais peut-être que la Bolivie détaillera son propos à cet égard lundi.

76. En tout état de cause, Monsieur le président : «l'engagement de négocier n'implique pas celui de s'entendre»[122], avait déjà souligné la Cour permanente de Justice internationale. Dès lors, s'agissant d'une négociation dont le seul objet est la recherche d'une solution mutuellement satisfaisante, si une partie en vient à constater qu'aucune des solutions qui s'offre à elle ne peut s'avérer satisfaisante, elle sera évidemment en droit de considérer que l'engagement de négocier

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[118] CR 2018/7, p. 65, par. 31 (Forteau).

[119] CR 2018/7, p. 65, note 243 (Forteau).

[120] CR 2018/6, p. 61, par. 14 (Lowe).

[121] CR 2018/7, p. 64, par. 29 (Forteau).

[122] *Trafic ferroviaire entre la Lithuanie et la Pologne, avis consultatif, 1931, C.P.J.I. série A/B n° 42*, p. 116.

qu'elle a initialement contracté, qu'elle aura exécuté autant que de raison, n'a plus d'objet. Il est, à cet égard, là encore utile de se référer à Paul Reuter :

> «Si le résultat des négociations ne peut être atteint que par un accord, par exemple dans le cas de négociations pour des échanges commerciaux, et si les perspectives de succès semblent définitivement écartées, il est raisonnable d'admettre que l'obligation de négocier est caduque faute d'objet.»[123]

77. Monsieur le président, Mesdames et Messieurs de la Cour, ces dernières considérations n'ont été présentées que pour surplus de droit. Elles ne valent qu'à propos d'une obligation de négocier dûment constatée. Mais, en l'espèce, bien que la Bolivie en ait appelé à toutes les sources possibles du droit international, le «chaînon manquant», l'obligation juridique, demeure manquant.

78. Ceci conclut mon propos. Je vous remercie de votre bienveillante attention, et vous prierais, Monsieur le président, d'appeler à la barre Mme Kate Parlett.

The PRESIDENT: I thank you. I now call Dr. Kate Parlett to take the floor.

Ms PARLETT:

DIPLOMATIC INTERACTIONS FROM 1910 TO 1926

1. Mr. President, Madam Vice-President, Members of the Court, it is an honour to appear before you again today, and a privilege to have been asked by the Republic of Chile to address diplomatic interactions between Chile and Bolivia in the early part of the twentieth century.

2. Earlier this week you heard from Bolivia's counsel that during this period Chile made a binding legal commitment to negotiate sovereign access. This was said to be established through express agreement, unilateral declarations, and estoppel. For good measure, Bolivia also argued that this period confirmed the existence of a historical bargain to negotiate on sovereign access, pre-dating and surviving the 1904 Peace Treaty. Remarkably, Bolivia did not take you through a single document. Instead, its submissions were made by multiple and repeated assertions about the evidence, with an occasional reference to highly selective extracts.

3. It is my task today to take you through the actual evidence.

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[123] P. Reuter, «De l'obligation de négocier», *op. cit.*, p. 729.

I. Bolivia's 1910 request

4. I start with a Bolivian proposal in 1910. At that time, the 1904 Peace Treaty between Bolivia and Chile had been in effect for six years, and its comprehensive settlement had been implemented by both of them. Chile had control over the coastal provinces of Tacna and Arica, to the west of the complete boundary already agreed with Bolivia, with definitive sovereignty over those two provinces to be decided in due course as between Chile and Peru.

5. It was in that context that Bolivia made a proposal to both Chile and Peru, on 22 April 1910. You find this at tab 16 of your folder. Bolivia asked whether the two States would "receive suggestions" and "listen to propositions" from Bolivia concerning the possibility of Bolivian sovereignty over coastal territory and a port[124]. Bolivia also said that it would be ready to propose compensation if the discussions proceeded[125], confirming that its proposal was not made on the basis of any pre-existing and uncompleted bargain.

6. Bolivia sent a further letter to Chile a week later, assuring Chile that, when formulating its "aspirations" to a port, Bolivia "will listen with absolute deference to the advice and opinion of Chile", and that if Chile "deems it more appropriate to postpone the study of this matter", Bolivia would do so[126].

7. Chile replied on 14 August 1910. It said that, in view of the arrangements with Peru concerning Tacna and Arica, Chile was unable to discuss Arica with Bolivia[127]. However, Chile expressed willingness to discuss "other means to serve [Bolivia's] commercial interests", including advantages for Bolivian commerce in Chilean ports[128].

8. Bolivia then responded on 29 August, expressing appreciation for Chile's "good will". It said that it would submit "a Memorandum containing [its] wishes" to facilitate Bolivian commerce in Chilean ports[129]. But in the event Bolivia made no proposals.

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[124] Bolivian Memorandum of 22 April 1910; MB, Ann. 18, pp. 88-89. Unless otherwise indicated, all page references given herein are to the numbering of the printed volumes of annexes.

[125] *Ibid.*, p. 91.

[126] Letter from the Minister for Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, 29 Apr. 1910; RC, Ann. 380, p. 71; tab 17, judges' folder.

[127] Letter from the Minister Plenipotentiary of Chile in Bolivia to the Government of Bolivia, 14 Aug. 1910; RC, Ann. 381, p. 75; tab 18, judges' folder.

[128] *Ibid.*, p. 77.

[129] Letter from the Ministry of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, 29 Aug. 1910; RC, Ann. 382, p. 81; tab 19, judges' folder.

9. These exchanges show that the two States were not operating on the basis of any pre-existing obligation, nor were they creating any legal obligation: Bolivia was merely asking Chile to listen to its proposals, including concerning compensation, with absolute deference to Chile. It is clear from these exchanges that Bolivia was not acting on the basis of an unfulfilled historical bargain, but was instead seeking to reach a new agreement.

10. This week Bolivia mentioned two other pieces of evidence from this decade, but neither assists it.

(a) Bolivia told you that President Montes insisted in 1913 "on the right of Bolivia to have its own port"[130]. The evidence submitted by Bolivia — which I have included at tab 20 of your bundle — indicates that in April 1913, *before* being re-elected president of Bolivia, Mr. Montes gave a speech suggesting that Tacna and Arica should be incorporated into Bolivia, but that his position was not accepted by the Bolivian Government[131].

(b) You also heard this week that Chile's Foreign Minister, Bello Codesido, said in a book published in 1919 that Chile "considered [Bolivia's] aspiration to have a port of its own to be legitimate and respectable"[132]. In the same book the former Minister explained in unequivocal terms that during the negotiations for the 1904 Peace Treaty, Bolivia abandoned "any aspiration to a port on the Pacific"[133]. Sir Daniel took you to that passage in opening this morning. Bello Codesido also suggested that a re-emerged aspiration might "lead to future agreements based on sufficient and equitable compensation" for Chile[134]. This shows that there was no unfulfilled historical bargain and it also indicates that no commitment had been made.

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[130] CR 2018/6, p. 36, para. 19 (Chemillier-Gendreau).

[131] Legation of Bolivia's Note No. 136 of 25 April 1913; MB, Ann. 41, pp. 177-178.

[132] E. B. Codesido, *Annotations for the History of Diplomatic Negotiations with Peru and Bolivia 1900-1904* (1919); CMC, Ann. 115, p. 303.

[133] E. B. Codesido, *Annotations for the History of Diplomatic Negotiations with Peru and Bolivia 1900-1904* (1919); RC, Ann. 383, p. 91; see also p. 87 (which is a translated extract from the same book as CMC, Ann. 115) (quoting the 1902 Memoir of the Chilean Foreign Ministry, as noted on p. 89).

[134] E. B. Codesido, *Annotations for the History of Diplomatic Negotiations with Peru and Bolivia 1900-1904* (1919); CMC, Ann. 115, p. 303.

II. The 1920 Minutes

11. Bolivia places great weight on a document dated 10 January 1920, recording minutes of a series of meetings between the Minister of Chile and the Minister for Foreign Affairs of Bolivia. Bolivia choses to the call this document the 1920 Act.

12. Professor Akhavan majored on the minutes of these meetings this week without actually taking you to them: he told you that they are an agreement to negotiate sovereign access[135]; that they contain binding unilateral declarations to end Bolivia's landlocked status[136]; and that they created an estoppel, and gave rise to Bolivia's legitimate expectations[137]. These arguments are all untenable.

13. You find the minutes at tab 21.

14. Turning to page 323, you will see that halfway down that page and over onto the next, Chile's Minister set out seven ideas that might become the bases for an agreement[138].

15. As Bolivia mentioned, these had been proposed by Chile four months earlier[139]; but Bolivia's position at the time was not to accept them because they were conditioned on Bolivia providing support to Chile in the plebiscite[140]. That condition remained controversial. Nevertheless, Chile did put forward its seven points in the meetings in January.

16. Starting at the second last paragraph on page 323, you see:

(a) point 1: the 1904 Peace Treaty was said to define the two States' political relations and to have put an end to all the questions deriving from the war. Point III notes that Bolivia's "aspiration to its own port was replaced by the construction of the railway" and Chile's other obligations under the 1904 Peace Treaty[141];

(b) over the page, at point IV, we see that "Chile is willing to seek that Bolivia acquire its own access to the sea" in the north of Arica;

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[135] CR 2018/6, p. 26, para. 13 (Akhavan).

[136] CR 2018/7, pp. 43-44, paras. 4-5 (Akhavan).

[137] CR 2018/6, p. 26, para. 15 (Akhavan); and CR 2018/7, p. 52, paras. 32-33 (Akhavan).

[138] Minutes of 10 Jan. 1920; CMC, Ann. 118, pp. 323 and 325.

[139] Chilean Memorandum of 9 Sept. 1919; CMC, Ann. 117, pp. 317-319.

[140] See Note from the Ministry of Foreign Affairs of Bolivia to the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, 21 Nov. 1919; RC, Ann. 384, pp. 97-101. See also pp. 109-111.

[141] Minutes of 10 Jan. 1920; CMC, Ann. 118, pp. 323 and 325.

(c) in point V, Chile "accepts to initiate new negotiations directed at satisfying the aspiration of [Bolivia], subject to the victory of Chile in the plebiscite"[142];

(d) point VI suggests that an agreement would need to be reached to determine the exact area — confirming that these were preliminary ideas — and that agreement would also need to address compensation for Chile[143]; and

(e) point VII states: "Bolivia would of course coordinate its diplomatic action with that of Chile and would agree to cooperate effectively to secure a favourable result for Chile in the plebiscite over the territory of Tacna and Arica"[144].

17. Bolivia has quoted selectively from these preliminary points. But the meetings did not end there: the records continue for another seven pages. So taking note of the "purposes of cordiality and political rapprochement", Bolivia set out its own points, and then, Chile responded, and then there was some more back and forth.

18. Bolivia's Minister then said — and this is the final paragraph on page 337 — he invited Chile "to a calm examination of the facts, so that it can be decided by an agreement favourable to Bolivia's wishes, in return for fair [p. 339] compensation". So it is clear that the two States' representatives were discussing ideas, nothing more.

19. That is confirmed by the following paragraph on page 339. It reads, "the present declarations do not contain provisions that create rights or obligations for the States whose representatives make them . . ."[145]. The Bolivian Foreign Minister then reiterated Bolivia's wish to acquire the port of Arica, which was inconsistent with what Chile had proposed in its point IV, that is cession of a "zone in the north of Arica"[146].

20. This paragraph confirms two points.

(a) First, it is conclusive evidence of an intention by the signatories of the 1920 Minutes not to assume any legal obligation on behalf of their States.

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[142] Minutes of 10 Jan. 1920; CMC, Ann. 118, p. 325.

[143] *Ibid.*

[144] *Ibid.*

[145] *Ibid.*, p. 339.

[146] *Ibid.*, p. 325. See also p. 333 (where Chile rejects the cession of the port of Arica).

(b) Second, it confirms that no agreement was reached on Chile's proposed ideas, as Bolivia concluded the meetings by putting to Chile a proposal inconsistent with what Chile had proposed.

21. Bolivia has put forward various arguments seeking to avoid the obvious effect of this key paragraph[147], but none are persuasive. The 1920 Minutes did not create or confirm any legal obligation. And it also follows that Bolivia's claims that points IV and V of Chile's ideas were binding unilateral declarations[148] and representations giving rise to an estoppel, are both hopeless.

22. On Tuesday, Bolivia put forward two additional arguments on the 1920 Minutes.

(a) It argued that the reference to the 1920 Minutes in the preambles to the two 1950 Notes confirmed their legal effect[149]. Bolivia referred to the 1920 Minutes in the introductory wording of its Note as one of the "important antecedents [*antecedentes* in the original Spanish] that reveal a clear orientation in the international policy followed by the Chilean Republic"[150], while Chile's Note in turn referred to "these antecedents"[151]. Bolivia translates *antecedentes* as "precedents" but the more accurate translation is "antecedents", in the sense of background. That word does not convey any legal connotation, in the sense of legal precedent[152]. This does not assist Bolivia.

(b) Bolivia also referred you to a book published in 2004 by a Chilean historian, which says that "Chile assumed a commitment" under point V of its ideas set out in the minutes[153]. It is apparent that this post-hoc characterization is of little assistance to the Court, and in a passage that Bolivia did not take you to, the same author said that the 1920 Minutes "is not a treaty. It merely enumerates the bases for a future treaty and records the considerations put forward by Chile and Bolivia in regard to the matter."[154]

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[147] Cf. CR 2018/7, p. 16, para. 9 (Remiro Brotóns); RB, para. 202.

[148] CR 2018/7, pp. 43-44, paras. 4-5 (Akhavan).

[149] CR 2018/7, p. 16, para. 11 (Remiro Brotóns).

[150] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Chile, 1 June 1950; RC, Ann. 398, p. 247.

[151] Note from the Minister for Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950; RC, Ann. 399, p. 253.

[152] Cf. CR 2018/7, p. 61, para. 20 (Forteau).

[153] CR 2018/7, p. 17, para. 11 (Remiro Brotóns).

[154] O. Pinochet de la Barra, *Chile and Bolivia: How much longer! (2004)*; RB, Ann. 352, p. 1265.

23. Finally, Bolivia has sought to make a case on estoppel and legitimate expectations, arguing that "in reliance on Chile's proposal, instead of repudiating the 1904 Treaty, Bolivia supported Chile in the plebiscite in expectation of a sovereign access to the sea"[155]. No evidence was given as to this alleged support, while Bolivia's own contemporaneous documents suggest that as events unfolded Bolivia was not willing to co-operate with Chile in the then-anticipated plebiscite[156]. In any event, the plebiscite never took place, so Bolivia's case on reliance is puzzling, at the very minimum. As to the assertion that it refrained from repudiating the 1904 Peace Treaty in reliance on Chile's alleged promises, in fact Bolivia sought to do that the very same year, in a claim before the League of Nations.

III. Bolivia's claim to revise the 1904 Peace Treaty before the League of Nations

24. So in November 1920, Bolivia brought a claim to the League for revision or nullity of the 1904 Peace Treaty[157]. Chile opposed that claim[158], and it was ultimately found to be beyond the competence of the League[159]. In a statement before the Assembly of the League on 28 September 1921, Chile's delegates said:

> "Bolivia can seek satisfaction through the medium of direct negotiations of our own arranging. Chile has never closed that door to Bolivia, and I am in a position to state that nothing would please us better than to sit down with her and discuss the best means of facilitating her development. It is her friendship we desire."[160]

25. Counsel for Bolivia took you to that statement on Monday[161], but he referred only to the first sentence. It was only on the basis of this selective quotation that he could suggest it concerned sovereign access.

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[155] CR 2018/6, p. 26, para. 15 (Akhavan); see also CR 2018/7, p. 52, para. 33 (Akhavan).

[156] See Note from the Minister for Foreign Affairs of Bolivia, Alberto Gutierrez, to the Minister Plenipotentiary of Bolivia to Chile, Eduardo Diez de Medina, No. 200, 31 Mar. 1926; RB, Ann. 240, esp. p. 81.

[157] See Letter from the Delegates of Bolivia to the League of Nations to James Eric Drummond, Secretary-General of the League of Nations, 1 Nov. 1920; POC, Ann. 37.

[158] See Statement by the Delegate of Chile, Augustín Edwards, during the Fifth Plenary Meeting of the League of Nations Assembly, 7 Sept. 1921; CMC, Ann. 119; and Letter from the Delegates of Chile to the League of Nations to the President of the Assembly of the League of Nations, No. 14, 19 Dec. 1920; POC, Ann. 38.

[159] League of Nations, Report of the Commission of Jurists on the Complaints of Peru and Bolivia, 21 Sept. 1921; POC, Ann. 39. See also Statement by the Delegate of Bolivia, M. C. Aramayo, during the Twenty-Second Plenary Meeting of the Assembly of the League of Nations, 28 Sept. 1921; CMC, Ann. 120, p. 373.

[160] Statement by the Delegate of Chile, Agustín Edwards, Records of the Twenty-Second Plenary Meeting of the Assembly of the League of Nations, 28 Sept. 1921; CMC, Ann. 120, p. 372.

[161] CR 2018/6, p. 26, para. 14 (Akhavan).

26. On Tuesday, counsel for Bolivia then told you that by this statement Chile "represented before the League of Nations that [repudiation of the 1904 Peace Treaty] was unnecessary because 'Bolivia can seek satisfaction through the medium of direct negotiations'"[162]. This is again said to form the basis of a claim of estoppel and reliance on legitimate expectations.

27. I have three points on this.

(a) First, and as I have explained by reference to the full quotation, Chile's statement was not a representation that Chile would negotiate sovereign access.

(b) Second, Bolivia did not then accept Chile's offer of discussions facilitating its development, but instead, two months later, Bolivia proposed to Chile that there be a tripartite arbitration on the question of the fate of Tacna and Arica, or that it be considered at an international conference[163]. In response, Chile was clear that the dispute over Tacna and Arica did not involve Bolivia[164]. It recalled that Bolivia had been invited to explain its "points of view regarding the aspirations to have a port in the Pacific", but Bolivia responded that it did not have any proposals to make to Chile on the subject[165]. None of this supports Bolivia's new case on reliance.

(c) Third, Bolivia has not suggested that there was some other course, or sound legal basis, as to which it intended to pursue a claim to repudiate the 1904 Peace Treaty and its definitive settlement of the two States' land boundaries. If Bolivia had a serious case on estoppel there would have to be some actual evidence of that, but Bolivia has not taken you to anything.

IV. 1923 correspondence

28. I move forward in time another two years, to correspondence in early 1923. Bolivia again asked Chile to revise the 1904 Peace Treaty[166], and on 6 February 1923 Chile refused, but it stated that it:

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[162] CR 2018/7, p. 52, para. 32. (Akhavan).

[163] Note from the Minister for Foreign Affairs of Bolivia, Alberto Guiterrez, to the Minister for Foreign Affairs of Chile, Ernesto Barros Jarpa, 20 Dec. 1921; RB, Ann. 236, pp. 25 and 27.

[164] Note from the Minister for Foreign Affairs of Chile to the Minister Plenipotentiary of Bolivia in Chile, 21 Dec. 1921; RC, Ann. 385, p. 117.

[165] *Ibid*., p. 119.

[166] Note from the Minister for Foreign Affairs of Bolivia to the Minister for Foreign Affairs of Chile, 27 Jan. 1923; CMC, Ann. 124, p. 399.

> "maintains its purpose to listen, with the utmost spirit of conciliation and equity, to the proposals that Your Excellency's Government wishes to submit in order to celebrate a new Pact regarding Bolivia's situation, but without modifying the Peace Treaty and without interrupting the continuity of the Chilean territory"[167].

29. Chile confirmed that this expression of openness to listen to Bolivia was not made on the basis of any unfulfilled historical bargain because it explicitly noted that any discussion would be on the basis of "mutual compensation"[168], a crucial detail, which Bolivia did not mention when it referred to this document earlier this week[169]. In any event, Chile's willingness to listen to Bolivia's proposals does not demonstrate an intention to create a legal obligation.

30. Bolivia took you to its internal report of a meeting said to have taken place the next day between its ambassador in Santiago and Chile's Foreign Minister. Bolivia's counsel placed particular emphasis on this — it was one of only the three pieces of evidence he showed you. But the document itself records:

> "The Minister invited me to a meeting today. He said it was useless for Bolivia to insist on the revision. When the situation of Tacna-Arica is resolved, we will be able to give a port to Bolivia in return through compensations."[170]

31. This was said to carry all the effects of a binding unilateral declaration[171]. It was projected on the screen as a quotation of the words of Chile's Foreign Minister[172]. You were not told that this is a paraphrased account found in a summary internal Bolivian record of a meeting.

32. The document then continues:

> "I replied that I would request for instructions and told him that Bolivia hopes that its current negotiations reach a define[d] result."[173]

33. But when Bolivia replied to Chile's letter of 6 February, it asked Chile again to revise the 1904 Peace Treaty and said that, absent agreement on this, it would end the negotiations[174]. This

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[167] Note from the Minister for Foreign Affairs of Chile to the Special Envoy and Minister Plenipotentiary of Bolivia in Chile, 6 Feb. 1923; CMC, Ann. 125, p. 405.

[168] *Ibid.*, p. 407.

[169] CR 2018/6, p. 37, para. 21 (Chemillier-Gendreau).

[170] Minister Plenipotentiary of Bolivia's Note of 9 Feb. 1923; MB, Ann. 49, p. 213.

[171] CR 2018/7, p. 44, para. 6 (Akhavan).

[172] See judges' folder of 20 March 2018: tab 27.

[173] Minister Plenipotentiary of Bolivia's Note of 9 Feb. 1923; MB, Ann. 49, p. 213.

was unacceptable to Chile, and any discussions were brought to an end[175], consistently with Bolivia's expressed intention.

34. In its first round, Bolivia placed significant emphasis on the words of President Arturo Alessandri said to be spoken the following week, on 27 February 1923[176]. But again, the alleged statement is paraphrased — not quoted — in a summary internal Bolivian document. We do have an actual quote of President Alessandri just six weeks later, in which he said that he would consider Bolivia's aspirations, but that Chile had no legal commitment with Bolivia. You find the evidence of this quote at tab 28. Referring to the pending arbitration with Peru over Tacna and Arica, the President said:

> "If the arbitral award . . . so provides, I will generously consider Bolivia's aspirations in the manner and under the terms that [were set out in the February letters]: This will be the new and valuable contribution of my country to the harmony of America since, legally, we have no commitment towards Bolivia. We have had our relations completely and definitively settled by the [1904 Treaty]."[177]

V. The Kellogg proposal

35. Bolivia then moves forward another three years, to documents following a proposal made to Chile and Peru in late 1926 by the United States Secretary of State Kellogg. In the context of the dispute between Chile and Peru, Kellogg's proposal was that those two States agree to cede sovereignty over all of Tacna and Arica to Bolivia, in exchange for adequate compensation[178].

36. Chile responded to the proposal in a document addressed to the United States Secretary of State, the so-called Matte Memorandum. The relevant parts are at tab 29, on pages 436 and 437 . You see there that Chile said that "it *has not rejected* the idea of granting a strip of territory and a

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[174] See tab 27, judges'folder (22 March 2018): Note from Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile to Luis Izquierdo, Minister for Foreign Affairs of Chile, 12 Feb. 1923, POC, Ann. 40, p. 601 ("I can do nothing more than tell you that my Government has instructed me to put an end to these negotiations, as the reason for them was to seek a firm and secure basis on which Bolivia's aspirations [to revision of the 1904 Treaty] could be reconciled with Chile's interests"). See also the Note from Ricardo Jaimes Freyre to Luis Izquierdo, 15 Feb. 1923, POC, Ann. 41.

[175] Note from the Minister for Foreign Affairs of Chile to the Special Envoy and Minister Plenipotentiary of Bolivia in Chile, 22 Feb. 1923; CMC, Ann. 126, esp. pp. 411 and 415.

[176] CR 2018/6, p. 26, para. 14 (Akhavan) and CR 2018/7, p. 44, para. 6 (Akhavan). See also CR 2018/6, p. 37, para. 21 (Chemillier-Gendreau) incorrectly referring to this statement having been made on 2 March 1923.

[177] "President Alessandri explains the guidelines of Chile's foreign policy", *El Mercurio* (Chile), 4 April 1923; CMC, Ann. 127, p. 423; tab 28 in the judges' folder.

[178] Memorandum on Tacna-Arica delivered by the Secretary of State of the United States to the Governments of Chile and Peru, 30 Nov. 1926; CMC, Ann. 128, p. 431.

port to the Bolivian nation", and that once the question of definitive sovereignty over Tacna and Arica had been determined, it would "honour its declarations in regard to the *consideration* of Bolivian *aspirations*"[179]. But it also noted that the Kellogg proposal "goes much farther than the concessions which the Chilean Government has generously been able to make". It was explicit that it "has always been disposed to listen to all propositions for settlement", including for compensation, but "in discussing such propositions" it was not abandoning its rights to have the dispute with Peru over Tacna and Arica resolved in accordance with the Treaty of Ancón[180]. It said it would "consider in principle the proposal"[181], nothing more.

37. Three days later Bolivia sent a letter to Chile referring to and purporting to accept the Matte Memorandum[182].

38. Apart from the fact that the memorandum was not addressed to Bolivia, it will be apparent to the Court that statements to the effect that a State has not rejected a particular course of action, and that it will consider a proposal and another country's aspirations, does not suffice to establish a legally binding obligation to negotiate.

39. The Kellogg proposal was ultimately not accepted by either Peru[183] or Chile. Bolivia acknowledged that, in a lengthy circular issued to its legations abroad in January 1927[184], but it did not then assert that Chile was nevertheless obliged to negotiate with it on the basis of a unilateral promise in the Matte Memorandum, or an agreement established by that document and Bolivia's response to it, or indeed on any other historical basis.

40. Following these few diplomatic communications in 1926, there was an extended period of silence on Bolivia's part. In 1929, through the Treaty of Lima, Chile returned the province of Tacna to Peru, and obtained definitive sovereignty over the province of Arica. As the Court is

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[179] Memorandum of the Minister for Foreign Affairs of Chile delivered to the Secretary of State of the United States regarding Tacna-Arica, 4 Dec. 1926; CMC, Ann. 129, p. 436; emphasis added.

[180] *Ibid.*

[181] *Ibid*., pp. 436-437.

[182] Note from the Minister for Foreign Affairs of Bolivia to the Special Envoy and Minister Plenipotentiary of Chile in Bolivia, 7 Dec. 1926, CMC, Ann. 130; judges'folder, tab. 30.

[183] Memorandum of the Government of Peru delivered to the Secretary of State of the United States regarding Tacna-Arica, 12 Jan. 1927, CMC, Ann. 131, p. 457.

[184] Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, 21 Jan. 1927, RC, Ann. 387, p. 139.

aware, the Supplementary Protocol to the Treaty of Lima provided in its Article 1 that neither Chile nor Peru would cede either of Tacna or Arica to a third State "without previous agreement between them"[185]. Bolivia reacted to that provision at the time by asserting that "[t]his policy is not one of real international cooperation, and is capable of producing profound resentment in Bolivian consciousness"[186]. It did not react by claiming that Chile was subject to an obligation to negotiate[187]. Instead, there was silence on the subject of Bolivia's aspiration for sovereign access to the sea that lasted well into the 1940s.

VI. Conclusion

41. Mr. President, Members of the Court, Bolivia's emphasis on this period of history is perplexing. Chile did not create or confirm any legal obligation to negotiate on sovereign access, and the weakness of Bolivia's claim to the contrary is so apparent that one wonders why Bolivia has troubled the Court with this period. And the fact that Bolivia now pleads its case on estoppel primarily by reference to representations that are now nearly a century old, and without any meaningful effort to show reliance, suggest that it is not a serious case at all.

42. Bolivia's emphasis on this period seems to be an attempt to find support for Bolivia's new theory of continuity, but what the actual evidence from this period shows is that Bolivia was seeking from 1910 to reach a new agreement to vary what had been agreed in 1904. It was not asserting the existence, as Bolivia's counsel now do before you, of some sort of historical understanding that survived from the nineteenth century to which effect remained to be given. The record also shows that the interactions between the two States in this period did not create any obligation to negotiate sovereign access, and Bolivia's attempts to claim otherwise do not find support in the actual evidence.

43. Mr. President, that concludes my submissions, and I ask that you call on Mr. Wordsworth to address you on the 1950 diplomatic Notes.

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[185] Treaty between Chile and Peru for the Settlement of the Dispute Regarding Tacna and Arica (the Treaty of Lima) and the Supplementary Protocol to the Treaty of Lima, both signed at Lima on 3 June 1929 (entry into force 28 July 1929), *LNTS*, Vol. 94, p. 401, POC, Ann. 11, p. 176.

[186] Bolivia's Foreign Affairs Minister Memorandum No. 327 of 1 Aug. 1929, MB, Ann. 23, p. 117.

[187] See RC, para. 4.33.

The PRESIDENT: I thank you and I now invite Mr. Wordsworth to take the floor. You have the floor.

Mr. WORDSWORTH:

THE 1950 DIPLOMATIC NOTES

I. Introduction

1. Mr. President, Members of the Court, it is a privilege to appear before you and to have been asked by Chile to address one of the mainstays of Bolivia's case, that is, its case on international agreements said to have been generated by the two diplomatic Notes of 1 and 20 June 1950, and by the Joint Declaration of Charaña of 8 February 1975.

2. I start with the Notes of 1 and 20 June 1950 and, looking at the Court's two well known cases on formation of an international agreement, there is a form of reality check that it may be helpful to have in mind.

(a) In *Aegean Sea*, the Joint Communiqué at the heart of the case was dated 31 May 1975, and this was invoked by Greece in proceedings commenced on 10 August 1976[188].

(b) In *Qatar* v. *Bahrain*, the Minutes at issue had been signed in December 1990, and this document was invoked in proceedings instituted by Qatar on 8 July 1991[189].

3. And here? Here, the June 1950 Notes are dated some 63 years prior to the commencement of the proceedings in 2013, following decade after decade in which there was no negotiation to Bolivia's satisfaction on sovereign access to the sea, and where the one extended negotiation on this topic — the Charaña episode of the mid-1970s — ended with Bolivia breaking off diplomatic relations. And, as I'll explain in a little more detail later, it is not as if during that 63-year period Bolivia sought to maintain a consistent position that the Notes were legally binding. So this is strongly suggestive of the *absence* of any legal obligation.

II. The language of the 1950 Notes

4. I turn, then, to the language of the two Notes.

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[188] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, pp. 5-6, para. 1.

[189] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 114, paras. 1 and 3.

A. Bolivia's Note of 1 June 1950

5. First, Bolivia's Note of 1 June 1950 (tab 32 of your folder). A proposal is made:

> "With such important antecedents that reveal a clear orientation in the international policy followed by the Chilean Republic, I have the honour of proposing to Your Excellency *that the governments of Bolivia and Chile formally enter into a direct negotiation to satisfy the fundamental need of Bolivia to obtain its own sovereign access to the Pacific Ocean*, thus solving the problem of the landlocked situation of Bolivia on bases that take into account the mutual benefits and genuine interests of both peoples."[190]

6. Three short points as to this proposal.

7. First, there is the reference to the "important antecedents", that is, a reference to various past statements made by Chilean representatives and other materials. There is no suggestion here that those established any binding legal commitment, and nor could there sensibly be so. Nor does the characterization of them as "antecedents" somehow suggest that they are legally binding, as Dr. Parlett has already just mentioned.

8. Secondly, the proposal is to "enter formally into a direct negotiation" — *una negociación directa*. This is not a proposal to agree to an entirely open-ended obligation to negotiate. It is a proposal to enter formally into a negotiation, and nothing more. And I recall Professor Thouvenin's remarks on entry into a negotiation that were made just before the break.

9. Thirdly, Bolivia's proposal is for a direct negotiation with a precisely defined object of satisfaction to Bolivia: "to satisfy the fundamental need of Bolivia to obtain its own sovereign access".

B. Chile's Note of 20 June 1950

10. When, on 20 June 1950, Chile responded to Bolivia's Note, it departed in material respects from what had been proposed. The Note (at tab 33 of your folder) recalls what Bolivia has said about the orientation in Chile's international policy, and quotes Bolivia's proposal. Chile then explained:

> "From the quotes contained in the Note I answer, it flows that the Government of Chile, together with safeguarding the *de jure* situation established in the Treaty of Peace of 1904, has been willing to study through direct efforts with Bolivia the

[190] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Chile, 1 June 1950, RC, Ann. 398, p. 247; emphasis added.

> possibility of satisfying the aspirations of the Government of Your Excellency and the interests of Chile."[191]

11. Again, there is no suggestion here of any extant legal obligation. Further, and this is a point that I am going to return to a little later, Chile wished to emphasize its policy with respect to safeguarding the legal position established by the 1904 Peace Treaty.

12. Chile then said:

> "At the present opportunity, I have the honour of expressing to Your Excellency *that my Government will be consistent with that position and that, motivated by a* fraternal spirit of friendship towards Bolivia, *is open formally to enter into a direct negotiation aimed at searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean*, and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests."[192]

13. Six points here.

14. First, Chile was stating that it would be consistent with its prior position, that is, of being "willing to study through direct efforts with Bolivia the possibility of satisfying [its] aspirations". There is no hint in that language of any past or newly informed intention to be legally bound, and likewise no hint that Chile was acting by reference to the Bolivian rights that are now alleged to exist pursuant to the so-called historical bargain[193].

15. Secondly, Chile did not say it was agreeing to anything. As to the term used, Chile said it "is open to" — *está llano a* — which does not suggest acceptance of any legal obligation.

(a) To take an example of where Bolivia itself has used this formulation. In May 1962, after it had broken off diplomatic relations with Chile because of disagreement over the River Lauca, Bolivia stated as follows to the OAS (judge's folder, tab 34): "The Government of Bolivia, in this regard, declares that it is open to *[está llano a]* resume its relations with the Government of Chile"[194].

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[191] Note from the Minister for Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, RC, Ann. 399, p. 253; emphasis in original.

[192] *Ibid*.; emphasis added.

[193] Cf. CR 2018/6, p. 39, para. 27 (Chemillier-Gendreau).

[194] Bolivian Note to the OAS requesting mediation, 28 May 1962, reproduced in Ministry of Foreign Relations and Culture of Bolivia, *La Desviaciòn del Río Lauca (Antecedentes y Documentos)* (La Paz, 1962), p. 274, tab 34 judges' folder ("El Gobierno de Bolivia, al respecto, declara que *está llano a* reanudar sus relaciones con el Gobierno de Chile, puesto que, considera la armoniosa convivencia hemisférica, como una necesidad de todos los países americanos, una vez que desaparezca la causa que provocó su interrupción"; emphasis added.)

(b) In precisely the same way as Chile's 1950 Note, the term *"está llano a"* is being used here to convey a statement of political willingness, not the undertaking of a legal obligation.

16. My third point: what Chile was open to in its Note was "formally to enter into a direct negotiation", that is, a discrete event, not an open-ended obligation to negotiate.

17. Fourthly, as to the subject-matter of the negotiation, this was not what Bolivia had been seeking. Bolivia sought a negotiation "to satisfy the fundamental need of Bolivia to obtain its own sovereign access". Instead, Chile was open to a negotiation:

— *aimed at searching for*, that is, aimed towards a form of conduct, "searching for";

— then what is being searched for is — *a formula*, another notably vague concept;

— *that would make it possible* — possible for Chile that is — *to give Bolivia its own sovereign access*, wording that reinforces how far removed this is from the more usual situation of a negotiation where competing rights are being asserted.

18. On Tuesday, Professor Remiro Brotóns quoted from the Note, saying that Chile was open formally to enter into a direct negotiation and he said that: "L'objectif est parfaitement indiqué"[195], to give Bolivia its own sovereign access to the Pacific Ocean. And that of course is to skip over the key words in the middle and, on that basis, to suggest — quite incorrectly — that Chile was open to a negotiation with the same object that had been proposed by Bolivia. Quite plainly it was not. And one wonders if the submission could have been made if you had been taken to the actual document.

19. And, pausing here, it is useful to see how different the actual wording is from cases that have come before this Court concerning a genuine treaty obligation to negotiate.

20. In the *Interim Accord* case, the treaty provision at issue, Article 5 (1), stated:

> "The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993)."[196]

So, clear words of agreement with respect to the continuance of negotiations, and a mutually agreed object.

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[195] CR 2018/7, p.19, para. 22 (Remiro Brotóns). See also CR 2018/6, p. 53, para.28 (Remiro Brotóns).

[196] Quoted in *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 656, para. 28. See judges' folder, tab 35.

21. To similar effect, as the Court will recall, Article VI of the Nuclear Non-Proliferation Treaty provides:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament"[197] and so on.

22. And such language, where States have indeed sought to generate a legal and ongoing obligation to negotiate, could scarcely be more different from what is now before the Court.

23. And this leads to a fifth point. Bolivia had, in its Note, proposed a negotiation on one basis, while Chile stated that it was "open formally" to a negotiation with respect to something materially different.

(a) One could conceive of a situation where Bolivia subsequently agreed to the different negotiation that Chile was open to, but that is not what happened.

(b) On Tuesday, Professor Remiro Brotóns emphasized that Chile had had Bolivia's Note in draft since June 1948, that Bolivia had seen Chile's Note in draft on 9 June 1950, and that an amendment to Chile's Note was made on Bolivia's suggestion[198]. But that background does not help Bolivia at all, to the contrary. If Chile had wished to align its wording with that of Bolivia, it had more than ample time and opportunity to do so and it plainly elected not to. The degree of stage managing reflects the intense political sensitivity, and the desire that statements made would be in a form acceptable to a wider audience in each State[199]. It does not somehow convert two carefully drafted but materially different statements of position into an international agreement.

24. And this leads to my sixth and final point on the wording of Chile's Note of 20 June.

(a) The negotiation as proposed by Bolivia said nothing about compensation to Chile, but referred with no doubt deliberate vagueness to "solving the problem of the landlocked situation of Bolivia on bases that take into account the mutual benefits and genuine interests of both

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[197] Treaty on the Non-Proliferation of Nuclear Weapons, signed at London, Moscow and Washington on 1 July 1968 (entry into force 5 March 1970), *UNTS*, Vol. 729, p. 161: Article VI.

[198] CR 2018/7, pp. 22-23, para. 26 (Remiro Brotóns).

[199] See e.g. Minutes of a conversation between the President of Chile and the Bolivian Ambassador to Chile, 17 June 1948, RC, Ann. 391, p. 189.

peoples"[200]. By contrast, the negotiation to which Chile expressed its openness included "for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests"[201].

(b) This is another element of important difference between the two Notes, and compensation to Chile is also a notable absentee so far as concerns the relief that Bolivia is seeking before this Court[202]. You are told that the 1950 Notes make up a treaty[203]; you are asked to give effect to that treaty; and yet the relief sought bears no resemblance whatsoever to what Chile in fact declared itself open to on 20 June 1950, and it even goes so far as to leave out altogether the key matter of compensation.

25. That is not a coherent legal position. On Bolivia's case, compensation should be one unavoidable aspect of a central, treaty-based *quid pro quo* that it now seeks to enforce. Yet you are asked to order negotiations that refer to only one part of the allegedly agreed package[204]; and so one wonders what is motivating this obvious inconsistency in Bolivia's case.

III. The particular circumstances in which the 1950 Notes were drawn up

26. And, in answering that question, I wish to move to the second area of enquiry identified in the Court's jurisprudence on formation of an international agreement: the "particular circumstances in which [the Notes] [were] drawn up"[205]. Three points.

27. First, Bolivia wishes the Court to focus on statements made by Chile in 1948. In particular, Bolivia's counsel wish you to believe that a binding verbal commitment to negotiate was given by Chile's President González Videla at a meeting of 23 July 1948[206], or at least that a statement was made on which it could legitimately rely[207]. This is the statement: "What has been

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[200] Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Chile, 1 June 1950, RC, Ann. 398, p. 247.

[201] Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, RC, Ann. 399, p. 253.

[202] See the relief sought: RB, p. 192.

[203] See, e.g. CR 2018/7, p. 19, para. 19 (Remiro Brotóns).

[204] Cf. CR 2018/7, p. 21, para. 23 (Remiro Brotóns).

[205] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 39, para. 96.

[206] CR 2018/7, p. 45, para. 7 (Akhavan).

[207] CR 2018/6, p. 56, para. 40 (Remiro Brotóns).

verbally agreed is as if it were already written", which is contained in a Bolivian internal report that covers the meeting[208]. And Chile has been unable to locate any record of this meeting, but I think that matters little.

28. You were not taken to the statement of President González Videla of 1 June 1948 setting the framework for the discussions of June-July 1948. You see there that Bolivia's Ambassador, Ostria Gutiérrez, requested authorization to declare open "negotiations aimed at satisfying the Bolivian port aspirations". Chile's President refused. You can see that from the next two paragraphs, where he is saying that Bolivia must first come up with "a concrete and precise proposal", and then again overleaf:

> "The President added that under no circumstance could these informal talks be relied on as bases for any discussion since the very idea of granting a strip of land north of Arica had merely been the subject of a conversation and the President may not take initiatives on a problem that concerns Bolivia, not Chile."[209]

29. So, informal talks that could not be relied on.

30. And, in the event, it is plain that Bolivia was not relying on anything that had been said in these talks. In an internal communication of 25 May 1950, Bolivia's Ambassador described what Bolivia was seeking to achieve through its submission of what was to become the Note of 1 June 1950:

> "The submission of this note — a copy of which I am enclosing — was agreed to with the Under-Secretary of Foreign Affairs, Mr. Manuel Trucco, and has the aim of taking the port negotiation *out of the field of mere personal talks* — which could be prolonged indefinitely, as has already happened since August 1946 — to formalize and document it."[210]

31. There is no trace here of a belief that any binding commitment had been made by Chile, and no hint of any reliance by Bolivia on anything that had been previously said. What is more, what was to become Bolivia's Note of 1 June 1950, the "aim" was to formalize and document the entry into a negotiation, not to establish a binding agreement to negotiate.

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[208] Note from the Bolivian Ambassador in Chile to the Minister for Foreign Affairs of Bolivia, No. 648/460, 28 July 1948, RB, Ann. 259, p. 213.

[209] Minutes of Meeting between the Chilean President and the Bolivian Ambassador to Chile, 1 June 1948, CMC, Ann. 140, pp. 507 and 509.

[210] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, 25 May 1950, BR, Ann. 397, p. 233; emphasis added.

32. This brings me to my second point. You can also see from this document of 25 May 1950 that Bolivia's Ambassador was hopeful that Chile would conclude an exchange of Notes that week. He said, and the emphasis is in the original:

> "If this were to happen and we managed to conclude the exchange of the said notes, we would be taking a particularly transcendental step, even if it would only probably be in the general terms of the negotiation, namely, to acknowledge '*the fundamental need of Bolivia to obtain its own and sovereign access to the Pacific Ocean*'."[211]

33. Bolivia's Ambassador was not saying: "If the exchange takes place, we will have a treaty or some other form of legally binding commitment from Chile to negotiate." There is simply no suggestion of that. He saw that it would be a politically, not legally, important step, in terms of securing a particular express acknowledgement of Bolivia's "need", which was not, however, forthcoming in Chile's Note.

34. My third point concerns compensation, and — with your leave Mr. President, if I could just complete this point — it will lead to a natural breaking point. By March 1950, Chile had decided that this should be in the form of access to Bolivian waters. At a meeting of 14 March 1950, Bolivia's Ambassador recorded that President González Videla of Chile

> "mentioned, for the first time, the possibility of irrigating the north of Chile with Bolivian waters which, in his view, would cause the arrangement to yield economic benefits for Chile.
>
> Only if the Chilean people see that there is some compensation for the territory ceded will the arrangement be accepted. [This is the Bolivian Ambassador's record of what the Chilean President is saying.] I would submit to the Chilean public opinion a simple formula: exchanging land for water . . . Thus, the northern part of the country would not resist the decision but support it in favor of Bolivia."[212]

35. Indeed, a matter so significant as territorial cession could scarcely be agreed to without popular support, including the support of those most closely affected.

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[211] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, 25 May 1950, BR Ann. 397, p. 233; emphasis in original.

[212] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs for Bolivia, 14 Mar. 1950, RC, Ann. 395, pp. 223 and 225.

36. The hydro project was then raised by President González Videla in discussions with United States President Truman in April 1950[213]. Chile's President was recorded as explaining to Bolivia's representative in Washington:

> "Chile will not ask for territorial or economic compensation. Therefore, it will merely seek an agreement allowing it to use the waters of the River Desaguadero, for purposes of irrigation and production of electrical energy, which he [i.e. Chile's President] hopes will be useful for the two countries, and will also serve to justify to the Chilean public opinion the agreement that could be reached to give Bolivia a port of its own to the north of Arica."

The Note continues, you can also see our sketch-map putting before you the rough locations.

> "President Truman was very pleased with the project being considered by the Governments of Bolivia and Chile, and offered to provide the firm and determined support of the U.S. Government."[214]

37. Now, this matters for two reasons.

(a) First, it shows again how incorrect it is for Bolivia to contend that Chile was willing to agree to a sovereign access to the sea by reference to some "historical bargain". Chile was only open to a negotiation on the basis of compensation. Indeed, the Chilean Government did not have a free hand. It had, in the Chilean President's words "to justify to the Chilean public opinion the agreement that could be reached to give Bolivia a port of its own to the north of Arica"[215].

(b) Secondly, to enter into a negotiation was an extraordinarily sensitive matter. In the event, there was a strong adverse reaction to the prospect of a negotiation in both Chile and Bolivia, and the 1950 negotiation never took place. You heard remarkably little of that earlier this week, because Bolivia would rather put before you idealized images of two States walking together on a path of reconciliation[216]. But in Chile, there was a powerful reaction against the prospect of negotiating a cession of territory[217]; while in Bolivia, there was a similar adverse reaction because of the fear that Bolivia would be negotiating with regard to its waters[218].

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[213] Remarks of welcome to the President of Chile at the Washington National Airport, 12 Apr. 1950, RC, Ann. 396; and A. Ostria Gutiérrez, *Notes on Port Negotiations with Chile* (1998), RC, Ann. 440, pp. 699-709.

[214] A. Ostria Gutiérrez, *Notes on Port Negotiations with Chile* (1998), RC, Ann. 440, p. 707.

[215] *Ibid.*

[216] CR 2018/6, p. 31, para. 35 (Akhavan).

[217] Note from the Bolivian Ambassador in Chile to the Minister for Foreign Affairs of Bolivia, No. 648/460, 28 July 1948, RB, Ann. 259, p. 211.

[218] See Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, No. 844/513, 9 Sept. 1950, RB, Ann. 275, p. 359. See also A. Ostria Gutiérrez, *A Work and a Destiny, Bolivia's International Policy After the Chaco War* (1953), RC, Ann. 406, p. 297.

38. And, so far as concerns the current issue of formation of an international agreement or other binding obligation, given the huge political sensitivity of which all the protagonists were more than fully aware, as one sees from the pre-June 1950 documents, the point is that it is objectively unlikely that either Chile or Bolivia would have been willing to bind themselves to negotiate. Mr. President, Members of the Court, I think I have overrun a little, I apologize for that. With your leave, tomorrow morning I will move onto the events subsequent to the June-1950 Notes.

The PRESIDENT: I thank you, this brings us to the end of today's oral proceedings. The Court will meet again tomorrow, Friday 23 March at 10 a.m., to hear the second part of Chile's first round of oral argument and to allow Mr. Wordsworth to finish his speech. The sitting is adjourned.

The Court rose at 1.05 p.m.

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